

RESEARCH TITLE

**ANALYSIS OF THE LEGALITY AND IMPACT OF THE DEATH
PENALTY IN KENYA**

BY

MAGANGA .O. CHRIS

LLB/11059/62/DF

SUPERVISOR: MR. TITUS KAMYA

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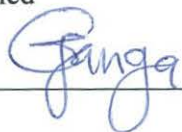
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DECLARATION

I Maganga O. Chris do hereby declare that the work presented here in this dissertation is my own, except where acknowledged, and it has never been submitted or examined in any university as an academic requirement for any award.

Signed



MAGANGA .O. CHRIS

28/3/2011

DATE

LLB/11059/62/DF

(STUDENT)

CERTIFICATION

The undersigned certifies that he has read and hereby recommends for acceptance by Kampala International University a dissertation entitled “Analysis of the Legality and Impact of the Death Penalty in Kenya,” in partial fulfillment of the requirements of the Degree of Bachelor of Laws.

Signed



MR.TITUS KAMYA (SUPERVISOR)

28/3/2011

DATE

DEDICATION

I dedicate this research to my beloved parents Alfred .O. Maganga and Nereah .A. Okoth, and my siblings Aggrey, Faith, Joy and Dedi, whose love, extreme tolerance, understanding, guidance and support has brought me this far.

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Any errors, weaknesses or shortcomings found in this work are however entirely mine, for which I assume all the responsibilities.

LIST OF CASES

1. Catholic Commission for Peace in Zimbabwe vs The Attorney General & others,
Supreme Court of Zimbabwe No.3/1993 unreported
2. Evanson Muiruri Gichane vs Republic (2010)KLRwww.kenyalaw.org
3. Godfrey Ngotho Mutiso vs Republic (2010)KLR www.kenyalaw.org
4. Republic vs Mbushuu & another (1994)2LRC 335
5. Stephen .M. Riungu & 3 others vs Republic, Criminal Appeal No 902/1981 unreported
6. Susan Kigula & others vs Uganda, Constitutional Petition No. 6 of 2003
7. The State vs Makwanyare (1994)2 LRC

LIST OF INTERNATIONAL INSTRUMENTS

1. The African Charter on Human and Peoples' Rights
2. The American Convention on Human Rights
3. The European Convention on Human Rights
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5. The United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
6. The United Nations Safeguards Protecting the Rights of those facing the death penalty
7. The Universal Declaration of Human Rights

LIST OF STATUTES

1. The Constitution of Kenya 2010
2. The Criminal Procedure Code, Chapter 75 Laws of Kenya
3. The Penal Code, Chapter 63 Laws of Kenya
4. The Prisons' Act, Chapter 90 Laws of Kenya
5. The Prisons' Regulations

ABSTRACT

The death penalty is associated with two fundamental human rights; the right to life and the protection against cruel, inhuman and degrading treatment or punishment. This research sought to establish whether the death penalty as practiced in Kenya conforms to comparative and international human rights norms. It analyzed the legality of death penalty in Kenya with respect to the right to life and its impact. The research was historical and was also based on the reports and views of various scholars.

The major findings revealed that the death penalty is inhuman and degrading punishment that is unacceptable both under international law and the domestic legislation in Kenya since it offends the concept and the law on human rights and is inconsistent with the contemporary trends in international criminal law. It is further manifested that the death penalty is not a deterrent since murderers do not usually reflect much on the consequences of their actions before acting. Also, that mandatory death sentencing is antithetical to the constitutional provisions on protection against inhuman or degrading treatment or punishment and fair trial.

The major conclusion in this research was that the death penalty is not in consonance with the letter and spirit of the Constitution of Kenya 2010.

The research recommended the need for Kenya to formalize its de facto moratorium by adopting a de jure moratorium. In addition, legislative amendments are needed to suppress mandatory death sentences and broaden the restriction on the imposition of the death penalty on the persons with a mental deficiency, while addressing social and structural conditions of society to reduce violent crimes.

CHAPTER ONE

1.0 Introduction

Although the notion of human rights is a relatively modern political discovery, its development is rooted in a number of major ideas from ancient and medieval political thought. Stoics believed in the universality of moral reason which contributed decisively to the rise of natural law, from which the notion of natural rights first emerged in the 17th century¹. The earliest major challenge to the classical doctrine of individual rights was developed by Bentham who believed that there was no such thing as transcendent morality or natural law; human rights were entirely fictitious.

Discourse on contemporary moral issues like capital punishments dwell on the constitutionality of the death penalty and parallel those raised in discussions of its morality. Imposing sentences on convicted offenders, according to the classic formulation, offer four ways to accomplish this: retribution, deterrence, incapacitation, and rehabilitation². These four theories produce very different results in the real world. The choice of theory can therefore be critical.

There are three capital offences in Kenya; murder, treason, and armed robbery³. The question whether or not capital punishment should be retained in our jurisdiction is a topical and controversial issue. It is against this background that the death penalty in Kenya shall be discussed.

1.1 Background of the Problem

The official statistics and numbers of convicts on death row as at 3rd August 2009 stood at 4,000 in Kenya⁴. The surge in prison numbers of death row convicts has awakened debate on the effectiveness of the death sentence in theory and in practice.

¹ R.J Vincent " Human Rights and International Relations " (Cambridge university Press,1986) page 21

² Andrew Von Hirsch " Doing Justice : The choice of Punishments " New York : Hill and Wang 1976) page 12

³ Section 6 of the Prisons Act Chapter 90 Laws of Kenya states that, "When any person is sentenced to death, he shall be hanged by the neck until he is dead."

⁴<http://www.deathpenaltyinfo.org/time-death-row> accessed on 3/11/2010

Kenya still retains the death penalty in its statutes although this has never been applied since 1987 when death sentence convicts were last hanged⁵. In 2009, the President of Kenya commuted the death sentences of over 4,000 death row inmates to life imprisonment citing the wait to face execution “undue mental anguish and suffering”. The President also directed the government to study the deterrent effects of the death penalty in Kenya where crime is rampant⁶.

What if the penalty does not work? Justice does demand that murderers be punished and common sense demands that society be protected from them. However, neither justice nor self-preservation demands that we kill men and women whom we have already imprisoned. What really fuels the death penalty is the justifiable frustration and rage of the people who see that government is not coping with violent crime. Whether or not the death penalty deters murder is beside the point, for convicted murderers do not go unpunished. The relevant question is whether the death penalty would deter more effectively than does life imprisonment or imprisonment for some other longer term.

1.2 Statement of the Problem

Capital punishment is a drastically polarizing issue, with most people either strongly in favor of executions or strongly opposed to them. Few people remain neutral on the subject.

For several decades now, the question whether or not capital punishment should be retained has been a topical and controversial issue in Kenya and worldwide. Amnesty International has after detailed study arrived at the conclusion that the death penalty is the premeditated killing of a human being by the State and that the State can exercise no greater power over a person than by deliberate depriving him or her life⁷. Amnesty

⁵ <http://www.deathpenaltyinformation.blogspot.com/2007/04kenya-prisons-hit-by-upsurge-in-number.html> accessed on 15/9/2010

⁶ <http://www.deathpenaltyinfo.org/time-death-row> accessed on 3/11/2010

⁷ Amnesty International newsletter “When the State Kills” Amnesty International April 1989

International calls it a violation of a basic human right whatever the circumstance under which the deliberate killing takes place⁸.

Both the Kenya High Court and the Court of Appeal had earlier ruled that the death penalty is not unconstitutional⁹. Neither of the courts was addressed nor did any of them make those findings on grounds of cruel or inhuman treatment. The courts had been asked to rule a death penalty imposed by subordinate court of being unconstitutional on grounds of lack of jurisdiction.

In July 30th 2010 in a landmark judgment, the Court of Appeal of Kenya declared unconstitutional the application of a mandatory death sentence on all prisoners convicted of murder¹⁰. As a result 4000 prisoners currently on death row in Kenya will fall to be re-sentenced as the court had ruled that the automatic nature of the death penalty in Kenya for murder violates the right to life and amounts to inhuman punishment.

The new Constitution of Kenya 2010¹¹ failed to abolish the death penalty. The issue therefore, whether the death penalty per se may be unconstitutional on grounds of cruelty or inhuman punishment remains undecided in Kenya today.

1.3 Objectives of the Study

The broad objective of this study was to find out whether the existing law and legislation on the death penalty in Kenya conforms to the standards of comparative and international human rights norms.

The specific objectives of the study are:

1. To examine whether the death penalty in Kenya is unconstitutional.
2. To examine utilitarian punishment philosophy in relation to death penalty sentencing.

⁸ Amnesty International newsletter "When the State Kills" Amnesty International April 1989

⁹ Stephen M. Riungu & 3ors vs. Republic Criminal Appeal 902/1981

¹⁰ Godfrey Ngotho Mutiso vs Republic (2010) KLR (www.kenyalaw.org)

¹¹ Promulgated 27 August 2010

3. To examine whether the death penalty is justified in light of national and international human rights law.

1.4 Scope of Study

The study focused on the domestic legislation in Kenya in relation to the death penalty and how it can be reconciled with international human rights law on the protection of fundamental human rights.

1.5 Hypothesis

The death penalty does not deter crime nor does it allow for the protection against cruel, inhuman and degrading treatment or punishment. Ultimately, the death penalty denies the offender the right to life.

The right to life is fundamental and superior. It should not be taken away or restricted even where the individual has offended society since it is natural and inherent. It is important and right to punish offenders, but punishment should be just and humane.

1.6 Significance of the Study

Studies on the death penalty have not sufficiently shed light on the problems emanating from it especially at constitutional and human rights level. It is through this research that such crucial areas will be covered.

The study was also geared towards raising the awareness of policy makers to help them come up with appropriate strategies for purposes of reviews and reform of the law on the subject. The study therefore seeks to bring amendment of law towards abolition of the death penalty.

The researcher anticipates that the study will serve as an information source book and future literature for use by other researchers.

1.7 Methodology

Due to limited financial resources, field research was not possible. Thus the research was qualitative and heavily dependent on prior published documents, secondary data, archives, newspapers, NGO publications, text books and reports from libraries.

The internet will be used to provide data on international case study.

1.8 Literature Review

Literature on the death penalty in Kenya is lacking; this is because the issue of the death penalty has never attracted much interest until the recent decision of the Court of Appeal that held mandatory death sentence to be unconstitutional in Kenya.¹² Therefore studies on the death penalty in the East African region will prove relevant on this research given that most of the countries under consideration shared a similar colonial experience and were subject to similar penal policies. Moreover, since independence, the governments of these countries have adopted a broadly comparable stance on the question of penal policy, regardless of their particular political ideology. The present study brings out the contemporary knowledge on the subject being examined and enables its readers to appreciate the extent to which the right to life has been violated in Kenya.

Justice George Kanyeihamba (1999)¹³ “while justifying the role of the courts in upholding the death penalty, expresses his point of view stating that: “retribution means not only the convicted person should receive punishment that is in proportion to his or her moral guilt but the punishment must also be proportional to the harm done. In this later sense, punishment is tantamount to retaliation. The Judge seeks justice by imposing the sentence the criminal deserves.”

This argument seems to stress the fact that punishments are unjust unless they are like the crime itself. This is unacceptable concerning the abolition of the death penalty; and it is not necessary that the punishment is equivalent to the offence because it would require to punish the rapist by raping him or putting out the eyes of those who have blinded others.

¹² Godfrey Ngotho Mutiso vs Republic(2010)KLR(www.kenyalaw.org)

¹³ G. W. Kanyeihamba “ Uganda Still Needs The Death Penalty” The Uganda Human Rights Magazine June/July 1999 p 24

This literature does not justify the abolition of the death penalty which is an objective of this study. Moreover, a retributive form of punishment can be accepted without necessarily resorting to the death penalty.

In Tanzania, the Report of the Nyalali Commission, whose membership represented a broad cross-section of society, unanimously reached the conclusion that the death sentence is to be regarded as a barbaric form of punishment in democratic societies and morally insupportable.¹⁴ This work is relevant to the study as it deplores the continued imposition of the death penalty although it is known that the methods of execution are mostly brutal, thus contravening constitutional rights of the victims. It is also relevant on the argument of the research for the abolition of the death penalty especially the fact that the methods used when killing a person are not as sufficient as proponents think, resulting in a painful process which is contrary to the Convention against Torture.

J.S. Mbiti (1985) states that before colonialism, each community had its own form of restitution and punishment for various offences, like flogging and fines; death was reserved for very serious offences, for example practicing sorcery or witchcraft¹⁵. This literature helps us understand that the death penalty fits serious offences which could not otherwise be punished by other forms of punishment. But the weakness under this review is the fact that serious offences are not well defined by the author.

Apollo .N. Makubuya (2000)¹⁶, writes that retentionists of capital punishment link the deterrence theory through their argument that if the death penalty is abolished there will not be any punishment adequate enough to deter those criminals who are already serving long term sentences in prison or those who commit murder while incarcerated and even those who have not yet been caught but are potential criminals". The retentionists in this literature argue that since taking the offender's life is the most severe punishment than any other form, therefore it has a better deterrent effect to potential offenders. In regard to this study, this argument does not hold; this is because soaring crime is proof that taking the offender's life does not serve the deterrent purpose.

¹⁴ Report of the Nyalali Commission, Government of Tanzania Printer, Vol 3 at page 25

¹⁵ J.S. Mbiti "Introduction to African Religion" London, Heinemann 1985 at p211

¹⁶ The East African Journal of Peace and Human Rights vol 16 No. 2 of 2000 at p 227

Apollo Kakaire (2003) observes that “some people who murder are normally irrational at the time they commit the crime. Therefore, the threat of future death does not enter the mind of a killer acting under the influence of drugs or alcohol, in the grip of fear or rage or panicking while committing a crime or simply lacking an understanding of what he is doing. The deterrence theory is therefore based on speculation and not any tested evidence.”¹⁷ This work is relevant to the study which seeks to disprove that capital punishment is the most effective deterrent and will form a basis for the recommendations.

Amnesty International report (1999)¹⁸ states that “society should not condone the premeditated killing of defenceless people, whatever they might have done. If this is done, it condemns us to live in a world where brutality is officially sanctioned and where murderers set the moral tone to state officials authorized to shoot, hang, poison or electrocute men and women in cold blood.” The report further states that “all methods of execution are gruesome and can go wrong. Many of such executions have resulted in prolonged death and the condemned has to suffer the terror of waiting for the pre-ordained moment of death”. This report is relevant to the objectives of the study considering that execution in Kenya is legally done by hanging until death results. The findings of this report capture the scenario that the condemned person undergoes pain and suffering which could amount to cruel, inhuman and degrading treatment specifically prohibited by the Constitution of Kenya.

Amnesty International (1989) has after detailed study arrived at the conclusion that the death penalty is the premeditated killing of a human being by the state and that the state can exercise no greater power over a person than by deliberately depriving him or her life: Amnesty International calls it a violation of a basic human right whatever the circumstance under which the deliberate killing takes place.¹⁹ This work is relevant on the issue of arguments for the abolition of the death penalty for the reason that it violates the right to life as constitutionally protected. It therefore will form a basis for the recommendations of this study.

¹⁷ Apollo Kakaire The Death Penalty: The Case for Total Abolition, Uganda Human Rights Monthly Magazine vol 6 No. 1 May 2003

¹⁸ Amnesty International Report “The Death Penalty: An Affront to Our Humanity 1999 p 4

¹⁹ Amnesty International Newsletter “When The State Kills” April 1989

A survey by the United Nations in 1998 and later updated in 2002 found no correlation between the death penalty and homicide rates²⁰. According to the study, the hypothesis that capital punishments deters crime to a greater extent than does the application of the supposedly lesser punishment of life imprisonment is flawed. This literature is relevant to the study in that it supports the hypothesis of the study. However the fact that this was not a study conducted in Kenya but United Nations, it creates a gap to test this hypothesis in Kenya.

Expert criminologists in America, polled in 1995, overwhelmingly stated that they did not think the death penalty significantly reduces the homicide rates (94%), and they knew of no empirical evidence that would support such a claim²¹. The results of this project show that there is a wide consensus among America's criminologists that scholarly research has demonstrated that the death penalty does not, and can do little, to reduce rates of criminal violence. The findings of this literature will form a basis for the recommendations of this study.

²⁰ <http://www.knhc.org/dmdocuments/PositionPaperonDeath.pdf> accessed on 15/11/2010

²¹ Michael L. Radelet and Ronald L. Akers "Deterrence and the Death Penalty: The View of Experts" journal of Criminal Law and Criminology vol 87 issue 1, 1996 pg 1-16.

CHAPTER TWO

HISTORICAL CONCEPT OF CAPITAL PUNISHMENT AND MAJOR THEMES

2.0 Introduction

Etymologically, capital is something that is at the top of head,” it comes from Latin “**caput**” meaning head. Capital punishment for instance comes from the notion of a crime which figuratively speaking affects the head or life²².

The principle of a life for a life appears to be as old as civilization itself. Doubtless it is older and hence outdated in a civilized world. Whether its retention is warranted today as a basis for punishing major or capital offences is the essence of the contemporary debate on the death penalty. Capital punishment provides an illustration of the issue raised by the use of coercive forms of social control.

2.1 Emergence of Formal and Legal Punishment.

The historical discussion of punishment begins at the point when legal codes were first established. The development of language and writing skills led to the formalization of legal codes which subsequently served as the official guidelines of society.

The Code of Hammurabi, most popularly known by the phrase “an eye for an eye” is considered to be among the first written codes, dating back 1760BC in Babylon. Welch states that the basis of punishment according to the Code of Hammurabi was the concept of *lex talionis*, “the law of retaliation” which refers to vengeance²³. This principle is to be found in many cultures, notably in Mosaic²⁴ and Roman law. Hence from the beginning the rationale for legally sanctioned punishment was retribution.

Beheading as a form of retribution is traced to pre-Christian times and symbolizes urge to avenge a crime. This was a sacrificial act to placate the gods, or an apotropaic act²⁵.

²² Newman Graeme “ The Punishment Response “ Philadelphia : lippincott 1990 at page 37

²³ Michel Welch,” Corrections: A Critical Approach“ McGraw-Hill Inc 1996 pg 37

²⁴ Exodus 21:24 King James Version

²⁵ Michel Welch ,”Corrections: A Critical Approach“ McGraw-Hill Inc 1996 pg 37

2.2 Ancient Greece

Ancient Greeks denied offenders recourse to law by the penalty of “atimia” (loss of rights)²⁶. There were lesser degrees of this but the full degree of “atimia” and death are interchangeable. Nietzsche calls this “punishment as the expulsion of a degenerate element, as means of preserving the purity of a race or maintaining a social type.”²⁷

Notable punishments passed onto ancient Greeks from earlier days included, stoning, burning alive, strangling, banishing, crucifying and garroting. Breaking on the wheel was believed to ward off evil. The wheel was not only a symbol of the sun in both Greek and Roman mythologies but also an altar for sacrifices.²⁸ Class bias with different punishments employed for different classes of people was evident in the use of poisoning which emerged as an elitist form of capital punishment²⁹

2.3 Ancient Rome.

Ancient Romans like the ancient Greeks before them relied on numerous forms of torture and execution-breaking on the wheel, burying alive, hanging, drowning, burning as well as branding of criminals.³⁰ Romans let crucified bodies hang to be pecked at and decompose.³¹

The most notable documents of legal punishment during this period were the Burgundian Code and the Justinian Code. The Burgundian code (AD500) categorized types of punishment according to social class. The Justinian code (AD 529) formalized punishment with an unusual degree of precision and uniformity in so far as crimes were listed beside their assigned penalty.

²⁶ A.R.W Harrison, “The Law of Athens”, vol 2: procedure (Oxford university press 1971) pg 170

²⁷ Friedrich Nietzsche “On the Genealogy of Morals 2.11-14” trans by Walter Kaufmann in basic writings of Nietzsche (Modern library) 1992 pg 509-518

²⁸ Newman Graeme “The Punishment Response” Philadelphia Lippincott 1978 pg 37

²⁹ Newman Graeme “The punishment Response” Philadelphia, Lippincott 1978 pg 37

³⁰ Barnes Harry, Negley Teeters, “New Horizons in Criminology,” 3rd edition New York Prentice Hall

³¹ Samuel Y. Edgerton, “Pictures and punishment: Art and criminal prosecution during the Florentine Resistance”, Cornell university press 1985 pg 112-123

2.4 The Middle Ages

In light of the prevailing religious forces, the church and institutional religion prevailed as a dominant social force exerting influence over all the major institutions. Certain acts were criminalized including heresy witchcraft, and sexual offenses. Confronting the threat of heresy became a central theme of formal social control and the Holy Inquisition was established as an official law enforcement campaign in 1231³²

2.5 The Sixteenth and Seventeenth Centuries

Executions and corporal punishments were still common. In the days of Blackstone, there were 160 felonies for which the penalty was death.³³ The death for traitors in Elizabethan Europe was an elaborate piece of theater. Coke said that the man "was not worthy any more to tread upon the face of the earth where of he was made; also for that he hath been retrograde to nature therefore he is drawn backward at a horse-tail"³⁴.

According to Hume, 72,000 thieves were executed in the reign of Henry VIII, and 19,000 criminals perished at the end of the rope during the reign of Queen Elizabeth.³⁵ Although the 1500s are characterized as a period when earlier forms of punishments remained popular, many innovations developed during this period which reflects a reconceptualisation of punishment, with the construction of work houses and houses of correction as well as by the emergence of transportation and the use of hulks as prison "ware houses."³⁶

Public executions during the late Middle Ages continued to take place in the market place or village square, but the unbridled rage of past executions was blunted by formal pageantry replete with festive ornaments and rituals. Eventually, executions were no longer publicly displayed. Most forms of punishment were taken behind closed doors, in the privacy of the penitentiary. Mc Clellan asserts that the eventual decline of the public executions had become so brutal that citizens began to view government officials as

³² Lea H.C "The Inquisition of the Middle Ages" New York: Harper and Row 1969

³³ Grant Mc Clellan "Capital punishment" The H.W Company New York 1961 pg 13

³⁴ Grant Mc Clellan "Capital Punishment" The H.W company New York 1961 pg 18

³⁵ Grant Mc Clellan "Capital Punishment" The H.W company New York 1961 pg 18

³⁶ Barnes and Teeters "New Horizons in Criminology" 3rd edn New York Prentice Hall

being more despicable than the offenders.³⁷ Consequently, punishment was removed from public scrutiny to keep offenders from receiving public sympathy. Moreover, since penitentiaries were not open to the public, punishment became mystified; exactly what types of punishments were inflicted on prisoners remained a mystery to those in the community. This type of mystification furthered notions of deterrence while reinforcing the government's right and legitimacy to punish society's wrong doers.

2.6 Major Themes in Capital Punishment

An explicit threat of punitive action is necessary to the justification of any legal punishment. Many people ardently support the retention of the death sentence for murder. The main basis for supporting the use of the death penalty is that it is an effective deterrent, but even more stems from the deep conviction that the death sentence is just retribution; murderers have seen fit to kill people and therefore they too deserve to die. Being part and parcel of the globe, Kenya is not isolated from the debate under consideration, in that there are some people who support and some who oppose capital punishment, which is the death sentence with respect to those found guilty in murder cases.

2.7 Deterrence and Capital Punishment.

The criminal law is commonly justified as having deterrent effect. While debating the Criminal Law (Amendment) Bill of 1971 that introduced the death penalty for armed robbers, one Kenyan parliamentarian spoke thus: "I do not think that anybody cannot be convinced one that by hanging these people, by passing the death sentence, this is not going to educate them."³⁸

Most criminologists, but not all of them, distinguish between specific deterrence and general deterrence.³⁹ Cousineau avers that the notion of deterrence is not a simple one

³⁷ Ibid pg 23

³⁸ National Assembly Official Reports, vol 20, Government Printer, Part 1, pg 245

³⁹ Zimring E.F. Hawkins G.J. "Deterrence: The legal Threat in Crime Control" Chicago, University of Chicago press, 1073

and it is possible to discern many meanings in the concept.⁴⁰ The idea behind specific deterrence is that the arrested person is less likely to commit a similar offence in future as a result of the legal penalty suffered. The assumption underlying the idea of general deterrence is that application of the criminal law to others will reduce the probability that you and I will commit the crimes for which they have been punished.

2.7.1. Not a Unique Deterrent.

Scientific studies have consistently failed to find evidence that the death penalty deters crime more effectively than other punishments. Most research has found no evidence that either the death penalty laws or actual executions deter crime.⁴¹ Studies that appear to show a deterrent effect have been repudiated on methodological grounds. Critics argue that the methodological shortcomings of these studies invalidate their conclusions.⁴²

There are reasons for the absence of deterrent effect; according to Gibbs, murderers do not usually reflect much on the consequences of their behavior before acting.⁴³ Blumstein et al, argue that lack of prompt punishment also reduces any general deterrent effect that the death penalty might have.⁴⁴ Fattah says another consideration is that because capital punishment applies to premeditated murders and extremely brutal slayings, those laws are unlikely to deter all types of murder.⁴⁵

A survey by the United Nations in 1998 and later updated in 2002 found no correlation between the death penalty and homicide rates⁴⁶. According to the study, the hypothesis that capital punishment deters crime to a greater extent than does the application of the supposedly lesser punishment of life imprisonment is flawed.

⁴⁰ Cousineau D.F “General Deterrence of Crime: An Analysis”, 1976 Edmonton University of Alberta, Department of Sociology, PhD dissertation.

⁴¹ Archer Dane, Rosemary Gartner and Marc Beitel “Homicide and the Death Penalty: A Cross-National Test of Deterrence Hypothesis” journal of Criminal law and Criminology Fox James Allan, Michael Radelet, Persistent Flaws in Econometric studies of the Deterrent Effect of the Death Penalty “Loyola of Los Angeles law Review (1989) pg 29-44.

⁴² Craig J. Albert, “Challenging Deterrence: New Insights on Capital Punishment Derived from Panel data” University of Pittsburgh law Review 1999 pg 321.

⁴³ Jack.P. Gibbs, “Crime, Punishment and Deterrence” Elsevier, New York 1975.

⁴⁴ Alfred Blumstein et al, “Deterrence and Incapacitation”, National Academy of Sciences, Washington DC, 1978.

⁴⁵ E.A, Fattah, “Deterrence: A Review of Literature” Canadian Journal of Criminology 19(2):1-19.

⁴⁶ <http://www.Knhrc.org/dmdocuments/PositionPaperonDeath.pdf> Accessed on 15/11/2010

2.8 Retribution and Capital Punishment.

The arguments under this category have largely religious or moral underpinnings. Retribution is the oldest conception of justice. It is the moral demand that evil not go unpunished; that the harm a person does be returned to him or her in equal degree, if not in kind. Retribution finds support in the Bible.⁴⁷

This argument was not entirely lost on speakers debating the death penalty for robbery in Criminal Law (Amendment) Bill of 1971, commonly referred to as the "Hanging Bill": "These robbers also use violence, undue killers should be hanged or should abide by the law of Moses, that is an eye for an eye."⁴⁸

Bedau writes that retributive justice need not be thought to consist of *lex talionis* "an eye for an eye": that one may reject that principle as too crude and still embrace the retributive principle that the severity of punishment should be graded according to the gravity of the offence.⁴⁹ He points out that retribution simply requires a punishment proportional to the crime, not any specific form of punishment such as the death penalty.

Marc Raphael Guedj, former Chief Rabbi of Geneva states. "If you read the Bible literally it advocates the death penalty. An eye for an eye can be understood in terms of values, in terms of compensatory payment; a man who has lost his hand should be recompensed for the loss of his tool of work or the replacement of his hand".⁵⁰ Durham avers that "just deserts" or retribution places limits on the degree to which someone may be punished; the difficulty with desert is that we can not yet precisely measure levels of crime severity or of punishment severity.⁵¹

⁴⁷ Exodus 21:23-25 New King James Version

⁴⁸ National Assembly Official Reports Vol.20, Government Printer Part I pg 307

⁴⁹ Hugo Bedau Adam "The Death Penalty in America: Current Controversies," 4th edition. New York Oxford University Press 1997

⁵⁰ <http://www.worldcoalition.org/modules/smartsection/item.php2itemid=421> accessed on 25/9/2010

⁵¹ Durham. A.M "Crime Seriousness and Punitive society. An Assessment of Social Attitudes" Justice Quarterly 13(4) pg 705-736.

Retributivists assert that deterrence and rehabilitation are secondary or derivative goals of punishment; the primary justification for punishment is that offenders deserve to be punished in proportion to the harm they have inflicted on the victim and society.⁵²

Support for and opposition to the death penalty is based to a large extent on considerations of just deserts. Some Christians also argue that the Bible prescribes executions as just. Leviticus 24:17-21 New King James Version says: "he who has killed a man shall be put to death." Genesis 9:6 New King James Version reads: "Whoever sheds the blood of man, by man shall his blood be shed." However, the same Bible in Romans 12:19 states: "Vengeance is mine, I will repay, says the Lord."

Most Muslim states argue that their Islamic laws and religion allows execution for various offences. The Islamic Council adopted a Universal Declaration of Rights which guaranteed the right to life but also provides for the death penalty under authority of the law under Article 1(a).⁵³ According to Islam theologian Site Musdah Mulia: "Within Islam there is a predominant place given to respect of human life".⁵⁴

As the Archbishop of Canterbury said of "an eye for an eye" in the 1948 debate on the abolition of the death penalty in Britain; "It is well to remember that in its origin it was a restraint upon vengeance. It does not require that equivalent punishment, but it says that no punishment should go beyond that limit; no more than one eye for an eye, and no more than one tooth for one tooth."⁵⁵

2.9 Utilitarian Punishment Philosophy

For the utilitarian, a social practice is justified in so far as it tends to produce more good than harm. Beccaria⁵⁶ wrote the essential principles of the classical school and stated that there should be no capital punishment; life imprisonment being a better deterrent.

⁵²Ernest Van Den Haag, "Punishing Criminals: Concerning a Very Old and Painful Question" (1975) *Journal of Criminal Law and Criminology and Police Science* vol.60 No.2 ;Walter Berns and Joseph Bessette "Why the Death Penalty is Fair" *Wall Street Journal*, January 9, 1998

⁵³ <http://www.worldcoalition.org/modules/smartsection/item.php2itemid=421> accessed on 25/9/2010

⁵⁴ <http://www.worldcoalition.org/modules/smartsection/item.php2itemid=421> accessed on 25/9/2010

⁵⁵ Quoted in Sellin Thorsten ed. "Capital Punishment" Harper and Row, New York, 1967 pg 84

⁵⁶ Cesare Beccaria, "Crime and Punishment" quoted in Barnes and Teeters "New Horizons in Criminology" 3d ed Englewood Cliffs N.J Prentice-Hall 1959 p285

Bentham⁵⁷ further developed the philosophy of the classical school by stating that human beings were rational creatures who, being free to choose their actions, would be held responsible for their behavior. The theory was that, if the human being is a creature governed by a felicific calculus and oriented toward obtaining a favorable balance of pleasure and pain, then setting up a rational scale of punishments painful enough to deter the criminal from further offences and others from following the offenders example ought to be possible.⁵⁸

Proponents of the utilitarian punishment philosophy advocate a wider use of mandatory sentencing.⁵⁹ They believe that sentences fixed by the legislature will deal with the crime problem more adequately than those that depend on the discretion of judges and parole boards, and argue that the death penalty is a proper and fitting penalty for some crimes, and should be more widely used. This is the reasoning that informed parliamentarians while debating and passing the Criminal Law Amendment Bill of 1971, which introduced the death penalty for armed robbers.⁶⁰ Speakers then stated that punishment deters crime because it is educative and moral; criminals are taught not to commit further crimes, and non-criminals see what happens to those who break the law. Thus, punishment deters crime because it is a message to the public at large that “this will happen to you if you violate the law”.

Supporters of the utilitarian punishment philosophy have used research on deterrence to validate the need for a harder line on crime. Gibbs⁶¹ found according to Federal Bureau of Investigation data, that the greater the certainty and the severity of punishment in forty-eight American states, the lower the homicide rate. Louis Gray and J. Martin⁶², who used the same data, concluded that the “certainty and severity of punishment have a demonstrable impact on the homicide rate.”

⁵⁷ Jeremy Bentham “Principles of Penal law” (1843)p346

⁵⁸ Richard .A. Ball “Restricted Reprobation and the Reparation of Social Reality: A Theory of Punishment”(Paper presented at the Annual Meeting of The American Psychiatric Society, Dallas 1978)p8

⁵⁹ James .Q. Wilson “Thinking about Crime” New York: Basic 1975 p197. Also Ernest Van Den Haag “Punishing Criminals: Concerning a Very Old and Painful Question” New York Basic 1975 p1-15

⁶⁰ National Assembly Official Reports volume 20, Government Printer Part 1 p245

⁶¹ Jack Gibbs “Crime, Punishment, and Deterrence” Social Science Quarterly 48 (1968) 515-530

⁶² Louis Gray and J. Martin “Criminal Homicide, Punishment and Deterrence: Methodological and Substantive Reconsiderations” Social Science Quarterly 52(1971)277-289

2.9.1 Criticisms of the Utilitarian Punishment Philosophy

The most widespread criticism of utilitarian punishment philosophy is that a repressive response to crime will not work; that it has not worked in the past and is no more likely to work now or in future.⁶³ This neo-classical approach assumes that criminal acts take place after offenders have calculated rationally the costs and benefits of crime; however, some crimes are committed by intoxicated and insane persons who would not possess such rational decision-making.

Critics further question whether the efficacy of utilitarian punishment philosophy can be judged on the basis of the various deterrence studies, because most of these research findings are filled with speculation and methodological problems.⁶⁴

The utilitarian punishment philosophy is further accused of limiting the impetus for reform of overcrowded, violent, and criminogenic prisons and could result in a return to a primitive conception of criminal justice.⁶⁵

Critics argue that proponents of the utilitarian punishment philosophy neglect the social and structural conditions of society that lead to crime.⁶⁶

2.9.2 Relevance of Punishment Theories to Kenya

The main thrust of this research is to advocate for the abolishment of the death penalty in Kenya. The danger today lies in the fact that the decisions of policy makers are supporting utilitarianism. The neo-classical utilitarian punishment philosophy, unlike the classical school of old which did not support the death penalty, leads to a repressive rather than a more humane approach to justice. Since utilitarian punishment offers some tangible results and is consistent with the principles of our utilitarian society, it enjoys the support of the Kenyan public. However, utilitarian punishment would be unjust because criminal behavior is not excused because of any internal temptation, for example, motivation or inclination; or any external temptation like opportunity, stimulation or

⁶³ Jack Gibbs "Crime, Punishment, and Deterrence" Elsevier, New York 1975

⁶⁴ Stephen Van Dine, John P. Conrad, and Simon Dinitz "Restraining the Wicked; The Incapacitation of the Dangerous Criminal" (Lexington, Mass: Heath, 1979) p17-33

⁶⁵ Francis A. Allen "The Decline of the Rehabilitative Ideal" New Haven: Yale University Press, 1981 p6

⁶⁶ Richard Quinney "Class, State and Crime: On the Theory and Practice of Criminal Justice (New York: Viking Press, 1968)

deprivation. The landmark decision in **Godfrey Ngotho Mutiso vs Republic**⁶⁷ stated that mandatory death sentence had no constitutional justification and everyone convicted of a capital offence should be given an opportunity to show why the sentence should not be passed.

It seems thus unlikely that the current system of capital punishment in Kenya can be justified on utilitarian grounds.

Conclusion

The idea that harming offenders is good in itself may be the oldest idea associated with punishment. If this had been thought to be the only underpinning of the institution, it might have been eliminated by Christians, who taught that vengeance was best left to God, as in the early twentieth century, when the consensus among philosophers was that retribution was barbaric and pointless. If instead punishment had been consistently seen simply as a regrettable necessity to promote the good of society, it would have had difficulty withstanding the late twentieth century recognition both of the practical elusiveness of deterrent and rehabilitative goals and of the questionable morality of using individuals to promote social ends. And if we had consistently thought of punishment as something we do to benefit offenders, the stark reality itself that it typically does the opposite would eventually have forced itself on our attention. Instead as successive generations have inherited the institution of punishment and found the old rationale wanting, they have found new ones-or revived old ones for continuing it.

⁶⁷ (2010)eKLR www.kenyalaw.org

CHAPTER THREE

LEGAL REGIME ON CAPITAL PUNISHMENT IN KENYA

3.0 Introduction

Capital punishment is still administered in Kenya. That is to say, the sentence is among the punishments which may be pronounced by a court.

According to the penal law, capital punishment is awardable for the following three capital offences, namely, murder, treason and armed robbery.⁶⁸

3.1 Constitutional Framework on Capital Punishment

Although Article 26 of the Constitution of Kenya 2010 provides that every person has the right to life; however, this right is qualified under Article 26(3) that “a person shall not be deprived of life intentionally except to the extent authorized by the constitution or other written law”. That is to say, that the death penalty is not unconstitutional. Therefore, when life is taken away in due process of the law then that action cannot be said to be unconstitutional.

In **Godfrey Ngotho Mutiso vs. Republic**⁶⁹ the learned Justices of the Court of appeal declared the imposition of a mandatory death sentence for murder unconstitutional. They however, also observed that: “The abolition of death penalty is not one of the provisions of the (then) Proposed Constitution and not a contentious issue. As the draft was arrived at through consultative and public process, it can be concluded that the people of Kenya have resolved to qualify the right to life and to retain the death penalty in the statute books”.

Article 25 states that: “Despite any other provision in the Constitution, the following rights and fundamental freedoms shall not be limited;

⁶⁸ Section 204, 40 and 295 Penal Code Act, Chapter 63, respectively

⁶⁹ (2010)e KLR www.kenyalaw.org

a) Freedom from torture and cruel, inhuman or degrading treatment or punishment.”⁷⁰

Article 28 provides that “every person has inherent dignity and the right to have that dignity respected and protected.”⁷¹

For that matter, the death penalty offends these rights.⁷² Hanging, which is the method of execution in Kenya as in many African countries, has been held to be barbaric.⁷³ Capital punishment enforced in this manner is contrary to the non-derogable right of freedom from torture and cruel, inhuman or degrading punishment since the condemned person may undergo prolonged pain and suffering.

3.2 Legislative Framework on Capital Punishment

Section 330 of the Criminal Procedure Code⁷⁴ requires that the court shall inform an accused person sentenced to death of the time within which, if he wishes to appeal, his appeal should be preferred.

Under section 331 of the Criminal Procedure Code⁷⁵, a certificate under the hand of the Registrar or other officer of the court that sentence of death has been passed and naming the person condemned, shall be sufficient authority for the detention of that person.

According to Section 332 (1) of the Criminal Procedure Code⁷⁶, states that:

“As soon as conveniently may be after sentence of death has been pronounced, if no appeal from the sentence is confirmed, then as soon as conveniently may be after confirmation, the presiding judge shall forward to the President a copy of the notes of evidence taken on the trial, with a report in writing signed by him

⁷⁰ Constitution of Kenya 2010

⁷¹ Constitution of Kenya 2010

⁷² Section 69 of the Prisons Act chapter 90 states that: “When any person is sentenced to death, he shall be hanged by the neck until he is dead and the sentence shall be carried out in such manner as the commissioner shall direct.” (Emphasis mine)

⁷³ Republic vs Mbushuu (1995)1 LRC 216 Tanzania Court of Appeal

⁷⁴ Chapter 75 Laws of Kenya

⁷⁵ Chapter 75 Laws of Kenya

⁷⁶ Chapter 75 Laws of Kenya

containing; any recommendation or observations on the case he may think fit to make.

2) The President, after considering the report, shall communicate to the judge, or his successor in office, the terms of any decision to which he may come thereon and the judge shall cause the tenor and substance thereof to be entered in the records of the court.

3) The President shall issue a death warrant or an order for the sentence of death to be commuted or a pardon, under his hand and the public seal of Kenya to give effect to the decision, and

- a) If the sentence of death is to be carried out, the warrant shall state the place where and the time when execution is to be had, and shall give directions as to the place of burial or cremation of the body of the person executed.
- b) If the sentence is commuted for any other punishment, the order shall specify that punishment;
- c) If the person sentenced is pardoned, the pardon shall state whether it is free, or to what conditions (if any) it is subject.

4) The warrant, or order or pardon of the President shall be sufficient authority in law to all persons to whom it is directed to execute the sentence of death or other punishment awarded and to carry out the directions therein accordance with the terms thereof.

Section 24 of the Penal Code⁷⁷ provides that death is one of different kinds of punishments that maybe inflicted by a court. According to section 25 of the Penal Code⁷⁸ “where any person is sentenced to death, the form of the sentence shall be to the effect only that he is to suffer death in the manner authorized by the law”.

Article 133 of Constitution of Kenya 2010 requires that where a person is sentenced to death for an offence, a written report from the trial judge or person presiding over the

⁷⁷ Chapter 63 Laws of Kenya

⁷⁸ Chapter 63 Laws of Kenya

court, together with any other information derived from the record of the case is to be submitted to the Advisory Committee on the Power of Mercy.

The Advisory Committee on the Power of Mercy consists of the Attorney General as the chair person, the Cabinet Secretary responsible for correctional services and six prominent citizens of Kenya appointed by the President as stated in Article 133(2) of the Constitution of Kenya 2010.

The condemned person writes an appeal for mercy to the President, an appeal that goes to the Advisory Committee on the power of mercy:

“The President may exercise a power of mercy in accordance with the advice of the Advisory Committee on the power of mercy by:

- a) granting a free or conditional pardon to a person convicted of an offence;
- b) postponing the carrying out of a punishment, either for a specified or indefinite period;
- c) Substituting a less severe form of punishment for a punishment; or
- d) Remitting all or part of a punishment’’.⁷⁹

In practice, the operation of the advisory committee is shrouded in secrecy. The seeming lack of transparency and potential lack of objectivity in the procedure is a cause of concern.

There are several situations in respect of which the death sentence is provided for:

Section 204 Penal Code⁸⁰ states: “Any person convicted of murder shall be sentenced to death.” From the foregoing, the death sentence is a mandatory sentence, that is to say, once the court has found an accused person guilty of murder, there is no other sentence that can be imposed against him except the death sentence. However, in the case of **Godfrey Ngotho Mutiso vs. Republic**⁸¹ in a landmark judgment, the Court of Appeal of

⁷⁹ Article 133(2) of the Constitution of Kenya 2010

⁸⁰ Chapter 63 Laws of Kenya

⁸¹ (2010)e KLR (www.kenyalaw.org)

Kenya on July 30, 2010 declared unconstitutional the application of mandatory death sentence on all prisoners convicted of murder.

In their unanimous judgment, the Court of Appeal ruled that the automatic nature of the death penalty in Kenya for murder violates the right of life and amounts to inhuman punishment as it does not provide the individuals concerned with an opportunity to mitigate their sentences. As a result, hundreds of prisoners currently on death row in Kenya, including the appellant, will fall be re-sentenced in accordance with the new law. The Court of Appeal said that the same reasoning would apply to other offences having a mandatory death sentence, such as treason and robbery with violence.

On examining the mandatory nature of the death penalty, the court referred to other commonwealth countries where the sentence had been found to violate constitutional provisions similar to Kenya's by not allowing for individualized consideration of the offender and the commission of the offence.

Guided by that finding, the court held that Section 204 of the penal Code was antithetical to the constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial.

It noted that while the Constitution itself recognized the death penalty as being lawful, it did not state anywhere that where a conviction for murder was recorded, only the death sentence should be imposed.

On the question of prolonged delay on death row, the court found that it had adverse effect on the condemned prisoners' physical and mental state as a result of "the death row syndrome" which, as internationally accepted amounted to cruel, inhuman or degrading treatment which was prohibited by the Constitution. The court said that despite many serious crime offenders having been sent to the gallows since independence in 1963, only a handful had been executed, leaving the prisons inundated with a huge number of death row convicts.

Consequently, from the above landmark judgement, a new set of procedures will now have to be adopted to ensure that sentence hearings takes place and a judge will now have

the discretion to consider what sentence to impose after hearing evidence in mitigation. The death penalty is now the maximum sentence, but not the only sentence. It would thus seem that the system of criminal proceedings in America known as bifurcated trial will be adopted; this is a special two-part trial proceeding in which the guilt is tried in the first step and, if a conviction results, the appropriate sentence is determined in the second step.

Section 40 of the Penal Code⁸² provides that:

“Any person convicted of the offence of treason shall be sentenced to death.”

Treason is a serious offence which is set out and defined by Section 40 of the Penal Code. There are two categories of treason:

(a) Section 40 (1):” Any person who, owing allegiance to the Republic of Kenya or elsewhere;

1. Compasses, imagines, devices, or intends;

(1) The death, maiming or wounding or the imprisonment or restraint of the President, or

(2) The deposing by unlawful means of the President from his position as President or from the style, honour and the name of Head of State and Commander-in-Chief of the Armed Forces of the Republic of Kenya. or

(3) The overthrow by unlawful means of the Government; and

2. Expresses, utters, or declares any such compassing, imaginations, inventions, devices, or intentions by publishing any writing or by any overt act or deed, is guilty of treason.”

This category of treason is meant to protect the President and Government from unlawful overthrow.

(b) Section 40 (2):” Any person , who owing allegiance to the Republic;

⁸² Chapter 63 Laws of Kenya

- (1) Levies war in Kenya against the Republic;
- (2) Is adherent to the enemies of the Republic, or gives them aid or comfort, in Kenya or elsewhere; or
- (3) Instigates whether in Kenya or elsewhere any person to invade Kenya with an armed force, is guilty of the offence of treason.”

This category is meant to protect the country from invasion by enemies.

In 2002, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions said that the United Nations Human Rights Committee has recommended restrictions to exclude the possibility of imposing death sentences for economic and other so-called victimless offences, actions relating to prevailing moral standards, or activities of a religious or political nature, including acts of treason, espionage or other vaguely defined acts, usually described as “crimes against the state”.⁸³

The death penalty for treason is thus not tenable. Political opponents should not be seen as criminals or enemies.

Section 295 Penal Code⁸⁴ provides for the offence of robbery. Section 296(2) of the same Code further states: “If the offender is armed with any dangerous weapon or instrument, or is in company with one or more other person or persons, or if at immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

Section 297 (1) provides for the offence of attempted robbery and states that “any person who assaults any other person with intent to steal anything and at immediately before or immediately after the assault, uses or threaten to use actual violence to any person or property in order to obtain the thing intended to be stolen or to prevent or overcome resistance to its being stolen, commits a felony”.

⁸³ Report of Ms. Asma Jahangir, Special Rapporteur on extrajudicial, summary or arbitrary executions. E/CN.4/2002/74, 9th January 2002

⁸⁴ Chapter 63 Laws of Kenya

Section 297(2) on attempted robbery is as Section 296(2) *mutatis mutandis*. However, Section 389 of the Penal Code states that: “Any person who attempts to commit a misdemeanor is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.”

Conflicting laws providing for the sentence to be passed when a person is convicted of the offence of attempted robbery have led to Judges’ decision to substitute a convict’s death sentence with prison term. In **Evanson Muiruri Gichane vs Republic**⁸⁵ the Court of Appeal agreed that there might be a contradiction between two sections of the Penal Code. The appellant who had been convicted for attempted robbery with violence which under section 297(2) was punishable by death yet under section 389 he would not have been liable to imprisonment for a term exceeding seven years. The judges observed that “the apparent conflict in the law can only be resolved by parliament, but the appellant is entitled to the less punitive of the two”.

The court allowed the appeal and considered that the appellant was sentenced to death on March 5, 2004. They substituted that sentence with a jail term that would result in his release as he should have been imprisoned for not more than seven years.

In fact as the law stands, a robber could be legally hanged without having been armed or inflicting any injury on a person. The three alternative conditions required by law under subsection 2 of Section 296 and 297 of the Penal Code are:

- a) Being armed with any dangerous or offensive weapon or instrument, or
- b) Being in the company of one or more other person or persons, or
- c) Wounding, beating, striking or using any personal violence on any person.

Thus, under (a), a robber does not have to use the weapon to qualify for the hangman’s noose. Under (b), it is neither necessary to be armed nor to inflict injury to qualify for the noose. Under (c), the injury inflicted need not to be inflicted using a dangerous weapon. Since robbery is distinguished from theft by the element of use of force required in the

⁸⁵ (2010)eKLR www.kenyalaw.org

latter, the force required may very well be covered by the phrase “any personal violence” in the hanging clause. The death penalty is therefore not for “armed” or “violent” robbers, but for robbers who attain any one or more of the prescribed “qualifications” which are stated in the alternative, each independent of the other.

3.2.1 Exceptions to Imposition of Death Sentence.

There are however, people who are exempted from suffering the death penalty, notwithstanding that they are found guilty of murder; these are pregnant women, juveniles and insane persons.

Regarding pregnant women, Section 211 Penal Code states that: “Where a woman convicted of an offence punishable with death is found to be pregnant, the sentence to be passed on her shall be a sentence of imprisonment for life instead of sentence of death”.

For pregnant women, it would seem that the right to life as proclaimed in the Constitution⁸⁶ ensures that the unborn child is guaranteed a future existence by the preservation of its mother’s life.

For those who are below the age of 18, section 25(1) of the Penal Code states that: “Sentence of death shall not be pronounced or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of 18 but in lieu thereof the court shall sentence such person to be detained during the President’s pleasure and if so sentenced he shall be liable to be detained in such place and under such conditions as the president may direct, and whilst so detained shall be deemed to be in legal custody.”

Since it is the duty of every court in dealing with any child or young person to “have regard to the welfare of the child or young person” and merely retributive punishment is ruled out, it is likely that the child or young person is detained at the President’s pleasure for correctional treatment.⁸⁷

⁸⁶ Article 26 of the Constitution of Kenya 2010

⁸⁷ Children and Young Persons Act, Section 44(1)

Section 166 (1) of the Criminal Procedure Code⁸⁸ provides for the defence of lunacy adduced at trial and states that:

“where an act or omission is charged against a person as an offence and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.

2) When a special finding is so made, the court shall report the case for the order of the President, and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct.”

Section 12 of the Penal Code⁸⁹ states that: “every person is presumed to be sound of mind and to have been sound of mind at any time which comes in question until the contrary is proven.” The general rule is that everybody is presumed sane until the contrary is proved. The rule as to the presumption of sanity can be rebutted and it will be a defence to a criminal prosecution for an accused person to show that he was labouring under such a defect of reason because of a disease of the mind as either;

- 1) Not to know the nature and quality of his act; or
- 2) Not to know that what he was doing was wrong.⁹⁰

The definition of insanity in the Penal Code is broadly based on the Mc’Naghten Rules: whereas these much criticized rules have lost much of their importance in England since the introduction of the defence of diminished responsibility for murder by the Homicide Act 1957, this is not the case with Kenya. The defence of insanity, when so defined, is so limited that it tends not to be relied on in jurisdictions that have an alternative defence of

⁸⁸ Chapter 75 Laws of Kenya

⁸⁹ Chapter 63 Laws of Kenya

⁹⁰ (R. Vs Daniel McNaghten (1843) 10 CL & Finn 200:)

diminished responsibility. This is because the wider test of diminished responsibility acknowledges the need to afford at least a partial excuse to those whose disorders affect their powers of self-control.

3.3 International Conventions

The right to life is the supreme human right since without effective guarantees for it all other human rights would be devoid of meaning⁹¹. The right of everyone to life and security of person is proclaimed in Article 3 of the Universal Declaration of Human Rights. These rights are reiterated in Articles 6(1) of the International Covenant on Civil and Political Rights as well as in regional instruments; African Charter on Human and peoples Rights, Article 4; American Convention on Human Rights Article 4(1) and European Convention on Human Rights in Article 2.

Kenya is a party to the 1948 Convention Against Torture And other Cruel, Inhuman or Degrading Treatment or Punishment. The aim of this Convention is to “promote universal respect for, and observance of human rights and fundamental freedoms”. Article 4 of the Convention requires states to “ensure that all acts of torture are offences under its criminal laws. The same shall apply to an attempt to commit torture and to by any person which constitutes complicity or participation in torture.”

To give full effect to the Convention Against Torture, domestic legislation is needed to incorporate its provisions into Kenyan Law.⁹²

During the 61st session of the UN Commission on Human Rights in 2005, Kenya was one among the countries that abstained from voting for a UN Draft Resolution calling for abolition of death penalty.⁹³ Kenya also refused to vote on another resolution condemning arbitrary executions and impunity. At the same time it is significant that

⁹¹ Per Justice Chaskalson in *The State vs Makwanyare* (1994)LRC

⁹² Thus section 69 of the Prisons Act Chapter 90 which specifically requires that “a person shall be hanged by the neck until he is dead” will be contrary to the spirit of the Convention Against Torture.

⁹³ <http://www.knhrc.org/dmdocuments/PositionPaperonDeath.pdf> accessed on 15/11/2010

Kenya has still not signed the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at abolition of the death penalty.⁹⁴

Table 1. Situation of Death Penalty in Kenya⁹⁵

Status	Year				
	2001	2002	2003	2004	2005
Sentenced to death	728	865	787	877	744
Life sentence on Appeal	13	13	35	49	72
Presidential pleasure	0	0	0	0	0
Convicted when under 18	23	57	20	12	13

Source: Kenya Prisons Headquarters, September 2006

There are no exhaustive, clear and transparent statistics on the number of people sentenced to death in Kenya; however, the above table indicates that the number of those sentenced to death remains on average very high on a yearly basis. The same table also shows that successful appeals from the death sentence keeps on rising, evidencing that the trial process had not been proper. The lack of statistics of those detained on Presidential Pleasure indicates the secretive nature of the Executive with regard to the death sentence.

As noted by the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions: "Secrecy prevents any informed public debate about capital punishment within the relevant society. Countries that have maintained the death penalty are not prohibited by international law from making that choice, but they have a clear obligation to disclose the details of their application of the penalty."⁹⁶

3.4 Death Row Syndrome/Death Row phenomenon.

Psychologists and lawyers in the United States and elsewhere have argued that protracted periods in the confines of death row can make inmates suicidal, delusional and insane.

⁹⁴ <http://www.knhrc.org/dmdocuments/PositionPaperonDeath.pdf> accessed on 15/11/2010

⁹⁵ <http://www.knhrc.org/dmdocuments/PositionPaperonDeath.pdf> accessed on 15/11/2010

⁹⁶ E/CN.4/2005/7 para 57 and 59 Quoted in the International Federation for Human Rights Report 2002 p 16

Some have referred to the living conditions on death row-the bleak isolation and years of uncertainty as to the time execution-as the death row phenomenon and the psychological effects that can result as death row syndrome.⁹⁷

In 2009, Kenya's President commuted all death sentences in the wake of legal challenges brought by local and international activists.⁹⁸ The President decided to commute the country's 4,000 death row inmates to life in prison on August 3, 2009, citing "undue mental anguish" suffered by those sentenced to death.

Christian Lawyers for Justice (CLEAR)⁹⁹ state that; "a key underlying factor behind the decision to commute the sentences of all of those on death row relates to the impact of these cases. If the death penalty per se had been declared unconstitutional by the court, and there is every indication that they would have done so, the government would have been faced with the unenviable task of holding individual sentence hearings for all 4,000 plus prisoners under sentence of death".¹⁰⁰

3.5 The Administration of Capital Punishment in Kenya

In Kenya, the death sentence is administered through hanging that is to say, death by hanging and not otherwise.¹⁰¹

In line with the main provisions in the Prison's Act, the Prison's Regulations in Regulation 103 provides that a prisoner under a sentence of death shall be under constant supervision of a prison officer, both by day and by night. Regulation 105(2) states that such executions shall be carried into effect in accordance with instructions issued from time to time by the commissioner of prison. And the officer in charge of a prisoner, under regulation 105(3), together with the public executor shall make themselves familiar with such instructions and shall satisfy themselves that every precaution is taken to ensure efficiency and dispatch and that all appliances are maintained in good condition.

⁹⁷ Hood Roger, "The Death Penalty: A Worldwide Perspective", 3rd ed Oxford: Oxford University Press, 2002.

⁹⁸ <http://www.worldcoalition.org/modules/smartsection/item.php2.itemid=450> accessed on 20/8/2010

⁹⁹ a Kenyan human rights organization, with support from the international Death Penalty Project

¹⁰⁰ <http://www.worldcoalition.org/modules/smartsection/item.php2.itemid=450> accessed on 20/8/2020

¹⁰¹ Section 69 of the Prisons Act Chapter 90 provides that: "When any person is sentenced to death, he shall be hanged by the neck until he is dead and the sentence shall be carried out in such manner as the commissioner shall direct."

Below describes what happens during execution of condemned persons in Kenya:

Unmarked graves.¹⁰²

“Normally the executions are carried out between 4am and 5am when the hangman summons the convict, ties his hands behind his back and escorts him to the wooden execution platform. Once there, his ankles are bound and a hood placed over his head. Finally, the hangman tosses the rope over his victim’s neck and a lever is simultaneously pulled to open the huge platform trap down from under the feet of the convict. As he bolts downwards the rope jerks him to a stop at the end of its length and instantly snaps his neck. The execution takes place in the presence of a doctor, a priest and the commissioner of the prison or his deputy. Before the hanging, the doctor must certify that the convict is in sound medical condition. The hanged convicts are buried in single unmarked graves inside Kamiti Prison unlike in the colonial days when the convicts were buried in mass graves”.

For convicts on death row, the execution of one’s colleagues is a trauma amounting to mental torture. One convict had this to say: “the radio was switched on to mask the sounds from the hanging room. It was a mechanical sound like an old crane, it increased in volume until the whole building was shaking as though there was an earthquake. For weeks after the execution, I was literally trembling inside. My nerves were at breaking point. I became edgy. Voices of warders, even when friendly, would only scare me stiff. We were all left in mental torment.”¹⁰³

From the foregoing, the whole process of hanging is a source of unnecessary suffering. The procedure leading to the hanging is cruel and traumatic. The execution itself causes great physical pain, adding an excruciating corporal punishment before death finally occurs.

The norm prohibiting torture and inhuman treatment also applies to the method of execution. The United Nations Human Rights Committee in General Comment

¹⁰² Oduol. R. Capital punishment: From Texas to Kenya at <http://www.g21.net/africa8.html>. Accessed on 10/11/2010

¹⁰³ “Death Sentence: Prison Conditions in Kenya” Kenya Human Rights Commission Prisons Project, 1996 p62

20¹⁰⁴:”When the death penalty is applied by a state party for the most serious crimes, it must not only be limited in accordance with Article 6 of the International Convention on Civil and Political Rights but it must be carried out in such a way as to cause the least possible physical and mental suffering.” The same provision is also included in the United Nations Safeguards Protecting the Rights of those facing the death penalty in Section 9 that provides that: “where capital punishment occurs, it shall be carried out as to inflict the minimum possible suffering.”

3.5.1 Should Capital Punishment Be Abolished?

The Kenya National Human Rights Commission wants the urgent need for the abolition of the death penalty because it is a violation of a fundamental right to life.¹⁰⁵ It quotes the International Covenant on Civil and Political Rights which provides: “Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence.”¹⁰⁶ The Kenya National Human Rights Commission Position Paper Number 2 on Abolition of the Death Penalty argues that Kenya as a civilized society should not accept retributive justice whose essence is the eye-for-an-eye strategy because to support the death penalty is to teach that revenge is an acceptable way of dealing with crime.

The Kenya National Human Rights and Equality Commission is a constitutional body.¹⁰⁷ The functions of the Commission are, inter alia; to promote respect for human rights and develop a culture of human rights in the Republic; to receive and investigate complaints about alleged abuses of human rights and take steps to ensure appropriate redress where human rights have been violated; and to act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights.

Saul Lehrfreund MBE and Parvais Jabbar, human rights lawyers and Executive Directors of the Death Penalty Project in commenting about the commutation of death sentences in Kenya said: “We are delighted that the jurisprudence from Uganda and other regions in

¹⁰⁴ Quoted in the International Federation for Human Rights Report on Uganda 2002

¹⁰⁵ <http://www.Knhrc.org/documents/positionPaperonDeath.pdf> accessed on 15/11/2010

¹⁰⁶ Article 6(4) ICCPR

¹⁰⁷ Cited in Article 59 Constitution of Kenya 2010

the world has now been accepted in Kenya. It also reflects an emerging trend seeking to restrict the application and scope of the death penalty.¹⁰⁸

3.5.2 The Pains of Imprisonment

Life in prison is a punishing experience and many advocates of utilitarianism and retribution argue that it is supposed to be. Being confined to death row is psychologically tormenting; such torment is deliberate because it facilitates the execution process.¹⁰⁹

3.5.2.1 Kamiti Maximum Prison in Kenya

Kamiti Maximum Prison is an infamous Prison in Nairobi where all executions are carried out. Kenyan prisons have had a historic reputation as being some of the most brutal correction facilities in the world.¹¹⁰ In this maximum security prison, death hovers really close. But for convicts incarcerated here, death comes even earlier when they are abandoned by their friends and families.¹¹¹

Johnson contends that after years of being warehoused on death row in a tomb-like cell (5 x 7 feet), the prisoner is reduced simply to a hollow body void of emotion, passively accepting its fate.¹¹²

In Kenya, under the Prisons Regulations, a prisoner under a sentence of death is confined apart from other prisoners and is under constant supervision of a prison officer.¹¹³ During this time, death row convicts are generally isolated from other prisoners, excluded from prison educational and employment programs and sharply restricted in terms of visitation and exercise.¹¹⁴

This raises the question whether death row prisoners are receiving two distinct punishments: the death sentence itself, and the years of living conditions tantamount to solitary confinement-a severe form of punishment that may be used only for very limited

¹⁰⁸ <http://www.deathpenaltyinfo.org/international-clemency-kenya-commutes-4000-death-sentences>

¹⁰⁹ Johnson Robert, "Death work : A Study of The Modern Execution Process". Pacific Grove California Brooks/cole 1990

¹¹⁰ "Death Sentence: Prison Conditions in Kenya" Kenya Human Rights Commission Prisons Project, 1996

¹¹¹ <http://www.mail-archive.com/deathpenalty@list.washlaw.edu/msg02071.html> accessed on 19/12/2010

¹¹² Johnson Robert, "Death work: A Study of The Modern Execution Process". Pacific Grove California Brooks/cole 1990

¹¹³ Prisons Rules, Regulation 105

¹¹⁴ "Death sentence: Prison Conditions in Kenya." Kenya Human Rights Commission Prison Project, 1996

periods for general population prisoners. Moreover, unlike general population prisoners, even in solitary confinement, death row inmates live in a state of constant anxiety and uncertainty over when they will be executed.

3.5.2.2 Upsurge of Death Row Convicts

Local prisons are facing an accommodation crisis with the population of death row inmates shooting up by the day. The new cases add to a backlog of some that have remained unexecuted for decades and others awaiting hearing of their appeals.¹¹⁵

Kenya is so beset by crime. Carjackings and violent robbery are common. There are no current figures for the crime rate, but the United States State Department says there is a “high rate of crime in all regions of Kenya, particularly Nairobi, Mombasa, Kisumu, and at coastal beach resorts.”¹¹⁶

Prison authorities are warning that the situation could get worse as courts countrywide continue to sentence violent crime suspects to hang. At Kamiti, authorities have been forced to convert an ordinary cell block into a holding cell for death row convicts.¹¹⁷ Until recently death row inmates were only held in “Condemn A”, “Isolation” and “Condemn G”. Apart from 273 awaiting the hangman’s noose at Kamiti, 700 others sentenced to death by different courts around the country are still awaiting hearing of their appeals. The situation has been compounded by the fact that the death penalty has not been carried out pending appeal or other recourse.¹¹⁸

Henry Maina of the Legal Resource Foundation, which has been working with convicts, said they had noted a daily surge of death row convicts; “We have noticed an increase in the number of convicts including those on death row in three major prisons, namely, Kamiti, Naivasha and Shimo la Tewa Maximum prisons.”¹¹⁹

¹¹⁵<http://www.deathpenaltyinformation.blogspot.com/2007/04kenya-prisons-hit-by-upsurge-in-number-html> accessed on 15/9/2010

¹¹⁶ Kenya’s Death Row Get Life Instead” Time magazine, August 2009

¹¹⁷<http://www.deathpenaltyinformation.blogspot.com/04> accessed 20/8/2010

¹¹⁸ <http://www/icj-kenya.org/dmdocuments/reports/kenya-violence-report.pdf> accessed 30/9/2010

¹¹⁹ <http://www.deathpenaltyinformation.blogspot.com/2007/04kenya-prisons-hit-by-upsurge-in-number-html> accessed on 15/9/2010

Prisoners have appealed to the Government to be considered for pardon in the recently proposed plan to decongest jails. In 2003, President Mwai Kibaki on February 25th lifted the death row sentence for 28 prisoners and commuted to life imprisonment 195 others on death row. The 28 released whose ages ranged from 36 to 66 had served between 15 and 21 years in prison awaiting the hangman's noose.¹²⁰ One released convict had this to say: "The public finds it hard to have us released, however, some of us have reformed. We should be glad if there is a system of surveillance to monitor our every move so that we prove that we have truly reformed."¹²¹

Death row convicts are hardly visited; this is because of the nature of the crime they committed. Some may have killed a relative or done something that makes them a pariah, and are left to carry the guilt to the grave.¹²² Regardless of the sentence, convicts long for visits from friends and relatives to give some consolation in life that there are people who care for them

3.6 Conclusion

The above outlines the salient features of administration of capital punishment in Kenya in that after the court of law has condemned an accused person to death after finding him guilty of murder the execution of the sentence depends much on the issuing of the death warrant. As such, nothing prevents the President from commuting the death sentence to any other sentence such as life sentence on the advice of the Advisory Committee on Prerogative of Mercy.

Based on the above discussion, the death penalty in Kenya is neither arbitrary nor unconstitutional for it is executed according to the due process of law and the Judiciary and Police are bound to mete out the penalty until it is abolished.

¹²⁰ <http://www.allafrica.com/stories/20037153.html> accessed on 7/12/2010

¹²¹ <http://www.allafrica.com/stories/20037153.html> accessed on 7/12/2010

¹²² <http://www.prisonstake.com/forums/archives/index.php/t-109241.html> accessed on 15/9/2010

CHAPTER FOUR

A COMPARATIVE ANALYSIS OF THE DEATH PENALTY IN OTHER JURISDICTIONS

4.0 Introduction

Human rights law consists of a set principles and rules on the basis of which individuals or groups can expect certain standards of protection, conduct or benefits from the authorities, simply because they are human beings.

This chapter seeks to show that over the last two decades judicial decisions on the death penalty have increasingly referenced international and comparative legal standards and jurisprudence. However, African States provide ad hoc attempts on the question of abolishing the death penalty.

4.1 African Charter on Human and Peoples Rights

The African Charter on Human and Peoples Rights, adopted in 1981 by the Organisation of African Unity, does not refer to the death penalty. However, like other regional conventions, the African Charter recognizes the right to life in Article 4.¹²³

According to the analysis of William Schabas,¹²⁴ the language of Article 4 of the African Charter, with its reference to the “arbitrary” deprivation of life, echoes Article 6 paragraph 1 of the International Covenant on Civil and Political Rights and most certainly indicates a prohibition on the arbitrary use of capital punishment.

Articles 4 and 5 of the African Charter on Human and Peoples Rights, though not expressly referencing the death penalty, forbids arbitrary deprivation of life as well as degradation and exploitation, including torture, cruel, inhuman and degrading treatment.

¹²³ Article 4 states that: “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily be deprived of this right.”

¹²⁴ Schabas William, “The Abolition of the Death Penalty in International Law”, Cambridge Press, London 2002

Some commentators have interpreted these provisions as approving of the death penalty, provided it is not imposed arbitrarily.¹²⁵

4.2 Comparative African Countries' Court Decisions.

Judicial decisions on the death penalty across the African continent have shown that the matter of capital punishment as a consequence of international protection of fundamental human rights has come under close scrutiny.¹²⁶ Together with enhanced access to comparative and international human rights norms, this should encourage not only the courts to recognize and uphold the constitutional rights of condemned persons, but also encouraging and assisting governments to undertake a reconsideration of their penal policy as a whole.

4.2.1 Tanzania

Three offences are punished by the death penalty in the Tanzanian legal system. These offences are murder,¹²⁷ treason¹²⁸ and misconduct of commanders or any serviceman in the presence of enemy.¹²⁹

The Supreme Court of Tanzania clearly acknowledges that the death penalty considered as a whole was a cruel inhuman and degrading punishment. In the case of **Republic vs. Mbushuu and Another**¹³⁰ it was held that the death penalty considered as a whole was a cruel inhuman and degrading punishment. This was notwithstanding the provisions of Section 197 of Tanzanian Penal Code, which stipulated death penalty for certain offences.

¹²⁵ Emmanuel Kasimbazi "The Death Penalty in Uganda" Paper presented at The First Conference on the Application of the Death Penalty in Commonwealth Africa 10-11th May 2004 Entebbe, Uganda
<http://www.biicl.org/index.asp?contentid=555> accessed on 4/1/2011

¹²⁶ The cases are: Republic vs Mbushuu & Anor (1994) 2 LRC 335; Susan Kigula & others vs Uganda Constitutional petition no. 6 of 2003; Catholic Commission for Justice and Peace in Zimbabwe Supreme Court no 73/1993 (unreported); The State vs Makwanyare (1994) LRC

¹²⁷ Section 196 Penal Code, Chapter 16 Laws of Tanzania

¹²⁸ Section 40 Penal Code, Chapter 16 Laws of Tanzania

¹²⁹ First schedule to the National Defence Act no. 24 of 1966 Laws of Tanzania

¹³⁰ (1994) 2 LRC 335

Court also noted that a punishment might be cruel, inhuman or degrading either inherently or because of the manner of its execution.¹³¹ Hanging, which is the method of execution in Kenya, as in many other African countries, was held to be barbaric. Justice Mwalusanya stated that: “the process of execution is particularly gruesome, generally sordid, debasing and generally brutalizing and it offends Article 13(6) of the Constitution of the United Republic of Tanzania.”

4.2.2 Uganda.

According to Ugandan legislation, the offences of murder¹³², treason¹³³, and aggravated robbery¹³⁴ attracted a mandatory death penalty on conviction. This is also the case for Terrorism¹³⁵. The Uganda Peoples Defence Forces Act provides a long list of offences which entail the death penalty¹³⁶. Other offences that carry the death penalty are left to judicial discretion upon conviction. These include kidnapping with intent to murder,¹³⁷ defilement,¹³⁸ smuggling where the offender is armed with, uses or threatens to use a deadly weapon,¹³⁹ and detention with a sexual intent, where a person having authority to detain or keep the victim in custody participates in or facilitates unlawful sexual intercourse¹⁴⁰.

In the Constitutional Court of Uganda in **Susan Kigula and others vs. Uganda**¹⁴¹ all of those on death row, 417 in total, including 23 women, brought proceedings challenging mandatory death sentences imposed on them. The petitioners relied on three key submissions; first, they argued that the death penalty is inhuman and thus contravenes the Constitution of Uganda. Their second submission was that even if the death penalty itself is not unconstitutional, the automatic nature of the sentence of death is arbitrary and

¹³¹ Section 26 of the Penal Code of Tanzania provides that: “When any person is sentenced to death, the sentence shall direct that he shall suffer death by hanging.”

¹³² Section 189 of the Penal Code

¹³³ Section 23 of the Penal Code

¹³⁴ Section 286(2) of the Penal Code

¹³⁵ Anti-Terrorism Act section 7.1(a)

¹³⁶ Section 16-39 UPDF Act

¹³⁷ Section 243 Penal Code

¹³⁸ Section 129(1) Penal Code

¹³⁹ Section 319(2) Penal Code

¹⁴⁰ Section 134(5) Penal Code

¹⁴¹ Constitutional Court Petition no.6 of 2003

disproportionate. Third, the petitioners argued that those who had been on death row for long periods should be reprieved and their sentences commuted to life imprisonment.

In a landmark judgement, the first of its kind in Africa, the majority of the Constitutional Court declared that the death sentence passed on all 417 were unconstitutional. The court pronounced itself on the question of the constitutionality of the death penalty and stated that the Constitution recognizes death penalty as an exception to the enjoyment of the right to life and that the right is not included in Article 44 on the list of the non-derogable rights. Imposition of the death penalty therefore constitutes no cruel, inhuman or degrading punishment as provided in Article 22. Although the court did not strike the death penalty down altogether, it found the mandatory nature of its imposition was unconstitutional because it did not provide the individuals with an opportunity to mitigate their sentences. Mandatory death sentences are inconsistent with the right of appeal against sentence only, and not conviction.

The Constitutional Court also ruled that any of the prisoners who had been on death row more than 3 years were entitled to have their death sentences commuted to life imprisonment. The court stated that the long delay between the pronouncement of the death sentence and the carrying out of the sentence allows for a death row syndrome, which constitutes a cruel, inhuman and degrading treatment prohibited by Articles 24 and 44 of The 1995 Constitution of Uganda. That decision was upheld by the Ugandan Supreme Court on appeal.

4.2.3 Zimbabwe

The Supreme Court of Zimbabwe in the case of **Catholic Commission for Justice and Peace in Zimbabwe Vs the Attorney General and Others**¹⁴² considered whether the dehumanizing factor of prolonged delay, viewed in conjunction with the harsh and degrading conditions in the condemned sections of the holding prison, meant that the executions themselves would have constituted inhuman and degrading treatment contrary to Section 15(1) of the Constitution of Zimbabwe.

¹⁴² Supreme Court no 73/1993 unreported

The case aroused considerable public debate with all views on the abolition debate aired through, although the court emphasized the case concerned neither the constitutionality of the death sentence itself nor the manner of execution.

In approaching its task, the court adopted a progressive and enlightened approach towards the plight of the condemned men noting that: "Prison walls do not keep out fundamental rights and protection" and no matter the magnitude of the crime "prisoners are not reduced to non-persons but retain all basic rights, save those inevitably removed from them by law, expressly or by implication".

The court therein found that the prolonged delay on the death row had adverse effect on the condemned prisoners' physical and mental state as a result of "the death row syndrome which, as internationally accepted, amounted to cruel, inhuman or degrading treatment which was prohibited by the Constitution."

4.2.4 South Africa.

The court in **The State vs. Makwanyare**¹⁴³ referred to the age-old ubuntu concept of "humanness" common to Bantu people's to construe the death penalty as a violation of the right to life.

The Court stated that in deciding whether a penalty is cruel, inhuman or degrading proportionality was an ingredient to be taken into account. Justice Chaskalson stated that: "Mitigating and aggravating circumstances must be identified by the court, bearing in mind that the onus is on the State to prove beyond reasonable doubt the existence of aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating factors relied on by the accused. Due regard must be paid to the personal circumstances and subjective factors that might have influenced the accused person's conduct and these factors must then be weighted with the main objectives of punishment, which have been held to be deterrence, prevention, reformation and retribution. In this process any relevant considerations should receive the most scrupulous care and reasoned attention, and the death sentence should only be imposed in the most exceptional cases,

¹⁴³ (1994) LRC

where there is no reasonable prospect of reformation and the objects of punishment would not be achieved by any other sentence”.

The court also stated that: “the proclamation of the right to life and respect to it demanded from the State must surely entitle one, at the very least, not to be put to death by the State deliberately, systematically and as an act of policy that denies in principle the value of the victim’s life.”

4.3 Global Trends

The statutes of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) as well as the Rome Statute of the International Criminal Court (ICC) in Article 77, and the Sierra Leone Special Court which prosecute the most serious crimes against humanity, exclude the death penalty as a form of punishment to be administered for crimes falling within their jurisdiction.¹⁴⁴ To these international courts, the death penalty is not an option even for the most heinous crimes against humanity.

4.4 Amnesty Organization.

Amnesty International is unconditionally opposed to the death penalty and works for its worldwide abolition on the grounds that it is the ultimate cruel, inhuman and degrading punishment and a violation of the fundamental right to life.

Amnesty International urges that the cruelty of the death penalty is evident; like torture execution is an extreme physical and mental assault on a person already rendered helpless by government authorities.¹⁴⁵

Amnesty International has the following on death by hanging: “whether a prisoner loses consciousness immediately through trauma to the spinal cord or more slowly through strangulation, depends on the technique involved. The suffering maybe prolonged if the execution has miscalculated and something goes wrong. Even with modern methods,

¹⁴⁴ Schabas, William. “The Abolition of the Death Penalty in international law”, 2nd Edition, Cambridge: Cambridge University Press 1997

¹⁴⁵ Amnesty International, “When The State Kills,” Amnesty International Newsletter Vol. XII May, 1989

guards have sometimes had to finish the hanging by pulling down the legs of the suspended prisoners. Although unconsciousness may have occurred before, the prisoner's body may jerk in spasms and the heart may continue beating for some minutes."¹⁴⁶

In a recent report, Amnesty International found out that more than half the world's states have taken steps towards total or de facto abolition of the death penalty and apply life imprisonment for the most serious crimes. There was a reduction to 54 (2005) from 60 (2004) and 61 (2003) of countries that retain the death penalty. There was also a reduction in the number of countries executing convicts to 24 (2005) from 26 (2004) and 30 (2003). The total number of executions decreased to 5,494 (2005) from 5,530 (2004). Out of the 88 countries which have abolished the death penalty for all crimes, 42 have prohibited the death penalty in their respective Constitutions.¹⁴⁷

Table 2. Status of Abolition of Death Penalty Globally (as at November 2006)¹⁴⁸

Status	Number of countries
Abolitionist for ordinary crimes	88
Abolitionist for serious crimes	11
Abolitionist in practice	30
Total abolitionist in law or practice	129
Retentionist	68

The above table shows an increasing number of States eradicating the death penalty, evidencing the growing impetus of the abolitionist movement. As of 2006, half the world's countries had abolished the death penalty in law or in practice. But whilst this trend looks promising, sixty-eight States currently retain the death penalty. These countries pose the biggest challenges for efforts to abolish the death penalty

¹⁴⁶ Amnesty International, "When The State Kills," Amnesty International Newsletter, Vol XII May 1989 p50

¹⁴⁷ <http://www.amnesty.org/pages/deathpenalty-countries> accessed on 15/8/2010

¹⁴⁸ <http://www.amnesty.org/pages/deathpenalty-countries> accessed on 9th November 2010

4.5 International Federation for Human Rights

The International Federation for Human Rights strongly opposes the death penalty and states that it is contrary to the very notion of human rights.¹⁴⁹ The federation believes that the death penalty is nothing but a remnant of an outmoded system of criminal justice based on vengeance. Furthermore, it does not believe in the supposed necessity of the death penalty as a means to vindicate the victims and their relatives. The federation reaffirms that a solemn and public recognition by a criminal court of the suffering of the victim plays an important role in preventing the need for vengeance.

4.6 From Moratorium to Abolition:

Looking at the African continent, it appears that the debate has been so strong that some countries have abolished the death penalty in law. Such countries include: i) Angola ii) Guinea Bissau, iii) Namibia, iv) Cape Verde, v) Mozambique¹⁵⁰, vi) Sao Tome and Principe, vii) Burundi, viii) Togo and ix) South Africa. It should however be noted that Gambia, which abolished the death penalty in 1993, reintroduced it in 1995.¹⁵¹ This demonstrates the controversial nature of the issue.

The President Mwanawasa of Zambia made a commitment not to sign execution orders, and in February 2004 commuted the death sentences of 44 soldiers who were sentenced to death for their role in a failed 1997 coup and reiterated that there would be no executions during his presidency.¹⁵²

Different abolitionist movements, including the African Commission for Human Rights, have joined together to debate the transition from moratorium to full legal abolition. Phillip Iya a member of the working group within that institution identifies four strategies. "Law reforms, obtaining a protocol for abolition, assurance that each case will

¹⁴⁹ The International Federation for Human Rights (FIDH) Report 2002 p 4&5. The FIDH is an international non-governmental organization for the defence of human rights enshrined in the Universal Declaration of Human Rights 1948. Created in 1992, the FIDH brings together 141 human rights organizations from 100 countries.

¹⁵⁰ Article 70(2) Constitution of Mozambique states: "In the Republic of Mozambique there shall be no death penalty".

¹⁵¹ <http://www.biicl.org/files/2311mapunda-police-application-death-penalty-pdf> accessed on 22/11/2010

¹⁵² Amnesty international Canada, Death Penalty news, June 2004, accessed at <http://www.amnesty.ca/resource-centre/reports/view.php?load=arcview&article=1707&c=Resource+Centre+Reports> 2/1/2011

be treated seriously, and finally the putting in place measures against the death penalty by different states.”¹⁵³

4.7 Conclusion

This chapter has shown that the death penalty still remains a controversial subject in Africa with some countries abolishing the death penalty, while others are still retaining it. A more positive trend has been a willingness on the parts of the courts in a few countries to deal with the death penalty issues, particularly in the constitutional context. Generally speaking, judges more than politicians seem to have become aware of this argument and the fact that extended periods on death row are tantamount to acts of torture. They have already declared that the death penalty is incompatible with a fair trial and that a law cannot oblige a Judge to automatically pass the death penalty.

¹⁵³ <http://www.worldcoalition.org/modules/smartsection/item.php2itemid=421> accessed on 22/10/2010

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

This chapter presents the findings of the study, conclusions and recommendations.

5.1 CONCLUSIONS

The death penalty in Kenya is constitutional.¹⁵⁴ Death sentence is one of the different kinds of punishments that may be inflicted by a court.¹⁵⁵ Therefore, when life is taken away in due process of the law then that action cannot be said to be unconstitutional.

However, the imposition of a mandatory death sentence without allowing opportunity for the convict to raise mitigation on the personal history and circumstances of the offender and criminal culpability is unconstitutional.¹⁵⁶ Section 204 of the Penal Code¹⁵⁷ is thus antithetical to the constitutional provisions on protection against cruel, inhuman or degrading treatment or punishment¹⁵⁸ and fair trial.¹⁵⁹ Sentencing is a matter of law and part of the administration of justice which is the preserve of the Judiciary; Parliament is to prescribe the maximum sentence and leave the courts to administer justice by sentencing according to the gravity and circumstances of the case.

The effect of the landmark ruling in **Godfrey Ngotho Mutiso Vs Republic**¹⁶⁰ is that the cases of many prisoners on death row in Kenya will now have to be reviewed; a new set of procedures will now have to be adopted to ensure that sentence hearings take place and

¹⁵⁴ Article 26 (3) of the Constitution of Kenya 2010 states that: "A person shall not be deprived of life intentionally except to the extent authorized by this Constitution or other written law."

¹⁵⁵ Section 24 of the Penal Code Act Chapter 63 Laws of Kenya.

¹⁵⁶ *Godfrey Ngotho Mutiso Vs Republic* (2010) Kenya Law Reports www.kenya.org.

¹⁵⁷ Chapter 63 Laws of Kenya which provides for mandatory death sentences.

¹⁵⁸ Article 25(a) of the Constitution of Kenya 2010.

¹⁵⁹ Article 25 (c) of the Constitution of Kenya guarantees the right to fair trial.

¹⁶⁰ *(2010) Kenya Law Reports* www.kenyalaw.org.

a judge has the discretion to consider what sentence to impose after hearing evidence in mitigation. The death sentence is now the maximum sentence, but discretionary and not mandatory.

The manner authorized by law in Kenya for execution of death penalty is to hang by the neck until death is confirmed.¹⁶¹ Capital punishment enforced in this manner is painful method and barbaric;¹⁶² thus contrary to the non-derogable right of freedom from torture and cruel, inhuman or degrading treatment or punishment¹⁶³ and an affront to human dignity.¹⁶⁴

Long delays between sentencing and execution, compounded by a prisoner's uncertainty over time of execution is unconstitutional,¹⁶⁵ since it results into the death row phenomenon, which as internationally accepted, amounts to cruel, inhuman or degrading treatment or punishment. Neither retribution nor deterrence is served in such a case and a punishment of death after significant delay is totally without penological justification that it results in the gratuitous infliction of suffering¹⁶⁶. The President of Kenya, while commuting the death sentences of 4,000 death row inmates to life imprisonment,¹⁶⁷ may as well have been responding to the obvious injustice of the death row syndrome. Kenya carried out its last execution in 1987, but the courts had kept handing down mandatory death sentences for armed robbery, murder and treason, leaving the prisons inundated with a large number of death row convicts.

The death penalty in Kenya violates international human rights and norms to which Kenya is a state party and has pledged to uphold.¹⁶⁸ A recent consequence of

¹⁶¹ .Section 69 of the Prisons Act Chapter 90, Laws of Kenya.

¹⁶² .Republic Vs Mbushuu (1994) Tanzania Law Reports at 163.

¹⁶³ .Article 25 (a) of the Constitution of Kenya 2010.

¹⁶⁴ .Article 28 of the Constitution of Kenya 2010 provides that: "Every person has inherent dignity and the right to have that dignity respected and protected".

¹⁶⁵ .Godfrey Ngotho Mutiso Vs Republic (2010)Kenya Law Reports WWW.Kenyalaw.org

¹⁶⁶ Gregg vs Georgia (1976) United States Supreme Court Case

¹⁶⁷ . August 3, 2009. A statement from the Presidency cited "undue mental anguish".

<http://www.deathpenaltyinfo.org/international-clemency-Kenya-commutes-4000-death-sentences>.

¹⁶⁸ .Article 2 (6) of the Constitution of Kenya 2010 states that: "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution." Kenya is a state party to the United Nations Convention.

international protection of fundamental rights, especially the primary of the right to life is that the use of capital punishment is now considerably restricted by international law.¹⁶⁹

Capital punishment is no longer the prerogative of individual states; it is considered illegitimate for international law and order.¹⁷⁰ Looking to international norms and to the constitutional law of other countries is now fairly common place.¹⁷¹ Yet states are traditionally competent to define their criminal law and free to fix legally applicable sentences for offences committed by their citizens.

Capital punishment is not a deterrent because a brutal treatment of criminal has not worked in the past and a repressive response is no more likely to work now or in the future; this is because murderers do not usually reflect much on the consequences of their actions before acting.¹⁷² Little evidence is available to support the existence of a rational process of decision-making among offenders.

Retention of the death penalty in Kenya¹⁷³ portrays Kenya as a society that does not respect the sanctity of life or the ability of those who have committed crimes to learn and reform through restorative and rehabilitative justice. Everyone on death row is very bad but even within that depraved group it is possible to make moral judgements about how deeply someone has stepped down the rungs of criminality.

5.2 RECOMMENDATIONS

The special deterrent effect of capital punishment has proved to be what it really is—an unverified hypothesis supported by neither history nor criminal psychology. Therefore, it is recommended that the death penalty should be abolished and in its place have life imprisonment that would also serve the deterrent purpose.

Against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment and also ratified without reservations the International Covenant on Civil and Political Rights on 1st May 1972.

¹⁶⁹ .The Second Optional Protocol to the International Covenant on Civil and Political Rights.

¹⁷⁰ .The second Optional Protocol to the International Covenant on Civil and Political Rights aimed at abolishing the death penalty. Also the Rome Statute to the International Criminal Court does not have the death sentence.

¹⁷¹ .The cases of Susan Kigula and Others Vs Uganda Constitutional Petition N.6 of 2003; Catholic Commission for Justice and Peace in Zimbabwe Vs The Attorney General and others, Supreme Court of Zimbabwe N.73/1993, The State Vs Makwanyare (1995) 1 LRC offer comparative jurisprudence.

¹⁷² .E.A Fattah, "Deterrence: A Review of Literature," *Canadian Journal of Criminology*, 19 (2):1-19.

¹⁷³ .Article 26 (3) of the Constitution of Kenya 2010 qualifies the right to life.

The primary cause of crime for the retributivist is the bad moral decisions of the offenders. Although most specific crimes, for example, murder, may appropriately be said to reflect bad moral choices, the overall rate of crime depends on larger social conditions and some individuals, at some places and times, are at far greater risk of making bad choices than others. Income inequality should be reduced by redistributive taxation, which would in turn better the fortunes of the less fortunate and thereby reduce incidences of violent crime, thus diminishing the public's need for the death penalty to curb offences..

The death penalty is in contradiction with the fact that Kenya ratified the Statute of the International Criminal Court, which excludes recourse to the death penalty, in particular, for the most serious international crimes. Therefore I recommend that Kenya should ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights that is aimed at abolishing the death penalty while the government should carry out programmes of sensitization of the public on the necessity to abolish the death penalty.

Kenya should formalize its de facto moratorium on executions by adopting a de jure moratorium, thereby putting an end to the uncertainty of death row prisoners about their fate. A moratorium can be used to convince those who are reluctant so that the weight of opinion falls in favour of abolition. This should be considered as a first step towards abolition, which must remain the ultimate objective.

There is need to legislate for a mandatory appeal or review of a sentence of death. The United Nations Safeguards guaranteeing protection of those facing the death penalty require that anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals become mandatory.¹⁷⁴

There should also be a suppression of mandatory death sentences as imposed by international human rights law and by the ruling of the Court of Appeal in **Godfrey Ngotho Mutiso vs Republic**.¹⁷⁵

¹⁷⁴ Safeguard 6

¹⁷⁵ (2010) KLR. www.kenyalaw.org

Last but not least, the restriction on the imposition of the death penalty on persons with a mental deficiency is not broad enough to be in line with international standards in that regard. There is need to come up with legislation to cover diminished responsibility.

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