

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS
(Established under the KNCHR Act, 2002)

ABOLITION OF THE DEATH PENALTY IN KENYA



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LIST OF ABBREVIATIONS

ACHPR:	African Charter on Human and Peoples Rights
AG:	Attorney General
CAT:	Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
FIDA (K):	Federation of Women Lawyers, Kenya
ICC:	International Criminal Court
ICTY:	International Criminal Tribunal for the Former Yugoslavia
ICTR:	International Criminal Tribunal for Rwanda
ICCPR:	International Covenant on Civil and Political Rights
KLR:	Kenya Law Reports
KNCHR:	Kenya National Commission on Human Rights
MoJCA:	Ministry of Justice and Constitutional Affairs
UDHR:	Universal Declaration for Human Rights
UN:	United Nations

I: BACKGROUND INFORMATION

1. The Kenya National Commission on Human Rights (hereinafter the KNCHR or the National Commission) is a public body established under the KNCHR Act, 2002. Although established by Government, the National Commission has an autonomous mandate. Its operations are guided by the United Nations approved Paris Principles on the establishment and functioning of national human rights institutions.
2. The Commission's mandate, as elaborated in section 16 of the KNCHR Act, is broadly to enhance the promotion and protection of all human rights. As the supreme human rights organ of the State, the Commission is specifically mandated to advise the government on ways to enhance the promotion and protection of human rights in Kenya. This position paper on abolition of the death penalty makes the case for abolishing the death penalty so as to further enhance protection of the fundamental right to life and the freedom not to be subjected to torture or to cruel, inhuman and degrading treatment or punishment.
3. The National Commission executes its mandate through research, advocacy, investigations, and human rights education among other strategies. The Commission produces Position Papers to state its position on a contentious or topical key human rights issue. In publishing this paper, the National Commission seeks to present its position on the issue at hand with a view to setting clarity, providing guidance and generating informed debate on the subject. It does this using established human rights standards and norms.¹ This position paper is part of the work of the National Commission's Research, Policy and Legislation Programme.²

II: EXECUTIVE SUMMARY

4. Under Kenyan law, offences of murder, treason and robbery with violence, including attempted robbery with violence, carry a mandatory death sentence³. In this paper, the National Commission seeks to demonstrate the urgent need for the abolition of the death penalty from Kenya's statutes. This is because the death penalty is a violation of the fundamental right to life.
5. This paper outlines the case for abolition of the death penalty in Kenya from a human rights perspective, including the position of the National Commission on the subject. It seeks to persuade the public, and policy makers on the need to abolish capital punishment. Informed by the various theories of punishment and

¹ The Kenya National Commission on Human Rights Strategic Plan, 2004 -2009.

² Members of the Programme who participated in preparing this position paper were: Commissioner Lawrence Mute, Carole Abong, Ezra Chiloba and Christine Njeru.

³ Sec 204, 40(3), 296(2) and 297(2) of the Penal Code, CAP 63 Laws of Kenya. Whereas the Constitution of Kenya protects the right to life, Sec 71 (1) takes it away to the effect that " no person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted".

human rights principles, the paper addresses arguments by the proponents of the death penalty; builds a case for abolition of the death penalty; and finally makes recommendations to policy makers and other stakeholders for necessary action towards abolition of the death penalty. Some of the key recommendations that this paper makes include that:

- The Government should take immediate steps to fully abolish the death penalty in law and practice.
- The Government should implement life sentences for the most serious offences and commute current death sentences to life sentences.
- Parliament should amend all laws that currently permit the death penalty. These are Sections 204, 40(3), 296(2) and 297(2) of the Penal Code, CAP 63 Laws of Kenya, the Criminal Procedure Code, CAP 75 Laws of Kenya, and other statutory provisions linked to the death penalty and the Bill of Rights of the Constitution of Kenya.
- As part of penal reform, the Kenya Prisons Service should be transformed into the Department of Correctional Services. This would facilitate restorative justice and rehabilitation of offenders as a key objective of the department, and of punishment generally.
- The Ministry of Justice and Constitutional Affairs (MoJCA) and the KNCHR together with civil society organizations, should undertake campaigns to educate the public on the need to abolish the death penalty.

III: DEATH PENALTY: AN OVERVIEW

6. The death penalty entails the taking away of a person's life after conviction on a capital offence by a competent court. This form of punishment has existed in almost all civilizations although the modes of its execution have varied from country to country. Common methods of execution that have been employed include crucifixion, drowning, stoning to death, burning or boiling alive, hanging and beheading, electrocution, shooting and use of lethal injection.
7. An early example of enforcement of the death penalty dates as far back as the 5th Century B.C. in Roman law. The first formal laws on the death penalty were, however, not established until the 18th Century. Britain through European settlers influenced the use of the death penalty in jurisdictions such as the United States⁴ and colonial Africa. Although in pre-colonial Africa the death penalty was also used as a form of punishment, it was reserved for the most serious offences. Its application, however, varied in time and space and depended on what a particular community considered a serious offence punishable by death. There was no uniformity or prescribed method of determining which crimes were punishable through imposition of the death sentence.

⁴ The first execution in USA was in Virginia in 1608. See in Death Penalty Information Centre: *Introduction to the Death Penalty*, at: <http://www.deathpenaltyinfo.org/>.

8. The notion of punishment in colonial Africa was associated with “good governance, justice, and civilization”. Violence and excessive punishment meted by colonial regimes were tools often used to control the operation of the state⁵.
9. The death penalty applied in the United Kingdom until 1965, when the Murder (Abolition of Death Penalty) Act suspended the death penalty for murder for a period of 5 years. In 1969, the House of Commons voted by 343 to 185 to reaffirm its decision that capital punishment for murder should be permanently abolished. By the time of abolition of the death penalty in Britain, most of her colonies, including Kenya, had attained independence. That meant that it was the choice of respective independent colonies to either follow the trend of Britain to abolish the death penalty or retain it. Kenya chose to retain the death penalty.
10. The application of the death penalty in colonial Kenya was heightened during the struggle for independence. Sir Evelyn Baring, Governor-General of Kenya in 1953 imposed the death penalty for persons who administered the Mau Mau oath. Following Kenya’s independence, available reports indicate that from 1963 to 1987 alone, 280 persons out of 3,584 people sentenced to death had been executed. 135 prisoners had benefited from the presidential prerogative of mercy and their sentences commuted to life imprisonment.⁶ It is believed that the last execution was carried out in 1987 against John Ochuka who was convicted for the offence of treason. The table below shows the number of capital offence convicts between 2001 and 2005 and the status of the convictions.⁷

Table 1: Situation of Death Penalty in Kenya.

Status	Year				
	2001	2002	2003	2004	2005
Sentenced to death	728	865	787	617	744
Life Sentences on Appeal	13	13	35	49	72
Presidential Pleasure - Convicted when under 18 yrs	23	57	20	12	13

Source: Kenya Prisons Headquarters, Sept.2006

⁵Hynd, Stacey, *Power and Prejudice: Death Penalty Practices in Nyasaland, 1900-1955* at <http://www.nuff.ox.ac.uk/General/Seminar/Papers/408.pdf>.

⁶Oduol, Robert (2000), *Capital Punishment; Texas to Kenya*, at: <http://www.g21.net/africa8.html>.

⁷ Section 48 of the Prisons Act, CAP 90, Laws of Kenya establishes a Board of Review, which upon appeal by prisoners, reviews the sentences of prisoners sentenced to more than seven years and makes recommendations to the president on commutation of death sentences to life imprisonment. Section 25 (2) of the Penal Code provides that the death sentence shall not be pronounced upon persons who committed a capital offence while under the age of 18 years but shall be sentenced to be detained during the President’s pleasure and while in such detention, shall be deemed to be in legal custody.

IV: RECENT DEVELOPMENTS

11. The Constitution of Kenya provides for the right to life of every person save in the execution of the sentence of a court in respect of a criminal offence under the laws of Kenya of which a person would have been convicted.⁸ The death sentence in Kenya is limited to the offences of treason, murder and robbery with violence. However, the offences of robbery with violence and attempted robbery with violence did not carry the death sentence until 1973 when the Penal Code was amended to provide for it⁹.
12. Debate preceding the adoption of the Bomas Draft Constitution in March 2004¹⁰ grappled with the question of the death penalty and its abolition. Despite initial inclusion of express language in the draft Constitution outlawing capital punishment, delegates at the National Constitutional Conference eventually voted in favour of retaining capital punishment, principally on the basis that people who committed heinous crimes should be punished as harshly as possible. As a result, the Bomas Draft Constitution recognized that every person has the right to life, but remained silent on the death penalty and neither mentioned situations under which the right to life may be deprived. Adopting a different approach from the Bomas draft, the Wako Draft¹¹ recognised the right to life but gave Parliament the power to legislate the extent to which a person may enjoy that right. By implication, the death penalty still had room in the then proposed Draft Constitution that was rejected during the November 2005 referendum.
13. Thinking and actions at the local and international levels highlight the state of polarisation confronting Kenyan policy-makers and policy-implementers regarding the question of whether to abolish the death penalty. 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 the death penalty¹². Kenya also refused to vote on another resolution condemning arbitrary executions and impunity. At the same time, it is significant that Kenya has still not signed the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) aiming at abolition of the death penalty.

⁸ Constitution of Kenya, Section 71 (1).

⁹ The Penal Code was amended to include robbery with violence under the category of offences for which the death sentence is applied due to popular pressure arising from the high rates of robbery with violence at that time. This illustrates the extent to which the public relates capital punishment with deterrence for crimes.

¹⁰ The National Constitutional Conference was held in Nairobi at the Bomas of Kenya in 2003-2004.

¹¹ See Article 35 of Proposed New Constitution of Kenya (Wako Draft) that was rejected by Kenyans when it was subjected to a referendum on the 21st of November 2005.

¹² This resolution, which was adopted by 26 votes to 17, noted “abolition of death penalty contributes to the enhancement of human dignity and to the progressive development of human rights”. It called upon all states that still maintain the death penalty to abolish it completely, and in the meantime establish a moratorium on executions.

14. On the other hand, nationally, Vice President, Moody Awori, in 2003 when releasing more than 20 prisoners convicted for capital offences, stated his intention to introduce a Bill in Parliament to abolish the death penalty. The then Commissioner of Prisons, Abraham Kamakil, termed this a “historic event”, saying that the death penalty should be abolished because it claimed innocent lives. He observed, “We are longing for the day Parliament will remove the death penalty from our Constitution.” The same views were echoed by the then Minister for Justice and Constitutional Affairs, Hon. Kiraitu Murungi, who reiterated that the death penalty, being a violation of human rights, would be abolished and death row convicts would soon have their sentences commuted to life.¹³ Hence, while Kenya has not *de jure* abolished capital punishment, practice *de facto* testifies to the presence of an unofficial moratorium on enforcement of the death sentence.

V: GLOBAL TRENDS

15. There has been a global shift towards abolishing the death penalty. By 1971, the UN General Assembly had passed a resolution affirming that “in order to fully guarantee the right to life, provided for in Article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to abolishing this punishment in all countries”. Regionally, Article 4 of the African Charter on Human and Peoples’ Rights, which provides for the right to life and bodily integrity, demonstrates a trend towards abolition¹⁴. The Second Optional Protocol to the International Covenant on Civil and Political Rights (1989) aiming at abolition of the death penalty, which entered into force in 1991, has been ratified by 57 countries.¹⁵

16. Elsewhere, 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) 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 jurisdictions¹⁶. To these international courts, the death penalty is not an option even for the most heinous crimes against humanity. The Sierra Leone Truth and Reconciliation Commission, in support of the practice of the Sierra Leone Special Court, noted that abolition of the death penalty would mark a symbolic departure from the past to the present. It observed that “respect for human dignity and human rights must begin with respect for human life. This is

¹³ This was said during a meeting with the KNCHR on June 6th 2005 and was widely reported in both print and electronic media; see, for example, a report in the Daily Nation on 7th June 2005, page 6.

¹⁴ Protocol No. 6 to the European Convention on Human Rights and Protocol to the American Convention on Human Rights to Abolish the Death Penalty are other regional efforts to abolish the death penalty.

¹⁵ Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty, 1989. See <http://www.ohchr.org/english/countries/ratification/12.htm>.

¹⁶ The Statutes of these Courts provide for life imprisonment as the most severe sentence, precluding imposition of capital punishment.

because a society that accords the highest respect for human life is unlikely to turn on itself¹⁷.

17. Currently, 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 carried out decreased to 5,494 (2005) from 5,530 (2004). Out of the 88 countries, which have abolished the death penalty for all crimes (see table 2, below), 42 have prohibited the death penalty in their respective constitutions¹⁸.

Table 2: Status of abolition of death penalty globally (as at Nov 2006)

Status	No. of countries
Abolitionist for all crimes	88
Abolitionist for ordinary crimes	11
Abolitionist in practice	30
Total abolitionist in law or practice	129
Retentionist	68

Source: www.amnestv.org/pages/deathpenalty-countries

VI: POSITION OF THE NATIONAL COMMISSION ON THE DEATH PENALTY

18. For the National Commission, the death penalty is the ultimate violation of human rights. It is a violation of the fundamental right to life, which the Government has pledged to protect under the Constitution and other international human rights instruments that it has ratified. Similarly, the death penalty amounts to cruel, inhuman and degrading treatment, which contravenes provisions of section 74(1) of the Constitution, the CAT and the ICCPR. The National Commission holds the position that abolition of the death penalty would contribute to the enhancement of human dignity and the protection of human rights.

19. The National Commission takes cognisance of the fact that the case for abolition of the death penalty may be at variance with public opinion. For policymakers, it will always be challenging to achieve the right balance between public expectations and demands and the state’s obligation to protect, respect, promote and fulfil the right to life and affirming human dignity by abolishing the death penalty. However, the National Commission contends that the Government cannot be justified in perpetuating human rights violations simply because the public demands it. Any policies and actions of the Government need to abide by

¹⁷ See Report of the Sierra Leone TRC, Vol II, Chapter 3 at para 53.

¹⁸ Hands off Cain Report, *The Death Penalty Worldwide*, at: www.handsoffcain.org.

certain minimum human rights standards and values, which are unimpeachable regardless of any social or political demands. It is important to create awareness on the need to abolish the death penalty so that the public can understand that by abolishing the death penalty, the Government would not in any way be construed as condoning the crimes for which persons are sentenced to death.

20. While punishing crime, there are certain human rights standards and values that should be taken into consideration. Any policies and actions need to abide by these minimum human rights standards and values that are un-impeachable regardless of economic, social or political demands. Therefore, the National Commission advances the following arguments for total abolition of the death penalty in Kenya.

VII: ARGUMENTS FOR ABOLITION OF THE DEATH PENALTY

Violation of the most fundamental right to life

21. The death penalty constitutes a violation of the most fundamental right, the right to life. Proponents of the death penalty argue, “it is by exacting the highest penalty for the taking of human life that we affirm the highest value of human life.” However, the hallmark of a civilised society is arguably the acknowledgement of human worth and dignity at the core of which is the principle of the sanctity of life, which should be most protected under all circumstances. It is this duty to protect life that both the state and the individual pledge to uphold under the Constitution and other international human rights instruments that Kenya has ratified.¹⁹ Guarantee of the right to life is the very minimum requirement for the enjoyment of other human rights since other rights cannot be enjoyed in a vacuum.

Retribution

22. One often articulated justification by proponents of the death penalty is that the life of a person who takes away another’s life should similarly be taken away. Many feel that killing convicted murderers will satisfy their (victims’) need for justice and/or vengeance. They feel that certain crimes are so heinous that executing the criminal is the only reasonable response. Proponents of this position argue that if justice is to be done in cases of murder and violent crime, only the death penalty should be the recourse given by law.
23. But, however “satisfying vengeance may seem, civilised societies cannot accept [the retributive] eye-for-an-eye delivery of justice.”²⁰ To support the death penalty is to teach that violence and killing is an acceptable way of dealing with serious crimes. “The use of (the) death penalty only lowers the standards of government to the mentality of the murderer itself; it only demonstrates that the government is not different from the murderer. We do not punish rape with rape, or burn down

¹⁹ Sec 71(1) of the Constitution; Art 3 of the UDHR; Art 6 of ICCPR (ratified in 1972) and Art 7 of African Charter on Human and Peoples Rights (ratified in 1992).

²⁰ American Civil Liberties Union (2001), *The Death Penalty*, Briefing Paper No. 14, Spring: 24 September, at: <http://www.nhclu.org/publications/deathpenalty.htm>.

the house of an arsonist. We should not, therefore, punish the murderer with death.”²¹ For the National Commission, public confidence and faith in the justice system is the greatest principle to be maintained at all times.

24. In fact, the death penalty does not address the victim’s pain and the suffering endured by the victim’s family as argued by proponents of capital punishment. Whoever was murdered has no way of knowing and appreciating the punishment meted upon the offender. It will also be assumptive to say that the family of the victim is satisfied by execution of a convict. In this regard, it has been noted thus:
- “Every time we execute a member of our community we reinforce the notion that taking a human life is justified to achieve the ends we seek. Moreover... we try to soothe one family’s anguish by killing someone else’s child. Far from solving anything, this only adds to the pain caused by the initial crime.”²²
25. In addition, in some cases, the application of the death penalty may not be proportional to the gravity of the crime. Even in the case of robbery with violence, those convicted of attempted robbery with violence get the death sentence too. Similarly, accomplices to those who commit robbery with violence are sentenced to death. The public might support the death penalty because of murder but the same public might have a different opinion where there is no loss of life, for example, in the case of treason and attempted robbery with violence.

Inhuman and cruel treatment

26. Enforcement of the death penalty amounts to cruel, inhuman and degrading treatment and punishment of the condemned person. Stories of implementation of death sentences are not only unpalatable but also cause psychological trauma.

Box 1 below describes what happens during execution of condemned persons in Kenya.

Box 1: Unmarked graves

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 convicts were buried in mass graves.

Source: Oduol, R., *Capital Punishment; Texas to Kenya*, at: <http://www.g21.net/africa8.html>.

²¹ Ibid.

²² Parikh, Sujar (2005), “A New Vision of Justice: Restorative Justice is more effective than the Death Penalty”, *Peace Power*, Berkeley’s Journal of Principled Non-Violence and Conflict Transformation, VOL. 1, Issue 1 Summer, at: http://calpeacepower.org/0101/death_penalty.htm

27. The death penalty is not only about the moment of execution. There is evidence that in a *de facto* abolitionist state like Kenya, a person always lives in anxiety with the reality of death hanging over his or her head from the moment of sentencing.²³ Such form of treatment and punishment amounts to cruel, inhuman and degrading treatment. It contravenes the provisions of Section 74(1) of the Kenyan constitution, which states, “no person shall be subject to torture or to inhuman or degrading punishment or other treatment.” It also violates Article 7 of the International Covenant on Civil and Political Rights and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, to which Kenya is a state party.
28. While the first case challenging the death penalty in Kenya has not been determined yet,²⁴ trends in other jurisdictions are very persuasive for abolition. Judges in Uganda, Tanzania and South Africa have developed jurisprudence with respect to the death penalty terming it “cruel and inhuman treatment.” In *Mbushuu and Another v. Republic*²⁵, the Court of Appeal of Tanzania upheld a High Court of Tanzania decision that “the death penalty amounts to torture, inhuman and degrading form of punishment.” In *The State v. T. Makwanyane and M. Mchunu*,²⁶ the South African Supreme Court held that the death penalty was contrary to the country’s provisional Constitution and was a violation of the right to life, human dignity and the right not to be subjected to cruel, inhuman or degrading treatment or punishment. The Court further noted that the right to life and dignity are the source of and the most important of all human rights; therefore by committing to being a society founded on the recognition of human rights, South Africa was required to value these rights above all other rights. In the recent Uganda case of *Susan Kigula and 416 others v. the Attorney General*,²⁷ the Constitutional Court ruled that mandatory death sentences as applied in Uganda were unconstitutional. The Court ruled that laws that impose the mandatory death penalty were inconsistent with the Constitution because they interfere with the discretion of judges in dispensing justice. For this reason, the Court ruled that these laws must be amended by Parliament. It further ruled that the nature of the death penalty in Uganda amounted to cruel and inhuman punishment.

Irreversibility of the death sentence

29. Once executed, the death sentence is irreversible. The National Commission argues that the guilt of any prisoner must be on the basis of evidence that is clear and convincing, leaving no room for alternative explanation. With an inefficient justice system coupled with corruption in both the Judiciary and the Police departments, miscarriage of justice is a common phenomenon around the world. Once innocent people have been executed, that can never be reversed. Proponents

²³ In Taiwan for example, a prisoner on death row, Huang Chih-hsien, 28 years and who had been sentenced to death in 2004, was reported to have committed suicide on 23 January 2006 because he was unable to bear the pain of waiting for the execution. See: Taipei Times, 24th January 2006.

²⁴ *Michael Jimmy Abuoka v. Attorney General*, High Court Misc.Appl. Case No 342/02.

²⁵ 1995, 1 LRC 216 (CA, Tanzania); 1995 TLR 97.

²⁶ 1995 (3) SA 391; CASE NO. CCT/3/94.

²⁷ 2005; Constitutional Petition no.6 of 2003.

of the death penalty, however, argue, “this (miscarriage of justice) is a known risk that a modern and democratic state must be prepared to take.”²⁸ Obviously, the risk of wrongful executions will cease to exist if a deliberate policy of abolition of the death penalty is put in place and, for example, replaced with life imprisonment.

30. Since 1987, no death sentence has been enforced in Kenya. Although there is no statistical evidence of wrongful execution of innocent persons before 1987, it does not imply none was ever committed. Going by the number of reversed court decisions on appeal, it is highly likely that a number of people might have been wrongly executed due to a flawed justice system or lack of fair trial. In *Sawe v Republic*²⁹, the appellant was convicted in the High Court for the murder of her husband and sentenced to death. On appeal the judges were of the opinion that the evidence did not justify the conviction and the appellant’s conviction was quashed and the death sentence set aside. In similar circumstances, the appellant in *Kinyua v Republic*³⁰ was also convicted of murder and sentenced to death. On appeal, the conviction was substituted for manslaughter and the sentence reduced to twelve years.³¹ An observer comments: “There are many decisions of the High Court on capital offences that have been overturned by Judges on appeal some because of errors of law and fact by the High Courtthe rate of cases of death sentences being set aside is so high that you might think the courts are on a mission to decongest prisons.”³²

Fair trial

31. Every person has a right to a fair trial. This entails access to legal representation and hearing within a reasonable time by an independent and impartial court.³³ A fair trial also entails legal representation to enable one put up an effective defence.³⁴ Sutherland J, in *Powell v Alabama*³⁵ noted that the unfamiliarity of an accused to the rules of evidence, and the lack thereof of skill and knowledge to prepare a defence may result in a conviction where the evidence is incompetent or inadmissible. Execution of prisoners without a fair trial amounts to arbitrary execution, which is a violation of the right to life. In Kenya, murder and treason offences entitle the accused person to state-sponsored legal representation in the event such person cannot afford representation. However, the same does not exist for those charged with robbery with violence. Interestingly, robbery with violence constitutes the highest percentage of capital convicts relative to murder and treason. Sample assessment report submitted by 9 prisons in the country showed that out of 1311 convictions for capital punishment, 1171 were for robbery with violence compared to 140 convicted for murder. The bigger the number, the

²⁸ Supra note 20.

²⁹ [2003] KLR 364.

³⁰ [2003] KLR 294.

³¹ There are many more cases in which the death penalty has been set aside, including: *Juma & another v Republic* [2003] KLR 386; *Charles Njagi v Republic* [2006] KLR et al.

³² Opinion of a Research officer at the National Council for Law Reporting.

³³ Article 10 of ICCPR; article 7 of the ACHPR; and Section 77 (1) and (9) of the Constitution.

³⁴ Section 77 (2) grants the accused person the opportunity to make his/her defence.

³⁵ 287 US 45, 53 S.Ct.55, 77 L.Ed. 158 (1932).

higher the chances that innocent people have been convicted because of their inability to put up an effective defence.

32. From the foregoing, too, the poor are more likely to be convicted of a capital offence because they cannot afford good lawyers. Defending a capital offence is one of the most expensive undertakings; most accused persons are also poor and they cannot afford to put up an adequate defence. Good lawyers are quite costly. Legal aid by non-governmental organizations such as FIDA and Kituo cha Sheria is limited to major cities. At the end of the day the death penalty remains a “privilege of the poor”!

Imperfect judicial system/miscarriage of justice

33. A fair trial cannot be guaranteed where the judiciary and the prosecution does not demonstrate high levels of integrity and professional competence. Impartiality and independence of the judiciary has been suspect in Kenya in the past because of political interferences or corruption. The number of judges and magistrates implicated in corruption allegations and other forms of misconduct³⁶ recently was alarming and one cannot be certain of how many persons have been wrongly sentenced to death because of a biased and corrupt judiciary. An imperfect judicial system entails the risk of judicial errors that are difficult to correct. In addition, police officers who are not trained lawyers (question of competency) are allowed to conduct prosecutions in capital offences which result in unprofessional presentations of evidence and errors during trials.³⁷ At the same time, many arrests, investigations and trials are shrouded in a culture of corruption, hence rendering such trials unfair.

Death penalty does not necessarily deter crime

34. Proponents of the death penalty assert that it has a deterrent effect on crime in society. However, there has been no proven correlation between the death penalty and deterrence of crimes and countries that still maintain the death penalty in their statutes have not seen a downturn in crime. A survey conducted by the UN in 1998 and later updated in 2002 found no correlation between the death penalty and homicide rates. 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.³⁸ In Kenya, for instance, the fact that death sentences are handed down has not deterred commission of crimes for which such sentences are implemented. The key to deterrence is not to apply the death penalty but to increase the likelihood of detection of crime, arrest and conviction.

³⁶ 23 judges of the High Court and Court of Appeal were suspended in 2003 and Judicial inquiries constituted by the President to investigate allegations of corruption and other malpractices levelled against the suspended judges and magistrates.

³⁷ In *Elirema & Another vs R*, [2003] KLR 537, the appellant was making his third appeal against the conviction on charges of robbery with violence on the ground that the magistrate erred in law permitting prosecution by two police officers of the rank of Corporal. In its decision the Court of Appeal held that the Attorney General had no power to appoint a police officer below the rank of Assistant Inspector public Prosecutor. The trial conducted by the two corporals was declared a nullity.

³⁸ Hood, Robert (2002), *The Death Penalty: A World Wide Perspective*, Oxford University Press, at 230.

Public opinion on the death penalty

35. Political elites tend to support the death penalty influenced by public opinion which in general believes that the death penalty deters crime. However, as stated above, that belief is not empirically factual. In 1991, in a US poll,³⁹ 76 percent of the respondents who indicated support for the death penalty were asked:

“Suppose new evidence showed that the death penalty does not act as a deterrent to murder, that it does not lower the murder rate. Would you favor or oppose the death penalty?”

36. Only 69 percent of those supporting the death penalty would still maintain their support while 26 percent would change and oppose the punishment. This poll demonstrates that there are other underlying reasons that go beyond deterrence perpetuated by emotive persuasion and factual ignorance on the part of the public. Similarly, the National Commission argues that respect for and protection of fundamental human rights should not be driven only by public opinion.

Towards restorative justice

37. As opposed to the retributive theory of punishment, the principal goal of any criminal justice system should be reform and rehabilitation of offenders. The death penalty negates the principle of rehabilitation of offenders. The National Commission contends that there can be no reform, learning and rehabilitation in the death of a convict. Restorative justice has, therefore, gained ground in modern penology, focusing more on rehabilitation of offenders.

38. Restorative justice is a process whereby parties with a stake in a specific offence resolve collectively how to deal with the aftermath of the offence and its implications for the future⁴⁰. More specifically, it seeks to address the effects of crime on the criminals, their victims, and the community as a whole. Restorative justice gives offended individuals a voice in the resolution process, rather than simply focusing on the legal and prison systems. In doing so, it uses prevention of crime and reparation of harm as a measure of efficacy, rather than the harshness of a penalty imposed on an offender. Together, all parties involved can develop a way to address the effects of the transgression. The ultimate goal of restorative justice is to reintroduce the transgressor back into society in a manner that is safe for everyone. Instead of dehumanizing offenders by characterizing them as permanent monsters that should be segregated from others, restorative justice emphasizes each person’s ability to change for the better.

39. In the traditional African justice system, the notion of punishment was centred more on reconciliation and compensation than retribution. In a few instances, depending on the nature of the offence, punishments such as corporal punishment, expulsion, ostracisation and banishment were meted out. Capital punishment was used in very rare circumstances. The trend among diverse religions shows a

³⁹ Radelet, Michael L. and Akers, Ronald L., *Deterrence and the Death Penalty: The Views of the Experts*. At: <http://www.soci.niu.edu/~critcrim/dp/dppapers/mike.deterence>.

⁴⁰ Supra note. 20.

restorative approach to punishment.⁴¹ In abolishing the death penalty, society will resort to an in-depth reflection on what other alternative penalty can be administered for serious crimes with the effect of both punishing and rehabilitating the offender.

Trend towards abolition

40. More than half the countries of the world have now abolished the death penalty and apply life imprisonment for the most serious crimes (See Fig. 1, below). This trend should encourage Kenya, which has been a *de facto* abolitionist state, to move forward towards total abolition of the death penalty.

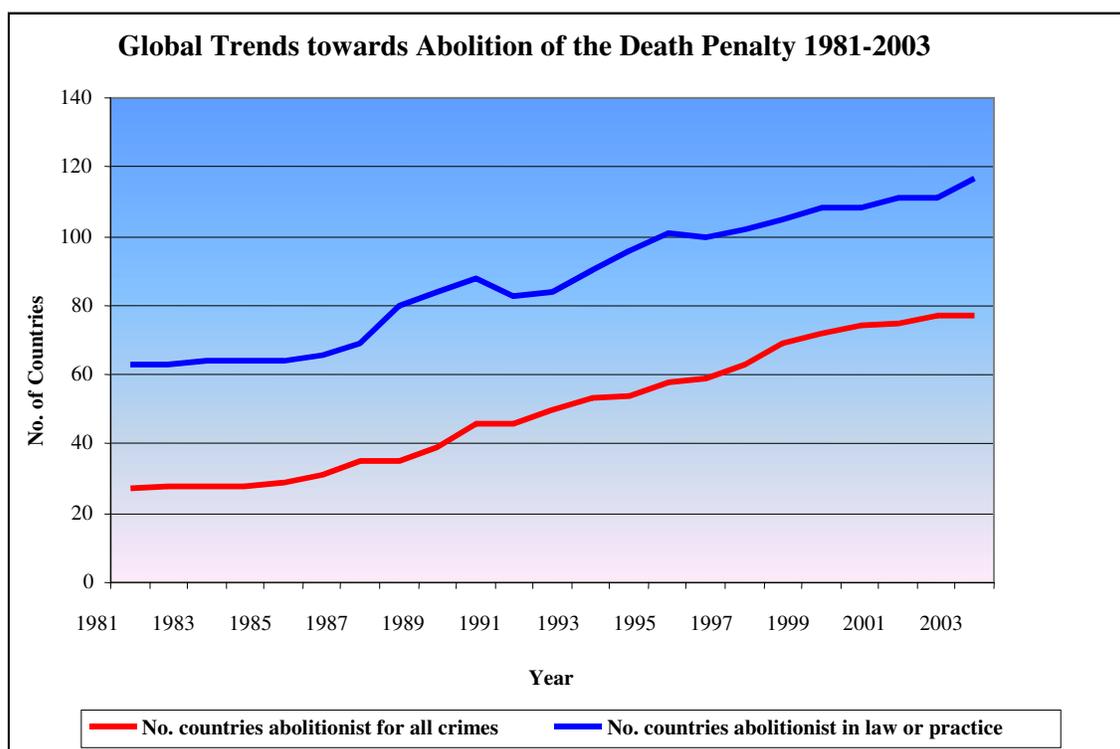


Fig.1: Shows trend towards abolition of the death penalty. SOURCE: Amnesty International

VIII: RECOMMENDATIONS

41. The National Commission takes cognisance of the fact that Kenya has not enforced any death sentence since 1987. However, Kenya has not amended its statutes to be compliant with this practice. The National Commission has argued here that the death penalty is not tenable because it violates the fundamental right

⁴¹The notion of punishment differs from religion to religion. Religions such as Islam support the death penalty. Christianity is however divided on the issue, but the Catholic Church globally campaigns against capital punishment while some Protestant churches support its use as having the sanction of God. See: Andrew F (2004), "The Christian Perspective on Capital Punishment: An Evaluation of Rehabilitation", *Quodlibet Journal*: Volume 6 Number 3, July - September. Hindus firmly believe in the law of Karma, the thrust of which is that if one does good or evil, it must always come back hence humans cannot take it upon themselves to execute criminals.

to life and amounts to cruel and inhuman treatment that sets the wrong precedent of vengeance by the state. It violates international human rights standards and norms to which Kenya is a state party and has pledged to uphold. The death penalty does not particularly deter crime in comparison with other sentences. It is irreversible once a person has been executed and is mostly affects the poor who are unable to hire costly defence counsel. In the end, retention of the death penalty in our statutes portrays Kenya as a society that does not respect the sanctity of life nor the ability of those who have committed crimes to learn and reform through restorative and rehabilitative justice. This negative stance affects Kenya's desire to become a human rights state built on and governed by the principles of human rights.

42. The National Commission makes the following specific recommendations with respect to the death penalty:

- a) The Parliament of Kenya should take immediate and necessary steps to abolish the death penalty in Kenya through an amendment to Sections 204, 40(3), 296(2) and 297(2) of the Penal Code, CAP 63 Laws of Kenya; the Criminal Procedure Code, CAP 75 Laws of Kenya; other statutory provisions linked to the death penalty and the Bill of Rights, Chapter V of the Constitution of Kenya to guarantee absolute enjoyment and guarantee of the right to life and accompanying rights and freedoms.
- b) The Government should, in the meantime through a Presidential Declaration or otherwise, confirm the moratorium on all current death sentences and commute all sentences of death row convicts to life imprisonment.
- c) The Government, through MoJCA and the Office of the Attorney General, should facilitate the immediate ratification and implementation of the 2nd Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty.
- d) There should be a provision entitling legal representation to all persons charged with capital offences including the offence of robbery with violence. MoJCA should facilitate this Legal Aid Scheme.
- e) The Government, through the Kenya Prisons Service, should facilitate programmes and activities towards a restorative justice system. Alternatives to the death penalty such as life sentences, with a focus on reform and rehabilitation of offenders, should be given priority. This should include the transformation of the Kenya Prisons service into the Department of Correctional Services.
- f) The Government, specifically MoJCA, should collaborate with human rights advocates including civil society organizations and the KNCHR on a long-term public education campaign against the death penalty. The

campaign should incorporate programmatic intervention on alternatives to the death penalty.

- g) The Government should seek to establish and implement a support system for relatives of murder victims to ensure that they do not suffer further violation by virtue of the crime. This is part of the restorative justice system that should be set up.
- h) The Government should build the institutional capacity of the judiciary and prosecutions department to avoid miscarriage of justice as much as possible during trial of capital offences. This should entail investing in personnel including in the least having trained lawyers to conduct trial proceedings on behalf of the state.
- i) Related to the above, the Government should employ advanced technology in presenting evidence in criminal proceedings regarding capital offences. For instance, DNA testing should be conducted on suspects of crimes. This would eliminate miscarriage of justice.

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