

**AN ANALYSIS OF ARTICLE 26 (3) ON THE DEATH PENALTY IN THE KENYAN
2010 CONSTITUTION**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

By

Kavutha Mwendwa

082731

Prepared under the supervision of

Dr. Antoinette Kankindi

March 2018

Word count (8359)

Declaration

I, KAVUTHA MWENDWA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

Dr. Antoinette Kankindi

Table of Contents

Declaration.....	ii
Abstract.....	v
Dedication	vi
Acknowledgement	vii
List of cases.....	viii
List of legal instruments	viii
List of abbreviations	viii
1.0 Chapter One: Introduction to the research.....	1
1.1 Background of the problem	1
1.2 Statement of the problem	2
1.3 Purpose of the study.....	2
1.4 Hypothesis.....	3
1.5 Research questions.....	3
1.6 Importance of study.....	3
1.7 Scope and limitations of the study	3
1.8 Definition of terms	3
1.9 Outline of the dissertation and its flow of argument	4
2.0 Chapter Two: Theoretical Framework and Methodology	6
2.1 Contextualism.....	6
2.1.1 Judicial Activism as a critique of Contextualism	7
2.1.2 Applicability of other theories of judicial interpretation	9
2.2 Constitutionalism	10
2.2.1 Human Rights as an element of Constitutionalism	10
2.3 Research methodology	12
3.0 Chapter Three: Literature Review.....	14
3.1 Primary Sources.....	14
3.1.1 Legal history of the death penalty post-independence.....	14
3.2 Secondary Sources	17
3.2.1 On the ambiguity of article 26 (3).....	17
3.2.2 On the death penalty within the Penal Code from the perspective of the Bill of Rights	20
4.0 Chapter Four: Understanding the death penalty in light of the bill of rights	22
4.1 The Right to Life under article 26 (3)	22
4.2 Limitation of rights and fundamental freedoms under article 24	24
4.3 The death penalty and article 28 on human dignity	27

5.0 Chapter Five: Conclusion and Recommendations	29
5.1 Conclusion	29
5.2 Recommendations	29
5.2.1 Amendment of the Penal Code	30
5.2.2 Constitutional Amendment	30
5.2.3 Ratification of International Treaties on the Death Penalty	31
Bibliography	32

Abstract

This study analyses article 26 (3) on the death penalty in the Kenyan 2010 constitution. The Kenyan judiciary continues to sentence convicts to death based on the formulation of the right to life in article 26(3) of the constitution and the death penalty provisions in the penal code. However, the rare occurrence of actual execution has made many view Kenya as a de facto abolitionist state. Moreover, the death penalty though codified is applied only through sentencing and not execution. Using the theories of contextualism, constitutionalism and human rights, this study examines the extent to which the death penalty complies with the constitution, particularly the bill of rights. Through qualitative analysis of case law and secondary sources, the study found that Kenya's de facto abolitionist status allows for violations of constitutional provisions on the right to life, human dignity, access to justice and freedom and security of the person. This study concludes on the extent to which the death penalty is antithetical to the constitution. To harmonize the penal code with the constitution the study recommends that the death penalty should be legally abolished.

Dedication

To God and my parents without whom I would not have been here to write this dissertation.

Acknowledgement

I must profess my profound gratitude to my supervisor, Dr. Kankindi, who has been the most patient and understanding supervisor one could have. I would also like to acknowledge Tito Maina and Jacqueline Kibogi for their helpful input and support.

List of cases

Francis Karioko Muruatetu & another v Republic (2017) eKLR.

Godfrey Ngotho Mutiso v Republic (2010) eKLR

Jackson Maina Wangui & another v Republic (2014) eKLR.

Joseph Njuguna Mwaura & 2 others v Republic (2008) eKLR.

Joseph Njuguna Mwaura & 2 others v Republic (2013) eKLR.

Republic v Abduba Guyo Wada (2015) eKLR.

Republic v Joseph Njuguna Mwaura & 2 others, (2004) Thika Law Courts.

Republic v Thomas Kipkemoi Kipkorir & 2 others (2016) eKLR.

Soering v. The United Kingdom, ECtHR Judgement of 7 July 1989.

S v Makwanyane and another (1995), Constitutional Court of South Africa.

List of legal instruments

Constitution of Kenya (2010)

Constitution of Kenya (1963)

Penal Code Chapter 63 Laws of Kenya

List of abbreviations

ACmHPR	African Commission on Human and Peoples' Rights
CCPR	United Nations Human Rights Commission
ICCPR	International Covenant on Civil and Political Rights
KHCR	Kenya Human Rights Commission
NCC	National Constitutional Conference
UDHR	United Nations Universal Declaration of Human Rights
UNCHR	United Nations Commission on Human Rights
UNGA	United Nations General Assembly
UN HRC	United Nations Human Rights Council

1.0 Chapter One: Introduction to the research

1.1 Background of the problem

The question of the death penalty in Kenya has always been an emotive subject. It was provided for under article 71 of the 1963 constitution which stated: “*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.*”¹ Article 26 of the 2010 constitution which substituted article 71 states “*a person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.*”²

This exclusion of the express provision for the death penalty creates legal uncertainty absent in the 1963 constitution. The Kenyan penal code provides the death penalty for capital offences. If Kenyan courts continue to sentence convicts to death it is because of the penal code. In fact, about four thousand criminals have been sentenced to death but the last execution was carried out in 1987³. This situation explains why Kenya is considered, in international death penalty databases such as that of Amnesty International, a de facto abolitionist country⁴.

When read textually article 26 (3) apparently legitimises the death penalty in line with the Penal Code. However, that it leaves room for the death penalty seems to contradict the progressive Bill of Rights within the constitution.

Kenyan case law proves that practically, the facilitation of the death penalty results in constitutional violations. On this merit the study will consider the case of *Francis Karioko Muruatetu and another v Republic (Muruatetu)* in which the Supreme Court declared the mandatory nature of death sentencing under section 204 of the Penal Code unconstitutional. The Supreme Court found that section 204 of the Penal Code prevented the courts from considering mitigating circumstances for purposes of sentencing⁵. This violated the right to fair

¹ Article 71, *Constitution of Kenya* (1963).

² Article 26(3), *Constitution of Kenya* (2010).

³ ‘Abolition of the death penalty in Kenya’ Kenya National Commission on Human Rights, Position paper N0 2, 2007, 3- <http://www.knchr.org/Portals/0/CivilAndPoliticalReports/PP2%20-%20Abolition%20of%20the%20death%20penalty%20-%20final.pdf> on 28 February 2018.

⁴ - <https://www.amnesty.org/en/countries/africa/kenya/> on 28 February 2018.

⁵ (2017) eKLR.

trial, the right to equality and freedom from discrimination. The *Muruatetu* case is significant for this study because of the method of judicial interpretation used by the Supreme Court. The Supreme Court did not address the constitutionality of the death penalty because it was not an issue arising from the case.⁶

Death row convicts in Kenya are not given specific execution dates but serve an indefinite prison term. This death row phenomenon has been found to violate human rights by being cruel and inhumane treatment⁷. This can be resolved by harmonizing the provisions of the Penal Code with the Constitution and its values. Such harmonization could be achieved by amendment of the Penal Code.

Muruatetu has reignited the debate on whether Kenya should completely abolish the death penalty. This study's question goes beyond the central point of the debate: can the Penal Code provisions on the death penalty be qualified as unconstitutional in light of the ambiguity of article 26 (3) on one hand and on the other hand can Kenya afford to have a penal code that is in contradiction with the Bill of Rights in the 2010 constitution.

1.2 Statement of the problem

The ambiguity of article 26 (3) gives room for diverging interpretations on the constitutionality of the death penalty which creates the need for legal harmonization between the constitution and the penal code.

Since Kenya is a de facto abolitionist state and the death penalty is antithetical to the constitution, steps should be taken to: stop the interpretation of article 26(3) as prescribing the death penalty and; expressly delegitimize the death penalty within Kenyan laws.

1.3 Purpose of the study

The study purposes to make a case for the complete abolition of the death penalty by building upon the rationale used in *Muruatetu* when outlawing section 204 of the Penal Code to prove that the death penalty is unconstitutional.

⁶ *Francis Karioko Muruatetu & another v Republic* (2017) eKLR, para. 26.

⁷ *Soering v. The United Kingdom*, ECtHR Judgement of 7 July 1989 para. 111.

1.4 Hypothesis

The courts derive the authority to dispense the death penalty solely from the Penal Code's express provisions, legitimised by a textual interpretation of article 26(3).

The assumption made from the onset of this study is that the progressive nature of the constitution does not allow for a state-imposed limitation on the right to life along the vein of a death penalty.

1.5 Research questions

Given that Kenya is considered a de facto abolitionist state, the research will seek to discuss the following questions;

1. To what extent does article 26 (3) ambiguity open the way for the Penal Code to uphold the death penalty?
2. Are the provisions on the death penalty within the Penal Code in contradiction with the Bill of Rights?

1.6 Importance of study

The study seeks to contribute to the literature that proposes the complete abolition of the death penalty. In doing so, the study's perspective will be informed by the method of judicial interpretation in *Muruatetu*.⁸ As the judgement is recent there is scarcity of published literature analysing it.

1.7 Scope and limitations of the study

In attempting to make a case for the abolition of the death penalty, the scope of the study shall be the consideration of human rights as provided for within Kenya's bill of rights.

The study is limited by lack of public access to Kenyan death penalty statistics such as an official number of convicts sentenced to death. The study must rely on data obtained from human rights commissions and other institutions such as the United Nations Human Rights Commission (CCPR).

The second limitation is the scarcity of literature on the death penalty in Kenya.

1.8 Definition of terms

Death Row Syndrome

⁸ *Francis Karioko Muruatetu & another v Republic* (2017) eKLR.

Convicts who have been sentenced to death and are awaiting execution are known as “being on death row”. Part of the death row phenomenon is the stigma and uncertainty of one’s execution date. The psychological effects of these bleak living conditions result in “death row syndrome.”⁹

The death row syndrome was recognised in *Godfrey Mutiso v Republic (Mutiso)*¹⁰. In reaction to the public outcry about the death row syndrome, the President Mwai Kibaki authorised a mass commutation of death sentences to life imprisonment in 2009. He stated that the wait for execution caused convicts to suffer “undue mental anguish”¹¹.

De Facto Abolitionist State

States fall under four categories for the status of the death penalty: retentionists, abolitionists for ordinary offences, complete abolitionists and de facto abolitionists.¹² Retentionist states retain the death penalty in law and practice by executing death row convicts. Abolitionists for ordinary offences, retain the death penalty for crimes considered ‘most serious’. Complete abolitionists legally and practically abolish the death penalty for all crimes.

De facto abolitionists retain the death penalty legally but do not apply it. While there is no standard classification for what constitutes practicing the penalty, some institutions use a ten-year limit as a test¹³. Based on this test, Kenya is de facto abolitionist because no executions have occurred in the past 31 years.

1.9 Outline of the dissertation and its flow of argument

The dissertation is both a case analysis and a constitutional review. First, the study determines the method of constitutional interpretation used by the Supreme Court in *Muruatetu*. Then the study applies this method to article 26 (3) of the constitution to resolve the ambiguity of the

⁹ —<<https://deathpenaltyinfo.org/time-death-row>> on 29 January 2018.

¹⁰ (2010) eKLR, para 16.

¹¹ ‘Kenya death inmates to serve life’ Daily Nation, 3 August 2009, —< <https://www.nation.co.ke/news/1056-634012-jn68qoz/index.html>> on 21 February 2018.

¹² Amnesty International, *Abolitionist and retentionist countries as of march 2018*, 1 —<<https://www.amnesty.org/en/documents/act50/6665/2017/en/>>, on 8 March 2018.

¹³ Amnesty International, *Abolitionist and retentionist countries as of march 2018*, 1 —<<https://www.amnesty.org/en/documents/act50/6665/2017/en/>>, on 8 March 2018.

law on the death penalty. The main argument is that a contextual reading of the constitution leads to the conclusion that the death penalty is unconstitutional. Recommendations are made based on the results of the research; the harmonization of the penal system and the constitution with the aim of abolition of the death penalty.

2.0 Chapter Two: Theoretical Framework and Methodology

This chapter outlines the theoretical framework used to challenge and extend the knowledge informing the general acceptance that the death penalty is a constitutional limitation of the right to life provided for under article 26(3).

The theories used are contextualism and constitutionalism. The criteria was based on the theories which most satisfactorily support the following positions:

1. The position that although the ambiguity of article 26(3) allows the Penal Code to uphold the death penalty, it is not a legitimate limitation on the right to life as it can be proven to be antithetical to the constitution.
2. The position that there must be expedient legal remedies when a law is contrary to the constitution:
 - a. The significance of harmonization of the constitution and its values with other legal statutes.
 - b. The significance of the Bill of Rights in the constitution.

2.1 Contextualism

Contextualism is the philosophy and technique of “constitutional interpretation in which there is a blend of factual and normative considerations taken into account while interpreting the constitution.”¹⁴

Contextualism involves understanding the constitution based on factors like the context of the dispute, constitutional values, a contemporary sense of justice and subjective rights, morality, norms regarding institutional relationships, and most essentially the practical efficacy of constitutional provisions in the present context.¹⁵ In *Muruatetu*, the main issue was the mandatory death sentence for murder.¹⁶ The court relied on constitutional provisions, national and international case law, a resolution of the CCPR and articles of the International Covenant

¹⁴ Khatiwada A, ‘Interpreting the Constitution: The Formalism and Contextualism Debate’ 2(1) *National Judicial Academy Law Journal*, 2008, 40.

¹⁵ Khatiwada A, ‘Interpreting the Constitution’, 40.

¹⁶ *Francis Karioko Muruatetu & another v Republic* (2017) eKLR, para 27.

on Civil and Political Rights (ICCPR). *Muruatetu* serves as a model for the appropriate method of judicial interpretation used in this study.

The main critique of contextualism has to be addressed as this study attempts to establish the death penalty as unconstitutional using contextualism.

2.1.1 Judicial Activism as a critique of Contextualism

Contextualism is critiqued for enabling judicial activism. Judicial activism is a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent."¹⁷

Within the Kenyan context this risk was enunciated in *Joseph Njuguna Mwaura and two others v Republic (Mwaura)*. In *Mwaura*, the appellants were convicted of two counts of robbery with violence and sentenced to death according to section 296 (2) of the Penal Code¹⁸. They appealed to the High Court which upheld the convictions and affirmed the sentences¹⁹. The matter was taken before the Court of Appeal where the issue of the constitutionality of the sentence was raised.²⁰

Section 296 (2) provides for a mandatory death sentence for robbery with violence. At the Court of Appeal, the counsel for the appellants argued that "*as a result of our new, more progressive Constitution, courts in this country no longer have the power to sentence convicts to death; that the sentence of death is now unlawful, first because it is a violation on the right to life, and secondly because it amounts to cruel and inhuman treatment.*"²¹

The court disagreed and held that the constitution, clearly envisioned the right to life as not absolute:

¹⁷ Black's Law Dictionary, 8th ed, 2473.

¹⁸ *Republic v Joseph Njuguna Mwaura & 2 others* (2004), Thika Law Courts.

¹⁹ *Joseph Njuguna Mwaura & 2 others v Republic* (2008) eKLR.

²⁰ *Joseph Njuguna Mwaura & 2 others v Republic* (2013) eKLR.

²¹ *Joseph Njuguna Mwaura & 2 others v Republic* (2013) eKLR, para. 42.

“To suggest that the Articles of the Constitution outlaw the death penalty is, with respect, a great danger to the people of Kenya and that is a remarkable departure from the tenets of constitutional interpretation.”²²

The *Mwaura* principle asserts that the court cannot infringe on the powers of the legislature and there is a thin line between interpreting and making law. Those who walk that line are judicial activists.

This study proposes a similar argument to that of the appellants’ counsel in *Mwaura*. Article 259 (1) of the 2010 constitution counters the Court of Appeal’s position on constitutional interpretation. It provides that the constitution shall be interpreted in a manner that promotes its purposes, values and principles; advances the human rights and fundamental freedoms in the Bill of Rights; the development of the law; and contributes to good governance. Article 259 (3) states: “every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking.” Therefore, the position that the constitution outlaws the death penalty, is not a departure from the tenets of constitutional interpretation as *Mwaura* maintains.

In addition, article 20 (3) (b) provides that in applying a bill of rights’ provision, a court shall adopt the interpretation most favorable for enforcement of the right. In response to the *Mwaura* principle, the Supreme Court in *Muruatetu* affirmed and greatly emphasised the statement by the Court of Appeal in *Mutiso* at paragraph 14 that:

*“(…) human society is constantly evolving and therefore the law, which all civilized societies must live under, must evolve in tandem. A law that is caught up in a time warp would soon find itself irrelevant and would be swept into the dustbins of history.”*²³

The Supreme Court relies on contextualism and in this way, the court reached the conclusion that mandatory death sentencing is unconstitutional and section 204 of the Penal Code is not valid.

²² *Joseph Njuguna Mwaura & 2 others v Republic* (2013) eKLR, para. 55.

²³ *Francis Karioko Muruatetu & another v Republic* (2017) eKLR para. 68.

2.1.2 Applicability of other theories of judicial interpretation

The current interpretation that has upheld the validity of the death penalty is what some would call formalism. Formalism is a theory of judicial interpretation claiming that due to legal principles adjudication is autonomous from ‘non-legal normative considerations of morality or politics’.²⁴ Textualism falls under the umbrella of formalism²⁵. Textualism is the theory of interpretation of the law primarily based on interpreting a document or statute, especially one involving penal sanctions, according to the ordinary or literal meaning of the text, without looking to other sources to ascertain the meaning.²⁶

Using textualism, the provision in article 26 (3) is straightforward. Life is limited “to the extent authorised by this Constitution or other written law.” The Penal Code serves as “other written law” and expressly provides for the death penalty. Therefore, the death penalty is legitimate and concurs with the stance held in *Mwaura*.

Contextualism and textualism are complementary to some extent. Contextualism integrates aspects of different theories beginning with textualism, then making other considerations. The language of article 26 (3) provides that the limitation on the right to life is also hinged on authorisation by the constitution. The textual meaning is that if there is no express authorisation of the death penalty by the constitution, the legitimacy of the death penalty can be authorised by other written law. Using contextualism, this study comes in to clarify the first part on what authorisation by the constitution means. It would seem, that based upon the Bill of Rights there is no room for authorisation of the death penalty by the constitution. This implies a contradiction between the constitution and the penal code created by the provision of the text of article 26 (3) on authorisation by both instruments.

Formalism cannot direct judges sufficiently in all constitutional cases. This is because value-neutral interpretations cannot address instances where textual justifications of incoherent laws are used to interfere with a fundamental right of people.²⁷ Contextualism is the most appropriate

²⁴ Leiter B, ‘Legal formalism and legal realism: what is the issue?’ 16(2), *Legal Theory Journal*, 2010, 111.

²⁵ Khatiwada A, ‘Interpreting the Constitution’, 5.

²⁶ Black’s Law Dictionary, 8th ed, 4458.

²⁷ Khatiwada A, ‘Interpreting the Constitution’, 40.

method because it requires an examination of what precedes and follows article 26 (3) as well as a dependence on constitutional values.

2.2 Constitutionalism

Constitutionalism speaks to the entire juridical and legal order of a nation. A government is only constitutional if it lives by the spirit of its constitution.²⁸ Constitutionalism promotes the embodiment of constitutional principles procedurally and substantively.²⁹

The spirit of the constitution is identified by its values. Kenya's national values include human dignity and human rights.³⁰ The constitution is the supreme law and the government should not abide the death penalty which contradicts constitutional values.

The assertions in *Mwaura* on judicial interpretation are contestable. However, this study concurs with the *Mwaura* principle holding that "laws are made by Parliament, not by the Court. The Court cannot purport to be ahead of Parliament. Parliament enacts laws and the court interprets those laws when made."³¹ There must be checks and balances for each function of a constitutional government. Respecting constitutionalism facilitates a de jure abolition of the death penalty through parliament's amendment of the Penal Code³².

2.2.1 Human Rights as an element of Constitutionalism

Human rights are natural entitlements due to humans by virtue of them being human³³. The human rights movement stemmed from natural rights and evolved drastically during the Enlightenment Period. Natural entitlements are universal and inalienable. Any laws repealing

²⁸ Lumumba PLO and Franceschi L, *The constitution of Kenya 2010: An introductory commentary*, Strathmore University Press, Nairobi, 2014, 3.

²⁹ Lumumba PLO and Franceschi L, *The constitution of Kenya 2010*, 4.

³⁰ Article 10 (2) (b), *Constitution of Kenya* (2010).

³¹ Franceschi L, 'The supreme court almost killed the death penalty' Daily Nation, 15 December 2017—<
<https://www.nation.co.ke/oped/blogs/dot9/franceschi/2274464-4229722-qalmy3/index.html>> on 31 January 2018.

³² Lumumba PLO and Franceschi L, *The constitution of Kenya 2010*, 155.

³³ Mbondenyei MK and Ambani J, *The new constitutional law of Kenya: Principles, government and human rights*, LawAfrica Publishing, Nairobi, 2014, 155.

them would be unjust³⁴. In contrast, legal rights are those entitlements bestowed on a person by a legal system and can be limited or repealed.

In the 20th century, natural rights were codified into soft law, in reaction to slavery, war crimes and other forms of human exploitation. Human rights are a precondition for the possibility of a justly organised society³⁵. The United Nations Universal Declaration of Human Rights (UDHR) recognizes that human rights are “equal and inalienable” rights acknowledged to “all members of the human family”³⁶.

The human rights theory is relevant to the death penalty debate because both arguments for and against it revolve around different conceptions of the right to life. Kenya’s conception of human rights aligns with the position that rights accrue to human beings naturally.³⁷ Article 19(3) (a) of the 2010 Constitution provides that rights “belong to each individual and are not granted by the State”. Kenya’s constitution has an extensive Bill of Rights different from the last which was full of limitations via claw-back clauses.³⁸ These clauses defeated the purpose of guaranteeing the rights by frustrating their facilitation³⁹. The claw-back clauses informed the judiciary’s restrictive treatment of human rights litigation and constitutional interpretation⁴⁰. Evidenced by the discussions on contextualism and constitutionalism, a restrictive approach to the Bill of Rights is not a proper approach to constitutional interpretation.

Along with the 2010 constitution’s Bill of Rights, Kenya established specialized bodies such as the Commission on Administrative Justice and a Human Rights Commission (KHRC) to protect, promote and enforce human rights.⁴¹ The KHRC has conducted research studies aimed at abolition of the death penalty and acted as *amicus curiae* in *Muruatetu*.

³⁴ Thomas Aquinas, ‘Summa Theologiae’ Prima Secundae, Part I-II q95, a 2 — <http://www.newadvent.org/summa/2095.htm> on 8 March 2018.

³⁵ Burns H. Weston, ‘Human rights’, 20 March 2014, Encyclopaedia Britannica, — <https://www.britannica.com/topic/human-rights> on 21 February 2018.

³⁶ UNGA, *The universal declaration of human rights*, UN A/Res/217/(III), 10 December 1948.

³⁷ Mbondenyi MK and Ambani J, *The new constitutional law of Kenya*, 155.

³⁸ Mbondenyi MK and Ambani J, *The new constitutional law of Kenya*, 156.

³⁹ Mbondenyi MK and Ambani J, *The new constitutional law of Kenya*, 156.

⁴⁰ Mbondenyi MK and Ambani J, *The new constitutional law of Kenya*, 156.

⁴¹ Mbondenyi MK and Ambani J, *The new constitutional law of Kenya*, 212.

Basing this study's theoretical framework on such a conception of human rights justifies the arguments made for the abolition of the death penalty. Notably, Kenya is a signatory to international human rights conventions and has obligations under them and customary international law. Accordingly, death penalty positions asserted within international law, for example, provisions of UDHR are relied on as persuasive authorities.

2.3 Research methodology

This is a doctrinal research study involving qualitative analysis. Doctrinal research aims at systematizing, rectifying and clarifying a legal question by an analysis of authoritative texts that consists of primary and secondary sources⁴². The study reviews the constitution, the penal code and case law as primary sources. From the case law, *Muruatetu* was appropriately chosen to model the theoretical framework because it is a decision of the Supreme Court and it confirmed the use of contextualism for constitutional interpretation.

The study's secondary sources are also doctrinal research and are analysed to systematize the legal development of the death penalty in Kenya. Relevant books, journals, human rights commissions' reports and articles which support arguments for and against the abolition of the death penalty in Kenya are reviewed based on the theoretical framework; an interpretive approach that considers the subjective meanings and context of the sources. Deductive reasoning is applied as a technique of qualitative analysis.⁴³

The qualitative analysis or value-based judgement is necessary to determine which of the two diverging interpretations of article 26 (3) is fitting. Textually interpreted the constitution gives room for the Penal Code to uphold the death penalty. Contextually, it could lead to the conclusion that the constitution does not authorize the death penalty. Analysis of the application of article 26(3) was achieved using the theories of contextualism, constitutionalism and the perspective of human rights.

This study focuses on the human rights perspective because the death penalty is a human rights issue. Using this perspective, the study hinges on a critical analysis of the bill of rights within

⁴² __

<http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/law/09_research_methodology/06_research_design/et/8152_et_et.pdf> on 2 March 2018.

⁴³ Chynoweth P, 'Legal Research' in Knight A and Ruddock L (eds) 1st ed *Advanced research methods in the built environment*, Wiley-Blackwell, Chichester, 2008, 32.

the constitution. The constitution is an appropriate authority because it is the supreme law of Kenya. The analysis of the three different areas using deductive reasoning provided answers to the research questions.

The methodology suits the time and resource limits of this study because only desk top research and not field research is used to address the research problem. The methodology relied greatly on analysis of laws and literature so it was limited by the scarcity of secondary sources dealing specifically with abolition of the death penalty in Kenya.

3.0 Chapter Three: Literature Review

3.1 Primary Sources

Besides the constitution, Kenyan case law was considered in answering the research questions because the courts have investigated both the issue of the phrasing of article 26 (3) and the phrasing of the death penalty provisions in the penal code, together with their alignment to the bill of rights.

Different positions on the death penalty have been taken in Kenyan case law, informed by factors like foreign case law and Kenya's international obligations. A review of these primary sources entails a description of the legal history of the death penalty in post-independent Kenya.

3.1.1 Legal history of the death penalty post-independence

In 1963 the death penalty was provided for under article 71 (1) of the constitution which stated 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".⁴⁴ While the intention of the provision is to uphold the right to life, it provides in clear terms an endorsement for the death penalty.

Since its inception, the penal code has prescribed a mandatory imposition of the death penalty for the following crimes:

- a. Murder under section 204
- b. Treason under section 40
- c. Robbery with violence under section 296 (2)
- d. Attempted robbery under section 297 (2)
- e. Administration of unlawful oaths to commit capital offences under section 60.

In 2003, the president of the country commuted death row convicts to life imprisonment⁴⁵. At the time, there was pressure from civil societies and support for abolition by personalities such

⁴⁴ Article 71(1), *Constitution of Kenya* (1963).

⁴⁵ Namyalo D and Macalesher J, 'The abolition of the death penalty and its alternative sanction in East Africa: Kenya and Uganda' Penal Reform International, Research Paper, 2012, 8 —<https://www.penalreform.org/wp-content/uploads/2013/05/East-Africa-research-report-on-death-penalty-and-life-imprisonment.pdf> on 22 February 2018.

as the vice-president, the minister of justice and constitutional affairs and the commissioner of prisons.⁴⁶

In 2007, there was a motion to abolish the death penalty in Parliament because of the large number of inmates languishing on death row.⁴⁷ The motion failed because majority of the members of parliament and the public in general were still in support of the death penalty.⁴⁸ The main reason for this was the fear that abolition would be a catalyst for the commission of more capital offences at a time when Kenya was dealing with a security threat in the form of the organization called ‘Mungiki’.⁴⁹ The justice and constitutional affairs minister said the issue would be comprehensively debated during the constitutional review to be held after the elections.⁵⁰ In the same year, Kenya abstained on a United Nations General Assembly (UNGA) resolution calling for a global moratorium on executions which passed by a majority of 104 to 54, with 29 abstentions.⁵¹

In 2009, Mwai Kibaki issued the largest commutation of convicts yet in reaction to the discourse on the death row syndrome.⁵² Around 4000 death row convicts had their sentences commuted to life imprisonment.⁵³

In the case of *Godfrey Ngotho Mutiso v Republic (Mutiso)* the Court of Appeal found mandatory death sentencing for the crime of murder to be unconstitutional, because it

⁴⁶ Namyalo D and Macalesher J, ‘The abolition of the death penalty and its alternative sanction in East Africa: Kenya and Uganda’, 8.

⁴⁷ Namyalo D and Macalesher J, ‘The abolition of the death penalty and its alternative sanction in East Africa: Kenya and Uganda’, 8.

⁴⁸ Namyalo D and Macalesher J, ‘The abolition of the death penalty and its alternative sanction in East Africa: Kenya and Uganda’, 6.

⁴⁹ Kenya parliament maintains death penalty, afrol News, 2 August 2007, —< <http://www.afrol.com/articles/26311>> 26 February 2018.

⁵⁰ Kenya parliament maintains death penalty, afrol News, 2 August 2007, —< <http://www.afrol.com/articles/26311>> 26 February 2018.

⁵¹ UNGA, *Moratorium on the use of the death penalty*, UN A/RES/62/149 (18 December 2007).

⁵² ‘Kenya death inmates to serve life’ Daily Nation, 3 August 2009, —< <https://www.nation.co.ke/news/1056-634012-jn68qoz/index.html>> on 21 February 2018.

⁵³ Namyalo D and Macalesher J, ‘The abolition of the death penalty and its alternative sanction in East Africa: Kenya and Uganda’, 8.

constituted cruel and inhumane treatment, and violated the right to fair trial.⁵⁴ Moreover, the court mentioned that their findings could be applied to other capital offences stating that while, it could not make a conclusive determination on the other capital, there is doubt that different arguments could be raised in respect of these offenses⁵⁵.

In the same year as the *Mutiso* judgement a new constitution was promulgated. The provision on the right to life was amended. Article 26(3) of the constitution states: “A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law”. This provision differs from article 71 (1) of the 1963 constitution because it makes no mention of the state imposing a death sentence in respect to criminal offences. It seems to be progressing towards the abolition of the death penalty but does not outwardly delegitimize it.

Kenya abstained from voting in the 2010 UNGA resolution on a death penalty moratorium with a view to abolition⁵⁶. This is Kenya’s third abstention from a UNGA resolution concerning the death penalty. Despite the abstention, there is a de facto moratorium on the execution of the death penalty.⁵⁷ Kenya notified the United Nations Human Rights Council (UN HRC) that the existing de facto moratorium in place since 1987, would remain.⁵⁸

This de facto moratorium contradicts Kenya’s position because it does not impact the legality of it or stop courts from meting it out. Kenya’s moratorium on executions is not presented as official government policy but the personal inclination of the incumbent president not to sign execution warrants and to commute death sentences.⁵⁹ Technically, execution of the death

⁵⁴ (2010) eKLR, para 36.

⁵⁵ *Godfrey Ngotho Mutiso v Republic* (2010) eKLR, para. 36.

⁵⁶ UNGA, *Moratorium on the use of the death penalty*, UN A/Res/65/206 (21 December 2010).

⁵⁷ *UN Committee against Torture Concluding observations on the second periodic report of Kenya, adopted by the Committee at its fiftieth session (6 to 31 May 2013)*, 19 June 2013, CAT/C/KEN/CO/2, 11.

⁵⁸ *UN HRC National Report of Kenya Submitted in Accordance with Paragraph 15(a) of the Annex to the Human Rights Council Resolution 5/1, A/HRC/WG.6/8/KEN/1*, 22 February 2010.

⁵⁹ *ACmHPR Study on the question of the death penalty in Africa submitted by the working group on the death penalty in Africa in accordance with Resolution ACHPR/Res.79 (XXXVIII) 05*, 19 April 2012, 48.

penalty could be resumed any time. This situation demands clarity at least in relation to the right to life.

In 2013, the Court of Appeal in *Mwaura* gave a decision that was in conflict with its judgement in *Mutiso*. It provided that section 204 of the penal code was not discretionary. The use of the term “shall” left the court with no alternative but to impose the death penalty, because the term bestows a mandatory obligation. The court stated: “We hold that the decision in *Godfrey Mutiso v R* to be *per incuriam* in so far as it purports to grant discretion in sentencing with regard to capital offences.”

This decision affected the treatment of mandatory death sentencing in the lower courts. An example of this is the *Republic v Abduba Guyo Wada* case which spoke against the rationale used in *Mwaura*, but had to uphold *stare decisis*.⁶⁰ Other cases followed suit by deferring to *stare decisis*, and applying the mandatory death sentencing, provided for within the penal code including *Jackson Maina Wangui & another v Republic* and *Republic v Thomas Kipkemoi Kipkorir & 2 others*.⁶¹

In 2017, the *Muruatetu* decision of the Supreme Court, declared the mandatory nature of the death sentence under Section 204 of the penal code unconstitutional. This decision is binding on all other courts. It is an assumption of the study that the rationale used in *Muruatetu* can be applied by the lower courts, not only to the offence of murder but to all other capital offences. Effectively, *Muruatetu* delegitimizes the mandatory imposition of the death sentence.

Based on this history, the study’s objective is an attempt to prove that interpreting the constitution contextually as in *Muruatetu* will lead to the conclusion that the death penalty should be abolished.

3.2 Secondary Sources

To answer the research questions, this study reviewed literature on the constitutionality of the death penalty in Kenya and the human rights perspective on the death penalty.

3.2.1 On the ambiguity of article 26 (3)

While this research question was mainly addressed through analysis of the primary sources, some secondary sources are referred to. This is because the main issue is the determination of

⁶⁰ (2015) eKLR.

⁶¹ (2014) eKLR and (2016) eKLR.

an appropriate method of constitutional interpretation. Given the time and the resources limit, these sources are relied upon:

- a. Khatiwada A, (2008).⁶²
- b. Novak A, (2011).⁶³
- c. *African Commission on Human and Peoples' Rights (ACmHPR) Study on the question of the death penalty in Africa* (2012).⁶⁴
- d. Lumumba PLO and Franceschi L, (2010).⁶⁵

Khatiwada makes a case for contextualism as preferable to formalism as a method of constitutional interpretation. The article describes the various methods of judicial interpretation, including textualism. He proposes that judicial interpretation must be value-based in order to promote the protection of fundamental rights of people⁶⁶. The article supports this study's use of contextualism as a theoretical framework to explain how the constitution can be construed as antithetical to the death penalty.

Novak discusses the constitutional challenges brought against the death penalty worldwide. He highlights the trend toward abolition of the death penalty.⁶⁷ The history of the death penalty in Kenya as well as its current use is analysed. Novak discusses *Mutiso* in which mandatory death sentencing for the crime of murder was declared unconstitutional⁶⁸. He highlights the social context in which the 2010 constitution was drafted and possible reasons why the death penalty was not expressly abolished at that juncture; there were more controversial issues that took the spotlight including the questions of abortion and Kadhi's courts.⁶⁹

⁶² Khatiwada A, 'Interpreting the Constitution'.

⁶³ Novak A, 'Constitutional reform and abolition of the death penalty in Kenya' 45 (2) *Suffolk Law Review*, 285-356.

⁶⁴ *ACmHPR Study on the question of the death penalty in Africa*.

⁶⁵ Lumumba PLO and Franceschi L, *The constitution of Kenya 2010*.

⁶⁶ Khatiwada A, 'Interpreting the Constitution', 40.

⁶⁷ Novak A, 'Constitutional reform and abolition of the death penalty in Kenya', 1.

⁶⁸ Novak A, 'Constitutional reform and abolition of the death penalty in Kenya', 48.

⁶⁹ Novak A, 'Constitutional reform and abolition of the death penalty in Kenya', 45.

One of the opposing arguments on death penalty abolition is that of public opinion. Novak recognizes public opinion as a reason the death penalty was not abolished.⁷⁰ Death penalty retentionists rely on public opinion in relation to constitutionalism and constitutional values. They maintain that all sovereign power belongs to the people and is to be exercised according to the constitution.⁷¹ The Kenyan constitution provides that democracy is a national value.⁷² Therefore, a state that respects the sovereignty of its people and upholds democracy cannot ignore their wishes.

However, Lumumba's book informed this study's conception of constitutionalism, providing a definition and listing the characteristics of a constitutional government based on constitutional values and principles. The public opinion argument is countered using Lumumba and a study by ACmHPR.⁷³ The study lays out paternalistic rebuttals by abolitionists. It states that a key responsibility of a democratic state is to lead and educate its people.⁷⁴

The Commission's study describes a number of issues with the death penalty, they include: the death penalty is cruel, inhumane and degrading treatment because of the death row syndrome; and in the case of error when carrying out an execution or where the execution is a gruesome public display, it is traumatizing on prison staff and the executor and the death penalty system is more expensive than an alternative system in which the maximum sentence is life imprisonment.⁷⁵ Where a state is aware of all these factors, it would seem that they would be justified in acting against public opinion where it is in the best interests of the public.

Novak opines that in Kenya, the use of the mandatory death penalty for crimes other than murder has been a means by which political opponents have been targeted by the government.⁷⁶ This provides the study with insight on some of the effects of the uncertain formulation of article 26 (3).

⁷⁰ Novak A, 'Constitutional reform and abolition of the death penalty in Kenya', 45.

⁷¹ Article 1 (1), *Constitution of Kenya* (2010).

⁷² Article 10, *Constitution of Kenya* (2010).

⁷³ *ACmHPR Study on the question of the death penalty in Africa*.

⁷⁴ *ACmHPR Study on the question of the death penalty in Africa*, 41.

⁷⁵ *ACmHPR Study on the question of the death penalty in Africa*, 42.

⁷⁶ Novak A, 'Constitutional reform and abolition of the death penalty in Kenya', 54.

3.2.2 On the death penalty within the Penal Code from the perspective of the Bill of Rights

Addressing this research question required reliance primarily on:

- a. Novak A, (2011).⁷⁷
- b. Chenwi L, (2007).⁷⁸
- c. Mbondenyei MK and Ambani J, (2014).⁷⁹

Ambani's book was relied on to conceptualise human rights within the Kenyan context. He defines human rights and describes their inherent nature. He also discusses the importance of a bill of rights and connects it to the reason why there was a need for constitutional review of the 1963 Kenyan constitution.⁸⁰

According to Novak, *Mutiso* was at the time the leading case on a constitutional challenge of the death penalty. He discussed the three constitutional provisions examined in the case. provisions were on the right to life, the right to be free from cruel, inhumane, or degrading treatment or punishment, and the right to a fair trial.

On the other hand, Chenwi writes broadly on the ways in which the death penalty's operation in Africa conflicts with human rights. She delves into the qualified and unqualified nature of the right to life provided for under the constitutions of African State.⁸¹ Chenwi concludes that it is proper for African states to join the international trend for death penalty abolition because it conflicts with human rights, its retentionist justifications are fundamentally flawed, and there are alternatives to the death penalty which can be implemented in Africa.

This position clarifies the research problem and addresses the first research question by emphasizing the importance of phrasing: it states that it is the formulation of the right to life in constitutions that obstructs the abolition of the death penalty.⁸² While the author has not examined the Kenyan constitution specifically the insight provided by her general analysis of

⁷⁷ Novak A, 'Constitutional reform and abolition of the death penalty in Kenya'.

⁷⁸ Chenwi L, *Towards the abolition of the death penalty in Africa; A human rights perspective*, Pretoria University Law Press, Pretoria, 2007.

⁷⁹ Mbondenyei MK and Ambani J, *The new constitutional law of Kenya*.

⁸⁰ Mbondenyei MK and Ambani J, *The new constitutional law of Kenya*, 155-160.

⁸¹ Chenwi L, *Towards the abolition of the death penalty in Africa*, 74.

⁸² Chenwi L, *Towards the abolition of the death penalty in Africa*, 77.

constitutions with limited and absolute provisions on the right to life is helpful. Her book is relevant to the theoretical framework because of her detailed addresses of: the right to life, right to a fair trial and the prohibition of cruel degrading and inhumane treatment.

The literature examined is in agreement on the status of Kenya as a de facto abolitionist state. There is also general consensus on the fact that the current operation of the death penalty in Kenya leads to the death row syndrome. The position that the death penalty is a human rights issue and can be constitutionally challenged is popular as the human rights reports have shown. However, scientific publications on the death penalty in Africa and Kenya are scarce. Most of the literature on the death penalty in Kenya is focused on the abolition of the mandatory imposition of the death penalty rather than the abolition of the penalty itself.

In the following chapter the Kenyan bill of rights shall be examined in greater detail to determine if its provisions can be interpreted as supporting the abolition of the death penalty.

4.0 Chapter Four: Understanding the death penalty in light of the bill of rights

In determining the constitutionality of the mandatory nature of the death penalty, the Supreme Court stated “it is imperative to consider certain constitutional provisions in relation to the above”.⁸³ Using the same method, this study shall analyze the constitutionality of the death penalty in the logic of the bill of rights. While the right to life is central to the discussion, other constitutional rights will be examined in so far as they contribute to the death penalty debate.

4.1 The Right to Life under article 26 (3)⁸⁴

The right to life recognises that a human being is entitled to live and particularly, not be killed by another human being. In Kenya, life begins at conception.⁸⁵ Once a human being is conceived, the state has an obligation to protect and promote their enjoyment of the right to life.

Like Chenwi, the ACmHPR’s study on the death penalty states the right to life is a cardinal human right.⁸⁶ The commission and the author agree that the death penalty is incompatible with the right to life as provided in article 3 of the UDHR.⁸⁷ Chenwi states: “I am of the view that the application of the death penalty in Africa is, therefore, a violation of the right to life guaranteed under article 3 of the UDHR, which is binding on states as it constitutes customary international law.”⁸⁸ The CCPR takes the definitive view that the right to life is supreme and cannot be derogated from even in times of public emergency.⁸⁹

While the international consensus is that the right to life is a fundamental right, this does not mean that fundamental rights are universally absolute⁹⁰. The right to life in Kenya is a qualified right as opposed to absolute.⁹¹ The debate is on whether the right to life ought to be recognized

⁸³ *Francis Karioko Muruatetu & another v Republic* (2017) eKLR, para. 35.

⁸⁴ Article 26 (3), *Constitution of Kenya* (2010).

⁸⁵ Article 26 (2), *Constitution of Kenya* (2010).

⁸⁶ *ACmHPR Study on the question of the death penalty in Africa*, 19.

⁸⁷ Chenwi L, *Towards the abolition of the death penalty in Africa*, 59.

⁸⁸ Chenwi L, *Towards the abolition of the death penalty in Africa*, 59.

⁸⁹ *CCPR General Comment No 6, Article 6 (right to life)*, 30 April 1982, 1.

⁹⁰ Schabas W, 55 (3) ‘International Law and Abolition of the Death Penalty’ *Washington and Lee Law Review*, 1998, 208.

⁹¹ Article 26 (3), *Constitution of Kenya* (2010).

as non-derogable. *Muruatetu* makes reference to the CCPR's assertion of the right to life as the most fundamental.⁹²

This study hypothesizes that if the issue was examined in detail, it would find the right to life should have been provided for in the constitution without any limiting terms. The study examines the death penalty based on the fact that article 26 (3) does not provide for an absolute right to life which makes it difficult to challenge the constitutionality of the death penalty.⁹³

The right to life can be qualified in two ways: by stating it may not be deprived arbitrarily or by stating that one can be deprived of life in execution of a sentence of a court.⁹⁴ This study does not consider article 26 (3) to be a clearly defined qualification, when compared to other constitutional provisions on the right to life in countries such as Nigeria, which utilize a savings clause similar to the one in the 1963 Kenyan constitution. The main difference between the two qualified provisions, article 71 and article 26 (3) is that the latter allows for a constitutional challenge of the death penalty that depends on the court's interpretation of the provision.⁹⁵

The 1963 constitution envisioned instances where the right to life could be limited. It provided for circumstances such as defence from violence, defence of property, effecting a lawful arrest, suppressing riots and, in the prevention of a criminal offence.⁹⁶

Using the examples provided by article 71 (2), it is true that there could be, implied under article 26(3), reasonable limitations on the right to life. Self-defence can be one of them because the right to life cannot realistically admit to having no qualifications whatsoever.⁹⁷ However, this study concerns itself with state-sanctioned limitations on the right to life, specifically the death penalty.

In *S v Makwanyane*, the Constitutional Court stated that the right to life includes the right of every person not to be deliberately killed by the State through a systematically planned act of execution as a mode of punishment.⁹⁸ It differentiated between the death penalty and self-

⁹² *Francis Karioko Muruatetu & another v Republic* (2017) eKLR, para. 33.

⁹³ Chenwi L, *Towards the abolition of the death penalty in Africa*, 74.

⁹⁴ Chenwi L, *Towards the abolition of the death penalty in Africa*, 74.

⁹⁵ Chenwi L, *Towards the abolition of the death penalty in Africa*, 74.

⁹⁶ Article 71 (2), *Constitution of Kenya* (2010).

⁹⁷ *ACmHPR Study on the question of the death penalty in Africa*, 43.

⁹⁸ *S v Makwanyane and another* (1995), Constitutional Court of South Africa, para.269.

defence by saying: “The deliberate annihilation of the life of a person, systematically planned by the State as a mode of punishment, is wholly and qualitatively different. It is not like the act of killing in self-defence, an act justifiable in the defence of the clear right of the victim to the preservation of his life. It is not performed in a state of sudden emergency, or under the extraordinary pressures which operate when insurrections are confronted or when the State defends itself during war”.⁹⁹ The case rationale proposes that taking a life in self defence is justifiable but the state taking a life as punishment is not.

Limiting the state’s power to repeal the right to life, be it through shoot to kill orders or the death penalty, is an objective of constitutionalism. Notably the provisions of the bill of rights are binding on all law and state organs.¹⁰⁰ Despite the formulation of article 26 (3), article 20 provides that everyone shall enjoy a right to the greatest extent consistent with the nature of that right¹⁰¹. The nature of the right to life shall be discussed in the examination of the provisions on the limitation of rights.

4.2 Limitation of rights and fundamental freedoms under article 24¹⁰²

Since the right to life is limited it is important to examine the constitutional provisions on the limitations of rights under Article 24 (1) which states:

“A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- a) the nature of the right or fundamental freedom;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;
- d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

⁹⁹ *S v Makwanyane and another* (1995), Constitutional Court of South Africa para. 270.

¹⁰⁰ Article 20 (1), *Constitution of Kenya* (2010).

¹⁰¹ Article 20 (2), *Constitution of Kenya* (2010).

¹⁰² Article 24, *Constitution of Kenya* (2010).

- e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose”.

The primacy of the right to life is that it enables the enjoyment of other rights. This quality amplifies the severity of the death penalty as a mode of punishment. The importance of the death penalty’s purpose can be gauged by questioning whether it meets the goals of punishment. According to the 2016 Judiciary of Kenya Sentencing Policy Guidelines referenced in *Muruatetu*, sentences are imposed to meet the objectives of retribution, deterrence both general and specific, rehabilitation, restorative justice, community protection and denunciation.¹⁰³

Proponents of the death penalty argue that it is effective as retribution and for specific deterrence, community protection and denunciation. Specific deterrence is the inhibition of the offender’s recidivism. While this study agrees that the death penalty is effective as a specific deterrence measure, opponents of the death penalty sustain that this mode of deterrence undermines the goals of rehabilitation and restorative justice.

Furthermore, there is little proof of its efficiency in general deterrence. General deterrence is the discouragement of the public from committing similar offences. A comparison between retentionists and abolitionist states suggests little correlation between capital punishment and the number of capital offences committed.¹⁰⁴

The death penalty in Kenya serves as a poorer deterrent because it is not being utilized fully: it has not been effected since 1987.¹⁰⁵ More death row convicts have had their terms commuted to life imprisonment than have been executed.¹⁰⁶ The best deterrents are punishments which are sure and quick, unlike spending years on death row.¹⁰⁷

The provision in article 24 (1) (d) on the need to ensure one’s right to life does not prejudice the rights of others can be considered together with article 24 (1) (e). Article 24 (1) (e) provides

¹⁰³ *Francis Karioko Muruatetu & another v Republic* (2017) eKLR, para. 92.

¹⁰⁴ *ACmHPR Study on the question of the death penalty in Africa*, 39.

¹⁰⁵ *UN Committee against Torture Concluding observations on the second periodic report of Kenya, adopted by the Committee at its fiftieth session (6 to 31 May 2013)*, 19 June 2013, CAT/C/KEN/CO/2, 11.

¹⁰⁶ Robert Oduol, G21 Africa Capital Punishment: Texas to Kenya, 12 September 2005, — <http://archive.li/yRpB3> on 27 February 2018.

¹⁰⁷ *ACmHPR Study on the question of the death penalty in Africa*, 38.

for the relation between the death penalty's purpose and whether there are less restrictive means to achieve the purpose. Allowing for the continued existence of the offender may prejudice the rights and freedoms of others. However, the right to life of a person who has committed a capital offence is equal to that of any other citizen. The finality of the death penalty makes it more important to investigate alternative means of effecting punishment.

This study agrees with the Supreme Court in *Muruatetu* that the death penalty is an exceptional form of punishment.¹⁰⁸ The right to life if limited should be limited in the same manner as other rights. For example, when freedom of movement is limited by a curfew during a state of emergency, it is not an absolute limitation. The limitation is location and time specific and the freedom can be restored after a change of circumstances. The death penalty leaves no room for any manner of enjoyment of the right to life when executed: it is irreversible and irrevocable.¹⁰⁹

Life imprisonment could be a less restrictive means of effecting the goals of punishment. Opponents of this stance raise the theory of proportionality as an issue. Proportionality maintains that the punishment should fit the crime, which means the death penalty should be reserved for the most serious crimes of which the offenders are effectively culpable. The National Constitutional Conference (NCC) relied on proportionality when they removed the express provision abolishing the death penalty from the Bomas Draft stating: "people who commit heinous crimes should be punished as harshly as possible".¹¹⁰

The internationally recognized crimes considered most serious include crimes against humanity, genocide and war crimes. The national system should treat their most serious crimes with the same respect for human rights as the international system treats theirs. For grave crimes, the greatest penalties that have been imposed by the International Criminal Court, International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia are variations on life imprisonment.¹¹¹

¹⁰⁸ *Francis Karioko Muruatetu & another v Republic* (2017) eKLR, para. 53.

¹⁰⁹ *ACmHPR Study on the question of the death penalty in Africa*, 39.

¹¹⁰ 'Abolition of the death penalty in Kenya' Kenya National Commission on Human Rights, Position paper N0 2, 2007, 3- <http://www.knchr.org/Portals/0/CivilAndPoliticalReports/PP2%20-%20Abolition%20of%20the%20death%20penalty%20-%20final.pdf> on 28 February 2018.

¹¹¹ Chenwi L, *Towards the abolition of the death penalty in Africa*, 35.

Life imprisonment is a less restrictive means of achieving the goals of punishment. It is more congruent with human rights than the death penalty. Therefore, when the NCC prescribed the harshest punishment possible, the death penalty should not have been envisioned as a possibility.

4.3 The death penalty and article 28 on human dignity

Human dignity is a foundational value for any bill of rights as well as a right. Indeed, article 28 of the constitution provides:

“Every person has inherent dignity and the right to have that dignity respected and protected.”

The United Nations Commission on Human Rights (UNCHR) is convinced that “abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights”.¹¹² Article 19 (2) provides that the purpose of recognizing and protecting human rights is to preserve the dignity of individuals and communities.¹¹³ Logically, if all due respect was accorded to human dignity, there could be no justification for the denial of the right to life of convicts, even in denunciation and retribution-centered justice systems.¹¹⁴ This is based on the reasoning that human beings cannot be treated as a means to an end or an ‘article of crime prevention’.¹¹⁵ The act of taking a human life to achieve a set of goals is degrading to human dignity, more so when the death penalty is not an efficient means of achieving most goals of punishment.

The concept of human dignity in relation to the death penalty is tied to other provisions within the bill of rights including access to justice and freedom and security of the person under which the freedom from cruel, inhumane and degrading treatment is provided.

Muruatetu abolished the mandatory death penalty in deference to the right of access to justice and the right to fair trial. Even with a discretionary death penalty that allows for appeal, there

¹¹² *Question of the death penalty*, UNCHR, 1998, UN Doc E/CN.4/1998/8.

¹¹³ Article 19 (2), *Constitution of Kenya* (2010).

¹¹⁴ Lubulellah E, “Mandatory’ Death Penalty in Kenya: an Examination of Its Legality in Light of the Constitution of Kenya 2010 and the “right to freedom from inhuman or degrading treatment or punishment”” Published LLM Thesis, University of Nairobi, Nairobi, 99.

¹¹⁵ Lubulellah E, ‘Mandatory’ Death Penalty in Kenya: an Examination of Its Legality in Light of the Constitution of Kenya 2010 and the “right to freedom from inhuman or degrading treatment or punishment” ’ Published LLM Thesis, University of Nairobi, Nairobi, 99-100.

is always the risk of erroneous conviction. Respect of fair trial rights and due process mitigates this risk. However, the only guarantee to prevent the death of innocents and uphold the integrity of the right to life is abolition of the death penalty.

Ignoring the possibility of erroneous convictions, death row convicts suffer numerous violations of their dignity within the penal system. Kenyan courts legally continue to pass death sentences but executions are not carried out. Notwithstanding commutation of death sentences, this leads to a situation whereby the number of death row convicts keeps increasing without a corresponding increase or improvement in holding facilities and conditions.¹¹⁶ Prisons in Kenya are challenged by severe overcrowding.¹¹⁷ Due to this, the Kenyan prisons service is unable to provide adequate living conditions, and access to medical and psychiatric care.¹¹⁸ This lack is felt more gravely by death row convicts.¹¹⁹

This situation and the death row syndrome violates personal dignity through the violation of freedom and security of the person which provides for freedom from cruel, inhumane or degrading treatment: a freedom which cannot be limited.¹²⁰

¹¹⁶ *ACmHPR Study on the question of the death penalty in Africa*, 48.

¹¹⁷ Namyalo D and Macalesher J, 'The abolition of the death penalty and its alternative sanction in East Africa: Kenya and Uganda', 17.

¹¹⁸ Namyalo D and Macalesher J, 'The abolition of the death penalty and its alternative sanction in East Africa: Kenya and Uganda', 17.

¹¹⁹ Namyalo D and Macalesher J, 'The abolition of the death penalty and its alternative sanction in East Africa: Kenya and Uganda', 17.

¹²⁰ Article 25 and 29, *Constitution of Kenya* (2010).

5.0 Chapter Five: Conclusion and Recommendations

5.1 Conclusion

It is about time that Kenya's de facto abolitionist status shifted to a de jure abolitionist one. Its current status allows for the possibility that the death penalty can be executed in the event of a president willing to sign execution warrants.¹²¹

An examination of article 26 (3) showed that technically, its ambiguity does not prevent the Penal Code or any other written law to prescribe the death penalty. However as shown, a further analysis of the constitution leads to the conclusion that other written law should not prescribe rules which are inconsistent with the constitution. The death penalty is antithetical to the constitutional provisions and to the spirit of the Constitution.¹²² Maintaining the irrevocable death penalty provisions in the penal code when there are less restrictive limitations is illogical.

The abolition of mandatory death sentencing does not facilitate access to justice. It does not completely erode cruel, inhumane and degrading treatment because it creates a situation that exacerbates poor living conditions for death row convicts. All these factors go against human dignity, a value that the constitution purposes to promote and protect.

The abolition of mandatory death sentencing in *Muruatetu*, signals the potential complete abolition of the death penalty. It is this study's prediction that if a constitutional challenge to the death penalty arose, the judiciary would rule in favor of it. It is envisaged that Kenya will one day become a de jure abolitionist state. Instead of waiting for a constitutional challenge to be brought before the courts via public interest litigation, the study provides recommendations towards the move to complete abolition of the death penalty.

5.2 Recommendations

As a provisional measure, the government can establish an official moratorium on both sentencing offenders to death and execution of the penalty itself. The permanent measures for the abolition of the death penalty in Kenyan law would include:

¹²¹ *ACmHPR Study on the question of the death penalty in Africa*, 49.

¹²² *Godfrey Ngotho Mutiso v Republic*, (2010) eKLR, para. 36.

5.2.1 Amendment of the Penal Code

The possibility of parliament should abolish in law the death penalty by eliminating it as a form of punishment under section 24 and 25 of the Penal Code Act as well as from the five capital offences provisions; sections 40, 60, 204, 296 (2) and 297 (2).

Abolition of the death penalty through the proposed means would create a need for an alternative penalty to replace it.

The theory that punishments ought to be proportionate to the crime can still be respected even with the abolition of the death penalty. Currently the alternative sanction to the death penalty in Kenya is life imprisonment without the possibility of parole.¹²³ Life imprisonment, can serve the purposes of deterrence, retribution and rehabilitation. There has been no proof that the death penalty is a more effective deterrent than life imprisonment.¹²⁴

The challenge of life imprisonment as an alternative sanction in Kenya is the poor living conditions in prisons. This study recommends the adoption of a prisons reform strategy, through the Ministry of Interior and Coordination of National Government, with the mission of ensuring that living conditions in prisons are consistent with international human rights standards and norms.

5.2.2 Constitutional Amendment

After the 2010 constitution it was felt by many that the wording of article 26 (3) was progressing towards abolition of the death penalty in a very near future. However, this has not been the case as eight years later the penalty still exists de jure.

The provision of article 26(3) is constitutional. The issue is that the constitution does not justify the death penalty. If the penal code is not amended, to clarify the matter, it would be best if the article 26 expressly abolished the death penalty. The same effect could be achieved if article 26 was provided for in absolute, non-qualified terms.

¹²³ Namyalo D and Macalesher J, 'The abolition of the death penalty and its alternative sanction in East Africa: Kenya and Uganda', 6.

¹²⁴ Chenwi L, *Towards the abolition of the death penalty in Africa*, 208.

Amendment of the constitution occurs by parliamentary initiative or popular initiative.¹²⁵ Both ways would require the amendment to be approved through national referendum because it relates to the bill of rights.¹²⁶

Alternatively, the parliament could make a request/reference to the Office of the Attorney General to interpret article 26(3) with the aim of effectively abolishing the death penalty.

5.2.3 Ratification of International Treaties on the Death Penalty

If the penal code or constitution is not amended, the Government, through the office of the attorney general, should facilitate the signing and ratification of the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty which would lead the state to harmonize its laws to meet its international obligations.¹²⁷

¹²⁵ Articles 256 and 257, *Constitution of Kenya* (2010).

¹²⁶ Article 255 (1), *Constitution of Kenya* (2010).

¹²⁷ Namyalo D and Macalesher J, 'The abolition of the death penalty and its alternative sanction in East Africa: Kenya and Uganda', 21.

Bibliography

Books

Chenwi L, *Towards the abolition of the death penalty in Africa: A human rights perspective*, Pretoria University Law Press, Pretoria, 2007.

Lumumba PLO and Franceschi L, *The constitution of Kenya 2010: An introductory commentary*, Strathmore University Press, Nairobi, 2014.

Mbondenyi MK and Ambani J, *The new constitutional law of Kenya: Principles, government and human rights*, LawAfrica Publishing, Nairobi, 2014.

Thomas Aquinas, 'Summa Theologiae' Prima Secundae.

Chapter in Book

Chynoweth P, 'Legal Research' in Knight A and Ruddock L (eds) 1st ed *Advanced research methods in the built environment*, Wiley-Blackwell, Chichester, 2008.

Journals

Khatiwada A, 'Interpreting the Constitution: The Formalism and Contextualism Debate' 2(1) *National Judicial Academy Law Journal*, 2008.

Leiter B, 'Legal formalism and legal realism: what is the issue?' 16(2), *Legal Theory Journal*, 2010, 111-133.

Novak A, 'Constitutional reform and abolition of the death penalty in Kenya' 45 (2) *Suffolk Law Review*, 285-356.

Schabas W, 'International Law and Abolition of the Death Penalty' 55 (3) *Washington and Lee Law Review*, 1998.

Working Papers, Discussion Papers and Research Papers

'Abolition of the death penalty in Kenya' Kenya National Commission on Human Rights, Position paper N0 2, 2007, 3 —

<http://www.knchr.org/Portals/0/CivilAndPoliticalReports/PP2%20-%20Abolition%20of%20the%20death%20penalty%20-%20final.pdf>>.

Namyalo D and Macalesher J, 'The abolition of the death penalty and its alternative sanction in East Africa: Kenya and Uganda' Penal Reform International, Research Paper, 2012, 8 — <https://www.penalreform.org/wp-content/uploads/2013/05/East-Africa-research-report-on-death-penalty-and-life-imprisonment.pdf>>.

United Nations General Assembly documents

UNGA, *The universal declaration of human rights*, UN A/Res/217/(III) 10 December 1948.

UNGA, *Moratorium on the use of the death penalty*, UN A/Res/65/206 (21 December 2010).

Other United Nations documents

CCPR General Comment No 6, Article 6 (right to life), 30 April 1982.

UN Committee against Torture Concluding observations on the second periodic report of Kenya, adopted by the Committee at its fiftieth session (6 to 31 May 2013), 19 June 2013, CAT/C/KEN/CO/2.

UN HRC National Report of Kenya Submitted in Accordance with Paragraph 15(a) of the Annex to the Human Rights Council Resolution 5/1, A/HRC/WG.6/8/KEN/1, 22 February 2010.

UNCHR Question of the death penalty, UN Doc E/CN.4/1998/8.

Institutional Reports

ACmHPR Study on the question of the death penalty in Africa submitted by the working group on the death penalty in Africa in accordance with Resolution ACHPR/Res.79 (XXXVIII) 05, 19 April 2012.

Amnesty International, *Abolitionist and retentionist countries as of march 2018*, 1 — <https://www.amnesty.org/en/documents/act50/6665/2017/en/>>.

Newspapers

Franceschi L, 'The supreme court almost killed the death penalty' Daily Nation, 15 December 2017—<<https://www.nation.co.ke/oped/blogs/dot9/franceschi/2274464-4229722-galmy3/index.html>>.

'Kenya death inmates to serve life' Daily Nation, 3 August 2009, —<<https://www.nation.co.ke/news/1056-634012-jn68qoz/index.html>>.

Kenya parliament maintains death penalty, afrol News, 2 August 2007, —<<http://www.afrol.com/articles/26311>>.

Robert Oduol, G21 Africa Capital Punishment: Texas to Kenya, 12 September 2005, —<<http://archive.li/yRpB3>>

Internet resources

Burns H. Weston, 'Human rights', 20 March 2014, Encyclopaedia Britannica, -
<https://www.britannica.com/topic/human-rights> 21 February 2018.

—<<https://deathpenaltyinfo.org/time-death-row>>.

—

<http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/law/09_research_methodology/06_research_design/et/8152_et_et.pdf>.

Theses

Lubulellah E, 'Mandatory' Death Penalty in Kenya: an Examination of Its Legality in Light of the Constitution of Kenya 2010 and the "right to freedom from inhuman or degrading treatment or punishment"' Published LLM Thesis, University of Nairobi, Nairobi.

Dictionaries

Black's Law Dictionary, 8th ed.

