

A CASE FOR THE ABOLITION OF THE DEATH PENALTY

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Declaration

I, KARANJA WAWERU, 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: 28th March 2018

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

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ABSTRACT

Kenya has had the death penalty through 70 years of colonization and 54 years of independence. The punishment is handed down to capital offenders and although no one has ever been hanged in Kenya since 1982 the number of death row inmates is quite high. The death penalty involves the deprivation of the supreme right to life. A right which is protected under article 3 of the universal declaration of human rights,¹ article 6 of the ICCPR,² article 4 of the ACHPR³ and article 26 of the Kenyan constitution.⁴ Thus its existence not only violates the human right to life but also international norms and standards and human rights law. This paper will provide a case for the abolition of the death penalty by suggesting that the death penalty does not mitigate nor deter crime, that it infringes on the right to life and amounts to human torture, a practice that has no place in our modern society, that without a fool proof justice system, the risk of executing innocent persons cannot be ruled out and Such a miscarriage of justice would be permanent and finally that there is an alternative to the death penalty which is reform and rehabilitation.

The study mainly relied on case law, internet articles and various international and domestic legislation. It was mainly conducted through a desktop research and the use of books. This study found that there existed no evidence that the death penalty deters crime in Kenya. It also found that the death penalty infringes on the basic human right to life and amounts to torture. It also found that instances of miscarriages in justice have been quite numerous in the world. Many have been the times that scores of innocent persons have been wrongfully executed. This paper also found that there exist alternatives to the death penalty. It found that rehabilitation and reform have the possibility of changing some.

This paper recommends that Kenya should with immediate effect ratify the second optional protocol of the International Covenant on Civil and Political Rights (ICCPR) that aims towards the abolishment of the death penalty. It further recommends that Parliament makes the necessary amendments to the constitution and the penal code to abolish the death penalty from Kenya completely.

¹ Article 3 of the universal declaration of human rights

² Article 6 of the ICCPR

³ Article 4 of the ACHPR

⁴ Article 26 of the Kenyan constitution

LIST OF CASES

- a) Francis Kariuki Muruatetu & another v Republic & 5 others [2017] eKLR
- b) Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR
- c) Godfrey Ngotho Mutiso v Republic [2010] eKLR
- d) Attorney General v Susan Kigula & 417 Ors ((CONSTITUTIONAL APPEAL NO. 03 OF 2006)) [2009] UGSC 6 (21 January 2009
- e) Furman V Georgia(USA)
- f) Republic v Mohamed Abdow Mohamed [2013] eKLR

LEGAL INSTRUMENTS

- a) Constitution of Kenya 2010
- b) Kenya penal code (cap 63)
- c) Kenya Defence Forces Act
- d) Kenya Prisons Act
- e) International Covenant on Civil and Political Rights (ICCPR)
- f) African Charter on Human People Rights on the Right to Life (ACHPR)
- g) Protocol to The ACHPR On the Rights of Women
- h) African Charter on the Rights and Welfare of the Child
- i) Protocol to The American Convention on Human Rights to Abolish the Death Penalty(ACHR)

CHAPTER ONE: INTRODUCTION

1.1 Background to the study

The death penalty can be traced back to the first codification of the law in the world.⁵ In the 18th century BC the Hammurabi code of Babylon codified the death penalty for twenty crimes which at the time included murder⁶. The first ever death penalty was recorded in the 16th century in Egypt where a noble was killed with an axe for the use of sorcery⁷. Other great civilizations to codify the death penalty are the Hittites in the 14th century, the Athenians in the 7th century and most notably the romans in the 5th century⁸.

The introduction of the death penalty in Kenya came as a result of the colonization of Kenya by Great Britain in the 19th century.⁹ Britain historically allowed the death penalty where people were hanged in gallows, but during the time of William the conqueror the practice was outlawed and people were only allowed to take life during times of war¹⁰.

In pre-colonial Kenya, societies were not eager to take the lives of criminals even though they committed grave crimes such as murder.¹¹ For example, the Abanyoro of the Luhya community banished and exiled criminals for the most severe crimes.¹² The Luo on the other hand used compensation as punishment of severe crimes where a murderer married the widow of the man he had killed as compensation.¹³ The Akamba on the other hand used the policy of the blood price, where a murderer paid about fifteen cows to the victim's family as compensation for the life taken.¹⁴ The Muslims of coastal Kenya also used compensation through animals such as goats for crimes such as murder.¹⁵ The kikuyu community on the other hand exiled murderers and sexual offenders from the community.¹⁶

⁵ Michael H Reggio, History of the death Penalty

⁶ Michael H Reggio, History of the death Penalty

⁷ Michael H Reggio, History of the death Penalty

⁸ W. Schabas "The Abolition of the Death Penalty in International Law," Cambridge University Press, second edition, 1997.

⁹ Nyambega Gisesa, Origin and History of the death Penalty in Kenya 1st July 2014

¹⁰ Michael H Reggio, History of the death Penalty

¹¹ Nyambega Gisesa, Origin and History of the death Penalty in Kenya 1st July 2014

¹² Nyambega Gisesa, Origin and History of the death Penalty in Kenya 1st July 2014

¹³ Nyambega Gisesa, Origin and History of the death Penalty in Kenya 1st July 2014

¹⁴ Nyambega Gisesa, Origin and History of the death Penalty in Kenya 1st July 2014

¹⁵ REPUBLIC v MOHAMED ABDOW MOHAMED [2013] eKLR

¹⁶ Nyambega Gisesa, Origin and History of the death Penalty in Kenya 1st July 2014

Come 1893 with the colonization of Kenya by the British, the death penalty was introduced. Although not widely used, information at the time suggests that many people were wrongfully sentenced to death due to lack of fair trials and flawed justice systems¹⁷. The death penalty was instituted for the crimes of murder, treason and any violent felony.¹⁸ In the 1920s the infamous black peril was introduced in Kenya. This capital offence occurred when a black man bedded a white woman, which was termed as rape¹⁹. Between 1906 and 1958 about 459 people were executed in Kenya for various crimes excluding the Mau Mau executions²⁰. More than 1000 freedom fighters were executed in Kenya for treason, among them General Dedan Kimathi who was hanged at Kamiti maximum prison.²¹ Come the independence of Kenya in 1963 the death penalty was inherited from the British legal system²².

Today the death penalty is found in section 25 of the penal code which reads as follows, “where any person is sentenced to death; the form of the sentence shall be to the effect only that he is to suffer death in the manner authorized by law which in Kenya is by hanging. Also the Sentence of death shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years, but in lieu thereof the court shall sentence such person to be detained during the President’s pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct, and whilst so detained shall be deemed to be in legal custody. Also when a person has been sentenced to be detained during the President’s pleasure under subsection (2), the presiding judge shall forward to the President a copy of the notes of evidence taken on the trial, with a report in writing signed by him containing any recommendation or observations on the case he may think fit to make”²³. The death penalty is thus handed down to those who have been found guilty of capital offences like robbery with violence contrary to section 296 two of the penal code of Kenya²⁴.

¹⁷ Nyambega Gisesa, Origin and History of the death Penalty in Kenya 1st July 2014

¹⁸ Nyambega Gisesa, Origin and History of the death Penalty in Kenya 1st July 2014

¹⁹ <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Kenya> on 14th September 2017

²⁰ Nyambega Gisesa, Origin and History of the death Penalty in Kenya 1st July 2014

²¹ Joseph Karimi Kenya: 'Dedan Kimathi Was Buried at Lang'ata' 10 December 2001

²² Lilian Ngweno, Makers of a nation

²³ Section 25 Penal code of Kenya Cap 63

²⁴ Section 25 Penal code of Kenya Cap 63

In reality the death penalty has been abolished de facto. This means that although it has not been abolished, no execution has been carried out in Kenya since the hanging of Hezekiah Ochuka and Pancras Okumu in 1987 for their involvement in the 1982 coup²⁵. Although executions have not been carried out in Kenya since 1987, death penalties are still handed out in Kenya as seen in 2014 where a nurse was sentenced to death for carrying out an illegal abortion on a woman who then died in the process.²⁶ Also the number of death row inmates is quite high in Kenya. In 2016 President Kenyatta commuted the death sentences of over 2000 inmates on death row to life imprisonment²⁷. The same was done by his predecessor in 2009 where about 4000 death sentences were commuted to life imprisonment.²⁸ In 2016 Kenya participated in the 6th world congress against the death penalty in Oslo showing an intention to have the death penalty in Kenya.²⁹, thus one question can be asked, should the death penalty be completely abolished from the laws of Kenya?

1.2 Statement of the problem

As human beings we are all entitled to human rights, rights of which human beings cannot exist without. These rights are inherent to all mankind and should not be violated whatsoever the reason. One of these rights is the supreme right to life. It is true to say that all other human rights depend on the continuous protection of the right to life. Without the right of life one cannot enjoy the freedom of speech, the freedom of movement or any other right. The death penalty involves the deprivation of the supreme right to life. A right which is protected under article 3 of the universal declaration of human rights,³⁰ article 6 of the ICCPR,³¹ article 4 of the ACHPR³² and article 26 of the Kenyan constitution.³³ Thus its existence not only violates the human right to life but also international norms and standards and human rights law. Criminals are human persons who should be treated as such. The function of punishment in this modern society should be to reform persons and not to punish them punitively making the death penalty an outdated medieval form of punishment that amounts to state murder. Also Without a completely fool-

²⁵ <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Kenya> on 14th September 2017

²⁶ Paul Ogemba, Nurse sentenced to death for procuring abortion set free

²⁷ <https://deathpenaltyinfo.org/node/6590> on 14th September 2017

²⁸ <https://deathpenaltyinfo.org/node/6590> on 14th September 2017

²⁹ Gilbert Koech, Kenya to state position on death penalty at Oslo congress, June 22 2016

³⁰ Article 3 of the universal declaration of human rights

³¹ Article 6 of the ICCPR

³² Article 4 of the ACHPR

³³ Article 26 of the Kenyan constitution

proof justice system in Kenya the risk of putting innocent people to death via capital punishment cannot be ruled out thus, consequently the death penalty, must be and should be fully abolished.

1.3 Justification of the study

The death penalty infringes on two fundamental human rights, the right to life and the right to be protected from torture.³⁴ These two rights are protected by the constitution and the international bill of human rights.³⁵ Thus the death penalty is inhumane, unconstitutional and an unusual manner of punishment which should be abolished. Another issue relating to the death penalty is the fact that it is not reversible.³⁶ This implies that incase one is sentenced to death and later it is found that indeed he or she was not guilty, one would have paid for a crime they did not commit. On the other hand, other forms of punishment like life imprisonment, one can simply be released. This has been seen in cases where many innocent men and women have been wrongfully sentenced to death. One of the importance of punishment is that it deters and mitigates crime.³⁷ Most supporters of the death penalty support it on the grounds that is deters and mitigates crime. It is true to say that there is no credible evidence that the death penalty deters crime more effectively than any other forms of punishment.³⁸ Recently a research in Canada showed evidence of startling nature revealing quite the opposite. Twenty seven years after abolishing the death penalty, Canada saw a 44 per cent drop in murders across the country³⁹. This was also witnessed in many countries worldwide which had also abolished the death penalty.⁴⁰

1.4 Hypothesis

This paper infers the following

³⁴ <http://www.manskligarattigheter.se/en/human-rights/what-rights-are-there/right-to-life-the-death-penalty> on 22nd January 2018

³⁵ <http://www.manskligarattigheter.se/en/human-rights/what-rights-are-there/right-to-life-the-death-penalty> on 22nd January 2018

³⁶ Glen Norah, Death Penalty, Irreversible, Irreparable on 14th October 2013

³⁷ <https://www.casebriefs.com/blog/law/criminal-law/outline-criminal-law-law/concepts-of-punishment/justification-of-punishment/> on 22nd January 2018

³⁸ Theodore G Chiricos Punishment and Crime: An Examination of Some Empirical Evidence

³⁹ Frank W. Anderson, *A Concise History of Capital Punishment in Canada*. (Calgary: Frontier Publishing, 1973), 5

⁴⁰ Frank W. Anderson, *A Concise History of Capital Punishment in Canada*. (Calgary: Frontier Publishing, 1973), 5

- i. That when the death penalty is abolished, Kenya will comply with international norms and standards which all advocate for the abolition of the death penalty universally.
- ii. That when the death penalty is abolished it will guarantee the full protection by the law to the right to life, a right which cannot be suspended under any circumstance.
- iii. That if the death penalty is abolished in Kenya, then the levels of murders in the society will drop for execution of offenders does not deter crime it only increases it as proved by criminologists, where it was discovered that after an execution more murders subsequently take place for its publicity promotes crime rather than deter it.⁴¹ This was seen in North Carolina where the rate of murders dropped after executions by the state stopped.⁴²
- iv. That when the death penalty is abolished in Kenya the criminal justice system will serve its purpose of rehabilitation. A significant number of death row inmates may be rehabilitated and become better people. By opting not to kill the inmates the state gives death row inmates a chance to realize their mistakes and change their lives, beliefs and ways. Rehabilitation is better than retribution or revenge.⁴³ By executing murderers we are revenging the loss of a life.⁴⁴ The criminal justice in Kenya does not serve the purpose of revenge. A life for a life is a clear illustration of revenge in the criminal justice system.
- v. That when the death penalty is abolished in Kenya a miscarriage in justice will be easily reversible. Many are the times that innocent people are wrongfully sentenced to death via capital punishment. If the death penalty is abolished there exists no risk of putting innocent persons to death. It is true to say that wrongful conviction does take place and if a death sentence is carried out the lapse in justice is permanently irreversible.

1.5 Statement of objectives

This paper will seek to propose that the death penalty lacks a moral and legal direction for it infringes on human rights. The great Indian leader mahatma Gandhi once said that an eye for an

⁴¹ <https://nccadp.org/death-penalty-issue/failure-to-deter-crime/> On 14th September 2017

⁴² <https://nccadp.org/death-penalty-issue/failure-to-deter-crime/> On 14th September 2017

⁴³ <https://debatewise.org/debates/2777-rehabilitation-vs-retribution/> On 14th September 2017

⁴⁴ Eric Jaffe, *The Complicated Psychology of Revenge*, October 4th 2011

eye will make the world go blind. It can be argued that the death penalty is a tit for tat game. You take a life and yours is taken. Tit for tat is not a moral justification for ending one's life.

This paper will also seek to propose that there is a better alternative to the death penalty in the form of reform and rehabilitation through life imprisonment.⁴⁵ This has been seen in Kenya where both President Kibaki and President Uhuru Kenyatta have commuted more than 1000 thousand death penalties to life imprisonment.⁴⁶

This paper will also seek to propose that there is always a danger of executing innocent persons as long as the death penalty is in place. Many are times where innocent people are wrongfully sentenced to death. In the United States of America in the state of Missouri it has been recently discovered that about 170 people were wrongfully sentenced to death since 1976⁴⁷. Thus in Kenya there is always a risk that innocent lives maybe lost.

This paper will also seek to propose that the death penalty is an inhumane form and manner of punishment. That it is a form of human torture and barbarism that has no place in the modern civilized society.

This paper will also seek to propose that the death penalty does not deter nor mitigate crime. One of the major functions that punishment serves is that of deterring crime. If the punishment does not serve that purpose thus there is no reason for instituting it.

This paper will also seek to propose that there is a better alternative to compensate the families of the murder victims other than retribution. It will seek to propose that reform is better than retribution.

1.6 Research Questions

- i. Whether the death penalty is deterring crime in Kenya and whether there is a better alternative to the death penalty in Kenya.
- ii. Whether the society both internationally and locally supports the death penalty and Whether or not the death penalty should be abolished.
- iii. Whether or not the death penalty is humane and whether or not it puts us at risk of executing innocent persons

⁴⁵ <https://debatewise.org/debates/2777-rehabilitation-vs-retribution/> On 14th September 2017

⁴⁶ PSCU, Reprieve for 2,747 after Uhuru cuts their death sentences, October 4th 2016

⁴⁷ Jeremy Kohler, Court holds back Missouri execution ^l *St. Louis Post-Dispatch*, July 15, 2008.

iv. Whether or not the death penalty violates human rights and specifically the right to life.

1.7 Literature review

In the book *Capital Punishment*, a century of discontinuous debate the author's Steiker and Carol S. discuss one of the most disturbing cases of execution in the United States.⁴⁸ In 1906 a black man named Johnson was arrested for the alleged rape of a white woman. Although not proven guilty a mob gathered outside his jail and with the assistance of the guards themselves took him and lynched him from a bridge. They also shot him 50 times of which five of the shots came from the sheriff himself at point blank range⁴⁹. The leaders of this lynch mob were only sentenced to mere terms in prison only to be released earlier and greeted by thousands of crowds as heroes'. An innocent man was hanged for a crime in which he was indeed not guilty⁵⁰.

In the book *Killing McVeigh*, the author Jody Lynee, portrays how the act of retribution will not bring one closure.⁵¹ She infers that closure through life for a life as just a myth. She talks of the victim-offender relationship and how after execution it does not bring any form of closure to the victim's family. She demonstrates this with the case of Henry McVeigh. On the 19th of April, 1995, Timothy McVeigh detonated a two-ton truck bomb that felled the Alfred P. Murray Federal Building in Oklahoma City, killing 168 people. On the 11th of June 2001, an unprecedented 242 witnesses watched him die by lethal injection. Majority of the victims' families did not get the closure they deserved⁵².

Another notable piece of literature relating to the death penalty is that of *Furman vs. Georgia* debating the death penalty.⁵³ The book focuses on the death penalty in the United States and more specifically the case of *Furman vs. Georgia* which led to the temporary abolishment of the death penalty in the United States.⁵⁴

⁴⁸ Officers Protect Prisoner," *The Savannah Tribune*, February 10, 1906

⁴⁹ "Officers Protect Prisoner," *The Savannah Tribune*, February 10, 1906

⁵⁰ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1991311 on 14th September 2017

⁵¹ Jody Lynee, *Killing McVeigh* 2015

⁵² Jody Lynee, *Killing McVeigh* 2015

⁵³ D.J Herda, *Furman v. Georgia: The Death Penalty Case (Landmark Supreme Court Cases, Gold Edition)*

⁵⁴ D.J Herda, *Furman v. Georgia: The Death Penalty Case (Landmark Supreme Court Cases, Gold Edition)*

1.8 Theoretical Framework

Natural law is a moral theory which is regarded as the basis of all human action.⁵⁵ It is the law that tells us to do good and avoid evil. It was proposed by Thomas Aquinas during the 13th century.⁵⁶ According to him natural law was given to mankind or Christians by God. However, during the enlightenment period philosophers like Thomas Hobbes, John Locke and Thomas Paine brought new theories proposing that natural law was not given to us by God and that it comes from our basic humanity.⁵⁷ This implies that natural law exists in each and every human being simply because we are human. The theory of natural rights was introduced by Thomas Hobbes in his book the Leviathan.⁵⁸ According to him natural rights are moral ideas derived from natural law.⁵⁹ These rights include the right to liberty and life to name a few. These rights are inalienable implying that they are rights which are not given to us but they are grounded in our human nature, thus they cannot be taken away from us whatsoever the reason.⁶⁰ They are not like civic rights which are given by the government and thus the government can take them away. Since they are derived from natural law, we have them simply by being human. Also one of the main importance that punishment serves is that of deterring and mitigating crime.⁶¹ According to the Utilitarian theory, the death penalty is not meant to provide justice by taking revenge like for example an eye for an eye. This form of punishment is not also supposed to be retributive by nature, it is, however, meant to deter many criminals from committing crimes⁶². One of the major reasons that punishment exists, is that it deters the crime that took place. A recent report by amnesty international shows that within the countries that abolished the death penalty the level of murders in the society has significantly dropped.⁶³ So it is true to say that the death penalty does not deter nor mitigate crime and thus should be abolished. The death penalty is also rather backward and can be attributed to a backward theory of punishment, Retributivism.

⁵⁵ <https://www.iep.utm.edu/natlaw/> on 14th September 2017

⁵⁶ <https://plato.stanford.edu/entries/aquinas/> on 14th September 2017

⁵⁷ Rhonie Boateng, THE THEORETICAL FRAMEWORK OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, Aalborg University Denmark, 27th May 2014

⁵⁸ Thomas Hobbes, Leviathan

⁵⁹ Rhonie Boateng, THE THEORETICAL FRAMEWORK OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, Aalborg University Denmark, 27th May 2014

⁶⁰ Rhonie Boateng, THE THEORETICAL FRAMEWORK OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, Aalborg University Denmark, 27th May 2014

⁶¹ <https://www.casebriefs.com/blog/law/criminal-law/outline-criminal-law-law/concepts-of-punishment/justification-of-punishment/>

⁶² Leva, The Death Penalty: Utilitarian and Deontological Perspectives, 6th March 2011

⁶³ <https://www.amnesty.org/en/what-we-do/death-penalty/> on 14th September 2017

This theory of punishment relies on revenge to bring some form of closure. As seen in the book killing McVeigh this is a totally false notion.

1.9 Assumptions

While conducting my study I assume that there exists global legislation that seeks to abolish the death penalty. I also assume that the government of Kenya is also reviewing whether or not the death penalty should be abolished in Kenya.

1.10 Methodology

This research will mostly rely on online secondary sources which include case law, online sources, journals, articles with detailed information on the history and current status of the death penalty. Also the bulk of the work will be conducted through a desktop research since a field study will require a vast resources and time.

1.11 Limitations

During the course of my research it's only normal that I encounter various limitations. One major limitation I may encounter is the lack of enough resources since my research will mainly be limited to a desktop research. A field study would have provided a more conclusive results and answers in regards to the death penalty.

1.12 Chapter Breakdown

The paper will have five chapters which will all discuss different aspects relating to the topic. Below are the chapters

i. Chapter 1: Introduction

This chapter will serve as the introduction to the death penalty and lay a foundation to the topic of study. It will include, background of the problem, Statement of the problem, Purpose of the study and general aims, Hypothesis, Research questions and specific objectives, Importance, justification and rationale of the study. It will also include the Scope and the limitations of the study and the timelines.

ii. Chapter 2: Theoretical Framework

The second chapter of the paper will provide a theoretical framework through which will seek to establish the purpose of the death penalty and whether or not it

serves that purpose. It will also include theories that advocate for the abolishment of the death penalty.

iii. Chapter 3: Legal framework in regards to the death penalty.

Chapter 3 of the paper will constitute of the analysis and discussion of the legal framework that supports the death penalty and the legal framework that seeks to abolish the death penalty both locally and internationally.

iv. Chapter 4: Case study and Comparative study

This chapter will incorporate case studies in relation to the death penalty. It will outline the major cases both locally and internationally that are paving way for the abolishment of the death penalty in Kenya. It will also look at the death penalty in various jurisdictions.

v. Chapter 5: Findings, Conclusion and Recommendations

The objective of this chapter will be to provide and review the research findings in the wider context of the literature in the area. It will also provide the conclusion to the study and offer a number of recommendations.

1.13 Timeline

The research is to be undertaken within two academic semesters during 4th year, after which a comprehensive dissertation on the case for the abolition of the death penalty in Kenya containing all findings and facts with credible references and recommendations will be handed in.

Chapter one.....complete by 31st July 2017.

Chapter two.....complete by 31st August 2017

Chapter three..... complete by 30th September 2017

Chapter four..... complete by 31st December 2017

Chapter five.....complete by 31st January 2018

2. CHAPTER: TWO THEORETICAL FRAMEWORK

2.1 Introduction

As discussed in chapter one the death penalty involves the deprivation of the supreme right to life. A right which is protected under article 3 of the universal declaration of human rights, article 6 of the ICCPR, article 4 of the ACHPR and article 26 of the Kenyan constitution. Thus its existence not only violates the human right to life but also international norms and standards and human rights law. In this chapter will analyze the theoretical framework which will be used to provide the lens in which the death penalty will be looked at in relation to human rights and the right to life. The theoretical framework will also provide the context of interpreting the study and will establish an entry point into the death penalty further establishing the vision through which the statement problem will be looked at.

2.2 Natural Rights Theory

Natural law is a moral theory which is regarded as the basis of all human action.⁶⁴ It is the law that tells us to do good and avoid evil. It was proposed by Thomas Aquinas during the 13th century.⁶⁵ According to him natural law was given to mankind or Christians by God. However, during the enlightenment period philosophers like Thomas Hobbes, John Locke and Thomas Paine brought new theories proposing that natural law was not given to us by God and that it comes from our basic humanity.⁶⁶ This implies that natural law exists in each and every human being simply because we are human. The theory of natural rights was introduced by Thomas Hobbes in his book the Leviathan.⁶⁷ According to him natural rights are moral ideas derived from natural law. These rights include the right to liberty and life to name a few. These rights are inalienable implying that they are rights which are not given to us but they are grounded in our human nature, thus they cannot be taken away from us whatsoever the reason.⁶⁸ They are not like civic rights which are given by the government and thus the government can take them away. Since they are derived from natural law, we have them simply by being human.

⁶⁴ Kenneth Einar Himma, Natural Law

⁶⁵ McInerney, Ralph, 1992. Aquinas on Human Action. Washington: Catholic University of America Press.

⁶⁶ Rhonie Boateng, THE THEORETICAL FRAMEWORK OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, Aalborg University Denmark, 27th May 2014

⁶⁷ Thomas Hobbes, Leviathan

⁶⁸ Thomas Hobbes, Leviathan

In his book Human rights, Maurice Cranston describes human rights as universal moral rights which all men and women have.⁶⁹ He further implies that our nature as human beings has a moral worth which gives us our dignity which in turn gives us the ability to reason and differentiate from wrong and right.⁷⁰ It also gives us the ability to act morally.⁷¹ Today there exists the death penalty. It is mainly handed down to capital offenders. One of the most severe capital offence is that of murder. There exists no debate that murder is moral. At the same time, you cannot argue that capital punishment is not killing. It is killing which some say amounts to premeditated state murder.⁷² Many arguments put forth argue that the death penalty is immoral and infringes on a person natural and human rights. There exist many ethical theories on the morality of the death penalty. Some deem it moral and some deem it immoral. According to the utilitarian theory the death penalty is moral. It was created by Jeremy Bentham in the 18th century. This theory implies that the morality of an action is determined by its adherence to the Greatest Happiness Principle.⁷³ It guides us to make decisions that will bring and cause happiness to the greatest number of people in the society. It is concerned with the consequences of an action. Thus the death penalty in Kenya is justified if it causes happiness to the greatest number of people. If a murderer is executed, he will be prevented from taking more life making the society safer. At the same time his execution will deter other would be offenders from committing crime. Thus according to this theory the main reason to punish persons is to deter others from committing crimes.⁷⁴ So one question can be asked, does the death penalty deter crime? Multiple studies have reached various conclusions on the deterrent effect of the death penalty.⁷⁵

The majority of the studies prove and show that there exists not even the slightest credible statistical evidence that capital punishment reduces the rate of murders and capital crimes in the world.⁷⁶ Recently a research in Canada showed evidence of startling nature revealing quite the opposite. Twenty seven years after abolishing the death penalty, Canada saw a 44 per cent drop

⁶⁹ Maurice Cranston, what are Human rights, P36

⁷⁰ Maurice Cranston, what are Human rights, P36

⁷¹ Maurice Cranston, what are Human rights, P36

⁷² Michael Shammass, The Death Penalty Is Premeditated, Unconstitutional Murder, August 13 2013

⁷³ Alex Peterson, The Greatest Happiness Principle: John Stuart Mill, December 26 2010

⁷⁴ <https://definitions.uslegal.com/u/utilitarian-deterrence-theory/> on14th September 2017

⁷⁵ <https://www.nap.edu/read/13363/chapter/7> on14th September 2017

⁷⁶ <https://deathpenalty.procon.org/> on14th September 2017

in murders across the country⁷⁷. This was also witnessed in many countries worldwide which had also abolished the death penalty.⁷⁸ In a post dated January 15th 2015 titled it's time to execute the death penalty, H. Lee Sorokin a US Court of Appeals Judge, wrote: "In my view deterrence plays no part whatsoever. Persons contemplating murder do not sit around the kitchen table and say I won't commit this murder if I face the death penalty, but I will do it if the penalty is life without parole. I do not believe persons contemplating or committing murder plan to get caught or weigh the consequences. Statistics demonstrate that states without the death penalty have consistently lower murder rates than states with it, but frankly I think those statistics are immaterial and coincidental. Fear of the death penalty may cause a few to hesitate, but certainly not enough to keep it in force."⁷⁹

This stance on the lack of deterrence by the death penalty was also taken by another famous philosopher, Hugo Adam Bedau.⁸⁰ According to him most people who support the death penalty do so on the grounds that it deters crime.⁸¹ He further says that most people who commit capital crimes like treason and murder always think that they are too clever to get caught. He also gives an example of terrorists who commit crime in the name of honor and martyrdom. To him trying to threaten such persons with death is futile.⁸² Although a founder of Utilitarianism Bentham opposed the death penalty. To him no one benefits from the death penalty.⁸³ He illustrates this with an example. If you execute a criminal he no longer has no purpose to the society, but if you fine him or her then the money can be used to serve the greater good or the society.⁸⁴ Also according to him another reason to shun the death penalty is the fact that it is not reversible.⁸⁵ A miscarriage of justice would be permanent.

Also known as Kantianism, Deontology views the death penalty as both moral and immoral.⁸⁶ This is called the double effect principle.⁸⁷ This theory was founded by Immanuel Kant and mainly focuses on the intentions of an action. If the intention of the action is good, then the

⁷⁷ Frank W. Anderson, *A Concise History of Capital Punishment in Canada*. (Calgary: Frontier Publishing, 1973)

⁷⁸ <https://deathpenalty.procon.org/on14thSeptember2017>

⁷⁹ <https://deathpenalty.procon.org/view.answers.php?questionID=000983> on14th September 2017

⁸⁰ Adam Hugo Budeau, A case against the death penalty

⁸¹ Adam Hugo Budeau, A case against the death penalty

⁸² <http://deathpenalty.narod.ru/nauka/Thecas2.html> on14th September 2017

⁸³ <https://rsp9-yogarajah.weebly.com/jeremy-bentham-and-utilitarianism.html> on14th September 2017

⁸⁴ <https://rsp9-yogarajah.weebly.com/jeremy-bentham-and-utilitarianism.html> on14th September 2017

⁸⁵ <https://rsp9-yogarajah.weebly.com/jeremy-bentham-and-utilitarianism.html> on14th September 2017

⁸⁶ Determining The Morality of Capital Punishment Philosophy Essay." UK Essays.

⁸⁷ David Solomon, "Double Effect," *The Encyclopedia of Ethics*

action is moral. Kant supported the death penalty. According to him man could not live without law and consequently punishment.⁸⁸ If the law does not punish a crime, then the law is weak. He further implied that the severity of a punishment should be proportionate to the crime. Thus if you take a life yours is taken. The intention of the death penalty in this case would be to seek retribution for the victim's family. Many argue that without retribution one would be victimizing the victim's family.⁸⁹ However, at the same time, Deontologists argue that although some intentions may be good they might have negative consequences making this theory flawed.⁹⁰ By executing a murderer, you will be victimizing his family and close friends. They further argue that the death penalty is wrong since it leads to the violation of the right to life which is universal to them.⁹¹

Further according to natural law and Thomas Aquinas everything has a telos.⁹² Teleology or telos refers to the end.⁹³ Each and every action has an end and if the end is good then the action is moral. The telos of the death penalty according to the theories of punishment will be to deter crime, serve as retribution and to reform offenders.⁹⁴ The first and the third ends are good but according to Aristotle the second which is retribution is not.⁹⁵ This issue on retribution also appears in the deontology moral theory. Retribution is a theory of punishment. This theory of punishment seeks to inflict vengeance for a crime or a wrongful act.⁹⁶ It was most notably supported by Immanuel Kant.⁹⁷ He called it the principle of retaliation. If a person upsets the balance of society he or she should be punished and wrongdoers should suffer since they inflicted suffering on others⁹⁸. This theory of punishment can be traced back 1200 years before the birth of Christ in the mosaic law which stated that if a man caused disfigurement to his neighbor the same shall be done to him thus an eye for an eye, a tooth for a tooth, a limb for a limb, a fracture for a fracture and a life for a life. Thus in accordance with this theory of

⁸⁸ Determining The Morality of Capital Punishment Philosophy Essay." UK Essays.

⁸⁹ Determining The Morality of Capital Punishment Philosophy Essay." UK Essays.

⁹⁰ Determining The Morality of Capital Punishment Philosophy Essay." UK Essays.

⁹¹ Determining The Morality of Capital Punishment Philosophy Essay." UK Essays.

⁹² <http://www.newadvent.org/cathen/14474a.htm> on14th September 2017

⁹³ <https://rsp9-chantelle-levy.weebly.com/natural-law.html> on14th September 2017

⁹⁴ <http://law.jrank.org/pages/9576/Punishment-THEORIES-PUNISHMENT.html> on14th September 2017

⁹⁵ Thomas Aquinas Summa Theologica question 108

⁹⁶ <https://www.citelighter.com/philosophy/philosophy/knowledgecards/retributivist-theory-of-punishment> on14th September 2017

⁹⁷ <https://www.ukessays.com/essays/philosophy/immanuel-kant-retributive-theories-of-justice-philosophy-essay.php> on14th September 2017

⁹⁸ <http://www.dictionary.com/browse/retributivism> on14th September 2017

punishment the death penalty is justifiable in that if you take a life yours is taken. This theory contradicts the utilitarian theory which implies that, the death penalty is not meant to provide justice by taking “an eye for an eye” nor it’s not supposed to be retributive by nature, it is, however, meant to deter many criminals from committing murder.⁹⁹ In the true sense Retribution is another word for revenge or vengeance.¹⁰⁰ According to Thomas Aquinas revenge is unnatural therefor it is not moral.¹⁰¹ It is true to say that man’s first instinct if wronged or subjected to pain will be to inflict immediate pain on the one who caused him pain, but living in the 21st century the standards of this mature society demand we calm ourselves and think things through. In this century our laws have been made to demonstrate a higher respect for life, even the life of a murderer. Taking a life for a life extends the cycle of killing in the society. In the book killing McVeigh, the author Jody Lynee, portrays how the act of retribution will not bring one closure, especially bereaved family members.¹⁰² She infers that closure through life for a life as just a myth. She demonstrates this with the case of Timothy McVeigh. On the 19th of April, 1995, Timothy McVeigh detonated a two-ton truck bomb that felled the Alfred P. Murray Federal Building in Oklahoma City, killing 168 people.¹⁰³ On the 11th of June 2001, an unprecedented 242 witnesses watched him die by lethal injection.¹⁰⁴ Most of the victims’ families did not get the closure they deserved.¹⁰⁵ For example, Bud Welch's daughter, Julie, was killed in the bombing.¹⁰⁶ Although his first reaction was to wish that those who committed this terrible crime be killed, he ultimately realized that such killing "is simply vengeance; and it was that same vengeance that killed his beloved daughter Julie.¹⁰⁷ The notion of an eye for an eye, or a life for a life, is a simplistic notion, one which our society has never endorsed.¹⁰⁸ We do not allow torturing the torturer, or raping the rapist, stealing from the thief or even burning the arson. Why then should we execute the murderer? Retributivism is a rather backward theory of punishment

⁹⁹ <http://law.irank.org/pages/9576/Punishment-THEORIES-PUNISHMENT.html> on 14th September 2017

¹⁰⁰ Whitley R. P. Kaufman, Retribution and Revenge

¹⁰¹ Thomas Aquinas Summa Theologica question 108

¹⁰² Jody Lynee, Killing McVeigh, The Death Penalty and the Myth of Closure 2012

¹⁰³ Ryan Gorman, 20 years after the Oklahoma City bombing, Timothy McVeigh remains the only terrorist executed by US, April 19 2015

¹⁰⁴ Ryan Gorman, 20 years after the Oklahoma City bombing, Timothy McVeigh remains the only terrorist executed by US, April 19 2015

¹⁰⁵ Jody Lynee, Killing McVeigh, The Death Penalty and the Myth of Closure 2012

¹⁰⁶ Jody Lynee, Killing McVeigh, The Death Penalty and the Myth of Closure 2012

¹⁰⁷ Jody Lynee, Killing McVeigh, The Death Penalty and the Myth of Closure 2012

¹⁰⁸ <https://deathpenaltycurriculum.org/node/12> on 14th September 2017

and should not be used to justify the existence of the death penalty in Kenya and in the words of the great Mahatma Gandhi; an eye for an eye will make the whole world go blind. Thus the death penalty should be abolished in Kenya.

Lastly one of the telos of punishment is to reform persons which puts forth the reformatory theory of punishment.¹⁰⁹ This is the most humane theory of punishment. It focuses on reforming offenders and giving them another chance and a new life¹¹⁰. It puts forward the changing mentality of the modern society which views criminals as human and not inhuman. It focuses on making an offender realize his or her wrong and returning them to society as a changed and law abiding individual.¹¹¹ It secludes criminals from the society with the attempt to reform them and to prevent the offenders from social ostracism¹¹². This theory is relevant to the study for it brings into consideration the issue on human rights. Sentencing one to death constitutes the deprivation of the basic right to life.¹¹³ Reform is necessary to ensure that this principle and the right to life is respected and protected.¹¹⁴ Offenders and prisoners are human persons. Their rights need to be protected by the law. By protecting their rights we comply with the relevant international standards and norms.¹¹⁵ Everyone deserves a chance to correct his or her wrong. Even on the cross, Jesus Christ gave a chance to Saint Dismas who is famously known as the penitent thief. By sentencing persons to death we offer them no chance to do what is right. We offer them no chance to reform. The importance of this theory can be seen in the case of Susan Kigula who was a death row inmate in Luzira women's Prison in Uganda.¹¹⁶ She was sentenced to death for killing her husband. In prison she got a chance to study law and became the first woman in Uganda to graduate with a law diploma in prison. Through her knew acquired skills she returned to court to appeal the sentence. She led not only to her release but that of other death row inmates

¹⁰⁹ <http://law.irank.org/pages/9576/Punishment-THEORIES-PUNISHMENT.html> on 14th September 2017

¹¹⁰ Essays, UK. (November 2013). Determining The Morality of Capital Punishment Philosophy Essay. Retrieved from <https://www.ukessays.com/essays/philosophy/determining-the-morality-of-capital-punishment-philosophy-essay.php?cref=1> on 14th September 2017

¹¹¹ Tanu Priya, Reformatory Theory of Punishment, September 2nd 2014

¹¹² Shaswata Dutta, Theories of Punishment- A Socio-Legal View

¹¹³ <http://www.manskligarattigheter.se/en/human-rights/what-rights-are-there/right-to-life-the-death-penalty> on 14th September 2017

¹¹⁴ <http://www.manskligarattigheter.se/en/human-rights/what-rights-are-there/right-to-life-the-death-penalty> on 14th September 2017

¹¹⁵ <http://www.manskligarattigheter.se/en/human-rights/what-rights-are-there/right-to-life-the-death-penalty> on 14th September 2017

¹¹⁶ Susan Kigula & 416 Ors v Attorney General ((Constitutional Petition No. 6 of 2003)) [2005] UGCC 8 (10 June 2005);

in the prison. Today she travels around the world telling of her incredible story.¹¹⁷ Together with the former secretary general of the United Nations Ban Ki Moon they are advocating to abolish the death penalty and instead use prisons as correctional, rehabilitation and reformatory centers¹¹⁸. Her story shows that reform does really work. From the above the death penalty does not deter crime. It also infringes on human rights for it does not adhere to natural law and is rather backward for it relies on medieval theories of punishment. Human rights and in particular the right to life cannot be taken away by any government or sovereignty as they justify our existence and right to have a better life, equality, interdependency and the pursuit of happiness.

¹¹⁷ Susan Kigula & 416 Ors v Attorney General ((Constitutional Petition No. 6 of 2003)) [2005] UGCC 8 (10 June 2005);

¹¹⁸ Susan Kigula & 416 Ors v Attorney General ((Constitutional Petition No. 6 of 2003)) [2005] UGCC 8 (10 June 2005);

3. CHAPTER THREE: LEGAL FRAMEWORK

Currently Kenya has not abolished the death penalty thus there exists no legislative framework in Kenya that seeks to abolish the death penalty. However internationally, pressure is piling up to have the death penalty fully abolished worldwide. This chapter will look at the international legislation that is agitating towards the abolition of the death penalty.

3.1 International Covenant on Civil and Political Rights (ICCPR)

On the 19th of December 1966 the United Nations General Assembly adopted the ICCPR.¹¹⁹ On the 23rd of March 1976 it came into force.¹²⁰ This treaty recognizes a vast number of human rights. It also recognizes the inherent dignity of each and every individual.¹²¹ Together with the Universal Declaration of Human Rights, it makes up the international bill of human rights.¹²² Article six of the ICCPR protects the inherent right to life.¹²³ The article reads that the laws of each country should protect this right to life which should not be taken away arbitrarily.¹²⁴ The ICCPR does not explicitly prohibit the use of the death penalty, but it imposes strict sanctions on its use. It infers that for countries which have not abolished the death penalty like Kenya, its use should be limited to serious crimes.¹²⁵ However, the ICCPR fails to describe these serious crimes. It also infers that anyone who is sentenced to death can seek amnesty, a pardon or commutation of the sentence which may be granted at all times.¹²⁶ It also forbids the use of the death penalty on persons below the age of eighteen years and on pregnant women. The language used in the ICCPR strongly suggests an intention to abolish the death penalty.

3.2 Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the abolition of the Death Penalty

This protocol was introduced by states believing that the abolition of the death penalty protects and helps in the development of human rights.¹²⁷ Article one of the protocol infers that no state

¹¹⁹ International Covenant on Civil and Political Rights

¹²⁰ International Covenant on Civil and Political Rights

¹²¹ International Covenant on Civil and Political Rights

¹²² International Covenant on Civil and Political Rights

¹²³ Article 6 International Covenant on Civil and Political Rights

¹²⁴ Article 6 International Covenant on Civil and Political Rights

¹²⁵ Article 6 International Covenant on Civil and Political Rights

¹²⁶ Article 6 International Covenant on Civil and Political Rights

¹²⁷ International Covenant on Civil and Political Rights

party shall execute persons within its territory or jurisdiction.¹²⁸ It also requires the state parties to make all the necessary steps to abolish the death penalty within their jurisdictions.¹²⁹ Article 2 of the protocol further prohibits any reservations and only allows reservations only during times of war where the nature of the offence is quite serious.¹³⁰ Currently Kenya is a party to the ICCPR but is not a signatory.¹³¹ The protocol has 38 signatories and 85 parties.¹³²

3.3 American Convention on Human Rights

Also known as the pact of San Jose Costa Rica, the convention was adopted in 1969 by the Organization of American States and came into force in 1978.¹³³ Article 4 of the convention protects the right to life which it stipulates begins at conception.¹³⁴ It also infers that the right to life is an obsolete right and should be protected by the law. It infers that for countries that have not yet abolished the death penalty its use should be limited to only serious and heinous crimes.¹³⁵ It also forbids counties that have abolished the death penalty from re-introducing it. It also forbids the use of the death penalty on political offences. It also assures that anyone sentenced to death has the right to amnesty, pardon and commutation of the death sentence which may be granted in all cases. It further forbids the use of the death penalty on persons under the age of eighteen and those over 70 years of age.¹³⁶

3.4 Protocol to The American Convention on Human Rights to Abolish the Death Penalty

Under article 4 of the ACHR the right to life is recognized and protected. This right is a right that is recognized as a right to which each and every individual has. The protocol was adopted considering that each and every individual has the inalienable right to the respect of his or her

¹²⁸ Article one, Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty

¹²⁹ Article one, Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty

¹³⁰ Article two, Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty

¹³¹ <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Kenya> on 9th September 2017

¹³² https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-12&chapter=4&clang=en on 10th December 2017

¹³³ http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.html on 9th September 2017

¹³⁴ Article four, American Convention on Human Rights

¹³⁵ Article four, American Convention on Human Rights

¹³⁶ Article four, American Convention on Human Rights

life a right that cannot be suspended for whatever reason.¹³⁷ That the tendency among many American states is to have the death penalty abolished completely.¹³⁸ That the application of the death penalty has irreversible consequences and in case of a miscarriage of justice the results will be permanent and that the use of the death penalty makes it impossible to change and rehabilitate those who are convicted.¹³⁹ This optional protocol seeks to have the death penalty abolished from the Americas for its abolition will ensure for the protection of the right to life.

3.5 Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms which concern The Abolition of the Death Penalty

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was adopted in 1950 under the articles of the council of Europe.¹⁴⁰ It established the European court of Human rights.¹⁴¹ The ECHR was introduced to protect fundamental human rights and freedoms. Article 2 of the ECHR protects the right to life.¹⁴² On the 28th of April 1983 the member states of the council of Europe met in Strasbourg France and together they signed Protocol No. 6 of the ECHR which concerns the abolition of the Death Penalty.¹⁴³ Under article one of the protocol they agreed to abolish the death penalty inferring that no one shall be condemned to death nor executed.¹⁴⁴ Article 3 and 4 the protocol also forbade derogations and reservations respectively by any member state.¹⁴⁵ Protocol no 13 of the ECHR provides for the full abolition of the death penalty even during times of war.¹⁴⁶

¹³⁷ Protocol to The American Convention on Human Rights to Abolish the Death Penalty

¹³⁸ Protocol to The American Convention on Human Rights to Abolish the Death Penalty

¹³⁹ Protocol to The American Convention on Human Rights to Abolish the Death Penalty

¹⁴⁰ <http://www.manskligarattigheter.se/en/who-does-what/european-council/the-european-convention-on-human-rights-and-the-european-court-of-human-rights> on 1st of January 2018

¹⁴¹ John G Merills, European Court of Human Rights

¹⁴² Article 2 European Convention on Human Rights

¹⁴³ Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms which concern The Abolition of the Death Penalty

¹⁴⁴ Article 1, Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms which concern The Abolition of the Death Penalty

¹⁴⁵ Article 3 and 4, Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms which concern The Abolition of the Death Penalty

¹⁴⁶ Protocol no 13 of The European Convention on Human Rights

3.6 General Comment No 3 on the African Charter on Human People Rights on the Right to Life (Article 4)

Also known as the Banjul charter, the ACHR was adopted in 1998 where members agreed to form the African Court on Human and People's rights.¹⁴⁷ The charter came to effect on the 25th of January 2005.¹⁴⁸ The ACHPR does not however forbid the use of the death penalty but it sanctions its use. It implies that the use of the death penalty should be limited to only serious and heinous crimes. In 1999 an ACHPR session was held in Kigali and one of the main issues of concern was the death penalty.¹⁴⁹ The session further required countries to reflect on the issue of abolishing the death penalty completely. Article 4 of the charter deals with the right to life.¹⁵⁰ It implies that this is a right inherent to all human beings and should be protected by the law. However, there has been a recent development in regards to the ACHPR and the death penalty. General comment no 3 of article 4 proposes for the abolishment of the death penalty since it infringes on the right to life.¹⁵¹ Currently many countries in Africa have now abolished the death penalty. They include Rwanda and Malawi to name a few. Since the 23rd of January 1992 Kenya has been a party to the ACHPR.¹⁵²

3.7 Protocol to The ACHPR On the Rights of Women

This protocol strictly forbids any member state from carrying out capital punishment in the form of the death penalty on pregnant and nursing women.¹⁵³ This is found in article 4(g) of the protocol. Kenya is a party to the protocol which it signed on the 6th of October 2010.¹⁵⁴

3.8 African Charter on the Rights and Welfare of the Child

Article 5 of the charter deals with survival and development of children.¹⁵⁵ It recognizes each child's right to life, a right that should be protected by the law. It requires state parties to ensure maximum survival, protection and development of African children.¹⁵⁶ It also stipulates that the

¹⁴⁷ African Charter on Human People Rights

¹⁴⁸ African Charter on Human People Rights

¹⁴⁹ <http://www.achpr.org/instruments/kigali> on 9th September 2017

¹⁵⁰ Article 4 of the African Charter on Human People Rights

¹⁵¹ General Comment No 3 on the African Charter on Human People Rights on the Right to Life (Article 4)

¹⁵² <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Kenya> on 9th September 2017

¹⁵³ Protocol to The ACHPR On the Rights of Women

¹⁵⁴ <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Kenya> on 9th September 2017

¹⁵⁵ Article 5 of the African Charter on the Rights and Welfare of the Child

¹⁵⁶ Article 5 of the African Charter on the Rights and Welfare of the Child

death penalty should not be handed to children regardless of the crime.¹⁵⁷ It burns pronouncing of the death penalty to minors. Kenya has been a party to the charter since the 25th of July 2000.¹⁵⁸

3.9 Conclusion

In conclusion all the above covenants all touch on the right to life and the abolition of the death penalty. Further, the ACHR touches on instances where innocents may be sentenced to death. The right to life is found in article 3 of the UDHR, article 6 of the ICCPR, article 4 of the ACHR and article 4 of ACPHR. All these put forth the great importance to the right to life, a right that should be protected by the law and should not be suspended for whatever reason whatsoever.

Also, the language used on these international instruments shows a clear intention by the international community to have the death penalty abolished. Thus, Kenya should comply with international standards and abolish the death penalty.

¹⁵⁷ Article 5 of the African Charter on the Rights and Welfare of the Child

¹⁵⁸ <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Kenya> on 9th September 2017

4.CHAPTER 4: COMPARATIVE ANALYSIS

4.1: Introduction

As discussed in chapter 1, 2 and 3, this paper will seek to provide for a case for the abolition of the death penalty in Kenya. Currently, many regions of the world have abolished the death penalty, but by far the most progressive region which has abolished the death penalty is Europe. One of the main things that has led to the abolishment of the death penalty in Europe was the establishment of the council of Europe in 1949. This organization was established with the aim of upholding human rights, democracy and the rule of law in Europe. Currently all countries in Europe have abolished the death penalty apart from Russia and Belarus. This chapter will provide a comparative analysis of the death penalty in Europe and in Kenya.

4.2 Death Penalty in Europe and Kenya

Currently, the council of Europe is made up of 47 member states.¹⁵⁹ It is a requirement for all member states in the council to abolish the death penalty.¹⁶⁰ However, Russia and Belarus have not abolished the death penalty.¹⁶¹

The death penalty in Belarus has been enshrined in its laws since its independence from the Soviet Union on the 27th of July 1990. The country has executed more than 100 people since 1990, the last execution taking place in 2017 when they executed one person.¹⁶² The method of execution is by a bullet to the back of the head. However, in October 2005, the Belarusian parliament amended its criminal code to declare that the use of the death penalty was on a temporal basis until it is abolished since neither the president nor the parliament has the power to do so.¹⁶³ Also the existence of the death penalty in Belarus is accredited to the fact that Belarus is not a party to the ECHR.

On the other hand, although the death penalty exists in Russia, no person has been executed since 1996.¹⁶⁴ As mentioned above, one of the requirements of the council of Europe is that no

¹⁵⁹ <http://en.strasbourg-europe.eu/member-states,44987,en.html> on 14th January 2018

¹⁶⁰ Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty

¹⁶¹ <https://www.amnesty.org/en/what-we-do/death-penalty/> on 14th January 2018

¹⁶² <https://www.amnesty.org/en/press-releases/2009/03/belarus-time-end-executions-20090324/> on 14th January 2018

¹⁶³ DECISION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF BELARUS OF 17.04.2001 No. D-114/2001".

Constitutional Court of the Republic of Belarus on 14th January 2018

¹⁶⁴ Arthur Bright, India uses death penalty: 5 other places where it's legal but rare, August 29th 2012

member state should have the death penalty in its laws. Russia joined the council of Europe in 1996, thus the country needed to abolish the death penalty. Instead, then president Boris Yeltsin implemented a moratorium to abolish the death penalty on a temporal basis.¹⁶⁵ This moratorium was implemented with the intention to have the death penalty abolished in Russia within 3 years. The moratorium was extended in 1999, 2006, 2009 and lastly 2013 by president Vladimir Putin.

The abolition of the death penalty in Europe is embedded in the charter of fundamental rights of the EU and the ECHR.¹⁶⁶ The first countries to abolish the death penalty in Europe were Portugal and the Netherlands the last being Latvia in 2012 and Poland in 2014.¹⁶⁷ One of the leading countries that advocated for the abolition of the death penalty in Europe is the United Kingdom. Were it not for a number of controversial executions in Britain the practice might have not been outlawed. The most notable case being that of Timothy Evans.¹⁶⁸ In 1947 Timothy Evans married Beryl Thorley. Never have gone to school nor learned how to read or write Evans worked as lorry driver. In 1948 the couple moved to a flat in London. Unknown to anyone, one of their neighbours, John Christie was a serial killer who had a sexual attraction to corpses. He had killed two women and had buried them in the Property where the flat was. Christie had Previously worked in the Police force and was married to Ethel. In the same year Evans became a father to a daughter Geraldine. The next year Beryl was Pregnant again. Due to the economic hardships the couple reluctantly decided to carry out an abortion which was illegal at the time. Christie then saw an opportunity to murder and rape Beryl. He informed the couple he had knowledge on abortions and that he would help them out. On a fateful November morning Evans left for work. Christie then proceeded to strangle and murder Beryl after which he raped her dead body. He then hid her body. When Evans came back home, Christie told him that his wife died during the abortion. He then told him to flee for the police would think he killed her. He was reluctant leaving his daughter Geraldine but Christie assured him that he would make sure she is adopted to a good family. He thus fled. Subsequently Christie murdered Geraldine and hid her body to. The bodies were later discovered and Evans was captured. Due to the shock of learning about his daughter's death Evans confessed to the murders. Evans later realized that it was

¹⁶⁵ Arthur Bright, India uses death penalty: 5 other places where it's legal but rare, August 29th 2012

¹⁶⁶ Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty

¹⁶⁷ <http://www.worldcoalition.org/International-law-abolition-protocols-ratified-last-month.html> on 14th January 2018

¹⁶⁸ *Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg* ISBN 978-0-230-39060-7 p. 82

Christie who murdered his wife and Child. He accused him but no one believed that a former Police man would commit murder. His pleas of not guilty fell on deaf years and he was hanged.

In July 1953 Christie murdered and raped his wife Ethel. This time round he was caught. Seven bodies were discovered in the Property including that of Christies wife. All of the bodies had been strangled and raped. Christie was arrested and he confessed to killing all the women. He also confessed to killing Beryl and Geraldine Evans. Timothy Evans was hanged for a crime he never committed. The miscarriage in justice proved too painful for the British public to forgive. Anti-death penalty protests became rampant in the UK and years later the practice was outlawed. This case among others contributed to the abolishment of the death penalty in Britain. The British government acknowledged the miscarriage in justice and compensated Timothy Evans family.¹⁶⁹ This case led to the rise of the abolitionist movement in the United Kingdom. The first time the death penalty was abolished in the UK was in 1965 with the introduction of the Murder (Abolition of the death penalty) Act 1965.¹⁷⁰ The act abolished the death penalty in the UK and in its place it was replaced by life imprisonment as the prescribed form of capital punishment.¹⁷¹ It was introduced as a private bill by then Member of Parliament Sydney Silverman and although the act abolished the death penalty it failed to abolish the death penalty for the crimes of high treason, espionage, high seas piracy and arson at the royal docks.¹⁷² The death penalty was not finally abolished in the United Kingdom fully until 1998 by the Human Rights Act and the Crime and Disorder Act.¹⁷³

Further, the abolition of the death penalty is embodied in two main instruments of the council of Europe. The instruments are protocol number 6 and protocol number 13. Protocol number 6 bans the use of death penalty in all circumstances except during the times of war.¹⁷⁴ It has been ratified by all member states with the exception of Russia. Protocol number 13 forbids the use of the death penalty at all times, even during times of war.¹⁷⁵ It has been ratified by all member states with the exception of Azerbaijan and Armenia.

¹⁶⁹ Sarah Doran, Rillington Place: The tragic real-life story of the trial of Timothy Evans

¹⁷⁰ Murder (Abolition of Death Penalty) Act 1965

¹⁷¹ Murder (Abolition of Death Penalty) Act 1965

¹⁷² Murder (Abolition of Death Penalty) Act 1965

¹⁷³ <http://www.capitalpunishmentuk.org/abolish.html> on 25th January

¹⁷⁴ Protocol no 6 of the ICCPR

¹⁷⁵ Protocol no 13 of the ICCPR

On the other hand, the death penalty still exists in Kenya which is authorized by the Kenyan constitution. Part 2 of the constitution of Kenya deals with rights and fundamental freedoms, one of which being life.¹⁷⁶ Under article 26(1) of the COK every person has a right to life which under article 26(2) begins during conception.¹⁷⁷ Although this right is protected it is also limited. Under article 26(3) a person shall not be deprived of life intentionally except to the extent authorized by the constitution or any other written law.¹⁷⁸ The other written law in this case is the Penal Code of Kenya, Kenya Defence Forces Act and the Kenya Prisons Act.

There exist a number of crimes classified as capital offences in the Penal Code of Kenya. The first is murder.¹⁷⁹ Under the law murder is punishable by death. Under section 203 of the penal code, any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.¹⁸⁰ Under section 204 of the penal code any person found guilty of murder shall be sentenced to death.¹⁸¹ The second offence is that of robbery with violence. Under robbery with violence the perpetrator requires to use violence or threaten violence.¹⁸² Also if the perpetrator uses a weapon or actual harm is caused to the victim then the punishment is death.¹⁸³ Initially in Kenya robbery with violence was not a capital offence but during the error of President Jomo Kenyatta, instances of armed bank robberies were quite high thus the need to deter and punish the crime made it a capital offence.¹⁸⁴ The third offence is that of treason.¹⁸⁵ Section 40(3) of the Penal Code uses mandatory language when it says that any person who is guilty of the offence of treason shall be sentenced to death.¹⁸⁶ Under the law a variety of acts amount to treason. They include sedition, intention to undermine or overthrow the Government, intention to harm or kill the President and intention to instigate or engage in war against the Republic.¹⁸⁷ Under the penal code any person who is guilty of the offence of treason

¹⁷⁶ Part (2) Constitution of Kenya (2010)

¹⁷⁷ Article 26(1)(2) Constitution of Kenya (2010)

¹⁷⁸ Article 26(3) Constitution of Kenya (2010)

¹⁷⁹ Section 203, 206 Kenya Penal Code

¹⁸⁰ Section 203 Kenya Penal Code

¹⁸¹ Section 204 Kenya Penal Code

¹⁸² Section 295 296(2) Kenya Penal Code,

¹⁸³ Section 295 296(2) Kenya Penal Code,

¹⁸⁴ Joseph Karimi, Day President Kenyatta sought death sentence for violent robbers, August 14 2013

¹⁸⁵ Section 40(3) Kenya Penal Code

¹⁸⁶ Section 40(3) Kenya Penal Code

¹⁸⁷ Section 40(3) Kenya Penal Code

shall be sentenced to death.¹⁸⁸ The last offence that amounts to a capital crime is that of oathing for criminal activities by proscribed criminal outfits.¹⁸⁹ Administering an oath purported to bind a person to commit a capital offence amounts to a capital offence.¹⁹⁰ The penal code reads that any person who administers an oath, or an engagement in the nature of an oath, purporting to bind the person who takes it to commit any offence, punishable by death, is guilty of a felony and shall be sentenced to death¹⁹¹. Under the penal code the prescribed form of punishment for these crimes is mandatory death. However, this mandatory requirement was declared unconstitutional by the Supreme Court in the case of Francis Kariuki Muruatetu v Republic.¹⁹²

Under the penal code there also exist a group of people who are excluded from the death penalty. They include people under the age of 18.¹⁹³ Persons under the age of 18 in Kenya cannot be sentenced to death. The penal code states that when an offence is committed when the person is under the age of 18 then he or she cannot be sentenced to death.¹⁹⁴ Instead he or she will be held under the President's pleasure in such place and conditions that the president will direct.¹⁹⁵

Also under the penal code pregnant women cannot be sentenced to death.¹⁹⁶ If a pregnant woman commits murder, treason, oathing of criminal activities or robbery with violence she cannot be sentenced to death. Instead she shall be sentenced to life imprisonment.¹⁹⁷ The last groups of persons to whom the death penalty cannot be handed to are those with mental disabilities. The penal code does not specifically mention persons with mental illness as people who cannot be sentenced to death; instead it provides insanity as a defense for murder.¹⁹⁸ Section 12 of the penal code reads as follows: "A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or

¹⁸⁸ Section 40(3) Kenya Penal Code

¹⁸⁹ Section 60 Kenya Penal Code

¹⁹⁰ Section 60 Kenya Penal Code

¹⁹¹ Section 60 Kenya Penal Code

¹⁹² Maureen Kakah, Mandatory death sentence now unconstitutional in Kenya, December 14 2017

¹⁹³ Section 25(2) Kenya Penal Code

¹⁹⁴ Section 25(2) Kenya Penal Code

¹⁹⁵ Section 25(2) Kenya Penal Code

¹⁹⁶ Section 211-212 Kenya Penal Code

¹⁹⁷ Section 211-212 Kenya Penal Code

¹⁹⁸ Section 12 Kenya Penal Code

other of the effects above mentioned in reference to that act or omission.”¹⁹⁹ Thus if at a trial the offender is deemed to be insane or mentally challenged during the time when the offence was committed, then the court shall make a special finding that the accused was guilty but mentally challenged.²⁰⁰ Thus consequently the President may order the accused to be detained in a mental hospital or in a suitable place with safe custody.²⁰¹

The death penalty is also enshrined in the Kenya Defence Forces Act. Under the defence forces act members of the defence forces maybe be sentenced to death if they commit acts of treachery, spying, aiding the enemy, assisting the enemy with intelligence information, unlawfully advocating for a change of government and any actions of mutiny.²⁰² Under the Kenya prisons act if one is sentenced to death, the execution shall be carried out by way of hanging.²⁰³ However there have been recent developments in a number of cases regarding the death penalty in Kenya. The first case is *Mutiso V republic of Kenya*.

On the 4th of November 2004, Godfrey Ngotho Mutiso together with three others murdered Patrick Waweru Gachuki in Mkomani village in the Mombasa district of Kongwea.²⁰⁴ At about 1 p.m. on the said date Mutiso was having a bed rest in his house when someone walked in and stole his two mobile phones. He reported the incident at Nyali Police Station but later decided to take matters into his own hands and after his own inquiries he suspected Patrick for the crime. Patrick’s girlfriend Josephine Atieno described witnessing Mutiso and another man brutally beating up her boyfriend with a whip and Somali knife. She rushed and reported the matter to the police who rescued Patrick. Six hours later Patrick died of his injuries in hospital.²⁰⁵ An autopsy carried out on the body revealed multiple cuts and bruises all over the body, swellings on the lips and bruises on the face. There was also hemorrhage below the skin of the skull and the pathologist was of the opinion that the deceased died as a result of intra-cranial hemorrhage due to head injury.²⁰⁶ Consequently Godfrey Ngotho Mutiso was convicted of murder contrary to section 203 of the penal code and sentenced to death by hanging. Aggrieved by his conviction he

¹⁹⁹ Section 12 Kenya Penal Code

²⁰⁰ Section 12 Kenya Penal Code

²⁰¹ Section 12 Kenya Penal Code

²⁰² Section 58,59,61 Kenya Defence Forces Act

²⁰³ Section 69 Kenya Prisons act

²⁰⁴ *Godfrey Ngotho Mutiso v Republic* [2010] eKLR

²⁰⁵ *Godfrey Ngotho Mutiso v Republic* [2010] eKLR

²⁰⁶ *Godfrey Ngotho Mutiso v Republic* [2010] eKLR

appealed his sentence.²⁰⁷ In its ruling the court of appeal ruled that the mandatory death penalty infringes on the constitutional right of humane treatment and thus declared it unconstitutional. In its decision the court said it had considered an array of foreign and international jurisprudence.²⁰⁸ Thus his sentence was commuted to life imprisonment. However, this stance was contradicted in the case of Joseph Njuguna Mwaura and 2 others V Republic of Kenya.

On the 14th of October 2004 Joseph Njuguna together with 4 others broke into the house of George Mwaura and demanded money. When he insisted he had none they matched him to his son's house who lived nearby. They demanded money from him and he gave them 7000 Kenyan shillings but they demanded more money from him. At the time George Mwaura's son was able to recognize Joseph Njuguna. During the robbery George Mwaura managed to slip away and rush to the police station. On realizing he had escaped the robbers ran away. Subsequently Joseph Njuguna was arrested and found Guilty of Robbery with violence contrary to section 296 (2) of the Penal Code. He was sentenced to death by hanging. Upon appeal in 2013 the court of appeal upheld the mandatory death penalty for armed robbery, ruling that it was up to the legislature to decide whether or not to impose the mandatory death penalty.²⁰⁹ This was contradictory to the initial ruling in the Mutiso case. This matter was finally settled in the case of Francis Karioko Muruatetu and Another v Republic.

Fifteen years ago Francis Karioko Muruatetu and six others were convicted of the murder of Lawrence Githinji Magondu a Kenyan business man. Subsequently he and another Wilson Thirimu Mwangi were sentenced to death by hanging.²¹⁰ The duo thus appealed to the supreme court to have the mandatory death sentence in Kenya declared unconstitutional. In a landmark ruling the supreme court declared section 204 of the penal code unconstitutional thus making the mandatory death sentence in Kenya unlawful. The court did this acknowledging that when courts deal with capital offences they should have judicial discretion. The court also ordered a professional review concerning sentencings which involved capital crimes. a copy of the

²⁰⁷ Godfrey Ngotho Mutiso v Republic [2010] eKLR

²⁰⁸ Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR

²⁰⁹ Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR

²¹⁰ Francis Karioko Muruatetu & another v Republic & 5 others [2016] eKLR

judgement was also forwarded to Parliament for the necessary adjustments to the law.²¹¹ This ruling upheld the ruling in the Mutiso case.

4.3 Conclusion

In conclusion, Europe should be used as an example to Kenya. As seen above, the council of Europe was formed with a mandate of upholding and protecting human rights. The issue of the death penalty is a human rights issue, one which the council of Europe has clearly demonstrated with their intentions of outlawing the practice. The council, through protocol number 6 and 13 have shown that the use of the death penalty is a violation of the human right to life. Also, as seen in the Timothy Evans case of the UK, the death penalty puts us at risk of executing innocent persons. As such, Kenya should follow the footsteps of the council of Europe to have the death penalty fully abolished. Lastly, it is true to say that Kenya, from the recent judgements in the Mutiso and Karioko case, is taking the right steps towards the abolishment of the death penalty.

²¹¹ Francis Karioki Muruatetu & another v Republic & 5 others [2016] eKLR

5. CHAPTER FIVE: FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The objective of this chapter will be to present the findings and summary of the death penalty both in Kenya and Internationally. It will also provide a number of recommendations regarding the death penalty in Kenya. It will also include the conclusion to the study.

5.2 Findings

The death penalty as observed breaches two universal human rights, the right to life and the right to be protected from torture.²¹² These rights are found in the universal declaration of human rights which was adopted in 1948.²¹³ It is also a cruel and unusual way of punishment. This is seen in the George Mutiso case, where in its ruling the appellate court of Kenya said that the mandatory death penalty for murder violates constitutional protections against arbitrariness and inhuman treatment.²¹⁴ On the 23rd of July 2014 Joseph Wood was executed for murder in the United States.²¹⁵ What was to be a seven minute execution turned out to be a gruesome two hour display.²¹⁶ Joseph wood gasped for more than two hours choking and writhing in pain. Subsequently, a California federal judge struck down capital punishment for being too slow and capricious.²¹⁷ In the book “Gruesome Spectacles, Botched Executions and Americas Death Penalty”, Austin Sarat talks about how people have perfected execution methods through the use of modern technology.²¹⁸ He also talks about how clumsy and inhumane hanging is. How the person suffers while hanging before he or she dies, how some electric chairs fail leaving people half dead and in severe pain. He talks about how the death row inmates suffer during execution. He talks of how it is such a gruesome spectacle to watch and witness.²¹⁹ Thus it is true to say that the death penalty is inhumane.

²¹² <https://www.amnesty.org/en/what-we-do/death-penalty/> on 20th September 2017

²¹³ Article 3 and 5 Universal declaration of Human rights

²¹⁴ Godfrey Ngotho Mutiso v Republic [2010] eKLR

²¹⁵ Tom Leonard, gasping for breath, the killer who took two horrific hours to die by lethal injection: Death row prisoner's last moments may prove a watershed for US way of execution, 25th July 2014

²¹⁶ Tom Leonard, gasping for breath, the killer who took two horrific hours to die by lethal injection: Death row prisoner's last moments may prove a watershed for US way of execution, 25th July 2014

²¹⁷ Tom Leonard, gasping for breath, the killer who took two horrific hours to die by lethal injection: Death row prisoner's last moments may prove a watershed for US way of execution, 25th July 2014

²¹⁸ Austin Sarat gruesome spectacles, botched executions and Americas death penalty

²¹⁹ Austin Sarat gruesome spectacles, botched executions and Americas death penalty

There also exists an alternative to the death penalty in the form of prison reform. Eighteen years ago, Susan Kigula was sentenced to death in Uganda for the murder of her husband.²²⁰ In Luzira women's Prison, Susan got the chance to enroll in a law diploma and became the first woman in Uganda to graduate with a diploma in law in prison. With her new acquired legal skills, she led to her eventual release and commuting of hundreds of death penalties to life imprisonment in the case Attorney General vs. Susan Kigula and 417 others. She was quoted saying "...Hanging a person is not a deterrent since everyone deserves a second chance to live. That is why I petitioned against the death penalty".²²¹ She entered prison a criminal but through rehabilitation she left a learned person and a beacon of hope to others.²²² She showed that rehabilitation works and that everyone deserves a second chance. The other thing one has to consider is the issue of deterrence since it is one of the functions the death penalty seeks to serve.

One of the functions of punishment, in relation to the death penalty is that it deters crime.²²³ Deterrence always seeks to discourage the would be offenders from committing of an offence by either instilling doubt or fear into a person.²²⁴ So, does the death penalty provide any deterrence effect to the would be offender? The best way to answer this is to look at the levels of capital crimes in countries where the death penalty has been abolished and compare them to before the penalty was abolished in those countries. Currently one hundred and four countries have abolished the death penalty.²²⁵ In Australia since abolishing the death penalty in mid-1960 the levels of murders have significantly dropped.²²⁶ In Canada the rate of murders in the society was very high, but after abolishing the death penalty in 1976 the levels dropped quite significantly.²²⁷ In 2003, 23 years after abolishing the death penalty, Canada reported a forty three percent drop in capital crimes, in particular murder.²²⁸ Most countries in east and central Europe abolished the

²²⁰ Jan Banning, Death Sentence in Uganda: the case of Susan Kigula

²²¹ Jan Banning, Death Sentence in Uganda: the case of Susan Kigula

²²² Jan Banning, Death Sentence in Uganda: the case of Susan Kigula

²²³ <http://open.lib.umn.edu/criminallaw/chapter/1-5-the-purposes-of-punishment/> on 20th September 2017

²²⁴ <https://www.merriam-webster.com/dictionary/deterrence> on 20th September 2017

²²⁵ <https://www.amnesty.org/en/latest/news/2017/04/death-penalty-2016-facts-and-figures/> on 20th September 2017

²²⁶ Darma Semito, there is no evidence that the death penalty acts as a deterrent, 25 April 2015

²²⁷ Darma Semito, there is no evidence that the death penalty acts as a deterrent, 25 April 2015

²²⁸ Darma Semito, there is no evidence that the death penalty acts as a deterrent, 25 April 2015

death penalty in the 1900's and since then they have reported a sixty percent drop in capital crimes.²²⁹

In the United States top criminologists led by Professor Michael Radelet conducted an investigation into the death penalty in 2009.²³⁰ They concluded that eighty three percent of the USA criminologists did not believe the death penalty deters crime.²³¹ Their investigation mainly relied on interviews and questionnaires. The investigation also found out that in the southern states, where 80 percent of USA executions are carried out, the rates of capital crimes are higher than in states that have abolished the death penalty from their laws.²³²

Further in a post dated January 15th 2015 titled "it's Time to Execute the Death Penalty", H. Lee Sorokin, LLB, former US District Court and US Court of Appeals Judge, wrote "In my view deterrence plays no part whatsoever. Persons contemplating murder do not sit around the kitchen table and say, "...I won't commit this murder if I face the death penalty, but I will do it if the penalty is life without parole". I do not believe persons contemplating or committing murder plan to get caught or weigh the consequences. Statistics demonstrate that states without the death penalty have consistently lower murder rates than states with it, but frankly I think those statistics are immaterial and coincidental. Fear of the death penalty may cause a few to hesitate, but certainly not enough to keep it in force..."²³³ In the USA alone there were 14000 murders and only 35 executions that took place in 2016.²³⁴ This clearly shows a lack of deterrence.²³⁵ The same can be said of Kenya. Since 1987, there have been more than 4000 death row inmates in Kenya and none have been executed.²³⁶ Thus a would be offender in Kenya knows that if he or she kills someone they will be sentenced to death but they will not actually be executed. This is a clear indication of lack of deterrence. Also another thing to consider is the increase of capital crimes in Kenya. Since 2016 there has been a six percent increase in capital crimes in Kenya²³⁷. This is also another indication of lack of deterrence. Thus if the death penalty does not deter crime in Kenya then it should be fully abolished.

²²⁹ Darma Semito, there is no evidence that the death penalty acts as a deterrent, 25 April 2015

²³⁰ <https://deathpenaltyinfo.org/facts-about-deterrence-and-death-penalty> on 20th September 2017

²³¹ <https://deathpenaltyinfo.org/facts-about-deterrence-and-death-penalty> on 20th September 2017

²³² <https://deathpenaltyinfo.org/facts-about-deterrence-and-death-penalty> on 20th September 2017

²³³ <https://deathpenalty.procon.org/view.answers.php?questionID=000983> on 14th September 2017

²³⁴ <https://deathpenaltyinfo.org/execution-list-2016> on 12th December 2017

²³⁵ <https://deathpenaltyinfo.org/facts-about-deterrence-and-death-penalty> on 20th September 2017

²³⁶ Payton Matt, Kenya Commutes sentences of all death row inmates, 25 October 2016

²³⁷ Payton Matt, Kenya Commutes sentences of all death row inmates, 25 October

Also as a society, the existence of the death penalty puts us at risk of sentencing innocent persons to death. A recent study in the United States showed that at least four percent of persons sentenced to death are innocent.²³⁸ Also, there are many cases and instances where many persons were wrongfully sentenced to death. These cases date back more than 400 years ago. In 1660, in England, William Harrison disappeared after taking a walk.²³⁹ Later his bloody clothes were found dumped somewhere in the forest. It was later ruled that he had been murdered. Two persons were accused of the murder, his mother and brother. They were both hanged. Three years later William Harrison appeared back in England. He had been abducted and had been sold as a slave in the Ottoman Empire. His mother and brother were in fact innocent and it was sad that William came back only to learn his family had been executed for his murder, which they did not commit.²⁴⁰ This is not the only wrongful execution ever recorded; they include the execution of Chipita Rodriguez, who was hanged in Texas in 1863 for murdering a horse trader only to be exonerated 122 years later after she had died. The most notable person to be wrongfully executed was Troy Davis, who was executed in 2011.²⁴¹ Many people had come to his defense including musicians such as M1, Former us President Jimmy Carter and various notable figures such as Archbishop Desmond Tutu.²⁴² It is better to imprison someone and rehabilitate them; for if it is later found that they were innocent they will simply be released. The death penalty is irreversible and scores of innocent persons have paid the ultimate price for something they did not purchase.

Currently the support of the death penalty, both in Kenya and internationally, is declining. In Kenya, this has been seen when Kenya participated in the 6th Oslo congress against the death penalty in 2016.²⁴³ Also the actions of both Presidents Kibaki and Uhuru commuting more than 4000 death penalties to life imprisonment have shown the death penalty's decline from favour.²⁴⁴ Also by being part of the ACHPR and other international protocols and bodies that advocate for

²³⁸ Elizabeth Larpato, How Many Innocent People Are Sentenced to Death?

²³⁹ Andy Jarosz, The Campden Wonder: How history can bring a place to life

²⁴⁰ https://www.reddit.com/r/UnresolvedMysteries/comments/5cee54/the_campden_wonder_what_really_happened_to/ on 20th September 2017

²⁴¹ Elizabeth Larpato, How Many Innocent People Are Sentenced to Death?

²⁴² Elizabeth Larpato, How Many Innocent People Are Sentenced to Death?

²⁴³ <https://www.standardmedia.co.ke/mobile/article/2000206058/kenya-delegation-in-oslo-on-meeting-to-end-death-penalty> on 20th September 2017

²⁴⁴ Oliver Mathenge, Uhuru commutes Death Row sentences to life prison terms, October 25 2016

the abolishment of the death penalty, Kenya shows an intention to abolish the death penalty.²⁴⁵ In 2016 the attorney general of Kenya professor Githu Muigai released a strategic plan to comply with the UNHRC to find an alternative to the death penalty in Kenya.²⁴⁶ In 2003 then Kenyan Vice President Moody Awori declared his intention to introduce a bill in parliament to have the death penalty abolished in Kenya.²⁴⁷ This was termed as a historic event. The same was also echoed by then Minister for justice and constitutional affairs, Kiraitu Murungi, who said that the practice infringes on human rights. All these show an intention by the Kenyan People to have the death penalty abolished.

Internationally many countries have banned the death penalty, one hundred and four to be exact. This represents more than half the countries in the world.²⁴⁸ Its decline from favour was also witnessed in the 2007 Record of Votes on the UN General Assembly Moratorium Resolution, 2008 Record of Votes on the UN General Assembly Moratorium Resolution, 2010 Record of Votes on the UN General Assembly Moratorium Resolution, 2012 Record of Votes on the UN General Assembly Moratorium Resolution, 2014 Record of Votes on the UN General Assembly Moratorium Resolution and the 2016 Record of Votes on the UN General Assembly Moratorium Resolution.²⁴⁹ Also notable world leaders have also come out to champion for the removal of the death penalty. They include Archbishop Desmond Tutu and Joseph Fiorenza, a renowned leader in the catholic church who once said that he opposes the death penalty not only for what it does to criminals, but also for giving us the illusion that we can defend life by taking life.²⁵⁰ Other notable leaders who have spoken out against the death penalty include former UN secretary general Ban Ki Moon and former Australian Prime Minister Tony Abbot.²⁵¹ In the words of Nelson Mandela, the death sentence is barbaric; it is a reflection of the animal instincts in all human beings. Thus the death penalty should be abolished in Kenya.

²⁴⁵ <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Kenya> on 20th September 2017

²⁴⁶ <https://www.nation.co.ke/news/Death-Penalty-Capital-Punishment-Githu-Muigai/-/1056/2671018/-/fbucrf/-/index.htm> on 20th September 2017

²⁴⁷ <https://www.mail-archive.com/deathpenalty@lists.washlaw.edu/msg06532.html> on 14th September 2017

²⁴⁸ <https://www.amnesty.org/en/latest/news/2017/04/death-penalty-2016-facts-and-figures/> on 20th September 2017

²⁴⁹ <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Kenya> on 20th September 2017

²⁵⁰ <https://www.ncronline.org/person/joseph-fiorenza> on 20th September 2017

²⁵¹ <https://deathpenaltyinfo.org/new-voices-political-leaders> on 20th September 2017

5.3 RECOMMENDATIONS

This paper will seek to make the following recommendations.

- i. That Kenya should with immediate effect ratify the second optional protocol of the ICCPR that aims at the abolishment of the death penalty.
- ii. That as the law making body in Kenya the national assembly should make the necessary amendments to article 26(3) of the constitution declaring that each and every person has a right to life, a right which he or she cannot be deprived of intentionally whatsoever the circumstances. Further to this, the national assembly should amend sections 40,203,204 of the penal code and any other act or law that touches on the use of the death penalty in Kenya to outlaw the practice completely. At the same time, they should amend the law to replace the death penalty with life imprisonment.
- iii. That as head of state and government the president of Kenya should in the meantime commute all death sentences to life imprisonment as the national assembly makes the necessary amendments to the law.
- iv. That the Government of Kenya should increase funding to the Kenya Prison service in order to make Prisons more productive in their efforts of rehabilitation and reform.
- v. That a special inquiry be carried out in Kenya on all executions to make sure that there has never been any miscarriage in justice, and if so a special fund be set up to compensate the victim's families.
- vi. That the Government of Kenya set up a family support system to help family members and friends of murdered persons to help them deal with the trauma and loss of a loved one. At the same time the government should set up a support system for persons who have been affected by robbery with violence to help them deal with the trauma.

5.4 CONCLUSION

The death penalty has been in existence for many centuries long before the birth of Kenya. In regards to Kenya it has been with us through 70 years of colonialism and 54 years of

independence and self-rule. Since 1987 Kenya has been a de facto abolitionist state, a situation which should change. The existence of the death penalty infringes on the Kenyan peoples' inalienable right to life, a right which must be and should be protected at all costs. It is also irreversible and a miscarriage in justice will be permanent, a situation which should never be given room to take place. Consequently, Kenya should follow the global trend and outlaw this inhumane and barbaric practice. Finally, in the words of Arch Bishop Desmond Tutu, there is no justice in Killing for justice.

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