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'Mandatory' Death Penalty in Kenya: An examination of its legality in light of the Constitution of Kenya 2010 and the "right to freedom from Inhuman or Degrading Treatment or Punishment"

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DECLARATION

I, **EUGENE LUBALE LUBULELLAH**, declare that the work presented in this dissertation is original. It has never been presented to any other university or institution. Where other people's works have been used, references have been provided. In this regard, I declare this work as originally mine. It is hereby presented in partial fulfillment of the requirements for the award of the degree of Master of Laws (LLM).

EUGENE LUBALE LUBULELLAH

Signature…….

Date…….

This dissertation has been submitted for examination with my approval as university supervisor

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Signature…….

Date…….

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LIST OF ABBREVIATIONS AND ACRONYMS

ICCPR *- International Covenant on Civil and Political Rights, 1966*

UNDHR *- Universal Declaration on Human Rights, 1948*

ECHR *- European Court of Human Rights*

ACHRPR *- African Charter on Human and Peoples' Rights, 1981*

ACHPR *- American Convention on Human Rights, 1968*

CAT *- Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984*

ICC *- International Criminal Court*

UNHRC *- United Nations Human Rights Commission*

BC *- Before Christ*

USA *- "United States of America*

UoN *- University of Nairobi*

UK *- United Kingdom*

EU *- European Union*

ECPHR - European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

ICTR *- International Criminal Tribunal for Rwanda*

ICTY *- The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*

ACHPR *- The Africa Charter on Human and Peoples' Rights*

ECHR *-European Court of Human Rights & European Convention on Human Rights*

ACHR *- American Convention on Human Rights*

UNHRC *- United Nations Human Rights Committee*

ICESPR *- International Covenant on Economic Social and Political Rights*

KNHRC *- Kenya National Human Rights Commission*

IBA *- International Bar Association*

NARC *- National Alliance Rainbow Coalition*

LIST OF STATUTES

1. Constitution of Kenya (2010) - Promulgated on 27th August 2010.
2. The Penal Code, Chapter 63 Laws of Kenya.
3. The Criminal Procedure Code, Chapter 75 Laws of Kenya.
4. Kenya National Commission on Human Rights Act, 2002.
5. International Crimes Act, 2009.

LIST OF CASES

1. Attorney General v Susan Kigula & 417 Others (CONSTITUTIONAL APPEAL NO. 03 OF 2006) [2009] UGSC 6
2. Boniface Liako Musima & 2 others v Republic [2010] eKLR
3. Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General
4. Chambers v. Bowersox
5. Charles Chitat Ng v. Canada
6. Coker v Georgia
7. Edwards v The Bahamas, Report No. 48/01 Inter-American Commission on Human Rights.
8. Fanuel Otieno Omido V R
9. Francis Kafantayeni and Others v The Attorney General of Malawi (Constitutional case No. 12 of 2005 (unreported)).
10. Francis Karioki Muruatetu & another v Republic & 5 others
11. Furman v. Georgia
12. Gregg v. Georgia
13. Isaac Karanja Mwangi V R
14. Jackson Maina Wangui & another v Republic [2014] eKLR
15. Johana Ndungu V R
16. Joseph Njuguna Mwaura & 2 others v R.
17. Jurek v. Texas

ABSTRACT

This study evaluates the 'Mandatory' Death Penalty in Kenya, its legality through the lens of the constitution of Kenya 2010. Despite being codified in the laws of Kenya, the death penalties have not been executed in Kenya for a long time and it has been argued by many lawyers that Kenya has de facto abandoned the practice of the death penalty, but not de jure. When Kenyan courts pass death penalties upon capital convicts, they are not executed but instead made to serve life imprisonments. Most colonies in the world, Kenya being one of them, adopted their colonizer's laws upon gaining their independence but continued with the colonizers' legal systems. Among the laws inherited by Kenya from its colonizers was the mandatory death penalty for selected crimes, which continues to be part of the Kenya's laws to-date even as the same penalty was abolished in Britain in 1965. Following this, there have been ostensibly successful international campaigns, treaties and practices forming international law on the abolition of the death penalty in the commonwealth colony states from the 1970's to-date. A death penalty abolishment wave swept through the commonwealth nations in the Caribbean's in the late 1990's and later reached the African former British colonies nations in the early years of 21st century between the years 2000-2010. The general objective of this study was to examine the status and the extent to which mandatory death penalty in Kenya complies with the international laws and human right principles. Specifically, the study sought to answer the following research questions: what legal theoretical positions anchor the mandatory death penalty in the criminal punishment in Kenya today? What is the status of the implementation of mandatory death penalty in other jurisdictions?, and lastly, is the mandatory death penalty in Kenya carried out in compliance with the human rights law? The study relied on qualitative assessment of secondary data in Kenya and other jurisdictions. Results indicate that Kenya still relies on the theoretical conceptualization of mandatory death penalty based on the commonwealth perspectives. It is also clear that most jurisdictions have abolished mandatory death penalty as inhuman practice. Additionally, in terms of compliance with human rights law, mandatory death penalty is not practiced in Kenya, although it has remained in the constitution, thereby sending mixed signal to the world. In conclusion, Kenya needs to expunge death penalty from the constitution to avoid any whimsical implementation of the same should perspective change.

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CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND

Death Penalty was first codified in law in the 18th Century B.C in what is famously known as Code of King Hammurabi of Babylon.[1] The Code stipulated 25 crimes punishable by death including adultery and helping slaves escape. Curiously, murder was not a capital offense under the said Code. The death penalty was also part of the Hittite Code in the 14th Century B.C". and in the Draconian code in the 7th Century B.C. In fact, the Draconian Code of Athens made death the lone punishment for all crimes.[2]

Death penalties were carried out in different forms by different civilizations of the world. Death penalties were carried out by such means as beheading, boiling in oil, burying alive, burning, crucifixion, disembowelment, drowning, flaying alive, hanging, impalement, stoning, strangling, being thrown to wild animals, and quartering (being torn apart) and guillotine.[3] Further, death penalty has been used throughout different epochs as the ultimate punishment for diverse crimes including treason, rape, practicing witchcraft, killing, stealing and many other criminal activities.

As far as English law history is concerned, the contemporary capital punishment law can be traced back to the 10th Century A.D when hanging was adopted as the best way to conduct a death penalty in Britain, but later in the 11th Century, capital punishment was suppressed by William the Conqueror (William I), the first Norman King of England who did not allow persons to be hanged or otherwise executed for any crime, except in times of war, but in

[1]Death Sentence Information Center, "Introduction to Death Sentence", available at: "http://www.deathpenaltyinfo.org/part-i-history-death-penalty"
[2]John "Laurence, *A History of Capital Punishment* (N.Y.: The Citadel Press, 1960"), page 1-3.
[3]http://criminal.findlaw.com/criminal-procedure/history-of-death-penalty-laws.html- Accessed on 11th August 2016

some instances he allowed criminals to be mutilated for their crimes. The ensuing middle ages saw capital punishment being meted even by the nobility especially against rogue slaves and was often accompanied by torture to better serve as deterrence to others. For instance, most barons had a drowning pit as well as gallows which were used for major as well as minor crimes. For instance, under Edward I, two gatekeepers were killed because the city gate had not been closed in time to prevent the escape of an accused murderer.[4]

In the 16th Century during the reign of England's King "Henry VIII" more than "72,000" executions were conducted to instill fear among the people and warm people of the repercussions of committing a crime against the state or a fellow man. In fact, the death penalty was during this period applied even for whimsical offenses such marrying a Jew and not confessing to a crime. By 1700 B.C. there were over 222 crimes in England that were all punishable by death penalty. These included stealing from a house in the amount of forty shillings, stealing from a shop the value of five shillings, robbing a rabbit warren, cutting down a tree, and counterfeiting tax stamps.[5]

In essence, this tended to water down the application of death penalty by juries during this period, where they often avoided convicting especially "when the penalty was great and the crime was not. It also discouraged many people from reporting not so serious crimes for fear that the accused thereof will meet their death as a result. Hence, reforms were introduced and 100 out of the 222 crimes were eliminated from the death penalty in 1823 followed by the elimination of more capital offences between 1832 and 1837.[6] The public opinion in Britain was so much against death penalty that in 1840, an attempt was made to abolish all capital

[4]Ibid page 72 - 73.
[5]*Ibid*.
[6]"John Laurence, *A History of Capital Punishment* (N.Y.: The Citadel Press, 1960), page 9-14."

punishment which failed to go through. Nevertheless, the 19th and 20th centuries saw "more and more capital punishments being abolished in Britain until the eventual abolition of death penalty for murder in Britain in 1965, and later in 1998 when the British Government abolished the death penalties of treason and piracy when it passed its *Crime and Disorder Act*[7].

It is noteworthy that the death penalty abolition tide was not experienced only in Britain during this period but across all Europe such that today only a few European countries retain the death penalty in their laws.[8]

The problem posed by the 'mandatory' death penalty in Kenya arose the moment most colonies in the world automatically adopted their colonizers laws upon gaining independence. Among the laws inherited by Kenya at independence in 1963 was the mandatory death penalty for selected crimes, which penalty has continued to be part of independent Kenya's laws to date and remains operational, even as the said law was abolished by Kenya's colonizer, Britain, initially in 1965 for murder and subsequently in 1998 for treason and piracy[9]. Whereas some major common law jurisdictions like India, USA and some few developing nations have retained the Death penalty in their legal systems without much perceived benefit to them, a death penalty abolition 'wave' has been sweeping through the commonwealth nations beginning with the Caribbean colonies in the late 1990's and later reaching the former British colonies in Africa in the early years of 21st century (2000-2010). This 'wave' was certainly propelled and influenced by the development of international

[7]http://www.dailymail.co.uk/news/article-1203828/The-222-Victorian-crimes-man-hanged.html#ixzz4NGuWOmIo (Accessed on 16/10/2016)
[8]*Ibid*.
[9]http://www.dailymail.co.uk/news/article-1203828/The-222-Victorian-crimes-man-hanged.html#ixzz4NGuWOmIo (Accessed on 16/10/2016)

human rights law and world-wide campaigns by human rights organizations and bodies within the international community at large.

According to data obtained in a report by a rights group named *Amnesty International* in 2014 and titled "Death Penalties and Executions"[10], there are indicative trends across Africa which suggest that the continent is gradually retreating on the death penalty and executions, but most African countries still have not renounced it entirely, in the spirit and light of the United Nation's CAT which was adopted and opened for signature, ratification and accession by the "United Nations General Assembly resolution 39/46 of 10th December 1984"[11].

Whereas between 1908 and 1956 in pre-independent Kenya, a total of 459 individuals faced the gallows (in exclusion of any case related to the Mau Mau executions[12]), following Kenya's independence in 1963, only 280 prisoners have been legally executed under the death penalty[13]. Despite hundreds of people being sentenced to death in Kenya, *Hezekiah Ochuka and Pancreas O. Okumu* were the last persons to be executed under the Death penalty in Kenya in 1987 for their involvement in treason related activities in the failed 1982 coup[14]. The 'mandatory' death penalty laws, despite Kenya's apparent *de facto* abolitionist nature or abandonment of the same through its non-execution and informal moratorium on it[15], nevertheless continues to be part of Kenya's laws and legal system[16] and no proper efforts to abolish it *de jure* have been instigated[17].

[10] http://www.amnestyusa.org/pdfs/DeathSentencesAndExecutions2014_EN.pdf (Accessed on 9th June 2016)
[11] http://www.unhcr.org/49e479d10.html (accessed on 16/10/2016)
[12] Swanepoel, Paul. "Judicial choice during the Mau Mau rebellion in Kenya 1952-1960." *Fundamina: A Journal of Legal History* 18.2 (2012): page 145.
[13] "http://racism.org/index.php?option=com_content&view=article&id=1448:mandatorydeathpenalty03&catid=140&Itemid=155&showall=&limitstart=7" (accessed on 17/10/2016).
[14] "http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=13337", (Accessed on 16th October 2014).
[15] Ibid.

The exact number of individuals currently under penalty of death in Kenya is uncertain, being that the Kenyan government does not publish statistics relating to the death penalty and sentencing. However, in 2012, the United Nations Human Rights Committee noted that 1,582 convicts faced the death penalty[18], which statistic took into account the "mass commutation" of death penalties by Kenya's erstwhile president, Mwai Kibaki, on August 2009, when the Kenyan government substituted the death penalties of all 4,000 prisoners then on death row to life imprisonment[19]. There have been no reported executions in Kenya since 1987[20].

Penal Reform International and the Foundation for Human Rights Initiative estimated that there were up to 2,000 people on death row in 2013.[21]According to the 2014 Economic Survey Report released in April, 2013 Kenyan courts are responsible for "32 per cent of all death penalties in the world".[22]

On 30th July 2010 the Kenya court of appeal in the landmark case of ***Mutiso v. The Republic***[23], held that the mandatory death penalty "violates the right to life and protections against arbitrariness and inhuman treatment", and that although that case was one on murder charges, its reasoning was equally applicable to other capital offenses. This decision was

[16]Kenya "Penal Code, secs. 40, 60, 296(2), and 297(2), Laws of Kenya Rev. Ed. 2010 Ch. 63, Aug. 1, 1930, as updated through to Jul. 12, 2012".
[17] Viljoen, Frans. "*International human rights law in Africa*. Oxford University Press", 2012; page 22.
[18]"U.N. ICCPR, Human Rights Committee, Concluding Observations of the Human Rights Committee: Kenya, para. 10, U.N. Doc. CCPR/C/KEN/CO/3, Aug. 31, 2012".
[19] Ibid.
[20] Ibid.
[21]"Penal Reform International and Foundation for Human Rights Initiative, Alternative report to the UN Committee against Torture regarding the consideration of Kenya's second report, page 3, Apr. 15, 2013".
[22]"http:// www.standardmedia.co.ke/article/2000125125/eyes-on-supreme-court-as-death-penalty-case-set-to-kick-off" (Accessed on 14/6/2016).
[23] "Criminal Appeal No. 17 of 2008, paras. 36-38, Court of Appeal at Mombasa, Jul. 30, 2010".

lauded as progressive[24], only to be reversed later in two subsequent judgments by the same Court of Appeal in the cases of ***Joseph Njuguna Mwaura & 2 others v R***,[25]***Michael Njoroge Waithera V R***[26] and the High Court Case of **Jackson Maina Wangui & another v Republic [2014] eKLR**. On top of all this, there awaits a Supreme Court decision in the case of **Francis Kariuki Muruatetu & another v Republic & 5 others**[27] whereby there's challenge to the constitutionality of the mandatory death penalty, coinciding with global efforts to put pressure on Kenya to abolish the death penalty.

The Constitution of Kenya 2010 states that "every person has the right to life, and a person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law."[28] The Constitution of Kenya therefore expressly sanctions the execution of the death penalty as authorized by the various statute laws and the constitution itself. The same constitution provides that any law, including customary law, that is inconsistent with it is "void to the extent of the inconsistency"[29], that "any act or omission in contravention of the Constitution is invalid"; "the general rules of international law shall form part of the law of Kenya"[30]; and "any treaty or convention ratified by Kenya shall form part of the law of Kenya" under the Constitution.[31] The Constitution of Kenya further provides that: "the State shall enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms"[32] and also provides with regard to a person who is detained, that "parliament shall enact legislation that (a) provides

[24] "Lines, Rick. Litigating against the Death Penalty for Drug Offences: An Interview with Saul Lehrfreund and Parvais Jabbar." "*International Journal on Human Rights and Drug Policy* 1 (2010): pages 53-62."
[25]*Criminal appeal No. 5 of 2008*.
[26]Criminal Case (Thika) No. 1516/10 *[2013] eKLR*.
[27](Kenya Supreme Court Petition No. 15 of 2015 As Consolidated With Petition No. 16 Of 2015).
[28]Articles 26 (1), 26 (2) and 26 (3) Constitution of Kenya, 2010.
[29]Ibid, Article 2 (4).
[30]Ibid, Article 2 (5).
[31]Ibid, Article 2 (6).
[32]Ibid, Article 21(4).

for the humane treatment of persons detained, held in custody or imprisoned; and (b) takes into account the relevant international human rights instruments."[33] It additionally states that "national security shall be promoted and guaranteed in accordance with human rights and fundamental freedoms", among other principles.[34]

Such fundamental human rights as clearly recognized by the Constitution of Kenya have at the present evolved into a corpus of laws which are essentially pro-abolitionist of the death penalty *in its entirety* or at least restrict its application within certain humane circumstances. It has been reported by Amnesty International that out of the 197 United Nations jurisdictions, 140 countries had by 6th April 2015 abolished their death penalties either in law or in practice.[35]

1.2 STATEMENT OF THE RESEARCH PROBLEM

The primary problem addressed in this study is the torturous or otherwise the "cruel, inhuman and degrading treatment" of persons subjected to the "mandatory death penalty" in Kenya, which causes excessive and unnecessary psychological and physical torture otherwise known as the death row syndrome.

The secondary problem in this research is that the 'mandatory' death penalty laws in Kenya, despite Kenya's ostensible recognition of their inherent conflict with international human rights laws, and Kenya's *de facto* abandonment in executing the same continue to be part of Kenya's laws whereas no apposite initiatives to abolish it *de jure* has been initiated.

[33] Ibid, Article 51(3).
[34] Ibid, Article 238(2).
[35] "https://www.amnesty.org/en/what-we-do/death-penalty/" (accessed on 17/10/2016).

The legal and constitutional crisis arising from the above prevailing scenario in Kenya is that: although in the books of law the death penalties still exist, Kenya no longer executes death penalties, but nothing legally precludes it from whimsically doing so at any moment, more-so since Kenya despite being a party to the ICCPR is not a signatory of "the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty" and neither has it ratified the same. A further problem that arises is the conditioning of a "death row syndrome" within the minds of death penalty convicts whereby they are indefinitely kept on death row knowing that they could at any spontaneous moment be executed, a situation internationally rebuffed as being contrary to the established fundamental human right of freedom from inhuman, cruel and degrading treatment.

The underlying danger is two-fold, in that: if Kenya decides to resume executing the death penalty (which it can, at any moment as there is nothing forbidding it), it would be in violation of the internationally recognized unqualified inherent human "right to life", and "the right to mitigate one's offence". The imposition of the Mandatory death penalty, without the benefit of mitigation and without the option of imposing lesser penalties depending on the mitigating circumstances of the crime, provides for an unreasonable and unconstitutional situation contrary to the internationally recognized principles of mitigation in sentencing.

On the other hand, maintaining the *status quo* of only being a *de facto* abolitionist state and failing to abolish the death penalty *de jure* while indefinitely keeping death penalty convicts on death row is causing a *"death row syndrome"* whereby prisoners have to live with the knowledge that they may be executed "at any time" at the discretion of the executive arm of government, which is a recognized "violation of the inherent human right of freedom from torture and degrading treatment".

1.3 "OBJECTIVES OF THE" STUDY

1.3.1 General objective

The general objective of this study is to examine the status of "Mandatory Death Penalty in Kenya", and whether it complies with the international laws and human rights principles.

1.3.2 Specific Objectives of the Study

1. To analyze the theoretical conceptualization of mandatory death penalty in the criminal punishment in Kenya today.

2. To analyze the status of mandatory death penalty in other jurisdictions.

3. To assess the compliance of mandatory death penalty in Kenya with the human rights laws.

1.4 RESEARCH QUESTIONS

The study sought to satisfy the following questions:-

1. How is the "mandatory death penalty" conceptualized within the criminal punishment in Kenya today?
2. What is the status of the "mandatory death penalty" in criminal punishment in other jurisdictions?

3. Does the imposition of 'mandatory' death penalty in Kenya comply with international laws and human rights best practices?

1.5 JUSTIFICATION OF THE STUDY

This study is justified because despite Kenya's *de facto* abolitionist stand on the death penalty by its informal moratorium whereby no death penalty executions have been carried out since 1987, and whereas the status quo of an informal moratorium on the death penalty is a manifestation of Kenya's respect for the unfettered "right to life", Kenya still retains the death penalty *de jure* in its laws, a situation which regrettably results in yet other violations of human rights of capital offenders due to its continued existence and Kenya's reluctance to amend its criminal law statutes to align itself with the international human rights framework calling for its abolition and casting mere moratoriums on death penalty as contrary to the CAT.

1.6 LITERATURE REVIEW

Novak[36] in his comparative constitutional study of abolition of the "mandatory death penalty" in Africa argues that the mandatory death penalty is in precipitous departure internationally.[37] He traces its origins by diffusion to the common law countries of the Caribbean, Africa, and South and Southeast Asia by way of the British Empire. The decline is now attributable, inter alia, to the finding that it is unconstitutional and incompatible with human rights norms in at least ten Caribbean nations since the year 2000. A new wave of litigation has appeared in the postcolonial "common law nations" of East and Southern Africa, and courts in Malawi,

[36]"Andrew Novak, J.D. (Boston University School of Law), M. A., B.A.; Adjunct Professor of Criminology, Law, and Society in the University Washington, District of Columbia".
[37] "Andrew Novak, The Abolition of the Mandatory Death Penalty in Africa: A Comparative Constitutional Analysis, *Indiana International and Comparative Law Review* 22 (2012)"; page 267.

Uganda, and now Kenya have found an automatic penalty of death unconstitutional and have replaced mandatory schemes with discretionary ones that allow consideration of mitigating factors in the capital sentencing process. The resulting criminal justice regimes operate in closer conformity with international human rights norms and explicitly adopt these norms in their domestic legal systems.[38]

He concludes that African countries appear to be following the emerging global consensus that not all incidences of murders are equally heinous and deserving death; that the right to a fair trial includes a sentencing hearing (where mitigating and aggravating circumstances can be presented); and that a penalty disproportionate to a crime is cruel and degrading punishment. Subsequently, African courts have increasingly followed the lead of the Privy Council's Caribbean jurisprudence on "the scope of executive clemency", "appellate review", "delay and conditions on death row", and "the right to appeal to international and regional human rights tribunals". The settled law of the Caribbean, formed over the course of a decade by challenges to supranational tribunals, national courts, the "Privy Council" in London, and later the "Caribbean Court of Justice", has almost entirely dispensed with the mandatory death penalty in the region. "Common law" African constitutions are in *pari materia* with Caribbean constitutions, and the weight of this jurisprudence is being imported to the African continent.[39]

The researcher also argues that African jurisdictions have made their own contributions to the global body of death penalty jurisprudence, and will likely be cited in later constitutional

[38] *Ibid.*, 292.
[39] Ibid., page 293.

challenges to the mandatory death penalty. Just as the case of "Edwards v. Bahamas"[40] stands for the proposition that the mandatory death penalty infringes the right to a fair trial, and "Reyes v. the Queen (Belize)"[41] is the seminal case finding that "the death penalty is cruel and inhuman punishment", so too are the decisions arising from Kenya, Malawi, and Uganda be cited for their original holdings.

The Kafantayeni case[42] in Malawi was the first one in Africa in which it was held that "the mandatory death penalty violates the right of access to the court system for the resolution of disputes" because it does not permit true appellate review of a penalty. The Ugandan case of Kigula[43] was the first case to explicitly hold that "the mandatory death penalty violates the constitutional separation of powers because the legislature was constraining judicial sentencing discretion". The Mutiso case[44] of Kenya was the first case to find that "because the mandatory death penalty is not specifically saved in the constitution, it violates the right to life". In each of these cases, the courts followed the emerging international consensus on the mandatory death penalty but adopted the international norms to their own domestic contexts. Indeed, the consequences of these decisions such as Kafantayeni, Kigula, and Mutiso extend far beyond death penalty cases. It is argued that in the aftermath capital sentencing regimes in Malawi, Uganda, and Kenya will require the creation of sentencing standards and a definitive list of aggravating and mitigating factors, and post-mandatory death penalty sentencing litigation has already begun.[45]

[40] "Edwards v The Bahamas, Report No. 48/01 Inter-American Commission on Human Rights".
[41] "Patrick Reyes v The Queen [2002] 2 AC 235 (Privy Council Appeal No. 64 of 2001").
[42] "Francis Kafantayeni and Others v The Attorney General of Malawi (Constitutional case No. 12 of 2005) (unreported)".
[43] "Attorney General v Susan Kigula & 417 Others (CONSTITUTIONAL APPEAL NO. 03 OF 2006) [2009] UGSC 6".
[44] "Mutiso v. The Republic (Criminal Appeal No. 17 of 2008)".
[45] Ibid., page 294.

The Kenya National Human Rights Commission published its position paper no. 2 of 2007 titled "Abolition of the Death Penalty in Kenya" whereby it stated its position and made a case for the abolition of the death penalty by Kenya from Kenya's statutes, at a human rights perspective.[46] Informed by the various theories of punishment and human rights principles, the said "position paper" addresses arguments by the proponents of the death penalty; builds a case for abolition of the death penalty; and finally makes recommendations to policy makers and other stakeholders for necessary action towards abolition of the death penalty.

KNHRC in its said position paper[47] made recommendations that "the Government should take immediate steps to fully abolish the death penalty in law and practice". Secondly, it recommended that "the Government should implement life penalties for the most serious offences" and "commute current death penalties to life penalties". Thirdly, it proposed that "Parliament should amend all laws that currently permit the death penalty". These are Sections 204, 40 (3), 296 (2) and 297 (2) of the Penal Code, CAP 63 Laws of Kenya, the Criminal Procedure Code, CAP 75 Laws of Kenya, and other statutory provisions linked to the death penalty and the Bill of Rights of the Constitution of Kenya.

A report by Sadakat Kadri attempts to define "mandatory death penalty" as "capital punishment that is required by law, whether or not a sentencing judge thinks it fair".[48] The report proceeds to identify grave shortcomings that affect systems of automatic execution. In certain jurisdictions, the offences that trigger death penalty are insufficiently serious to merit such a sanction in the first place. More generally, "any procedure that obliges a court to

[46] http://www.knchr.org/Portals/0/CivilAndPoliticalReports/PP2%20-%20Abolition%20of%20the%20death%20penalty%20-%20final.pdf?ver=2013-02-21-140244-507 (Accessed on 6/6/2016)
[47] *Ibid*.
[48] "Sadakat Kadri, Forced to Kill: The Mandatory Death Penalty and its Incompatibility with Fair Trial Standards", A report of the International Bar Association's Human Rights Institute, May 2016; Page 2.

impose the death penalty is inherently flawed". It makes it difficult or impossible for the law to give due weight to relevant facts: most obviously, the details that necessarily make one crime more or less serious than another.

Sadakat Kadri's paper surveys recent developments all over the world noting that there are certain countries that have been especially likely to impose the mandatory death penalty – those influenced by either the common law or Islamic jurisprudence – and particular attention is therefore paid to these jurisdictions. Schematically, the sections are divided as follows: mandatory application of the death penalty (an introduction and overview), mandatory death penalty under international law, mandatory death penalty according to Islamic law and conclusion.[49]

The paper is generally a study in comparative criminal procedure and international human rights law but aiming at specific, practical goals. They are: to persuade states with mandatory death penalty laws to discontinue their operation; to encourage these states to proceed, and abolish or repeal the mandatory death penalty absolutely; to urge all states to recognize and broadcast the ways in which the mandatory death penalty violates international law; and to persuade retentionist states to shun use of the death penalty over-all, and to espouse a moratorium on executions, when this would come up for reconsideration during the "71st session of the United Nations General Assembly in September 2016".[50]

The paper, therefore, entails analysis of the mandatory death penalty that follows and touches on more general questions about the justifiability of capital punishment. Although it takes a

[49] *Ibid*., page 5.
[50] *Ibid*.

clear point of view – considering executions both wrong and counter-productive – it does not, however, assume that everyone shares this opinion and it positively hopes to address many who do not. Its target audience includes anyone with a concern for fair and just legal procedures, who is prepared to consider stances towards the mandatory death penalty with an open mind.

The paper concludes that although opponents of the death penalty hope for its global abolition, there are formidable obstacles standing in the way of this goal. At the same time, there are measures short of abolition that would bring 'retentionist' states closer to the international consensus. Only a minority of those that retain the death penalty in law still carry it out in practice, after all, while mandatory executions take place in an even smaller number. States that face internal difficulties in the way of abolishing mandatory death penalty rules might usefully be encouraged, therefore, simply to put the application of those rules on hold. In any event, whatever penalties may be handed down by a country's courts, the actual executions themselves should always be suspended.[51]

Andrew Novak's[52] article on "Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya", analyzes the decision of the Kenya Court of Appeal in "Mutiso v. Republic", which struck down the mandatory death penalty for murder as "unconstitutional and incompatible with human rights norms".[53] The article places the July 2010 decision in the context of Kenya's new constitution, which was ratified by popular referendum the following month. Tracing the troubled history of the death penalty in pre-colonial Kenya through the

[51] *Ibid*.
[52] Andrew Novak, J.D. (Boston University School of Law), M.A., B.A.; Adjunct Professor of Criminology, Law, and Society in the University Washington, District Of Columbia.
[53] Novak, Andrew, Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya, *Suffolk Law Review* 45, no. 2 (2012): page 285-356.

Mau Mau Emergency and finally the politicized use of the penalty under Jomo Kenyatta and Daniel Arap Moi, the article discusses the current "de facto moratorium on the death penalty in Kenya" and the prospects for abolition. Finally, the article engages a textual reading of the Mutiso decision and similar decisions that have arisen out of the Caribbean, South and Southeast Asia, and the African countries of Malawi and Uganda. The mandatory death penalty is on the rapid and sustained retreat worldwide, and the decision in the Mutiso case confirms the same.[54]

In conclusion, Novak argues that the Mutiso case entails Kenya's "contribution to" the "global death penalty jurisprudence". In "addition to solidifying an emerging consensus on the mandatory death penalty, following the highest courts of Malawi and Uganda on the African continent, the Kenyan Court of Appeal in turn made a contribution of its own. To the extent that the Court of Appeal suggested that the mandatory death penalty was unconstitutional for crimes other than murder, in particular treason and aggravated robbery, the Court went further than most of its forerunners to note that the country should embrace the increasingly accepted state practice under the "International Covenant on Civil and Political Rights" to the tenor that the death penalty should be reserved for only the most heinous crimes, and premeditated murder in particular. In any case, the crime of robbery with violence in particular has a history of political prosecutions, and it likely does not qualify as a "most serious crime".[55]

According to Novak, the Kenyan Court of Appeal decision in "Mutiso" was also notable for its emphasis on the constitutional "right to life" provision, one unaddressed by the Constitutional Court of Malawi and the Supreme Court of Uganda. The "right to life"

[54] *Ibid*. page *295*.
[55] *Ibid*., page 332.

provision has a particularly long and controversial history in Kenyan constitutional history. Even in the 2010 constitutional debate, the scope of the right to life clause was the most controversial issue, particularly because of the abortion claw-back clause. According to the Kenyan Court of Appeal, because the mandatory death penalty is not constitutionally saved, the application of the penalty to a person not meriting death is a violation of the right to life. This was a somewhat novel holding, as the Court framed it, and will likely appear in future mandatory death penalty challenges in Africa. Another aspect of the decision that made the Court's ruling even more remarkable is that the Court very restrictively interpreted Kenya's partial savings clause at Section 74(2) of the Constitution (as it was then), which prevented constitutional challenge to a law that "authorizes the infliction of any description of punishment that was lawful in Kenya on 11th December, 1963".[56]

Finally, Novak notes that the mandatory death penalty "is on the rapid retreat worldwide" as postcolonial common law countries integrate international human rights norms into their domestic legal systems. Over several decades in many cultural contexts, including the Caribbean, Africa, and South Asia, the mandatory death penalty was replaced by a discretionary death penalty regime that allowed a judge to consider mitigating and aggravating circumstances at the sentencing phase of a trial. The mandatory death penalty almost uniformly led to bloated death rows even in countries that rarely perform executions, and in no country was the contradiction as great as in Kenya. The decision of the Kenya Court of Appeal striking down the mandatory death penalty for murder aligns Kenya with an emerging global consensus that finds an automatic penalty of death to be cruel, inhuman, and degrading punishment.[57]

[56] Ibid. page 329.
[57] Novak, Ibid., page 356.

Joy K. Asiema[58] and Ongoya Z. Elisha[59] in their paper, "the application of the death penalty in Kenya: a case of torturous de facto abstinence", set out to examine the application of death penalty in Kenya.[60] It examines the Kenya national legal framework under the pre-2010 Constitution against the backdrop of international and regional instruments dealing with death penalty. The paper also considers Kenya's stand on and initiatives towards the abolition of the death penalty in light of a heightened campaign in the world's legal order calling upon states that have not abolished the death penalty to do so. The writers' view is that death penalty is torturous to the death row inmates in Kenya which, as a member of the international community, is bound by certain obligations that have a bearing on the application of the death penalty. Asiema and Ongoya view Kenya's laws as wanting when examined against international and regional instruments prescribing the standards for the treatment of the death row inmates.

In their paper J.K. Asiema and Z. E. Ongoya emphasized that the pre-2010 constitution of Kenya recognized "death penalty as form of punishment in the penal system of Kenya". They concluded that Section 74 (2) of the said constitution must be read subject to Section 74 (1) of the same so as not to appear to foreclose avenues of challenging the malpractices associated with the execution of the death penalty, and that any description of punishment therefore, however lawful, must "not amount to cruel, inhuman, degrading treatment or punishment".

[58]"Lecturer & Head of Department of Public Law, Faculty of Law, University of Nairobi, Kenya National Collaborator, BIICL Death Penalty Project"

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[60]Joy K. Asiema & Ongoya Z. Elisha, The "Application of the Death Penalty in Kenya: A case of torturous De Facto Abstinence"- web page- "http://www.biicl.org/files/2196_country_report_kenya_asiema.pdf" (Accessed 8th November 2016)

The above paper by Asiema and Ongoya further highlights Kenya's stand on and initiatives "towards abolition of the death penalty in Kenya", including the "Kenya Law Reform Task Force on the Reform of Penal Laws and Procedures" which recommended in 1997 that the Death Penalty be abolished[61], and other promises made in the past by the state of its intention to abolish the Death Penalty in Kenya. Asiema and Ongoya suggest that the greatest impediment to the success of efforts towards abolition of the death penalty has been "its fortification within the Constitution of the Republic of Kenya", the supreme law of the land.

In their conclusion Asiema and Ongoya stated that the rejection of the proposal to abolish the death penalty at the Bomas Constitutional Conference in 2005 dealt relegated the efforts aimed towards the abolition of the death penalty in Kenya. They directly attributed this to inadequate public campaigns against the death penalty owing to unavailability of data which would be useful in sensitizing the public on the "breaches of human rights" associated with the death penalty, stating that it is not easy to undertake meaningful reform without the availability of data to demonstrate the need for the reform. They further opine that given the pronouncements by top Government officials as to the Government's intention to abolish the death penalty, active campaigns towards creating sufficient awareness on the undesirability of the death penalty as a penal sanction for offenders in light of the abolitionist stand of the international legal order should now be spearheaded especially by lobby groups and any reform minded pressure groups in Kenya through concerted efforts by all stakeholders.

[61]See Government of the Republic of Kenya *Report of the Task Force on the Reform of Penal Laws and Procedures* (October 1997) page 76-77. "One of the writers, Mrs. Joy K. Asiema, was the Joint Secretary to the Task Force."

C. Anyangwe[62] in his article emerging African jurisprudence suggesting the desirability of abolition of capital punishment[63] makes a case that death penalty has for thousands of years been the most dreaded[64] and probably the most misused form of punishment ever.[65] According to him, it continues to raise moral and religious issues as well as issues that impinge on law enforcement and the "administration of criminal justice". He correctly remarks that the "right to life" is the "primary right that conditions all others and thus has supreme value because without life, all human rights are superfluous". He further observes that, although several international treaties outlaw capital punishment, neither the International Bill of Rights nor the ACHPR explicitly do so, they however stringently regulate the application of the death penalty, thereby strongly suggesting that its abolition is desirable.

Anyangwe postulates that the death penalty besides violating the "right to life", also violates the following related rights: "the right to respect for the inviolability of the human person"; "the right to respect for the integrity of the person"; "the right to the inherent dignity of the human person"; "the right to liberty"; "the right to freedom from torture, cruel, inhuman and degrading punishment or treatment"; and, in some cases, "the right to fair trial".

While Anyangwe's paper briefly recalls the pros and cons of the death penalty, its focus is on the emerging abolitionist jurisprudence in Africa. Anyangwe describes Africa as a continent burdened with religious, cultural, historical and legal diversity in which the death penalty is

[62]Professor of Laws and Executive Dean , Faculty of Business, Management Sciences and Law, Walter Sisulu University , Republic of South Africa.
[63]Anyangwe C, 'Emerging African Jurisprudence Suggesting the Desirability of Abolition of Capital Punishment,' African Journal of International and Comparative Law 23.1 (2015): pages 1-28.
[64]W. Andrews, *Old Time Punishment*, Dorset Press (1991); page 109.
[65]"L. Chenwi, *Towards the Abolition of the Death Penalty in Africa: A Human Rights Perspective*, Pretoria University Press (2007)"; page 27.

still very much alive. He argues that most African states have retained the death penalty as a form of punishment because it is seen as an appropriate tool in the war against crimes, it is warranted by religious injunctions, and it ensures political and social stability and also public opinion which has mistakenly misled the majority to view it as effective weapon against rising criminality. He observes that many of these African countries are dealing with abolition by either having in place a temporary or permanent moratorium on executions[66]. He further observes that, a growing number of African states no longer have offences carrying mandatory death sentence, but instead, the passing of the death sentence in capital cases is left entirely at the judge's discretion.[67] He writes that there is now a definite and growing trend towards limitation of capital punishment as can be seen in the ever decreasing number and scope of capitally punishable crimes.[68]

Anyangwe argues that the current debate on capital punishment has gone beyond the traditional arguments based on deterrence, retribution, incapacitation and even public opinion, and says that states should stop executing offenders and completely abolish death as a form of punishment. He is of the persuasion that arguments by the death penalty retentionists are weak, that no government can seriously defend capital punishment as legitimate or appropriate or justified, that the deterrent value of capital punishment cannot be conclusively proved scientifically, and even quotes W. A. Shabas who said that the

[66]African Human Rights Commission, *Study on the Question of the Death Penalty in Africa*, Baobab Printers (2012). The study is the outcome of the work of the Commission's "Working Group on the Death Penalty and" Extra-Judicial, "Summary or Arbitrary Killings in Africa".

[67] R. Hood, "*The Death Penalty: A Worldwide Perspective*, 3rd edition, Oxford University Press (2002)" page 214.

[68]*Report of the "Working Group on the Death Penalty in Africa"* (2012), pp. 4, 9; W. A. Schabas, "'Abolition of the Death Penalty in Africa", in "William A. Schabas (ed.), *Sourcebook on theAbolition of the Death Penalty*, North-Eastern University Press (1997), pp. 30–5"; "Manfred Nowak, 'Is the Death Penalty an Inhuman Punishment?', in "T. S. Orlin, A. Rosas and M. Scheinin (eds), *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach*, Institute for Human Rights, Åbo Akademi University (2000"), pp. 42–43.

abolitionist argument is now firmly an *acquis politique* and even *juridique* that needs only to be operationalised.[6970]

He notes that some courts have declared the death penalty per se unconstitutional on the rationale that it constitutes "**cruel, inhuman and degrading** punishment", and have gone ahead to order its deletion from the state's penal system, as the Constitutional Court of South Africa did in "*State v Makwanyane & Mcbunu* (1995)*"*.[71] He also observes that conversely, courts in countries that retain the death penalty uphold its constitutionality on the deduction that it is expressly sanctioned by the country's constitution, but, however, some of these courts are prepared to declare the penalty unconstitutional in circumstances where it is a penalty **mandatorily** prescribed by law or where there has been **inordinate delay** in executing a convicted capital offender whose death sentence has become final.[72]

Anyangwe further remarks that although many African states are de facto abolitionists having a moratorium on executions but not on passing of death sentences, this situation has resulted in a significant increase in the number of "death-row" inmates living in appalling conditions and fearfully waiting to be executed but not knowing when they will be. The question of "delay in executions" would therefore appear to be an attempt by the courts to mitigate the harshness of the **death-row phenomenon**.

Anyangwe importantly notes that there is developing municipal jurisprudence that have determined the "death-row phenomenon" and even the way capital punishment is carried out

[69]W. A. Shabas, "The Abolition of Capital Punishment from an International Law Perspective paper delivered at the International Society for the Reform of Criminal Law 17th Conference", The Hague, August 2003.
[70]"The Abolition of the Death Penalty in International Law, 2nd edn, Cambridge University Press (2002)" page 42.
[71] (6) BCLR 665 (CC); (3) SA 391 (CC).
[72]*Ibid*.

may constitute "cruel, inhuman and degrading treatment" prohibited under domestic and international human rights law.

Anyangwe acknowledges in counter argument, that a death penalty legally authorized is not unconstitutional. He evaluates the Tanzanian case of *Republic v Mbushuu & Anor (1994)*,[73] considered in Uganda's *Susan Kigula* case, where the Supreme Court of Tanzania overruled an earlier decision of the High Court to the effect that the death penalty "per se" is unconstitutional. The Supreme Court held that the death penalty is constitutional in Tanzania. The Court acknowledged that "capital punishment amounts to cruel and degrading treatment" but said that it is not an unconstitutional form of punishment in Tanzania since the constitution provides for derogations to fundamental human rights for legitimate reasons.

He observes that the Supreme Court of the Democratic Republic of Congo reached the same conclusion in the unreported case of *Affaire Mukonkole* (2011). In that case the appellant was convicted of the crime known as *association des malfaiteurs* (criminal association), for which the death sentence is obligatory under the criminal law of Congo. The Court held that the obligatory death sentence provided for that crime did not render the penalty unconstitutional, or inhuman, cruel and degrading punishment.

Anyangwe also analyzes the cases of *Mbushuu* and *Mukonkole* are in line with the earlier Nigerian Supreme Court case of *Onuoha Kalu v The State* (1998)[74] in which the Court ruled that "the death penalty is valid and constitutional in Nigeria since it is explicitly permitted by the Constitution", "that the right to life guaranteed by the Constitution is a qualified and is

[73] 2 LRC 349.
[74](1998) 12 SCNJ.

not an unqualified right", that in terms of the Constitution "the right to life is not violated when life is taken in execution of a court order", and accordingly, "death penalty could not be interpreted as amounting to torture, inhuman and degrading treatment". The Court, however, stated that it was "up to the National Assembly to adopt measures to deal with the issue of the practice of the death penalty in Nigeria". The Court also left open the question whether keeping a condemned capital offender on death row for a significant amount of time might amount to a violation of procedural rights, but hinted that such prolonged detention would be improper as it did in the case of *Peter Nemi*[75] – a case of "prolonged confinement on death row for a period of 8 years"- in which the Nigerian Court of Appeal held that "prisoners have enforceable rights as citizens and suggested that prolonged incarceration of convicted prisoners could constitute breach of their right to dignified and humane treatment".

Anyangwe rounds off by remarking that the "African Commission's Working Group on the Death Penalty has suggested the espousal of an additional protocol to the African Charter on the abolition of the death penalty[76] and is presently organizing a draft of that protocol. The eventual adoption of that protocol by African States would position Africa to become a "death-penalty free continent".[77]

Lilian M. Chenwi,[78] in her book, Towards the "Abolition of Death Penalty in Africa: A Human Perspective", approaches the issue of death penalty from many angles including the moral, philosophical, ethical and legal perspectives[79], and discusses the legally obliging human rights commitments of states resultant from treaties that they have ratified. She

[75] *Peter Nemi v Attorney General of Lagos State & Anor* (1996) 6 NWLR pt 452 page 42.
[76] African Human Rights Commission, *Study on the Question of the Death Penalty in Africa*, page 63.
[77] *Ibid*.
[78] LLB (Buea); Maitrise (Yaounde); L1M, LLD (Pretoria).
[79] L. Chenwi, *Towards the Abolition of the Death Penalty in Africa: A Human Rights Perspective*, Pretoria University Press (2007); page 51.

principally deals with human rights law and puts forward arguments to re-enforce an "emerging trend to abolish capital punishment on the basis of obligation of states to obey international human rights law".

Chenwi submits that whereas there is no conclusive unanimity that capital punishment infringes human rights obligations under international law, copious facets of its implementation present regular human rights concerns, and that this method of punishment should only be imposed for the 'most serious offences', and only subsequent to all fair trial safeguards being adhere to. She observes that, however, in majority of the states that maintain this method of punishment, the preceding two minimum requirements are every so often not sustained.

Chenwi proceeds to submit that it is cruel and inhumane for someone sentenced to death to "live in the shadow of the gallows for an extended period of time, subjecting him or her to the 'death row' phenomenon". She posits that *De facto* abolitionist states (that is, states that allow the imposition but not the execution of death sentences) render inmates on death row to subsist lifetimes of uncertainty and vagueness. She nevertheless cautions that this critique should not be perceived as an encouragement to *de facto* abolitionist states to execute all death row inmates awaiting performance of the sentence. In any event, the numbers of inmates on 'death row' are so great that it is unthinkable to execute all of them in one go. Rather, she suggests that nations should eliminate the death penalty and commute the sentences of those at present serving sentences of death. She accordingly believes that permitting the death sentence as a isolated option makes it possible for its capricious use in circumstances that will serve short-sighted and expedient political objectives.

Chenwi, while contextualizing the South African situation where the Supreme Court declared the death penalty unconstitutional, rationalizes that "a progressive interpretation of existing law by an activist judiciary may provide the pivot that could steer the legislature towards abolition of the death penalty".

Chenwi is of the assessment that the death penalty is a human rights subject, and that its obliteration is concomitant to the progress of, and reverence for, human rights.[80] In her words, its eradication is a dominant topic in the enhancement of international human rights law. In view of the above, she states that the employment of the death penalty in Africa and other places is gradually turn out to be an impediment to the achievement of justice and the progression of human rights.

While Chenwi posits that the implementation of the death penalty cannot be extricated from the subject of human rights, she acknowledges, as does R. Hood[81], that some countries that maintain and utilize the death penalty have refrained from describing it as a human rights issue, rebuff the contention that judicial execution violates basic human rights, and regard their criminal justice system as an affair of national sovereignty manifesting their individual cultural and religious values.

1.7 RESEARCH METHODOLOGY

The research herein is desk and library-based research whose main purpose is to show whether the Kenyan legal and policy framework imposing "mandatory death penalty" upon conviction for murder, treason and robbery with violence meets the international human

[80]Ibid. page 22.
[81] R. Hood *The death penalty: A worldwide perspective* (2002), page 18.

rights law "standards and best practices". In so doing, the study aims to produce a compelling case for the abolition of the "mandatory death penalty" in Kenya. The research involves mainly critical examination of secondary sources. These include, but are not limited to, books, journal articles, dissertations and relevant studies. The Internet is also a very important source of information to this research especially in providing materials and perspectives on the comparative jurisdictions.

The libraries available and resourceful for the research are School of Law Parklands Campus library, Jomo Kenyatta Memorial Library in Main Campus (U.O.N), the High Court libraries in Nairobi Law courts and Milimani Commercial Courts are also available and accessible. No primary research, in the strict sense of the word, was undertaken in consideration of the nature of the subject matter of the study which appeals to secondary research. This is further the case due to the limit of time within which the study is to be undertaken. Nevertheless, consultations and engagements were made in ascertaining the views of key stakeholders especially within criminal justice system in Kenya including "the Office of the Director of Public Prosecutions", "State Law Office" and "Law Society of Kenya" among others on the subject matter of the study. However, this was not based on questionnaires but simply impromptu and informal interviews.

1.8 CHAPTER BREAKDOWN

The study is divided into the following chapters:

1.8.1 Chapter One: Introduction

This is basically the introductory chapter. It entails background and statement of the problem objectives of the study, research questions and justification of the study, literature review, theoretical framework and the research methodology.

1.8.2 **Chapter Two: Literature Review**

This chapter discusses the law and "policy framework" on the "imposition of mandatory death penalty as criminal punishment in Kenya". The aim of the chapter is to lay a descriptive foundation for the analysis of mandatory death penalty and proposals for reforms to follow in the next chapter. Hence, the meaning and basis for criminal punishment is outlined as well as the sentencing policy in Kenya.

In this chapter we also undertake a comparative analysis of the mandatory death penalty between the USA, UK, EU and South Africa- and Kenya.

1.8.3 **Chapter Three: Theoretical Framework**

This Chapter discusses the theoretical conceptualization of mandatory death penalty in the criminal punishment today, from an ethical and pragmatic perspective. In essence, this chapter explores the theories, principles and concepts surrounding the mandatory death penalty.

1.8.4 **Chapter Four: Situational Analysis in Kenya**

The chapter evaluates the prevailing situation on mandatory death penalty in Kenya by carrying out a situational "analysis of the status of" mandatory "death penalty in" Kenya including its status in compliance with the constitution, the factual reality of imposition and

implementation of mandatory death penalty, the *de facto* non-execution of death row convicts in Kenya since 1987 and the compliance and non-compliance of the Kenyan laws on mandatory death penalty with the international and regional human rights documents.

1.8.5 **Chapter Five: Summary, Conclusion and Recommendation**

This chapter entails a conclusion, summary of the findings of the study and discussion of the proposals and recommendations for law reforms towards abolition of mandatory death penalty in Kenya.

CHAPTER TWO: LITERATURE REVIEW

2.1 INTRODUCTION

This chapter discusses the law and policy framework on the imposition of "mandatory death penalty as criminal punishment" in Kenya. The aim of the chapter is to lay a descriptive foundation for the analysis of mandatory death penalty and proposals for reforms to follow in the next chapter. Hence, the meaning and basis for criminal punishment is outlined as well as the sentencing policy in Kenya including discussion of the various objectives of criminal justice and the nature of the common custodial and non-custodial penalties issued by Kenyan courts as per the law. In addition the instances where mandatory death penalty is applied and the exemptions thereof are also discussed in order to establish its current status for purposes of review and critique in ensuing chapters.

2.2 KENYAN CASE-LAW ON DEATH SENTENCES IN KENYA

2.2.1 FRANCIS KARIOKI MURUATETU &ANOTHER v REPUBLIC & 5 OTHERS- SUPREME COURT PETITION NO. 15 OF 2015 AS CONSOLIDATED WITH SUPREME COURT PETITION NO. 16 OF 2015.

In this matter the Supreme Court of Kenya is currently deciding a dispute on the compatibility of the mandatory death penalty with Kenya's Constitution.[82] The crucial question in the case is "whether the imposition of death for everyone convicted for murder, irrespective of the circumstances of the case and of any mitigating features, is consistent with the right to life and the prohibition of inhuman and degrading punishment under the

[82] http://www.deathpenaltyproject.org/news/2037/supreme-court-of-kenya-today-heard-submissions-on-mandatory-death-penalty/ (Accessed on 14th March 2015)

Constitution". The outcome of this case is likely to affect several thousand inmates in Kenya who are on death row for murder or aggravated robbery.

2.2.2 "JOSEPH NJUGUNA MWAURA & 2 OTHERS" v "REPUBLIC, CRIMINAL APPEAL NO. 5 OF 2008, COURT OF APPEAL AT NAIROBI"

On October 18th 2013 the Court of Appeal in this case overturned the ruling in *Mutiso, stating* that the law had expressly provided for death penalty, without an option of a lesser sentence, to anyone convicted of murder.

The death penalty for armed robbery was challenged in this case, and the Court held that "the death penalty was not too severe a sentence for armed robbery and was therefore constitutional". The Supreme Court is expected to make a decisive statement on the matter.

2.2.3 MICHAEL NJOROGE WAITHERA v R [2013] eKLR

The holding in above case of *Joseph Njuguna Mwaura* was later affirmed in the case of *Michael Njoroge Waithera V R [2013]* where the court of appeal found the Geoffrey Mutiso decision to be *per incuriam* because it purported to grant discretions regarding capital offences. In additional to this, the death sentence was found to be in conformity with the constitution.

Similarly, a three judge bench of the high court in the criminal appeal of "*Jackson Maina Wangui & another v R* [2014] eKRL" (criminal case 35 of 2012) also added that the people of Kenya through their elected leadership were the only people mandated to change this law if they deemed it as unacceptable. The court added that it was important that the society

resolves these issues as soon as possible especially due to the negative thoughts about the death penalty among the Kenyan.

2.2.4 JACKSON MAINA WANGUI & ANOTHER v REPUBLIC [2014] EKLR - CRIMINAL CASE NO 35 OF 2012[83]

In this case, a 3-judge bench of the High Court ruled as follows in relation to the Death Penalty, on the 2nd October 2012:

1. ***An accused person charged with the offence of murder is entitled to know and is deemed to know with certitude, at the date of taking plea, what possible sentence he stands to suffer in the event the trial court finds him/her "guilty" of the offence of murder. The law is clear on the penalty for murder, which is death, and the manner of execution, which is death by hanging.***
2. ***The punishment by a mandatory death sentence prescribed under section 204 of the Penal Code, Cap 63 of the Laws of Kenya or any other written law is authorized under the Constitution of Kenya. It is not contrary to the general rules of international law and/or treaties and conventions ratified by Kenya, and do not offend Article 26 of the Constitution.***
3. ***The mandatory death sentence is not unconstitutional and does not violate the fundamental rights enshrined in "Articles 26, 28 and 29 of the Constitution".***
4. ***The law that imposes a "mandatory death sentence" does not permit the exercise of judicial discretion in the passing of sentence.***

[83]http://kenyalaw.org/caselaw/cases/view/102134/ (Accessed on 12th December 2014)

5. ***A court cannot pass any sentence other than the death sentence in convicting an accused person in respect of the offence of murder.***
6. ***There are express statutory provisions contained in section 332(3) of the Criminal Procedure Code that vest the President of the Republic with lawful authority to commute a death sentence to life imprisonment. No such authority is vested in the Commissioner of Prisons.***

The Court also found that "while the death penalty is not unconstitutional, *the failure to carry out the death sentence* ***[indefinitely]*** *is unreasonable and does not accord with respect for the constitutional rights of those who have been found guilty of capital offences and sentenced to death".*

In this case it was also ruled that *"should the people find that the death penalty is unacceptable, the responsibility to abolish it lies with the people of Kenya, through their elected representatives. It is imperative, and as soon as possible, that the ambivalence that our society demonstrates towards the death penalty is resolved one way or the other".*

2.2.5 MUTISO v REPUBLIC, COURT OF APPEAL MOMBASA, CRIMINAL APPEAL NO.17 OF 2008 COURT OF APPEAL AT MOMBASA

A unanimous decision by the court sitting at Mombasa on 30th June 2010 found the mandatory nature of the death penalty handed to certain criminal convicts to be "not only inhuman but also degrading to human dignity".

The court further faulted the death sentence as being "a violation of the right to life". The Court further found that "the right to a fair hearing was not also accorded to the convict by allowing him/her to mitigate the circumstances surrounding the crime, before he/she is sentenced". The sentencing does not provide a chance to the convict to mitigate their sentences through any other optional sentence. Due to these violations of the fundamental human rights, the court of appeal invalidated the mandatory death sentence "to any convict of murder". The reasoning in this ruling was to be applicable not only to victims of murder but also to all other crimes that were punishable by mandatory death sentences.

The court further found that previously acquitted murder convicts would have to be tried again on the basis of his new reasoning. The court also faulted the decision to hold a convict in the death waiting row for over three years.

In the Mutiso case, the Kenya court of appeal noted that "although the death penalty was not provided for in the constitution, handing the sentence to a person who in the subjective circumstances does not deserve it amounts to violation of that person's human rights". This landmark ruling may be quoted largely in death sentence rulings in Africa. [84] The verdict was largely in line with the ICCPR which provides that death be set aside to the most heinous crimes and in premeditated murders[85].

In this Case the word "shall" was interpreted permissively, and the court held that "the gravity of a murder is a factor to be considered in determining whether to sentence an individual to death, so that death penalty might be restricted to aggravated murder".

[84] "Barkow, Rachel E". "The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity." "*Michigan Law Review"* (2009): Pages 1145-1205.
[85] Ibid

2.3 LEGISLATIVE FRAMEWORK OF THE LAWS ON DEATH PENALTY

Domestic legal standards often use international laws and regulations as a benchmark. They are also used as a guide when formulating domestic laws as they have existed for a longer period and help standardize the legal aspects of various laws across the globe.[86] This makes them a crucial contributor in domestic laws as far as passing mandatory death sentences in the nation is concerned. International laws are extremely crucial when interpreting domestic laws in situations where a nation is required to take steps to accept obligations laid down by international laws, mainly those found in treaties and conventions. Likewise, international laws play a crucial role in the decision making process in tribunals and foreign courts. This is done by basing comparable provisions on similar issues and providing great insight that enriches local laws. "As a" result "of the universal" nature of human rights, international laws are crucial in determination of the primary freedoms, foreign laws and international laws applicable in various regions across the world[87].

The main idea behind international rights is the universal nature of the rights that people should enjoy across the globe. The right to life is considered to be the main and most important right humans can have and enjoy. This is because without the right to life, all other rights automatically become redundant as one cannot enjoy them if he or she is not alive. As such, capital and mandatory death sentences often seek to eliminate this right. To do so it is necessary that the laws of the world support the notion. The significance of life and the fact

[86] Ademun-Odeke, Ademun. "Jurisdiction by Agreement over Foreign Pirates in Domestic Courts: In re Mohamud Mohamed Dashi & 8 Others." *USF Mar. LJ* 24 (2011): 35.
[87] Urueña, Rene. "V. 1 The ICC's Office of the Prosecutor and Transitional Justice: Article 53 of the Rome Statute and the Balance between Opportunity and Accountability."

that death sentences seek to eliminate the most important of human rights perhaps makes this a crucial subject[88].

International laws help in benchmarking the standards which the laws of a country should compare to and serve as a guide to interpreting the various domestic laws, but this only happens when a country has taken the steps to accept the obligations of international laws as contained in the various treaties and conventions. In this way, the decisions of the international tribunals and the judgments given in foreign courts in matters that are of similar nature in a domestic country can be used to enrich the domestic laws of a particular country[89].

Signature by a country/state of international treaties and protocols denotes an intention to become a party at a later date through ratification, but in the meantime those States are bound under international law to respect the provisions of treaties to which they are signatories, and not to do anything to defeat the object and purpose of the said treaties.

2.3.1 INTERNATIONAL HUMAN RIGHTS LAW ON DEATH PENALTY

International laws relating to capital punishment are found mostly in the ICCPR, UDHR and the "Second Optional Protocol to the ICCPR (1966) aiming at the abolition of the death penalty", which shall be discussed below. The United Nations Charter is similarly significant to the three in as far as it pledges to support and reaffirm faith in "fundamental rights of humans" in support of the dignity and worth of people. In the past international laws have also been very paramount in restricting and providing restrictions as to when the death

[88] Swanepoel, Paul. "Judicial choice during the Mau Mau rebellion in Kenya 1952-1960." *Fundamina: A Journal of Legal History* 18.2 (2012): page 145-161.
[89] Novak, Andrew. "Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya." *Suffolk UL Rev.* 45 (2011): page 285.

sentences should be used in courts. In as much as Article 6 of the ICCPR affirms the "right to life" of every human being and prohibits the "arbitrary deprivation of human life", it does not bar capital punishment. The overall formulation of Article 6 of ICCPR led the eighteen individual experts of the Human Rights Committee to conclude that the Article largely alludes to abolition in terms which "strongly suggest that abolition is desirable" and that "all measures of abolition should be considered as progress in the enjoyment of the right to life"[90].

The "restrictive approach to the death penalty" can be seen in the minimal procedural requirements for convicting people who are classified as capital offenders, whereby "procedural guarantees" prescribed in Article 14 of the ICCPR "must be duly observed, including the right to a fair hearing by a competent, independent and impartial tribunal, the presumption of innocence, the minimum guarantees for the defense and the right to review by a higher tribunal". This view was cogently endorsed by the Human Rights Committee in "Mbenge v. Zaire"[91] and "Reid v. Jamaica"[92], where it was emphasized that "in capital punishment cases, the duty of States parties to observe rigorously all the guarantees for a fair trial set out in Article 14 of the Covenant is even more imperative".

Human rights and fundamental freedoms bring out the importance of international laws. This is because of the need for a worldwide accepted standard or code of human rights and fundamental freedoms. The most protected and advocated right that is accepted universally is the right to life. This is because without one having his or her life all the other rights come up

[90]Report of the "Human Rights Committee, gaor, 37th Session, Supplement No. 40 (1982), Annex V, General Comment 6(16"), paragraph "6".
[91]Mbenge "v. Zaire, Search Term End Communication No. 16/1977 (8 September 1977), U.N. Doc. Supp. No. 40 (A/38/40") (1983) "at" page 134.
[92]Reid v. Jamaica, No. 250/1987, paragraph11.5

to nothing. "Capital punishment", which is the condemnation of a person to death, on the other hand goes against the right of to life by seeking to extinguish life as form of punishment, though it does that with the full sanction of the law. The importance of life as valued and protected by the human rights is what makes the death penalty a central issue in the human rights law[93].

Internationally the UDHR, ICCPR and the second optional protocol are the documents containing the laws relating to capital punishment. These laws, especially the second optional protocol, together with other regional treaties and conventions, seek to abolish or otherwise bring an end to the death penalty worldwide. The United Nations in protecting the right to life of every member of its umbrella seeks to abolish the death penalty. The customary international laws also play an important role as some requirements and restrictions on the use of the death penalty have been made "rules of customary international law", for example; "the death penalty not being passed on juvenile and pregnant women convicts". The international laws also require a strict due process to be followed during the prosecution so that the conviction or sentence passed is fairest to the capital offender[94].

The abolition of the death penalty has not developed into a *jus cogens* rule because there are several countries which still use it. To make the rule gain more momentum and be stronger the different partners in this struggle should strive to see the rise of the jus cogens rule against capital punishment in the near future[95].

93

"Anyangwe, C. Emerging African Jurisprudence Suggesting the Desirability of the Abolition of Capital Punishment." *African Journal of International and Comparative Law* 23.1 (2015): page 28.

94 Ibid.

95 Ibid.

2.3.2 INTERNATIONAL INSTRUMENTS ON THE DEATH PENALTY

2.3.2.1 Universal Declaration of Human Rights (UDHR)

The UDHR is one of the first global instruments averse to the death penalty. Towards the conclusion of World War II, the United Nations General Assembly adopted the Universal Declaration of Human Rights on 10th December 1948, in which it declared the doctrine of a "right to life" in an absolute fashion, with any limitations being only implicit. Knowing that international abolition of the death penalty was not yet a realistic goal in the years following the Universal Declaration, the United Nations shifted its focus to limiting the scope of the death penalty to exclude pregnant women, juveniles, and the elderly.[96]

Article 3 of the UDHR states that "everyone has a right to life", and although it does not expressly condemn the death penalty, article 5 thereof provides that "no human being is to be subjected to any form of torture, cruelty, inhumane or degrading acts", even as a form of punishment. This prohibition of the inhuman treatment and actions of torture is relevant in the capital punishment discourse in international human rights[97].

This instrument has been largely accepted as the international constitutional structure adopted by most countries throughout the world. The omission of the death penalty as an exception to the right to life in the UDHR shows that it was deliberately left out while it was being formulated because most of the documents that it borrowed its ideas and laws from like the American bill of rights and the English bill of rights 1689 recognized capital punishment explicitly. This serves as a key indication where the world is headed to; to the direction of

[96] "http://www.deathpenaltyinfo.org/part-ii-history-death-penalty" (accessed on 11/11/2014).
[97] "Novak, Andrew. Abolition of the Mandatory Death Penalty in Africa: A Comparative Constitutional Analysis, The. "*Ind. Int'l & Comp. L. Rev".* 22 (2012): page 267".

abolishing or restricting the application of the death punishment. It was omitted so as to give momentum to the jus cogens rule against capital punishment[98].

2.3.2.2 **International Covenant on Civil and Political Rights (ICCPR)**

The ICCPR[99] was developed from the UDHR, which influenced various concepts including the right to life. Kenya is a party to the ICCPR having acceded to it on 1st May 1972 but has never signed it to date.[100]Article 6 (1) of ICCPR prescribes that "every person has the inherent right to life". It proceeds to affirm that the right shall be safeguarded by the law and "no one shall arbitrarily be deprived of his/her life". This helps to point out the importance of the right to life, its safeguard by the law and how the international community abhors arbitrary denial of life. It does not explicitly proscribe the death penalty but it goes ahead to recognize the right to life and anticipates the continuation of life[101].

The ICCPR only mentions capital punishment in Article 6 but it is clear from its wording that it was drafted in line with the spirit of the UDHR by aspiring "the abolition of the death penalty in every country"[102].

The choice of selecting which crimes warrant the death penalty in countries still applying the punishment lies with the different states that have chosen to retain it. It is mostly imposed on the most serious crimes, and it cannot be reasonable to pass the sentence on small offenses like stealing.

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[98] Ibid.
[99]http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf (Accessed on 3/11/2014).
[100]Status, "Declarations, and Reservations, ICCPR, 999 U.N.T.S. 171, Dec. 16, 1966,"
"http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en, "
(Accessed on 21st "Feb". 2015).
[101] Ibid.
[102] Ibid.

The ICCPR gives even more protection to the children and women who are pregnant and have committed crimes that are liable to be punished by the death penalty in countries still applying it. It asserts that the sentence of death shall not be applied to crimes committed by persons under eighteen years of age and also to pregnant women, although such women after giving birth can still face capital punishment for the subject crimes[103].

2.3.2.3 **The Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty**

The second optional protocol to the ICCPR aiming at the abolishment of the capital punishment was adopted and proclaimed by "General Assembly resolution 44/128 of 15 December 1989" and effected in July 1991[104]. It states that no person within the jurisdiction of a country that is part of the present protocol shall be executed and that the countries will engage the desired measures to eliminate the death penalty from within its jurisdiction[105].

The second optional protocol instead goes for a moratorium on executions and insists on creation of new laws or amending the existing ones so as to abolish the capital punishment among the member countries. It also goes ahead to give a provision for a member state to apply the capital punishment during periods of war for serious crimes of a military nature committed, where a reservation to that effect has been made at the time of ratifying or acceding to the Protocol.[106]

[103] Ibid.
[104] http://"www.ohchr.org/EN/ProfessionalInterest/Pages"/2ndOPCCPR."aspx" (Accessed "on" 12/12/2014).
[105] Article 1 (1).
[106] Article 2 (1).

At the moment the Second Optional protocol has 73 members the ICCPR has 167 members. Many countries have opted to abandon the use of capital punishment but have not become party to the second protocol. This is explained by many countries abandoning the punishment by death but the second protocol not having many members[107].

Kenya's dedication to abolish the death penalty is still uncertain. Despite Kenya being a party to the ICCPR since 1972, it has never signed nor ratified the ICCPR protocols including this second protocol[108]. The first protocol allows the rights for petition and the second one is themed on abolition of death penalty.

2.3.2.4 **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)**

The CAT is an international treaty that encapsulates human rights and echoes the position established in the United Nations Charter, in as far as it recognizes the solemnity of the human rights which promote "inherent dignity of the human person".[109] Article 55 of the "United Nations Charter" imposes the duty upon subscriber states to foster the veneration and compliance of human rights and fundamental freedoms. [110]

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[107] Novak, Andrew. "Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya." *Suffolk UL Rev*. 45 (2011): 285.

[108] Status, "Declarations, and Reservations, Second Optional Prot. to the ICCPR, Aiming at the Abolition of the Death Penalty, 1642 U.N.T.S. 414, Dec. 15, 1989,"
"http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4&lang=en, (Accessed" on 1st May 2015).

[109] "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, web page: http://www.ohchr.org/en/ProfessionalInterest/pages/cat.aspx" , Accessed: 8th November 2016

[110] The United Nations, "Charter Of The United Nations And Statute Of The International Court Of Justice", Article 55, web page: https://treaties.un.org/doc/publication/ctc/uncharter.pdf, Accessed: 8th November 2016

This CAT, quite elaborately, advances the philosophy that prohibits the subjection of individuals to torture and all wrongful forms of treatment and punishment. This is a postulation of the provisions in Article 5 of the UDHR, and the ICCPR"

Article 1 of the CAT defines "torture" as:

> *"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."*[111]

There is an evolving international standard which considers the death penalty as "a violation of the prohibition of torture and cruel, inhuman and degrading treatment" resulting in the illegality of the death penalty under article 1 and 16 of the CAT[112], which is developing into a model of customary international law as revealed in a Report by the United Nations Special Rapporteur on "torture and other cruel, inhuman or degrading treatment or punishment", at

[111]Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, web page: http://www.ohchr.org/en/ProfessionalInterest/pages/cat.aspx, Accessed: 8th November 2016

[112]http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12685&LangID=E#sthash.KokafgZQ.dpuf (accessed on 15/8/2015).

the Sixty-seventh session of the United Nations General Assembly held on 9th August 2012.[113]

Additionally, the ICTY has held[114] that prohibition from torture now has the value of **customary law** internationally and is therefore binding on all States, even those which have not ratified the 1984 United Nations CAT or any other treaty for the protection of human rights which ban use of torture, such as the 1950 "European Convention for the Protection of Human Rights and Fundamental Freedoms", the 1966 ICCPR, the 1968 "American Convention on Human Rights", the 1981 ACHPR, etc.[115].

2.3.3 REGIONAL INSTRUMENTS ON THE DEATH PENALTY

2.3.3.1 The Africa Charter on Human and Peoples' Rights (ACHPR)

The ACHPR[116] is the foremost human right instrument in Africa and Kenya is party to this charter[117] having acceded to it on the 23rd January 1992.[118] It advocates for the right of life, human dignity and is against human cruelty. Article 4 of the instrument points out that, "human beings are inviolable" and "no one is to be arbitrarily denied the right to life". Article 5 goes ahead to explicate that "each individual shall have the right to the respect of the dignity that exists in a human being". All forms of actions that go against the human rights and freedoms are prohibited under this instrument. Most of the countries and especially those

[113] http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12685&LangID=E#sthash.KokafgZQ.dpuf (Accessed on 15/8/2015).

[114] ICTY, Judgement of the "prosecutor v. Anto Furundžija, Case no IT-95-17/1-T, 10 December 1998".

[116] "http://www.achpr.org/instruments/achpr/ratification", (Accessed on 1st May 2015).
[117] "African Union, List of countries which have signed, ratified/acceded to the African Charter of Human and People's Rights, Doc. 0002".
[118] "http://au.int/en/sites/default/files/African_Charter_on_Human_and_Peoples_Rights.pdf", (Accessed on 1st May 2015)

from the sub-Saharan Africa have moved or are moving towards the abandonment of the death penalty[119].

The ACHPR explicitly promotes the abolition of the death penalty in Africa. The charter requires "adherence to the United Nations charter and the universal declaration of human rights". This charter is important as it may mean that the focus of the UN and the UDHR show how the African countries view the death penalty[120].

Kenya in 1992 ratified the "African charter on Human Rights and People's Rights" as well as the "protocol to the establishment of the African Court on Human Rights" in 2004.

2.3.3.2 **European Court of Human Rights & European Convention on Human Rights (ECHR)**

The ECHR[121] is a respectable example of the European instruments that recognized the death penalty as an exception to the right to life in some circumstances. Its protocol no. 6 abolished the punishment of death and only preserved its use during times of war if the state saw the need to use it. As time went by, Europe through protocol No. 13 of the said charter abolished the death punishment for all the crimes committed even at time of war[122].

Protocol number 13 of the ECHR abolishes death penalty "by any circumstances". Majority of the member states to the ECHR have either signed or ratified the protocol. This Court has

[119] Novak, Andrew. "Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya." *Suffolk UL Rev.* 45 (2011): Page 285.
[120] Ibid.
[121] "http://www.echr.coe.int/Documents"/Convention_"ENG.pdf" (Accessed on 14/9/2014).
[122] "Hynd, Stacey. "Murder and Mercy: Capital Punishment in Colonial Kenya, Ca. 1909-1956*." *The "International Journal of African Historical Studies* 45.1 (2012)": page 81.

adjudged that the death penalty is a violation of article 3 of its convention, which prohibits any form of torturous acts as well as demeaning treatment of human beings. Only 2 of the members have not signed the protocol and only a paltry 3 members have signed the protocol but are yet to ratify it[123].

2.3.3.3 **American Convention on Human Rights (ACHR)**

On the other hand the ACHR[124] limits use of death punishment to the most serious crimes. The charter also prevents the introduction of new capital offences. It also exempts children under the age of 18 years, pregnant women and those over 70 years old from the capital punishment. The ACHR also abolished the death penalty in 1990 except for times of war offences or military offences[125].

2.3.4 **JUDICIAL DECISIONS BY INTERNATIONAL & REGIONAL HUMAN RIGHTS ORGANS**

The legality of the death penalty continues to be a debate in different international human rights factions. Some of the highly noted decisions include those by the "***European Court of Human Rights***" and those of the "***United Nations Human Rights Committee"***[126].

The UNHCR, in "resolution 1985/33", resolved to appoint an expert (a special rapporteur), to examine questions relevant to torture involving the death penalty. The mandate was extended for 3 years by Human Rights Council resolution 25/13 in March 2014. It covers all countries, irrespective of whether a State has ratified the CAT.

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[123] "Viljoen, Frans. '*International human rights law in Africa'*. Second Edition, Oxford University Press", 2012 page 213.
[124] http://www.cartercenter.org/resources/pdfs/peace/democracy/des/amer_conv_human_rights.pdf (Accessed on 12/8/2015).
[125] Ibid.
[126] Ibid.

2.3.4.1 *OCALAN V TURKEY* (DECISION "BY THE EUROPEAN COURT OF HUMAN RIGHTS")

One of the court rulings that explicitly deals with the death sentence includes ***Ocalan v Turkey***[127] where the ECHR noted that "the previously existing exception allowing death penalty had been removed and that death penalty was a violation of article 3 of the European Court of Human Rights convention".[128]

2.3.4.2 *SOERING VS UNITED KINGDOM* (DECISION "BY THE UNITED NATIONS HUMAN RIGHTS COMMITTEE")

In the European court of Human Rights the death penalty issue was brought out in the case of "***Soering vs United Kingdom"***[129][130] where the court found that "in extraditing a suspect to the US to the state of Virginia where he would face the death penalty and a prolonged detention on death row, the UK will be violating Article 3 of the ECHR which is against cruel, inhuman or degrading punishment". The Court considered both actual capital punishment and the psychological torment, commonly known as the "death row syndrome", that death row convicts suffer during long detention which is all considered to be inhuman or degrading. The court noted that "to be inhuman or degrading, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation Connected with a given form of legitimate punishment". Therefore the convict does not only undergo physical torture but also his mind is tortured while waiting for his execution and anticipating the anguish he is about to go through. Judge de Meyer ruled against extraditing the suspect to

[127] *Ocalan v. Turkey*, 46221/99, "Council of Europe: European Court of Human Rights", 12 March 2003.
[128] "http://www.refworld.org/docid"/3e71a9d84."html [accessed 31" March 2016].
[129] "Soering v. The United Kingdom, 1/1989/161/217 , Council of Europe: European Court of Human Rights, 7 July 1989".
[130] "http://www.refworld.org/docid/3ae6b6fec.html" [accessed 31 May 2016].

Virginia as capital punishment is not consistent with the current state of European civilization and it would not be right to extradite the suspect to go and face the death penalty which was against the right to the suspect's life[131].

2.4 FOREIGN COMPARATIVE LAW ON THE 'MANDATORY' DEATH PENALTY

2.4.1 MANDATORY DEATH PENALTY IN THE USA

The USA through the 5th and 14th amendments to its Constitution recognizes and validates the death penalty, thus allowing many of its states to practice it. The sentence however has to be passed through a grand jury as provided by the 5th amendment of 1971. Further, the "8th amendment of the USA constitution condemns "cruel and unusual punishment", and the supreme court of the USA sees it as a cruel and unusual punishment contrary to the 8th amendment "**IF** it is passed 'without any standards to guide the process of discretion by the judges and the juries where it is deemed 'mandatory' or 'non-discretionary'", for instance where it is imposed as punishment for rape where the relevant law does not provide for a consideration of mitigating factors during the passing of the sentence. An example is the *Kennedy v Louisiana*[132], a decision issued in 2008 by the US Supreme Court which stated that "a sentence of death for rape of a child was not constitutional where the crime did not result and was not meant to result in the death of the victim of the rape"[133].

[131] Ibid.
[132] 554 US 407 (2008).
[133] Swartz, Nico P. "Does Capital Punishment Amount to Cruel, Inhuman and Degrading Punishment: A Reflection on Botswana and South Africa." "*Journal of Politics and Law* 5.4" (2012): page "100".

The court cited the case of *Trop v Dulle*[134] and pointed out that the 8th amendment's clause on cruel and unusual punishment has inherent in its connotation the standards of decency that are developing and symbolizes the evolution in a developing society. The *Coker v Georgia*[135] case was also cited, in which the imposition of the death penalty on a convict for rape of an adult woman was barred but the question whether the 8th amendment permits the death penalty for any other non-homicide crimes was left open[136].

The U.S. Supreme Court in the 1970s decade ruled in both the affirmative and negative on the constitutionality of the death penalty. In "*McGautha v. California"*[137], the Court first held in 1971 that a jury's imposition of the death penalty without governing standards did not violate its Constitution's Fourteenth Amendment's Due Process Clause which states that "no one shall be deprived of life, liberty or property without due process of law". But then in 1972, in the landmark case of "*Furman v. Georgia",*[138] the Court interpreted the Cruel and Unusual Punishments Clause to hold that death penalties *(as then applied)* were contrary to the constitution.[139]

This was a "five-to-four" verdict, dispensed in a "*per curiam*"[140] opinion whereby all nine Judges issued distinct opinions,[141] in which the U.S.A death penalty laws were struck down as "violations of the Eighth and Fourteenth Amendments".[142]

The court appreciated that "the sentences of the capriciously selected random handful of those sentenced to die are cruel and unusual in the same way being struck by lightning is cruel and unusual".[143]

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[134] 356 US 86 (1958).
[135] 433 US 584 (1977).
[136] Swartz, Nico P. "Does Capital Punishment Amount to Cruel, Inhuman and Degrading Punishment: A Reflection on Botswana and South Africa." "*Journal of Politics and Law* 5.4 (2012"): Page 100.
[137] 402 U.S. 183 (1971).
[138] 408 U.S. 238 (1972).
[139] *ibid*,at page 239-240.
[140] a ruling issued by an appellate court of multiple judges in which the decision rendered is made by the court (or at least, a majority of the court) acting collectively and unanimously.
[141] "David R. Dow, *The Last Execution: Rethinking the Fundamentals of Death Penalty Law",* Revised edition, (2008) Pages 963-966.
[142] *Furman*, 408 U.S. at page 240.
[143] ibid. at page 309-310 (Stewart, J., concurring).

Some Judges in this case underscored the arbitrariness of death sentences,[144] with some focusing on the inequality and racial prejudice associated with them.[145]

However, merely four years after the above decision in *Furman v. Georgia*, 35 states amended their death penalty laws[146], which amendments caused the U.S Supreme Court in three subsequent criminal suits of "Gregg v. Georgia, Jurek v. Texas & Proffitt v. Florida" decided in 1976[147], to retreat from its stance on the unconstitutionality of the death penalty and once again endorse use of executions.

In the above three criminal suits, the U.S Supreme Court upheld the constitutionality of the amended "death penalty statutes" and ruled that the new laws regulating uninhibited juror discretion-and demanding capital offence jurors to make special findings[148] or to weigh 'aggravating' versus 'mitigating' circumstances[149] held up to constitutional scrutiny and were compliant with the new requirements, emphasizing that the Model Penal Code itself set standards for juries to use in death penalty cases in the rouse of "*Gregg v. Georgia* and *Jurek v. Texas"*.[150]

In two further cases in the same year of 1976, the Court ruled and clarified that only '***mandatory'*** death sentences "were too severe and thus unconstitutional".[151] In its decision in "*Woodson v. North Carolina",*[152]the Court explicitly ruled that "*mandatory* death sentences, the norm in the Framers' era, were no longer permissible and had been rejected by American society as unduly harsh and unworkably rigid".[153] By the early 1960s all death penalty

[144]ibid. at page 248-253 (Douglas, J., concurring); *ibid*. at page "291-95,305 (Brennan, J., concurring").
[145]ibid. at "256-257" (Douglas, J., concurring); "*ibid*. at 364-366 (Marshall, J., concurring)".
[146]"John D. Bessler, Kiss Of Death: America's Love Affair with the Death Penalty 60 (2003) page 29".
[147] "Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976)".
[148]*Jurek, "*428 U.S". at page 272.
[149]*Gregg,* 428 U.S. at page 164-66.
[150]"Jose Felipe Anderson, *Punitive Damages vs. The Death Penalty: In Search of a Unified Approach to Jury Discretion and Due Process of Law*, 79 UMKC L. (2011)", page 633-640.
[151] "Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976)".
[152]*Woodson, "*428 U.S. at" page 280.
[153]Ibid. at page 293.

jurisdictions in the USA had adopted discretionary sentencing schemes, replacing their automatic death penalty statutes with statutes designed to channel juror discretion.[154]

2.4.2 MANDATORY DEATH PENALTY IN SOUTH AFRICA

In South Africa the Constitutional Court delivered a land mark ruling in the case of "***the State v Makwanyane***"[155] where the court ruled that the death penalty law in South Africa was unconstitutional. The appellants were convicted on four counts of murder and sentenced to death by the Witwatersrand Local Division of the Supreme Court. The two appealed to the Appellate Division of the Supreme Court which dismissed their appeals. They were challenging the validity of the death penalty as provided by section 277 (1) of the South African Criminal Procedure Act, No. 51 of 1977 under post-apartheid transitional constitution. They argued that the death sentence was incompatible with section 11 (2) of their constitution which made provision against cruel, Inhuman and degrading punishment being exacted on human beings. Section 277(2) provided that the capital punishment be passed only if a judge and the assessors if any have analyzed and evaluated the existing mitigating and aggravating and they have found in those circumstances the death penalty to be appropriate to section 277 of the criminal procedure act which points out that[156]:

i. A death sentence may be passed by a superior court in the case of a conviction in the following instances;
    1. A treason committed when the Republic is in a war;
    2. For a murder case;

[154] Ibid.at page 291-292.
[155] "S v Makwanyane and Another (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995)"
[156] Swartz, Nico P. "Does Capital Punishment Amount to Cruel, Inhuman and Degrading Punishment: A Reflection on Botswana and South Africa." "*Journal of Politics and Law* 5.4 (2012)": page 101.

3. For a kidnapping case;
4. For rape accusation (both male and female genders);
5. For child stealing;
6. For attempted robbery or robbery , if the court finds aggravating circumstances to have been present;

ii. A death sentence shall be imposed in the following conditions;

1. After the court or the presiding judge together with the assessors (if any),... "or, in the case of a trial case by a superior court, that court, in relation to any argument or evidence on the sentence" ..., has made a finding on the absence or presence of any aggravating or mitigating factors[157];
2. If the court or the presiding judge based on the case in relation to the finding or fully satisfied that death sentence is the appropriate sentence.'

The law provided, however, that any court that handles a death sentence for the crime listed above (1), have the chance to account any circumstances of the cases, "in order to consider whether the death penalty is or not the appropriate verdict"[158].

The eleven-judge bench in the *Makwanyane* case determined the death penalty sentence as being an invalid penalty. Justice Chaskalson, the president of the court, strongly asseverated that the death penalty destroyed life; life has been protected by the constitution under Section 9, death penalty also lowered human dignity which was also protected by the constitution

[157] Ibid.
[158] Ibid.

under Section 10. Based on Section 11(2), the judge was satisfied that death penalty imposition for a crime was a cruel, degrading and an inhuman punishment to the criminals.

Justice Chaskalson ordered that "(a) the State is and all its organs are forbidden to execute any person already sentenced to death under any of the provisions thus declared to be invalid; and (b) all such persons will remain in custody under the sentences imposed on them, until such sentences have been set aside in accordance with law and substituted by lawful punishments".[159]

South Africa has been listed among the countries that have done away with death sentences for any crime committed by its citizens[160]. As noted from above, South Africa's laws on fundamental rights are similar when compared to the Kenyan constitution law and the international instrument in law[161].

There are at least two distinguishing features on capital punishment between the Kenyan and the South African laws. First, the transitional constitution in South Africa never gave any exception to the right of life, while the Kenya constitution admits exceptions to the right to life in situations sanctioned by any written law. Secondly, the South African law was liniment in that death penalty was seen as a matter of judicial discretion[162] whilst in Kenya's Constitution there is no mention of such discretion.

[159]https://www.opendemocracy.net/n-jayaram/it-is-20-years-since-great-antideath-penalty-judgement (Accessed on 2/5/2016).

[160] Swartz, Nico P. "Does Capital Punishment Amount to Cruel, Inhuman and Degrading Punishment: A Reflection on Botswana and South Africa." "*Journal of Politics and Law* 5.4 (2012"): p100.

[161] "Hynd, Stacey". "Murder and Mercy: Capital Punishment in Colonial Kenya, Ca. 1909-1956*." *The "International Journal of African Historical Studies* 45.1 (2012): 81".

[162] Ibid

The highest courts of other Commonwealth African members like Zimbabwe, Uganda and Tanzania, have similarly found the death penalty a cruel, degrading treatment and even an inhuman act, also a violation of the dignity of human being. The above countries just like Kenya inherited their colonial master's legal system.[163]

2.4.3 "MANDATORY DEATH PENALTY IN THE COMMONWEALTH CARIBBEAN"

The Commonwealth Caribbean is comprised of the twelve English-speaking Caribbean Member States of the Organization of American States, "**OAS": "**Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts **&**Nevis, St. Lucia, St. Vincent **&**the Grenadines, and Trinidad **&**Tobago".

On March 11**,** 2002, the Judicial Committee of the Privy Council issued milestone judgments in a trilogy of cases involving defendants "Peter Hughes, Berthill Fox, and Patrick Reyes",[164] in which the Privy Council disposed of appeals from decisions of the Eastern Caribbean Court of Appeal and the Court of Appeal of Belize by concluding that "the automatic imposition of the death penalty upon conviction for a crime without an opportunity for presenting and considering mitigating circumstances in the sentencing process – commonly referred to as the mandatory death penalty – contravened the right to humane treatment under the constitutions of St. Lucia, St. Christopher and Nevis, and Belize not to be subjected to inhuman or degrading punishment or other treatment".

[163] Swartz, Nico P. "Does Capital Punishment Amount to Cruel, Inhuman and Degrading Punishment: A Reflection on Botswana and South Africa." "*Journal of Politics and Law* 5.4" (2012): page "100".
[164] "The" "Queen v. Hughes, [200212 W.L.R. 1058, [2002] U.K.P.C. 12, [2002] 2 A.C. 259 (appeal taken from St. Lucia); Fox v. The Queen, [2002] 2 W.L.R. 1077, [2002] U.K.P.C. 13, [2002] 2 A.C. 284 (appeal taken from St. Kitts & Nevis); Reyes v. The Queen, [2002] 2 W.L.R. 1034, [2002] U.K.P.C. **11,** [2002] 2 **A.C. 235** (appeal taken from Belize").

These judgments were issued subsequent to the adoption of a series of similar decisions by the human rights supervisory bodies of the inter-American system, the Inter-American Court of Human Rights, and the Inter-American Commission on Human Rights, which found the mandatory death penalty in the Commonwealth Caribbean to be incompatible with "the right to life, the right to humane treatment, and the right to due process under regional human rights instruments".

The litigation of these issues before domestic and international tribunals also has prompted changes in the criminal legal procedures of several Caribbean countries where capital defendants are now being provided with "individualized sentencing proceedings".[165]

The "Inter-American Court of Human Rights" in its important "Advisory Opinion OC-3/83 on Restrictions to the Death Penalty under Articles 4(2) and 4(4) of the Convention",[166] adopted a restrictive approach to Article 4 of the Convention. The opinion stated that "without going so far as to abolish the death penalty, the Convention imposes restrictions designed to delimit strictly its application and scope, in order to reduce the application of the penalty to bring about its gradual disappearance".[167] The Court additionally noted the following restrictions/limitations applicable to States Parties which have not abolished the death penalty prescribed in the said Article:

(1) The imposition or application of this sanction is subject to certain procedural requirements whose compliance must be strictly observed and reviewed.
(2) The application of the death penalty must be limited to the most serious common crimes not related to political offenses.

[165]http://www.jamaicaobserver.com. (Accessed on 9/4/2016).
[166] Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3 (1983).
[167]Ibidat para. 57.

(3) Certain considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into account.

The experience of the Commonwealth Caribbean with the mandatory death penalty exemplifies the valuable role that a progressive and enlightened judiciary can play in pressuring states to abide by their international commitments, when the executive and legislative branches of government have failed to take the necessary steps to give effect to the international human rights instruments that they themselves have committed to uphold and respect.[168] The Judicial Committee of the Privy Council remains the court of final appeal for the overseas territories and Crown dependencies, and for those Commonwealth countries that have retained the appeal to Her Majesty in Council or, in the case of republics, to the Judicial Committee. This jurisdiction includes all English-speaking countries of the Commonwealth Caribbean with the exception of Guyana.

2.4.4 MANDATORY DEATH PENALTY IN UGANDA

The Constitution of the Republic of Uganda, 1995 provides for the death penalty in Article 22 (1). Other laws that provide for the death penalty are: the *Penal Code Act Cap 120, Anti-Terrorism Act,2002* (as amended by *the Anti-Terrorism Amendment Act, 2015*) and the *Uganda Peoples Defence Forces Act, 2005*. The three statutes provided for the mandatory death penalty until the *Susan Kigula* ruling.

In 2003, FHRI filed a petition on behalf of all prisoners on death row challenging the constitutionality of the death penalty – *Susan Kigula & 417 Others vs. Attorney General (Constitutional Petition No. 6of 2003)*. The petition argued, in the first instance, that the death

[168] Judicial Committee of the Privy Council, http://www.privy-council.org.uk (noting the court's jurisdiction) (Accessed on 2/10/2015).

penalty was a cruel, inhuman and/or degrading treatment and punishment and was therefore inherently unconstitutional. It also argued, in the alternative, that the mandatory death sentence was unconstitutional, and that execution by hanging is an unconstitutional method of execution. The petitioners further argued that the long delay between a sentence and execution thereof made an otherwise constitutional death penalty unconstitutional.

The Constitutional Court held that a mandatory death sentence violated the right to a fair trial by denying a proper sentence hearing and precluding the appellate review of criminal sentences and violated the principle of separation of powers; and that any inordinate delay lasting longer than three years would be unconstitutional. The Court, however, held that the death penalty in itself is constitutional. The court also ordered that the petitioners whose appeal process was completed and their sentence of deathhad been confirmed by the Supreme Court, their redress would be put on halt for two years to enable the Executive exercise its discretion under article 121 of the Constitution.

They could return to court after expiration of this period; Appellants still before an appellate court would be offered a hearing on mitigation of sentence; the court would exercise its discretion whether or not to confirm the sentence and a respect of those whose sentence of death would be confirmed the discretion under articles 121 should be exercised within 3 years.

The Attorney General appealed the decision to the Supreme Court. The Supreme Court dismissed the appeal and upheld the decision of the Constitutional Court and added some modifications to the above judgment that those respondents whose sentences were already confirmed by the highest court, their petition for mercy under section 121 of the Constitution

must be processed and determined within three years if no decision is made by the executive, the death sentences shall be deemed commuted to imprisonment for life without remission;
For those respondents whose sentences arose from the mandatory sentence provisions and are still pending before an appellate court, their cases shall be remitted to the High Court for them to be heard only on mitigation of sentence, and High Court may pass such sentence as it deems fit under the law.

The judgment made some impact by restoring judges' discretion. Judges are no longer bound by law to hand down the death penalty for capital offences. They can now exercise discretion on the suitable punishment for each case.

There has been a reduction in the number of death sentences handed down by the Ugandan judiciary i.e. the number of death sentences handed down pre-Kigula are significantly less than those post Kigula. Reduction of death row inmates: As a result of the Supreme Court's ruling, inmates whose petitions of mercy have not been decided within three years have had their death sentences commuted to imprisonment for life without remission. Additionally, over 100 inmates have had their sentences mitigated.[169]

A similar decision was arrived at by the High Court of Malawi in *Kafantayeni & Ors v Attorney General* (2007)[170] in which the court held that where Malawian law provides for capital punishment, it is entirely at the discretion of the trial judge whether to impose it or to impose an appropriate alternative sentence.

[169] www.penalreform.com

[170] *Commonwealth Human Rights Law Digest*, 6:3 (2010): 290.

2.5 COUNTRIES WHICH STILL HAVE THE DEATH PENALTY IN FORCE AND IN PRACTICE

According to "Amnesty international", the number of executions carried out globally in 2015 increased when compared to the number of executions carried out the previous year in 25 countries[171] and the countries that carry out the greatest forms of capital punishment are:

1. China
2. Iran
3. Pakistan
4. Saudi Arabia
5. The United States of America**, in that exact order.**

As per Amnesty International, 140 countries world-wide have, to-date, either abolished or not practiced capital punishment, and this accounts for "over two thirds of the states in the world that have abolished the practice".

Of worthy note is that the Human Rights Watch has observed that the processes of trying such matters in the relevant judicial systems of countries that carry out the death penalty did not adhere to the principles of natural justice - free and fair trials. This is due to the fact that confessions were illegally obtained from accused persons- particularly via duress. This was the case primarily in Bahrain, China, Iran, Iraq, North Korea and Saudi Arabia.[172]

[171] Death penalty 2015: Facts and figures, Amnesty International Charity Limited, April 2016, web page: "https://www.amnesty.org/en/latest/news/2016/04/death-penalty-2015-facts-and-figures/, Accessed": 29th October "2016".

[172] Death Penalty, Human rights Watch, web page: https://www.hrw.org/tag/death-penalty, Accessed: 29th October 2016

Amnesty International reports that people executed for capital offences were executed for crimes that never met the "most serious crimes of international killing" threshold set out in the second paragraph of Article 6 of the ICCPR.[173] Amnesty International goes further to elaborate the reasons for which such sentencing was carried out by stating as follows:

> *"... These offences included drug-related crimes in at least 12 countries in Asia and the Middle East, as well as committing "adultery" (Maldives, Saudi Arabia), economic crimes (China, North Korea, Viet Nam), "apostasy" (Saudi Arabia) and "insulting the prophet of Islam" (Iran)."*[174]

On its part, mandatory death penalty provisions are supported for similar reasons but criticized on a narrower basis. For instance, most adversaries of mandatory death penalty base their objection on the fact that the automatic imposition of a death penalty after conviction ignores or underplays the differences between less and more serious cases.[175] A Royal Commission in the United Kingdom once put it this way in the context of murder:

> *"Convicted people may be men, or they may be women, youths, girls, or hardly older than children. They may be normal or they may be feeble-minded, neurotic, epileptic, borderline cases, or insane; and in each case the mentally abnormal may be differently affected by their abnormality. The crime may be human and understandable, calling more for pity than for censure, or brutal and callous to an almost unbelievable degree. It may have occurred so much in the heat of passion as to*

[173] "International Commission against the Death Penalty The death penalty and the most serious crimes" "A country-by-country overview of the death penalty in law and practice in retentionist states January 2013"
[174] Death penalty 2015: Facts and figures, Amnesty International Charity Limited, April 2016, web page: "https://www.amnesty.org/en/latest/news/2016/04/death-penalty-2015-facts-and-figures/, Accessed": 29th October "2016"
[175] Sadakat Kadri, *Ibid*.

rule out the possibility of premeditation, or it may have been well prepared and carried out in cold blood."[176]

As much as criminal punishment is an important cog in any and every legal system, it exists to serve the public. It is innate in the concept of justice that punishment is wisely tempered by mercy. Indeed, even all major religions embrace the concept of mercy and forgiveness especially where remorse is shown. In fact, such religious tenets have played an important role in the 18th century even in secular states following the Italian jurist Cesar Beccaria's influential proposal that many existing penalties were excessive and should be more proportionate to the crimes for which they were being imposed. This birthed the international abolitionist movement.[177]

2.6 THE INTERNATIONAL ABOLITIONIST CRUSADE AGAINST THE DEATH PENALTY

The abolitionist movement goes back to the writings of European theorists Montesquieu, Voltaire and Bentham, and English Quakers John Bellers and John Howard[178].Nonetheless, it is the essay by Cesare Beccaria dated 1767 titled *On Crimes and Punishment*[179] which produced an exceptionally vigorous impression on the eradication of the death penalty, throughout the world. In that essay, Beccaria posited that "there is no justification for the state's taking of a life", and offered abolitionists "an authoritative voice and renewed energy, one result of which was the abolition of the death penalty in Austria and Tuscany".[180]

[176] "Report of the Royal Commission on Capital Punishment, 1949–1953, Cmd 8932 (London, 1953)", page 6.
[177] Ibid., p.7.
[178]http://"www.deathpenaltyinfo.org/part-i-history-death-penalty" (Accessed on 11/05/2016)
[179]Cesare Beccaria, *An Essay on Crimes and Punishments, E. D.* Ingraham, trans. (Philadelphia: H. Nicklin, 1819),pp.xii,1819,47,5960,9394,104-105,148149.
[180]W. "Schabas" "The Abolition of the Death Penalty in International Law," "Cambridge University Press, second edition, 1997": page 209.

In the USA, political and civil intellectuals were influenced by Beccaria and the first attempted reform to the death penalty in the U.S. occurred when Thomas Jefferson introduced a bill to revise Virginia's death penalty laws which proposed that capital punishment be used only for the crimes of murder and treason. It was defeated by only one vote. Another early convert to Beccaria's views in the USA was Dr. Benjamin Rush, one of the signatories of the "US Declaration of Independence" and founder of the "Pennsylvania Prison Society", who challenged the idea that the death penalty serves as a deterrent arguing that in fact it increased criminal conduct.[181] Rush gained the support of Benjamin Franklin and Philadelphia Attorney General William Bradford (subsequently the U.S. Attorney General) who steered Pennsylvania to become the first state to consider degrees of murder based on culpability.[182] In 1794, Pennsylvania repealed the death penalty for all offenses except first degree murder.[183] In the early part of the century, many U.S states reduced the number of their capital crimes and built state penitentiaries and by the end of the century the countries of Venezuela, Portugal, Netherlands, Costa Rica, Brazil and Ecuador did the same.[184] Although some U.S. states began abolishing the death penalty, most states held onto capital punishment, as some states made more crimes capital offenses, especially for offenses committed by slaves.

The international movement on the abolition of the death penalty achieved significant impetus with the dawn of the 1980s, whereby treaties declaring its abolition were drafted and ratified. Some examples are Protocol No. 6 to the ECHR and its successors, the Inter-

[181]R. "Bohm", "Deathquest: An Introduction to the Theory and Practice of Capital Punishment in the United States," "Anderson Publishing, 1999", page 113.
[182]"Society's Final Solution: A History and Discussion of the Death Penalty," "L. Randa, editor, University Press of America, 1997".
[183]W. "Schabas" "The Abolition of the Death Penalty in International Law," "Cambridge University Press, second edition, 1997": page 241.
[184]http://"www.deathpenaltyinfo.org/part-ii-history-death-penalty (Accessed" on 11/05/2016)

American Additional Protocol to the ACHR to Abolish the Death Penalty, and the United Nation's Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty, all of which were created with the objective of crafting the "abolition of the death penalty into an international norm".[185]

Presently, the requirement by the Council of Europe that new members undertake and ratify Protocol No. 6 to the European Convention on Human Rights, has in consequence, led to the abolition of the death penalty in Eastern Europe, where only Belarus retains the death penalty. For instance, the Ukraine, previously one of the world's frontrunners in death penalty executions, has now "discontinued" the death penalty and has been admitted to the Council of Europe.[186]

South Africa's Parliament voted to officially abolish the death penalty, which had previously been pronounced unconstitutional by the Constitutional Court.[187] In addition, Russian President Boris Yeltsin signed a decree commuting the death penalties of all of the convicts on Russia's death row in June 1999.[188] More countries abolished the death penalty for all crimes, and four others abolished the death penalty for ordinary crimes".[189]

In April 1999, the United Nations Human Rights Commission passed the Resolution Supporting "Worldwide Moratorium on Executions", which "calls on countries which have not abolished the death penalty to restrict their use of the death penalty, including not imposing it on juvenile offenders and limiting the number of offenses for which it can be imposed". However, ten countries, including the United States, China, Pakistan, Rwanda and

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[185] *Ibid.*
[186] *Ibid*
[187] *Ibid.*
[188] Amnesty "International", "List of Abolitionist and Retentionist Countries," "Report ACT 50/01/99"
[189] *Ibid*

Sudan voted in opposition to the resolution.[190] Kenya absented from ratifying the moratorium although it keeps reporting to the United Nations Commission on Human Rights that no executions have been carried out in the country since 1987. Indeed, each year since 1997, the United Nations Commission on Human Rights has passed a resolution calling on countries that have not abolished the death penalty to establish a moratorium on the same.

Today, death penalty has been abolished by law or *de facto* in around two-thirds of the world's 190 or so states, and the number applying it has been declining for years. For instance, only 25 countries carried out executions in 2015, down more than a third from the 42 that carried them out in 1995. Europe contains just two countries that still authorize capital punishment – Belarus and Kazakhstan – and the 47 members of the Council of Europe have committed themselves to renunciation of the death penalty by the European Convention of Human Rights and its thirteenth Protocol (which forbids its use even in wartime).[191] The main argument for abolitionist is that mandatory death penalty should be abolished, just like and/or alongside all forms of death punishment.

[190] http://"www.deathpenaltyinfo.org/part-ii-history-death-penalty (Accessed" on 11/05/2016)
[191] Sadakat Kadri, *Ibid, p.6.*

CHAPTER THREE: THEORETICAL FRAMEWORK

3.1 INTRODUCTION

As noted in Chapter Two, under Kenyan law, "the offences of murder, treason and robbery with violence, including attempted robbery with violence, carry a mandatory death penalty".[192] In this chapter, we evaluate the prevailing situation on mandatory death penalty in Kenya by carrying out a situational analysis of the status of mandatory death penalty in Kenya including its status in compliance with the constitution, the factual reality of imposition and implementation of mandatory death penalty, the *de facto* non-execution of death row convicts in Kenya since 1987 and the compliance and non-compliance of the Kenyan laws on mandatory death penalty with the international and regional human rights documents.

3.2 ETHICAL AND PRAGMATIC ARGUMENTS FOR AND AGAINST MANDATORY DEATH PENALTY

From the outset, it is important to note that the arguments for and against death penalty base their positions on ethical and pragmatic persuasions. For example, the proponents of capital punishment generally portray it as an effective deterrent arguing it is the best way to meet the interests and expectations of the victims and the send a message that crime does not pay. That way, it helps cultivate a law-abiding citizenry.

Additionally, given the popularity of death penalty especially with conservative community, they may also argue that it has democratic legitimacy. On the other hand, the opponents of death penalty assert that it is wrong in principle to empower states to kill their citizens,

[192] "Sec 204, 40(3), 296(2) and 297(2) of the Penal Code, CAP 63 Laws of Kenya."

especially because the inevitable flaws can easily turn into irreversible errors: several countries. According to them, it is possible to condemn innocent people only to later find out that they were not deserving of the punishment as has happened in countries such as the United States, China, Japan and Taiwan. Further, the alleged existence evidence of the effectiveness of death penalty is often question. It is a fact that countries that still impose the death penalty, like Pakistan and the United States still have high rates of violent crime.[193]

3.2.1 **Libertarian School of Thought on the Death Penalty**

According to libertarians any law or act of law can only be just if it incorporates the concept of liberty.[194] Liberty relates to the 3 broad issues of freedom welfare and virtue.[195] This aspect is conceptualized vividly in Article 3 of the Universal Declaration of Human Rights (The Declaration), wherein it is stated that everyone has the right to life, liberty and security of person. This brings about the philosophical argument as to whether the laws of nations that subscribe to The Declaration, such as Kenya's, are in concordance to the provisions set therein. It also warrants the questioning of the validity of the death penalty in matters pertaining to International law.

Libertarians heavily focus on the preservation of the constitutional liberties accorded to individuals. In this instance, Article 26 of our Kenyan Constitution (The Constitution) grants

[193] "Roger Hood and Carolyn Hoyle, The Death Penalty: A Worldwide Perspective (5th" ed, "Oxford" UP, "2015"), page 425-468.

[194]Schools of Thought in Classical Liberalism, Part 1: Introduction, Learn Liberty, web page: http://www.learnliberty.org/videos/schools-thought-classical-liberalism-part-1-introduction/, Accessed: 25th October 2016.

[195] M. Robinson, Assessing The Death Penalty, Page 28, webpage: https://www.scribd.com/document/248557050/Assessing-the-Death-Penalty-Using-Justice-Theory-Matt-Robinson, Accessed: 25th October 2016.

the "right to life". However, "Article 26 (3) of the Constitution" makes death sentence legal and is a limitation to the right to life in Kenya. It is widely argued by libertarians that the law in this as stated above is granting a right with one hand, which it takes away by another, and not by operation of circumstance or , but by mere operation of the same law.

According to Matthew Robinson, empirical statistics may be used in determining whether capital punishment indeed has any function in furthering liberty in the society. The evidence suggests that it does not, as very few death sentences are carried out every year as opposed to the number of capital offences carried out annually.

3.2.2 **Egalitarian School of Thought on the Death Penalty**

Egalitarianism is the second school of thought, which has proponents that believe a law is valid, in so far as it promotes equality amongst all people it binds, and protects the minorities in society.[196] Under this school of thought it is argued that "the application of the death penalty in several countries is discriminately conducted".[197] This is as a result of various social determinants and factors which range from wealth, to race of the person charged with a capital crime. For instance, in May 2006 the High Court of Kenya at Nairobi declined to sentence Tom Chomondeley to death, for the offence of murder occasioned by his use of excessive force. He was instead sentenced to 8 months in prison for the grievous offence in

[196] "Egalitarianism, Stanford Encyclopedia Of Philosophy, http://plato.stanford.edu/entries/egalitarianism/", Accessed: 25th October 2016

[197] A White Paper On Ethical Issues Concerning Capital Punishment, The World Medical Association, Inc., June 2012, p.3, webpage: http://www.wma.net/en/20activities/20humanrights/50other/Final_WMA_white_Paper_capital_punishment-June20121.pdf, Accessed: 25th October 2016

2009. However, five months into serving his sentence, he was granted pardon, and was set free.[198]

3.2.3 **Utilitarian School of Thought on the Death Penalty**

Utilitarian school of thought similarly has a unique perception of the validity of the death penalty. The school's proponents believe that a law is a good law in so far as it is enforced with efficiency and usefulness, for the greatest happiness of the greatest number of people.[199]

From a utilitarian aspect, the law on the death penalty is efficient, and thus has usefulness. It acts as a deterrent to the commission of capital crimes. It, therefore, may be said that the death penalty advocates for the happiness of the greater number of people in the society, as it reduces the rate of serious crime in the society[200].

However, it may be argued that the utility of capital punishment is vitiated by the mere incidence of potential and realized costs to be borne by the state in executing such individuals. According to Matthew Robinson, it is not possible to quantify the worth of having matters put to rest by executing capital offenders. It goes without saying, that the benefits realized are insignificant, if any.[201]

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[198] M. Pflanz, Aristocrat Tom Cholmondeley Released From Prison After Five Months, The Telegraph, webpage: "http://www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/6415490/Kenyan-aristocrat-Thomas-Cholmondeley-released-from-prison-after-five-months.html", (Accessed: 25th October 2016).
[199] Jeremy Bentham, "Stanford Encyclopedia Of Philosophy", 2015, web page: "http://plato.stanford.edu/entries"/bentham/, (Accessed: 26th October 2016.).
[200] Hugo A. "Bedau, 'Bentham's Utilitarian Critique Of The Death Penalty'", The Journal Of Criminal Law & Criminology, Vol. 74, No. 3, 1983, Northwestern University School of Law, web page: "http"://scholarlycommons."law.northwestern.edu"/cgi/viewcontent.cgi?article=6388&context=jclc, Accessed: 27th October 2016.
[201] M. Robinson, Assessing The Death Penalty, P 29, webpage: https://www.scribd.com/document/248557050/Assessing-the-Death-Penalty-Using-Justice-Theory-Matt-Robinson, Accessed: 25th October 2016.

3.2.4 **Legal Positivism School of Thought on the Death Penalty**

Legal positivism is another school of thought that asserts the idea that law and morality are operationally exclusive, and have no influence on each other. Additionally, it is of the fundamental idea that the existence of law is as a result of social facts, and merit of the law plays no part in its existence.[202] This school of thought may be divided into two categories, namely: the Classical legal positivism and modern legal positivism.

The classic school of thought's chief proponent, John Austin, further establishes the command theory of law, in which a law must be strictly observed without derogation. In the event that such laws are broken, sanctions follow. These sanctions may be either punitive or privative. In respect of capital offences, the law clearly states the offence, and the punitive sanction that follows, which in this case is death. Legal positivists in this case advocate for the rule of law to prevail for the preservation of the sanctity of order. The maintenance of order in society clearly is the deterrent effect of the death penalty to the commission of capital offences.[203]

However, it is worth noting that according to this school of thought, it is not said that the merits and morals of law are not crucial factors, they are; it merely asserts that the law is not influenced by those same factors.[204] This clearly puts into consideration the position of legal positivists on the issue of the death penalty. In that respect capital punishment is a sanction

[202] Legal Positivism, Stanford Encyclopedia of Philosophy, January 2003, web page: http://plato.stanford.edu/entries/legal-positivism/, Accessed: 28th October 2016.
[203] Prof. J. E. Mahon, Philosophy Of Law, web page: http://home.wlu.edu/~mahonj/PhilosophyofLaw.htm, Accessed: 27th October 2016
[204] Legal Positivism, Stanford Encyclopedia of Philosophy, January 2003, web page: http://plato.stanford.edu/entries/legal-positivism/, Accessed: 28th October 2016

under the law that exists not because of its merit, or morality. But because of the social factors it implies.

However, in that same respect, law is a dynamic instrument. The social factors (public policy and social concerns) seem to be changing with regard to the perspective held towards the death penalty. Less and less people, and countries, seem to be advocating for the enforcement of capital punishment. With this change, over time, the school of thought shall realign itself.

3.2.5 **Legal Realism School of Thought on the Death Penalty**

This school of thought particularly enforces the need for precedents to facilitate consistency in the rendering of justice. It also is a school of thought that further foregrounds that binding judicial decisions should be made in accordance to the judge's precedence, and allows for derogation form the law's provisions unlike in legal positivism. Judges, thus, consider social interests, public policy and judicial precedents in determining cases.[205]

H.L.A Hart, as a modern legal positivist, was opposed to the idea that judicial precedents should be the primary consideration of judges in decision making, as courts should be guided by the laws in the constitution, statutes, and executive orders, amongst others.[206] Note, however, that he did not oppose the *theory of adjudication*, he merely thought it was an exaggeration. Hart believed that according to the theory, statutes and like forms of the law were legitimate, but were nebulous to be certain determinants of the outcomes of judges' decisions; as judges typically determine the outcome of cases on the basis of non-legal considerations.[207]

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[205] Legal Realism, Legal Information Institute, Cornell University Law School, web page: https://www.law.cornell.edu/wex/legal_realism, Accessed, 28th October 2016.
[206] "H.L.A". Hart, "The Concept Of Law, 2nd" Edition, 1994: page 124-154.
[207] Michael S. Green, Legal Realism as Theory of Law, William And Mary Law Review, Vol 46, 2005, page 1918.

Therefore, to explore this school of thought, it is necessary to look at precedents on the same issue. By mere reference to the "Supreme Court of the United States of America case, **Gregg v Georgia 1979**"[208] it was argued that "the death penalty was unconstitutional for the reason that it was a form of unusual and inhumane punishment, against which the 8th Amendment (to the constitution of the United States of America) protects citizens". The court dismissed the case on the basis of rationale gathered from the British Commission on Capital Punishment. The court therefore proceeded to disregard the superiority of retribution as an objective in criminal matters. It seemingly is a situation in which the law enforces revenge over reconstructive justice.

Justice Thurgood Marshall's dissenting opinion on the decision in the case mentioned above were that the death penalty was applied in a "discriminatory and arbitrary fashion", further abetted by the idea that the some of the people accused were not represented fairly in cases such as the one above. It was however argued by the rest of the sitting bench that it was possible to ensure that capital punishment would no longer be awarded arbitrarily, nor discriminately. [209]

He, however, made it clear that the concurring opinion in Furman v. Georgia[210] had two propositions that made known his stance on the constitutionality of the death penalty.[211]

[208] 428 U.S. 153, 190-95 (1976)
[209] Gerald F. Uelmen, Justice Thurgood Marshall and the Death Penalty: A Former Criminal Defense Lawyer on the Supreme Court, Santa Clara University School of Law, web page: http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1373&context=facpubs , Accessed: 26th October 2016
[210] 408 U.S. 238, 240 (1972)

1) He opposed the notion that retribution was the chief reason behind the execution of punishment as per the 8th Amendment, and that death for that purpose was an excessive punishment.
2) He also stated that since fewer people advocated "for the use of the death penalty, the" public's opinion, which formulates public policy, which laws have to adhere to, would be that capital punishment is morally unacceptable.

In the case of **Base v Rees (2008)**[212] the issue as to whether the mode of execution of a death sentence via lethal injection was determined. The court arrived at a conclusion that the petitioners had failed to prove their case showing that Kentucky's mode of execution amounted to "cruel, and unusual treatment". The state's mode of carrying out the death penalty involved the use of a lethal injection which sedated pain, prevented spasms and stopped the heart expeditiously.

3.2.6 **Kantian Ethics on the Death Penalty**

Immanuel Kant's theory, just like the utilitarian school of thought, seems to support the death penalty. But, unlike utilitarianism, Kant's theory shows when the death penalty may be applied.[213]

Kant believes that humans have the capacity to apply intelligent thought to their actions, and therefore, duties arise to govern the process of such actions. Laws impose such duties, which imply the ultimate duty to respect the law likewise. This creates the idea of the "categorical imperative" which propounds the idea that each law has its unique categorical application;

[212] 553 U.S. 35 (2008)
[213] Categorical Imperative, Encyclopaedia Britannica, web page: https://www.britannica.com/topic/categorical-imperative, Accessed 28th October 2016.

applications which have to be conducted (by the government) and observed (by its subjects) without deviation.[214]

Kant's beliefs revolve around morality, and he asserts that actions committed will be moral depending on whether they are committed out of selfishness, or out of the better good for the society.[215] Therefore, in controversial matters, acting in one's self interest may be immoral, whereas acting in society's interest is moral. In that respect, it is immoral for a person to commit murder (a capital offence) for personal gain or satisfaction, e.g. revenge. The same does not apply in the instance that the government carries out capital punishment against such a person, as the government does not act in self-interest. It merely seeks to act on behalf of the people (who elected it) it represents as a whole. This has the effect of deterring the rate at which capital crimes are committed.

To achieve absolute justice, Kant advocates for *"jus talionis"* where the wrong doing is punished by a similar punishment, "An eye for an eye". This makes Immanuel Kant a retributivist - as he sees the death penalty to be mandatory for capital offenders.[216]

As stated above in the distinction between this and the utilitarian school of thought, Kant believes that various crimes qualify to be punished by death. These crimes are of two kinds (amongst others), murder and treason by harming the Head of State or Government (to create

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[214] M. Sandel, Immanuel Kant, Groundwork for the Metaphysics of Morals (1785), Havard University's Justice, web page: http://www.justiceharvard.org/resources/immanuel-kant-groundwork-for-the-metaphysics-of-morals-1785/, Accessed: 28th October 2016.

[215] Archil Avalani, 'Kant – The Death Penalty', web page: http://www.philosophypathways.com/newsletter/issue84.html, Accessed: 28th October 2016

[216] A White Paper On Ethical Issues Concerning Capital Punishment, The World Medical Association, Inc., June 2012, p.3, webpage: http://www.wma.net/en/20activities/20humanrights/50other/Final_WMA_white_Paper_capital_punishment-June20121.pdf, Accessed: 25th October 2016

vulnerability and instability). The state in tolerating such crimes by failing to execute capital punishment makes the state itself complicit in the commission of such crimes. Therefore, Kant's key objective in this case is the execution of the death penalty in instances where the protection of the public is needed.[217]

3.3 SOCIAL AND DEVELOPMENT BASIS OF CRIMINAL PUNISHMENT

Punishment is imposed on the wrong which was committed and was not supposed to be done. In this way, the social basis is that the thing is wrong and ought not to be done. Initially, the forms of punishment were crude and have since changed with time. Socially, punishment is determined by:-

(i) how the society perceives itself and its rules;

(ii) the best way the society thinks ought to be used to achieve compliance with the rules; and

(iii) The social and scientific understanding of nature and society. This will help to understand the kind of punishment imposed.

The theories that have been used to explain and justify punishment are determined by our social perceptions of the social relationships that exist. Thus, if the society considers a given kind of crime more wrong than another, it is likely the punishment imposed for the former crime will be severer than that of the latter.[218] There are many forms of punishment which are imposed in today's society around the world. They include:-

[217] Archil Avalani, 'Kant – The Death Penalty', web page: http://www.philosophypathways.com/newsletter/issue84.html, Accessed: 28th October 2016.

[218] Andrew "Ashworth, Sentencing and Criminal Justice (5th edn, Cambridge University Press 2010"): page 156.

(i) Deprivation of life or death. This exists in many jurisdictions and is usually reserved for most serious and heinous crimes. Here in Kenya, death as a punishment for crime is imposed for murder, treason and robbery with violence.

(ii) Deprivation of Liberty. The punishment under this count may take the form of imprisonment, exile, detention camp, medical rehabilitation asylum and committal to rehabilitation centre.

(iii) Corporal Punishment. It entails infliction of bodily pain.

(iv) Deprivation of property. Deprivation of property may take many forms including forfeiture (where the state decides to confiscate one's property), fines and compensation to the victim or individual injured by criminal activity.

(v) Probation supervision. Here the person is let free but under direction of an agency of the state which monitors his movements and day to day doings.

(vi) Absolute or Conditional discharge. In this case, one is left to go home either without conditions or under condition, say, not to commit an offence in the next one year.

(vii) Social censure. The society tries to punish the criminal by denouncing him.

(viii) Extra-mural punishment. Where for small crimes people are taken to the chief's camp.

3.4 PRINCIPLES OF SENTENCING AND MANDATORY DEATH PENALTY

There are two outstanding questions in evaluating effectiveness of criminal punishment, namely: Is punishment the proper sanction for criminal law? And should punishment be the

only object of criminal law?[219] However, these questions are hardly answered or even addressed in most jurisdictions. It is assumed that punishment is obviously the general objective for criminal law and this assumption is hardly put to test. It is usually not a subject for debate. In fact, in most jurisdictions everything comes second to the overall objective of punishment.

Having said that, it is fitting to address the question of what policies determine the form of punishment that can be administered in any given jurisdiction, in our case, in Kenya. The answer to this question lies in discovering the objective of criminal punishment in Kenya. Once a specific objective has been determined, then determining the sentencing policy becomes very cheap.

In Kenya, Article 28 of the Constitution recognizes that "every person has inherent dignity and the right to have that dignity respected and protected". This in essence means a sentencing policy which excludes torture, inhuman or degrading punishment. Article 29 elaborates further providing for the freedom and security of person, to wit: "every person has the right to freedom and security of the person, which includes the right not to be, *inter alia*, subjected to any form of violence from either public or private sources; subjected to torture in any manner, whether physical or psychological; subjected to corporal punishment; and treated or punished in a cruel, inhuman or degrading manner". The problem is that the neither the constitution nor the criminal statutes define what amounts to torture, inhuman or degrading punishment. These aspects may be relative depending on the circumstances of the case.

[219]The "Abolition of the Death Penalty in International Law", 2nd "edn, Cambridge University Press (2002") page 141.

There is no sentencing policy with regard to Death Penalties in Kenya. The provision of the constitution above merely attempts to formulate a guideline on punishment. However, Part V of the Penal Code clarifies issues relating to criminal punishment in Kenya. Sentencing involves a judicial authority determines what punishment will follow after proving that a given individual is guilty. At that point, the judicial authority has proved and convicted the individual to be guilty. Sentencing is therefore the determination of the actual punishment to be applied against the convict. Before sentencing somebody, it behoves the judicial officer to reflect on the broad social objectives to be achieved by the penalty. However, such aspects are usually not explicitly stated but implied in the law.

In Kenya, courts seek to achieve diverse objectives through sentencing. These include expiation, retribution, deterrence, rehabilitation, disablement and public protection and public education. "Expiationism", one of the old theories of punishment and literally means "paying for", looks at the offender who should pay for his acts. It is based on two principles, namely, one that the offender must atone for his acts or omissions. Secondly, the courts in initiating the punishment should try to square off, or balance the account of the wrong done and the punishment. This is doing a wrong to the offender because he has also done a wrong.

On the other hand, retributionism related to expiation but it looks at the offence from the offended person or the complainant. Retribution can, thus, be said to be the real objective of criminal punishment in that it looks at sentencing form the point of view of the victim and the complainant. In this case, criminal punishment is seen as a way of making the injured person feel comforted and settled by the revenge exacted against the offender. In short, criminal punishment is seen as a case for "an eye for an eye", only consideration being that the state

agencies exacts the revenge on behalf of the injured party instead of him adopting self-help methods to avenge his injury.

Retribution may be seen in distinct two ways as a criminal punishment. In one sense, it may be seen in the limited sense of revenge in the eyes of the individual who is injured. In alternative, criminal punishment as a means for retribution may be seen in the society's eye as a whole. In this sense, the society needs to be reinstated for the imbalance created when the rules that guide it are broken and the offender behaves against the society. In R v Kumwana wa Mulumbi,[220] Sir Charles Newbold talks about retribution by arguing that a person committing a crime should also face some impact.

C. Anynangwe postulates that a principal justification for capital punishment is "retribution". "A person who deliberately kills another has no moral right to claim entitlement to the right to life. He must be ready to forfeit his own life". Retribution in this context is presented as society's regulated revenge (i.e. state-authorised vengeance) against the criminal. According to him and other legal scholars, the death penalty is not the only way society has in expressing its moral revulsion whenever a serious crime is committed, as such a sentence smacks of state vengeance, denies the convicted offender any prospect of parole, practically amounts to life in death row and impinges on judicial sentencing discretion.[221]

With regard to deterrence, the word deterrence is derived from 'deter' which means 'to prevent or discourage from acting.' The justification of punishment by deterrence became prominent in the late 18th and early 19th Century when the theory assumed to be the basis of

[220] [1932] 14 KLR 137.
[221] R. C. Dieter, 'Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent', Death Penalty Information Centre, July 1997.

punishment. Deterrence means to stop or discourage. There are two levels of deterrence in criminal punishment, namely, individual offender's deterrence and general deterrence which posits that punishing the individual offender may serve to discourage the inclination of members of the general public to commit a similar offence. However, general deterrence theory is usually objected on the basis that it involves sacrificing the individual offender merely to discourage the large society.[222] In **R v Atma Singh s/o Chanda Singh**,[223] the Court of Appeal of Eastern Africa expressed the opinion that the purpose of the penalty was to deter the individual and the public. Thus, a lesser penalty may be misunderstood as the public will not learn a good lesson. In the same vein, a higher penalty will serve as a warning to the individual and the general public. C. Anyangwe argues that in Africa's continuing climate of 'law and order' politics, it is contended that death penalty is a restraining punishment that permanently incapacitates the offender and brings an end to his criminal career; thereby removing the danger of possible re-offending. Death penalty is further argued to serve as a general deterrence to serious crime given that its ultimate goal is to influence future conduct by dissuading potential criminals from committing grave crime.

Rehabilitation in legal parlance means to put back into good form and it is also called reformation. As a theory of criminal punishment, it focuses on making the criminal a new person by encouraging him to leave his criminal ways. Generally, rehabilitation focuses on making the offender a better person in the society. The theory took root in the 19th Century and gained wide importance and acceptance in the 20th Century. The theory proposes looking at the problem that led to the individual offender indulging in the crime in question. It thus calls for use of scientific and particularly psychological knowledge in building a thorough

[222] Jonathan S. Abernethy, "The Methodology of Death: Reexamining the Deterrence Rationale", "27 Columbia Human Rights Law Review (1995-1996"): Page 379.
[223] 9 EACA 69.

understanding of the factors which lead to criminal tendencies and how to deal with them. In Kenya, the law makes provisions for penalties aimed at rehabilitating offenders including probation and community service. The provisions dealing with special offenders such as children and persons who are guilty but insane embrace rehabilitation as a key aspect of criminal punishment in Kenya.

In the case of disablement and public protection, disablement is understood to mean 'to make unable to do something'. This aspect of criminal punishment is closely connected to deterrence. It means removing a convicted person from circulation by limiting his freedom of movement and thereby denying him the opportunity to commit any offence as a way of protecting the general public and the society. In this way, there is no chance of the offender exercising his will to commit the offence or affect the society. Imprisonment is one form of temporary disablement. In the case of life imprisonment, the disablement of the accused is permanent unless the prisoner is released at the President's mercy in future time. In the case of death penalty, the disablement is absolute as it involves the elimination of the accused ensuring that he never has the chance to commit the crime again.[224] However, disablement especially the extreme forms including death penalty has been criticized going contrary to the rehabilitation objective of criminal punishment.

Public education is connected with rehabilitation and deterrence. It posits that criminal punishment educates individual persons and the general public through personal experience and indirect participation. With respect to personal experience, the convicted person who has undergone the criminal process and served the punishment attains some knowledge on the negative side of criminal life. As the state carries the duty of prosecuting, convicting and

[224]Ibid.

punishing the criminal, all other laymen learn indirectly the price to pay for choosing criminal life. The state is merely the representative of the larger public which is indirectly involved in punishing crime. However, the theory of public education has the defect that it is not easy to learn of what is taking place especially for those who do not have an interest in the matter. Given that there is no coherent and unified way of drawing lessons from criminal punishment, different persons may end up learning and understanding different things from penalties meted out for different crimes.

3.5 THE THEORY OF 'PROPORTIONALITY' AND MANDATORY DEATH PENALTY

As already stated above, one of the contentions against mandatory death penalty in Kenya is that it denies the court the opportunity to determine the degree of culpability of the offender. As it is, the hands of the Judge are tied and upon conviction, he is required by law to impose death penalty regardless of the proportion of criminal liability on the part of the convict. Advocates of the theory of proportionality argue that "capital punishment should be limited to those offenders who commit a slim category of the 'worst and most serious crimes' and whose extreme culpability makes them the most deserving of execution". Such are generally offences against individuals "which result in the death of the victim". For instance, in *Kennedy v, Louisiana*[225], it was held that "the imposition of a death penalty for the rape of a child where the victim did not die is unconstitutional and severe".

Proponents of this school of thought including the U.S. Supreme Court in the case of *Kennedy v, Louisiana*[226], argue that the Eight Amendment to its Constitution requires

[225] *128 S. Ct. 2641-2650 (2008).*
[226] ibid

punishment to be "graduated and proportioned to the crime" in light of the following two (2) broad filters:

a) Whether the offense "does not or is not intended to produce the death of the victim".

b) Non-intentional first-time capital offence as opposed to repeat offender.

The U.S. Supreme Court in the case above determined that the imposition of capital punishment for offences falling under such classes above would fail to discharge the aims of retribution and deterrence that validate capital punishment.

As far as the USA is concerned, at least five prominent professional associations, including the American Bar Association's "Taskforce on Mental Disability and the Death penalty", have adopted policy statements that advocate a bar on the execution of persons with severe mental illness[227]. These professional associations include "the American Bar Association, the American Psychiatric Association, the American Psychological Association, the National Alliance on Mental Illness and Mental Health America (previously the National Mental Health Association)". These above mentioned professional associations recommended "a non-categorical, case-by-case determination of whether the severity of a defendant's mental illness at the time of commission of the crime should bar the prosecution from seeking the death penalty". It is worthy to note, however, as has been observed by Bruce J. Winick[228], that while the foregoing joint recommendation might provoke future legislative shift, it has not yet accomplished the same. Nevertheless, the Proportionality Theory is a key plug in the

[227] "Recommendation and Report on the Death Penalty and Persons with Mental Disabilities, 30 *Mental & Physical Disability L. Rep".* (2006) page 668.

[228] "Bruce J. Winick, The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness As the Next Frontier", Boston College Law Review, Volume 50, Number 3, May 2009, page 785.

argument against mandatory death penalty in that it flies in the face of the proportionality theory.

3.6 DISPROPORTIONALITY IN THE IMPOSITION OF A 'MANDATORY' DEATH PENALTY

'Mandatory' death penalty is disproportionate in that it fails to take into cognizance the various degrees of the offence or where the offenders and their ability control themselves vary. Thus, it is argued that for instance the levy of the mandatory death penalty in cases where capital offenders are either minors at the time of perpetrating the offence or those with mental illness or retardation, comprises a disproportionate punishment because it does not amply sustain the two primary goals of the punishments clause i.e. deterrence and retribution.[229] This is due to the fact that the "cognitive and volitional impairments" caused by severe mental illness result in a "parallel diminution in culpability and deterrability", and therefore a mandatory death penalty imposed on an individual regardless of such circumstances would definitely result in disproportionate or unequitable punishment and thus neglect to appropriately serve the goals of criminal retribution and deterrence.

Even though the tenets of democracy leave a state to determine the appositeness of the death penalty therein, the emerging concept of *proportionality* in death sentencing is being used by some courts to address evolving humanitarian values by deducing that it has become *per se* cruel and unusual punishment, when the same is meted out indiscriminately and regardless to extrinsic and intrinsic qualities of the offender and the circumstances of the commission of the offence e.g. mentally handicapped persons, minors / juveniles, and such.

[229] Ibid.

3.7 THE PRINCIPLE OF MITIGATION BEFORE DEATH SENTENCING

The principle that "nobody should be sentenced to death without an opportunity to put forward mitigation", about the nature and circumstances of their offence, and about their own individual history, their mental and social problems and their capacity for reform reflects an evolving international norm that it is wrong to penalize to death all those convicted of murder and leave it to the mercy stage to choose who should live and who should die.

The following factors have to be put into consideration before sentencing an individual to a death penalty, namely, the type and magnitude of the offence, the mental state of the offender, the absence of premeditation in the offence, the character of the offender, a show of remorse by the offender and the view of the victim's family of the offence, although the fact that the crime is exceptionally grave or heinous should not of itself create a presumption in favor of the death penalty that can be rebutted only by exceptional mitigating circumstances. There are arguments that there should be both an exceptionally grave offence and the absence of significant individual mitigation before the death penalty can be permissible[230].

3.8 THE 'MANDATORY' DEATH PENALTY AND THE CONCEPT OF 'HUMAN DIGNITY'

It is usually a difficult exercise to define the rights of human beings using legal terms and be understood within the Kenyan cultural context. The international bodies including UN, UDHCR, ACHPCR, ICESPR, and other human rights organization refer to the death penalty

[230] Ashworth, Andrew, and Julian V. Roberts, eds. *Sentencing guidelines: Exploring the English model*. Oxford University Press, 2013.

in terms of 'dignity and worth of the human person' , 'human dignity', ‘inherent dignity’, and many more terms.[231]

Human dignity is a human right on its own. The Kenyan constitution specifies that “every person has inherent human dignity and the right to have that dignity respected and protected”.[232] Human dignity is also a source of human rights. Human rights are defined as the rights that the human being is endowed by the fact that it is a human being. Human dignity in short is defined as the respect and the value that must be accorded to a human being, not by accident for the purpose of being a human.[233] It is essential for the preservation of human kind and humanity.

Even in the worst situations like denunciation and retributive criminal penalties, the international respect accorded to human dignity cannot logically allow or otherwise justify a situation whereby convicted persons are denied the elementary right to life. In relation to the Kantian deontological concept of human beings, they have to be treated as an end and not a means to the end.[234]

While capital punishment may in some cases be justified as a means of deterring crime, the benefits of a death penalty to the people weighed against right to human dignity is not enough to justify the punishment as meeting the criteria of “the greatest happiness for the greatest good” and cannot be in harmony with the deontological test of 'human dignity' as previously described herein. Clearly, the act of taking away a human life to achieve a set of goals lowers

[231]Hynd, “Stacey”. "Murder and Mercy: Capital Punishment in Colonial Kenya, Ca. 1909-1956*." *The “International Journal of African Historical Studies* 45.1 (2012): 81”.
[232]Article 28, The Constitution of Kenya.
[233]Hynd, Stacey, *Ibid*.
[234]Ibid.

and degrades human life and is inconsistent with human worth and dignity. The Federal Constitutional court in Germany identified stated that veneration of human dignity principally necessitates the prohibition of cruel, inhuman and degrading punishments, holding further that the state cannot convert the offender into an article of crime prevention to the detriment of his constitutionally protected right to a social worth and respect.[235]

3.9 THE THEORY OF DEATH PENALTY AS CRUEL, INHUMAN OR DEGRADING FORM OF PUNISHMENT

The definition of the death penalty according to Article 1 of the CAT gives rise to an inquiry on whether the death penalty qualifies to be classified as "cruel, inhuman or degrading form of treatment or punishment". In concordance with Article 6 of the ICCPR, the right to life may be inalienable, but it is not absolute. Therefore, the standards limiting the right to life are legal sanctions which may be carried out against specific offenders, recognizable even at international law.[236]

This theory entailed above propounds that a 'mandatory' death penalty goes against the normative "prohibition of cruel and degrading punishment or treatment" and human dignity. The theory seeks to demonstrate that, as a criminal punishment, mandatory death penalty is cruel, inhuman or degrading treatment in that it strives to make obsolete the other rights of the person. In fact, when implemented, the subject of the punishment ceases being human by the end of the punishment. Hence, both international human rights instruments and Kenya's constitution do not support any 'degrading punishment or treatment, cruelty' in equal forms.

[235] Ibid
[236] "Kealeboga N Bojosi, 'The Death Row Phenomenon And The Prohibition Against Torture And Cruel, Inhuman Or Degrading Treatment', African Human Rights Law Journal", Department of Law, University of Botswana, p. 304, web page: "http://www.corteidh.or.cr/tablas/R21564.pdf, Accessed": 9th November 2016

The theory suggests that capital punishment is a "cruel, inhuman and degrading form of punishment" in a number of ways. In the first place, a mandatory/compulsory death penalty denies the court an opportunity to take into account relevant mitigating circumstantial factors before convicting a person[237]. An example is the case of *Godfrey Ngotho Mutiso vs Republic*. Secondly, the hanging of a convict 'by the neck until he or she is dead' is also cruel, degrading and an inhuman act. A death penalty is not acceptable under the modern constitution. Also the practice where death row convicts are kept in detention for years is a cruel and inhuman act. Thirdly, the detention of death row convicts exposes them to severe mental anguish. The fact that convicts are incarcerated for many years on end without knowing when they shall be executed is torturous, inhuman and beyond the legal penal process. This is excessive and severe punishment and is therefore is very cruel inhuman, and degrading.

International law is, however, inconclusive in its stand on the validity of the death penalty. This is because it encourages its abolition in practice, but factually, it does not make it a mandatory requirement that it be abolished.[238]

Due to this inconclusiveness, it becomes imperative to turn to judicial precedents and other laws, both international and regional, which successfully stage the notion that the death

[237]Novak, Andrew. "Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya." *Suffolk UL Rev.* 45 (2011): 285.

[238]3rd World Congress against the "Death Penalty, The Death Penalty": Inhuman, "Cruel And Degrading" Treatment, May 2007, web page: "http://www.fiacat.org/the-death-penalty-inhuman-cruel-and-degrading-treatment, Accessed": 9th November 2016

penalty falls under the classification of being a form of torture and cruel, inhuman or degrading treatment or punishment.

3.9.1 Regional bodies on the death penalty as a "cruel, inhuman or degrading form of punishment"

3.9.1.1 African Commission on Human and Peoples' Rights

According to World Coalition, this body established a working group to study and give recommendations on the death penalty.[239] After 6 years, the chairwoman made known her working group's findings, that:*"...capital punishment is cruel and therefore morally unjustifiable, unnecessary, irreversible, illogical; and represents a most grave violation of fundamental human rights in particular the right to life under Article 4 of the African Charter.*"[240]

3.9.1.2 The European Court of Human Rights

It is established by Article 3 of the "European Convention on Human rights"[241], which speaks against the subjection to torture or to inhuman or degrading treatment or punishment. The court ruled in the case of "*Al-Saadoon and Mufdhi v The United Kingdom (2010)*"[242], that the United Kingdom had imperiled two individuals to cruel treatment by extraditing them back to Iraq, in full knowledge, but with disregard to the fact that they would be inflicted with capital punishment. The court, therefore, held that the imposition of mental distress as a consequence

[239] "http://www.achpr.org/english/_info/charter_en.html"

[240] Ann G. Ford et. al., World Coalition Against The Death penalty, International Jurisprudence: The "Death Penalty And The Prohibition Of Cruel, Inhuman" Or "Degrading Treatment Or Punishment", web page: https://"www".google.com/search?q=et+al&oq=et+al&aqs=chrome..69i57j0l5.2062j0j7&sourceid=chrome&ie=UTF-8#q=et+al+definition, Accessed: 10th November 2016

[241] European Convention on Human Rights, 4 Nov. 1950, web page: http://www.echr.coe.int/, Accessed: 10th November 2016

[242] Al-Saadoon and Mufdhi v The United Kingdom (2010) Eur. Ct. H.R., App. No. 61498/08

of fore-knowledge of impending death satisfies the allusion that it is inhuman and degrading treatment, according to article 3 of the convention.

3.9.1.3 **Inter-American Court of Human Rights**

Established by the Pact of San Jose, this court has also established some precedents on the matter at hand. The "Inter-American Court of Human Rights" construed Article 4 (1) of the Pact of San Jose, which postulates the right of life, in unison with Article 5, which provides for the protection from cruel and inhuman treatment. Therefore, it can be said to prohibit (or constrain) the use of the death penalty as a form of punishment. To that regard, Article 5 states:

> *"1. Every person has the right to have his physical, mental, and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."*[243]

3.9.1.4 **United Nations Human Rights Committee**

In the case of "*Charles Chitat Ng v. Canada"*[244], the Human Rights Committee of the United Nations established under article 28 of the ICCPR, reaffirmed the rationale of Article 7 of the ICCPR that, when inflicting capital punishment, the execution of the sentence "… must be carried out in such a way as to cause the least possible physical and mental suffering".

[243] Organization of American States, American Convention on Human Rights, Nov. 22, 1969, web page: http://www.oas.org/juridico/english/treaties/b-32.htm, Accessed: 10th November 2016

[244] Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994).

3.9.2 African Court decisions on death penalty as a "cruel, inhuman or degrading form of punishment"

While the authority of *Mutiso* case is still in uncertainty, judges in Uganda, Tanzania and South Africa have developed jurisprudence with respect to the death penalty terming it "cruel and inhuman treatment". In "*Mbushuu and Another v. Republic"*,[245] the Court of Appeal of Tanzania upheld a High Court of Tanzania decision that declared the death penalty aggregates to torture, inhuman and degrading form of punishment. In "*The State v. T. Makwanyane and M. Mchunu"*,[246] the South African Supreme Court held that the death penalty was perverse to the country's provisional Constitution and was a desecration of the right to life, human dignity and the right not to be exposed to cruel, inhuman or degrading treatment or punishment. The Court further noted that the right to life and dignity are the source of and the most important of all human rights; therefore by committing to being a society founded on the recognition of human rights, South Africa was required to value these rights above all other rights. In the recent Uganda case of "***Susan Kigula and 416 others v. the Attorney General"***,[247] Uganda's Constitutional Court ruled that mandatory death penalties as employed in Uganda were unconstitutional. The Court ruled that laws that oblige the mandatory death penalty were contradictory to the Constitution as they obstruct the discretion of judges in administration of justice. For this reason, the Court ruled that these laws must be amended by Parliament. It further ruled that the character of the death penalty in Uganda amounted to cruel and inhuman punishment.

[245] 1995, 1 LRC 216 (CA, Tanzania); 1995 TLR 97.
[246] 1995 (3) SA 391; CASE NO. CCT/3/94.
[247] 2005; Constitutional Petition No.6 of 2003.

3.10 THE 'DEATH ROW PHENOMENON' AND THE PROHIBITION AGAINST TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT

The Death Row Phenomenon, otherwise known as the "Death Row Syndrome", is a legal doctrine that has been expressed as the inhumane treatment ensuing from the exceptional and unique conditions on death row and the often protracted delay or postponement for executions to be carried out, or where execution is carried out, it is done in a way that exacts gratuitous suffering.[248]

Therefore, the phenomenon refers to "a combination of circumstances that lead to both severe mental and physical suffering in prisoners who serve on capital punishment". According to Kealeboga N Bojosi, these things include, amongst others: "prolonged periods waiting for uncertain outcomes- but inevitable death, solitary confinement, poor prison conditions, and lack of recreational activities".[249][250]

It has been assumed that the death penalty inexorably produces cruelty by the delay in conducting it.[251] For instance, in the case of *"Riley & Others v Attorney General of Jamaica & Another"*[252], the Privy Council held that "period of anguish and suffering is an inevitable consequence of sentence of death". Conversely, it is commonly acknowledged that it is human disposition to strive to extend one's life by all measures at one's disposal.[253] Thus, in

[248] W."A. Schabas, The Abolition Of The Death Penalty In International Law (Third Edition), Cambridge University Press", 1993, page 127.

[249] "Kealeboga N Bojosi, 'The Death Row Phenomenon And The Prohibition Against Torture And Cruel, Inhuman Or Degrading Treatment', African Human Rights Law Journal", Department of Law, University of Botswana, page. 304.

[250] http://"www.corteidh.or.cr/tablas/R21564.pdf(Accessed" on: 9th November 2016).

[251] D. Pannick *Judicial review of the death penalty*, London: Duckworth(1982) page 162.

[252] [1982] 3 All ER 473.

[253] Ibid page 479.

most cases, the delay in execution is partly due to the convicted prisoner "availing himself of appeal procedures", and the state has naught to profit or benefit by procrastinating execution.[254] This is one of the main causes for the conundrum encompassing the death row phenomenon. The justifications for delays on death row are diverse and vary from one country to another.[255] Whatever the causes for the delay, it is certain that delays on death row are proliferating.

The 'death row phenomenon' is therefore a scenario in which death-awaiting convicts undergo torture mentally as they await their times to be executed. They are equated to cows in the abattoir whose slaughter man is not around[256], and has been determined as tantamount to cruel, inhuman and degrading treatment, conflicting with the fundamental bill of rights.

A criminologist piloted a study and interrogated 35 condemned prisoners in Alabama, United States. He established that majority of the inmates were preoccupied with the extent or duration of time expended on death row.[257] He as well established that the isolated conditions under which death row inmates were confined on death row formed widespread feelings of abandonment, leading to what he styled 'death of personality'. The symptoms of the condition, according to the study, were "depression, capacity, loss of sense of reality and physical and mental deterioration". He described the condemned prisoners as suffering from "massive deprivation of personal autonomy and command over resources critical to psychological survival; tomblike setting, marked by indifference to basic human needs and

[254]Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Others (2001) AHRLR 248 (ZwSC 1993) 334.
[255]P. Hudson, 'Does the death row phenomenon violate a prisoner's rights under international law?' (2000) page 11.
[256] Novak, Andrew. "Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya." Suffolk UL Rev. 45 (2011): page 285.
[257]R. Johnson *Condemned to die: Life under sentence of death*. New York: Elsevier(1981) page 4.

desires; and their enforced isolation from the living, with the resulting emotional emptiness and death"[258]. All things considered, the numerous studies define the exquisite psychological torture ensuing from confinement on death row. The consequence of such torture is frequently "deterioration and severe personality distortions, as well as denial of reality".[259] Decisions by the African Commission on Human Rights[260] and the European Court of Human Rights[261] have determined the same.

Thus, the death row syndrome has been argued in support of mandatory death penalty in that it is not merely about the occasion of execution so that even in a de facto abolitionist state like Kenya, a person continually exists in apprehension with the reality of death suspended over his or her head from the second of sentencing. Such form of treatment and punishment aggregates to cruel, inhuman and degrading treatment and violates the provisions of the Kenyan constitution. It similarly infringes Article 7 of the ICCPR and the CAT, to which Kenya is a state party.

The death row phenomenon has concerned the highest judicial echelons of numerous states and international tribunals. The jurisprudence of the "death row phenomenon" has led to the assessment of the differing approaches that develop from the jurisprudence which has demonstrated that there is no unanimity as to the exact limitations and parameters of the death row phenomenon as seen hereunder.

[258]Ibid page 110.
[259]R. "Johnson '*Under the sentence of death: The psychology of death row confinement*' (1979) page 5 *Law and Psychology Review"* page 141; "R. Johnson", J. "Carroll 'Litigating death row conditions: The case for Reform in" Prisoners (I. "Robbins ed".) 1985 page 22.
[260] "Law Office of Ghazi Suleiman v. Sudan, Communication. 222/98 and 229/99 (2003); Amnesty International and Others v. Sudan, Communication. 48/90, 50/91, 52/91, 89/93 (1999").
[261]Messina "vs. Italy, Communication 25498/94, 28 December 2000".

The Constitutional Court of South Africa [262] had to contend with the death penalty in the case of "*S v Makwanyane and Another"*.[263] The accused persons had been convictedon four counts of murder, among other crimes. Their appeal to the Appellate Division was dismissed. However, as a result of the issue of the validity of the death penalty, the case was referred to the Constitutional Court which declared that the death penalty *per se* constituted cruel, inhuman or degrading punishment within the purport of section 11 (2) of the then interim Constitution. Although the Court examined decisions on the death row phenomenon, it did not absolutely address the conundrum.[264] Nevertheless, the Court remarked, *obiter dictum*, that if extensive delays are not regarded as in themselves cruel, inhuman, or degrading punishment, then this would entail gratuitous suffering which is inexorable in any system which maintains the death penalty. So the argument appears to approve jurisprudence to the upshot that inordinate or unwarranted delays in themselves constitute cruel, inhuman or degrading punishment.

The position in the United States is not different from the cases above. The Supreme Court of California adopted a different approach in "*People v Anderson"*[265] in which the Court was engrossed with the inquiry as to whether the death sentence breached article 6 of the state's constitutional proscription against cruel or unusual punishment. The Court determined that it did, and principally emphasized the cruelty of the delay in executing the death penalty. It went further to adjudge that an appellant's assertion to obtain the advantages that ensue from judicial review does not render the protracted period of impending death any less torturous.

[262]The "Constitutional Court is the only body with the power to rule on the constitutionality of any Act of Parliament; sec 167 of the Constitution of the Republic of South Africa".
[263]*Ibid*.
[264]WA "Schabas 'South Africa's new Constitutional Court abolishes the death penalty' (1995) 16 *Human Rights" LawJournal "*133–148".
[265]493 P 2d 88 (1972).

By the same token, in "*District Attorney for Suffolk District v Watson Mass*,"[266] the Supreme Court of Massachusetts declared the death penalty to be an infraction of the state's Constitution, which prohibited cruel treatment to death sentence convicts and held further that a capital convict's insistence on employing his appellate rights does not diminish the callousness of the impact on such person.

The above discussion discloses the undeniable presence of the death row phenomenon. What may perhaps not be certain from the foregoing is the precise source of the phenomenon. It is not clear whether the phenomenon ensues from mere incarceration or whether it develops from an amalgamation of incarceration coupled with the treatment that death row inmates are exposed to. Thus, it is imperative to establish whether the phenomenon is suffered as a consequence of mere confinement on death row, or whether there must be other circumstances like conditions on death row and the treatment that death row inmates are exposed to. Majority of the related inquiries have described the psychological trauma that capital convicts are subjected to, such as Vogelman[267] who has observed that "living in the death row factory is a traumatic experience, whether or not it results in execution; while the condemned are there, they are the living dead". What can be sifted from the above is that importance is placed on the psychological trauma that is an inexorable consequence of the execution of the death penalty. The mental trauma and suffering ensues from numerous elements attendant to the death penalty. These elements comprise uncertainty of the specific date of the approaching death, alternating or fluctuating hope and despair, and the feeling of segregation. Accordingly, while the conventionally difficult conditions on death row

[266]411 NE 2d 1274 (1980).
[267]L. Vogelman, BA (Hons) MA Clin Psych (Wits) Director , Project for the study of violence, University of Witwatersand.

exacerbate the anguish, it would appear that they need not subsist for a convicted prisoner to be subjected to the death row phenomenon.

Similarly, the High Court of Malawi in "*Kafantayeni & Ors v Attorney General* (2007)"[268] a case result from the meting of a mandatory death sentence upon a man for the murder of his two-year old stepson. The convicted man together with five others who were likewise sentenced to death sought a declaration from the High Court on a point of law that the mandatory death sentence is unconstitutional. The Court concurred that the mandatory sentence of death "for murder" stipulated under the Penal Code was unconstitutional and for numerous reasons as it "violated the right to life and to fair trial". It was moreover held to infringe the constitutional "prohibition of torture, cruel, inhuman and degrading punishment".

The "Inter-American Court of Human Rights" has held in orbiter dicta in the case of "*Maritza Urrutia v. Guatemala*", that "the illegal detention of a person can actually characterize torture and degrading treatment of that person".[269] Therefore, we can logically infer that the continued life imprisonment of death row convicts in Kenya, however well-meaning, is illegal, because they are supposed to be hanged to death as sentenced under the prescriptive penal law, unless of course such sentences are transmuted to life imprisonment sentences by the president vide his power of mercy.

In the case of "Soering v. UK",[270] it was held that protracted durations of incarceration on death row, pending execution, infringe the proscription of Cruel Inhuman Degrading

[268] *Commonwealth Human Rights Law Digest*, 6:3 (2010): 290.
[269] "Inter-American Court of Human Rights, Maritza Urrutia v. Guatemala. 27 November 2003. Series C No. 103, para 85"
[270] "Soering v. UK, 161 Eur. Ct. H.R. (ser. A) (1989")

Treatment. Additionally the personal circumstances of the inmate, including age and mental state were also found to be factors influencing the violation of the said convention.[271]

Likewise, "the Inter-American Court" and "Commission on Human Rights" equally held in the case of "Hilaire v. Trinidad and Tobago"[272] that the aforementioned events constitute a breach of the international proscription against torture, cruel, inhuman and degrading treatment.

The Supreme Court of Uganda on January 2009 delivered a milestone ruling in the case of "*Attorney General v. Susan Kigula and 417 Others"*[273] in which it found that the mandatory appliance of the death penalty was unconstitutional, and serving a minimum of three years on death row aggregates to cruel and inhuman punishment. Subsequent to the Kigula judgment, the Kenya High Court likewise found mandatory death penalties unconstitutional for the same reasons in the case of "*Godfrey Ngotho Mutiso v. the Republic"*.[274] This ruling also aligned the Kenya courts to it its fellow commonwealth nations concerning *the death row phenomenon*. The decision in *Mutiso* case was relegated by a differently constituted Court of Appeal bench which refused to follow this decision three years later, characterizing it as *per incuriam*.[275]

[271] "Juan E. Méndez, The Death Penalty and the Absolute Prohibition of Torture and Cruel, Inhuman, and Degrading Treatment or Punishment", web page, https://"www.wcl.american.edu/hrbrief/20/1mendez.pdf, Accessed":10th November 2016

[272] "Hilaire v. Trinidad and Tobago, Inter-Am. Ct. H.R, Series C, No. 94, paras.167,168 (Jun. 21 2002").

[273] "Attorney General v Susan Kigula & 417 Others (Constitutional Appeal No. 03 OF 2006) [2009] UGSC 6 (21 January 2009").

[274] "Godfrey Ngotho Mutiso v. Republic [2010] eKLR".

[275] Mwaura, Kamau and Kibia v Republic, Criminal Appeal 5/2008 (18 October 2013).

Subsequently, the Chief Justice of Kenya issued sentencing guidelines[276] in January 2016 that presumed the validity of the mandatory capital penalty. As things stand now, the matter awaits the decision of the Supreme Court of Kenya to pronounce itself and set an enduring authority on the substance of mandatory death penalty in Kenya in addition its death row syndrome effect in Kenya Supreme Court Petition No. 15 of 2015 As Consolidated With Petition No. 16 Of 2015- Francis Karioki Muruatetu & another v Republic & 5 others.

The "Judicial Committee of the Privy Council" in London In 1993 ruled in the cases of "*Pratt and Morgan v. Attorney General of Jamaica"*[277] that a five year delay on the death row infringes Article 7 of the ICCPR for the rationale that it comprises inhuman and degrading punishment, and in addition a delay for over two years might be considered as inhumane treatment, unless the convicted person is only availing him/herself of appellate reliefs.

In the Zimbabwean case of "*Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General"*, the Supreme Court of Zimbabwe made an analogous judgment, but a constitutional amendment five months subsequent controverted the Court's judgment.[278]

On the other hand, in 1998 a U.S Federal Court of Appeals in "Chambers v. Bowersox"[279] declared that a fifteen year stay on death row is not a situation that violates the Eighth Amendment of the Constitution with regard to the right of freedom from cruel and unusual punishment.

[276] Paul Ogemba, 'Judiciary's New Policy Spells Doom for Death Row Convicts', Daily Nation, 26 January 2016, www.nation.co.ke/news/New-guidelines-spell-doom-for-inmates-on-deathrow/-/1056/3048832/-/m633yiz/-/index.html
[277] [1993] 4 All E. R. 769.
[278] W. "A. Schabas, Book Review: Execution Delayed, Execution Denied, (1994"), page 180.
[279] (8th Circuit 1998)157 F. 3d 560, at page 570.

Whereas it may be said that individual proponents of this doctrine are inclined to support it, the jurisprudence so far- both in local and international hemispheres of the law- suggests that there is still no consensus on the viability of the application of the doctrine at hand.[280]

This lack of consensus is brought on two contravening factors in relation hereof. The first is the factor of time in vitiating the necessity of the death penalty. This is because it is debatable as to whether the prolonged detention before the carrying out of capital punishment is in the foresight of justice, as those to be punished are punished in more than one way, i.e. By their prolonged conviction they serve an imprisonment sentence for a period of time- albeit an undefined period, and by their ultimate demise the service of capital punishment as a second punishment for a crime committed.[281]

The second supporting argument is that prolonged detention is necessary to fulfill the aims of the capital punishment. Therefore, there must be demonstration of existence of other circumstances.[282]

A small number of legal conundrums have accomplished promoting reciprocal cognizance of the jurisprudence of national courts and international judicial bodies, as the death row phenomenon has done. Nonetheless, such judicial cognizance has not translated into judicial consensus on the issue of death row phenomenon.

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[280] P. "Hudson, 'Does the Death Row phenomenon Violate A Prisoner's Rights Under International Law?', EJIL, 2000, Vol 11, No. 4", p. 833-856, web page: "http://www.ejil.org/pdfs/11/4/556.pdf, Accessed": 10th November 2016

[281] "Juan E. Méndez, The Death Penalty and the Absolute Prohibition of Torture and Cruel, Inhuman, and Degrading Treatment or Punishment", web page, https://"www.wcl.american.edu/hrbrief/20/1mendez.pdf, Accessed":10th November 2016

[282] *Id*.

Jurisprudence on the death row phenomenon discloses the diverse attitudes that have been espoused by various courts around the world. Even though this dissertation may not be exhaustive, it is suggested that, geographically, it adequately overlays a wide spectrum of the international community as it considers court decisions and laws from various regions. What can be perceived from the above is that there are two approaches to the death row phenomenon, which are founded on assorted and incommensurable persuasions. These approaches have led to dissimilar judgments on similar cases. Below is an examination of the two approaches that have been classified from the above jurisprudential exploration of the death row syndrome.

3.10.1 **The progressive approach to the Death Row Phenomenon**

This "approach" is essentially to the conclusion that the implementation of a death sentence following a protracted delay is a violation of the prohibition against inhuman or degrading treatment. This is so irrespective of the fact that the delay may well have been at the instance of the convicted prisoner him/herself.

This "approach" has, for instance, been espoused by the Supreme Court of Zimbabwe, the Supreme Court of India, the Privy Council and the South African Constitutional Court. Gubbay CJ in the "*Catholic Commission"* case[283] suggested that the approach he adopted was more 'progressive' and 'compassionate'". Other jurisdictions with a similar approach have already been discussed above.

[283] "Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Others" (2001) AHRLR 248 (ZwSC 1993).

3.10.2 **The conservative approach to the Death Row Phenomenon**

This "approach" holds that "long detention *per se* does not amount to a violation of the prohibition against cruel, inhuman or degrading treatment, but it depends on the circumstances of the case including age, mental state and medical state".

The "Human Rights Committee on Civil and Political Rights" has regularly declared that protracted detention *per se* does not quantity to an infringement of the proscription against cruel, inhuman or degrading treatment[284], and has sustained the argument that there has to be an existence of 'further and compelling circumstances'. The ECHR in the *Greek* case[285] remarked that "for any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable, despite the fact the delay might have been due to the exploitation of appeal safeguards by the condemned prisoner". In this case, what decisively influenced the Court were the idiosyncratic conditions of the applicant. It is challenging to presume that the European Court would have arrived at the same determination if the circumstances of the applicant had been otherwise, as some reviewers have argued that neither the age nor the mental state of "Soering" persuaded the court.[286] It is suggested that the emphasis the Court laid on "Soering's" circumstances or conditions points one to the inexorable inference that, but for these circumstances, the Court's determination would have been something else. It is on this basis that the decision is categorized under the "conservative approach". The Court of Appeal of Botswana and the Court of Appeal of Singapore find themselves within this category as well.[287]

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[284] Committee on "Civil and Political Rights, General Comment No. 20 on article 7 of the International Covenant on Civil and Political Rights", paragraph "4".
[285] European "Court of Human Rights", "The Greek case", "Danemark v. Greece, Communication 3321/67".
[286] Kealeboga N Bojosi, AHRLJ Volume 4 (2004) 2 pages 303-331.
[287] Ibid.

3.11 'MANDATORY' DEATH PENALTY AND THE PRINCIPLE OF 'JUDICIAL DISCRETION'

It is an intrinsic principle of law that judicial discretion is necessary for imposition of any punishment to ensure that it is measured according to the degree and available evidence in a given case. Such judicial discretion is, as a matter of fact, premised upon one of the law's most fundamental normative tenets of constitutionalism, the principle of "*Separation of Powers*", whereby all the three arms of the government are precluded from assuming or usurping the powers, duties or jurisdictions of each other, even though not absolutely[288], of which in this discussion is narrowed down to separation of powers between the Judiciary and the Legislature. Thus, many courts in most jurisdictions frown upon mandatory penalty on the basis that it undermines the principle of judicial independence. This is made harder, if not impossible, by legislation that absolutely forbids any consideration of convicts' personal characteristics and the circumstances of their crimes by requiring "mandatory death penalty" in the event of conviction. The injustice of "mandatory death penalty" arises because it effectively blinds a court to mitigation, and this defect is not eliminated by the category of offence concerned.

Subsequently, courts have been up at arms to oppose mandatory death penalty condemning it in the harshest terms. For instance, the India's Supreme Court recently affirmed this view in resounding terms – characterizing the "mandatory death penalty" as a " relic of ancient

[288] M.J.C. Vile, Constitutionalism and the Separation of Powers (2nd ed.) (Indianapolis, Liberty Fund 1998). <http://oll.libertyfund.org/titles/677> Accessed on 10/8/2017.

history best suited to lawless… military regimes".[289] The "Eastern Caribbean Court of Appeal" ruled in 2001 that the mandatory death penalty laws of "St Vincent and St Lucia" breached constitutional proscriptions against inhuman or degrading punishment or other treatment.[290] On its part, the "Privy Council" concluded that "to deny the offender the opportunity, before penalty is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity".[291] Closer home, the "Constitutional and Supreme Courts of Uganda",[292] and the "High Court and Supreme Court of Appeal in Malawi"[293] have ruled that mandatory death penalties violate the guarantees afforded by their constitutions to a fair hearing, equal protection and the separation of powers.

3.12 MANDATORY DEATH PENALTY AND THE RIGHT TO A FAIR HEARING

The Constitution of Kenya 2010 guarantees the right of every person to "a fair hearing"[294]. This involves access to legal representation and hearing within a reasonable time by an independent and impartial court. A fair hearing also involves "legal representation to enable one put up an effective defense". Further, Article 50 (*k*) of the Constitution provides that "every accused person has the right to a fair trial" which includes the right- "to adduce and challenge evidence". Consequently, in case of imposition of mandatory death penalty, the

[289] State of Punjab v Dalbir Singh, AIR 2012 SC 1040.
[290] See Spence and Hughes v The Queen (Criminal Appeal No 20 of 1998), Eastern Caribbean Court of Appeal (judgment, 2 April 2001), paras 43–6, 214–17.
[291] Reyes v R. [2002] 2 AC 235, para 43.
[292] Susan Kigula & "416 Others "v Attorney General of Uganda (Constitutional" Appeal "No 6 of 2003) [2005"] UGSC 8
[293] Francis Kafatayeni "v Attorney General" of Malawi "(Constitutional Case No 12 of 2005", unreported), decided by the High Court in 2007 and affirmed a year later by the Supreme Court of Appeal in Twoboy Jacob v The Republic (Criminal Appeal Case No 18 of 2006, unreported).
[294] Article 50, Constitution of Kenya.

capital offender is treated differently in that unlike other non-capital offenders he is denied the right to exercise his defense in mitigating the penalty.[295][296]

In addition to the inherent denial of a convicted person from mitigating his offence with extenuating or justifiable circumstances in tandem with the established principles of the right to a fair hearing, the situation of a "mandatory" death penalty also deprives the convicts of their right to life. Execution of prisoners without affording them a fair trial, which fair trial we are terming in this case as an opportunity to mitigate their sentence, amounts to compulsory execution being meted upon them, which according to this study is contemporaneously a violation of the right to life.

[295] Kenya National Human Rights Commission, "Abolition of the Death Penalty in Kenya", Position Paper No. 2 of 2007.
[296] Available at: http://www.knchr.org/Portals/0/CivilAndPoliticalReports/PP2%20-%20Abolition%20of%20the%20death%20penalty%20-%20final.pdf?ver=2013-02-21-140244-507 9 (accessed on 15/07/2015).

CHAPTER FOUR: THE SITUATIONAL ANALYSIS

4.1 INTRODUCTION

Mandatory death penalty was recently described by an IBA report as being "forced to kill." The report defines "mandatory death penalty" as "capital punishment that is required by law, whether or not a sentencing judge thinks it fair". According to the Report, "any procedure that obliges a court to impose the death penalty is inherently flawed as it makes it difficult or impossible for the law to give due weight to relevant facts: most obviously, the details that necessarily make one crime more or less serious than another". Further, it is noted that in certain jurisdictions, the offences that trigger death penalties are insufficiently serious to merit such a sanction in the first place.[297]

In this chapter, the case is made for "abolition of mandatory death penalty in Kenya". The argument that the death penalty is a violation of the fundamental rights as enshrined in the International Legal instruments is espoused. In essence, the Chapter seeks to discuss the need "for abolition of the death penalty in Kenya from a human rights perspective". The various theories of punishment and human rights principles underlying the argument for abolition of death penalty are analyzed especially how they contribute in making the case for the abolition or repeal of the death penalty. The arguments and justifications for imposition of the death penalty are also discussed with a view to determine their applicability to the Kenyan case.

4.2 BACKGROUND TO DEATH PENALTY

The death penalty entails the elimination of a person's life following conviction on a capital offence by a competent court. This method of punishment has existed in almost all

[297] Sadakat Kadri, "Forced to Kill: The Mandatory Death Penalty and its Incompatibility with Fair Trial Standards", A report of "the International Bar Association's Human Rights Institute", May 2016; page 5.

civilizations though the manners of its implementation have differed from country to country. Regular techniques of its execution that have been utilized include crucifixion, drowning, stoning to death, hanging and beheading, burning or boiling alive, shooting, electrocution, and use of lethal injection. In Africa, the official establishment of death penalty was occasioned by influence from European colonizers subsequent to the Scramble for Africa which ensued after 1885. Nevertheless, even in pre-colonial Africa the death penalty was used as a method of punishment reserved for the most severe transgressions. Its application, however, differed in time and space and was determined by what a particular community considered a serious offence punishable by death. There was no consistency or prearranged process of establishing which crimes were punishable through imposition of the death penalty. The "mandatory" death penalty and other severe criminal punishments were introduced by colonialists in Africa at the time as part of instilling "good governance, justice, and civilization". Therefore, "violence and excessive punishment meted by colonial regimes were apparatuses regularly employed to command the management and control of the state".[298] For example, in colonial Kenya the utilization of death penalty peaked during the state of emergency period starting in 1953 with the infliction of the death penalty for individuals who "administered the Mau Mau oath".

Ensuing Kenya's independence, accessible reports reveal that "from 1963 to 1987 alone, 280 persons out of 3,584 people sentenced to death had been executed". Another 135 prisoners had profited from the presidential prerogative of mercy and their death penalties transmuted or commuted to life imprisonment sentences.[299]

[298] "Hynd, Stacey, Power and Prejudice: Death Penalty Practices in Nyasaland", pages 1900-1955 – "http://www.nuff.ox.ac.uk/General/Seminar/Papers/408.pdf (Accessed on" 21/8/2016)
[299] "Oduol, Robert (2000), Capital Punishment; Texas to Kenya, at: http://www.g21.net/africa8.html. (Accessed on" 21/8/2016)

4.3 BACKGROUND TO CRIMINAL PUNISHMENT IN KENYA

The consequence of criminal liability is punishment. Punishment for criminal liability may be anything from mere warning to death. Punishment in this sense is what ensues upon a finding of criminal liability. Every crime is framed with an element of consequence or punishment. Hence the famous definition of law as "commands, backed by threat of sanctions, from a sovereign"[300]. All criminal laws fit the definition of commands backed by threats of sanctions perfectly in that every crime has its stipulated punishment which is to be meted out against those who are found criminally liable for the given crime.

The term punishment hardly has one meaning which may be ascribed to it. It is not easy term to define with precision given that the term is broadly used in general speech as well as a term of art. Punishment means different things to different people. A teacher or a parent talking about warning a child of eminent punishment for rudeness does not refer to the same thing as a religious zealot who asks people to repent or face eternal punishment in hell. Similarly, when a human resource manager threatens an employee with punishment, she is not referring to the same punishment as administered to those who are found criminally liable. Extensive definition of punishment is beyond the book's mandate and so we shall endeavor to only explore the meaning of punishment as used in criminal law.

The term punishment may be defined as "an unpleasantness which somebody is subjected to in return for a wrong done by him". The unpleasantness is usually towards the person who has been found criminally liable. This is contrasted with self-imposed punishment for pleasure and/or religious reasons or unjustified punishment and torture against another.

[300]David O. Brink, "Austin and the Command Theory", available at: http://philosophyfaculty.ucsd.edu/faculty/dbrink/courses/168-06/Handout-1.pdf (accessed on 20/07/2016).

According to Anthony Flew, punishment imposed for a criminal offence consists of five elements:[301]

1. It must involve an unpleasantness to the victim.
2. It must be for an offense, actual or supposed.
3. It must be of an offender, actual or supposed.
4. It must be the work of personal agencies; in other words, it must not be the natural consequence of an action.
5. It must be imposed by an authority or an institution against whose rules the offense has been committed (the state).

If the above conditions are not met, then the act is not one of punishment but is simply a hostile act. Similarly, direct action by a person who has no special authority is not properly called punishment, and is more likely to be revenge or an act of hostility.[302]

4.4 CATEGORIES OF CRIMINAL PENALTIES IN KENYA

In Kenya various penalties exist which may be classified into two major categories which are custodial penalties and non-custodial penalties. Examples of custodial penalty include imprisonment while non-custodial penalties include probation, community service orders, fines, forfeiture and compensation among others.

Imprisonment is provided for in section 26 of the penal code. In most cases, the law provides for the maximum to allow court the discretion to decide on the amount of custodial penalty if

[301] Antony Flew "The Justification of Punishment", Volume 29, Issue 111 (1954): page 291-307.
[302] "Steiner, Henry J., Philip Alston, and Ryan Goodman. International Human Rights in Context: Law, Politics, Morals. 3rd ed. Oxford: Oxford University Press, 2007": Page 531.

any to be given. The maximum penalty in Kenya after death penalty is imprisonment for life. Fines are usually accompaniments or alternatives to imprisonment. In most cases, the maximum fines limits are set under the law. Fines are usually imposed in cases of misdemeanors. Only in rare cases is the option of imprisonment without fine imposed under the law and exercised in real life. The rationale of the fine as a criminal punishment is to exact a punishment for the not so serious criminal offences without unnecessarily congesting the nation's penitentiary institutions. Fines are also an avid income earner for the state and, as such, serve as a sure way to ensure the convicted person repairs the imbalance created by the commission of the offence.

The courts are also given powers under the Penal Code to "order the forfeiture of any property used in connection with the commission of the crime". The punishment is usually meted out as an addition or an alternative to other punishment. Compensation can also be ordered in relation to the victim of an offence is appropriate in the circumstances and considering means. Section 31 of the Penal Code provides that an accused "may be adjudged to make compensation to any person injured by his offence". Such compensation may either be "in addition to or in substitution for any other punishment". Under section 175 of the Criminal Procedure Code, compensation can only be awarded out of the fine imposed by the court. This is no license, however, to the court to impose hefty fines in order to create a find to draw compensation for the victim of the crime. Security for keeping the peace is provided for in the Penal Code and involves the convicted person being bonded over his own recognizance "to keep peace and be of good behavior". Absolute discharge is where the court convicts but opts to issue no punishment against the accused. The law requires it be issued where the "court is of the opinion that having regard to the circumstances of the offence and the character of the offender, there is no need to inflict punishment and a probation order is

also inappropriate". Only in rare circumstances is the court moved to give an absolute discharge.

Probation is a criminal punishment which emphasizes rehabilitation and resettlement, and a social welfare approach to crime. In Kenya, probation is provided for under Probation of Offenders Act (Cap. 64). Section 4 thereof provides that where the court is of the opinion that it is necessary to release the offender on probation, it may go ahead to convict the offender and make a probation order. The High Court is in addition entitled to make a probation order in lieu of sentencing an offender to any punishment.

Removal from Kenya as a criminal punishment is provided for in section 26A of the Penal Code and is only relevant where the convicted person is an alien, a non-Kenyan citizen. The law provides that "where the imprisonment is for a term not exceeding 12 months, the Court shall order their removal from Kenya upon directions either of the Inspector General of Police or Commissioner of Prisons". Where the penalty for the offence committed by the alien is more than 12 months imprisonment, the court shall "upon satisfaction that the person may be removed from Kenya, recommend to the Minister of Immigration to make the order for such removal". Such removal order may take effect "immediately or on completion of any penalty of imprisonment imposed".

The Courts are also given the mandate under section 176 of the Criminal Procedure Code to "encourage reconciliation by promoting and facilitating settlement in minor criminal cases". As was held by the Court in **Kurai v R (unreported)**, under section 176 of the CPC a court may only promote reconciliation and encourage and facilitate reconciliation in the circumstances expressly stated in the law. However, it is still uncertain which classes of

offences the courts may indulge in settlements. All the same, encouraging and infusing settlement into the criminal procedure is long overdue as it is in tandem with African traditions before the advent of colonialism which encouraged reconciliation and compensation even in criminal cases.

Extra-mural penal employment is provided for under the Prison's Act. The penalty can be ordered by a court where a person is convicted to imprisonment for six months or less or sentenced to prison for non-payment of a fine, compensation or costs or sentenced to detention. Such an offer usually works for half a day without a pay although s/he is usually provided with food.[303]

Lastly, death penalty remains the gravest penalty in Kenya and strictly speaking, it does not fall under the above two categories as it is neither a custodial or non-custodial penalty. The penalty of death is permitted under section 24 of the Penal Code. This mode of punishment is available "for murder, treason and robbery with violence". Death penalty cannot be inflicted on persons below 18 years, or an insane person or a pregnant woman. The first two are detained at the pleasure of the President while the pregnant woman's penalty will be commuted to life imprisonment. In all instances where death penalty is imposed in Kenya, it is provided for as a mandatory penalty meaning that the judges are not afforded any discretion in the event of convicting for the offence which attracts the death penalty but to inflict it to the offer without room for mitigation.

[303]P.L.O. Lumumba, *A Handbook of Criminal Procedure in Kenya*, 2nd edition (Law Africa, Nairobi: 2002), page 160.

4.5 THE CONSTITUTION OF KENYA AND MANDATORY DEATH PENALTY

The current Constitution of Kenya which was promulgated via popular referendum in 2010 has made extensive provisions for protection of fundamental human rights. However, the constitution is not clear on withdrawal of the mandatory death penalty. Article 26(3) of the new Constitution states that; "(a) a person shall not be denied life intentionally except to the extent authorized by this constitution or other written law". This article is construed as a legal justification for any mandatory death penalty as provided for under the criminal statutes.

Compared to the repealed Constitution, section 71 (1) thereof endowed the right to life in nearly analogous terminology, namely, " no person shall be deprived of his life intentionally save in execution of the penalty of a court in respect of a criminal offence under the law of Kenya of which he has been convicted" . Thus, the same limitations to "the right to life" still apply with respect to imposition of mandatory life penalty. Hence, the death penalty is still applicable in as punishment for the offences of "treason, murder and robbery with violence".

It is noteworthy that Kenya had an opportunity to do away with the unjust death penalty laws during the referendum and promulgation of the new constitution in 2010. The Constitutional Debate at the Bomas of Kenya contended with the conundrum of the death penalty and its repeal or abolition from the law of Kenya. Notwithstanding original insertion of explicit terms in the draft Constitution prohibiting capital punishment, delegates at the National Constitutional Conference ultimately elected in favour of maintaining capital punishment, chiefly on the foundation that people who committed heinous crimes should be punished as severely as imaginable. As a result, the Bomas Draft Constitution acknowledged that every person has the right to life, but remained mute on the death penalty and neither mentioned circumstances under which the right to life may be dispossessed. Assuming a dissimilar

methodology from the Bomas draft, the Wako Draft acknowledged the right to life but donated Parliament the power to legislate the scope to which a person may enjoy that right. By inference, the death penalty still had opportunity in the then proposed Draft Constitution that was refused during the November 2005 referendum. Similarly, the Committee of Experts Draft which was eventually promulgated into the Current Constitution adopted the Wako Draft provisions.[304] Thus, as it is now, the Constitution leaves applicability for the "death penalty" by virtue of "Article 26(3) of the Constitution 2010", which legitimizes and upholds laws which deny a convicted person of his right to life.

Capital punishment is therefore at the moment one of the legal limitations to the right of life. However, the question that begs is whether "capital punishment was also envisaged by framers of the constitution to avail as limitation to or qualify the right to human dignity and security of person as enshrined in Article 24 and 25 of the Kenyan constitution". Article 25 categorically states the rights which have no limitations under any given circumstances. These are "(a) the freedom from torture and cruel, inhuman or degrading treatment or punishment; (b) freedom from slavery or servitude; (c) the right to a fair trial; and (d) the right to an order of habeas corpus". As noted from the four criteria above, the right of life has been omitted and has been protected under Article 26 (1) also including the right to dignity as stated in Article 28[305]. This implies that the "right to a fair trial" and also the "protection from torture, inhuman acts, cruel deeds" and the degrading punishment or treatment cannot be restricted by law. With respect to the right to life, yes it can be restricted by the law but even then Constitution has restricted the scope of the law that may limit any right.

[304] The "National Constitutional Conference was held in Nairobi at the Bomas of Kenya in 2003-2004".
[305] Ibid.

Indeed, in view of the provisions of the Constitution itself, it has proven to be very difficult to defend the law on death penalty. Article 24(1) of the new constitution states that "a right or a fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity equality and freedom, taking into account all relevant factors" including the following:[306]

i. "The nature and extent of the limitation;
ii. The nature of the right or fundamental freedom;
iii. The importance of the purpose of the limitation; And;
iv. The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."

The criteria stated above in the Article 24(1) of the Constitution are very crucial in determining the future of mandatory death penalty which robs the Judiciary of discretion. It demands two issues. First, any limitations to the right to life must be in rhythm with human equality, freedom and dignity. More important is the "nature of the right", and "its purpose in the constitution". Finally, the relationship between the sole purpose of the limitation in the constitution and the stated purpose must be considered. Moreover, the law in this case implies that other less restricted methods can be preferred to achieve the same purpose[307].

For a criminal justice system to be just, it has to display the "importance of the right to life in the laws" it follows, in its practice methodology, and its attitude. True, other fundamental

[306] Ibid.
[307] Ibid.

rights can be restricted including right to own property, liberty, among other rights and where need arises compensated for. However, the right to life can never be restored after termination given that death is irreversible. Under the new constitution, death is considered to be an irreversible act and if it is executed upon a convict following conviction and sentencing, it will and does certainly conflict with the other rights that are stipulated in the same constitution law.[308] There is possibility that even with best intentions criminal trials may suffer from error and imperfections lead to conviction of an innocent person or the acquittal of the people who should be found guilty.

Thus according to me, the employment of the death penalty for even the foulest contemplated classifications of crimes, does not, on the face of it, satisfy the goals of criminal punishment in a criminal justice system as already discussed. In order to appreciate the justification and the 'reasonability' of the death penalty, there is need to evaluate and consider both the degree of damage in question and also the nature of the death penalty. While for some Kenyans capital punishment is the only satisfactory retribution for victims crying for eye-for-eye, to many others, convictions like life penalties in jails and long custodial penalties are considered to be sufficiently retributive to the society.

Interestingly, a death penalty that overly goes beyond the purpose of punishment is not considered in the new constitution[309] or even the Penal Statutes, as exceeding the retributive tenets of punishment or being contrary to the bill of rights.

[308] "Hynd, Stacey". "Murder and Mercy: Capital Punishment in Colonial Kenya, Ca. 1909-1956*." *The "International Journal of African Historical Studies* 45.1 (2012"): page 81.

[309] Ibid.

A democratic country like Kenya has to treat and consider even the cruelest of its citizens such as capital offenders with the same humanity it espouses for all persons on its soil. This includes giving them an opportunity to mitigate their penalties and not face a sealed fate without considering their peculiar conditions and the special circumstances pertaining before, during and after the commission of the crimes in question. It has been noted that this unavailability of mitigation for a lesser penalty in capital offences translates to a lack respect for human life and amounts to cruel, inhuman and degrading punishment.[310] In fact, in other incidences, it motivates the offer to go to extreme lengths to neutralize the evidence because he knows it is his life against that of the witnesses who may be used to identify him.

In fact, as early as 2003 when the NARC Government took over, it stated the "intention to introduce a Bill in Parliament to abolish the death penalty". The then Commissioner of Prisons supported the proposal expressing that the death penalty should be abolished as it "claimed innocent lives". He observed, "We are longing for the day Parliament will remove the death penalty from our Constitution". The Ministry of Justice and Constitutional Affairs echoed that the death penalty was a breach of human rights and ought for that reason to be abolished whereafter death row convicts should promptly have their death penalties commuted to life imprisonment sentences. Therefore, whereas Kenya has not de jure abolished capital punishment, practice de facto illustrates the existence of an unofficial moratorium on the implementation of the death penalty.[311]

4.6 DOMESTIC LAWS ON DEATH PENALTY IN KENYA

In Kenya, Article 26 (3) of the Constitution of Kenya (2010) (a provision formerly found under Section 74(2) of the repealed Constitution) contains a savings clause which legitimizes

[310] Swartz, Nico P. "Does Capital Punishment Amount to Cruel, Inhuman and Degrading Punishment: A Reflection on Botswana and South Africa." "*Journal of Politics and Law* 5.4 (2012"): page 100.
[311] "This was said during a meeting with the KNCHR on June 6th 2005". See the KNCHR Report at page 5.

the death penalty and protects any challenge to the legality of a death sentence. The Constitutions of several other jurisdictions for instance, the Caribbean states of Belize, Saint Lucia and Saint Kitts, all have such a 'saving clause', as used in the cases of Reys[312], Fox[313] and Hughes[314] which the Kenyan court of appeal cited and relied upon in the cases of "*Joseph Njuguna Mwaura & 2 others" v R, "Criminal appeal No. 5 of 2008"* and *Michael Njoroge Waithera V R [2013] eKLR*, due to the similarity of Kenya's savings clauses with theirs. This savings clause is also present in the Botswana Constitution, but is however absent in the constitutions of neighboring Uganda and Malawi[315].

Just as is the case in many commonwealth nations, capital punishment in Kenya was introduced by the British regime. This was during the colonial era, when Kenya was under the leadership and laws of England. After gaining its independence in 1963, the capital punishment laws were retained by the government.

All prosecutions and resulting penalties in Kenya are strictly predicated upon existing written laws. The penal code of Kenya, Chapter 63, Laws of Kenya, is the oldest statute sanctioning death in Kenya and happens to be the primary penal law. It clearly prescribes a mandatory death sentence for the following crimes:

1. murder[316],
2. treason[317],

[312] "Reyes v the Queen [2002] 2 AC 235"
[313] Fox "v" R ["2002] 2 AC" 284
[314] R "v" Hughes ["2002] 2 AC" 259
[315] Viljoen, Frans. "*International human rights law in Africa"*. Second edition, "Oxford University Press", 2012: page 346.
[316] Section 204 of the Penal Code Cap 63 Laws of Kenya.
[317] Section 40 ibid.

3. robbery with violence[318],
4. attempted robbery with violence[319], and
5. Administering or conducing of illegal oaths aimed at committing capital crimes and offenses[320].

Many of the death sentences meted out by Kenyan courts are in respect of the crimes of "robbery with violence, murder and attempted robbery with violence". Convictions and charges for other capital offences are very rare and at times even unheard of in Kenya. It is significant to note however, that offences such as "robbery with violence and attempted robbery with violence did not bear the death sentence until 1973, when the penal code was amended to provide for it".

The crime of treason includes several acts including sedition, an attempt to overthrow or undermine the authority of the government, causing harm or intention to kill the president, and any act deemed as likely to bring the Republic to a war is also considered as treason[321].

The country's service-men of the defense forces are not left out in the death sentences. The Kenya Defense Forces Act identifies several acts which if conducted by a member of the forces carry an outright death penalty to the person, without the benefit of mitigation and less severe or circumstantially meriting sentences. Such acts include disloyalty, spying, disobedience and aiding a foe nation with or assisting it in intelligence. Other acts include mutiny and advocating for a change in government through illegitimate means[322].

[318] Section 296(2) ibid.
[319] Section 297(2) ibid.
[320] Section 60 ibid.
[321] Ibid
[322] Viljoen, Frans. "*International human rights law in Africa"*. Second edition, "Oxford University Press", 2012: page 411.

Besides the penal code offences, the International Crimes Act (2009) of Kenya provides that the same penalty is applicable for "crimes such as genocide, war crimes and other crimes against humanity". This is especially the case if the motivation behind a crime was to kill. This implies that for all crimes that have been included in the death punishment in the international laws, it is automatic that the same applies under the laws of Kenya.

The Penal Code introduces hanging as a mandatory mode of execution of anyone convicted of murder, armed robbery and treason. Correspondingly the Kenya Prisons Act provides that executions are to be carried out by hanging[323].

4.7 THE 'MANDATORY' NATURE OF DEATH PENALTY IN KENYA

In the prescription of penalties for capital offences in Kenya, the Penal code uses the terms, "shall be sentenced to death"[324]. Kenya's International Crimes Act as well as the other international criminal laws, when pronouncing penalties upon those accused and found guilty of "genocide, crimes against humanity and war crimes which involve intentional killing", also apply imperative terms such as those of the Kenya Penal Code when prescribing punishments, other than death, for "crimes such as genocide, crimes against humanity and war crimes"[325].

The term "shall", in these instances, is the strongest obligatory term in the repertoire of the terms of law.[326].As such, the word "shall" is understood to be imposing a mandatory obligation; and the court system takes this to imply that the death penalty must be followed

[323] "Kenya Prisons Act, sec. 69, Laws of Kenya Rev. Ed. 2010 Ch. 90, Feb. 19, 1963, as updated through to Jul. 12, 2012".
[324] Sections 40 (3), 60, 204, 296 (2), 297 (2) of the Penal Code, Chapter 63, Laws of Kenya.
[325] International Crimes Act No. 16 of 2008 (Kenya).
[326] Armstrong, David, and Florencia Montal. "The politics of international criminal justice." *The "Routledge Handbook of International Crime and Justice Studies* (2013"): Page 125.

after the accused individual has been found guilty of the crimes charged. This means that at that moment even if the convicted person or his defense has any mitigating factors that they wish to present becomes irrelevant because the court has no discretion as the law does not give that discretion to the court.[327]

In juxtaposition to this, the law usually provides wide discretion in the sentencing of convicts of non-capital offences. This leeway is found in Section 26 (2) as well as section 26 (3) of the Penal Code, where the law provides specific situations where, for example, a court dealing with a case of a person facing a life penalty or any other prison penalty may choose to pass on a shorter penalty[328]. In fact, apart from situations where the law prescribes a minimum penalty, it is possible for the court to substitute the prison penalty with a fine.

For instance, section 26 (2) of the Penal Code states that "as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term."[329] This section of the law also empowers courts to change a prison penalty to a fine penalty. Under this section an individual sentenced to a prison term, "may be sentenced to a fine in addition to a prison term or the penalty may be substituted with a fine". Section 26 (3) of the Penal Code prohibits the application of a fine to substitute a prison penalty in cases where the law specifically prescribes for a minimum penalty,[330]but, nonetheless makes provision to substitute a prison penalty with a fine if the law does not prescribe a minimum penalty[331]. This clearly denotes

[327] Ibid
[328] Kiage, Patrick. *Essentials of Criminal Procedure in Kenya*. LawAfrica Publishing Ltd, 2014.
[329] Novak, Andrew. "The Mandatory Death Penalty in Ghana: A Comparative Constitutional Perspective on Dexter Johnson v. Republic." *Cardozo Pub. L. Pol'y & Ethics J.* 12 (2014): Pages 669-781.
[330] Ibid.
[331] Muia, Mike K. *Determinants of delivery of justice in sexual offence cases prosecuted in Naivasha law courts in Nakuru county*. Diss. University of Nairobi, 2014.

that courts have a wide discretion when it comes to handing down penalties for non-capital offences.[332] This allows the courts to put into consideration various aggravating and mitigating factors when dealing with various cases.[333] This wide discretion is justifiable upon recognition that crimes are a product of a complex interplay of economic, sociological, psychological and other factors. Judicial discretion in this sense improves on the substantive justice of the criminal justice system "as it allows the courts to mete out penalties in proportion to the situations of every case". Thus the law that imposes mandatory death penalties following the conviction of an individual for a capital offence is patently unreasonable as it compels courts to disregard all the circumstances that make each case an exceptional one.

The law thus affords the courts room to consider the aggravating and mitigating factors before handing punishment to the guilty offenders. The latitude is given to the court because most of the crimes committed by the offenders are a product of complicated and complex factors of economy, sociology, psychological factors and others which at times are almost impossible to explain.[334] It is additionally essential to observe that under the death penalty, the law has specifically prescribed hanging to death as a mandatory mode of execution of anyone convicted of murder, armed robbery and treason. As per the Kenya Prisons Act, executions are to be discharged by "hanging".[335] It is not seldom that the words used by a judge when passing such a penalty are "he *shall* be hanged by the neck until he is dead…" which leaves the hangman no alternative for a painless or less severe death as he has to hang

[332] Ocobock, Paul. "Spare the Rod, Spoil the Colony: Corporal Punishment, Colonial Violence, and Generational Authority in Kenya, 1897-1952*." *The "International Journal of African Historical Studies* 45.1 (2012"): page 29.
[333] Ferguson, Cleveland, et al. "International Human Rights." *The International Lawyer* (2011): Pages 381-394.
[334] Ibid.
[335] "Kenya Prisons Act, sec. 69, Laws of Kenya Rev. Ed. 2010 Ch. 90, Feb. 19, 1963, as updated through to Jul. 12, 2012".

the person found guilty until the person dies. This death penalty has since changed and nowadays people convicted to death penalties *de facto* are kept in prison as death row prisoners and thus for intentions their punishment is as good as substituted with life imprisonment.[336]

There is need to give the courts discretion even in capital offences to deal with each case based on its facts. When justice is given or seen in these terms it enhances the credibility, sense and fairness to all in the criminal justice systems. This is because the courts are given the responsibility to mete out penalties in proportion or equal to the circumstances of the cases being presided over. However, as it is now, the fact that the law provides for 'mandatory' death penalties once a capital offender has been found guilty, are unjust and hence improper as the courts end up having to treat non-similar situations similarly. This is because the law as it is does not permit the courts to put into consideration all the other circumstances which may make a particular case unique in own way.[337]

Additionally, by prescribing the 'mandatory' manner of execution of the penalty; that is, the guilty party convicted to the penalty "shall be hanged by the neck until he/she is dead", Kenya's death penalty law proves further to be inhuman and degrading to the person and dignity of the convict. Clearly this does not allow the executioner any discretion; because he cannot use any other means to carry out the penalty, even if in the end the means used would yield the same result of death to the convicted party. If the hangman employs any other

[336]Novak, Andrew. "Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya." *Suffolk UL Rev.* 45 (2011): Page 285.
[337] Ibid.

means in carrying out the death penalty then it will be illegal and he would have committed a crime[338]

Accordingly it goes without saying that a mandatory death penalty is more prejudicial than a discretionary death penalty in that while having death penalty as much provided for in the statutes simply implies that executions are allowed to be meted out by courts, mandatory death penalty implies that, as a matter of law, death penalty is necessary in the occurrence of a conviction for the specified offence. In essence, the main legal criticism is that any rule which compels a court to inflict the death penalty subsequent to a conviction is arbitrary and unjust. This is because it makes irrelevant the characteristics unique to an offender and the circumstances of an offence and by so doing it fails to make a punishment fit a crime. Since penalties are pre-ordained, it removes from both victims and defendants any meaningful opportunity to be heard. At a more systematic level, it often works against good governance, by weakening judicial discretion and reserving for the executive great control over the punishments handed down by courts.[339]

4.8 THE 'MANDATORY' DEATH PENALTIES IN KENYA

As already mentioned hereinabove, in Kenya there are four crimes that that attract a mandatory death penalty as punishment upon conviction. These are the offence of murder, treason, administration of unlawful oaths to commit capital offences, and robbery with violence. We shall discuss each of these three instances where the law provides for mandatory death penalty in Kenya in turn:

[338]Novak, Andrew, *Ibid*.
[339] Sadakat Kadri, *Ibid, p.6*.

4.8.1 **Mandatory Death Penalty as Punishment for the offence of Murder in Kenya**

Murder is regarded as the most serious offence in the criminal collection and therefore, some jurisdictions like Kenya compel a penalty for the offence of murder. The existence of the mandatory penalty has the impact on the shape and content of the remainder of the law of homicide. It takes the discretion out of the hands of the courts so that once a person is convicted of murder, the court has no choice but to issue the penalty stipulated under the law. No opportunity is afforded to the accused to mitigate the penalty.

The punishment for murder is defined in section 204 of the Penal Code. The section states that "any person convicted of murder shall be sentenced to death". Thus, once a person is convicted of murder, the court is bound to penalty them to death. Section 25(1) of the Penal Code stipulates that "where any person is sentenced to death, the form of the penalty is fixed". Such a person has to undergo death in the fashion approved by the law and the penalty cannot be mitigated to a lesser penalty. In "**Republic v John Kimita Mwaniki"**[340] the court of appeal of Kenya held that "Section 204 of the Penal Code provides that any person convicted of murder shall be sentenced to death and that the literal meaning to this provision is clear. The punishment for the offence of murder is death. The Section cannot be narrowed into any more construction harsher than it is already".

Prior to 1974, only Judges of the High Court of Kenya had power to penalty an accused to death. However, following an amendment of the Criminal Procedure Code, magistrates were

[340] [2011] eKLR

given the power to pronounce a death penalty. However, to date murder is only handled in the High Court of Kenya. The subordinate courts only have the opportunity of issuing death penalty only in robbery with violence cases.

4.8.2 **Mandatory Death Penalty as Punishment for the offence of Treason in Kenya**

In Kenya, the offence of treason is stipulated under section 40 of the Penal Code. Section 40 (1) of the Penal Code provides that "any person who, owing allegiance to the Republic, in Kenya or elsewhere:"

> "(*a*) Compasses, imagines, invents, devises or intends"
>
> "(i) the death, maiming or wounding, or the imprisonment or restraint, of the president or"
>
> "(ii) the deposing by unlawful means of the President from his position as President or from the style, honour and name of Head of State and Commander-in-Chief of the Armed Forces of the Republic of Kenya; or"
>
> "(iii) The overthrow by unlawful means of the Government; and"
>
> "(*b*) Expresses, utters or declares any such compassings, imaginations, inventions, devices or intentions by publishing, printing or writing or by any overt act or deed, is guilty of the offence of treason.""

Section 40 (1) above relates to the President and the office of the President especially the Government. Hence, in the first place, treason in Kenya is viewed as an offence against the President under the sub-section. On the other hand, section 40(2) of the Penal Code provides that "any person who, owing allegiance to the Republic" –

> "(*a*) levies war in Kenya against the Republic; or"

"(*b*) is adherent to the enemies of the Republic, or gives them aid or comfort, in Kenya or elsewhere; or"

"(*c*) instigates whether in Kenya or elsewhere any person to invade Kenya with an armed force,"

"is guilty of the offence of treason.""

Section 40(2) of the above statute relates to the state's sovereignty and the state while section 40(1) relates to state power particularly in relation to the President and his Government. Thus, the offence of treason in Kenya can be said to occur in two key ways. In the first place, treason occurs where attempt is made to overthrow the government of the republic of Kenya while owing allegiance to it. This can occur where such a person either levies war or materially supports or instigates the enemies of Kenya in invading Kenya. Treason may also occur where a person owing allegiance to the Republic of Kenya connives or threatens the life of the President of Kenya in a bid to overthrow a just and democratically elected government. The inclusion of the offence of treason in criminal statutes is justified and relevant in that such attacks prejudice the safety of the state. The offence is therefore necessarily for the purposes of protecting the government against sabotage and for maintaining the stability of the state in general.

With the increase of space for freedom and rights, individuals are likely to engage careless talks or acts which may implicate them to the act of treason. As this space continues to grow, it is likely that the law will change. Just like in developed jurisdictions such as the "United Kingdom, the United States of America and France, the law of treason over time has

continued to narrow down the *actus reus*, making it more definite.[341] Further, due to the respect for human rights, laws on treason have reduced the punitive nature of their punishments. This is evident in the Kenyan trend where in Amendment No. 5 of 2003, the death penalty was reduced to life imprisonment. The future of treason is depicted in the case of ***"R v Christian"***[342], where the Court of Appeal held that it was possible to commit the offence of high treason against the state possessing internal sovereignty even though it's external sovereignty is restricted. This precedent sets a broader scope for the offence of treason and hence is assured a promising development.

In Britain, the crime of high treason was, and arguably remains, the most serious capital crime the punishment in the Eighteenth century was severe. Sir William Blackstone in his "Commentaries on the Laws of England" states that "the punishment of high treason in general is very solemn and terrible". It included the offender being drawn to the gallows, and not be carried or walk. Any person who is culpable for the offence of treason "shall be sentenced to death hanged by the neck and then cut down alive". Alternatively, other extreme punishments included "his entrails be taken out and burned, while he is yet alive, his head be cut off, his body be divided in four parts and his head and quarters be at the king's disposal".[343] In Kenya today, the penal Code under section 40 (3) provides that "any person who is guilty of the offence of treason shall be sentenced to death". In essence, this implies that once an offender is convicted of treason, the only punishment the court can mete out is death penalty.

[341] *Ibid.*
[342] (1924) App. D 101
[343] Sir "William Blackstone's *Commentaries on the Laws of England" in four books, Vol 4* (1765-1769) page 119.

4.8.3 Mandatory Death Penalty as Punishment for Administration of Unlawful Oaths to commit capital offences

Section 60 of the Penal Code[344] unambiguously prescribes that "any person who administers an oath, or engagement in the nature of an oath, purporting to bind the person who takes it to commit any offence, punishable with death, is guilty of a felony and shall be sentenced to death".

4.8.4 Mandatory Death Penalty as Punishment for Robbery with Violence in Kenya

Robbery is theft aggravated with violence. For one to appreciate the requirement of robbery with violence there is need to define the offence as it is defined in section 295 of the penal code. Robbery may be defined as offence committed by "any person who steals anything and at or immediately before or immediately at the time of stealing it uses or threatens to use actual violence to any person or persons or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained".

Violence is described as an "exercise of physical force so as to inflict injury or damage to person or property". So when section 296 (2) of the Penal Code provides for robbery with violence it indicates that, "if the offender is armed with any dangerous or offensive weapon or instrument or is in company of one or more other persons or if immediately before or after the time of robbery he wounds, beats, strikes or uses any personal violence to any person, he is guilty of robbery with violence and shall be sentenced to death".

[344] Section 60, Penal Code, Chapter 63, Laws of Kenya.

In **John Kamau Wambugu and 2others V R**[345], a toy pistol was said to be a dangerous or offensive weapon falling under section 296(2) of the Penal Code. In **Isaac Karanja Mwangi V R**[346] the court held that being pushed out of a moving vehicle thus sustaining injuries was sufficient proof of violence. Thus the appellant's conviction and penalty for robbery with violence was well deserved and thus upheld. In **Osbon Onditi Ouko And Another V R**[347], the appellants were just the two of them when they robbed the complainants in this case. They did not injure them but were armed with a dangerous weapon an A.K 47 rifle. They threatened to use violence on their victims. They were charged and convicted for robbery with violence.

In exposition of the elements of robbery with violence, case law is worth noting for its material contribution. All the elements of robbery with violence need not be present in one alleged act for it to be robbery with violence. The court favoured this view in the case of **Fanuel Otieno Omido V R**.[348] The court stated that if any one of the ingredients of robbery with violence is proved, then there is no need to prove all the ingredients. The court stated:-

> *"the accused was in a gang of robbers that was armed with crude and dangerous weapons and attacked and injured people in the cause of robbery. The ingredients of section 296(2) of the penal code have therefore been satisfied."*

Evidence adduced showed that after the robbers broke into Complainant's bedroom they ordered him to lie down which he did and one of the robbers stepped on him as others ransacked his boxes. One said that he should be killed but as the other raised a panga to kill

[345](2009) Cr.App 152.
[346](2009)Cr.App 35.
[347](2006) Cr.App 173.
[348] (2009) Cr App98.

him, his wife screamed. They robbed him and left. There was no evidence of any other form of physical violence being used on him. One of the issues raised for the appeal was that ingredients of the offence were not fully proved. The court stated:-

"...for purposes of "section 296(2), if the offender" under section 295 is:-

a) "Armed with" a "dangerous or offensive weapon or"

b) Is in company with one or more other person or persons or

c) Immediately before "or immediately after the time of the robbery he wounds, beats, strikes" or uses any other personal violence to any person, he would be convicted under section 296(2) of the penal code once any one of the ingredients is proved and there is no need to prove all the ingredients..."

In the case of **Johana Ndungu V R**[349]court stated in details what proof was necessary for conviction in cases of "robbery with violence" under section 296 (2) of the penal code. It stated:-

"In order to appreciate properly as to what acts constitute an offence under section 296(2) one must consider the sub-section in conjunction with section 295 of the penal code. the essential ingredients of robbery under section 295 is ***use*** *of or* ***threat to use*** *actual violence against* ***any*** *person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredient constituting robbery are pre-supposed in the three sets of circumstances prescribed in section 296(2) which we give below and any one of which if proved will constitute the offence under the sub-section:*

[349] (1995) Cr App 116.

1) if the offender is armed with any dangerous or offensive weapon or instrument, or

2) if he is in company with one or more other person or persons, or

3)if at or immediately before or immediately after the time of the robbery , he wounds, beats, strikes or uses any other violence to any person."

Robbery with violence is a serious offence that carries a mandatory death penalty. There is diverse case law on punishment of robbery of violence in Kenya. For example, in case of **Boniface Liako Musima & 2 others v Republic**[350] on 2nd June 1998, at about 8.15 p.m. an armed gang of robbers attacked Guy Robin and his wife Betty Robin at their residence along 78 Muthaiga Road, and after cutting Guy Robin with a simi, the robbers bundled him, his wife and house-help into a bed-room. While there, the gang demanded and was given money which was in Kenya Shillings, French Francs and US dollars. They also demanded and were given the keys of the couple's Mercedes Benz 260E car, Reg. No. KAH 175W. The gang then ransacked the house and made away with several items whose value was estimated at over Kshs.6.8 million inclusive of the car and jewellery, electronic appliances and clothes. After tying together the hands of the couple as well as those of their maid, the gang shoved them into a bathroom and locked them therein. The gang then escaped in the Mercedes car, aforesaid. After a long struggle the couple and their maid freed themselves and came out. They found the other workers tied and grass stuffed into their mouths, presumably to prevent them from raising an alarm. The Court stated that it was surprising that none of the accused was remorseful for their heinous act. It therefore found that they deserved to suffer death penalty and confirmed the penalty.

[350] [2010] eKLR.

4.8.5 **Exemptions to the 'Mandatory' Death Penalty in Kenya**

In Kenya, there are only three classes of persons are exempted from the penalty of death upon conviction of murder. These exceptions basically entail persons under the age of 18, persons guilty of murder but insane and pregnant women convicted of murder.

4.8.5.1 **Persons below the age of 18 years**

Persons who are below the age of 18 years even if convicted of the crime of murder, cannot be sentenced to death. Such person is, by law, obliged to be "detained at the pleasure of the president in such a place and under such conditions as the president may direct and whilst so detained shall be deemed to be in legal custody". Such a minor is to be released "on the advice of the ministry of home affairs to the president" if they think to do so.

As per section 25 (2) of the Penal Code, the age of the accused is pertinent at the time the person committed the offence. Thus, if it appears to the court that "at the time when the accused committed the offence he was under the age of 18 years", the court is mandated not to issue a death penalty against such a person. Such a person is to be detained at the pleasure of the president as stated above. The presiding judge is required to "forward to the president a copy of the notes taken on the trial, with a signed report in writing containing any recommendations or observations on the case he may think fit to make". In *Republic v Matano Katana*[351] the court noted that while those convicted of murder have to be punished by death in case of child offender, no punishment by death is permitted. The procedure arrest and charge and provisions as to bail and remand arrangements of a child offender and the

[351] [2004] eKLR.

organization for court in certain cases to shield the children cases of death or morality are set out clearly.

4.8.5.2 **Pregnant Women**

Section 211 provides that "where a woman convicted of an offence punishable by death is found in accordance with the provisions of section 212 to be pregnant, the penalty to be passed to her shall be imprisonment for life instead of a death penalty". Section 212 in particular states as follows:

"When the woman alleges that she is pregnant, or where the court before whom she is convicted thinks fit so to order, the question whether or not the woman is pregnant shall, before the penalty is passed on her, be determined by the trial judge."

The judge shall determine that question "on such evidence as may be laid before him on the part of the woman or on the part of the Republic and the judge shall find that the woman is not pregnant unless it is proved affirmatively to his satisfaction that she is pregnant". If the judge finds the woman is not pregnant, "the woman may appeal to the court of appeal and the court, which if satisfied for any reason, shall set aside the findings and quash the penalty passed on her and replace it with one of imprisonment for life". If the trial judge is unable to sit for the purpose of determining the question whether or not the woman is pregnant, then some other judge of the High Court of Kenya shall sit and determine the question of her pregnancy.

Noteworthy, the exemption regarding pregnancy is relevant at the time of conviction. It matters not whether the woman committed the crime while she was pregnant. The exemption of death penalty favour "women who are pregnant at the time they are convicted of murder".

The rationale for the exemption of death penalty to pregnant women has to do with the principle of the "best interest of the child". First, if it is to be assumed that the penalty will be executed promptly, the child the woman is carrying would lose his/her life as a result. Even if the penalty is not to be executed immediately, a penalty of death would mean that the unborn child would live without the love of his mother. Most societies are also known to treat pregnant women with kindness and leniency and the law by exempting penalty of death against women seems to carry through this societal aspect.

4.8.5.3 **Guilty but Insane**

The law exempts insane people from infliction of death penalty. Indeed, the treatment prescribed under the law for offenders who are "guilty but insane" cannot technically be described as punishment or penalty. The law provides that a guilty but insane person be detained at the President's pleasure in a designated mental institution. President's pleasure implies that such a person is to be detained until the president issues an order releasing him either unconditionally or to his family care.

4.9 THE DE FACTO ABOLITION OF DEATH PENALTIES IN KENYA

Despite the fact that the death penalties are legal and still form part of the laws of Kenya, Kenya has not replaced its last known official hangman, Mr. Michael Wajuki Kiorugumia,

since his death in 2009. He had served the country at the Kamiti maximum prison's death pit for over 13 years, having succeeded an Asian.[352]

On 25th February 2003, Kenya's newly elected President, Mwai Kibaki, released 28 prisoners who had each spent between 15 and 20 years under sentence of death by order of the former President.[353] The death sentences of 195 other convicts were on the same day commuted to life. Announcing the order of the President, the Vice-President and Minister for Home Affairs and National Heritage, Moody Awori, under whose docket the Prisons Department fell, also stated that he (the Minister), wanted the Death Penalty in Kenya abolished and that he planned to introduce a Bill in Parliament to that effect.[354] At the same forum, the Commissioner of Prisons, Abraham Kamakil, while praising the unprecedented move by the Government, said "that the death penalty should be abolished because it claims innocent lives".

Subsequently in 2009, the same President of Kenya conducted a mass commutation of all death penalties thus affirming that Kenya has been a *de facto* death penalty abolitionist state since 1987.[355] This mass commutation affected over 4000 convicts and it is regarded as the largest commutation of prison penalties in the world.[356]

Again, on 24th October 2016, Kenya's President Uhuru Muigai Kenyatta exercised his constitutional Prerogative of Mercy and commuted the death sentences issued out to 2,655 male convicts and 92 female convicts, who will now serve life sentences. President Uhuru

[352] "Garland, David. Peculiar institution": Kenya's "death penalty in an age of abolition. Harvard University Press", Cambridge, MA, 2010: page 432.
[353] Daily Nation Newspaper, 26 February 2003.
[354] http://web.amnesty.org/library/Index/ENGACT (Accessed on 1st November 2016)
[355] Costa, Mazón. "International covenant on civil and political rights." (2010).
[356] Amnesty "Intl., Death Sentences and Executions in 2009, p. 23, ACT 50/001/2010, Mar. 30, 2010".

Muigai Kenyatta furthermore signed pardons for 102 convicts serving long terms, who were deemed to be rehabilitated.[357] It was on this occurrence that Muthoni Wanyeki, the Amnesty International regional director for East Africa the Horn and the Great Lakes, opined that the decision by the President of Kenya to commute all death sentences brings Kenya closer to the growing community of nations which "have abolished the death penalty", terming it a cruel and inhuman form of punishment, adding "that the death penalty must now be abolished for posterity".[358]

During the vote on the "United Nations general assembly on a worldwide moratorium on executions on the death penalty" in 2007 and 2008, Kenya conspicuously abstained[359] but followed with commutation of all death penalties handed in 2009 or before. Interestingly, perhaps with what was a sign of the country's commitment to the *status quo,* in 2010, Kenya defied pleas of abolishing death penalty when promulgating its new and current Constitution. Instead, the Republic notified the UN Human Rights Commission of the existence of a *de facto* state since 1987.[360] The country added that this state would continue to be in effect citing an ongoing review of the impact of death in fighting crimes. This is ironical because

[357] http://aa.com.tr/en/africa/kenyan-leader-commutes-death-penalty-for-2-700-convicts/671450 (Accessed on 31st Oct 2016).
[358] http://www.nytimes.com/2016/10/25/world/africa/kenya-kenyatta-death-penalty-reprieve.html?_r=0 (Accessed on 31/10/2016).
[359]

1. United Nations General Assembly ("U.N.G.A), 67th Session, Third Committee, Moratorium on the Use of the Death Penalty, U.N. Doc. A/C.3/67/L.44/Rev.1, Nov. 15, 2012";
2. "U.N.G.A., 65th Session, Promotion and Protection of Human Rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, p. 5, U.N. Doc. A/65/456/Add.2, Dec. 8, 2010";
3. "U.N.G.A., 63rd session, Promotion and Protection of Human Rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, U.N. Doc. A/63/430/Add.2, Dec. 4, 2008";
4. "U.N.G.A., 62nd Session, Promotion and Protection of Human Rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, U.N. Doc. A/62/439/Add.2, Dec. 5, 2007".

[360] Costa, Mazón. "International covenant on civil and political rights." (2010).

the UNHCR with the contribution of a member from the Kenyan Human Rights Commission recommended several proposals in 2010, all which the country brushed aside.[361]

Previously, the Kenya government through the office of the Attorney General decided to uphold and comply with a request from the "United Nations High Commission for Human Rights" on the abolition of death penalties in the country. This requires the abolition of death penalties and replacing them with life imprisonment without parole. However, the Attorney General said the implementation of the proposal will depend on what the Kenyan public say on the death penalty debate.

In a landmark judgment in the case of "Godfrey Ngotho Mutiso v R" the Kenya "Court of Appeal" declared that "the application of a mandatory death penalty on all prisoners convicted of murder is unconstitutional". This means that the death penalty "is not automatic to all suspects convicted of murder" and the judge shall have discretion to vary the penalties after the convicted person asks for mitigation. The Court of Appeal ruled that "the mandatory nature of the death penalty in Kenya is a violation of the right to life and amounts to inhuman punishment", for the reason that it does not accord an individual an opportunity to explain if there are any mitigating circumstances that assuage the murder.[362]

Subsequent to the *Mutiso case*, the Attorney-General of Kenya, whose prosecutorial powers were inherited by the the Director of Public Prosecutions in 2010, acceded to the abolition of mandatory death penalties and stated *"we now concede that ... a trial judge still retains a discretion not to impose the death penalty and instead impose such penalty as may be*

[361] Ibid.
[362] "http://www.icj"-kenya."org/index.php"/more-news/315-death-sentence-no-longer-automatic-for-kenyan-murder-convicts (Accessed on 13th August 2016).

warranted by the circumstances and facts of the particular case… The word 'shall' in Section 204 should now be read as 'may'".[363]

In the *Mutiso* case, whereby the appellant was re-sentenced to life imprisonment in place of the mandatory death penalty, the Kenya Court of Appeal suggested that sentencing should consider the "gravity of the offence committed and the circumstances of the deceased's death". The court in this matter relied on passages from other judicial and legal opinions that state or implies that "death penalty should be restricted to aggravated murders". In planning of his sentencing hearing, the appellant, *Mutiso,* underwent a psychiatric assessment, which was admitted as evidence at his resentencing hearing.[364]

With regard to the *de jure* abolition or repeal of the death penalty, the ball has been left to the Kenyan public to decide democratically, a suggestion which was made during the launch of a "Power of Mercy Advisory Committee (POMAC)" strategic plan 2015-2018 at the Serena hotel in Nairobi. The sole purpose of this committee is to engage Kenyans to give their opinion on the move to abolish capital punishments. Statistics show that in the year 2013, 26 criminal were sentenced to death by hanging, and this has been a continuous practice in the Kenyan courts but actually no criminal has ever been executed in the last 29 years (since1987), according to a report by the Kenya Prison Service, 8th July 2011.[365]

The fact of the matter is that capital punishments are becoming a thing of the past as awareness for human rights has been on the rise globally. Internationally capital is being

[363] "Petronella Mukaindo and Michael Murungi, Kenya Law Review Weekly e-Newsletter", 17th June "2011".
[364] Development "of the Death Penalty Campaign, Timothy Bryant, paper presented at the regional roundtable on 'Death Penalty in East Africa: Challenges, Prospects and Comparative Jurisprudence', 24–27 July 2011".
[365] https://"www.penalreform.org/wp-content/uploads/2013/05/East-Africa-research-report-on-death-penalty-and-life-imprisonment.pdf (Accessed" on 31st Oct 2016).

abolished and replaced with life imprisonment penalties. An assessment of the crime statistics between abolitionist Europe (excepting retentionist Belarus) and the United States and those between the abolitionist and retentionist US states themselves confirms that that the death penalty does not produce the deterrent effect desired. In excess of 140 sovereign states have, appreciating this, abolished or repealed the death penalty in law or practice as at present.[366] For example, the United Kingdom abolished it's death penalty formally in it's "Justice Act 1965" whereby the employment of capital punishments for instance those of death by hanging or lethal injection were expressly abolished.[367] It therefore follows that all death row convicts in Kenya should accordingly be resentenced to life imprisonment penalties with or without parole dependent on the circumstances.

4.10 KENYA'S COMPLIANCE AND NON-COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS STANDARDS

4.10.1 Compliance

Kenya as a constituent of the United Nations has the obligation to abide by its international obligations therein. Kenya is also a party to the ACHPR and the ICCPR. However, Kenya is not privy to the 1st or 2nd optional protocols to the ICCPR "aiming at the abolition of the death penalty". The capital punishment laws in Kenya partially comply with the International human rights in that children who are found to have committed capital offences before the age of majority are detained at the pleasure of the president[368] and pregnant women are usually spared the death penalty and their convictions reduced to life imprisonment.

[366] https://www.opendemocracy.net/n-jayaram/it-is-20-years-since-great-antideath-penalty-judgement (Accessed on 2/5/2016)
[367] Ibid
[368] Onyekachi Duru, The Constitutionality of Death Penalty under Nigerian Law (September 6, 2012).

Similarly, persons who are guilty but insane are detained at the pleasure of the President. Further, it is noteworthy that since 1987, Kenya has not executed any death penalty. Nonetheless, Kenya has not revised its penal statutes to conform to this de facto position of death penalty abandonment.

4.10.2 **Non-compliance**

From the discussion hereinabove it is evident that Kenya's conduct with regard to the death penalty falls short of "International human rights" standards and best practices in several ways. Firstly, the 'mandatory' nature of the death punishment per se contravenes the principle of human dignity as a fundamental right to human beings.[369] Secondly, the death penalties for war crimes and genocides under Kenya's International Crimes Act (2009) are very retrogressive, whereas statues like the ICTY, the ICTR, and the "Rome Statue" of the ICC do not apply the penalty of death for the above crimes. Thirdly, the detention of death row convicts exposes them to severe mental anguish and psychological torture recognized as the death row syndrome.

[369]Novak, Andrew. "The Mandatory Death Penalty in Ghana: A Comparative Constitutional Perspective on Dexter Johnson v. Republic." *Cardozo Pub. L. Pol'y & Ethics J.* 12 (2014): 669-781.

CHAPTER FIVE: SUMMARY, CONCLUSION & RECOMMENDATION

5.1 SUMMARY

The existence and continued application of the "mandatory" penalty of death in Kenya is in conflict with the following theories that have now become internationally accepted norms and best practice policies:

- The mandatory death penalty, where it's execution is unreasonably delayed by the state, conditions in the mind of the death penalty convicts, a situation termed the "death row syndrome" which situation culminates in the inveterate contravention of the convict's fundamental human right to freedom from cruel, inhuman and degrading punishment or treatment, contrary to the various international human rights instruments discussed above together with Kenya's constitution.
- The mandatory death penalty undermines the principle of judicial independence & indirectly fetters the separation of powers between the legislature and the judiciary, in as far as it deprives the court an opportunity to do justice by taking into account relevant mitigating circumstantial factors before sentencing persons convicted of a capital crimes
- The mandatory penalty of death in Kenya encourages a situation of disproportionality in the dispensation of real and proportionate criminal justice by enabling judges to make or vary capital sentences in accordance with the circumstances of each case, and take into cognizance the various "degrees of the offence" charged.
- The mandatory death penalty in Kenya, by its compulsory dispensation, contravenes the death penalty convicts' right to a fair hearing by denying them an "opportunity to

put forward" mitigation, about the nature and circumstances of their offence, and about their own individual history, their mental and social problems and their capacity for reform

- The mandatory death penalty in Kenya, in as far as it is executed by hanging the convict by their neck until they are dead, contravenes the right to human dignity, for the reason that it is not the "least painful" mode of execution internationally available, yet the Kenya law prescribes hanging as the only mode applicable.

This study elucidates that various laws, judicial precedents and judicial interpretations of the said laws, both international regional and domestic, have successfully illustrated the notion that the death penalty is indeed a form of "torture and cruel, inhuman or degrading treatment or punishment."

This study has demonstrated further, that there has been, as a consequence of the above recognition of the mandatory death penalty as being a form of "torture and cruel, inhuman or degrading treatment or punishment", a worldwide campaign for the restriction of the death penalty to the gravest conceivable circumstances, and the enactment of rigorous procedural safeguards prior to the death penalty being lawfully imposed. As this study has demonstrated, punishment by death is not always the best form of punishment. Capital punishment violates the rights to life and human dignity even when humane methods of execution are used as there can never be a better way of dying.[370] The proposal for introduction of less painful execution methods of execution of the death penalty or even commutations of death penalties to life imprisonments by the president will not remedy the legal quandary at hand. The

[370] Grandison, Claire, et al. "Updates from the International and Internationalized Criminal Courts." *Human Rights Brief* 19.1 (2011): Page 7.

'mandatory' death penalty as it stands is utterly inconsistent with the human rights and principles under the Constitution of Kenya 2010 and the international bill of rights, and therefore should be abolished[371] and replaced with other severe penalties which shall ensure that safeguards to fundamental human rights are respected and upheld even as criminal activity is combated.

In essence, chapter two discussed the legal and policy framework underlying mandatory death penalty in Kenya. That chapter has therefore explored the rationale of criminal punishment generally and in Kenya both from a social and developmental perspective. In chapter three the principles of sentencing applicable generally and in particular in Kenya and the constitutional guidelines for upholding human dignity and how they apply to application of mandatory death penalty in Kenya have also been explored. It has emerged that Kenya is yet to have and/or formulate a sentencing policy and/or review its criminal punishments in the aftermath of promulgation of the current Constitution of Kenya 2010. In turn, the three instances whereby mandatory death penalty is still applicable in Kenya, namely, as punishment for offence of murder, offence of treason and robbery with violence are discussed. In addition, the three exemptions to mandatory death penalty and their justification, relevance and limitations are discussed to show why the abolition of mandatory death penalty is long overdue in Kenya. This chapter was mainly descriptive and meant to lay the foundation for the next chapter which explores the case for and against the abolition of the mandatory penalty of death in Kenya.

The foregoing situational analysis at chapter four has established that Kenya as a country has been sending mixed signals with respect to its standing on abolition or retention of mandatory

[371] Duru, Onyekachi Wisdom Ceazar. "The Constitutionality of Death Penalty under Kenyan Law."

death penalty as criminal punishment. On the one hand, the Kenyan Government in the run-up to the new constitution commuted record-setting death penalties into life imprisonments. However, it soon followed that with failure to ban use of death penalty during the Constitutional change that followed immediately thereafter. It left the fate if the death penalty which is currently part of the statute books in the hands of Parliament. Thus, Kenya's Constitution presently does not expressly prohibit the death penalty, hence Kenya remains a country that, *de jure*, upholds mandatory death penalty and as such it is non-compliant to the relevant international human rights instruments proscribing the same. On the other hand, Kenya has not, *de facto*, implemented any execution of death row inmates in the last three decades, and as a matter of fact, ipso facto, the death penalties issued by Kenya's courts are as good as commuted to life imprisonments. The unfortunate culmination of all the foregoing is that, being on death row exposes death sentenced inmates in Kenya to unjustifiable mental anguish and psychological torture.

5.2 CONCLUSION

The death penalty is a very harsh punitive measure for capital crimes. Even where it is imposed for murder, there is hardly any justification for killing of an individual for killing another individual. For one, is not helpful in letting the society heal from the loss of a given individual. This is actually double tragedy and a death penalty is not an appropriate punitive measure. Secondly, the ssentencing of criminals to death is not socially retributive as it should be and therefore the abolition of capital punishment will save the country a lot of revenue as it is very expensive to house criminals on death row at taxpayer's cost when the same could have been put to more constructive use. Instead, all capital offender should be

convicted and sentenced to life imprisonment as we work towards a wholesome retribution for the crime victims and society at large.

In Kenya, individuals sentenced to the "mandatory death penalty" are deprived of their "right to live" and are not afforded any opportunity to mitigate the circumstances that forced the individual to commit a certain crime. The circumstances and state of a criminal should be taken into account and if he/she is found guilty of a capital crime, the worst is that he/she should be sentenced to a life imprisonment instead of being killed. While in prison the offender may come to terms with his actions and may have the chance to self-reflect and this definitely will help change the mindset of the individual. This will definitely go a long way in social reform of the offender, which is the most important objective in fighting crime. If people cannot reform and change their ways then crime becomes a 'cancer' in the society that we cannot get rid of and prisons as centres of rehabilitation of offenders lose their appeal. Social re-adaption will only be possible when one is given a life penalty as the offender is that way given an opportunity for self-reflection other than harsh finality that attends the death penalty.[372]

The abolition of mandatory death penalty, it emerges, is supported by ethical and pragmatic reasoning as well as theoretical evidence that excessive punishments don't necessarily serve as deterrence to crime. Further, mandatory death penalty negatively limits the power of the courts to exercise discretion upon entertaining mitigating evidence as to the degree of culpability of the offender. As it is, the law requires the courts to issue the capital penalty upon conviction which admittedly goes afoul the accepted international law tenets as it violates human dignity, amounts to "cruel, inhuman and degrading treatment", violates "right

[372] Ibid

to fair trial" and leaves no room for the discharge of justice in accordance with the principle of proportionality of the crime and punishment. Abolition or repeal of the mandatory death penalty is therefore necessary in the interest of upholding international "human rights standards" in addition to aligning the Kenyan "criminal justice system" with the progressive trends in other jurisdictions.

The 'mandatory' capital punishment in Kenya and elsewhere, as demonstrated hereinabove, is based on inferior didactic and utilitarian arguments. This is especially so because there has not been any implementation of the death penalty for the foregoing thirty years, and counting. While many have argued that the death penalty prevents criminals from engaging in criminal activities, countries like South Africa have abolished capital punishment and Kenya should follow suit especially now after the constitutional overhaul that saw the country embrace world-class human rights framework. It is crucial because human beings should have their moral worth guaranteed, respected and protected in every place and by everyone.[373]

Since the death penalty was accepted by the Kenyan society at the independence period, half a century ago, and was not expressly reversed under the Constitution of Kenya 2010, Kenya has an arduous task now to consider amending the laws on death penalty to conform it in tandem with the emerging and accepted international criminal justice jurisprudence, and rationalize its application in keeping with the "international standards" aforesaid.[374] The question as to whether death penalty is constitutional or not is not a straight forward one, but it can be surmised that the legal status of death penalty in Kenya depends on ordinary statutory legislations so that if the Parliament amends the law to prohibit mandatory death

[373] Ochieng, George O. *Impact of prison reforms on inmates' right to health: a case study of kamiti maximum security prison*. Diss. University of Nairobi, 2014.
[374] Alston, Philip, and "Ryan Goodman. *International Human Rights*. Oxford University Press", 2012.

penalty or death penalty in all its manifestations, it would be acting within its constitutional prerogative.

In the event that the law on abolition of death penalty does not carry the day in Parliament, then at least there is need for reforms to ensure that it is reserved only for the most heinous crimes and where it is to be implemented, the law provides for humane, rational and non-arbitrary manner. It is also incumbent to provide for judicial discretion by removing the mandatory requirement for death penalty and replacing it with sentencing law and policy that is "guided by legislative or judicial principles and standards", and where necessary is "subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances". To facilitate this, it is necessary to amend criminal laws to require the courts, in sentencing capital offenders, to take into account all appropriate mitigating factors and circumstances before giving a death penalty. Further, there ought to be made some legal provision for "individualized sentencing" at the stage of delivery of the death sentence.[375]

However, these reforms to death penalty sentencing can only be altered by the National Assembly which in Kenya is vested with the duty to amend and enact laws that implement and take into consideration the instruments on the international bill of rights, which in the context of the "mandatory death penalty" it has not done. The Supreme Court which is the final authority on the process of constitutional interpretation is yet to pronounce itself on the

[375] Sir Dennis Byron, Chief Justice in the Eastern Caribbean Court of Appeal at paragraphs 43 and 44 of his judgment in ***Hughes v The Queen(2002) 2 WLR 1058***

constitutional-appositeness of the death penalty and the statutes imposing it in light of Kenya's current Constitutional dispensation.[376]

5.3 RECOMMENDATIONS

In view of the foregoing discussion, summary, conclusion and findings, it is recommended that Kenya:

(1) Formally abolish, by repeal, the death penalties from the laws of Kenya by deleting them as a form of punishment from the five pertinent Sections of Kenya's Penal Code, and subsequently amend Article 26 (3) of the Constitution to effectively guarantee Kenyans with the "unqualified right to life".

(2) As a short-term measure, Kenya should take steps necessary to progressively diminish the employment of the penalty of death to only the "most serious crimes" by abolishing those crimes which do not meet the "most serious crimes" standard (for example, where intentional loss of life is involved in brutal and gruesome circumstances, such as aggravated homicide), and establish an official moratorium on death sentencing and executions.

(3) Commute all death penalties to fixed term penalties, with every case being reviewed exclusively, giving regard to the duration of penalty already gone through, the circumstances of the prisoner, and the nature of crime committed (mitigating/aggravating circumstances).

(4) The Government, through the relevant cabinet secretary or ministry including the Attorney General's Office, should facilitate the immediate ratification and implementation of the Second Optional Protocol to the ICCPR which aims at the abolition of the death penalty.

[376] Ibid.

(5) Kenya ought to consultatively develop judicial sentencing guidelines to bring up to standards sentencing in capital cases, which should include a non-exhaustive list of all aggravating and mitigating factors that could be taken into account at a sentencing hearing, and once enacted, a comprehensive training on the guidelines should be given to judges, lawyers, prosecutors and any other stakeholders, and if possible, mitigation hearings should be carried out for those already on death row. Such guidelines should not be prescriptive or fetter judicial discretion, but should aim to streamline sentencing practices.

(6) The retention of the death penalty should be appraised by way of dialogue and public national debates to discover whether the views of the people have changed. All stakeholders across the region should engage in massive civic education to inform the public on the effect and efficacy of the death penalty in practice, and on alternative sanctions to the death penalty.

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