

# THE DEATH PENALTY IN TANZANIA: LAW AND PRACTICE

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## I. INTRODUCTION

The death penalty where it is practised has been reserved for the most serious crimes. The list of capital offences has been shrinking in different societies with the passage of time, although the list is not identical even within African countries.

Similarly, the list of abolitionist states has grown steadily from a handful of abolitionist states in 1940s to approximately half the countries of the world de facto or de jure rejecting the death penalty. Even the countries which retain the death penalty are under increasing international pressure to abolish it. The immediate focus is on narrowing as much as possible, offences which carry the death penalty, particularly to limit it to murder only. In inter-state relations sometimes extradition may be refused where a fugitive may be exposed to the application of the death penalty. The death penalty is therefore, regarded as a punishment of the past, not the future.

This penalty has received ideological justification from the main religions, in our case Christianity and Islam. Many believers would not wish to question anything which they consider to have been sanctioned by their religion as taught by their religious leaders.

In penological terms, capital punishment is a reflection of retributive justice, embodying the ancient maxim of 'an eye for an eye, a tooth for a tooth.' It is based on vengeance channelling public outrage into a legalized form of punishment. It is argued by its proponents that, in its absence, outraged people may be forced to seek vengeance through mob justice or individualized forms of revenge. These are, however, mere impressions not supported by any data.

## II. LAW AND PRACTICE

In Tanzania there are two offences which carry the death penalty: murder and treason.

Under section 197 of the Penal Code (Chapter 16), 'any person convicted of murder shall be sentenced to death.' This is a mandatory requirement which leaves the court with no option but to pass the death sentence upon conviction of a person. However, the same section in its proviso exempts pregnant women. Instead they are to be sentenced to imprisonment for life if convicted of murder.

Treason, under sections 39 and 40 also carries the death penalty, but 'misprision of treason' (section 41) is punishable with life imprisonment.

Section 26 of the Penal Code also exempts persons under eighteen years of age from the death penalty. Such juveniles are to be detained 'during the President's pleasure...in such place and under such conditions as the Minister for Legal Affairs may direct.'

The Tanzania High Court and Court of Appeal have construed capital punishment statutes strictly. In the case of treason, for example no person has been sentenced to die under the provisions which carry the death

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penalty since the country became independent in 1961. Under the offence of treason, the phrase used in the sentence provision is 'shall be liable on conviction to suffer death.' The courts have interpreted this as merely setting the upper limit, but not mandatory. As for murder, the phrase used is 'shall be sentenced to death', and this is taken as mandatory. However in the case of murder, most prosecutions for this offence end up with the verdict of manslaughter, which does not carry the death penalty. Murder convictions are, therefore, recorded in cases where there is overwhelming evidence to establish the offence, and the law provides that where any person is sentenced to death, the sentence shall direct that he shall suffer death by hanging.

On the question of age, the law provides that the death penalty should not be pronounced against a person under 18 years of age. There are conflicting decisions as to whether this age limit refers to the time of commission of the offence or during sentencing. In the case of *R.v. Lubasha Maderenya and Tegai Lebasha*<sup>1</sup>, the High Court (Lugakingira, J.) did not impose a death penalty on one of the accused because he was below 18 years at the time of commission of the murder. During the hearing of the Appeal, the Court of Appeal reversed this decision.<sup>2</sup>

### III. CONSTITUTIONAL CONCERNS

The first serious scrutiny of the death penalty in Tanzania was in the early 1990s. In 1991, a Commission was formed under the Chairmanship of the late Chief Justice Francis Nyalali to recommend changes to the political system. The Commission, popularly known as the Nyalali Commission recommended amongst other things, the abolition of capital punishment for being a barbaric form of punishment and morally insupportable.<sup>3</sup> There was no follow up of any sort to this recommendation.

A second attempt to question the constitutionality of the death penalty featured in the case of *R. v. Mbushuu and Dominick Mnyaraje and Another*<sup>4</sup> where Justice Mwalusanya in the High Court held that the death penalty was inherently cruel, inhuman and degrading and the mode or manner of execution of the punishment was inhuman, cruel and degrading. Further that the imposition of the death sentence was not saved by Article 30 (2) of the Constitution as it was not a provision which was lawful and in the public interest, the latter finding being based on factors such as (i) the possibility of erroneous convictions, including the fact that most poor defendants did not receive adequate legal representation; (ii) sentences of life imprisonment provided protection against violent crime no less effective than the death sentence and (iii) the mode of execution, the inhumane conditions on death row and delays in executing the sentence. Therefore although he convicted the accused persons of murder he imposed a sentence of life imprisonment for both. When this case reached the Court of Appeal, while it agreed with the trial judge that the right to life under the Constitution was not absolute, and that the death penalty is inherently inhuman cruel and degrading, and further that it is also so in its execution, and thus offends the right to dignity provided in the Constitution; it nevertheless held that the imposition of the death penalty under the law was lawful, not arbitrary and hence constitutional. The Court of Appeal further ruled that the sentence was saved by Article 30(2), as it was not an arbitrary sentence since decisions as to guilt or innocence were taken by the judges, and that there was no proof one way or the other as to whether or not the death sentence was a more effective punishment than a period of imprisonment; and in any event it was for society and not for the courts to decide whether the death sentence was a necessary punishment. This case marks the parting of ways in interpreting the law on the issue with the famous 1995 South African case of *S. v. Makwanyane*

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<sup>1</sup> High Court (Mwanza) Criminal Sessions Case No. 143 of 1977.

<sup>2</sup> Appeal No. 32 of 1979. See also Chris Maina Peter *Human Rights in Tanzania* (Rudiger Koppe Verlag Koln 1997) 30.

<sup>3</sup> Government of the United Republic of Tanzania: *Tume ya Rais ya Mfumo wa Chama Kimoja au Vyama Vingi vya Siasa*, 1991, Part III.

<sup>4</sup> High Court (Dodoma) Criminal Sessions Case No. 44 of 1991 reported in 1994 2 LRC 335.

*and Mchunu*,<sup>5</sup> where Chaskalson, J, held that the death penalty was cruel, inhuman and degrading and therefore, unconstitutional. Unlike the holding of the Tanzania Court of Appeal in *Mbushuu v. Republic*<sup>6</sup> which he was aware of, Chaskalson was prepared to assume that the overwhelming majority of the public was in favour of retaining the death penalty, but pointed out that public opinion was no substitute for the duty vested in the courts to uphold constitutional provisions without fear or favour.

It should be noted that not all murder convicts are executed upon being sentenced. The Head of State often uses his constitutional powers of the prerogative of mercy to commute death sentences to life imprisonment or to a lesser number of years of imprisonment. It is difficult to know the exact number of people who are executed since this information is not published. However, it is reliably known that executions were rampant during the colonial period. They were scaled down after Independence, and none has been carried out in the last decade.

Since the death penalty is still mandatory for people convicted of murder, courts continue to pass that sentence, and each year many people are sentenced to death. The whole matter therefore, hinges on the goodwill of the President. Where a convict is condemned to die, the sentence is executed through hanging by the neck until the convict is dead. On the other hand, public opinion (which is relatively uninformed i.e. not sensitized) seems to be in favour of the death penalty for murder. In the circumstances, it is understandable for the President to continue to use his constitutional power of prerogative of mercy in the way he has been using it, rather than to push for a formal abolition of the death penalty for the time being.

#### IV. HUMAN RIGHTS CONCERNS

The right to life is a fundamental right upon which other rights depend. Article 3 of the Universal Declaration of Human Rights (1948) declares this right in absolute terms, namely that:

Everyone has the right to life, liberty and security of person.

Article 5 further declares that

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

These two statements appear in most other international and regional human rights instruments. The International Covenant on Civil and Political Rights (1966) Article 6 provides that every human being has the inherent right to life and that this right shall be protected by law and no one shall be arbitrarily deprived of his right to life. Recognizing that some countries have not abolished the death penalty, it provides that the death penalty may be imposed only for the most serious crimes in accordance with the law, pursuant to a final judgement rendered by a competent court. Anyone sentenced to death has the right to seek pardon or commutation of that sentence.

In the same spirit, the African Charter on Human and Peoples' Rights (1981) provides in Article 4 that

Human beings are inviolable. Every human being shall be entitled to respect for his life and integrity of his person. No one may be arbitrarily deprived of this right.

The Second Optional Protocol to the International Covenant on Civil and Political Rights (1989) goes a step further in aiming at the abolition of the death penalty altogether. The Protocol which is open for

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<sup>5</sup> C.C.T./3/94 of 1995 (S.A).

<sup>6</sup> (n4)

signature by any state that has signed the Covenant and open to accession by any State that has ratified the Covenant or acceded to it, applies as additional provisions to the Covenant. In its Article 1, it provides

1. No one within the jurisdiction of State party to the present Protocol shall be executed.
2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Looking at international and regional instruments as a whole, with the exception of the Universal Declaration of Human Rights and the Second Optional Protocol to the International Covenant on Civil and Political Rights, which do not have 'permissive' exceptions to the absolute protection of human life, the rest carry such exceptions. Provisions such as no one should be 'arbitrarily deprived of his right to life' or that deprivation of life must be 'in accordance with the law' provide justification for the retention of the death penalty within the jurisdictions which maintain such a penalty. Even suggesting that the death penalty shall be restricted to the 'most serious crimes' is to make its application open ended, and may be abused.

Article 14 of the Constitution of the United Republic of Tanzania recognizes the right to life in the same terms as it is recognized under the International Covenant on Civil and Political Rights as well as the African Charter on Human and Peoples' Rights. Article 14 of the said Constitution provides:

Every person has a right to live and subject to law, to protection of his life by the society.

The right to life is therefore not absolute, but 'subject to law'. For the time being this issue is still debatable as exemplified in the Nyalali Commission Report as well as in the *R. v. Mbushuu* case before the Tanzania High Court and Court of Appeal.

## V. THE WAY FORWARD

The ultimate goal of any crusade against the death penalty is definitely its abolition. However, before that goal is reached efforts can also be directed at various other measures which can diminish its prevalence, use and impact. These should include amongst other measures:

- (a) Shrinking further the list of capital offences. In the case of Tanzania, treason should be taken out of the list of capital offences. If treason involves the killing of any person including the President, a person can be charged with murder. This will leave murder as the only capital offence;
- (b) Removing mandatory death penalty provisions. Courts should be left with the discretion of imposing or not imposing the death penalty in appropriate cases;
- (c) Introducing the defence of 'diminished responsibility'. Tanzania still applies the old fashioned "*M'Naghten Rules*"<sup>7</sup> which presume that every person is sane unless it is proved that as a result of a disease of the mind at the material time, he was incapable of understanding what he was doing or he was incapable of knowing that what he was doing was wrong. This is a high degree of proof of insanity which leaves out a lot of people who kill under mental problems or delusions without a defence to murder. An amendment of the law similar to section 2 of the United Kingdom's 1957 Homicide Act will make a lot of difference. The said section provides that

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<sup>7</sup> *R.v. M'Naghten* (1843) 10 CL. And F, 200.

Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions or being a part to the killing.

In East Africa, an equivalent provision is found in the Uganda Penal Code only.<sup>8</sup> Such a defence, together with the tightening of categories of intentional killing (malice aforethought) will help to check the number of accused persons convicted with murder and having to face the death penalty.

(d) Finally, it is important to sensitise the public on the futility and negative aspects of the death penalty in order to have a broad public support for its abolition. While we agree with Justice Chaskalson's statement in *S. v. Makwanyane and Mchunu* that 'public opinion was no substitute for the duty vested in the courts to uphold constitutional provisions without fear or favour', the judiciary cannot divorce itself completely from the public which it is intended to serve.

## VI. CONCLUSION

From a human rights perspective we can conclude that the death penalty is a cruel, inhuman and degrading punishment which violates the right to life. Executing a person is an act of violence committed by the State, thereby reducing itself to the same level as the perpetrator of that crime. Its enforcement is brutalizing to all who are involved in the process. A public executioner is not usually accepted by the society as a normal person. Penology studies are generally in agreement that the death penalty does not have any deterrent value. Worse still is the inherent danger that this punishment can be imposed on an innocent person. There are cases where people have been mistakenly convicted because of improper confessions, false identification, suppression or fabrication of evidence or even for being poorly defended. Furthermore, it is a punishment which has negative effects on other innocent people especially vulnerable dependents of the executed person as well as other family members and friends.

The reform of the criminal justice system particularly the issue of treatment of offenders has not attracted the attention of policy makers and other stake holders in the same way as has happened in other areas of our laws. As Coldham appropriately observes "the need to establish a criminal justice system that meets the requirements of a developing African State has seldom generated much interest."<sup>9</sup> Even measures that have been taken to tackle rising crime levels are not based on any empirical studies or justifications notwithstanding their draconian proportions. Even the introduction of the multiparty system in Tanzania since 1990 has not had any impact in terms of attracting any attention from the political parties or opposition members of Parliament. No one wants to be seen as being 'soft' on offenders. The outcome of this is the lack of a coherent penal policy.

The first step towards having rational punishments is the development of a clear, modern penal policy which respects the basic human rights of suspects and offenders, as well as those of their victims. The purpose of criminal law should not be reduced to the punishment of offenders for the sake of it.

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<sup>8</sup> c188A The Penal Code Act (Uganda), c 106.

<sup>9</sup> Simon Coldham 'Criminal Justice Policies in Commonwealth Africa: Trends and Prospects' Vol. 44 No. 2 (2000) *Journal of African law*, OUP 218-238