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The Downfall of the Mandatory Death Penalty in Kenya

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Abstract

The retention and use of the death penalty, especially the mandatory death penalty, continues to be an issue of controversy and concern in Africa and elsewhere. Accordingly, African states are slowly but increasingly moving away from the death penalty, with many of them abolishing it either de facto or de jure, or limiting its use, with some finding its mandatory application to be unlawful. This article considers the recent Supreme Court of Kenya decision that declared the mandatory nature of the death penalty as provided for under the country's Penal Code to be unconstitutional. However, it argues that, while declaring the mandatory death penalty to be unconstitutional is commendable and a promising step on the path towards the abolition of the death penalty, the death penalty remains available as a punishment, with serious human rights implications if procedural safeguards are not followed.

Keywords

Death penalty, death row, death sentence, capital offence, life imprisonment, fair trial

INTRODUCTION

The desirability of abolishing the death penalty to enhance and protect human rights has been emphasized by various human rights bodies at the global and regional levels, including the UN Human Rights Committee (HRC)[1] and the African Commission on Human and Peoples' Rights (African Commission),[2] as well as many states that have actually abolished it. The HRC is of the view that "States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, de facto and de jure, in the foreseeable future", as "[t]he death penalty

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1 HRC "General comment no 36 on article 6 of the International Covenant on Civil and Political Rights, on the Right to life" (124th session, 2018), UN doc CCPR/C/GC/36 (2018), para 50.

2 African Commission "General comment no 3 on the African Charter on Human and Peoples' Rights: The right to life (article 4)" (57th ordinary session, 2015), para 22, available at: <http://www.achpr.org/files/instruments/general-comments-right-to-life/general_comment_no_3_english.pdf> (last accessed 22 October 2018).

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cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable and necessary for the enhancement of human dignity and progressive development of human rights".[3] State parties to the Second Optional Protocol to the International Covenant on Civil and Political Rights 1989 (ICCPR-OP2) also postulate "that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights".[4] Similarly, the African Commission recognizes that abolition is important to securing, among other rights, the rights to life, dignity and to be free from torture, and cruel, inhuman or degrading treatment.[5] In Africa, developing jurisprudence from the African Commission and national courts "strongly" suggests the desirability of abolishing the death penalty.[6] In fact, the desirability of its abolition is not only evident in the African system, as jurisprudence and developments in the other two developed human rights systems (the European and Inter-American systems) also speak to the desirability of its abolition.[7]

For African countries that still apply the death penalty, the African Commission has emphasized that under no circumstances should its imposition be mandatory for any offence.[8] This is in line with the view of UN and other regional human rights bodies, which have found a mandatory death penalty (the automatic imposition of a death sentence upon conviction for a capital offence) to be harsh, as it does not allow for consideration of the circumstances of the offence or of the convicted person, and is thus cruel and

3 HRC "General comment no 36", above at note 1, para 50 (footnotes omitted). This position, as stated by the HRC, is reaffirmed by article 6(6) of the International Covenant on Civil and Political Rights 1966, which prohibits the invocation of the right to life provision "to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant". See also ICCPR-OP2, preamble.

4 ICCPR-OP2, preamble. Of the 85 state parties to this protocol, 14 are African (Benin, Cape Verde, Djibouti, Gabon, Guinea Bissau, Liberia, Madagascar, Mozambique, Namibia, Rwanda, São Tomé and Príncipe, Seychelles, South Africa and Togo), with an additional two that have only signed it (Angola and Gambia).

5 African Commission "General comment no 3", above at note 2, para 22.

6 See C Anyangwe "Emerging African jurisprudence suggesting the desirability of the abolition of capital punishment" (2015) 23/1 *African Journal of International and Comparative Law* 1.

7 See for example, Council of Europe "Exchange of views on the question of abolition of capital punishment" (Human Dimension Implementation Meeting, Warsaw 11–22 September 2017, working session 12, HDIM.IO/0021/2017/EN, 11 September 2017), available at: <https://www.osce.org/odihr/342976?download=true> (last accessed 22 October 2018); R Hnidka "European perspective and legal framework of death penalty" (2016) 1/4 *Izzivi Prihodnosti* 159; Inter-American Commission on Human Rights "The death penalty in the Inter-American human rights system: From restrictions to abolition" (31 December 2011), OEA/Ser.L/V/II doc 68, available at: <https://www.oas.org/en/iachr/docs/pdf/deathpenalty.pdf> (last accessed 22 October 2018).

8 African Commission "General comment no 3", above at note 2, para 24.

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degrading punishment.[9] The HRC, for example, has emphasized "that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the [International Covenant on Civil and Political Rights 1966 (ICCPR)], in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence".[10] This position has been highlighted in the HRC's recent general comment on article 6 of the ICCPR.[11] The mandatory death penalty is seen to be "out of sync with prevailing human rights norms".[12] Hence, its mandatory application is increasingly being abandoned in African states that still retain the death penalty, with Kenya being the most recent after the issue had been in constitutional limbo from 2010 until 2017.

This article considers the 2017 decision of Kenya's Supreme Court of Appeal (SCA) in *Muruatetu and Mwangi v Republic* (*Muruatetu*)[13] that declared the mandatory death penalty to be unconstitutional, and the (potential) impact of that decision. The article first provides an overview of the status of the death penalty and of the mandatory death penalty in Africa and subsequently in Kenya, thus providing a contextual background against which the case should be understood and illustrating the decline in use of not just the death penalty but also the mandatory death penalty on the continent.

THE DEATH PENALTY IN AFRICA

This section does not seek to provide a comprehensive contextual background but rather an overview, with an emphasis on more recent aspects / developments regarding the current status of the death penalty in Africa, limitations on its use and its abolition. This is important in locating the Kenyan decision within evident trends and establishing its contribution to furthering developments regarding the death penalty, aimed at protecting the rights of those facing the death penalty, restricting its application and promoting its abolition.

Statistics on the status of the death penalty

Amnesty International (AI) reports[14] that 2017 saw a decrease in the global use of the death penalty. The number of countries that have abolished the death

9 A Novak "Capital sentencing discretion in southern Africa: A human rights perspective on the doctrine of extenuating circumstances in death penalty cases" (2014) 14/1 *African Human Rights Law Journal* 24 at 25 and 28.

10 *Pagdayawon Rolando v Philippines* comm no 1110/2002, UN doc CCPR/C/82/D/1110/2002 (2004), para 5.2; *Eversley Thompson v St Vincent and the Grenadines* comm no 806/1998, UN doc CCPR/C/70/D/806/1998 (2000), para 8.2.

11 HRC "General comment no 36", above at note 1, para 37.

12 Novak "Capital sentencing discretion", above at note 9 at 25.

13 Petition nos 15 and 16 of 2015 (consolidated), judgment of 14 December 2017, [2017] eKLR.

14 AI collects information "from a variety of sources, including: official figures; information

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penalty for all crimes increased to 106, compared to 104 in 2016.[15] The number of executions decreased by 4 per cent to 993 in 23 countries, compared to at least 1,032 in 23 countries in 2016; and the number of death sentences imposed dropped by 17 per cent to 2,591 in 53 countries, compared to 3,117 in 55 countries in 2016.[16]

In Africa, many states are increasingly abandoning the practice of the death penalty. AI's statistics as at the end of 2017 indicate that: 20 African countries have abolished it for all crimes (Angola, Benin, Burundi, Cape Verde, Congo, Côte d'Ivoire, Djibouti, Gabon, Guinea, Guinea-Bissau, Madagascar, Mauritius, Mozambique, Namibia, Rwanda, São Tomé and Príncipe, Senegal, Seychelles, South Africa and Togo); 19 are considered abolitionist in practice[17] (Algeria, Burkina Faso, Cameroon, Central African Republic, Eritrea, Ghana, Kenya, Liberia, Malawi, Mali, Mauritania, Morocco, Niger, Sierra Leone, Swaziland, Tanzania, Tunisia, Western Sahara and Zambia); and 16 are considered retentionist[18] (Botswana, Chad, Comoros, Democratic Republic of the Congo (DRC), Egypt, Equatorial Guinea, Ethiopia, Gambia, Lesotho, Libya, Nigeria, Somalia, South Sudan, Sudan, Uganda and Zimbabwe).[19] It should be noted that, because the African Commission's Working Group on Death Penalty and Extra-Judicial, Summary or Arbitrary Killings in Africa (Working Group)[20] uses different terminology, some states that AI classifies as retentionist (Comoros, DRC, Lesotho and Zimbabwe) because they retain the death penalty for ordinary crimes are classified by the Working Group as states that have not carried out an execution over the past ten years.[21]

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from individuals sentenced to death and their families and representatives; reporting by other civil society organizations; and media reports". It ensures reasonable confirmation of the information it receives. See AI "Global report: Death sentences and executions 2017" AI Index: ACT 50/7955/2018 (2018) at 4.

15 Id at 5; AI "Global report: Death sentences and executions 2016" AI Index: ACT 50/5740/2017 (2017) at 42.

16 AI "Death sentences and executions 2017", above at note 14 at 6 and 7; AI "Death sentences and executions 2016", above at note 15 at 4 and 5.

17 "Abolitionist in practice" states have not carried out executions in the past ten years and are thought to have established a practice or policy of not carrying out executions.

18 Retentionist states retain the death penalty for ordinary crimes.

19 AI "Death sentences and executions 2017", above at note 14 at 40–41.

20 The working group is also mandated to "[c]ollect information and continue to monitor the situation of the application of the Death Penalty in African States". See African Commission "Resolution 79: Resolution on the composition and the operationalization of the working group on the death penalty" (38th ordinary session, 2005) ACHPR/Res.79 (XXXVIII) 05.

21 African Union "62nd ordinary session of the African Commission on Human and Peoples' Rights: Inter-session activity report (December 2017 – April 2018)" (presented by Commissioner KZ Sylvie, Nouakchott, Mauritania, 25 April – 9 May 2018), para 17. In fact, available reports indicate that the last known executions took place in these states as follows: Comoros in 1997, DRC in 2003, Lesotho in 1995 and Zimbabwe in 2005; see World Coalition Against the Death Penalty "Worldwide database", available

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On executions, AI's statistics for 2017 indicate that, in north and sub-Saharan Africa, at least 63 people were executed in three countries, a decrease from at least 66 people in six countries the previous year.[22] The total number of death sentences imposed in north and sub-Saharan Africa was at least 1,350 in 20 countries, a drop from the 2016 figure of at least 1,424 in 20 countries.[23] The number of people known to be under a sentence of death in these African sub-regions was however higher in 2017: at least 4,357 in at least 22 countries (2,285 in Nigeria alone), compared to at least 3,506 people in at least 19 countries in 2016.[24] The Working Group reports that, during the first quarter of 2018, two death sentences were imposed in South Sudan and 13 executions were carried out (one in Botswana, one in Sudan and 11 in Egypt).[25]

Regional efforts towards the abolition of the death penalty

The desirability of the non-use and abolition of the death penalty in Africa has been promoted for more than a decade. The African Commission, in 1999 and 2008 for instance, urged African states to place a moratorium on the death penalty.[26] In 2009, it then operationalized the Working Group's mandate to, inter alia, "develop a strategic plan(s) including a practical and legal framework on the abolition of the Death Penalty".[27] Three regional African conferences have also been held on the death penalty (in 2009, 2010 and 2018), ending with declarations emphasizing the need to take steps towards its abolition on the continent.[28]

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at: <http://www.worldcoalition.org/worldwide-database.html> (last accessed 22 October 2018); Cornell Center on the Death Penalty Worldwide "Death penalty database", available at: <http://www.deathpenaltyworldwide.org/> (last accessed 22 October 2018).

22 AI "Death sentences and executions 2017", above at note 14 at 30–32 and 34–37; AI "Death sentences and executions 2016", above at note 15 at 8, 30–31 and 35–36. As the report focuses on north and sub-Saharan Africa, there could have been executions and death sentences imposed in other parts of Africa that are not recorded in the report. See also African Union "62nd ordinary session of African Commission", above at note 21, para 22.

23 AI "Death sentences and executions 2017", above at note 14 at 30–32 and 34–37; AI "Death sentences and executions 2016", above at note 15 at 30–32 and 35–39.

24 AI "Death sentences and executions 2017", ibid; AI "Death sentences and executions 2016", id at 30–31 and 35–36.

25 African Union "62nd ordinary session of African Commission", above at note 21, para 23.

26 African Commission "Resolution 42: Resolution urging states to envisage a moratorium on death penalty" (26th ordinary session, 1999) ACHPR/Res.42(XXVI)9; African Commission "Resolution 136: Resolution calling on state parties to observe a moratorium on the death penalty" (44th ordinary session, 2008) ACHPR/Res.136(XXXXIIII).08.

27 African Commission "Resolution 79", above at note 20.

28 The Kigali Framework Document on the Abolition of the Death Penalty in Africa, adopted by the First Sub-Regional Conference for Central, Eastern and Southern Africa on the Question of the Death Penalty in Africa in Kigali, Rwanda (25 September 2009); The Cotonou Framework Document Towards the Abolition of the Death Penalty in

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In 2015, the African Commission adopted the draft Protocol to the African Charter on Human and Peoples' Rights on the Abolition of the Death Penalty, which it forwarded to the African Union (AU) for formal adoption.[29] However, the AU Specialized Technical Committee on Legal Affairs was of the view that there was no legal basis for its adoption and therefore declined to consider the draft protocol.[30] The Working Group has, however, continued with sensitization, lobbying and recommendations for states to support its adoption.[31]

Nevertheless, there have been additional notable steps towards abolition in Africa. For example, Benin abolished the death penalty in 2016, following a landmark decision by its Constitutional Court that found laws making provision for the death penalty to be void on the basis of the country's international human rights obligations,[32] and Guinea abolished it in 2017, following the adoption and entry into force of a new Code of Military Justice by the National Assembly of Guinea, which did not mention the death penalty.[33] Burkina Faso and Chad reportedly took steps in 2017 towards abolition "under new or proposed laws"; and in 2017, Gambia signed ICCPR-OP2 and declared in February 2018 "a moratorium on the application of the death penalty" in the country.[34] Also, as explained below, some African states that retain the death penalty have refrained from its mandatory use (in general or for murder). While some African states have reduced the number of capital offences, others have indicated their willingness to do so.[35]

Furthermore, the African Commission in its general comment no 3 on the right to life emphasized the desirability of abolishing the death penalty in Africa, in line with African and global trends, and as required under international law.[36] Regarding moratoria on executions, the African Commission stated: "[s]tates with moratoria on the death penalty must take steps to formalize

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Africa, adopted by the Second Regional Conference for North and West Africa on the Question of the Death Penalty in Africa, adopted in Cotonou, Benin (15 April 2010); final declaration of the African Congress, adopted by the Third Regional Congress Against the Death Penalty, Abidjan, Côte d'Ivoire (10 April 2018).

29 Adopted at its 56th session, 21 April – 7 May 2015. See AU "Final communiqué of the 56th ordinary session of the African Commission on Human and Peoples' Rights" (Banjul, The Gambia, 21 April – 7 May 2015) at 9.

30 AI "Death sentences and executions 2015" AI Index: ACT 50/3487/2016 (2016) at 12.

31 AU "62nd ordinary session of African Commission", above at note 21, paras 16 and 32.

32 AU "61st ordinary session of the African Commission on Human and Peoples' Rights: Inter-session activity report (June – November 2017)" (presented by Commissioner KZ Sylvie, Banjul, The Gambia, 1–15 November 2017), para 21.

33 AU "59th ordinary session of the African Commission on Human and Peoples' Rights: Inter-session activity report (May – October 2016)" (presented by Commissioner KZ Sylvie, Banjul, The Gambia, 21 October – 4 November 2016), para 13; AI "Death sentences and executions 2017", above at note 14 at 10.

34 AU "62nd ordinary session of African Commission", above at note 21, paras 18–19 and 21; AI "Death sentences and executions 2017", above at note 14 at 11 and 35.

35 Anyangwe "Emerging African jurisprudence", above at note 6 at 2.

36 African Commission "General comment no 3", above at note 2, para 22.

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abolition in law, allowing no further executions", prosecutors should "refrain from seeking the death penalty" and judges should "choose not to impose it".[37] In states that are yet to abolish the death penalty, trials and convictions must meet the fair trial standards in article 7 of the African Charter on Human and Peoples' Rights 1981 (African Charter); and failure "stringently" to meet "the highest standards of fairness" would render "the subsequent application of the death penalty … a violation of the right to life".[38]

Provisional measures to stay executions

International bodies have sought to use provisional measures to protect life, among other rights, in death penalty cases.[39] Accordingly, in 2016, the African Court on Human and Peoples' Rights (African Court), while acting on its own initiative, unanimously issued provisional measures in 17 cases against Tanzania, requiring the state to refrain from carrying out the death penalty that had been imposed on the applicants, pending determination of the cases by the court.[40] The cases concerned individuals who had been sentenced to death but were challenging the fairness of their convictions. In 2017, the African Court unanimously ordered Ghana to refrain from carrying out the death penalty it had imposed on the applicant, pending the court's determination of the case.[41] The applicant was under a sentence of death and was challenging, inter alia, the mandatory nature of the death penalty

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37 Id, para 23.

38 Id, para 24.

39 A Duxbury "Saving lives in the International Court of Justice: The use of provisional measures to protect human rights" (2000) 31/1 *California Western International Law Journal* 141; JM Pasqualucci *The Practice and Procedure of the Inter-American Court of Human Rights* (2003, Cambridge University Press) at 324.

40 *Guehi v Tanzania* appln no 001/2015, order for provisional measures (18 March 2016); *Rajabu and Others v Tanzania* appln no 007/2015, order for provisional measures (18 March 2016); *Lazaro v Tanzania* appln no 003/2016, order for provisional measures (18 March 2016); *Rutechura v Tanzania* appln no 004/2016, order for provisional measures (18 March 2016); *Augustino and Another v Tanzania* appln no 015/2016, order for provisional measures (3 June 2016); *Jeshi v Tanzania* appln no 017/2016, order for provisional measures (3 June 2016); *Faustine v Tanzania* appln no 018/2016, order for provisional measures (3 June 2016); *Mukwano v Tanzania* appln no 021/2016, order for provisional measures (3 June 2016); *Juma v Tanzania* appln no 024/2016, order for provisional measures (3 June 2016); *Damian v Tanzania* appln no 048/2016, order for provisional measures (18 November 2016); *John v Tanzania* appln no 049/2016, order for provisional measures (18 November 2016); *Gabriel and Another v Tanzania* appln no 050/2016, order for provisional measures (18 November 2016); *Zabron v Tanzania* appln no 051/2016, order for provisional measures (18 November 2016); *Msuguri v Tanzania* appln no 052/2016, order for provisional measures (18 November 2016); *Josiah v Tanzania* appln no 053/2016, order for provisional measures (18 November 2016); *Henerico v Tanzania* appln no 056/2016, order for provisional measures (18 November 2016); *Anatori v Tanzania* appln no 057/2016, order for provisional measures (18 November 2016).

41 *Johnson v Ghana* appln no 016/2017, order for provisional measures (28 September 2017).

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on human rights grounds, in particular that its imposition without consideration of the relevant circumstances of the offender or offence violates the rights to life, a fair trial, a review of sentence, freedom from cruel, inhuman or degrading treatment or punishment and, by failing to give effect to rights in the African Charter, a consequential violation of the state's obligation in article 1 of the charter.[42] As at November 2018, the African Court is yet to issue its decision on the merits in the case, but has issued a provisional measures order stating that "the risk of execution of the death penalty will jeopardise the enjoyment of rights guaranteed under Articles 4, 5 and 7 of the [African] Charter, Articles 6(1), 7, 14(1) and 14(5) of the [ICCPR] and Articles 3 and 5 of the [the Universal Declaration of Human Rights 1948 (UDHR)]".[43]

As stated above, both Tanzania and Ghana are classified as "abolitionist in practice" and were / are thus expected to comply with the provisional measures orders. Ghana is still to report on its implementation of the order. Tanzania has, however, indicated unwillingness to comply with some of the provisional measure orders.[44] Tanzania's response is of concern, as it goes against the essence of provisional measures, which is to protect human rights and prevent irreparable harm. Non-compliance would also constitute a separate breach of its obligations to adhere to such measures.

Nevertheless, the African Court has shown its willingness to protect life in urgent cases of potential violations and irreparable harm being caused to those under a death sentence. The indication of willingness to comply with some of the provisional measures orders in death penalty cases is encouraging when compared to the African Commission's experience, where orders requesting a stay of execution until it had considered the communications fell on deaf ears, as the executions were carried out while the cases were still pending before it.[45] However, unwillingness to comply, even in the face of a commitment to comply with some of the measures, should not be condoned since the death penalty is a matter of life and death.

Decline in use of the mandatory death penalty

Worldwide, there have been trends towards the mandatory death penalty being recognised as unconstitutional and not in sync with human rights.[46]

42 Id, para 4.

43 Id, para 17.

44 African Court on Human and Peoples' Rights "Report on the activities of the African Court on Human and Peoples Rights: 1 January 31 – December 2016" (AU Executive Council 30th ordinary session, 2017) doc EX.CL/999(XXX), paras 21(ii) and 57.

45 L Chenwi *Towards the Abolition of the Death Penalty in Africa: A Human Rights Perspective* (2007, Pretoria University Law Press) at 70–71. The cases were: *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* comm nos 137/94, 139/94, 154/96 and 161/97 (2000) AHRLR 212 (ACHPR 1998); and *Interights et al (on behalf of Bosch) v Botswana* comm no 240/2001 (2003) AHRLR 55 (ACHPR 2003). See also AU "59th ordinary session of the African Commission", above at note 33, para 15.

46 See A Novak *The Global Decline of the Mandatory Death Penalty: Constitutional Jurisprudence*

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Use of the mandatory death penalty has reportedly been declining rapidly, due, among other things, to judicial challenges to its application, with various bodies (judicial and quasi-judicial) at UN and regional levels as well as national courts declaring it unconstitutional and a violation of human rights.[47] Since 2000, the mandatory death penalty "has been found unconstitutional and incompatible with human rights norms in at least ten Caribbean nations".[48]

In Africa, the mandatory death penalty is a colonial legacy[49] and, despite its use having steadily declined, it remains in parts of the continent. However, in line with global trends, the African Commission has stated that the death penalty should not be mandatory, regardless of the circumstances.[50]

At a national level, African states are increasingly abandoning mandatory death sentences.[51] A "new wave of litigation", particularly in eastern and southern Africa, has found it to be unconstitutional, leading it to be replaced with a discretionary death penalty scheme.[52] Currently, Botswana, Kenya, Lesotho, Malawi, Swaziland, Uganda, Zambia and Zimbabwe and are among the countries that have abolished the mandatory death penalty, either in general or for specific offences that previously carried a mandatory death sentence.[53] This resulted either from constitutional challenges, or constitutional or legislative amendments. In Ghana, the Supreme Court found the mandatory death penalty to be constitutional,[54] resulting in its challenge before the HRC[55] and, following Ghana's failure to comply with the HRC's decision,[56] before the African Court.[57] The HRC found Ghana's automatic

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and Legislative Reform in Africa, Asia, and the Caribbean (2014, Ashgate); A Novak "The abolition of the mandatory death penalty in Africa: A comparative constitutional analysis" (2012) 22/2 *Indiana International and Comparative Law Review* 267.

47 Novak *The Global Decline*, id at 1; Novak "The abolition", id at 267 (focussing on the crime of murder); Cornell Centre on the Death Penalty Worldwide "Mandatory death penalty" (last updated 25 January 2012), available at: <http://www.deathpenaltyworldwide.org/mandatory-death-penalty.cfm> (last accessed 22 October 2018) (focussing on the mandatory death penalty generally).

48 Novak "The abolition", ibid.

49 FIDH "Triggers for abolition of the death penalty in Africa: A southern African perspective" (October 2017) at 11, available at: <https://www.fidh.org/IMG/pdf/death_penalty_in_africa_703a_eng_25_oct_2017_web_ok_ok.pdf> (last accessed 22 October 2018); Novak, id at 268; and *Muruatetu*, above at note 13, para 67.

50 African Commission "General comment no 3", above at note 2, para 24.

51 Anyangwe "Emerging African jurisprudence", above at note 6 at 2 and 20.

52 Novak "The abolition", above at note 46 at 267.

53 Ibid; Novak "Capital sentencing discretion", above at note 9 at 33, 35 and 39; FIDH "Triggers for abolition", above at note 49 at 12.

54 See *Johnson v The Republic* [2011] 2 SCGLR 601. The decision was based on "a narrow, textual reading of the constitution"; see Novak *The Global Decline*, above at note 46 at 100.

55 *Johnson v Ghana* comm no 2177/2012, UN doc CCPR/C/110/D/2177/2012 (2014).

56 Death Penalty Project "*Dexter Johnson v The Republic of Ghana*" (last updated 28 July 2017), available at: <http://www.deathpenaltyproject.org/news/1911/dexter-johnson-v-the-republic-of-ghana/> (last accessed 22 October 2018).

57 *Johnson* (African Court), above at note 41.

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and mandatory death penalty in the case to constitute a violation of the right to life.[58]

In relation to constitutional challenges, the relevant cases from Malawi, Uganda and Kenya (before *Muruatetu*) have been discussed in detail elsewhere,[59] so are not discussed here beyond stating in a nutshell the findings of the respective courts. In 2005, the Constitutional Court of Uganda in *Kigula* declared the mandatory death penalty unconstitutional, a decision that was upheld by the Supreme Court in 2009, following an appeal by the Attorney General (AG).[60] The Supreme Court found that the mandatory death penalty deprived the trial court of the opportunity to consider mitigating factors and exercise sentencing discretion, and was thus a violation of, inter alia, the right to a fair trial.[61] In 2007, the High Court of Malawi in *Kafantayeni* also found the mandatory death penalty to be unconstitutional.[62] The court found that it violated the rights to life, a fair trial and not to be subjected to cruel and inhuman punishment (due to the lack of opportunity to consider mitigating factors), as well as violating the right of access to the courts (due to the lack of an avenue for the defendant to appeal against the conviction and sentence).[63] Malawi's Supreme Court of Appeal confirmed the decision (with approval) in 2008 in *Jacob*.[64]

The first constitutional amendment was seen in Swaziland in 2005, with a constitutional provision stating, "[t]he death penalty shall not be mandatory".[65] Zimbabwe was next, with a constitutional reform in 2013 that abolished the mandatory death penalty, limiting the imposition of the death penalty to "murder committed in aggravating circumstances" and subject to judicial discretion.[66]

An amendment to the Penal Code of Zambia resulted in the prohibition of the mandatory death penalty for murder, excluding "murder committed in the course of aggravated robbery with a firearm".[67] Although the Penal Code appears to impose a mandatory death penalty for aggravated robbery

58 *Johnson* (HRC), above at note 55, para 7.3.

59 See Novak *The Global Decline*, above at note 46 at 99–123; Novak "The abolition", above at note 46 at 279–93.

60 See *Kigula and 416 Others v Attorney General* constitutional petition no 6 of 2003 [2005] UGCC 8, (2005) AHRLR 197 (UgCC 2005); *Attorney General v Kigula and 417 Others* constitutional appeal no 3 of 2006 [2009] UGSC 6 (21 January 2009), [2009] 2 EALR 1.

61 For discussion of the case, see Novak "The abolition", above at note 46 at 282–87; Novak *The Global Decline*, above at note 46 at 112–15.

62 *Kafantayeni v Attorney General* constitutional case no 12 of 2005 [2007] MWHC 1.

63 For discussion of the case, see MJ Nkhata "Bidding farewell to mandatory capital punishment: *Francis Kafantayeni and Others v Attorney General*" (2007) 1 *Malawi Law Journal* 103; Novak "The abolition", above at note 46 at 279–82; Novak *The Global Decline*, above at note 46 at 111–12.

64 *Jacob v Republic* criminal appeal no 16 of 2006.

65 Constitution of the Kingdom of Swaziland Act, 2005, sec 15(2).

66 Constitution of Zimbabwe Amendment Act (No 20), 2013, art 48(2)(a).

67 Zambia Penal Code Act, chap 87 of the Laws of Zambia, sec 201.

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with a firearm, there are exceptions, for example where evidence shows that "the accused person was not armed with a firearm" and "was not aware that any of the other persons involved in committing the offence was so armed" or "dissociated himself from the offence immediately on becoming so aware".[68] A 2016 bill of rights referendum in Zambia to vote on a constitutional amendment that would have seen a general prohibition of the death penalty "where there are extenuating circumstances relating to the commission of the offence"[69] was unsuccessful.[70] A legislative amendment in Botswana saw the abolition of the mandatory death penalty for murder and treason where there are extenuating circumstances.[71] The Penal Code of Lesotho was also amended, inter alia to prohibit the mandatory death penalty for murder where there are extenuating circumstances.[72] Likewise, the Sexual Offences Act of Lesotho prohibits the mandatory death penalty for a sexual offence where the offender (the accused) is infected with HIV and "had knowledge or reasonable suspicion of the infection" at the time of committing the offence, where extenuating circumstances exist or where the individual circumstances of the accused or lawful intimate relations between the victim and the perpetrator dictate otherwise.[73]

THE MANDATORY DEATH PENALTY IN KENYA: *MURUATETU AND MWANGI v REPUBLIC*

Contextual background

Although Kenya has not carried out any executions since 1987,[74] the mandatory death penalty has remained on its books. However, death sentences have been commuted to life imprisonment. For example, in 2009 all death sentences were commuted to life imprisonment and, in 2016, 2,747 death sentences were commuted to life imprisonment.[75] However, the courts have continued to impose the death penalty.[76] Recent statistics indicate that, in

68 Id, sec 294(2)(a).

69 Constitution of Zambia (Amendment) Bill, 2016, art 15(4)(c).

70 C Lumina "Zambia's failed constitutional referendum: What next?" (12 September 2016) *Constitutionnet*, available at: <http://www.constitutionnet.org/news/zambias-failed-constitutional-referendum-what-next> (last accessed 22 October 2018).

71 Botswana Penal Code, 1964 (Law No 2 of 1964) (as amended up to Act No 14 of 2005), secs 34 and 35, read with sec 40 (on treason) and sec 203 (on murder).

72 Lesotho Penal Code Act, 2010 (Act No 6 of 2012), sec 40(3)(c).

73 Lesotho Sexual Offences Act No 3 of 2003, sec 32(a)(vii) read with sec 31(1).

74 HRC "Report of the Working Group on the Universal Periodic Review: Kenya", UN doc A/HRC/29/10 (2015), para 83; AI "Death sentences and executions 2017", above at note 14 at 36.

75 AI "Death sentences and executions 2016", above at note 15 at 38; AU "61st ordinary session of the African Commission", above at note 32, para 21.

76 C Rickard "Demise of Kenya's mandatory death penalty" (10 April 2018) *Legalbrief*, available at: <http://legalbrief.co.za/diary/a-matter-of-justice/story/demise-of-kenyas-mandatory-death-penalty-2/> (last accessed 21 November 2018).

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2017, at least 21 death sentences were passed, a slight decrease from the 24 passed in 2016.[77]

In 2015, Kenya was one of the countries in which bills aimed at abolishing the death penalty were proposed without success.[78] In 2016, Kenya abstained from voting for the UN General Assembly's resolution on a universal moratorium on the use of the death penalty.[79] Its abstention, arguably, casts doubt on the Kenyan government's willingness to formalize its informal moratorium on executions that has been in place for more than three decades. Following its second universal periodic review in 2015, Kenya "noted" recommendations from other states for it to formalize its moratorium and ratify the ICCPR-OP2, and "accepted" (and in other instances "noted") calls for it to suspend the application of the death penalty and to abolish it.[80] However, it is still to implement the recommendations.

It is unclear whether the government's stance is influenced by the perceived unreadiness of the Kenyan public for abolition, as it previously explained in response to the HRC's recommendation that it consider abolishing the death penalty. While the government stated unequivocally "that the penalty is in conflict with the fundamental human right norms as embodied in international instruments of which Kenya is a party", it indicated "that the Kenyan public is still not ready for [its] abolition but [that] the Government and the Kenya National Commission for Human Rights [have] intensified efforts of educating the public on the need to abolish it in conformity with the international standards and trends".[81] It stated further that "[a]t this juncture, Kenya is unable to abolish the death penalty as the Kenyan public has overwhelmingly rejected the abolition of the death penalty for the most serious crimes".[82] In response, the HRC expressed "regret" over the retention and use of the death penalty in Kenya and reiterated its recommendation that Kenya consider abolishing it, acceding to ICCPR-OP2 and intensifying awareness campaigns aimed at changing the public mindset regarding its retention.[83]

There was consensus regarding the application of the mandatory death penalty before 2010; after 2010, there were divergent views on its application,

77 AI "Death sentences and executions 2017", above at note 14 at 7, 34 and 36; AI "Death sentences and executions 2016", above at note 15 at 5 and 36.

78 AI "Death sentences and executions 2015", above at note 30 at 12 and 55.

79 UN General Assembly "Resolution 71/187: Moratorium on the use of the death penalty" (19 December 2016), UN doc A/RES/71/187 (2017).

80 HRC "Report of the Working Group", above at note 74, paras 67, 142 and 143; "2RP: Responses to recommendations & voluntary pledges: Kenya" *UPR Info*, available at: <https://www.upr-info.org/sites/default/files/document/kenya/session_21_-_january_2015/recommendations_and_pledges_kenya_2015.pdf> (last accessed 22 October 2018).

81 HRC "Third periodic report of states parties: Kenya", UN doc CCPR/C/KEN/3 (2011), paras 38 and 141.

82 Id, para 141.

83 HRC "Concluding observations adopted at its 105th session, 9–27 July 2012: Kenya", UN doc CCPR/C/KEN/CO/3 (2012), para 10.

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following its invalidation in 2010 by the Kenyan Court of Appeal (CA) in *Mutiso*.[84] The CA held, inter alia, that the mandatory death penalty was "antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial".[85] Subsequently, some Kenyan courts have imposed a mandatory death penalty while others have imposed custodial sentences for capital offences.[86] This divergent position continued until 2013, when the CA held in *Mwaura* that the *Mutiso* decision was "per incuriam in so far as it purports to grant discretion in sentencing with regard to capital offences" and that section 204 of the Penal Code of Kenya, allowing for the death penalty, was phrased in mandatory terms due to its use of "shall".[87] The CA added that Kenyans will decide through their representatives in Parliament when to "remove the death sentence from our statute books".[88] Despite questioning the *Mwaura* decision, the lower courts were bound to follow it as the doctrine of precedent demands.[89]

The year 2010 marked the dawn of a new and progressive constitutional era in Kenya. Hence, the *Mwaura* decision was problematic as it did not accord with the intention of the drafters of Kenya's new Constitution nor with Kenya's international human rights obligations, which became part of domestic law under Kenya's 2010 Constitution (the Constitution).[90] In 2016, the mandatory requirement was then written into the Sentencing Policy Guidelines of the Judiciary of Kenya, which provided: "[i]n the absence of law reform or the reversing of the decision in *Joseph Njuguna Mwaura and Others v Republic*, the court must impose the death sentence in respect to capital offences in

84 *Mutiso v Republic* (*Mutiso*) criminal appeal no 17/2008, [2010] eKLR (Kenya CA). For discussion of this case, see Novak "The abolition", above at note 46 at 287–93; Novak *The Global Decline*, above at note 46 at 115–19.

85 *Mutiso*, id, para 36.

86 *Muruatetu*, above at note 13, para 70.

87 *Mwaura and Others v Republic* criminal appeal no 5 of 2008, [2013] eKLR, available at <http://kenyalaw.org/caselaw/cases/view/91626/> (last accessed 21 November 2018).

88 Id at 12.

89 *Muruatetu*, above at note 13, para 29. *Mwaura* had a five judge panel while *Mutiso* had three, so, while *Mwaura* could, arguably and despite its problematic nature, be seen by some to carry more weight than *Mutiso*, the latter's holding that the Constitution does not provide for a mandatory death penalty was affirmed by the SCA in *Muruatetu* (para 52). Also, a three judge panel in *Kahinga and 11 Others v Attorney General*, petition no 618 of 2010 [2016] eKLR, did not follow *Mwaura*, on the basis that *Mwaura* did not address the focus issues in *Kahinga*, noting (at 35–36 and 40) that "the [*Mwaura*] decision may have been rendered by the Court without the benefit of the kind of submission that was presented before [the High Court in *Kahinga*] and also before the Sentencing Policy Guidelines came into effect". After finding that "mitigation by a convict facing any criminal charge before sentencing is a constitutional imperative of fair trial", the High Court found the mandatory death penalty to be unconstitutional, as it does not afford a court the opportunity to consider "mitigating circumstances and other statutory pre-sentencing requirements" (at 41 and 42).

90 The Constitution, art 2(5): "The general rules of international law shall form part of the law of Kenya".

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accordance with the law".[91] The position has now been clarified by the SCA, following its decision in *Muruatetu*, which rendered this guideline inapplicable.[92] The SCA also found that the mandatory death penalty was a "colonial relic that has no place in Kenya today".[93]

Facts and issues

The case concerned two petitioners who were sentenced to death for murder, as mandated by section 204 of the Kenyan Penal Code.[94] Their death sentence was later commuted to life imprisonment but they had already spent a significant amount of time (17 years) on death row.[95] They approached the SCA, where they argued that the mandatory death sentence under section 204 of the Penal Code and its subsequent commutation were both unconstitutional.[96] They argued that a mandatory death penalty violated the right to a fair trial. First, they argued that sentencing was part of the right to a fair trial under article 50(2) of the Constitution and that a legislative requirement for a pre-determined sentence denied the trial judge sentencing discretion, contrary to this right.[97] Secondly, that anyone who has been criminally tried is entitled under article 50(2)(q) of the Constitution to "appeal and seek a review from a higher court", but that the right to a second appeal is limited to appeals against convictions (that is, one is not able to appeal or seek review of a death sentence from a higher court). Thus, if the first appellate court does not set aside the conviction, then the right to a fair hearing under article 50(2)(q) of the Constitution is breached, due to the mandatory nature of the death penalty.[98] It therefore followed, as they further argued, that its commutation to life imprisonment was invalid.[99] The petitioners requested that they be compensated for the 17 "agonizing" years on death row.[100] They argued that the SCA's declaration that the mandatory death penalty was unconstitutional and the resultant damages award should be applied "to all convicts suffering the same fate".[101] They also argued that the SCA should overturn the CA's ruling that "the death penalty is grounded in the Constitution" on the basis that such a ruling is bad law.[102]

The state agreed that the mandatory nature of the death penalty was unconstitutional, as it does not allow for the consideration of mitigating

91 *Muruatetu*, above at note 13, para 70 (emboldening omitted).
92 Id, para 71.
93 Id, para 67.
94 Id, para 2.
95 Id, paras 12 and 13.
96 Id, paras 4 and 6.
97 Id, para 6.
98 Id, para 7.
99 Id, para 12.
100 Id, para 13.
101 Id, para 14.
102 Id, para 12.

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circumstances and other pre-sentencing policy and statutory requirements.[103] It also agreed that the case be sent back to the High Court for resentencing, taking into consideration the time that the petitioners had spent in prison.[104] The state however disagreed with the damages claim, on the basis that the petitioners' conviction by the High Court had not been challenged and that a damages claim is a civil matter requiring a separate hearing.[105]

A joint *amici curiae* submission[106] also argued that a mandatory death penalty was unconstitutional, as it was at odds with "international law and customs" and did not accord with constitutional guarantees.[107] On the latter, it cited the right to be free from cruel, inhuman and degrading treatment (articles 29(f) and 25(a)), fair trial rights (articles 50(1) and (2) and 25(c)) and the principles of separation of power and independence of the judiciary (chapters 9, 10 and 11, and articles 159 and 160, respectively). It also argued that the subsequent commutation of the petitioners' death sentence "did not affect their entitlement to challenge the constitutionality of the mandatory death sentence imposed upon them", for the court to rule that "only a lawful sentence could be commuted",[108] and that the petitioners were entitled to a remedy for the continued breach of their rights.[109]

The AG also intervened as *amicus curiae*, arguing that the mandatory death penalty was unconstitutional, not at the time it was imposed on the petitioners nor in relation to it being cruel, inhuman and degrading, but rather because it violates the right to a fair trial and is incompatible with the Constitution.[110] The AG differed from the petitioners, state and other *amici* in arguing that the petitioners had no standing to challenge the constitutionality of the mandatory death penalty since, with reference to the previous constitution, it was "expressly legal and constitutional" at the time it was imposed on them.[111]

The court, therefore, had to consider: whether a mandatory death penalty and indeterminate life sentence were unconstitutional; whether it could and should define parameters for a life sentence; and the remedies, if any, to which the petitioners were entitled.[112] The court did not deal with broader issues relating to constitutionality of the death sentence and violation of the right to life, on the basis that "they did not arise in [the]

103 Id, para 15.

104 Id, para 17.

105 Id, para 1.

106 By Katiba Institute, Death Penalty Project, Kenya National Commission on Human Rights, International Commission of Jurists – Kenya Chapter and Legal Resources Foundation.

107 *Muruatetu*, above at note 13, paras 20 and 23.

108 Id, para 22.

109 Ibid.

110 Id, para 24.

111 Ibid.

112 Id, para 25.

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appeal".[113] Concerning the right to life, it stated however that it was not convinced that the wording of article 26(3) of the Constitution (that permits the intentional deprivation of life if authorized by the Constitution or other written law) permits a mandatory death penalty.[114]

Also, the court did not elaborate on whether the mandatory death penalty amounted to cruel, inhuman and degrading treatment and whether an indeterminate life sentence was a cruel, inhuman and degrading treatment or punishment, as raised by the *amici* and first petitioner, respectively.[115] However, it observed that "the imposition of the mandatory death sentence which denied the convicted person an opportunity to seek review from a higher Court amounted to inhuman treatment or punishment".[116] It cited the holding in *Mutiso* that "section 204 of the Penal Code … is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment".[117] In the context of life sentences, it noted the European Court of Human Rights decision in *Kafkaris*, finding a reducible life sentence (de facto and de jure) not to be a violation of the prohibition of torture or inhuman or degrading treatment or punishment.[118]

Unconstitutionality of the mandatory death penalty

The SCA found that the provision of a mandatory death penalty for murder in section 204 of the Penal Code of Kenya was "inconsistent with the Constitution and invalid".[119] This was based on it finding that the mandatory death penalty was "out of sync" with the Constitution, specifically articles 25(c) (prohibiting limitation of the right to a fair trial), 27 (right to equality and freedom from discrimination), 28 (right to human dignity), 48 (right of access to justice), and 50(1) and (2)(q) (right to a fair trial).[120] It also found the mandatory death penalty to be in breach of the principle of the rule of law. It further found that section 204 of the Penal Code cannot be valid in the light of article 19(3)(a) of the Constitution confirming the inherent nature of the rights in the Bill of Rights and article 20(1) and (2) of the Constitution on the application of the Bill of Rights.[121]

In addition, the court emphasized the importance of adopting a "generous and purposive" approach to interpreting the provisions in the Constitution that protect human rights, as it was of the view that it is through such an approach that "life and meaning" can be given to the constitutional bill of

113 Id, para 26.
114 Id, para 66.
115 Id, paras 20 and 74.
116 Id, para 10.
117 Id, para 27 (emboldening omitted).
118 Id, para 83.
119 Id, paras 69 and 112(a).
120 Id, para 64.
121 Ibid.

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rights.[122] The court did not, however, elaborate on the specifics of the approach in the Kenyan context, beyond highlighting the supremacy of the Constitution.

As stated subsequently, the court drew in its decision from a number of significant cases from Africa and elsewhere that view a mandatory death sentence as a violation of relevant human rights and unconstitutional. It quoted these cases with approval and viewed them as having persuasive authority.[123]

Violation of human rights

Right to a fair trial: The SCA elaborated on the nature of the right to a fair trial and whether it can be restricted. It held that the right is a "fundamental" right, "an important congruent element of fair trial", is necessary and essential in the fair trial process and "is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse".[124] It is an "inalienable" right as stipulated in the UDHR and is provided for as an "absolute", "non-derogable" right in the Constitution.[125] The right to a fair trial guaranteed in article 50(2) of the Constitution is listed under article 25 as one of the rights that, notwithstanding any other constitutional provision, "shall not be limited".[126] Also, under article 50(1) of the Constitution, a fair hearing must be understood to connote "a hearing of both sides".[127]
In addition to this constitutional guarantee, the ICCPR guarantees regarding the right to a fair trial apply to Kenya, as a state party to this treaty.[128] Hence, for it to be valid, section 204 of the Penal Code "must be in accord with" the principles contained in the ICCPR and the Constitution. These principles are: "[f]irstly, the rights and fundamental freedoms belong to each individual. Secondly, the bill of rights applies to all law and binds all persons. Thirdly, all persons have inherent dignity which must be respected and protected. Fourthly, the State must ensure access to justice to all. Fifthly, every person is entitled to a fair hearing and lastly, the right to a fair trial is non-derogable."[129]

Other aspects of a fair trial include "mitigation" and the "right to appeal" or right to "apply for review by a higher Court as prescribed by law."[130] Hence, as the court held, the application of the right extends to the sentencing

122 Ibid.
123 Id, paras 27–33, 39, 55, 65 and 83–86.
124 Id, paras 46 and 47.
125 Id, paras 37 and 47.
126 Kenyan Constitution, art 25(c).
127 *Muruatetu*, above at note 13, para 66.
128 Id, para 38.
129 Id, para 40.
130 Id, para 54.

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phase of a trial, since the trial process does not end upon conviction of an accused.[131]

The court observed that "mitigation" forms part of the trial process, as stipulated in sections 216 and 329 of Kenya's Criminal Procedure Code (CPC) and is therefore "an important facet of fair trial".[132] This implies that failure to make provision for the consideration of mitigating factors would render a trial unfair.[133] Although sections 216 and 329 of the CPC "are couched in permissive terms", the court held that, upon reading them, a court is undoubtedly required to consider mitigating evidence "in order to arrive at an appropriate sentence" and also, as has been echoed by the CA, "for futuristic endeavors such as when the appeal is placed before another body for clemency".[134]

Considering the above, the court held that it could not untangle the rationale for the mandatory nature of section 204 of the Penal Code, especially as a "person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence".[135] Section 204 of the Penal Code was thus viewed to be problematic as it "is essentially saying to a convict … that he or she cannot be heard on why, in all the circumstances of his or her case, the death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless".[136] The court thus held that, as the death penalty is a matter of life or death, judicial discretion is crucial, yet section 204 of the Penal Code deprives the court of its "legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases".[137] It held that the mandatory nature of the death penalty is therefore in conflict with the tenets of the absolute right to a fair trial, guaranteed under article 25 of the Constitution, since a court can listen to mitigating factors but is nevertheless required to impose a death sentence.[138] Due to the possibility of the different culpability of murder convicts, in the absence of mitigation or judicial discretion in sentencing, the sentence could be "wholly disproportionate to the accused's criminal culpability", with the "undesirable effect of 'overpunishing' the convict".[139] To support its view, the court cited, with approval and viewing it as persuasive authority, jurisprudence from the Privy Council (*Reyes*) and US Supreme Court (*Woodson*) on the necessity of mitigation in the context of the death penalty for murder.[140]

131 Id, paras 41 and 52.
132 Id, paras 43 and 48.
133 Id, para 66.
134 Id, paras 43 and 44.
135 Id, para 45.
136 Ibid.
137 Id, para 48.
138 Ibid.
139 Id, para 53.
140 Id, paras 49–50.

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In relation to the right to appeal or review, which are facets of a fair trial as reflected in article 50(2)(q) of the Constitution, the court held that the mandatory death penalty violates article 50(2)(q), since an appeal in the context of the death penalty is limited to conviction only, that is, convicts can only appeal against their conviction and not the sentence.[141] A court that is considering an appeal is therefore deprived of the opportunity to consider the appropriateness of the sentence.[142] The lack of judicial discretion in sentencing therefore resulted in the court finding the trial and resultant sentence to be unfair, in breach of articles 50(1) and 2(q) of the Constitution.[143] It held that imposition of a death sentence can only be permissible if imposed after a "fair trial", which is one that includes consideration of mitigating factors.[144]

Right to dignity: The court was of the view that the mandatory death penalty for murder violates the right to dignity. The court did not define the right per se, but stated that it is an "inherent" right and that the court has to ensure its enjoyment by all persons.[145] Article 28 of the Constitution guarantees this right to everyone. This is on the basis of the lack of an opportunity to mitigate and lack of judicial discretion in sentencing, which result in convicts being treated "as an undifferentiated mass", despite the fact that they could have differential culpability.[146] Such differential culpability can be addressed through the exercise of judicial discretion in sentencing, to eliminate the question of "a formal equal penalty for unequally wicked crimes and criminals", which, as the court pointed out, "is not in keeping with the tenets of a fair trial".[147] As held by the court, "dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate".[148] Hence, the lack of judicial discretion in sentencing also resulted in the court finding the trial and resultant sentence to be unfair, in breach of the right to dignity.[149]

Right to justice: As a reviewing higher court is not able to consider the appropriateness of a death sentence due to its mandatory nature, the court found that this also results in a violation of the right to justice.[150] This right is provided for in article 48 of the Constitution. The court found that, though the scope of this right is wide, justice must be administered in line with the principles stated in article 159 of the Constitution, which include

141 Id, para 56.
142 Ibid.
143 Id, para 59.
144 Id, para 66.
145 Id, para 50.
146 Id, para 51.
147 Ibid.
148 Ibid.
149 Id, para 59.
150 Id, para 56.

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non-delay and non-discrimination in the administration of justice. In this regard, the court held that access to justice and a fair hearing requires that individuals are able to "ventilate their disputes" before the courts. As access to justice is a facet of the right to a fair trial, an unfair trial implies denial of access to justice. It then concluded that "when a murder convict's sentence cannot be reviewed by a higher court he is denied access to justice which cannot be justified in light of Article 48 of the Constitution".[151] The court, therefore, also concluded that the lack of judicial discretion in sentencing, resulting in the trial and resultant sentence being unfair, amounted to a breach of the right to justice.[152]

Right to non-discrimination and equality: Article 27 of the Constitution guarantees everyone the right to equality and freedom from discrimination. The right to non-discrimination is also provided for in article 26 of the ICCPR, which applies to Kenya. The court held that, under section 204 of the Penal Code, a mandatory death penalty is discriminatory in nature, in that it "gives differential treatment to a convict under that Section, distinct from the kind of treatment accorded to a convict under a Section that does not impose a mandatory sentence".[153] The court found that it is "unjustifiable discrimination and unfair" and "repugnant to the principle of equality before the law" for those facing lesser sentences to have an opportunity to be heard in mitigation, while those facing the death penalty do not have a similar opportunity due to the mandatory nature of the sentence.[154] It thus found section 204 of the Penal Code to be in breach of the right to equality and non-discrimination.[155] The court supported its view with reference to Ugandan case law (*Kigula*) on the mandatory death penalty being a breach of the right of equality before and under the law, which the SCA considered to be a "greatly" persuasive authority.[156]

Respect for the rule of law

The court also found that the mandatory death penalty "runs counter to constitutional guarantees enshrining respect for the rule of law".[157] This is because of the lack of an opportunity for the courts to consider the appropriateness of the death sentence compared with the circumstances of the offence and offender, as required by "due process". It held that a procedure or law that results in the termination of life when applied "ought to be just, fair and reasonable".[158]

151 Id, para 57.
152 Id, para 59.
153 Id, paras 60 and 63.
154 Id, para 63.
155 Ibid.
156 Id, para 62.
157 Id, para 58.
158 Ibid.

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Separation of powers principle

As stated above, the petitioners and joint *amici* argued that the lack of judicial discretion in sentencing breached the principle of separation of powers, since a judge is compelled to impose a sentence that is "pre-determined by the Legislature", "thus leaving it to Parliament to control sentences in all murder cases".[159] The state agreed that sentencing was a judicial function and thus, as per the separation of powers doctrine, "the Legislature ought not encroach upon territory that constitutionally belongs to the Judiciary".[160] Despite this concession by the state, the SCA merely noted these arguments and did not rule specifically on whether the mandatory death penalty violates the principle of separation of powers. It therefore missed the opportunity to develop jurisprudence on this question. However, the SCA highlighted its willingness to assess the constitutionality of laws passed by Parliament, as follows: "[w]hereas it is the duty of Parliament to make laws, it is the duty of this Court to evaluate, without fear or favour, whether the laws passed by Parliament contravene the Constitution".[161] The court was also cautious not to cross the separation of powers line as seen from its consideration of life imprisonment as an alternative sentence.

The alternative sentence: Life imprisonment

The SCA also had to determine whether an indeterminate life sentence was unconstitutional and if it should set guidelines in relation to life sentences. Following the commutation of their death sentence, the petitioners were serving an indefinite life sentence, with no prospect of parole.[162] A consideration of questions relating to the alternative sentence of life imprisonment is important because, as observed by Dirk van Zyl Smit, "restriction of the death penalty can occur best if there is an open debate on alternatives to the death penalty" that is "informed by the same concern for human rights as the debate about the death penalty itself".[163]

It was thus disappointing that, on the first question, the court declined to make a determination, on the basis that the petitioners had "not sufficiently argued" the issue.[164] Hence, the court missed the opportunity to consider the alternative sentence of life imprisonment through a human rights lens as it had done with the mandatory death penalty. A related issue raised in the case by the *amici* was the unconstitutionality of section 46 of the Prisons Act, for excluding "prisoners serving life sentences from being considered for remission".[165] As the issue had not been raised before, and considered

159 Id, paras 6 and 20.

160 Id, para 15.

161 Id, para 67.

162 Id, para 79.

163 D van Zyl Smit "The death penalty in Africa" (2004) 4 *African Journal on Human Rights* 1 at 12.

164 *Muruatetu*, above at note 13, para 76.

165 Id, para 77. Prisons Act, rev 2017, chap 90 of the Laws of Kenya.

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by, the High Court and Court of Appeal,[166] the SCA could not consider the question (and cannot be faulted for not doing so), as it was not a court of first instance.

On the second question, the SCA drew from English law and jurisprudence from the European Court on indeterminate life sentence.[167] While it was clear from the jurisprudence that different categories of life sentence have in some instances been defined, the SCA observed that Kenyan law does not define a life sentence, resulting in the assumption that the sentence implies "the number of years of the prisoner's natural life, in that it ceases upon his or her death".[168] With reference to the relevant provision on the rights of detained persons (article 51 of the Constitution), jurisprudence from the Kenyan High Court (*Wangui* and *Hussein*) and comparative foreign case law, the SCA observed that it is the task of the legislature and not the judiciary to determine what amounts to a life sentence, ie whether it is served throughout one's natural life or if a specific term of years is to be served before consideration of parole.[169] However, following its consideration of the objectives of sentences (retribution, deterrence, rehabilitation, restorative justice, community protection and enunciation) and placing specific emphasis on rehabilitation, the court held that "a life sentence should not necessarily mean the natural life of the prisoner; it could mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism".[170] The court was also persuaded by a similar position in comparative jurisprudence (which it found to be "compelling") on indeterminate life sentences.[171] It also considered article 10(3) of the ICCPR, which states in part that "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation".[172] As a state party to the ICCPR, Kenya has an obligation to ensure it complies with its obligations under article 10(3) of the ICCPR, which now forms part of domestic law in line with article 2(6) of the Constitution. Apparently, the court viewed indeterminate life imprisonment as failing to meet the objective of reformation or rehabilitation.

As there was a lacuna in the Kenyan legal framework on what constitutes a life sentence, and considering that it was the legislature's task to put such framework in place, the court then *recommended* that the "Attorney General and Parliament commence an enquiry and develop legislation on the definition of 'what constitutes a life sentence'; this may include a minimum number of years to be served before a prisoner is considered for parole

166 *Muruatetu*, id, paras 77–78.
167 Id, paras 82–87.
168 Id, para 88.
169 Id, paras 89–90 and 94.
170 Id, paras 91–93 and 95.
171 Id, para 95.
172 Id, para 93.

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or remission, or provision for prisoners under specific circumstances to serve whole life sentences. This will be in tandem with the objectives of sentencing."[173]

The court was of the view that the lack of such legislation would imply the country's non-compliance with article 2(6) of the Constitution, which makes ratified treaties or conventions part of Kenyan Law.[174] Put differently, such legislation would ensure compliance with, for instance, article 10(3) of the ICCPR.

Remedies

Upon finding the mandatory death penalty to be unconstitutional, the SCA had to consider "[w]hat remedies, if any, accrue to the petitioners".[175] The petitioners had argued that the court should order "sentencing", as an order of "re-sentencing" would be unfair since the unconstitutionality of the mandatory death penalty implied that the petitioners' 17 years of imprisonment on death row was illegal.[176] While the *amici* supported a sentencing hearing by the High Court, the AG was against a sentencing order on the basis that the petitioners could seek "pardon, substitution or remission of punishment under Article 133 of the Constitution", and the state thought it was "premature and un-procedural" to award damages without first having a re-hearing.[177]

The SCA held that, as the petitioners' trial was unfair, thus violating their right to a fair trial, they deserved a remedy.[178] In determining an appropriate remedy, the court sought guidance from comparative case law of the Privy Council, Supreme Court of Uganda and Constitutional Court of Malawi as well as the Kenyan Court of Appeal (as persuasive authority). These showed that the best remedial practice is remittance of the case to the High Court for it, after considering mitigating submissions, to determine an appropriate sentence.[179] It ordered that the "sentencing re-hearing" be done "on a priority basis, and in conformity with" the SCA judgment.[180] The SCA clarified that this remedy ("sentencing re-hearing") was applicable only to the two petitioners before it and that those with similar cases should "await appropriate guidelines" that would address their situation.[181] In this regard, it *directed* the AG "to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case".[182] The court's final order in this regard is directed to the AG, the director of public prosecutions and other relevant agencies,

173 Id, para 96.
174 Id, para 97.
175 Id, para 98.
176 Ibid.
177 Id, paras 99–101.
178 Id, para 102.
179 Id, paras 102–111.
180 Id, para 112(b).
181 Id, para 111.
182 Ibid.

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who are required to "prepare a detailed professional review in the context of this Judgment and Order made with a view to setting up a framework to deal with sentence re-hearing [of] cases similar to that of the petitioners herein".[183] It further placed a reporting obligation on the AG, "to give progress report" to the SCA on these matters.[184]

Impact

The SCA's decision has both legal and social implications. The death penalty remains a valid punishment under Kenyan law. As the court stated, the unconstitutionality of a mandatory death penalty "does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution".[185] The death penalty remains applicable "as a discretionary maximum punishment".[186] It cannot therefore be imposed as a mandatory punishment for murder, as mitigating circumstances must be considered in order to establish an appropriate sentence in any specific case.

The decision has an impact on legislation, as it invalidates section 204 of the Penal Code as well as any other legislative provision that allows for a mandatory death penalty or an indeterminate life sentence. Accordingly, the court ordered that the "judgment be placed before the Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, attended with a signal of the utmost urgency, for any necessary amendments, formulation and enactment of statute law, to give effect to this judgment on the mandatory nature of the death sentence and the parameters of what ought [to] constitute life imprisonment".[187]

Another legal effect of declaring the mandatory death penalty unconstitutional is the non-applicability of the Sentencing Policy Guidelines published by the Kenyan judiciary in 2016 that confirmed the mandatory death penalty.[188] In their place, in relation to mitigating circumstances during "a re-hearing sentence for the conviction of a murder charge", the court provided the following criteria: "(a) age of the offender; (b) being a first offender; (c) whether the offender pleaded guilty; (d) character and record of the offender; (e) commission of the offence in response to gender-based violence; (f) remorsefulness of the offender; (g) the possibility of reform and social re-adaptation of the offender; (h) any other factor that the Court considers relevant."[189]

The application of these guidelines is context-sensitive, as they are "advisory and not mandatory" and do not replace judicial discretion.[190] They are aimed

183 Id, para 112(c) (emboldening and italics omitted).
184 Ibid.
185 Id, para 112(a). See also para 69.
186 Id, para 69.
187 Id, para 112(d) (emboldening and italics omitted).
188 Id, para 71 (emboldening and italics omitted).
189 Ibid.
190 Id, para 72.

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at "promoting consistency and transparency in sentencing hearings" and "promoting public understanding of the sentencing process".[191] The setting out of guidelines would also prevent a lacuna in the law after the mandatory death penalty had been declared unconstitutional. Having clear guidelines would also help address human rights concerns around fairness in the discretionary application of the death penalty. However, if the guidelines are not followed, inconsistencies in the application of the discretionary death penalty cannot be avoided, resulting in challenges relating to equal treatment and equality before the law. Also, if procedural safeguards relating to a fair trial are not adhered to, most of the human rights concerns with a mandatory death penalty would also be present with a discretionary death penalty.

A significant development on the impact of the decision occurred on 22 March 2018, when the Court of Appeal, with reference to *Muruatetu*, found the mandatory death penalty for robbery with violence to be unconstitutional.[192] This was in *Meja*, where the appellant had been convicted of robbery with violence and subsequently sentenced to death, since "the offence of robbery with violence under section 296(2) of the Penal Code carries a mandatory death sentence".[193] The appellant launched his appeal against his conviction and sentence before the mandatory death penalty for murder had been ruled unconstitutional. As a result, he did not have to wait for guidelines to be put in place (as the SCA had ordered in *Muruatetu*) in order to challenge the death sentence imposed on him. The Court of Appeal held that, because of the similarity between sections 204 and 296(2) of the Penal Code, "the arguments in the *Muruatetu* decision can be extended to cases of robbery with violence under section 296(2)".[194] The court also cited its decision in *Kittiny v Republic*[195] where it applied the *Muruatetu* decision, holding that the SCA's decision "particularly in paragraph 69 applies mutatis mutandis to section 296(2) and 297(2) of the Penal Code", rendering the death sentence under section 296(2) and 297(2) of the Penal Code "a discretionary maximum punishment", and that "[t]o the extent that section 296(2) and 297(2) of the Penal Code provides for mandatory death sentence the sections are inconsistent with [the] Constitution."[196] While upholding the appellant's conviction, the court then found it appropriate to substitute his death sentence with a sentence of ten years' imprisonment, with effect from the date of his conviction.[197]

Generally, this decision can be seen as a step towards the abolition of the death penalty in Kenya. However, whether it has the effect of not only

191 Ibid.

192 *Meja (alias Uncle "P") v Republic* (*Meja*) criminal appeal no 98 of 2015 [2018] eKLR, para 21.

193 Id, paras 1, 2 and 20.

194 Id, para 22.

195 Civil appeal no 56 of 2013 (unreported).

196 *Meja*, above at note 192, para 22.

197 Id, paras 23–24.

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fortifying debate on its abolition but leading to its abolition in the near future remains to be seen. While some have viewed the decision as "evidence of the Kenyan unwillingness to support the death penalty"[198] or "a very strong signal … that there is need for Kenya to consider the legal abolition of the death penalty",[199] the government has also, as established previously, shown an unwillingness to take the death penalty abolition debate or moratorium formalization any further. Moreover, it has recently been reported that a law to make illegal hunting of wildlife a capital offence in Kenya will be fast-tracked.[200] Nonetheless, in the years to come, a possible reduction in the number of death sentences passed for murder will be evident, as courts are no longer compelled to impose the death sentence for every murder or robbery with violence conviction, assuming the courts adopt a flexible approach to the exercise of judicial discretion that is case and context specific. In addition, once a sentence re-hearing framework is in place and is effectively applied to cases similar to that of the petitioners, commutation of death sentences during this process would imply a reduction in the number of prisoners on death row, assuming that the number of death sentences that are subsequently passed does not outweigh the number of commutations.

CONCLUSION

There has been a decline, globally and in Africa, in the use of not just the death penalty but also the mandatory death penalty. When one looks at the respective judicial decisions declaring a mandatory death penalty unconstitutional, there seems to be a transnational judicial dialogue on the issue, as it is evident that international and (foreign) domestic developments influenced the courts' considerations. The decisions refer to the developments, indicating in some cases (like *Muruatetu*) that these developments are persuasive authority.

Kenya's SCA decision in *Muruatetu* is significant as it is in sync with trends in Africa and elsewhere on the unconstitutionality of the mandatory death penalty. The "emerging global consensus", in relation to murder for example, is to the effect that "not all murders are equally heinous and deserving of death, that the right to a fair trial includes a right to a sentencing hearing, and that a disproportionately harsh sentence is cruel and degrading

198 T Gerzso "The Supreme Court of Kenya declares the mandatory death penalty unconstitutional" (23 January 2018) *World Coalition Against the Death Penalty*, available at: <http://www.worldcoalition.org/The-Supreme-Court-of-Kenya-declares-the-mandatory-death-penalty-unconstitutional.html> (last accessed 22 October 2018).

199 AU "62nd ordinary session of the African Commission", above at note 21, para 20.

200 J Dalton "Wildlife poachers in Kenya 'to face death penalty': 'Life sentence or fines are insufficient deterrents'" *Independent* (13 May 2018), available at: <https://www.independent.co.uk/news/world/africa/poachers-kenya-wildlife-death-penalty-capital-punishment-najib-balala-a8349966.html> (last accessed 22 October 2018).

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punishment".[201] The SCA's decision reinforces this global consensus and emphasizes the importance of judicial discretion in sentencing, especially in the death penalty context. In relation to the death penalty in general, the decision is in line with the view of the African Commission as well as its regional counterparts on the restriction of the use of the death penalty. The court can however not be criticized for not ruling on the constitutionality of the death penalty itself, as that was not part of the appeal. The challenge to the mandatory death penalty has a "much larger" goal: "to end the death penalty worldwide by fundamentally making it more difficult for prisoners to be placed on death row".[202] The SCA's decision has thus been hailed as "a significant step towards complete abolition" of the death penalty.[203] The court however missed an opportunity to make a more substantive ruling on the mandatory death penalty in relation to the prohibition of cruel, inhuman and degrading treatment and the right to life. Nevertheless, the case will serve as a lesson for other African countries that retain the mandatory death penalty. Also, as observed in the previous section, the decision has already had a noteworthy impact at the domestic (Kenyan) level in relation to the mandatory death penalty for robbery with violence.

Bringing a challenge to the unconstitutionality of this sentence should however be strategic and not rushed. As noted by the SCA, the success of *Muruatetu* was also due to its timing.[204] It should also be emphasized that the discretionary application of the death penalty does not eliminate human rights concerns surrounding its application. An even greater challenge following the invalidation of the mandatory death penalty is ensuring consistency in its discretionary application as well as respect for the right to a fair trial and other human rights, including rights to dignity, equality and non-discrimination.

201 Novak *The Global Decline*, above at note 46 at 123.

202 Novak "The abolition", above at note 46 at 293.

203 AI "Kenya: Landmark death penalty judgement must lead to full abolition of cruel punishment" (14 December 2017), available at: <https://www.amnesty.org/en/latest/news/2017/12/kenya-landmark-death-penalty-judgement-must-lead-to-full-abolition-of-cruel-punishment/> (last accessed 21 November 2018).

204 *Muruatetu*, above at note 13, para 64.

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