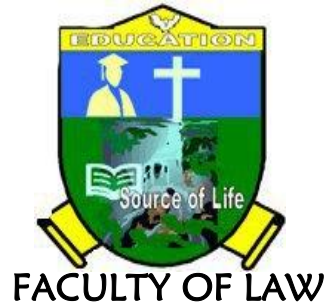


**RUAHA CATHOLIC UNIVERSITY (RUCU)**



**CRITICAL ANALYSIS OF CRIMINAL JUSTICE AND ALTERNATIVE  
PUNISHMENT IN TANZANIA; CASE STUDY OF DEATH PENALTY**

**Research Paper Submitted in Partial Fulfillment of the Requirements For the award of the  
Degree of Bachelor of Laws (LL.B) of Ruaha Catholic University**

**By**

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**RU/LLB/2020/056**

**Prepared under the supervision of**

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**At the Faculty of Law**

**July, 2024**

## CERTIFICATION

The undersigned certifies that she has read and hereby recommends for acceptance by Ruaha Catholic University a research paper entitled: **“Critical Analysis Of Criminal Justice And Alternative Punishment In Tanzania; Case Study Of Death Penalty;”** In partial fulfillment of the Requirements for the Bachelor Degree of Law (LL.B).

.....

Mr. COSMAS BABILAS MASIMO

(Supervisor)

DATE.....

-

## DECLARATION

I, Theresia A. Dionisi do hereby declare that, this study on “**CRITICAL ANALYSIS OF CRIMINAL JUSTICE AND ALTERNATIVE PUNISHMENT IN TANZANIA; CASE STUDY OF DEATH PENALTY**” is my original work and that has not been presented to any individual in this year of study at Ruaha Catholic University for the award of a degree

.....

Signature

Signed on this.....Day of .....2024

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**THERESIA A. DIONISI**

**RUAHA CATHOLIC UNIVERSITY**

**2024**

## ACKNOWLEDGEMENT

This work could not have been accomplished without the significant contributions of the efforts, ideas, cooperation, and support which are both moral and material support of various individuals and institutions

The list is very long to thank everyone who's in one way or another assisted me in preparing this work. However, the space is very limited to mention all of them, so I will provide some of them due to their significant role in accomplishing this work

The first is our Almighty GOD who has given me that grace of living, he also has given me this chance to attend at a higher level of education as it is not by my power or my self-ability instead it is for his glory.

Secondly, my sincerely acknowledgement is to my supervisor MR. Cosmas B. Masimo (ADVOCATE) he is not only my supervisor but also, he is a part and parcel of this particular study because of the great contribution he made to the completion of this research study

I wish to express my sincerely thanks to my mother, Domitila Assey for the special role she played in the completion of this work. Also, I wish to express my sincerely thanks to my lovely sister Neema Assey for her financial support in the completion of this research study.

Again, I wish to express the contribution of every individual who has contributed a lot in the collection of data, as well as different institutions including the district court of Tanga at Tanga who helped me in acquiring abundance data concerning my study.

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## DEDICATION

This work is dedicated to my parent especially my mother Domitilla Assey and my lovely sister Neema ASSEY for their love and support towards the completion of this work.

## ABSTRACTS

The right to life is one of the fundamental rights guaranteed by the Constitution of 1977 of the United Republic of Tanzania, but such a right is not absolute due to the presence of the death penalty, which the same provided under the law-governed criminal matters that is Penal Code Cap 16 Revised Edition of 2022. The study has been carried out on Criminal justice and alternative punishment of the death penalty. This study is a theoretical and practical concern on the death penalty and is divided into five chapters.

Chapter one of the study is about the introduction and background of the research. It carries out the title of the study, statement of the problem, objectives of the research, and literature review and describes the means through which data was collected.

Chapter two covers the conceptual framework work which discusses a brief history of the death penalty worldwide. It also explains the history of the death penalty in Tanzania mainland, Also, covers the offenses punishable by the death penalty in Tanzania, and includes the procedures and the Presidential power over capital punishment.

Chapter three covers the legal framework and in that regard, I have divided them into international instruments, and National instruments that discuss the right to life as opposed to the death penalty which deprives people's right to life.

Chapter four is concerned with the findings of the research and analysis of the views obtained from different sources of data, which reflect the research questions, raised and also includes the attitude of the Courts over the death penalty in Tanzania.

Chapter five covers the conclusions and recommendations of the research study.



## LIST OF STATUTE

### INTERNATIONAL INSTRUMENTS

International Covenant on Civil and Political Rights, adopted on 16<sup>th</sup> December 1966 (in General Assembly Resolution) [Entered into force on 23<sup>rd</sup> March 1976]

The African Charter on the Rights and Welfare of the Child, adopted on July 1990 (in Monrovia, Liberia) [entered into force on 29<sup>th</sup> November, 1999]

The African Charter of Human Rights, adopted on 18<sup>th</sup> June, 1981(in Nairobi, Kenya [entered into force on 21<sup>st</sup> October, 1986]

Universal Declaration of Human Rights, adopted on 10<sup>th</sup> December 1948 (in Paris France) (entered to force in 1976)

### DOMESTIC INSTRUMENTS

Penal Code [CAP 16 RE 2022]

The Constitution of the United Republic of Tanzania of 1977 as amended from time to time

The Criminal Procedure Act [CAP 20 RE 2019]

The Indian Penal Code 1980

The Judicature and Application of Laws Ordinance [CAP 453 R.E 1961]

The Tanganyika Order in Council of 1920

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Gwao Bin Kilimo V Ifunde Ifuti [1938] TLR 403

Mbushuu Alias Dominic Mnyoroje & another V Republic [1995] TLR 94 (CA)

Republic V Mbushuu Alias Domonic Mnyoroje & Kalai Sangula [1994] TLR 14 (HC)

SMZ V Machano Khamis Ally and 17 Others, Court of Appeal of Tanzania Criminal session no 08 of 2000 (unreported)

## LIST OF ABBREVIATIONS

AG	-	Attorney General
CA	-	Court of Appeal
CAP	-	Chapter
CPA	-	Criminal Procedure Act
ED	-	Edition
HC	-	High Court
IBID	-	Ibidem
ICCPR	-	International Covenant on Civil and Political Rights
J	-	Judge
LHRC	-	Legal and Human Right Centre
R	-	Republic
RE	-	Revised Edition
TLR	-	Tanzania Law Report
TOC	-	Tanganyika Order in Council
UDHR	-	Universal Declaration of Human Rights
URT	-	United Republic of Tanzania

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## CHAPTER ONE

### CRITICAL ANALYSIS OF CRIMINAL JUSTICE AND ALTERNATIVE PUNISHMENT IN TANZANIA; CASE STUDY OF DEATH PENALTY

#### 1.1 BACKGROUND OF THE PROBLEM

In criminal justice in Tanzania before colonialism, the punishment which was used for the wrongdoer was mostly corporal punishment. After colonialism, the colonial master came with their mode of punishment like the death penalty, and led the country to adopt this form of punishment. So, this research aims to change the mode of punishment that was adopted from colonialism, especially in the death penalty by substituting it with another punishment or to turn back to the system of punishment during the pre-colonial era.

The death penalty in Tanzania and elsewhere in the world has raised hot debate. In other jurisdictions like South Africa and Mexico such a penalty was abolished also in the United States of America in about twelve states the penalty was abolished completely like in Hawaii, Michigan, Alaska, etc.<sup>1</sup> In the United Nations, the punishment has been rejected since it's inhuman and it's contrary to the Universal Declaration of Human Rights of 1948<sup>2</sup>, and the International Convention on the Civil and Political Rights of 1966<sup>3</sup>. In Tanzania the death penalty is still enforced in our Law even though it's about fifty years now such a penalty has not been executed which has led number of accused persons to increase in the prisons.

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<sup>1</sup> <https://www.deathpenaltyinfomationcentre.com> accessed on 15<sup>th</sup> July 2023 at 09:08pm.

<sup>2</sup> Art.3 of Universal Declaration of Human Rights, 1948 ‘

<sup>3</sup> Art 4 of International Covenant on Civil and Political Rights, 1966 ‘



The death penalty has been criticized from many fonts. These include human right activists like Amnesty International, Tanzania Commission for Human Right and Good Governance, Legal and Human Right Center. Even some Judges and other individuals are of the view that the death penalty contravenes the right to life which is among the fundamentals of human rights. These groups argue against the death penalty saying that it is a cruel, inhuman, and degrading punishment. They built such arguments by looking at how the penalty is executed. The manner of execution is against human nature, for example, the use of lethal injection, electric chair, and gas chamber applied in the USA. In Korea and Islamic states like Pakistan and Iran, the mode of execution is through beheading. In the case of Tanzania, execution is directed under the law, that is, the matter shall suffer death by hanging.

So the death penalty in Tanzania seems unexecutable because the report show that the accused convicted of the death penalty increased as the day goes for example in April 2003 in Tanzania mainland prisoners convicted of murder and sentenced to death is about 370, and report from the federation International for human right [FIDH] and legal and human right center [LHRC] show that in 2019 were 436 in prison custody of Tanzania mainland not yet executed and most of them are in horrific condition of prison.<sup>4</sup> Also report from Amnesty international report of 2022 show that people sentenced to death is 11 and people known to be under sentenced of death at the end of the 2022 is more than 491.

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<sup>4</sup> <https://www.amnesty.ca/resource-centre/report/view.php> accessed on 14th July 2023 at 10:31pm.

It is almost three decades (over 29 years) since death penalty is executed in Tanzania it has never been executed up to now. This raise a lot of doubt that may be the mode which is used to execute the penalty is barbaric or may be outdated, if it is Yes why then the justice system is reluctant to adopt the new mode or to substitute death penalty with an alternative punishment. Since no one who is responsible to sign the execution is willing to sign the warrant. Number of people waiting to be executed increased every day. Statistic shows that Tanzania has more than 491 inmates in prison waiting for the death penalty in 2022.<sup>5</sup>

Since the law was enacted its almost not more than 10 people have been executed, and the last time for execution is in 1994. So it seems that it is almost 50 years since the Leigh of J.K.Nyerere as the president up to J.P.Magufuli the number of accused convicted to murder is increased and number of those who executed is low o compare to the number of the accused who are in the prison

## **1.2 STATEMENT OF THE PROBLEM**

Despite of the criminal laws stipulating punishment of death penalty but its execution is still reluctantly exercisable. Death penalty is the punishment which is provided to the individual who committed murder crime per section 196 and 197 of the penal code, also in treason as provided under section 39 of the Penal Code.<sup>6</sup>

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<sup>5</sup> Amnesty "International Global Report" pg 34, (available on line at <https://www.reliefweb.int.com> accessed on 25<sup>th</sup> July 2023 at 11:43pm.

<sup>6</sup> The Penal Code [Cap 16 R.E 2022].section 196 &197 &39.

Section 325(3)<sup>7</sup> of the Criminal Procedure Act gives power for the president of the United Republic of Tanzania to sign the warrant of execution which states that the president shall issue a death warrant or an order of the sentence of death to be commuted or a pardon under his hand and the seal of the united republic to give effect to that decision. So according to that death penalty is unexecutable because none of the presidents is willing to sign the warrant of execution as required by the law.

In Tanzania, some laws say people can be punished with the death penalty for serious crimes like murder and treason. However, even though the execution of the death penalty hasn't been carried out for over 29 years because no president is willing to sign the order for it to happen that lead to a growing number of inmates in the prison.

Therefore, the statistics from different research conducted there is the need to examine the effectiveness of the law on punishment of the death penalty and legal challenge to that punishment in Tanzania.

### 1.3 LITERATURE REVIEW

**Blackstone**<sup>8</sup> argues that some States believe that the abolition of the death penalty contributes to the enhancement of human dignity and the progressive development of human rights. But from the words of the author, he seems to be emphasizing the purpose of enhancement of human dignity as the core reason for the abolition of the death penalty. However, the author said nothing about the Constitutionality of the punishment. The research therefore looks at it as the problem in the light of Constitution

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<sup>7</sup> [cap 20 R.E 2022]

<sup>8</sup> C. Blackstone, *International Human Rights Documents*, Harvard University Press: Cambridge, 1966

principles which is the mother law of all laws of the land. So, the death penalty should be abolished in a country that can protect human rights and not go against the Constitution.

Furthermore, **Favreau**<sup>9</sup> states that the other methods have been used to study the effect of capital punishment on the incidence of murder supported by Rodger Hood who was the Director of the Center for Criminological Research of the University of Oxford has examined this carefully and concluded that the researcher failed to provide the scientific proof on the notion that the death penalty had greater impact than the life imprisonment as it was provided that the execution of death penalty had greater effect than life imprisonment. However, the authors did not discuss the effect of the death penalty on the issue of its legality in the Constitution. So, this research aims to show the effect of the death penalty on victims who are in prison waiting for execution.

**Mwalusanya**<sup>10</sup>, on his part, discussed the death penalty based on Constitutionality and reached the conclusion by declaring that the penalty is unconstitutional because it offends the constitutional principles which are enshrined under chapter one specifically Article 13(6) (a), (e) and 14 of the Constitution of United Republic of Tanzania of 1977 as amended time to time. He also stated that the penalty is cruel, inhuman, and degrading punishment. he went further to indicate the manner of executing the punishment like the use of the electric chair, use of Gas chamber, use of lethal injection which are applied in the USA and hanging to death used in Tanzania those days. He also argued that the

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<sup>9</sup>G. Favreau, *Capital Punishment Relating*, 113 (available online at [http://www. Unicri.it/ public actions/ book/ journal/ reports/ r.8.php](http://www.Unicri.it/public_actions/book/journal/reports/r.8.php))

<sup>10</sup> *Republic vs. Mbushuu Alias Dominic Mnyaroge [1994] TZHC7.*

punishment is not for the public interest for it does not guarantee under Article 30(2) of the Constitution of 1977. So, he proposed the penalty of life imprisonment instead of the death penalty. This decision originated in the case of Republic vs. Mbushuu Alias dominic mnyaroje & Kalai sangula [1994] where he sentenced the accused to life imprisonment which was supposed to be provided based on the crime committed. However, that decision was later nullified by the Court of Appeal where they based on the lawfulness of the punishment and stated that it is a lawful law and it's served by the Constitution. The Court of Appeal further examined the reason for having the death penalty and provided the argument that the punishment of the death penalty was enforced purposively to protect society from the murderer. The author fails to provide the reason why the execution of the death penalty was not done. So, there is a need to change this punishment or the power to sign the death penalty should shift to the chief justice to ensure enforcement of the law.

**Roger,**<sup>11</sup> The director of the Center for Criminology Research of the University of Oxford has examined carefully these various studies and concludes that research so far has failed to provide scientific proof that execution has a greater effect than life imprisonment. It is provided that the execution of the death penalty had no greater effect than life imprisonment. However, the author did not discuss the effect of the death penalty on the issue of its legality in the Constitution. So, we should look at the impact of the death penalty on society and on the accused person.

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<sup>11</sup> H. Roger, *The Death Penalty Worldwide Perspective*, 3<sup>rd</sup> Edition, Oxford University Press: London, 1989

**Darrow,** <sup>12</sup> in his speech discussing the issue of capital punishment in New York, he stated that we teach people to kill and the state is among them that teaches them so if the State wishes its citizens to respect the life of the other citizen, then the State should stop killing its subjects as by doing so the citizens will learn how to respect the life of the other citizens. The greater the sanctity of the State's punishment of life, the greater the feeling of the sanctity the individuals have for life. Based on his argument Darrow argued that the best way of resolving the problem of murder crimes is not through hanging people to death, instead the State should find other ways that will give them a lesson on respecting the life of other individuals as failure to do so attract the majority to commission of more murder crimes through the lesson obtained from the State itself. So, according to this argument, there is a need to abolish the death penalty in our laws and substitute it with other punishment.

#### **1.4 HYPOTHESIS**

It seems that the death penalty in Tanzania is unexecutable and the country is reluctant to adopt the new mode of execution or substitute it with an alternative punishment hence being unjust for inmates waiting for its execution.

#### **1.5 OBJECTIVES OF THE STUDY**

##### **1.5.1 General objective**

To examine the law relating to the death penalty in Tanzania and to see whether there is a need to adopt a new mode of execution or to replace it with an alternative punishment.

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<sup>12</sup> C. Darrow, *Attorney for the Damned*, Bactan Publishers: New York, 1957, 95

### **1.5.2 Specific objective**

Firstly, to examine the practical challenges of the execution of the death penalty.

Second, to examine the need for the alternative punishment of the death penalty.

### **1.6 SIGNIFICANCE OF THE RESEARCH.**

Firstly, this study may be useful to lawmakers and policy formulators as it can be used as reference material for the enactment of the law and policy formulation.

Secondly, it's important to the researcher as it is a mandatory requirement to attain a bachelor of law.

Third, the study also helps the researcher to gain more knowledge on the subject of the research.

Fourth, the study recommends that lawmakers come up with amendments to the existing legislation and regulations on the unexecutable death penalty.

Fifthly, the research is useful to other researchers and academicians who will need to investigate some issues relating to the topic of the death penalty.

### **1.7 RESEARCH METHODOLOGY**

The researcher used both primary data and secondary data.

#### **1.7.1. Primary data**

In the primary data collection method, the researcher uses two tools interview and a questionnaire.

## **Interview**

Face-to-face interviews are used to allow the interviewer an opportunity to have a discussion with the subjects and even to get more clarification on points, to allow more flexibility, and to ask more details questions on the subject. In the research, their semi-structured questions arise during the interviews with the different offices such as the office of the Advocate, prisoner office, from Tanga to ensure more information. So, an interview is aimed at getting information through conversation from different individuals based on a specific issue and it helps to get quick answers from the respondent and their experience about the topic because it involves questions and answers at the same time.

To ensure there is sufficient data the researcher employed the interview method which was conducted on the respective and relevant people including lawyers who practice law, human rights activists, and those individuals where all of them has different opinions pertaining to the issue of the death penalty,

## **Questionnaire,**

This also was among the methods which were employed by the researcher where the set of questions was prepared and provided to individuals to obtain their personal opinions. The research questions provided to the relevant people include lawyers practicing law, individual citizens, and those people affected by the death penalty, where their opinions pertaining death penalty were collected for the purpose of reaching the right conclusion.



### 1.7.2. Secondary data

The Researcher used documentary review as the method of collecting data such as books, journals, and articles, this source was used particularly in this chapter in helpful the source of data that are proposed to be used, published and unpublished materials in the form of textbook, dissertation (thesis), articles, reports, unreported judgment of superior courts and dictionaries. Also, data will be collected through library research from Ruaha Catholic University (RUCU) and to use of internet sources like law websites and Google Books.

## 1.8 SCOPE AND LIMITATION OF THE STUDY

### 1.8.1 Scope of the study

The study will be limited to Tanzania's mainland. Though this study does not intend to cover only one region in the country the researcher can't go across all regions to conduct research thus since many Tanzanians are faced with this problem and the accused are convicted with the same law the study would not provide results that are far remotely from other regions when the same study is conducted.

### 1.8.2 Limitations of the Study

In accomplishing this study, the researcher encountered a lot of challenges that limited her in preparing that research paper but also to obtain a good research paper the researcher employed different means to resolve those challenges. The following are limitations of the study and means applied by the researcher to resolve those challenges:-

**Time limitation:** the time provided for the collection of data was minimal hence leading to insufficient data collection. To resolve that problem the researcher decided to employ

other means of data collection like a documentary review rather than depending on those means required the researcher to be in the area of the field, hence this enabled the researcher to obtain enough data despite having a minimal time of data collection in the area of the field.

**Poor Cooperation from the respondents which hindered the collection of data:** This was also among the problems where the institution responsible for facilitating easy collection of data was less cooperative hence making the researcher spend a lot of time asking for permission. To tackle that problem the researcher decided to use other means of data collection like documentary review and other methods which enabled the researcher to obtain the required information.

**Financial problem,** the researcher faced various problems such as financial problems simply because the research process of collecting data uses a lot of money for transport from one place to another, interview guidelines, and printing.

## CHAPTER TWO

### CONCEPTUAL FRAMEWORK ON ANALYSIS OF CRIMINAL JUSTICE AND ALTERNATIVE PUNISHMENT IN TANZANIA

#### 2.0 INTRODUCTION

The death penalty is among the supreme punishment provided to those people who committed murder crimes and other capital offenses<sup>13</sup>. It is an old mode of punishment that was provided as a general return to retribution in criminal charges but the penalty has been for several centuries highly controversial. It has both strong supporters and severe critics who debate on the moral and ethical, constitutional and legal, humanitarian and practical issues surrounding it.

In this particular chapter the coverage is on the criminal justice system, a brief history of the death penalty worldwide, and its history in Tanzania, which will also cover the mode of execution and the practice of this punishment in other countries.

#### 2.1 CONCEPT OF CRIMINAL JUSTICE SYSTEM

**Criminal justice** is the structure of laws, rules, and offices planned to hold hoodlums responsible for their offenses and offer assistance to them to reestablish their casualties as much as conceivable. The criminal justice system has different components which are; law enforcement, criminal justice professionals who enforce laws and apprehend violators, and the court system, The court prosecutes criminal cases and defends against those prosecutions while protecting witnesses and victims who come forward to participate in

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<sup>13</sup> Campbell, H.M.A, Black's Law Dictionary. 1991 pg 277

court proceedings also is responsible for analyzing and creating new laws that prohibit or penalize behavior, corrections, correctional agencies are tasked with the housing punishment and rehabilitation of law offenders.<sup>14</sup>

A Criminal justice system; is an organization that exists to enforce a legal code. The criminal justice system in Tanzania has a lot of challenges that in the end lead to injustice and unfair decisions or sometimes no decision at all, which result in infringement some of human rights such as torture to the offender who is waiting for a long time for the trial or decision to be made especially for those commit murder. There are three branches of the criminal justice system the police, the court, and the correction system.<sup>15</sup>

**Police,** police are the gracious strengths in charge of implementing laws and open arrange at a government, state, or community level. federal bureau of examination. Government officers can as it were bargain with things that are expressly inside the control of the federal such as the Federal Bureau of Investigation. Federal officers can only deal with matters that are explicitly within the power of the federal government. A country police officer may spend time responding to emergency calls, working at the local jail, or patrolling areas as needed, to investigate suspects in firearms trafficking or provide security for government officials.

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<sup>14</sup> <https://www.umassglobal.com> accessed on 29<sup>th</sup> desember 2023 at 11:24am.

<sup>15</sup> <sup>15</sup> <https://www.umassglobal.com> accessed on 29<sup>th</sup> desember 2023 at 11:24am

State police have the authority to enforce state-wide laws, including regulating traffic on highways, local or country police on the other hand have a limited jurisdiction with authority only in the town or county in which they serve.<sup>16</sup>

**In court**, once a crime has been committed and a violator has been identified by the police the case goes to court. A court is the system that has the authority to make decisions based on the law.

Criminal cases are heard by the trial court with general jurisdiction therefore the judge and jury are both present it is the judge's responsibility to determine the guilt and determine the punishment.<sup>17</sup>

**Corrections**, the correction system more commonly known as the prison system is charged with supervising individuals who have been arrested, convicted, and sentenced for a criminal offense. Prison is different from a jail. A jail provides for temporary confinement usually while an individual awaits trial or parole. Prisons are facilities built for individuals serving sentences of more than a year, where a jail is small and local, prisons are large and run by either the state or federal government.

## 2.2 THE CONCEPT OF CRIMINAL JUSTICE STAKEHOLDERS

Are people groups and teachers influenced by the criminal equity framework and its open approaches, the partners can be inside partners and outside partners.

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<sup>16</sup> <https://www.courses.lumenlearning.com> accessed at 21 March 2024.

<sup>17</sup> *ibid*

**Internal stakeholders** include police officers, judges, probation officers, parole officers' correction officers, lawyers, court personnel, and those who are responsible for enforcing the law and the interpretation of the law are part of the criminal justice system internally.

**External stakeholders** include elected officials, the media, groups who serve victims of crime, businesses, families, schools, and society in general. When someone is the victim of a crime they are impacted. The media is also impacted when reporting on a crime and those who receive the media reporting of a crime are impacted as well, in one way or another everyone is affected by the criminal justice system.<sup>18</sup>

## 2.3 CONCEPT OF ALTERNATIVE PUNISHMENT

Can refer to just about anything that is not an outright sentence of incarceration. The logic of elective discipline is based on keeping the sentenced individual free while forcing a discipline that will act preventively against committing another felony. For example, an alternative punishment to the death penalty is life imprisonment, as it was provided under section 198 of the penal code cap 16 R.E 2022.

## 2.4 CONCEPT OF DEATH PENALTY

**Death penalty;** refers to capital punishment which is the judicially ordered execution of a convict as a punishment for every serious crime committed in a breach of a certain law that prohibits the occurrence.

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<sup>18</sup> <https://www.courses.lumenlearning.com> accessed on 21 March 2024

## The History of the Death Penalty in Tanzania

### Pre-colonial period

History shows that during the pre-colonial era, the death penalty was not a punishment used to deter murderers in African societies, therefore, the societies had their ways of punishing murders, for instance, in Tanganyika in some societies like Chagga, if an individual committed murder his relatives were obliged to slaughter a goat and pour the blood of that goat to the accused as a sign of forgiveness and both accused family and victims family will cut the meat of that goat in ceremony to symbolize forgiveness<sup>19</sup>.

In other societies like Hehe, in case a person committed murder elders were supposed to sit together with both families that are, of the victim and accused, and settle the dispute amicably, and the accused family was required to pay cattle as compensation to the victim's family and thereafter they celebrate as a symbol of peacemaking.

### Colonial period

During the German occupation of Tanganyika, death existed as a punishment used by the Germans to get cheap labor in their plantations. This was done to the persons who attempted to avoid working on the plantation owned by the Germans. However, after the Germans were defeated in the First World War of 1914-1918, Tanganyika territory was handed over to the British authority in 1920 as a mandate territory where by in 1922

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<sup>19</sup> R. Walter, *How Europe Underdeveloped Africa*, East Africa Educational Publishers: Nairobi, 2001

British colonial rule had full powers of legislation and administration system in Tanganyika territory<sup>20</sup>.

The British jurisdiction over Tanganyika was exercised under the powers vested in the Crown under the Foreign Jurisdiction Act 1890, and in 1920 British issued the Tanganyika Order in Council (TOC) that operated as a constitution. Through the Tanganyika Order in the Council of 1920, some of the laws that were applicable in other British colonial territories were imported into Tanganyika especially from India through the reception clause which stated that:

“Subject to the provision of this order such Civil and Criminal jurisdiction shall for as circumstance be exercised in the conformity with the civil procedure, Criminal procedure and Penal code of India”<sup>21</sup>

The application of the law from other British colonial territories like India by the Tanganyika Order in Council of 1920 was further affected whereby the Indian Penal Code of 1890 was received and became part of the criminal law and hence became applicable in Tanganyika-by-Tanganyika Order in Council of 1920.

The code contained provisions for the offenses punishable by the death penalty including the offenses of waging war against the government, abetting mounting by a member of the armed force, fabricating false evidence to procure connection for a capital offense like murder, abetting suicide of a child or insane persons<sup>22</sup>.

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<sup>20</sup> *ibid*

<sup>21</sup> The Tanganyika Order in Council of 1920

<sup>22</sup> The Indian Penal Code 1980



However, with the Tanganyika Order in the Council of 1920, the application of common law doctrines of equity and statute of general applications did not render the application of the Customary law to be nullity because the order allowed the application of Customary criminal law in the case where the natives were the parties in the dispute in the said customary law provided that it is not repugnant to the justice and morality or against the Tanganyika Order<sup>23</sup> in Council. Meanwhile, the imported laws were mostly applied by the Courts, particularly on the offences that attracted capital punishment the death penalty inclusive, and in case of any conflict of the laws that is native law (customary law) and Statutory laws (received laws) the Statutory law would prevail as it was stated by the Wilson J in **Gwao bin kilimo V Ifunda bin Ifuti**<sup>24</sup>, that:

“The only standard of justice and morality is the British one and the most appreciation of the law should be vested to the law from England because Customary laws of Tanganyika are barbaric and not in the standard of justice”

Regardless of the application of customary criminal law, the main source of criminal law in Tanganyika was the Indian Penal Code which was imported into the entire regions of East Africa via India. The Code operated in East Africa till 1930 when each colony started to make its own criminal law based on the famous queen and the Criminal Code of 1899<sup>25</sup>. However, the Indian Penal Code of 1890 was later modified to be known as Penal Code Chapter 16 of the Law (Revised).

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<sup>23</sup> The Tanganyika Order in Council of 1920

<sup>24</sup> [1938] TLR 403

<sup>25</sup> J. Mapunda, *Criminal Law and Procedure Part One*, 1996.

## Post-Independence

The Judicature and Application of the Laws Ordinance (JALO) <sup>26</sup>was enacted to replace the Tanganyika Order in Council <sup>27</sup> after the Tanganyika gained its independence in 1961. The law i.e. JALO like the Tanganyika Order in Council recognized the application of the received laws that is the law which applied in England and other British colonial territories like that of India to be applied to our territory.

Tanzania's legal system is based on the concept of continuity, in which after independence the government inherited the British legal framework, therefore, Penal Code CAP 16 was and still is the law regulating criminal offenses in Tanzania with few amendments and modifications due to the political and social-economic reason to fit the contemporary environment.

The death penalty was imported from India under the Indian Penal Code of 1890 and also appeared in the Penal Code CAP 16 of the Laws Revised, However, the current position of the Penal Code on the subject of the death penalty is slightly different from the Code of India because the offenses which were punishable by death in that Code were many.

## Methods of Execution

This punishment has several methods of execution, and Human Rights activists classify those methods as painful. The method of executing the penalty differs from one jurisdiction to another, but all in all the final result is to make sure that the life of the

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<sup>26</sup> [ CAP 453 R.E 1961]

<sup>27</sup> The Tanganyika Order in Council of 1920

murderer is taken like of the deceased person. However, execution by hanging method is considered to be worse than gas chamber, lethal injection, and electric chair.

In Tanzania, the manner of execution of the death penalty is directed under the Penal Code <sup>28</sup> which states that

‘When any person is sentenced to the death penalty, he shall suffer death by hanging’

There is an alternative mode of execution of the death penalty in Tanzania like in other countries for instance in the United States of America where other methods like lethal injection, gas chamber, and electric chair are used in the execution of the death penalty. As pointed the death penalty by hanging is classified by human rights activists’ barbarous method of taking one’s life this was also supported by High Court Judge **Mwalusanya** in the case of **R V Mbushuu**<sup>29</sup> where he stated that;

“The process of execution by hanging to death is particularly gruesome. One leading doctor describes the process as slow, dirty, horrible, brutal, uncivilized, and unspeakably barbaric. The prisoner is dropped through a trapdoor to eight and a half feet with a rope around his neck. The intention is to break his neck so that he dies quickly. The length of the drop is determined based on such factors as body weight and muscularity or fatness of the prisoner’s neck. If the hangman gets it wrong and the prisoner drops too far, the prisoner’s head can be decapitated or his face can be turned

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<sup>28</sup> [CAP 16 RE 2022]

<sup>29</sup> [1994] TLR at pg 152

away. If the droop is too short then the neck will not be broken but instead, the prisoner will die of strangulation.

### **The methods they use**

Execution by hanging is still widely used, which was also applied in Tanzania during the time it was executed, and classified by human rights activists to be the most cruel method of taking one's life as stated by Mwalusanya, J in the case of Mbushuu<sup>30</sup>

Hanging is a lawful method of execution in 58 countries and the sole method in 33 of those. Other executions of the death penalty are by shooting which was carried out in the countries of Indonesia, Lebanon, Libya, Palestine, Uzbekistan, Vietnam, and Yemen.

Publicly beheaded is mostly applied in Saudi Arabia and the report shows that in the year 2020, 65 people were executed for murder and drug offences. Saudi Arabia is the only country that normally uses that method.

Lethal injection, gas chamber, and electric chair are other methods of execution of the death penalty that are mostly applied in the USA, and for the year 2020, 40 people were executed by lethal injection.

### **Under Sharia law**

The death penalty is allowed under Sharia law which is practiced in most Muslim countries. This provided that the person who kills with malice aforethought the same must be killed. The death penalty has been imposed for other offenses like adultery, drug

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<sup>30</sup> supra

trafficking, rape, sodomy, and apostasy. Execution under sharia for instance in adulterers is carried out by stoning <sup>31</sup>

## Offences punishable by the death penalty in Tanzania

There are a number of offenses in Tanzania that are subject to the death penalty which have been provided herein below.

### Treason

This is one of the offenses that is punishable by death in Tanzania like murder also this has no statutory definition but, it is provided under section 39 of the Penal Code<sup>32</sup> to mean

*Any person who is under allegations in the United Republic:*

*(a) In the United Republic or elsewhere murder or attempt to murder the president*

*(b) In the United Republic levies war against the United Republic, shall be guilty of treason and shall be liable on conviction to suffer death*

The Courts in Tanzania as merely set the upper limit of punishment to this offense rather than mandatory sentence as interpreted by the word “shall be liable on conviction to suffer death. Nevertheless, no person has ever been sentenced to death for a treason offense since the independence of the United Republic of Tanzania and no case has been reported with that nature, however in the case of **SMZ V Machano Khamis Ally & 17**

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<sup>31</sup> Universal Islam Declaration of Human Rights, 1982

<sup>32</sup> [CAP 16 RE 2022]

**Others**<sup>33</sup> a case that has been decided in Zanzibar where the respondents were alleged to have committed treason against the Revolutionary President of Zanzibar. In which the Court quashed the indictment as an element of the offense was not made out.

## **Murder**

‘When a man of sound mind and the age of majority unlawfully kills any reasonable creature in rerun nature under the king’s peace, with malice aforethought, either expressed by the party or implied by the law, so as the party wounded or hurt die of the wound or die then that is murder. According to him for an offense of murder to stand there must be actual killing and that killing should be of a living man and it should have been done with a person who is of sound mind and it must incorporate to kill (malice aforethought or men’s rea) then those condition amount to murder<sup>34</sup>.

There is no statutory definition of the term murder, however, under Chapter 16 of the Tanzania Penal Code<sup>35</sup>, it is provided that, any person who of malice aforethought caused the death of another person by unlawful act or omission is guilty of murder. The laws go further to provide a person who committed murder shall be sentenced to death. The sentence of death under the law is mandatory provided and it’s administered to a fair justice by proven beyond reasonable doubt that the accused committed murder with malice aforethought. In practice, most prosecution for murder results in a verdict of

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<sup>33</sup> Court of Appeal of Tanzania Criminal Application no 08 of 2000 TZCA 22 (unreported)

<sup>34</sup> W. Jephason, *Criminal Law*, Butter Worth Publishers: New York, 1999

<sup>35</sup> [CAP 16 RE 2022]

manslaughter which does not carry the death penalty. It has been provided by section 196 of the Penal Code and its punishment has been provided by virtue of section 197.<sup>36</sup>

The High Court is the first instance for serious offenses such a murder and treason. In conducting trials, a judge in the High Court seats with assessors whose opinions are not binding, and trial in that court cannot commence before a preliminary inquiry (committal proceeding) which could be conducted in a subordinate Court that is Primary Court, District Court, and Resident Magistrate Court as provided under section 178, 243 and 244.<sup>37</sup>

As pointed out earlier under this chapter; murder and treason offenses are punishable by death the trial is made by the High Court, but, the Minister for Justice is empowered by the law that is section 173 of the CPA to vest any Resident Magistrate with power to try any categories of offenses including murder that would ordinarily be tried by the High Court, however a sentence passed by that Courts exercising extended jurisdiction be confirmed by the High Court in case no appeal to Court of Appeal has been lodged by the convicted person. It required without delay that the record of the case or certified copy of it within the time prescribed be transmitted to the High Court for confirmation because no sentence of death shall be executed without confirmation by the High Court and if such sentence was passed by the subordinate court with extended jurisdiction according to section 175<sup>38</sup> of the CPA.

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<sup>36</sup> [Cap 16 R.E 2022]

<sup>37</sup> [CAP 20 R.E 2022]

<sup>38</sup> Ibid

Once a death penalty is imposed by the High Court or confirmed by it the judge who does so shall as soon be practicable transmit the records of the case or a certified true copy of it to the president with a written report of recommendation and observation by him and the Court on why he sentenced the accused death as provided under Section 176 of the CPA<sup>39</sup>.

But before the reference has been made to the President the Court has a duty to inform the victim of the death penalty of all his or her rights and a period if he wish to appeal against the sentence. If no appeal or if the sentence is upheld in the appeal, then as soon as conveniently the presiding judge shall forward to the President a copy of notes on the decision taken per section 325 (1) of the CPA. Once the President considers it he shall communicate to the said judge or his successor in office on terms and decision reached thereon and substance therefore entered into Court records as provided under section 325(2).<sup>40</sup>

## 2.5 CONCLUSION

The death penalty is among the supreme punishment provided to those people who committed murder crimes and other capital offenses<sup>41</sup>. It is an old mode of punishment that was provided as a general return to retribution for criminal charges but the penalty has been for several centuries highly controversial. It has both strong supporters and severe critics who debate on the moral and ethical, constitutional and legal, humanitarian and practical issues surrounding it.

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<sup>70</sup>[CAP 20 RE 2022]

<sup>40</sup> ibid

<sup>41</sup>H.M.A, Campbell Black's Law Dictionary. 1991 pg 277



This particular chapter, the coverage is on the brief history of the death penalty worldwide and its history in Tanzania, which will also cover the mode of execution and the practice of this punishment in other countries.

## **CHAPTER THREE**

# **THE LEGAL FRAMEWORK GOVERNING THE RIGHT TO LIFE AND DEATH PENALTY IN TANZANIA**

### **3.0 INTRODUCTION**

This chapter addresses the legal framework governing the right to life in Tanzania. The issue of protection on human rights, particularly the right to life is protected not only by individuals or society, there are specific laws that duly protect individual's rights against being deprived by any means, those laws start from the international level and extend to regional level and up to the National level. The purpose of this is only to ensure that an individual's right to life is not deprived as a means of execution of a sentence or any kind of deprivation of their right to life. So, this chapter will provide a clear detail pertaining protection of the right to life to individuals starting from the International, Regional to National levels.

For the purpose of this chapter, attention will be based on international instrument and regional instruments that have been ratified by the United Republic of Tanzania and domestic laws governing the right to life in Tanzania

### **3.1. LEGAL FRAMEWORK AT INTERNATIONAL LEVEL**

#### **3.1.1. Universal Declaration of Human Rights (UDHR)<sup>42</sup>**

This is among the International Instruments that though do not actually prohibit the death penalty as a mode of punishment but it guarantees the right to life to every

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<sup>42</sup> Universal Declaration of Human Right (UDHR), 1948

individual. So, this simply means that if it is promoting the issue of protection of the right to life it is undeniable fact that it is against the issue of the death penalty which is contrary to the right to life. It is clearly stipulated by virtue of Article 3 of the Universal Declaration of Human Rights which provides for the right to life, liberty, and security. So, this shows that the Universal Declaration of Human Rights it secures the right to life for each individual. Also, article 5 of the same Universal Declaration of Human Rights<sup>43</sup> provides for the prohibition of individuals to be subjected to torture or cruel, Inhuman or degrading treatment or punishment. This led to the rise of debate about the manner of the death penalty which includes the use of the electric chair, use of lethal injection, hanging to death, and other manners of punishment in terms of torture, cruel, inhuman, and degrading treatment to those who sentenced death penalty so due to that those human right activists use that article as they are focal position toward argue against the issue of the death penalty. So they have all reason for arguing that manner of punishment to be abolished.

### **3.1.2. African Charter on Human and Peoples Right (ACHPR)<sup>44</sup>**

This is among of the Regional instrument pertaining the issue of right of individuals against deprive of people's right to life and the provision of cruel, degrading and inhuman punishment. This has been clearly provided by virtue of Article 4 of the African Charter on Human and Peoples Right which among of other things the law is clearly provide that every human beings shall be entitled to respect for his life and integrity of his personal, no one may be arbitrary deprived of this right. The reason was that human

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<sup>43</sup> *ibid*

<sup>44</sup> African Charter on Human and Peoples Right (ACHPR), 1981

beings are inviolable so they are right to life has to be protected and the law has to provide the priority on protection of human rights. Also, Article 5 of the African Charter on Human and Peoples Rights<sup>45</sup> requires the state to abolish all forms of torture, cruel, inhuman, or degrading punishment. Among that punishment, though the law does not actually provide the death penalty is among those degrading punishments that the African Charter on Human and Peoples Right need to be abolished in society

### **3.1.3 The African Charter on the Rights and Welfare of the Child (ACRWC)<sup>46</sup>**

This is among the regional instruments that have provided for the protection of the right to life, though it has gone specifically to children it has the same status in protecting deprive of individuals right. This has been clearly provided by virtue of Article 5(1) of The African Charter on the Rights and Welfare of the Child<sup>47</sup> which particularly provides for inherent to life to every child and it require that right to be protected by the law. So, this simply means that whoever deprives the right of the particular child has to be subjected to the law and has to be punished accordingly.

### **3.1.4 International Covenant on Civil and Political Rights (ICCPR)<sup>48</sup>**

This is among of the international instruments that have provided for the protection of individuals' lives by the law. ICCPR is an International treaty adopted in 1966. The UK agreed to follow the treaty in 1976. It enables people to enjoy a wide range of rights including those relating to freedom from torture and other cruel, inhuman, and

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<sup>45</sup> African Charter on Human and Peoples Right (ACHPR), 1981

<sup>46</sup> The African Charter on the Rights and Welfare of the child (ACRWC), 1990

<sup>47</sup> *ibid*

<sup>48</sup> International Covenant on Civil and Political Rights (ICCPR), 1966

degrading treatment or punishment particularly under Article 7 of the International Covenant on Civil and Political Rights. The manner of execution of the death penalty is degrading and inhuman punishment then are against the treaty and that is a reason for it being used as a focal point for human rights activists toward pursuance of the abolition of the death penalty as it is inhuman and degrading in nature. Article 6(1) –(6) of the International Covenant on Civil and Political Rights<sup>49</sup> has the same views as that provided under the American Convention on Human Rights where Article 6(1) provides for the requirement of protection of individuals' rights against death, also under Article 6(2) and (3) of International Covenant on Civil and Political Rights<sup>50</sup> provide for the provision of the death penalty to individuals who have committed serious crimes and also there are avenues provided under Article 6(4) of the International Covenant on Civil and Political Rights include amnesty pardon and commutation service. So, they are focusing on removing the issue of the death penalty as a manner of punishing people.

## **3.2. DOMESTIC INSTRUMENT**

### **3.2.1 The Constitution of the United Republic of Tanzania<sup>51</sup>**

This is among the mother Tanzania law which as it forms the basis of other laws. The Constitution of the United Republic of Tanzania by virtue of Article 14 provides for the protection of individuals' right to live and the protection of their society in accordance with the law. So, the Constitution requires an individual's right to life to be protected in accordance with the law and also provides that purposively to ensure the protection of

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<sup>49</sup> International Covenant on Civil and Political Rights (ICCPR),1966

<sup>50</sup> *ibid*

<sup>51</sup> [CAP 2 RE 2008]

others' life from being deprived. Article 64(4) of the Constitution of the United Republic of Tanzania declares that any legislation which is inconsistent with the constitution is null and void. So, the presence of the death penalty which is contrary to the Constitution of the United Republic of Tanzania has to be declared null and void, so the provision of sections 196 & 197 of the penal code was declared to be null and void in the **Republic vs. Mbushuu Alias Dominic Mnyaroje & Kalai Sangula**.<sup>52</sup>

In this case, the accused person was convicted of murder and sentenced to death. In the case it led to the debate which rise that the death penalty is unconstitutional due to the death penalty it offends the right of dignity in the execution of sentence as provided under article 13 (6) (d) of the constitution of Tanzania, also death penalty is cruel, inhuman, and degrading punishment and treatment prohibited by article 13 (6)(e) and death penalty offend the right to life as provided under article 14 of the constitution of Tanzania.

So due to this issue raised the death penalty must be abolished so that do not go against the constitution.

### **3.2.2 Penal Code Cap 16 R.E 2022**

This is another law that contains the provision of the death penalty. This law is that provides the offense of the death penalty and the punishment for that offense. Section 196<sup>53</sup> provides that any person who with malice aforethought causes the murder of another person by an unlawful act or omission is guilty of murder. Section 197 of the

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<sup>52</sup> [1994] TZHC7 (22 JUNE 1994)

<sup>53</sup> Penal code Act cap 16 R.E 2022

Act<sup>54</sup> provides that a person convicted of murder shall be sentenced to death. Also, section 39 of the penal code<sup>55</sup> provides for treason that ‘any person who is under allegiance to the united republic in the united republic or elsewhere murder or attempts to murder the president or in the united republic levies war against the united republic shall be guilty of treason and shall be liable on conviction to suffer death.

So due to this Act violates the right to life as it’s against the constitution of the United Republic of Tanzania so it’s better to abolish the punishment of the death sentence and substitute it with another penalty.

### **3.2.3 The Criminal Procedure Act Cap 20 R.E 2022**

This also is the law that deals with the death penalty whereby the act gives the power to the president of the United Republic of Tanzania to sign the warrant of execution as provided under section 325 (3)<sup>56</sup> of the Criminal Procedure Act which states that the president shall issue a death warrant or an order of the sentence of death to be commuted or a pardon under his hand and the seal of the United Republic to give effect to that decision.

So according to this law, it seems that it's unexecuted because none of the presidents is willing to sign the warrant of execution as required by the law, so it’s better to abolish this penalty.

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<sup>54</sup> *ibid*

<sup>55</sup> *idem*

<sup>56</sup> The criminal procedure Act cap 20 R.E 2022.

### 3.3. CONCLUSION

Therefore, from the above discussion we have seen the legal framework that deals with the right to life and the death penalty, it shows how the right to life should be protected. So, under this chapter, we see the legal framework international and domestic which protects the life of the person.



## CHAPTER FOUR

### DATA ANALYSIS AND RESEARCH FINDINGS

#### 4.0 INTRODUCTION

The researcher has tried to find out whether the general public sees any importance on the death penalty as a means of controlling murder crimes. In that respect therefor the researcher has managed to grasp information from different groups of people categorized into three categories namely Lawyers, Human rights activists, and non-lawyers, and try to see whether the death penalty in Tanzania is unexecutable and the country is reluctant to adopt the new mode of execution or substitute with an alternative punishment lead to unjust for the inmates who waiting for its execution.

#### 4.1 LAWYERS

The researcher conducted the interview and questionnaire with 3 lawyers whereby 2 out of three argued against the death penalty as a mode of punishment against those who committed murder crimes because it violates the Constitution of the United Republic of Tanzania since the Constitution is the basic law of the land and any laws against the constitution has to be declared as null and void as provided by Article 75(5) of the Constitution of United Republic of Tanzania<sup>57</sup>, so to them the death penalty has no important and it has to be abolished from Tanzania law. In addition to that they argued that the purpose that was formed on the death penalty is unpracticed hence instead of resolving problems in society, it increases the burden on the Government on feeding, health treatment, and other services that are provided to them, so there has to be an

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<sup>57</sup> The Constitution of United Republic of Tanzania of 1977 as amended time to time

amendment on the death penalty. Also, this increases the depression of those individuals who are in court waiting for the trial of their case which took a long period of time till they have determined. So, to them death penalty is not a suitable punishment as no reformation can be made also in case the decision was made in a personal era there is no chance for the victim to rebuild it. So it is contrary to the Constitutional right to life.

However, there was another lawyer who argued for the death penalty to be enforced in Tanzania law due to the fact that the purpose of this punishment was to deter society from committing murder crimes. They argued that the act of removing the death penalty in Tanzania law will give a wide room for the commission of murder crimes. But the interesting question is that since the time it was executed were there no murder cases that were reported in Tanzania. If was there then what was the role of that provision in Tanzania laws? So, this directly shows that there is no way that the existence of the death penalty in Tanzania law has facilitated in effective control of murder crimes.

Generally, what I extracted from the lawyer, shows that they do not believe that the capital punishment in our jurisdiction so far is not important

However, the Law Reforms Commission on their side when conducting their investigation of some parts of the general public as to whether there is a need to abolish capital punishment the findings show, people do not support the abolition of it on the reason that the one who kills someone must be carried as the same as he or she failed to consider the life of the other person so there is no need of having a killer in the society. Nevertheless, those as Law Reforms Committee that so long as Tanzania is a member of

the International Community, do not see any importance of having the death penalty that is internationally avoided.

However, such a comment was made by the Law Reforms on the World Day of Abolition of the Death penalty, this indicated that The Committee was influenced by the surrounding environment, as Law Reforms has failed to take necessary measures until now in advising the government about the law of death penalty this gives the impression that they support the important of having such penalty.

## **4.2 HUMAN RIGHTS ACTIVISTS**

This is among the respondents that the researcher managed when they were discussing the impact of World Day of Abolition of the death penalty on Tanzania law, where on that conference it was argued that the death penalty is not relevant to Tanzania, let fight in abolishing this form of punishment because it is nothing rather than violating of fundamental rights of human. One of the speakers said, the penalty is there for the purpose of revenge and there are other offenses that seriously to the extent of murder but yet are not revenged, for example, rape, why rapist do not rape? She asked. Also, it was lamented concerning the provision of section 325 (3) of the CPA <sup>58</sup> that there is a delay in executing the penalty that resulted in the convicted murderers living under horrible conditions in the cell, keeping them without knowing their final determination that results to psychological torture in waiting for death, so recommended that though the murdered committed a serious offense the good solution is not a sentence them to death but is to separate from the general republic by sentencing them to life

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<sup>58</sup> [CAP 20 RE 2022]

imprisonment. Also, it was suggested that the government should implement the Nyalali Report of 1991,<sup>59</sup> which recommended the abolition of the death penalty. What inspired human rights activists is that the penalty of death has no importance other than being revengeful to the accused it violates fundamental principles of human rights.

The arguments of human rights activists are biased because those who always do speak are concerned with the rights of the convicted person and forget the rights of the deceased person by the reason that “two wrongs cannot make one right”, what they mean to execute murder is same of doing wrong as what the accused did.

The human rights activists argued on the basis of the bad side of the death penalty, but they always not take much time to discuss the victim’s (deceased person) rights to life, which has been curtailed by the accused they just consider the death penalty that imposed to the accused person which is against to the human rights. Of course, it is wrong in law to keep for an undefined period a convict of murder to wait for something that is unknown that is torture to him bearing in mind that, the conditions of our prisons are not in good order to the extent for keeping the person who sentenced to death over ten or twenty years; therefore it is better for section 325(3) of the CPA <sup>60</sup>to be amended which gives power to the President to issue a death warrant or to direct otherwise for giving a specific period of time or commute the sentence or pardoning the convicted in order to avoid the psychological torture that which convict suffers while waiting for the final result which they don’t know

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<sup>59</sup> Nyalali Report, The Report and Recommendations of the Presidential Commission on Single Party or Multiparty system in Tanzania on Democratic System in Tanzania, Dar-es-salaam University Press, Dar-es-salaam, 1992

<sup>60</sup> [CAP 20 RE 2022]

### 4.3 NON-LAWYERS

This group involved people who professional are not lawyers and included the ordinary citizens whom the researcher interviewed and supplied questionnaire and received the answers, there, were about ten people, five were secondary teachers, two were prison police officers and three were ordinary citizens. In their response to the questions them includes police officers replied that the law of the death penalty is important due to the current situation of life and poverty encouraging more commission of murder hence if the death penalty is abolished it may encourage more criminal matters especially armed robbery offences which contribute murder cases. However, two of them who were ordinary illiterate people who knew nothing about the death penalty and were free from this were against it and said that the aim of punishment is to give a lesson to the offender, therefore if such an offender has been executed to death he won't get chance of neglect his wrongful deed. What is inspired by this group is that the majority of them still support the death penalty by showing its importance as a means of controlling crimes within a society but few of them do not appreciate it.

### 4.4 ATTITUDE OF COURTS OVER THE DEATH PENALTY

The Court's attitude over the death penalty was shown by the Court of Appeal of Tanzania decision in the case of **Mbushuu V Republic**,<sup>61</sup> it was an appeal from the High Court in which the accused was convicted of murder with malice aforethought hence he was sentenced to life imprisonment instead of mandatory sentence of death penalty due to the reason that the death penalty is cruel and inhuman and it's against the Constitution

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<sup>61</sup> supra

of United Republic of Tanzania <sup>62</sup> Articles 13(6)(d) and (e) plus Article 14 therefore Court sent the convict to life imprisonment. When matters referred to the Court of Appeal one of the issues determined was that of whether the law governing the death penalty is lawful law. On this issue, the court found that the law of the death penalty is lawful and it was saved by Article 30(2)<sup>63</sup> therefore is not unconstitutional as the Court of First Instance held it. Further, the Court said that they are aware of towards abolition of the death worldwide, but at present, even international instruments still provide for the death penalty quoted Paul Sieghart in the International Law of Human Rights<sup>64</sup>,

Therefore, the Courts of Appeal quashed the decision made by the High Court against the death penalty and declared the penalty constitutional

The position of the Court over the death penalty has not overruled till now hence the case of **Mbushuu V Republic** <sup>65</sup> give the position that the law of the death penalty in our Court is still important that's why we still enforce it and people are sentenced to suffer death, however on the other side of procedures such penalty cannot be executed till when the President has signed the warrant of death or to direct otherwise according to law.

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<sup>62</sup> The Constitution of United Republic of Tanzania of 1977 as amended time to time

<sup>63</sup> *ibid*

<sup>64</sup> P. Sieghart, The International Law on Human Rights, Oxford University Press: London, 1983

<sup>65</sup> [1995] TLR 94 (CA)

## 4.5 CONCLUSION

Therefore, there is a need for an amendment to be done on the issue of the death penalty if the purpose is to deter more commission of murder crimes as seen there are some countries that have abolished the death penalty, and still, the rate of commission of murder crimes increases also there are countries that have to withhold the penalty and yet there is an increase in commission of murder crimes. So, this shows that there is no exact proof that enforcement of the death penalty in Tanzanian law has deterred individuals from commissioning of murder crimes hence it has to be removed in Tanzania Laws as it does not achieve its purpose.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.0 INTRODUCTION

This chapter presents the conclusion and recommendations of the study, basically, this emanates from the data collected, analyzed, and presented in the previous chapter. The recommendations help to shed some light on the various stakeholders particularly on the amendment of the law pertaining to the issue of the death penalty and the need for alternative punishment of the death penalty.

#### 5.1 CONCLUSION

The purpose of this study was to examine the law relating to the death penalty in Tanzania and to see whether there is a need to adopt a new mode of execution or to replace it with an alternative punishment. It has been noted from this study that the law relating to the death penalty is based on the Indian Penal Code<sup>66</sup> adopted from the Code of India this is due to historical reasons.

The current situation of the penalty in Tanzania exists theoretically rather than practically because since 1994 no execution has been carried out despite the Court of Law sentencing people to death. However, Currently, there are movements toward the abolition of the death penalty worldwide, and in the case of Tanzania jurisdiction that penalty is argued by a large number of people to be important, due to the changes that take place in our country in terms of social, economic and political does not attracting in the rushing to the

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<sup>66</sup> [CAP 16 RE 2022]



abolition of death penalty due to the fact that majority of people are very poor in terms of economics and socially therefore once death penalty is abolished, it will encourage people to do whatever in order to sustain their lively hood. In such case, they will be in a position even to kill their fellows in order to get something to satisfy their life. We have been witnessing people involved in the armed robbery offense which amounts to the perpetuation of murder offence. The evidence shows most murder cases reported in our Courts of Law are results of armed robbery according to the police officers I interviewed them.

Although it is argued by a number of people that the punishment is important in our jurisdiction we can ask ourselves why the commission of murder is still there. So it's better to abolish the death penalty and provide education to people about the importance of the life of another person so as to prohibit the commission of murder.

Not only that but also murder arises in our society due to superstitious beliefs, we have witnessed that most people have been reported killed by groups of people suspected of being witches for example in Shinyanga they argued that those grandparents with red eyes are the ones who do so and other regions of lake zones, also in Mbeya region people were been killed and their skin were taken off for superstitious act, therefore this makes the death penalty is important.

However, the provided views have been criticized as instead of resolving murder crimes by hanging people to death the rate of commission of murder crimes is still the same. So instead of the Court having the same standing on the death penalty, there must be an amendment to the death penalty and this can be made by impacting education on the

values of others' lives, which will enable others to protect the life of other individuals. Also, in enforcing that penalty, there is delay hence leading to the psychological torture of those individuals who sometimes spend more than twenty years in custody awaiting their litigation. The impact also exceeds the government as there is a need for the government to provide money for the purpose of food, health treatment, and other needs which were able to be used in other important matters that have benefited society in general.

So, it is important for the amendment of the sentence due to the reason that the execution is enactive hence this has made people encounter psychological torture especially those who committed murder crimes and are jailed waiting for their death of execution. Also, murder cases take a long time before they have been adjudicated so this leads to government costs in terms of food, medical services, and clothes. Also, there is a cost in the rehabilitation of prison facilities to accommodate those people who are convicted of a murder case. So due to that, there is a great need to amend the law. The death penalty also in case it has begun to be executed there will be a problem that will lead to the deduction of productive force. So better measures have to be taken to abolish the death penalty through educating citizens on the protection of dignity and the right of others to life.

## **5.2 RECOMMENDATIONS**

We witnessed that in the third phase Government of the United Republic of Tanzania under former President of Mkapa, there was no person executed for the death penalty in such case number of people were in prisons awaiting their final determination the new

president was required to execute but he didn't execute them, then the fifth phase of Government which was under President Magufuli the situation was the same. And the sixth phase of Samia Saluhu Hassan the situation is the same as no execution has been made. Section 325(3) of the CPA gives power to the President to think whether to execute or pardoning those convicts<sup>67</sup>.

**The following are recommendations I have to make over this particular study to the authority concerned: -**

First, to make reasonable amendments to the law governing criminal procedure, especially on the provision of section 325(3) of the CPA<sup>68</sup> that required the President to direct what should be done to the murderers either to execute, pardon, or commute to another form of punishment far from death, amendment should be done in such a law for providing a specific period for the President to decide as to whether execution to take place or failure of it should be an imprisonment sentence instead of death penalty rather than the presence law which give discretionary power at what time to do so and also before the tenure of that President was over should direct what to be done the convict instead of living the burden to the incoming President

Second, although the right to appeal is provided to the convicted murderer there is a need to amend section 325(1) of the CPA<sup>69</sup> that before matters as soon as practicable referred to the President first should be referred to the Court of Appeal for the satisfaction on the conviction of murder by the Court of first instance. It is true that

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<sup>67</sup> [CAP 20 RE 2022]

<sup>68</sup> *ibid*

<sup>69</sup> [CAP 20 RE 2022]

sometimes there is human error whereby a Court can convict an innocent person, thus, to satisfy itself to the Court of Appeal before matters referred to the President should be referred to it by *suo motto*.

According to the reports shows that, there are a number of murder cases reported in our Courts but not yet decided therefore I recommend that there must be a need to appoint additional judges and Magistrates to utilize the power given under section 173(1) of the CPA<sup>70</sup>, so they should provide extended jurisdiction to reduce the burden of the murder cases reported in the Courts which are yet tried due to the different reasons that includes a small number of judges. Also, the Director of Public Prosecution should speed up the investigation process in the discovery of the evidence to support the case, as this is among the problems in the adjuration of the murder case is delaying of prosecution side to obtaining the evidence which takes a long period for the murder case be determined.

Third, there is a need for amendment of sections 196 and 197 and also section 39<sup>71</sup> which provides for the death penalty and substitutes it with another penalty like life imprisonment which is provided under section 198<sup>72</sup> for punishment to be executed under the law. Because the death penalty seems a theoretical and not practical thing.

Avoidance of doubt about the death penalty before the government rushes in the abolition of the death penalty there is a need to educate people about fundamental rights including the right to life in order, to make people respect one's life.

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<sup>70</sup> *ibid*

<sup>71</sup> The penal code cap 16 R.E 2022

<sup>72</sup> *ibid*

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