



PARLIAMENTARIANS FOR GLOBAL ACTION
Parliamentary Roundtable on the
Abolition of the Death Penalty
3rd May 2015
Protea Court Yard Hotel
Dar es Salaam

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Stop Crime, Not Lives
ABOLISH THE DEATH PENALTY NOW



The Role and Contribution of the Parliamentarians on the Abolition of the Death Penalty in Tanzania 03.05.2015



Quote

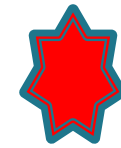
- ▶ "The possibility of a judicial error, for whatever reason, assumes ever greater danger because the death penalty is irreversible, it is the end of the matter, and it cannot be corrected. And mind you, convictions for murder in error (after the appeals) are not rare “

Justice Mwalusanya. 1994.

Rights are not gifts – we should fight for them – Mahatma
Ghandi



Major Epochs



- ▶ Early Stages
- ▶ Colonial Parliament
- ▶ Post Colonial Parliament
- ▶ Multi Party Parliament
- ▶ **Question: Is DP foreign or indigenous in Africa?** Mps are representatives of the people – do they represent fully all what all people want? Do they have discretion? Public Opinion?



Early Stages

- ▶ Introduced in Tanganyika, like elsewhere in the colonies, by the first colonisers – the Germans
 - ▶ Karl Peters, the head of the German East Africa Company was among the first people to introduce
 - ▶ death penalty imposed on ‘natives’ for very flimsy reasons including not working hard or absence from duty.
 - ▶ first victims of the death penalty in the territory was businessman Abushiri bin Salim who had led other Arab traders who had taken up arms to resist the German rule
 - ▶ heroes of Maji Maji resistance to German occupation were put under the ropes and hanged by the new rulers
- NB: A cruel punishment imposed as part of the general colonial project and aimed at cowing down the “natives” and prepare them for total exploitation.**



Colonial Parliament

- ▶ British who took over the territory which they called Tanganyika after the First World War
 - Mandate under the League of Nations and later a Trusteeship Territory under the United Nations after the Second World War.
 - institutionalised the death penalty by engraving it in the Penal Code in 1930 with major amendments in 1945.
 - To date, this law is still in force in independent Tanzania – 54 years after independence!

CHAPTER 16

PENAL CODE

An Ordinance to Establish a Code of Criminal Laws

[28 .September, 1945]

PART I

General Provisions

1930 No. 11
 1936 No. 10
 1939 No. 24
 1971 No. 26
 Acts—
 1943 No. 16
 1945 No. 21
 1976 No. 3





Post Colonial Parliament

- ▶ Retained the Penal Code in 1945.
 - To date, this law is still in force in independent Tanzania – 54 years after independence!
- ▶ Independence
 - First Phase Government 1961–1984
 - Second Phase 1985–1995 – Last Execution in 1994 – 21 executed.
 - Third Phase 1992–2005 – No Executions
 - Forth Phase 2005 – to date – No Executions

Tanzania has a total of 410 inmates in various prisons in Tanzania on death row *[Source Presentation On: Towards The Abolition Of Mandatory Death Penalty: The Prison's Perspective– A Case Of Tanzania :A Roundtable On Prison Reform In East Africa 11th–12th March 2015, Maanzoni Lodge Nairobi , Kenya: Acp. M.S. Semwanza (Ndc) Tanzania Prisons Services (Tps*

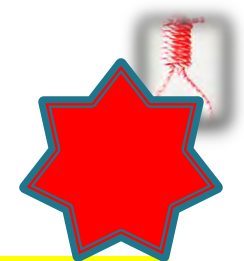


....

- ▶ Only in 1984 the Parliament begun to consider Human Rights in General – the 5th Amendments to the 1977 Constitution brought in Bill of Rights But Did not abolish the DP
- ▶ TANU constitution held Bill of Rights but ceased to be an annex to the Constitution in 1977! Moreover the



What can Parliament Do?



- ▶ Amend the Laws
- ▶ Controversies:–
 - DP as a political Question –
 - Human Rights is a Non Union Matters!
 - Whether abolition of DP in Tanzania will have any effect in Zanzibar unless the ZBR constitution is amended
 - Pretence that the People still want it! Whether the Parliament can decide on behalf of its people
 - The Court has refused to act – Mbushuu Dominic
 - Piece of wisdom – undo it now or face it tomorrow!
 - Lead by reasoning not succumb to mere emotions
 - DP is based on vengeance – Tit for tat – can we afford it?



Laws to be amended

- ▶ colonial piece of legislation enacted by a colonial parliament on 28th September 1945.
- ▶ the Zanzibar Penal Decree Cap 13 dated 31st December 1934. In fact the Zanzibar Penal Decree has been amended is now Zanzibar Penal Decree Act no. 6 of 2004 came to force in 16th August 2004.
- ▶ a total of 2562 were convicted for murder and were sentenced to death. Among them it were 6 women and 232 men who were actually executed.



What does the law say?

▶ Tanzania Mainland

- Treason – sections 39 and 40 treasonable offence
- Murder –
 - s. 196 that *"any person who on malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder"*.
 - S. 197 states that *"any person convicted of murder shall be sentenced to death"*.
- Misconduct of commanders or any service man in presence of enemy – First Schedule to the National Defence Act No 24 of 1966 see also the Regulations
- Special Tribunals Act

▶ Tanzania Zanzibar

- Treason – sections 28 bring about or cause the removal or change of the Government of Zanzibar
- Entering Zanzibar with intent of organising counter revolution S.29
- Instigating Invasion S. 30
- Murder S.197
- Child Destruction S. 217(1)



Laws to be amended

Penal Code:

26. Sentence of death Acts Nos. 55 of 1963 6th Sch.; 31 of 1997 Sch.; 9 of 2002 Sch.

(1) When a person is sentenced to death, the sentence shall direct that he shall suffer death by **hanging**:

Provided that, if a woman convicted of an offence punishable with death is alleged to be pregnant, the court shall inquire into the fact and, if it is proved to the satisfaction of the court that she is pregnant the sentence to be passed on her shall be a sentence of imprisonment for life instead of a sentence of death.

(2) The sentence, of death shall not be pronounced on or recorded against any person who at the time of the commission of the offence was under eighteen years of age, but in, lieu of the sentence of death, the court shall sentence that person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the Minister for the time being responsible for legal affair may direct, and whilst so detained shall be deemed to be in legal custody.



Reasons by Pro-DP

- ▶ If we execute murderers and there is in fact no deterrent effect, we have killed a bunch of murderers. If we fail to execute murderers, and doing so would in fact have deterred other murders, we have allowed the killing of a bunch of innocent victims. I would much rather risk the former. This, to me, is not a tough call."

John McAdams – Marquette University/Department of Political Science, on deterrence

- ▶ It helps to reduce crime by way of deterrence
- ▶ It Complies with Religious Teachings – laws
- ▶ In fact the Murderer Has Lost the Humanity –
- ▶ Public Support – multi party? Risky – where public is ignorant
- ▶ It avenges for the deceased spirit
 - Ref: Prof Othman example– a widow and two sons



Reasons by Abolitionists

- ▶ **Death Penalty is Against Right to Life**
- ▶ **The death penalty is inconsistent with notions of human dignity and liberty**
- ▶ **The death penalty is ineffective to reduce crime rate**
- ▶ **Death Penalty is not preferred by the international human rights law**
- ▶ **Death penalty is Inconsistent with the international standards**
 - **The United Nations system – UDHR and ICCPR**
 - **The Regional System:**
- ▶ **The Tanzanian criminal justice system do not guarantee justice**
 - **A Problem on Compliance with the Rule of law**
 - **A criminal System is Based on Retaliation and Revenge**
 - **Manufactured Cases**
 - **The Sluggish Prosecution of Alleged Offenders**



Challenges to Abolition



- ▶ **Legal**
 - Lack of Judicial Activism
 - Constitutional Impediments

- ▶ **Political**
 - Quest to appease the public
 - DP as a tool for maintaining order and power [Said Mamwindi]

- ▶ **Religious**
 - Skewed belief that there is a link between religion and the penalty

- ▶ **Social/Cultural**
 - Prevalence of crimes and quest for revenge – Albino killings, killings of elderly women, [who is responsible? What should be done? What is the role of Leaders?]



Challenges to Abolition

- ▶ **Legal**
 - **Lack of Judicial Activism**
 - *C.f Judgment of Court of Appeal in Mbushuu*
 - **Constitutional Reforms and DP**
- ▶ **Article 72** of the Draft Constitution prescribed the duties and responsibilities of the president as the head of State, in which one of those responsibilities (Article 72 (1)(k) is to approve or sign for the execution of death penalty.
- ▶ **BUT**
- ▶ **Article 95 (1)(c)** of the Proposed Constitution gives the president a free hand, even to change death penalty into life imprisonment.
- ▶ **BUT both retained the current provisions of Ar. 14 with claw back clause – ‘according to the law’**



Current Constitution

The Right to Life

14. Every person has the right to live and to the protection of his life by the society in accordance with the law.

Proposed Constitution

33. Kila mtu anayo haki ya kuishi na kupata hifadhi ya maisha yake kutoka katika Serikali na jamii kwa mujibu wa sheria za nchi.



Contemporary Call by Some MPs

- ▶ Call for new crimes list punishable by death:-
 - Rape
 - Defilement
 - Impregnation of school girls
 - Sodomy
 - etc



.... Challenges – Lack of Political Will



- ▶ **At UPR – Recommendations rejected by Tanzania : Death penalty** ▪ Ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, aimed at abolishing the death penalty (Australia, Cape Verde, UK, Belgium, Sweden), and take the necessary steps to remove the death penalty from Tanzania's justice system (Australia) ▪
- ▶ Consider ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights (Brazil, Romania) ▪
- ▶ Abolish the death penalty (UK, Belgium, Uruguay, Romania, Spain) ▪
- ▶ Abolish the death penalty within the projected constitutional reform and to ratify the Second Optional Protocol to the international Covenant on Civil and Political Rights and, if it is not the case, consider declaring an official moratorium on the death penalty (Germany) ▪
- ▶ Amend the Constitution to abolish any constitutional provisions that provide for death penalty, provide civic education at all levels of the society on the need of abolishing the death penalty and commute the death sentences of current prisoners awaiting execution (Sweden) ▪
- ▶ Establish a moratorium on use of the death penalty as a step towards its abolition (Hungary, France, Slovenia, Denmark) ▪ Consider abolishing the death penalty (Turkey, Brazil) ▪
- ▶ Carry out efforts to repeal the application of the death penalty (Argentina)



▶ **RESPONSE:**

- “The establishment of a de jure moratorium is closely linked with the application of death penalty in Tanzania. It is our considered view that internal consultations and public opinion should be given highest consideration before any policy measure is undertaken. Furthermore, death penalty, being one of the burning issues, **WILL BE DELIBERATED IN THE FORTHCOMING CONSTITUTIONAL REVIEW PROCESS.**”
- “Tanzania wishes to reiterate its position expressed in the National UPR Report, the Minister’s Statement delivered in October during the review as well as the position expressed during the consideration of our Fourth ICCPR Report in July 1999. In the meantime the government continues to educate the public on the general world`s trend on the death penalty.”



The move towards abolition

▶ Judicial Activism

◦ Lubasha's Case in 1977

minor convicted acquitted by high court but sentenced to death by Curt of Appeal.

◦ Mbushuu's Case in 1994

cruel, inhumane and degrading treatment

- High Court

the death penalty is a cruel, inhuman and degrading punishment; and that it offends the right to dignity in the course of executing the sentence; the death penalty infringes the right to life; the death penalty is not in public interest; thus it is unconstitutional and hence null and void; in the place of death penalty the punishment of life imprisonment can serve the purpose. That is the punishment which the High Court imposed on the accused persons.

- Court of Appeal

death penalty is not arbitrary, hence, a lawful law, and it is reasonably necessary. Therefore, the death penalty and the law prescribing it are saved by the Constitution, and thus, constitutional.



.... Rejuvenated Judicial Activism?

Appeal Court judge rejects death penalty

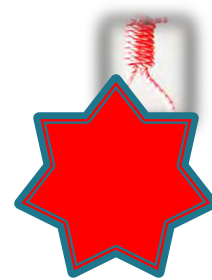
Appeal Court judge rejects death penalty

Daily News

FOR the first time in the country's history, a justice of the Court of Appeal has refused to endorse a death sentence passed against a resident of Bukoba, Dominick Damian, who killed his mother on suspicion that she was bewitching him. While Justices ...



Move towards abolitionLaw reform Commission



▶ Law Reform Commission

- consistently argued for the abolition of the death penalty.
- a stiff resistance to the abolition of this punishment from the public.
- the Commission is pressurised by the ill-informed members of the public in the country who still support the punishment.
- recent arbitrary killings of Albinos have done a lot of damage to the campaign against the death penalty. Those in support of this punishment use this unfortunate behaviour on some strange members of the public to justify the existence of this punishment



Move towards abolition ...Ministers

- ▶ On 9 September 2013, then Minister of Justice and Constitution Affairs Mathias Chikawe proposed that the death penalty be removed in the new Constitution. He said life imprisonment should be an alternative to enable criminals to change their behaviour. Chikawe said sometimes innocent people were executed... with life imprisonment, such innocent souls could be saved. Minister Chikawe said he had hoped the Draft Constitution would state clearly that every person has the right to live and make sure that the right isn't violated through laws that impose the death penalty on Tanzanians. He stressed that he still hope that the final document will call for its abolition.



Move towards abolition.... CSOs

▶ Civil Society Efforts:

- Campaigns
- Death penalty day 10th October
- Public opinion and sensitization
- Strategic Litigation – LHRC in collaboration with TLS and SAHRiNGON Tanzania Chapter continued to use media and litigation as tools for campaigning against death penalty.
- Publicity Materials

▶ Request:

- MPs to raise a question on my behalf – that do we still have a hang man? Is he being paid salary? For what work?



Recommendation

**Pursue the possibility
[if any] of abolishing
DP through the
proposed Constitution
2014**



Thanks For Listening

