

TOWARDS THE ABOLITION OF THE DEATH PENALTY IN
AFRICA: A HUMAN RIGHTS PERSPECTIVE

By

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DECLARATION

I hereby declare that this thesis, which I submit for the degree: Doctor of Laws (LLD) at the University of Pretoria, is my own work and has not previously been submitted by me for a degree at another university. Both primary and secondary sources used have been duly acknowledged.

Lilian Manka Chenwi

Date

DEDICATION

In memory of my father

Mr Chenwi Henry Shu

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SUMMARY

The death penalty has been an issue of debate for decades and it is of great relevance at present. Different reasons have emerged that make recourse to the death penalty appear necessary, such as, that it serves as a deterrent, it meets the need for retribution and that public opinion demands its imposition. Conversely, more convincing arguments have been raised for its abolition, amongst which is the argument that it is a violation of human rights.

Africa is seen as one of the “death penalty regions” in the world, as most African states still retain the death penalty despite the growing international human rights standards and trends towards its abolition. Further, the African Charter on Human and Peoples’ Rights makes no mention of the death penalty. The death penalty in Africa is therefore an issue that one has to be particularly concerned about. During the 36th Ordinary Session (2004) of the African Commission on Human and Peoples’ Rights, for the first time, the death penalty was one of the issues discussed by the Commission. Commissioner Chirwa initiated debate about the abolition of the death penalty in Africa, urging the Commission to take a clear position on the subject. In view of this and the international human rights developments and trends on the death penalty, discourses on the abolition of the death penalty in Africa are much needed.

Accordingly, this study examines the death penalty in Africa from a human rights perspective. It seeks to determine why African states retain the death penalty, the ways in which the current operation of the death penalty in African states conflicts with human rights, what causes obstructions to its abolition in Africa, and whether it is appropriate for African states to join the international trend for the abolition of the death penalty.

The current status and operation of the death penalty in Africa is first examined. The historical background to the death penalty in Africa from a traditional and western perspective is also discussed. Subsequently, the main arguments advanced by Africans (including African leaders, writers, priests and government officials) for the retention of the death penalty in Africa are evaluated. The study goes further to examine the death penalty in African states in the light of the right to life, the

prohibition of cruel inhuman and degrading treatment and fair trial rights at both the international and national levels.

After examining the death penalty in African states, the study arrives at the conclusion that it is appropriate for African states to join the international trend for the abolition of the death penalty, considering that the death penalty in Africa conflicts with human rights, the justifications for its retention are fundamentally flawed, and that alternatives to the death penalty in Africa exist. A number of recommendations are then made, which are geared towards the abolition of the death penalty in Africa.

Key words: death penalty, capital punishment, abolition, abolition trends, human rights, right to life, Africa, African Charter, African Commission, fair trial, cruel, inhuman and degrading punishment, torture, life imprisonment, punishment, execution, moratorium, criminal justice, alternative sanctions, retribution, deterrence, public opinion, retentionist, *de facto* abolitionist, mitigating factor, extenuating circumstance.

OPSOMMING

Die doodstraf heers vir dekades lank as debatspunt en is op die oomblik van groot belang. Verskeie redes het aan die lig gekom wat die hertoetrede van die doodstraf noodsaaklik laat blyk, byvoorbeeld: dit dien as afskrikmiddel, dit vervul die behoefte aan retribusie en openbare opinie veries die toepassing daarvan. Teenstellig daarmee, bestaan daar meer oortuigende redenasie vir die afskaffing daarvan, waaronder die redenasie dat dit 'n skending van menseregte is.

Afrika word gesien as een van dié doodstraf gebiede in die wêreld, want meeste Afrika state pas die doodstraf toe ongeag die groeiende internasionale menseregte standarde en tendense vir die afskaffing daarvan. Verder maak die “African Charter on Human and Peoples’ Rights” geen melding van die doodstraf nie. Daarom is die doodstraf in Afrika 'n aangeleentheid wat groot hoofbrekens besorg. Gedurende die 36ste Gewone Sessie (2004) van die Afriko Kommissie vir Menseregte, is die doodstraf vir die eerste keer op die Kommissie se agenda as aangeleentheid bespreek. Kommissaris Chirwa het die leiding geneem met die doodstraf afskaffing in Afrika debat, hy het die Kommissie aangemoedig om 'n beduidende standpunt in te neem. Hierdie in ag geneem en die internasionale menseregte ontwikkelings en tendense van die doodstraf, is bespreking van die afskaffing van die doodstraf in Afrika noodsaaklik.

Gevolglik, ondersoek hierdie studie die doodstraf in Afrika vanaf 'n menseregte perspektief. Dit probeer bepaal hoekom Afrika state die doodstraf behou, die maniere waarmee die huidige gebruik van die doodstraf bots met menseregte, watter oorsake lei tot obstruksie van teenvoeters vir die afskaffing in Afrika, en om vas te stel of dit betaamlik is vir Afrika om die internasionale tendens vir die afskaffing van die doodstraf te volg.

Die huidige status en gebruik van die doodstraf in Afrika is eers ondersoek. Die historiese agtergrond na die doodstraf in Afrika vanuit 'n tradisionele en westerse perspektief is ook bespreek. As gevolg daarvan word die hoof argumente wat voorgesit is deur mense uit Afrika (en dit sluit leiers, skrywers, digters en regerings amptenare in) vir die behouding van die doodstraf in Afrika evalueer. Die studie gaan nog verder en ondersoek die doodstraf in Afrika in die lig van die reg tot lewe, die

verhinderings van wrede, onmenslike en vernederende behandeling en regverdige verhoor regte op beide internasionale en nasionale vlak.

Na ondersoek na die doodstraf in Afrika, bereik die studie die slotsom dat dit wel betaamlik is vir Afrika om die internasionale tendens te volg vir die afskaffing van die doodstraf, in ag geneem dat die doodstraf in Afrika in konflik is met menseregte, die regverdiging vir die behoud van die praktyk is basies verkeerd, en dat alternatiewe vir die doodstraf in Afrika wel bestaan. 'n aantal voorstelle word dan gemaak wat gerig is tot die afskaffing van die doodstraf in Afrika.

LIST OF ABBREVIATIONS

AAR	-	Annual Activity Report
AC	-	Appeal Cases
ACHPR	-	African Commission on Human and Peoples' Rights
ACHR	-	American Convention on Human Rights
ADRDM	-	American Declaration of the Rights and Duties of Man
AHRLR	-	African Human Rights Law Reports
AI	-	Amnesty International
All ER	-	All England Reports
ANC	-	African National Congress
AU	-	African Union
BCLR	-	Butterworths Constitutional Law Reports
BHRC	-	Butterworths Human Rights Cases
CA	-	Court of Appeal
CAT	-	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CC	-	Constitutional Court
C & F	-	Clark & Finnelly's House of Lords Cases
CPT	-	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	-	Convention on the Rights of the Child
DOC	-	Document
DRC	-	Democratic Republic of Congo
ECHR	-	European Court of Human Rights Reports
ECOSOC	-	Economic and Social Council
ECOWAS	-	Economic Community of West African States
EHRR	-	Essex Human Rights Review
ESCOR	-	Economic and Social Council Official Records
ETS	-	European Treaties
F 3d	-	Federal Reporter, Third Series
F SUPP	-	Federal Supplement
GA	-	General Assembly
GAOR	-	General Assembly Official Records

GLR	-	Ghana Law Reports
HC	-	High Court
HRC	-	Human Rights Committee
IAYHR	-	Inter-American Yearbook on Human Rights
ICC	-	International Criminal Court
ICJ	-	International Commission of Jurists
ICCPR	-	International Covenant on Civil and Political Rights
ICTR	-	International Criminal Tribunal for Rwanda
ICTY	-	International Criminal Tribunal for the Former Yugoslavia
ILM	-	International Legal Materials
JCPC	-	Judicial Committee of the Privy Council
LRC	-	Law Reports of the Commonwealth
MDC	-	Movement for Democratic Change
NGO	-	Non-Governmental Organisations
NO	-	Number
NWLR	-	Nigerian Weekly Law Report
OAS	-	Organization of American States
OAU	-	Organisation of African Unity
PACE	-	Parliamentary Assembly of the Council of Europe
PARA	-	Paragraph
PC	-	Privy Council
RLR	-	Rhodesian Law Reports
SA	-	South African Law Reports
SC	-	Supreme Court
SCOR	-	Security Council Records
SCR	-	Supreme Court Reports
SCSL	-	Special Court for Sierra Leone
SCZ	-	Supreme Court of Zambia
SJC	-	Supreme Judicial Court
TLR	-	Tanzanian Law Reports
TRC	-	Truth and Reconciliation Commission
UDHR	-	Universal Declaration of Human Rights
UHRC	-	Ugandan Human Rights Commission
UN	-	United Nations

UNCHR	-	United Nations Commission on Human Rights
UNHRC	-	United Nations Human Rights Committee
UNTS	-	United Nations Treaty Series
USA	-	United States of America
VOL	-	Volume
WL	-	Westlaw Transcripts
WLR	-	Weekly Law Reports
YB	-	Year Books
ZLR	-	Zimbabwe Law Reports

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