

**[MU]**  
**MZUMBE UNIVERSITY**

**CONTEMPORARY TANZANIAN PENAL POLICY : A Critical  
Analysis**

**A paper presented at the Crime Conference, organized by the British  
Institute in East Africa at Naivasha, Kenya.**

**\*BY: *ROSS E.J. KINEMO***  
**P.O.Box 184, MZUMBE**  
**TANZANIA**  
**Phone 26043/80/4**  
**Fax 2604082**  
**Email [edm@raha.com](mailto:edm@raha.com)**  
**rKinemo@yahoo(UK)**  
**Mobile 0744 310906**

\* The author of this paper is a Senior Lecturer (Law) at the Mzumbe University.

## **ABSTRACT**

*This paper analyzes the Tanzania's penal policy in relation to reformation or rehabilitation of offenders in Tanzania. Although the aim of the prisons Act 1968 was to reform or rehabilitate offenders, death penalty, excessive punishment and corporal punishment have defeated reformation or rehabilitation of offenders in Tanzania*

*The author argues that these punishments are too excessive and makes no measurable contribution towards acceptable reformation goals. Therefore, the author argues that the government of United Republic of Tanzania should review the current legislation in order to improve the minimum sentences Acts and give room for reformation or rehabilitation practices. Other laws and regulations which tend to defeat the very spirit of reformation of offenders in Tanzania should also be reviewed and improved in order to accommodate the rehabilitation process for offenders.*

*The author has used various methodologies which include library research, discussion, observation, field visits and seminar reports. However, the most important part of this, study has been derived from the author's experience and workshop reports.*

## 1.0 **Introduction**

The term punishment in criminal law has been defined as "any pain, penalty, suffering or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court; for some crime or offence committed by him, or his omission of a duty enjoined by the law". The Grotius Black Dictionary defines punishment as "the infliction of an ill suffered for an ill done". Thus, we can gather from the above definitions that Firstly some punishment is something unpleasant to the recipient; and it is a sequel to some previous act disapproved by the authority. Merely inflicting pain without provocation is not punishment.

Secondly, the unpleasantness of the punishment to the person punished reflects the "unpleasantness of the crime to its victims and to the community". Thirdly, the punishment is inflicted. It is imposed by another person's voluntary act; and fourthly, punishment is inflicted upon criminal or anybody answerable for him, if an angry man vents his anger on anybody within reach, that is not punishment.

There have been numerous theories regarding punishment and justification for it. The first theory propounds that the guilt justifies the punishment, and the punishment should serve the purpose of nullifying the guilt. However the second theory propounds that punishment presupposes a system of publicly supported rights which some individuals may deliberately violate. In canceling this wrongful act the punishment negates the bad will of the criminal. The third theory propounds that the state has a right to punish because it has a right to injure in the public interest; and because in enacting the criminal law it had promised protection to the Citizens.

Such theories first make a presumption that the criminal is a rational being who always knows what is good for the Society and what is bad, and he chooses of his own volition, to commit a wrongful act. Although the criminal law deals with criminal deeds per se, regardless of the characters and dispositions from where they originate, those enforcing this criminal law deal with criminals as responsible persons inhabiting the same world of morals as the "non-criminals".

## 2.0 **Aims of Punishment**

There is no universal theory of punishment which can be said to be predominant. Available information suggest that deterrence, reformation (education towards rehabilitation) and retribution forms the major approaches to punishment.

### 2.1 **Retribution**

This is the notion that criminals deserve to suffer for their crimes, a responsible criminal should be punished with a penalty proportionate to his offence. This theory also holds up that punishment shows the community's disapproval of the crime; that if the community condones the crime. This theory is illustrated by the case of Alan Milner, Nigerian Penal System (1972) 1950 of Rex V Mulumbix in which sixty people were sentenced to death for having killed a woman they believed to be a witch. In sentencing them; the judge said "the government does want not to legalize the killing of witches" so the court must be very strict. But if we may ask; what is the relationship between a Scale of the Seriousness of the offence and that of the severity of punishment?. It is not practically possible to administer in such a way that the amount of pain and suffering experienced by an individual offender can be measured by any standard<sup>1</sup>. The Vagrant may welcome the security of the prison while the businessmen will resent its restrictions. Socially this theory works backwards to the offence and the

offender's guilt. In that case it is indiscriminating as to the future consequences of the punishment itself.

## 2.2 **Deterrence**

In the case of *Mussa Mnapax, Mwakasendo J.*, confirming a sentence on a person who had stolen property of an Ujamaa village said, "in order to instil in the minds of the people some respect for property owned communally the court must impose salutary sentence<sup>2</sup>. They must act firmly and severally. If people know that courts will not tolerate this type of conduct, there is every reason to suppose that fewer and fewer people would wish to engage in this type of senseless and want on destruction of Ujamaa property". However, the deterrence theory has not succeeded in relieving us of the problem of crime. The government, in effort to find an answer to this problem introduced the minimum sentences Act in 1963. This was an attempt to find an answer to this very serious problem. The Act failed to function effectively and the new Act of 1972 is also seem to face the same fate. The first weakness of the deterrent theory is publicity. Many people commit offences without being aware that they are breaking the law.

The Second weakness is that even if one knew of the existence of the prohibition it is not similar to knowing the punishment attached to it. But even that were known, there is no doubt as to whether it really affects the decision of the individual<sup>3</sup>.

## 2.3 **Prevention or Restraint:**

This is a third aim of punishment. It is based on the belief that there are some Criminals who are beyond redemption. The community can be better protected if they removed from a position in which he can commit any crime. In *Rex V. Abebesin*,<sup>4</sup> the two defendants were sentenced to concurrent sentences of ten years hard labour and eight (8) years of burglary, stealing and robbery. On appeal from severity of sentence the Judge enhanced the sentence, "The accused were members of an armed gang committing burglary and robbery; Moreover, the first accused had been seriously been convicted on grounding and attempted shooting. For protection of the public, they should be sent to prison for even longer term".

Sentence of the first accused increased to 15 years, of the second accused to 12 years. This was in 1940. More than 30 years later Nigeria now shoots criminals of the same offences. This theory is of last resort turned to if the community cannot achieve its objectives by more constructive means.

#### 2.4 **Rehabilitation**

This is a popular theory now. Underlying it is the assumption that the criminal is a "sick" citizen who should be treated. The time for confinement is used to teach him a skill and to make him a "better" citizen. It manifests class differences in a society. Assuming that all criminals are unskilled and unemployed. It shows that only the sick are prone to being netted into the cobwels of "justices" and brushes aside the fact that even managers can be prisoners.

#### 3.0 **THE TANZANIA'S PENAL POLICY**

In the foreword of the Prisons annual Report we are told inter alia: "Tanzania consider the Prisons as only 21 years old because of the reincarnation that, came with Independence in 1961. The distinction is drawn from the philosophy, nature

and objectives of the Institution before and after Independence. On one hand, the colonialists enforced their oppressive rule by incarcerating anti-colonial elements among the people. Their sentences were accompanied with hard labour torture and degradation, both as deference to them and as a threat to the rest. ... on the other, the Institution became a penitentiary, basically aimed at rehabilitating inmates by reformatory treatment. It was thus assigned to ensure the scientific deployment of inmates, human resources as strive to become a model for mobilisation and implementation of national and cultural affairs."

The fact that in this report we are told of some change of attitude by the government towards criminals, such an attitude was not knew. Lord Hailey in his work mentioned that the colonial government had instituted reform oriented measures. The aim was to rehabilitate offenders. It has been found that if offenders were trained in various skills they could be usefully employed after serving their sentences in prisons. This was on the assumption that criminals are always drawn from non-trained people.

The asserted change of attitude did not necessarily mean that the other purposes of punishment were abandoned. Three years after Independence, the government introduced the Minimum Sentences Act 1963 whose aim was to provide a minimum penalty for scheduled offences.

Although Judges and magistrates view punishment as serving the rehabilitation of the criminal, their discretion in sentencing is limited by the Minimum Sentences Acts. As a result many prisoners have been subjected to inhuman and degrading punishments such as death, excessive years of imprisonment or Corporal punishment which retards the Cardinal point of rehabilitation of prisoners.

In fact, when it comes to calculating the severity of punishment, the main grounds upon which sentences are assessed in Courts today are the gravity of the crime and the moral responsibility of the criminal for his crime rather than rehabilitation.

### 3.1 **Thirty Years Imprisonment**

The Minimum Sentences Act in applying minimum terms of imprisonment Carte-branche preclude considerations being given to probation, conditional discharge, suspended sentences and entering into recognisances.

That, much has rendered the impugned legislation arbitrary, disproportionately punitive and non rehabilitative.

It is considered that the minimum sentence of thirty (30) years imprisonment is disproportionate and does not rehabilitate an offender because it is excessive or unconscionable even for the offence of armed robbery. The punishment is `excessive` because it makes no measurable contribution to acceptable reformation goals and hence it is nothing more than the purposeless and needless

imposition of pain and suffering. Slattery states that punishment for criminal offence is generally viewed as serving one or more of three main purposes:

- (i) deterrence both of the Criminal himself (special deterrence) and also of society at large (general deterrence),
- (ii) the rehabilitation of the criminal; and

- (iii) restraint - the isolation of the hardened or dangerous criminal from society. These objectives are seen as constituting the ultimate justification for sentence imposed by a court in place of the more traditional view which simply holds that evil man serve to be punished, which notion, is sometimes called `retribution' or `the notion of justice'".

The government takes rehabilitation as a top priority as reflected in S.61 of the Prisons Act wherein emphasis is laid on training of prisoners so that when the prisoner is released he becomes a good citizen, usefully self-employed. Now the thirty (30) years imprisonment is self defeating because that period is almost the life-expectancy of a Tanzanian. and so the rehabilitation policy is not in place. It appears the government on enacting such a severe sentence had in mind only retribution and restraint of the offenders. It should be remembered that restraint of offenders is reserved for recidivists only (hardened and dangerous criminals). And retribution as a sentencing policy is old fashioned and uncivilised as it espouses sadism. It will be seen therefore that the sentence of thirty (30) years minimum, goes beyond legitimate penal objectives and does not bear a rational relationship to the accomplishment of penalogical goals which are of sufficient importance to justify its severity.

Therefore to suggest that parliament had seriously addressed itself to the whole issue of rehabilitation is a premise which is obviously a suspect. This is because it is both simplistic and unrealistic to suggest that an increase in the severity of punishment by itself will have any significant impact on existing patterns of crime. Where moral values are central to a problem such as crime, the legal system should struggle to achieve at least incidental significance. The working of the criminal justice system can have little, if any, impact on complex, sociological

phenomena. Any discussion of crime and punishment inevitably overlooks, the heart of the dilemma. Really, what we have is a major problem involving education and policing. A sociological phenomenon cannot be effectively influenced by judicial band-aiding. Imposing harsh sentences indiscriminately is nothing other than Kangaroo justice.

It just does not work and stands little chance of effectively influencing current rehabilitation process. So we cannot look to the Courts alone, otherwise that would be a fundamental misunderstanding of the role of the courts. All that the justice system can reasonably do at the present time is to maintain a predictable and reasonable response to the increasing crime rate, in terms of what most Tanzanians really and truly might be the consequences of detection and conviction (moderate prison sentences). Any major change can only be effected at the political level, the legislators are encouraged to get serious about rehabilitation of offenders.

It is my opinion therefore that the minimum sentence of thirty (30) years is unconstitutional because it is inhuman. It is inhuman because it is disproportionate and excessive as it makes no measurable contribution to acceptable goals of rehabilitation, and goes beyond legitimate penal objectives. It bears no rational relationship to the accomplishment of penological goals. As White J. said in the united States case of *Furman V. Georgia*<sup>5</sup>, such punishment has only marginal contributions to any discernible social or public purpose. A penalty with negligible returns to the state would be patently excessive, unusual, and cruel violative of the eighth amendment of the Constitution. There is no doubt that under Art 15(2) of the Constitution, parliament is empowered to take away the personal freedom of an individual only by using law which is fair, reasonable and not arbitrary. Article 15 reads<sup>6</sup>;

*"15(1) Man's freedom is inviolable and every person is entitled to his personal freedom.*

*(2) For the purposes of protecting the rights to personal freedom, no person shall be subject to arrest, restriction, detention, exile or deprivation of his liberty in any other manner save in the following cases:-*

*(a) in certain circumstances, and subject to a procedure, prescribed by law or,*

*(b) in the execution of the sentence or order of a court in respect of a criminal offence of which he has been convicted or upon reasonable suspicion of his having committed a criminal offence".*

It means that the law on criminal procedure and evidence should be fair and reasonable; and that the law on sentencing should also be fair and reasonable.

This is imported from the case of D.P.P.Vs Daudi Pete<sup>7</sup>, which had cited the Indian Case of Maneka Gandhi V. Union<sup>8</sup>, of India, which decided that a sentence of thirty (30) years imprisonment is patently excessive and does not rehabilitate and eventually reform an offender.

After release such a prisoner becomes a menace to the public, he doesn't have the capital nor an employment to enable him to sustain himself and maintain his livelihood. He becomes alienated from the society and he may rarely find a job. The government has no money or scheme to enable such prisoners to establish projects. Some of them when coming out of prison may find their relatives have migrated to other places and hence become desperate. Thus, instead of rehabilitating the offender the thirty (30) years imprisonment totally destroys the prisoner and makes him a public menace.

Under the Colonial regime, such a prisoner could have been dealt with by the "Discharged Prisoners Aid Society" which was financed by the Colonial State and some other charitable organizations. The Society's duty to deal with the Discharged Prisoners was limited to the provision of certain basic necessities to a released prisoner. There were a provision of a travel warrant home, some necessary wearing apparels, where the prisoner had none, some travelling allowance, and other petty aids. The operation of this Society seems to have disappeared after independence.

So far there have been a number of urgent calls for the restoration of this programme. "The 1969 Prison Annual Report Confirms that, "Prisoners released from Custody are assisted in getting employment by the Commissioner for Social Welfare. The Society operates in most of the big towns through the Welfare officer of the Labour department. When necessary it also helps the released prisoners in their rehabilitation. The prisoners are provided with free transport to their home districts and sufficient subsistence allowances for their journeys. In cases where a prisoner shows an exceptional ability in a certain trade he is, on discharge, considered for a gratuity or an award of equipment to enable him to establish himself in any profession or trade he has learnt". The need to employ ex-prisoners was reiterated by the then Prime Minister, Hon. Rashid Kawawa in 1972, when in his opening address to Prison Officers' Conference he insisted on the need to provide assistance of ex-prisoners by employing their skills.

Inspite of all the pleas to have the after-care programme implemented, it appears that its role and effectiveness today is very minimal. Apart from their relatives, neighbors and friends ex-prisoner have no other help and thus become a menace

to the public. Such a person can easily revert to criminality. Indeed, under such conditions, the whole concept of reformation of offenders becomes illusory.

### 3.2 **Corporal punishment**

Tanzania has a legislation which sanctions Corporal punishment by installments.

The Minimum Sentences Act as amended Introduced Corporal punishment by installments. The Corporal punishment ordinance is amended in S.12 whereof Corporal punishment shall be inflicted in the installments each consisting of six strokes. The first instalment at the commencement of the term of imprisonment and the other immediately before the person in question is finally released. That is a horrible situation and does not rehabilitate the prisoner.

It is worthy noting that postponed whipping or whipping by instalments was deemed as cruel as long ago as 1880 in apartheid South Africa. In the case of Queen V. Nortje<sup>9</sup>, the Eastern District Court of South Africa held that Corporal punishment by instalments (part of the lashes to be inflicted at one and the remainder at the expiration of the sentence) was illegal. The case of Queen V. Hans Windvogae and another<sup>10</sup> is to the same effect. That court found it highly objectionable to sentence persons to lashes to be inflicted at the expiration of a sentence of a hard labour. It is my view that corporal punishment in this case, is unconstitutional because it is cruel, inhuman and degrading as it is inflicted by instalments; and it does not rehabilitate the offender.

The leading case in this regard is the decision of the European Court of human Rights which was cited with approval both by the Zimbabwe Supreme Court and the Botswana Court of appeal. It is the case of the Tyrer V. U.L<sup>11</sup>. where a 15 years old boy was sentenced by a juvenile court in the Isle of Man to three strokes on conviction of assault. The court found that, while the punishment in

the instant case did not constitute torture, or inhuman punishment, it did amount to degrading punishment and therefore was in Violation of Art 3 of the European Convention which is identical to article 13(b)(1) of the Constitution of Tanzania<sup>12</sup>.

The substantive paragraph in the judgment deserves to be quoted in extenso: It reads:

*"The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalized violence, that is in the present case violence permitted by the law, ordered by the judicial authorities of the state and carried out by the police authorities of the state apparatus, although the applicant did not suffer any severe or long lasting physical effects, his punishment, whereby he was treated as an object in the power of authorities constituted an assault on precisely that which it is one of the main purposes of Art. 3 to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects. The institutionalized character of this violence is further compounded by the whole aura of official procedure attending, punishment and by the fact that those inflicting it were total strangers to the offenders."*

The aura of official procedure attending corporal punishment that the European Court refers to with apparent disgust is even more disgusting in Tanzania under the Corporal punishment order which provides:

2. *"A Sentence of Corporal punishment shall be inflicted upon adults upon the bare buttocks with a light rattan cane which is free from knots. Such cane shall, be not less than half an inch and not more than five-eighths of an inch in diameter and shall not exceed forty-two inches in length."*

One has to use value judgement; it seems to me that Corporal punishment inescapably falls within the definition of inhuman and degrading punishment and it does not rehabilitate the offenders as envisaged by section 61 of the Prisons (Amendment) Act 1968.

In the case decided by the Supreme court of Zimbabwe after reviewing the position in Zimbabwe<sup>13</sup>, South Africa, the U.K., Canada, Australia and the United States, Mr. Justice Gubbay concluded that:-

*"Fortunately on the few occasions where the issue of whether whipping is constitutionally defensible has been judiciously considered, it appears to have resulted in little difference of opinion, whether imposed upon an adult person or a juvenile offender the punishment in the main has been branded as both cruel and degrading."*

Mr. Justice Gubbay described the penalty of whipping as:

*"... not only inherently brutal and cruel. It is relentless in its severity and contrary to the traditional humanity practised by almost the whole of the civilised world, being incompatible with the evolving standards of decency."*

The approach to constitutional interpretation adopted by the Zimbabwe Supreme Court and Botswana Court of Appeal has been strongly endorsed by a group of commonwealth Judges at a meeting in Bangalore, India in February 1988. The Bangalore Principles which that meeting adopted, recognized and affirmed the relevance and importance of:

*"...a growing tendency for national Courts to have regards these international norms for the purpose of deciding cases where the democratic law-whether constitutional, statute or common law-is uncertain or incomplete."*

That view was reiterated by Commonwealth Judges in the Harare Declaration of Human Rights<sup>14</sup>.

It is gratifying to note that the Nyalali Commission 1992<sup>15</sup>, holds the view that Corporal punishment is inherently cruel, inhuman and degrading and contrary to Art. 13(b)(e) of our Constitution. Article 13(b)(e) provides that,

*"No person shall be subjected to torture or to inhuman to degrading treatment".*

Such a considered view from eminent Tanzanians should weigh highly in the Court. Moreover, there is no doubt that corporal punishment is against the dignity of man as stipulated in Art (9)(1)(a) of the constitution which is part of the fundamental objectives and Directive Principles of State Policy which provides that:

*"9(1)(a)the object of this constitution is to facilitate the building up of the United Republic as a nation of equal and free individuals enjoying freedom, justice, fraternity and concord, through the pursuit of the policy of Ujamaa and self reliance which is the creative application of socialist principles to the conditions prevailing within the United Republic.*

*Consequently, the state authority and all its agencies are required to direct all their policy and business towards securing:*

*(a) the maintenance of respect and due regard for the dignity and all other rights of man;"*

the

Zimbabwe Supreme Court in the Ncube Case (supra) on the same theme said:

*"The raison detre underlying section 15(1) is nothing less than the dignity of man. It is a provision that embodies broad and idealistic notions of dignity, humanity and decency, against which penal measures should be evaluated. It guarantees that the power of the state to punish is exercised within the limits of civilised standards. Punishment which are incompatible with the evolving standards of decency that mark the progress of maturing society or which involve the unnecessary and Wanton infliction of pain, are repugnant."*

These decisions on the constitutionality of corporal punishment are examples of the prudent application of international human rights norms to domestic human right law. They identify with evolving standards of decency and humanity Tanzania cannot be left behind in that boat.

It is admitted that although corporal punishment may deter offenders, it is also inherently inhuman, degrading, unconstitutional and unacceptable in a civilised and democratic society. This type of punishment does not rehabilitate the prisoners as it was envisaged by section 61 prisons (Amendment Act 1968)<sup>16</sup>

Therefore, much as I advocate corporal punishment to be abolished, this article reveals out that this punishment does not reform or rehabilitate prisoners.

### 3.3 **Death Penalty:**

The death penalty imposed on a number of prisoners does not rehabilitate them.

It has been said that the question of capital punishment falls between two schools: If it proves deterrent, it risks executing the innocent if it protects the innocent perfectly, it is so seldom that it fails to deter<sup>17</sup>. The question again is not merely whether capital punishment deters but whether it does so more effectively than other penalties or methods. Studies have concluded that the death penalty is inconsequential as a deterrent.<sup>18</sup>

A number of non scientific arguments have been presented for the death penalty.

Thus it has been said to be justified by the scriptures, to be natural expression of the emotion of vengeance or to be "just" in cases of murder in terms of the balanced-account theory and punishment.

If the death penalty really appreciably decreases murder, if there is no equally effective substitute, and if its by-products are not equally injurious to society penology will support the death penalty to be the most intense of all fears. But fear of death is fear of certain, imminent death, and courage is not confined to those who are engaged in meritorious deeds. One cannot argue from any terror of the murderer on the morning of execution to the deterrent effect of fear of problematic execution at the moment of the crime. After all death penalty violates not only the right to the life but also the Stockholm Declaration, 1977 which pleaded to all civilized and democratic states to abolish the Death Penalty.

The major cause of murder is not the presence or absence of the death penalty, but social relations leading to tensions preceding the act or strong desires to have someone out of the way. Less significant are other arguments. Many criminals are said to be hopeless cases and better put out of the way instead of incurring expense to the state. The same argument, as Sutherland points out, would apply to many other dependent and pathological classes. It also applies to many criminals for whom capital punishment has never been suggested. It is usually a sufficient reply that the injury to humanitarian sentiments involved in wholesale killing of social ineffectiveness would far more than offset the saving in money.

Capital punishment has also been opposed on the ground that it is irreparable. The number of innocent among the accused who have been executed cannot be known. There have been authentic cases of such miscarriage of justice.<sup>25</sup> Their number has probably been very small in democratic countries of developed world.

It has been revealed that the cause of such errors, a side from prejudice against some minority group or class, have been the use of circumstantial evidence, false identification, false confessions, forced by mistreatment, false promises of immunity, and convictions of person suffering from several mental disorder<sup>26</sup>. A prominent lawyer.<sup>28</sup> after careful study, has concluded that the existence of the death penalty tends to destroy the proper administration of justice and hinders its improvement. With the death penalty, sentences tend to be based on emotions rather than upon rational considerations of either facts or consequences of the punishment. This is true because, with the death penalty, judges have been inclined to allow the accused otherwise indefensible technical defences and urged that these be retained in the law.

Finally, the effect of the death penalty on the general public is a most important question. Yet this effect can only be summarized that "not only a same solution of the crime problem, but also a generally happy social existence, seems to depend not a little upon the reduction of hatred and violence to a minimum. Moreover, the society which values life should not readily take it. It would seem, then, that only absolutely incontrovertible evidence that the abolition of capital punishment will mean a significant increase in murder would sacrifice to justify its retention.

When the British Parliament in 1810 debated over the abolition of capital punishment, Lord Ellenborough, the then Lord Chief Justice speaking for the retentionists had this to say:

*"I trust your lordships will pause before you assent to an experiment pregnant with danger to the security of property, and before you repeal a statute which has so long been held necessary to public expediency requires there should be no remission of the terror denounced against this description of offenders. Such will be the consequence of the repeal of this statute that I am certain depredations to an unlimited extent would be immediately committed"<sup>29</sup>*

Now that capital punishment has been abolished in England and in other European countries without a noticeable increase in the murder rate. It is easy to see the futility of Lord Elleborough's argument. Brazil abolished capital punishment in 1891. Capital punishment was abolished in Switzerland in 1874. In Honduras, the death penalty has never been heard of. If capital punishment has never been known in Honduras and the murder rate there has never been

known to be more than in other countries which have retained it, there must be reasons other than the protection of society for its existence and acceptance.

The reason why the death penalty came into existence and gained quick acceptance has very aptly been put forward by one of the most famous abolitionists. Sellin in his book<sup>30</sup> outline the reasons as being:

- (i) Insignificant value attached to human life and
- (ii) Death penalty was to find natural support by the arrival or gradual establishment of an all powerful state where the sovereign was both the only source of justice and guardian of peace and of public security.

There is ample evidence to support Dr. Sellin, monarchs intoxicated with power saw that other human beings were things which they could dispose of at any moment. No example could be more glaring than that of Sir Thomas More, who argued in his defence:

"I was asked by his majesty to give my opinion honestly according to the dictates of my conscience, as to whether he was the Supreme Head of the Church. In honestly I could not give such an opinion."

The Attorney-General replied:

*"Sir Thomas, we have not one word or deed of yours to object against you, we have your silence which is evidence sign of the malice of your heart, because no dutiful subject being asked this question will refuse to answer it."*

This sounds incredible but Sir Thomas' head was struck off and exhibited on London Bridge only to be dumped into the Thames. But these sovereigns and the present political potentials fail to appreciate the fact that a good number of

ancient societies did not know the death penalty. In these groups we should include the ancient Chinese law as revealed in the famous Book of Five Punishments. By 1889, the Italian code contained no capital punishment. It is agonizing therefore to see some countries introducing the death penalty for offences other than murder at a time when its abolition is long overdue. Kenya has introduced it for armed robbery. And of all countries in Africa, Zambia, well known for its humanism, has introduced it for the same purpose. The argument is that all this is done for the protection of society. This contention we challenge.

Since the creation of the world, men have renaciously struggled with the odious question of capital punishment. During times, criminals were executed by impalement on a stake, stoning, hanging and of course, by crucification. Nations have resorted to the death penalty for some supposedly serious crimes. But the death penalty has also been used to get rid of political rivals or even those suspected of being on disagreement with established regimes. Those who are conversant with the English legal history will remember King Henry VIII, who in his struggle to establish himself as the sole head of the Church of England, passed the Emergency Legislation decreeing that if any person should refuse to acknowledge him as such, he should be executed. This Bishop of Rochester went to the gallows before Sir Thomas More. He also felt reluctant to pronounce the King and the Head of the Church. His case is mentioned here to show how brutal were these punishments. The Bishop was charged with treason, found guilty and was executed on 22 June 1535 after the Lord Chancellor has summed up the case in a very telling manner:

The following sentences was passed with considerable ease and speed:

"..you shall be hanged by the neck, taken down while you are still half alive, thereafter your head smitten off and your body divided into four quarters."

People have been hanged in error. Or to simplify this, it has been proved that innocent men have been convicted of murder and hanged. They never killed, but they were killed. When use the term innocent men. I exclude those maliciously killed for political reasons. I mean charged with murder, tried and a verdict of guilty entered against them.

In 1879, Charles Peace (Englishman) confessed to the murder of a policeman for which John Habron had been wrongly sentenced to death three years before. Daniel Leary (Englishman) was sentenced to death for having poisoned his friend with whom he lodged. It was later discovered and proved that he had died of heart failure. Steven Tonka (Hungarian) was hanged for the murder of a man who was later discovered to have committed suicide. Rowland was sentenced to death for having killed his woman friend O.Balchin, while a year later John Ware confessed that he killed her because she infected him with V. D. Another case is that of Evans, a mentally retarded van-driver who was charged in December, 1949 with the murder of his wife and child. He was convicted although the evidence was scanty and he kept on praying that Christie had done it. He was hanged on March 9th, 1950. Later Christie came along and said - "I strangled her". It was found that Evans had been hanged in error. It is for these horrifying reasons that I say to the whole world that:

"I shall ask for the abolition of capital punishment until I have the infallibility of human judgement demonstrated to me."

Before the coming of colonialism, Africa, had never witnessed hangman. The most severe form of punishment was ostracism. Indeed, Kenyatta, in his book Facing Mount Kenya, says the fear of ostracism was one of the chief factors which prevented people from committing crime. So hanging was handed down to us through colonialism. We have retained it, but it is a great contradiction since the

African by nature is a humanitarian. He has never shown an inclination to kill culprits. Dr. Junod, one of the great reformers of the day, said at the conference on Penal problems in East Africa, held in 1966 at the then University College, Dar es Salaam, that in African the idea of an executioner appointed by the State, and paid for the job, is traditionally unknown. What Dr. Junod was saying is that it is surprising that those who introduced capital punishment Africa and Tanzania in particular have though it ineffective at home and subsequently abolished it. Why Tanzania don't follow suit?

The death penalty does not reform the person hanged. It does not help him. It remains therefore for us to find out whether it helps society. And this we do by findings out whether it does deter any one. Some people argue that the death penalty deters others. If there are people who reflect about the possibility of being punished for their crimes at the time they are committing them, they are very few. Be that as it may, the catch that we talk of deterrence in relation to crime, indicates a failure to remove the root causes of crime. The best method of preventing crime, and of course murder, is to eliminate the conditions which produce it. To make the results of wrongdoing so horribly unpleasant to X that Q will be frightened into a negative sort of virtue is a very poor achievement and above all psychologically unsound.

Crime statistics in Tanzania show that, capital punishment notwithstanding, murder manage its own affairs quite independently. The teachings of the Bible have not affected the murder rate either. So it is high time that the non-abolitionist ceased quoting the Bible to support their non-humanitarian stand. Murder will go on the way it wants despite the death penalty. In Tanzania capital sentences were passed by the High Court on 33 person in 1968. In 1969 the

number of people convicted of murder increased to 78 persons. It more than doubled. Who can tell us the reasons?

*"I say the death penalty must go; Let is not be supposed that social order will depart with the scaffold; the social building will not fall from wanting this hideous keystone."<sup>31</sup>*

Penal laws should be civilized. Evil should be treated with charity instead of anger. Capital punishment should be abolished, but still a substitute should be found.

It is admitted that the death penalty does not rehabilitate prisoners as it was envisaged in section 61 of the prisons (Amendment) Act 1968. The penalty is too irrational and expresses the emotion of vengeance. It does not decrease murder and it is irreparable. The number of innocent among the executed cannot be known. Those who have been sentenced to death but have been imprisoned for many years without execution are subjected to double punishment through psychological torture and pains. In spite of the fact that it is dehumanising and unconstitutional, the government incurs a lot of money for food and general maintenance in the prisons. I therefore join the progressive criminologists and call upon the government to abolish death penalty, and look for another alternative (e.g. life imprisonment). I again insist that the death penalty does not reform or rehabilitate the offender.

#### **4.0 CONCLUSION and POLICY IMPLICATIONS**

Although the Government of United Republic of Tanzania has taken reformation or rehabilitation as a top priority, Judges and Magistrates have been denied their sentencing discretion by the minimum sentences Acts.

As a result many offenders have been subjected to inhuman and degrading punishments such as death, excessive years of imprisonment or corporal punishment etc. which defeats the reformation or rehabilitating spirit. Infact when it comes to calculating the severity of punishment the main grounds upon which sentences are assessed in courts today are the gravity of the crime and the moral responsibility of the criminal or his crime rather than reformation or rehabilitation of offenders. While the thirty (30) years imprisonment is self defeating, it appears the government on enacting such a severed sentence had in mind only retribution and restraint of the offenders. This punishment has gone beyond legitimate penal activities and does not bear a rational relationship to the accomplishment of penological goals which are of sufficient importance to justify its severity. It is obvious that the parliament did not address itself to the whole issue of rehabilitation of offenders.

Although corporal punishment may deter offenders it is inherently inhuman, degrading and unconstitutional. This punishment does not reform or rehabilitate the offenders. Similarly, the death penalty imposed on a number of prisoners doe not rehabilitate them. This punishment is irreparable, unconstitutional and it risks executing the innocent people.

Thus, it is recommended that the government should review corporal punishment, death penalty and thirty (30) years imprisonment in relation to section 61 of the Prisons Act 1968 and also the rehabilitation or reformation of offenders policy.

The government should also review rule 21 (1) 2 of civil service Regulations (1970) which prohibits a person who has been imprisoned to get a job without a clearance from the president. This constraints hinders the government's efforts to rehabilitate the ex-convicts.

Subsequently, the standing order number 22 of prisons service should be reviewed because it prohibits employment of ex convict with trade skills in Prison Department and hence hindering the government's efforts to rehabilitate the ex-convicts.

### **END NOTES**

1. Rex V. Mumbi (1932) 14 K.L.R. 137.
2. R. V. Mussa C/o Mnepa (1973) L.R.T. No 93.
3. Rex V. Abebesin (1960) E.A.L.J Pg. 67.
4. 6 W.A.C.A.
5. (1972) 408 US 238 at P. 391 and the case of hart v Coiner (1993) 433 F. 2d. 136.

6. The constitution of United Republic of Tanzania 1977. (as amended).
7. Crime Appeal No. 28 of 1990.
8. Maneka Gandhi V Union 1978 1 S.C.C. 248.
9. No 1/1972.
10. Act No. 10 of 1989.
11. Cap 17.
12. (1980) 1 EDC 231.
13. (1988) 2 EDC 98.
14. (1978) 2 E.H.R.R1.
15. The Constitution of the United Republic of Tanzania (1977).
16. Neube, Tshuma & Ndhlovo V. the State (1988) L.R.C. (Const.) 442.
17. Harare Principles - Judicial Colloquium in (Harare, Zimbabwe 19-22nd April 1989) and also in Banjul Affirmation (Judicial Colloquium in Banjul, The Gambia 7th to 9th November, 1990).
18. The Presidential Commission on whether Tanzania should adopt a one-Party or Multi-party system, Book three at p. 10.
19. Thorsten Sellin, The Death Penalty and police Safety, Minutes of proceedings and Evidence, No. 20, of joint Committee of the Senate and House of Commons on capital punishment of the Canadian Parliament, pp.718-41, quoted in `Notes\* Journal of criminal law, Criminology and Police Science 1959, pp.465-66.
20. Ibid.
21. G.B. Vold, can the death Penalty prevent crime? The Prison Journal (Oct. 1932) pp. 4 - 9.
22. Edwin M. Boarchar, Convincing the Innocent (New haven, cann: Yale University L. Sanville, "When Justice goes Astray" in Julia E. Johnsen capital punishment (New York: H.W. Wilsion, 1939), pp. 38 - 44.

23. Otto Pollak, "The Errors of Justice" *Annals* Loc. cit pp. 115-23.
24. Herbert b. Ehrmann "The Death Penalty and The Administration of Justice" *Annals* Loc. cit pp. 73 - 84.
25. Quoted from A.A.F. Massawe - Notes on Capital Punishments *E.A.L.J.* (1974).
26. Thorsten Sellin, The Death Penalty and police safety, minutes of proceedings and evidence, No. 20 of joint committee of the senate and House of Commons on capital punishment of the canadian parliament pp. 7118-41, quoted in 'Notes' *Journal of criminal law, criminology and police science* 1959, pp 456-66.
27. A.A.F. Massawe - Notes on Capital punishment *E.A.L.J* (1974) pg. 113.
28. Quoted from A.A.F. Massawe - Notes on Capital Punishment *E.A.L.J* (1966) pg. 113.