

**ADVISORY NOTE ON THE ABOLITION
OF THE DEATH PENALTY
IN THE GAMBIA**



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1.0 INTRODUCTION

The National Human Rights Commission (NHRC) is an independent institution established by the National Human Rights Commission Act of 2017.¹ It is mandated inter alia to promote and protect human rights in The Gambia, undertake studies on all matters concerning human rights as well as review existing human rights legislations and make recommendations to the Government concerning the compliance of the existing legislation with the international treaty obligations of the Gambia. In fulfilment of its advisory mandate, the NHRC presents this Advisory Note.

This Advisory Note will analyse Gambian laws on the death penalty, both statutory and case laws, and also look at the trend towards the abolition of the death penalty as it has emerged over recent decades. It will highlight the development of capital punishment as a human rights issue in international fora and examine recent developments about the death penalty in The Gambia. The NHRC will finally propose some recommendations aimed at the abolition of the death penalty in line with the country's international human rights obligation.

2.0 DEFINITION OF DEATH PENALTY

The death penalty, also known as capital punishment, refers to the imposition and execution of a death sentence on a person convicted under a prescribed law. In recent times, the death penalty has become a controversial subject matter. This controversy has led

¹NHRC Act 2017 was assented to by the President on 13th January 2018

to the emergence of those who support its retention in the laws of The Gambia and those who want it abolished. The two schools of thought have their reasons and they are regularly shared by the most populous country in the world, China, and the most powerful country, the United States of America.² Amnesty International recorded 579 executions in 18 countries in 2021, an increase of 20% from the 483 recorded in 2020. This figure represents the second lowest number of executions recorded by Amnesty International since 2010.³ At the end of 2019, 106 countries, a majority of the world's States, had abolished the death penalty for all crimes.⁴ Thus, the number of countries employing the death penalty is declining and it is possible that public opinion and pressure will gradually influence all countries, including The Gambia, to abandon this practice.

3.0 DEATH PENALTY VIS-VIS-LAWS OF THE GAMBIA

The death penalty existed in the Laws of The Gambia until 1993 when it was abolished by the Death Penalty (Abolition) Act 1993. However, this abolition was short-lived as it was reinstated in 1995 by the then Military Junta through Decree No. 52, entitled the Death Penalty (Restoration) Decree, 1995, now Death Penalty (Restoration) Act. Among the reasons given for the restoration of the death penalty were

²Richard C. Dieter, The Death Penalty and Human Rights "US Death Penalty and International Law P. 1 available at <https://files.deathpenaltyinfo.org/legacy/files/pdf/Oxfordpaper.pdf> accessed on 20th July 2020

³<https://www.amnesty.org/en/latest/news/2022/05/death-penalty-2021-facts-and-figures/#:~:text=Amnesty%20International%20recorded%20579%20executions.International%20since%20at%20least%202010.>

⁴Amnesty International, Death Penalty in 2019: facts and figures 21st April 2020..

that “since the abolition of the death penalty in The Gambia there has been a steady increase in cases of homicide and treasonable offences which, if not effectively checked, may degenerate into a breakdown of law and order,”⁵ and that it is the duty of the State “to provide adequate mechanisms for the security of life and liberty of its citizenry thereby maintaining law and order and ensuring greater respect for individual human rights.”⁶

Section 18 of the 1997 Constitution guarantees a person’s right to life. It provides that “no person shall be deprived of his or her life intentionally except in the execution of a sentence of death imposed by a court of competent jurisdiction in respect of a criminal offence for which the penalty is death under the Laws of The Gambia as they have effect in accordance with subsection (2) and of which he or she has been lawfully convicted”.⁷ However, the offences of murder and treason in the Criminal Code are punishable with death.⁸ Similar punishment has also been provided for the offence of aiding the enemy under Section 36 of The Gambia Armed Forces Act and acts of terrorism under Section 3 of the Anti-Terrorism Act.

⁵Antouman A.B Gaye, Janet R. Sallah-Njie & Gaye Sowe, Desk Review Report of the Criminal Code and Criminal Procedure Code, p.18

⁶*ibid*

⁷Section 18 (1) 1997 Constitution.

⁸See Sections 188 and 35 1 (f) of the Criminal Code Cap:10 Vol. 3 Revised Laws of The Gambia 2009.

4.0 HUMAN RIGHTS AS A BASIS FOR THE ABOLITION OF THE DEATH PENALTY IN THE GAMBIA

The Gambia Government has demonstrated commitment to the pursuit of abolishing the death penalty as evidenced by its ratification of the International Covenant on Civil and Political Rights and its Second Optional Protocol aiming to the abolition of the death penalty. At the regional level, it has also signed and ratified the African Charter on Human and Peoples' Rights (ACHPR). Both the Second Optional Protocol to the ICCPR and the ACHPR imposed an obligation on the State to respect the sanctity of life and abolish the death penalty.

Despite these commitments, The Gambia Government under the leadership of former President Yahya Jammeh executed 9 death row prisoners on or about 26th August 2012 in violation of due process and international standards concerning the use of the death penalty. These executions were condemned by Amnesty International, international human rights organisations and West African Civil Society Groups all of whom called on the Government to commit to an official moratorium.⁹

In 2012, the African Commission on Human and Peoples' Rights, through the Working Group on Death Penalty, Extra Judicial, Summary or Arbitrary Killings and Enforced Disappearances in Africa, conducted a study on the question of the death penalty and human rights. At the end of the study, the Working Group believes

⁹Point Newspaper, Government must not carry out further executions-Amnesty published on 6th September 2012.

that the abolition of the death penalty may be achieved in one of three ways listed below:

1. by inserting a clause in the national constitution guaranteeing the right to life in absolute terms (i.e., with no qualifications whatsoever);
2. by legislation proscribing the death penalty as a permissible sanction; and
3. by subscribing to regional and international human rights instruments requiring the abolition of the death penalty and then aligning municipal law to those instruments.¹⁰ The Working Group indicated that any of the two methods is to be preferred because they make any hasty or a politically motivated re-introduction of the death penalty much more difficult. It argued that abolition of the death penalty imposed by decree or by law enacted by a controlled legislature must be suspected because dictators can decree abolition overnight, but swiftly re-instate it as was the case in The Gambia when the then Military Junta restored the death penalty through Decree No:52.¹¹

In 2018 the new Government of The Gambia, under the leadership of His Excellency President Adama Barrow, announced a moratorium on the use of the death penalty¹² and since then there has been no execution of death row prisoners in The Gambia.

¹⁰African Commission, Study on the question of the death penalty in Africa, 2012 P.54

¹¹African Commission, Study on the question of the death penalty in Africa, 2012 P.54. Emphasis mine.

¹²See <www.reuters.com/article/us-gambia-justice-idUSKCN1G20V2 accessed on 19th December 2022

5.0 WHY DOES THE GAMBIA NEED TO ABOLISH THE DEATH PENALTY?

The retention and application of the death penalty constitute grave violation of human rights, particularly the right to life and freedom from cruel and inhuman treatment. Thus, the death penalty should be abolished on the following grounds:

1. International Law Suggests that Abolition is Desirable

Although international law does not directly prohibit the imposition and enforcement of the death penalty, the desirability of the abolition of the death penalty has been strongly reaffirmed on different occasions by the international community. To exemplify, the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP2) which The Gambia ratified on 28 September 2018 requires The Gambia as a State Party to abolish the death penalty¹³. The United Nations organs and bodies in the field of human rights, *inter alia*, the Security Council, Human Rights Committee, General Assembly and the Economic and Social Council strongly recommend the abolition of the death penalty. In its General Comment No. 6, the Human Rights Committee has also urged States to consider reviewing their criminal laws in order to restrict the application of the death penalty to “most serious crimes”. The Economic and Social Council also passed a resolution on May 25, 1984 urging States

¹³Article 2 ICCPR-OP2

such as The Gambia that have not abolished the death penalty to impose it only for the most serious crimes.¹⁴

Similarly, the move within the United Nations towards the abolition of the death penalty can also be seen in the reports on United Nations norms and guidelines in criminal justice: from standard setting to implementation (A/CONF.87/8) and on capital punishment (A/CONF.87/9) presented to the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1980. The reports noted that the United Nations had gradually shifted from the position of a neutral observer, concerned about but not committed on the question of the death penalty, to a position favouring the eventual abolition of the death penalty. Thus, at the level of the United Nations there has been a gradual move to a position favouring the abolition of the death penalty.¹⁵

At the regional level, the African Commission adopted a resolution on November 15, 1999 urging all States Parties to the African Charter that still maintain the death penalty to comply fully with their obligations under the Charter and to ensure that persons accused of crimes for which the death penalty is a competent sentence are afforded all the guarantees in the African Charter. The Commission

¹⁴Safeguards guaranteeing protection of the rights of those facing the death penalty, resolution 1984/50 approved by the Economic and Social Council on 25 May 1984

¹⁵*Antouman A.B. Gaye, Janet R. Sallah Njie & Gaye Sowe* (Review and Drafting of the Criminal Code and Criminal Procedure Code of The Gambia) citing the UN Commission on Human Rights, *Question of the violation of human rights and fundamental freedoms in any part of the world, with particular reference to colonial and other dependent countries and territories Assistance to the Central African Republic*, 9 March 1981, E/CN.4/RES/15(XXXVII), available at: <http://www.unhcr.org/refworld/docid/3b00f0bc66.html>

further called upon States to limit the imposition of the death penalty only to the most serious crimes, to consider establishing a moratorium on executions of death penalty and to reflect on the possibility of abolishing the death penalty.¹⁶

Furthermore and consistent with this abolitionist trend, the death penalty is excluded from the permissible punishments available to the International Criminal Court, the Special Court for Sierra Leone, and the ad hoc tribunals for former Yugoslavia and Rwanda, even though these courts/tribunals have jurisdiction over extremely grave crimes such as genocide and crimes against humanity.

2. The Death Penalty has Little Deterrent Value

One of the main arguments against the death penalty is that it has little or no deterrent, reformatory, or other criminological value for persons convicted of a capital offence and waiting to be executed.¹⁷ Some studies and famous cases have shown that the personality of the condemned person at the time of his execution is usually different from what it was at the time of the commission of the capital offense.

Additionally, there is no conclusive evidence that crime rates are higher in countries that have abolished the death penalty, nor has there been irrefutable evidence linking high crime rates to the

¹⁶*Antouman A.B. Gaye, Janet R. Sallah Njie & Gaye Sowe* (Review and Drafting of the Criminal Code and Criminal Procedure Code of The Gambia) citing the ACHPR /Res.42 (XXVI) 99: Resolution Urging the State to Envisage a Moratorium on Death Penalty (1999).

¹⁷*ibid*, at p. 38

abolition of the death penalty.¹⁸ A comparison between retentionist and abolitionist States suggests little correlation, whether negative or positive, between capital punishment and the incidence of violent crimes. The rise of violent crimes cannot be attributed to the non-application of the death penalty; its absence does not result to increase in violent crimes as well. Conversely, in countries such as the United States of America where the death penalty is retained and enforced (in some of its States), there has not been a fundamental decrease in violent crimes.¹⁹ In fact, violent crimes are even higher in some of these retentionist States. Thus, the only scientifically and ethically acceptable conclusion from the complete body of existing social science literature on deterrence and the death penalty is that it is impossible to tell whether deterrent effects are strong or weak or whether they exist at all...²⁰

3. Irreversibility of the death sentence, especially in instances of Miscarriage of Justice

The death penalty has also been criticised on grounds of its finality and irreversibility.²¹ Once carried out, the death penalty is irreversible and, therefore, not amenable to rectification where there has been a miscarriage of justice.²² As a result of its finality, the death penalty

¹⁸ibid, supra note 9, at p. 38

¹⁹See the UNODC crime and criminal justice statistics, available at <<http://www.unodc.org/unodc/en/dataandanalysis/crimedata.html>>accessed on the 25th September, 2022

²⁰see also Roger Hood and Carolyn Hoyle 'The Question of Deterrence' in *The Death Penalty: A Worldwide Perspective* 5th edn, (OUP 2015) ch 9.

²¹ibid, supra note 12

²²Anyangwe C, Finality and miscarriage of justice in criminal law: post-conviction remedies in common and civil law jurisdictions, *Zambia Law Journal*, vol 30, 1998, p.51

forecloses the likelihood of benefitting from amnesty, pardon, or commutation of sentence.²³ For the same reason, there is no possibility of correcting any judicial missteps or mistakes that may have subsequently been realised. With the advent of DNA technology and advances in forensic science, the possibility of flawed conviction and execution of innocent persons has been an incontestable fact associated with the death penalty.²⁴ Studies by Amnesty International show that several innocent persons have been wrongly convicted and executed in the United States of America. According to Amnesty International, between 1973 and 2005, 117 death row inmates have been released in the United States of America after evidence of their innocence.²⁵ While an erroneous guilty verdict could be corrected on the record, the person executed based on such a flawed verdict cannot be brought back to life even if the erroneous conviction is subsequently realised and corrected on the records.

4. Serves No Legitimate Penal Purpose

It is argued that capital punishment does not have any legitimate penal purpose as a sanction. In modern times, literal retribution is an impermissible purpose for punishment. This is more so as some offences that carry capital punishment in some countries are not suitable for the death penalty, a case in point being that of treason which is punishable with death under **Section 35 (1) (f) of the Criminal Code**. The argument of the retentionists has weight only in the context of killing by the accused. Since treason, for example,

²³ibid

²⁴Ibid, supra note 9

²⁵ibid

does not necessarily have to involve loss of lives for it to be capitally punishable, the argument in favour of the application of the death penalty is much weaker. The notion of “*an eye for an eye*” is an expression of emotional impulse for revenge whereas the standards of a mature and civilised society demand a much measured one— At least to punish, but most importantly to reform them- a promotion of reformation than retribution. Although the Biblical adage “*an eye for an eye*” is frequently relied upon to justify the application of the death penalty, the same cannot be relied upon to justify the torturing of torturers, raping of rapists, and committing arson against arsonists.

Similarly, it has been argued that permanent incapacitation and literal retribution, by way of capital punishment, are now no longer considered legitimate objectives of punishment. Penologists have now agreed that the objective of criminal punishment should be: to punish the criminal for his wrong-doing so as to make him atone for his iniquity by a process of moral retribution, to protect the public against an evildoer and so turn him into a useful member of society, and to deter potential wrongdoers from crime by showing the offender up as a bad example.

5. Cruel and Inhuman nature of death row and executions

In addition to the above, it has also been argued that the death penalty is cruel and inhuman, thus necessitating its total abolition. By virtue of its very nature and suffering consequential to its enforcement, the death penalty has been said to be inconsistent with freedom from torture, cruel, inhuman and degrading treatment guaranteed under several regional and international instruments ratified by The

Gambia.²⁶ In fact, this point was eloquently expressed in the case of ***Mbushuu and Another v. Republic***,²⁷ where the Court of Appeal of Tanzania upheld a High Court decision that “*the death penalty amounts to torture, inhuman and degrading punishment.*”²⁸ A similar decision was reached in the case of ***The State v. T. Makwanyane and M. Mchunu***.²⁹ In that case, the Supreme Court of South Africa held that the death penalty was a violation of the right to life, human dignity and the right not to be subjected to cruel, inhuman or degrading treatment or punishment. The Court further noted that the right to life and dignity are the source of and the most important of all human rights; therefore, by committing to being a society founded on the recognition of human rights, South Africa was required to value these rights above all other rights.

6. The South African and Rwandan Experiences

The retentionists argue that the abolitionists have never experienced the agony experienced by victims of capital offenders. They asserted that the abolitionists would perhaps not be so willing to advocate for the abolition of the death penalty if they were to lose a loved one to a capital offender. However, the South African and Rwandan experience show that this is not necessarily true. There are so many people in South Africa and Rwanda who have been through severe

²⁶The Gambia ratified the Convention Against Torture, the International Covenant on Civil and Political Rights as well as the African Charter all of which instruments frown against torture and other cruel punishments

²⁷1995, 1 LRC 216 (CA, Tanzania); 1995 TLR 97

²⁸ibid

²⁹1995 (3) SA 391; CASE NO. CCT/3/94

pain of losing loved ones, but have risen above the issue of revenge, and have spearheaded campaigns in their respective countries to eradicate the death penalty.

6.0 THE QUESTION OF MORATORIUM ON EXECUTION

Across the world, States' attitudes towards the enforcement of the death penalty vary: some are retentionist, others are abolitionist *de jure* and others abolitionist *de facto*.³⁰ The retentionist States are those that retain the death penalty in their legislation as a valid sanction for certain crimes and continue to enforce it. Conversely, abolitionist *de jure* are those States that have legally abolished the death penalty as a permissible sanction for certain crimes. In between retentionist and abolitionist *de jure*, there is another category known as abolitionist *de facto*. Abolitionists *de facto* are those States that declined to authorise the execution of those sentenced to death, albeit there being no legislation proscribing such. A perfect and close example would be The Gambia. Although **Section 18** of the **1997 Constitution** and **Sections 35** and **188** of the **Criminal Code** (among other hosts of domestic legislation) permit the imposition and execution of the death penalty, The Gambia has not enforced any death sentence since the execution in 2012. Thus, The Gambia can correctly be regarded as an abolitionist *de facto*. This is so because The Gambia has frozen or put on hold the execution of condemned prisoners. Upon his assumption of office, President Barrow placed a moratorium on the death penalty in honour of The Gambia's commitments under the Second Optional Protocol to the ICCPR.

³⁰ibid, supra note 9

7.0 THE GAMBIA'S MORATORIUM ON EXECUTIONS: A POSITIVE DEVELOPMENT?

Section 18 (3) of the 1997 Constitution provides that the National Assembly shall within ten years from the date of coming into force of the Constitution review the desirability or otherwise of the total abolition of the death penalty in The Gambia. The timeline has elapsed but the said provision has not been reviewed by the National Assembly.

The Gambia's expressed imposition of a moratorium on the death penalty points to the fact that The Gambia retains the death penalty with a very weak resolve. A moratorium appears to be something of a 'halfway house' between total abolition and retention. The imposition of a moratorium ought normally to be a step towards the ultimate decision of proscription. That is, it is legitimate to expect that after several years of moratorium, The Gambia would devise means of bringing about a total abolition of the death penalty.

However, the experience in some other countries in Africa has shown that this is not always the case. More often than not, even after moratorium (for even a period of as long as a quarter century), a State may resume executions without any compunction. The imposition of a moratorium may be official or unofficial; it may also be in consequence of an international commitment to do so as in case of The Gambia, or it may be as mere matter of grace by the Head of State. In all of these cases, if the sentences are not systematically commuted, it leads to an agonising situation whereby the number

of death row inmates keeps increasing without the corresponding increase in the prison's facilities.


8.0 CONCLUSION

In conclusion, the above analysis of the death penalty shows that it is desirable for The Gambia to devise strategies for bringing about the total and eventual proscription of the death penalty both in practice and law. Although The Gambia has taken commendable steps aimed at the abolition of the death penalty, a lot more needs to be done, as most of the developments only inspire the abolition of the death penalty in practice. Placing a moratorium on legal execution is not adequate in that the death penalty is still retained in our Constitution and statute books as a valid and lawful punishment of certain criminal offences such as murder, treason, and violent acts of terrorism and has been imposed on individuals by the High Court. In this regard, The Gambia could lawfully resume execution of prisoners convicted of offences that attract the death penalty. For this reason, and to ensure compliance with its international commitments, particularly under International Human Rights Law, The Gambia needs to take all necessary steps, including but not limited to progressive legislative measures, to bring about the total proscription of the death penalty in The Gambia.

9.0 RECOMMENDATIONS

To expedite the abolition of the death penalty in The Gambia, it is recommended that the Government:

1. Re-introduces the 2020 Draft Constitution which contained progressive provisions that guarantee fundamental rights and freedoms, including the right to life.
2. Prioritises and expedites the enactment of the Criminal Offences Bill and the Criminal Procedure Bill which proposed to abolish the death penalty as a form of punishment.

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