

# The Death Penalty in Kenya: A Punishment that has Died Out in Practice

Part Two: Overwhelming Support for Abolition  
Among Opinion Leaders

Carolyn Hoyle and Lucy Harry

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This research builds on, and contributes to, a series of similar projects commissioned by The Death Penalty Project, focusing on the views of opinion formers on the death penalty conducted in Zimbabwe, Indonesia, the Eastern Caribbean and Barbados, and, most recently, Taiwan.

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**Carolyn Hoyle & Lucy Harry**  
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# Foreword

This publication, and its companion report on public attitudes to the death penalty – Part One: A Public Ready to Accept Abolition – provide an important contribution to the debate in Kenya about the death penalty. For those who – like myself – are strongly opposed to the death penalty, they are also very encouraging, and give reason to believe that not only are attitudes changing but that in the not-too-distant future, it may be possible for law to be passed that will see capital punishment abolished.

My introductory reflections here centre on the Constitution.

In some countries abolition of the death penalty has come about through court decisions not through acts of Parliament. This is true of South Africa, where constitution makers felt unable to come to a decision on the death penalty so simply left the provision “Everyone has the right to life.” This was leaving the matter to the courts, and in the now celebrated and seminal case of Makwanyane, the Constitutional Court of South Africa decided that the death penalty was unconstitutional. They drew on the vein of idealism that they discerned in the Constitution, and on an assumption that the “sweeping language in favour of life, ... could well in part have been because of a realisation that this was the moment to remove any temptation in coming years to attempt to solve grave social and political problems by means of executing opponents.

Is something like this possible in Kenya? The most obvious obstacle is that the Kenyan Constitution includes a qualification to the right to life provision: “A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.” This was clearly intended to preserve the possibility of the death penalty – and its constitutionality.

In 2017, when the Supreme Court held that the mandatory death penalty was unconstitutional (in the Muruatetu case referred to in this publication), it was careful to add, “For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment.” It also stated, “It is not in dispute that Article 26 (3) of the Constitution permits the deprivation of life within the confines of the law.” This is not a court anticipating declaring the death penalty as such unconstitutional in the near future, which takes us back to Parliament, where over the years there have been several attempts to have the death penalty removed from Kenya’s statutes but with little support from parliamentarians.

In 1994, Kiraitu Murungi (now Governor of Meru County) moved a motion in the National Assembly for the removal of the death penalty from the Penal Code, on the basis that it had not been effective to prevent crime, as well as being “a legacy of the dark ages of man’s history and man’s inhumanity to man” and that it is “barbaric and savage”. Mr Murungi returned to the issue in 2000, this time referring to the death penalty as “a symbol of savagery and primitive colonial past”. In 2007, a motion was moved seeking to introduce an amendment to the Penal Code to remove the death penalty but was clearly defeated.

During the constitution making process, the initial draft, in 2002, by the Constitution Kenyan Review Commission, included abolition of the death penalty.

However, during the National Constitutional Conference, which considered that draft, the reference to abolition disappeared. Interestingly the Minister of Justice at the time (Martha Karua) later said that

her Ministry had put a strong case for abolition to the Conference, but that it had been rejected by the delegates. As chair of that Conference, I cannot now recall from which section of delegates (MPs or others) those objections came. When the constitution making process resumed in 2009, an Assistant Minister said in Parliament (as recorded in Hansard) that the Government intended to push for abolition in the new constitution. But the first two drafts by the Committee of Experts, which carried out this revived process, included only a clause prohibiting ‘arbitrary deprivation of life’. It appears that either government had not made its push for abolition, or the Committee rejected it.

The current language – “except to the extent authorised by this Constitution or other written law” – was introduced by a committee of MPs that considered the draft and introduced many changes, some of which the Committee of Experts rejected but others, including this, they felt obliged to retain. Thus, while governments seem to have been quite often in favour of abolition of the death penalty, Members of Parliament have been less so. However, the make-up of Parliament changes significantly at each election so the orientation on this issue of the bodies to be elected in 2022 cannot be anticipated.

If Parliament is the best hope of abolishing the penalty, the importance of this research becomes clear. Although it is unlikely that a referendum on this issue would be called, it is vital that Parliament is reliably informed on current public attitudes towards the death penalty. Research of this type is therefore invaluable.

In addition, the Constitution does two other things that increase the significance of public opinion. The first, is that under Article 119, it provides for the right to petition Parliament, including to press for a change in the law. The second, is that it states that Parliament must “facilitate public participation and involvement in the legislative ... business of Parliament.” In these ways public opinion can penetrate those halls.

This publication by The Death Penalty Project and the Kenya National Commission on Human Rights clearly demonstrates how the contribution of public opinion – more particularly the views of opinion formers, the subject of this study – are likely to be reflective and useful. The research shows that the public’s views, while less solidly abolitionist, are not something that MPs can continue to hide behind, saying “the public don’t want this”. We need a calm evidence-based debate on this topic in Kenya – may this publication initiate it.

**Professor Yash Ghai**

March 2022



# Key findings

This report considers findings from interviews with 42 ‘opinion formers’ across Kenya – people who have jurisdiction over part of the criminal process or who are considered to be influential in shaping, or responding to, public opinion: social justice centres, civil society organisations, advocates, senior government officials, representatives of the media, elders, religious leaders, and magistrates and prosecutors. We sought evidence of their knowledge about the current administration of the criminal justice system, and the death penalty in particular; of their views on capital punishment; and of their rationales for those views, as well as their likely responses to changes in penal policy.

It is a companion report to our study *The Death Penalty in Kenya: A Punishment that has Died Out in Practice: Part One: A Public Ready to Accept Abolition*, also published in 2022, and is best read alongside that report. These publications reveal that the opinions of Kenyan citizens on the death penalty are no impediment to abolition.

This research found **very high levels of support (90%) for abolition** among those opinion formers we interviewed, the vast majority of whom were *strongly* in favour. Taking into account the *strength* of opinion, this represents the highest level of support for abolition across all studies of opinion formers commissioned by The Death Penalty Project. Most of those who identified as abolitionists were worried about the risk of sentencing to death someone who has been wrongfully convicted, but many also saw the death penalty as an abuse of human rights.

There were only four retentionists within our sample, and they supported the death penalty because they believed it was necessary for **retribution** and for its **deterrent effect**, but they did not want it to be widened in its scope. Indeed, three of the four wanted it to be further restricted – for example, by abolishing it for robbery with violence.

Most interviewees were **very well informed about the administration of the death penalty in Kenya**. They were less knowledgeable about research on the death penalty, though instinctively felt that it was unlikely to be a deterrent to violent crime and were alive to the risks of wrongful convictions. Yet, most interviewees thought that political decision-makers were much less well informed about such research. Indeed, opinion formers had **little confidence in politicians’ knowledge** of research on the death penalty. Furthermore, almost all thought that accurate information on the administration of the death penalty and on widespread abolition around the world *should* inform government policy on the question of the death penalty in Kenya.

While the **preferred abolition strategy was amendment of the criminal law**, there was considerable consensus that no single option would be adequate. Instead, it would be necessary to apply several strategies simultaneously, with ‘bottom up’, community-led approaches operating alongside ‘top-down’ international and national incentives and actions from the courts, the churches, and the president.

Interviewees were told that a recent public opinion survey commissioned by The Death Penalty Project had found only 51% of people in support of retention of the death penalty, and only 32% strongly in support. Almost half of the opinion formers we interviewed were surprised by this finding; many not because it was low, though it is very low, but because it was higher than they expected. They thought that support for retention would be much lower if citizens were better informed about Kenya’s use of the death penalty and about its risks and its inefficacy. **More than two-thirds of opinion formers thought that this public opinion data should inform government policy on the death penalty in a democratic country.** Most were not surprised that the public opinion survey found that the majority of committed retentionists would, nonetheless, accept abolition if it was government policy and believed that this finding, as well as data on the high rates of concern about wrongful convictions, should also influence policy on the death penalty.

The majority of interviewees (55%) had low levels of trust in the Kenyan criminal justice system to offer adequate safeguards for suspects and defendants; thought that wrongful convictions happened often or even very often (57%); and believed that suspects were never, or only rarely, treated fairly by the police (54%). Only a third (34%) thought that prosecutors could *usually* or *always* be trusted to ensure that suspects are treated fairly – and while 38% thought the courts usually treated defendants fairly, almost 20% thought that the courts never, or only rarely, did so. Overall, these findings indicate **relatively low levels of trust in all organs of the criminal justice system.**

Opinion formers thought that the **government retained the death penalty**, despite not executing anyone for more than three decades, **because it was believed to be necessary to deter crime**, but also because it was thought that the **government lacked political will to act**, in part because they worry that abolition could make them unpopular with the electorate.

In response to some questions, interviewees mentioned public concern over relatively high rates of violence, but **when asked what measures were most likely to reduce violent crime** in Kenya, interviewees put their faith in **social measures, such as better moral education of young people and reducing poverty**. While the third most cited measure was related to criminal justice – ‘more effective policing’ – no-one chose ‘more executions’, and only one person chose ‘more death sentences’ as likely to reduce violent crime.

Not surprisingly, given almost all respondents were in favour of abolition, **most said they would support an act of parliament to abolish the death penalty**, with none of the retentionists saying they would strongly oppose such legislation. Furthermore, **more than three-quarters felt that the public would accept abolition**, even if some people might not initially want it. Some were of the opinion that the public will follow the government, as people respect authority, though they felt it would be better for the government to engage with and inform the public of the rationales for abolition in the run-up to legislative change.

# PARADISE

## The purpose of the study





1.1 The context

Having been used only very rarely in the pre-colonial legal systems of the East African region, Kenya’s contemporary death penalty framework is a direct inheritance of the colonial era.<sup>1</sup> During the period of British rule, from the 1890s through to independence in 1963, capital punishment was deployed as a means of imposing order and asserting the authority of the colonial state.<sup>2</sup> The peak of its use came amid the ‘state of emergency’ in response to the Mau Mau rebellion in the 1950s, when 2,509 mostly Kikuyu individuals received death sentences, of whom 1,090 were executed – more than double the total number of other executions between 1908 and 1956.<sup>3</sup> In the words of historian David Anderson, ‘[s]tate judicial execution, the highest form of institutional violence available under the rule of law, was ruthlessly deployed in the suppression of the rebellion’.<sup>4</sup>

At the time of independence, Kenya adopted a new constitution, which permitted multiparty democracy and incorporated certain civil and political rights akin to those found in the European Convention on Human Rights, including establishing the right to life, restricted by a death penalty savings clause mirroring those found in the constitutions of other former British colonies.<sup>5</sup> Under the presidency of Daniel arap Moi from 1978 to 2002, constitutional protections were eroded, with the death penalty being politicised as a way to target government opponents.<sup>6</sup> The last execution to date – that of an air force officer who led a coup against the Moi government – was carried out in 1987, with a total of 280 executions taking place in the post-independence era.<sup>7</sup>

It is now 35 years since the last execution in Kenya, with the country classified as an ‘abolitionist de facto’ state: those in which the punishment is still present in law, but never used in practice. Under the penal code, the death penalty is currently retained for offences of murder, robbery with violence, attempted robbery with violence, and treason. Death sentences have continued to be handed down, with around 600 individuals estimated to be on death row at present.<sup>8</sup> Notwithstanding the long hiatus in executions, for those held on death row incarceration can generate significant anxiety and trauma, given the uncertain and indefinite nature of their sentence.

The numbers of those on death row have been vastly inflated by the use of mandatory death sentences, preventing the use of judicial discretion. This problem has been intermittently addressed by the use of mass commutations of death row prisoners. For example, in 2009, President Mwai Kibaki commuted the sentences of more than 4,000 individuals – the largest recorded single death row commutation – and in 2016, President Uhuru Kenyatta approved a further 2,747 commutations. On both occasions, before the commutations Kenya had had the largest death row population of any African nation.<sup>9</sup> These and other mass commutations appear to reflect a lack of enthusiasm for the death penalty at the level of political leadership in Kenya.

In the decades following the last execution there have been repeated expressions of support for abolition among government representatives and official institutions. In 1997, the abolition of the death penalty was recommended by the Kenya Law Reform Task Force,<sup>10</sup> and in 2003, the Vice-President, Moody Awori, stated that the Kibaki government intended to introduce a bill for abolition in parliament, which was supported by the Commissioner of Prisons.<sup>11</sup> Just a year later, in 2004, the Justice Minister of the Kibaki government, Kiraitu Murungi, restated the government’s commitment to abolition,<sup>12</sup> and in 2007, a motion to abolish the death penalty was introduced in parliament, although it did not pass.<sup>13</sup> More recently, in 2018, the government informed the UN that it was committed to reviewing the death penalty, and in the same year, the Kenya Law Reform Commission also recommended its abolition.<sup>14</sup>

The latest steps in the restriction of the use of the death penalty have been through changes to the mandatory sentencing regime that have arisen through the courts. In 2010, the Court of Appeal of Kenya decided the case of *Mutiso v Republic*, in which the appellant, who had been convicted of murder, challenged the constitutionality of the mandatory death penalty for that offence. The court found that the mandatory death penalty was incompatible with the constitution, as it: violated the defendant’s right to a fair trial; constituted cruel, inhuman or degrading treatment or punishment; and violated the right to life. This judgment applied specifically to the offence of murder, but left open the possibility of challenges against mandatory sentencing for the other capital offences.<sup>15</sup> The following week, the new Constitution of Kenya 2010 was approved by public referendum, still permitting the death penalty as an exception to the right to life.

Shortly after the *Mutiso* judgment, however, the constitutional status of the mandatory death penalty became complicated by the 2013 Court of Appeal ruling in *Mwaura and others v Republic*. In this case, the appellants had been convicted of robbery with violence, and also sought to challenge the mandatory nature of their death sentences. In its judgment, the court rejected the prior decision in *Mutiso*, and upheld the mandatory death penalty for robbery with violence as constitutional.<sup>16</sup> The divergences between these two decisions created a lack of clarity surrounding mandatory sentencing, which the Supreme Court of Kenya sought to address in the 2017 case of *Muratetu v Republic*.<sup>17</sup>

*Muratetu* concerned the cases of two petitioners who had been convicted of murder. Confirming the abolition of the mandatory death sentence for murder, the Supreme Court concluded *inter alia* that the prevention of any judicial discretion in sentencing was ‘harsh, unjust and unfair’,<sup>18</sup> in violation of the right to a fair trial. This decision followed on from similar decisions, in the preceding years, ending mandatory sentencing in neighbouring Malawi and Uganda. The Supreme Court also recommended that the Attorney General and parliament develop legislation to specify what constituted a life sentence<sup>19</sup> and that the Attorney General set up a framework to deal with the resentencing process for those who had received mandatory sentences.<sup>20</sup>

<sup>1</sup> Novak A, Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya, *Suffolk University Law Review* 45 2012, pp285–356, p323.  
<sup>2</sup> Ibid. p314; see also Hynd S, Killing the Condemned: The Practice and Process of Capital Punishment in British Africa 1900–1950s, *Journal of African History* 49 2008, pp403–18.  
<sup>3</sup> Rates of commutations were relatively high during this period: in some years, up to half of the death sentences imposed were commuted. Novak, Constitutional Reform, p319, p326.  
<sup>4</sup> David Anderson, *Histories of the Hanged: The Dirty War in Kenya and the End of Empire* (Weidenfeld & Nicolson 2006), p291.  
<sup>5</sup> Novak, *Constitutional Reform*, p330.  
<sup>6</sup> Ibid. p348.  
<sup>7</sup> Ibid. p332.  
<sup>8</sup> Official statistics from the Kenya Prison Service confirmed that there are 593 death row prisoners in Kenya as of 23 November 2021.  
<sup>9</sup> Amnesty International, Death Penalty is not the Solution to Corruption in Kenya, 8 June 2018, [www.amnesty.org/en/latest/news/2018/06/op-ed-death-penalty-is-not-the-solution-to-corruption-in-kenya](https://www.amnesty.org/en/latest/news/2018/06/op-ed-death-penalty-is-not-the-solution-to-corruption-in-kenya) – accessed: 23 December 2021.

<sup>10</sup> Asiema J K and Elisha O Z, *The Application of the Death Penalty in Kenya: A Case of Torturous De Facto Abstinence* (British Institute of International and Comparative Law 2005), p13.  
<sup>11</sup> Ibid.  
<sup>12</sup> Ibid.  
<sup>13</sup> Hood R and Hoyle C, *The Death Penalty: A Worldwide Perspective* (Oxford University Press 2015), p94.  
<sup>14</sup> UN Human Rights Council, Question of the Death Penalty: Report of the Secretary-General, 14 September 2018, UN Doc ref A/HRC/39/19, paras 7, 26.  
<sup>15</sup> *Godfrey Ngatho Mutiso v Republic* [2010] eKLR, Criminal Appeal No 17 of 2008.  
<sup>16</sup> *Joseph Njuguna Mwaura and others v Republic* [2013] eKLR, Criminal Appeal No 5 of 2008.  
<sup>17</sup> *Francis Karioko Muratetu and another v Republic* [2017] eKLR, Petition No 15 of 2015.  
<sup>18</sup> Ibid. para 48.  
<sup>19</sup> Ibid. para 96.  
<sup>20</sup> Ibid. para 111.

As a result, a task force on the review of the mandatory death penalty was set up by the Attorney General in 2018. It concluded that the abolition of the death penalty should be recommended, with a category of the ‘rarest of rare’ murder offences receiving the harshest sentence of life imprisonment without parole. Alternatively, if abolition was rejected, the task force advised that the death penalty should apply only to these ‘rarest of rare’ offences.<sup>21</sup> In the course of its research, the task force determined that the criminal justice system in Kenya was defective,<sup>22</sup> and that those on death row disproportionately represented the most vulnerable groups in society, as has been shown by research in many other jurisdictions.<sup>23</sup> These conclusions represented yet another official expression of the problems of Kenya’s death penalty regime and support for its abolition.

The process of resentencing those subject to mandatory sentences has since faced challenges. Following confusion within lower courts about which offenders were eligible for resentencing, the Supreme Court published updated guidance on the *Muratetu* decision in July 2021, because of the courts’ receipt of ‘an avalanche of applications’.<sup>24</sup> In this guidance, the Supreme Court made clear that its judgment applied only to the offence of murder, and that separate constitutional challenges would be required to address the other offences of robbery with violence, attempted robbery with violence, and treason.<sup>25</sup> Based on these guidelines, the courts have rejected applications for resentencing from those who received mandatory sentences for other offences.<sup>26</sup> This means that, for those still on death row for offences other than murder, any resentencing would be contingent on the success of further litigation or on further clarification by the Supreme Court.

One purported barrier to the wider abolition of the death penalty, previously cited by government officials, has been lack of public support, with Kenyan delegates telling a UN Committee in 2013 that abolition was ‘not supported by the will of the Kenyan people’.<sup>27</sup> This stands in contrast, however, to the findings of new research published by The Death Penalty Project (UK) in partnership with the Kenya National Commission on Human Rights on public opinion, which found that an overall majority of the public would, in fact, accept abolition as government policy if it were to be adopted.<sup>28</sup> The presentation of public opinion as a barrier to abolition also runs counter to official expressions of support for abolition and legislative proposals that have arisen during the moratorium period.

The individuals interviewed for the present report – the representatives of a wide range of key institutions in society – are those who hold the potential to shape public opinion in Kenya through their leadership. Religious leaders, for example, have held a central, albeit complex, position in public life in Kenya, frequently exerting influence on matters of political and social affairs. According to Huma Haider, ‘[r]eligious leaders and religious organisations have historically played important roles in promoting social cohesion and social change in Kenya’.<sup>29</sup> This leadership role was exemplified during the 1990s, when church leaders became vocal

critics of authoritarianism under President Moi and were able to mobilise significant numbers of citizens to express their opposition to the regime.<sup>30</sup>

In recent decades, civil society organisations have also come to play an increasingly prominent role in national political discourse and democratic processes. This has included undertaking campaigns and advocacy to hold governments to account for their policy decisions, as well as involvement in development-related projects and the provision of social services.<sup>31</sup> Furthermore, political leaders themselves can also engage significantly with the public to seek popular support for their positions. The potential power of this dynamic to change public sentiments was demonstrated in campaigning prior to the 2010 constitutional referendum. Following the rejection of an earlier draft constitution in a referendum in 2005, Christina Murray credits the successful adoption of the 2010 constitution to the combination of public involvement through citizen education and consultation processes, together with joint cross-party campaigning undertaken by high-profile political leaders.<sup>32</sup> This demonstrates the potential for elites in Kenyan politics, the media, civil society, and beyond to shape opinions within government and in wider society.

## 1.2 The need for research on opinion leaders

In some countries, such as South Africa and Rwanda, abolition coincided with the end of a repressive regime; elsewhere, economic and political incentives for abolition were powerful, including across Eastern Europe during the 1990s. Abolition can be led by a president and brought about by a vote in parliament, as happened in July 2021 in Sierra Leone and in May 2020 in Chad, when the National Assembly abolished the death penalty for terrorism-related offences, having abolished it for ordinary offences in 2017. Or it can be decided by a constitutional court, as occurred in South Africa. Notwithstanding different courses, in most jurisdictions abolition has been led by political ‘elites’, without majority support from the public.

While in some countries around the globe political expediency played a role in movements towards abolition, and unique social, economic, political, cultural, and historical contexts influenced progress, elites have led the way – in part because of increasing ideological commitment to human rights. Hence, political will has reflected wider recognition among elites that death is not only unnecessary to meet the goal of retribution, but that denial of the right to life of the prisoner brutalises us all. However, political leaders – those who have the opportunity to effect change – do not operate in a political vacuum; they are typically influenced by wider elites, what we may call ‘opinion formers’. Such people can shape views within government and among legislators, but they can also influence the public, creating the conditions whereby the public can be led by their government, can trust that their rulers make policy choices in their best interests.

Hence, in Chad, where the movement towards abolition had been active since 2003, when the country first observed a moratorium on capital punishment, civil society organisations and other stakeholders had been vocal in their opposition to capital punishment. This was especially apparent during the public executions in 2015 that broke the moratorium, following several terrorist attacks in the capital. Similarly, in parts of Europe – such as Hungary, where abolition came via the constitutional court – courts, like governments, had

<sup>21</sup> Njau-Kimani M, The Taskforce on the Review of the Mandatory Nature of the Death Penalty in Kenya, [congres.ecpm.org/wp-content/uploads/2019/04/Maryann-Njau-Kimani-PRESENTATION-DEATH-PENALTY-BRUSSELS.pdf](https://congres.ecpm.org/wp-content/uploads/2019/04/Maryann-Njau-Kimani-PRESENTATION-DEATH-PENALTY-BRUSSELS.pdf) – accessed: 23 December 2021.

<sup>22</sup> Muthoni K, Criminal Justice System Favours the Rich, State Report Reveals, *The Standard*, 4 November 2019, [www.standardmedia.co.ke/nairobi/article/2001348026/freedom-for-the-rich-prison-for-the-poor-injustice-in-corridors-of-law](http://www.standardmedia.co.ke/nairobi/article/2001348026/freedom-for-the-rich-prison-for-the-poor-injustice-in-corridors-of-law) – accessed: 23 December 2021.

<sup>23</sup> The Death Penalty Project is currently conducting research on prisoners sentenced to death in Kenya, including those whose sentences have been commuted to life imprisonment, to provide further evidence to support these findings.

<sup>24</sup> *Francis Karioko Muratetu and other v Republic; Katiba Institute and five others (Amicus curiae)* [2021] eKLR, Petition No 15 and 16 (Consolidated) of 2015, para 8.

<sup>25</sup> *Ibid.* paras 11–15.

<sup>26</sup> See e.g., *Kemmedy Kavai Abdalla v Director of Public Prosecutions* [2021] eKLR, Petition No 189 of 2019 and *Wright Kinyatta v Republic* [2021] eKLR, Criminal Appeal No 125 of 2019.

<sup>27</sup> UN Office of the High Commissioner for Human Rights, Committee Against Torture Examines Report of Kenya, 16 May 2013, [newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13337&LangID=E](https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13337&LangID=E) – accessed: 23 December 2021.

<sup>28</sup> Hoyle C with Batchelor D, *The Death Penalty in Kenya: A Punishment that has Died Out in Practice: Part One: A Public Ready to Accept Abolition* (The Death Penalty Project 2022).

<sup>29</sup> Haider H, Religious Leaders and the Prevention of Electoral Violence, [gsdrc.org/wp-content/uploads/2016/07/HDQ1366.pdf](https://gsdrc.org/wp-content/uploads/2016/07/HDQ1366.pdf) – accessed: 23 December 2021.

<sup>30</sup> Sabar G, *Church, State and Society in Kenya* (Routledge 2012), p1; Cheesman N, Kanyinga K and Lynch G (eds.) *The Oxford Handbook of Kenyan Politics* (Oxford University Press 2020), p5.

<sup>31</sup> Lugano G, Civil Society and the State, in Cheesman N, Kanyinga K and Lynch G (eds.) *The Oxford Handbook of Kenyan Politics* (Oxford University Press 2020), p310.

<sup>32</sup> Murray C, Political Elites and the People: Kenya’s Decade-long Constitution-making Process, in Negretto G L (eds) *Redrafting Constitutions in Democratic Regimes* (Cambridge University Press 2020), p190.



been influenced for years by intellectual elites; lawyers, social scientists, writers, journalists and representatives of churches have typically campaigned for years before political or legal elites change laws. So, while the presidents of Mongolia and Sierra Leone have recently been praised by the international community for abolishing the death penalty, they did so following decades of advocacy by civil society, academia, and the legal community, just as presidents in South America have been strongly influenced by the Catholic church.

Though many retentionist countries regularly survey the public on their views on capital punishment, until recently there has been little research to establish what those who could be termed ‘elites’ or ‘opinion leaders’ think about the death penalty; what shapes those opinions, and whether such people could be relied on to support abolition. Over the past few years, The Death Penalty Project has commissioned a series of studies across various countries to establish what those who are well informed about justice processes – those whose views can influence policy and practice – think about the death penalty and whether they are inclined towards supporting abolitionist efforts. This report takes a similar approach to previous ‘elite’ studies in Zimbabwe, Indonesia, Taiwan and the Eastern Caribbean, and in presenting data on opinion formers in Kenya, makes some comparisons with these jurisdictions.

Opinion formers are those with social, cultural and political influence. Thought to be credible and trustworthy, they can be role models for the public, with their opinions well respected. The report offers an insight into the mindset of those who have played a role in shaping Kenyan society, those who are in positions of power or influence.<sup>33</sup> Opinion formers are likely to have more influence on political outcomes than general members of the public, so the interviews we conducted seek to uncover their understanding of and opinions about criminal justice and penal laws and policies, as well as their specific opinions on the death penalty, its use, potential efficacy, and pitfalls. Interviews with opinion leaders do not reveal ‘truths’; their accounts are inevitably subjective, reflecting an active process of creation of meanings.<sup>34</sup> That said, in most countries, including Kenya, these are the voices that will be heard and that can shape policy, practice and discourse. Importantly, they tell us if the elites in Kenyan society will support any efforts towards abolition, or at least not oppose them. They will reveal their concerns about the death penalty and its administration, and any worries about the consequences of abolition, so that those inclined towards reform of the law can make progress fully informed about potential obstacles along the way.

### 1.3 Research design and methods

While it is interesting to know what proportion of opinion formers is for or against abolition of the death penalty, rich empirical data on their views and understandings, and the reasons for those views, can uncover important nuances of opinion and, elsewhere, has shown that respondents are far less resistant to abolition of the death penalty than may be assumed.<sup>35</sup>

This was found to be the case in a recent public opinion survey in Kenya, also commissioned by The Death Penalty Project and published in 2022.<sup>36</sup> This survey of a random sample of 1,672 people across Kenya found that only half of Kenyans supported the death penalty. Importantly, this figure dropped to between a quarter and a third of Kenyans when they were given relevant information about its administration or abolition

elsewhere in sub-Saharan Africa, and to just 17% when presented with specific and realistic scenarios of cases with common mitigating features. We drew on the findings of this survey in some of the questions posed to opinion formers, asking if these findings were surprising to them and if they thought the information should influence government policy about retention or abolition (see questions 11-13 at Appendix 1).

This opinion formers research also builds on our experience of conducting research on opinion formers’ views on the death penalty elsewhere, to allow for comparative analysis – and, indeed, the report makes occasional references to those other studies where relevant. However, we made minor amendments to the instrument to take account of jurisdictional particularities.

At all stages of the research, from editing the instrument to contacting potential interviewees, conducting interviews, and making sense of the data, we worked closely with the Kenya National Commission on Human Rights (KNCHR). Interviews were conducted by the authors and two members of KNCHR; most were online via Zoom, given the restrictions occasioned by the Covid-19 pandemic, though some interviews with religious leaders and ‘elders’ were conducted in person given the challenges of internet connectivity.

Following the design of the interview schedule and approval of the research by the University of Oxford Research Ethics Committee, we trained the two KNCHR researchers who were to assist us in the empirical data collection. Having consulted with KNCHR to establish a representative list of potential ‘opinion formers’, from categories agreed by the research team, invitations to be interviewed were sent out in September 2021. Following this, the team made phone calls to those invited, to establish if they were willing to be interviewed. Potential interviewees were provided with participant information sheets that explained: the purpose of the research; that it was being led by an independent academic institution; that all interview data would be confidential; that any quotations would be fully anonymised before publication; and that they could withdraw their cooperation with the project at any stage.

We conducted three pilot interviews to test the research tool and the agreed approach for interviewing; this was to interview in teams of two, with most interviews organised so that a member of the Oxford team and a member of the KNCHR team were present. Following this, from September through to December 2021, we interviewed 42 people from diverse backgrounds covering the key institutions of influence: social justice centres, civil society organisations, advocates, senior government officials, representatives of the media, elders, religious leaders, and magistrates and prosecutors. To avoid the risk of any interviewee being identified through their responses, thus breaching our promise of anonymity, we do not reveal how many interviewees there were in each category, though can attest to reasonably equal distribution across occupations. Nor do we reveal the occupation of those we quote in our report. We chose not to interview parliamentarians in this study, as we determined them to be in a somewhat separate category; they are the very people who can enact the changes that other opinion formers may seek to influence. We plan to conduct a separate study of parliamentarians in the coming months.

While our interviews were long and covered considerable ground, not all interviewees were fully responsive to the range of questions. In some cases, therefore, certain questions were not answered by the interviewee, so our data are not complete for all questions, though they are for most. Where the data are incomplete, we alert the reader to this with the expression ‘of those who answered...’. The question number is recorded for all relevant data in the findings, with the interview schedule reproduced at Appendix 1.

<sup>33</sup> Richards D, Elite Interviewing: Approaches and Pitfalls, *Politics* 16(3) 1996, pp199-204, pp199-200.

<sup>34</sup> Portelli A, What Makes Oral History Different, in Perks R and Thomson A (eds.) *The Oral History Reader* (Routledge 2006).

<sup>35</sup> Hood R, Is Public Opinion a Justifiable Reason Not to Abolish the Death Penalty? A Comparative Analysis of Surveys in Eight Countries, *Berkeley Journal of Criminal Law* 23 2018, pp218-242.

<sup>36</sup> Hoyle C with Batchelor D, *The Death Penalty in Kenya: A Punishment that has Died Out in Practice: Part One: A Public Ready to Accept Abolition* (The Death Penalty Project 2022).

In conducting the interviews, we used a series of ‘interview showcards’ to help the interviewer share with the interviewee possible responses to certain questions. As mentioned, the majority of interviews were conducted online, so the interviewer shared these ‘interview showcards’ using the Zoom ‘share screen’ feature. For the few interviews that were conducted in person, the interviewee received a print-out to read. These ‘interview showcards’ were aimed at reducing the time spent during an interview, but also at helping the researcher to administer the interview tool, and to reduce error and non-compliance. Furthermore, having secured permission from interviewees, we video recorded all online interviews and audio recorded face-to-face interviews, to allow for full and accurate interview transcriptions that have produced rich qualitative data alongside quantitative material. The quantitative data was recorded and analysed using Excel, while the qualitative data was thematically coded using an analysis programme (NVivo).

## PART TWO

### The findings



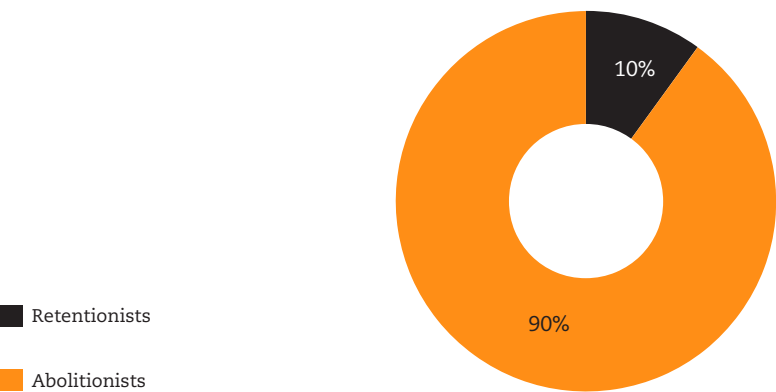


2.1 Views on abolition and retention of the death penalty

Almost all of the 42 Kenyan opinion formers that we interviewed were in favour of abolishing the death penalty (90%) and only a small minority supported its retention (10%, 4 participants) (see Q3 of the survey, reproduced in the Appendix). Crucially, our study also assessed the strength of opinion formers’ views and found that most ‘abolitionists’ (82%) were *strongly* in favour of abolition, while only one ‘retentionist’ participant was *strongly* in favour of keeping the death penalty.

Significantly, this is the highest level of support for abolition of the death penalty among opinion formers of all the international studies we have conducted: in the Eastern Caribbean and Barbados<sup>37</sup>, 52% of opinion formers’ supported abolition; in Indonesia<sup>38</sup>, 67% supported abolition; and in a similar study of the opinions of legislators in Taiwan,<sup>39</sup> 61% expressed support for abolition. The Kenyan findings on support for abolition are almost identical to those produced from our research in Zimbabwe<sup>40</sup>. In both studies, 90% of opinion formers supported abolition. However, there were marginally fewer people in Zimbabwe who were *strongly* in support of abolition.

Figure 1: Participants’ views on abolition or retention of the death penalty



2.1.1 Support for abolition of the death penalty

Abolitionist interviewees were presented with possible reasons for supporting abolition of the death penalty and asked to rank them in order of priority (Q8). In each study of opinion formers conducted in various jurisdictions over the past few years, concerns about wrongful convictions and the human rights of all citizens have been in the top three reasons for favouring abolition.<sup>41</sup> Kenya is no exception.

<sup>37</sup> Hood R and Seemungal F, *Sentenced to Death Without Execution: Why Capital Punishment has not yet been Abolished in the Eastern Caribbean and Barbados* (The Death Penalty Project 2020).  
<sup>38</sup> Hoyle C, *Investigating Attitudes to the Death Penalty in Indonesia: Opinion Formers: An Appetite for Change* (The Death Penalty Project 2021).  
<sup>39</sup> Hoyle C, *Legislators’ Opinions on the Death Penalty in Taiwan* (The Death Penalty Project 2021).  
<sup>40</sup> In Zimbabwe, 38 out of 42 participants were in favour of abolition, with 33 participants (87%) *strongly* in favour, and only 5 participants (13%) who *tended* to favour abolition; Hoyle C, *Time to Abolish the Death Penalty in Zimbabwe: Exploring the Views of its Opinion Leaders* (The Death Penalty Project 2020).  
<sup>41</sup> Hoyle C, *Investigating Attitudes to the Death Penalty in Indonesia: Opinion Formers: An Appetite for Change* (The Death Penalty Project 2021); Hood R and Seemungal F, *Sentenced to Death Without Execution: Why Capital Punishment has not yet been Abolished in the Eastern Caribbean and Barbados* (The Death Penalty Project 2020); Hoyle C, *Legislators’ Opinions on the Death Penalty in Taiwan* (The Death Penalty Project 2021).

Table 1: Support for abolition of the death penalty

Ranking	Reason
1	People may be wrongfully convicted or executed
2	It is an abuse of human rights
3	Every criminal deserves an opportunity to be rehabilitated
4	Indigent defendants have such limited access to justice that a fair trial cannot be guaranteed
5	It has no special or extra deterrent than a long term of imprisonment
6	My ideological or religious beliefs forbid the use of the death penalty
7	It is pointless to impose a punishment that will not be carried out by execution for a long time, maybe never
8	It cannot be carried out in a non-arbitrary/fair way
9	It is a stain on the reputation of the country
10	Other reason: ‘corruption’

As Table 1 shows, participants were particularly concerned about the possibility of wrongful convictions, especially in cases involving indigent defendants. According to the Legal Aid Act (2016) Section 43 (4):

**‘Where an accused person is brought before the court and is charged with an offence punishable by death, the court may, where the accused is represented, order the Service to provide legal representation for the accused.’**

However, it is unclear whether this standard is always applied in practice. Many cases before the magistrates’ court may be unrepresented and this will include capital robbery cases that could result in a death sentence. While we did not specifically ask our interviewees about this, many of the legal practitioners we interviewed claimed that not all defendants are represented, and the quality of representation is not always good; one participant explained: *‘State counsel are overworked and underpaid’*. In this way, some opinion formers feel that the death penalty unduly affects those from lower socio-economic backgrounds: *‘The death penalty is a punishment that is fashioned to punish poverty.’* Furthermore, participants referred to recent high-profile cases of wrongful convictions to illustrate this risk<sup>42</sup>. Others were concerned that widespread corruption in the criminal justice system increased the possibility of wrongful convictions, a matter we return to in section 2.3, below.

Participants were also opposed to the death penalty on the grounds that *‘it is an abuse of human rights’* and an affront to *‘human dignity’*, to the *‘sanctity of life’*. Many made reference to Section 26 (1) of the 2010 Kenyan Constitution – ‘every person has the right to life’ – with some arguing that Section 26 (3), which states that ‘a person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law’, should be omitted so that there would be no limitations on the ‘right to life’ in the constitution.

Many abolitionists felt that *‘every criminal deserves an opportunity to be rehabilitated’*, with several citing examples of death row inmates who successfully completed law degrees while incarcerated as evidence of

<sup>42</sup> Including the much-publicised case of a Kenyan man, Julius Wambua Musyoki, who, in 2020, was exonerated by the High Court after serving eight years of a life sentence for the charge of incest, when it was held that he had been ‘framed’ by his wife. For more information, see: [www.kenyans.co.ke/news/60563-exclusive-wife-man-framed-rape-speaks-out-after-release](https://www.kenyans.co.ke/news/60563-exclusive-wife-man-framed-rape-speaks-out-after-release)



their educability and potential for reform.<sup>43</sup> Others expressed doubts over the deterrent value of the death penalty, recognising that it does not have an extra deterrent effect over a long prison sentence, as has been well established in international research.<sup>44</sup> Furthermore, several of the interviewees discussed their abolitionist stance on the death penalty with reference to their Christian beliefs; Kenya is a predominantly Christian country, with latest census figures suggesting that 85% of the population identify as Christian. Still others referred to a rationale that was not included on the ‘showcard’: that the death penalty is an outdated colonial punishment, ‘*an inheritance problem*’.

2.1.2 Support for retention of the death penalty

The four ‘retentionist’ opinion formers were presented with possible reasons for supporting the retention of the death penalty and asked to rank them in order of priority (Q5). As Table 2 shows, desert, or retribution, and deterrence were the two main reasons, though victim satisfaction and the somewhat related concern about vigilante justice were also mentioned. We were surprised that respondents had selected the first of these justifications, given that no-one has been executed in Kenya for decades.

Table 2: Support for retention of the death penalty

Ranking	Reason for supporting retention
1	There will always be some criminals who deserve to be executed
2	It’s necessary to deter people from crime
3	Every criminal deserves an opportunity to be rehabilitated
4	Relatives and others might take matters into their own hands without the death penalty
5	Because I believe the public want the death penalty for serious crimes
	My ideological or religious beliefs support the death penalty
6	Other reason

In explaining their choices, the retentionists suggested that there are some ‘*very serious crimes*’ for which the death penalty is the only suitable punishment, and used a recent Kenyan case from 2021 as an example: Masten Wanjala, a 20-year-old man, confessed to killing 10 young boys in Western Kenya over a five-year period. This case also demonstrates the fourth point that abolition could cause relatives to ‘take matters into their own hands’, because, after escaping from custody, Wanjala was beaten to death by villagers in Bungoma town.<sup>45</sup> Of course, vigilante justice can occur in jurisdictions without the death penalty, and speaks to collective revenge rather than necessarily a perceived absence of formal justice solutions.

Those that thought the death penalty to be necessary to deter serious crimes mentioned the alarming rates of extra-judicial killings, femicide, and crimes in the informal settlements, while one spoke at some length about victims being ‘*the most important people in this discussion*’. Interestingly, one participant used his Christian

<sup>43</sup> See Good D, *The Power of Access to Justice*, Justice Defenders 2021, [uploads-ssl.webflow.com/5e175b3d2465535e877e6d59/607f0cb0a74cb654d66a6cfe\\_Justice%20Defenders%20-%C2%A0The%20Power%20of%20Access%20to%20Justice.pdf](https://uploads-ssl.webflow.com/5e175b3d2465535e877e6d59/607f0cb0a74cb654d66a6cfe_Justice%20Defenders%20-%C2%A0The%20Power%20of%20Access%20to%20Justice.pdf) – accessed 19 January 2022.  
<sup>44</sup> See the US National Academy of Science’s denunciation of studies of deterrence and the death penalty, which states that these studies are inconclusive and thus should not be used to effect policy judgements on capital punishment; Nagin D S and Pepper J V P, *Deterrence and the Death Penalty* (National Academies Press 2012).  
<sup>45</sup> Igunza E, Masten Wanjala: *Mob Beats Kenyan Child Serial Killer to Death*, BBC News, 15 October 2021, [www.bbc.co.uk/news/world-africa-58923592](https://www.bbc.co.uk/news/world-africa-58923592) – accessed: 18 January 2022.

religious beliefs to justify his support for the death penalty, referencing the Biblical quote that ‘*he who lives by the sword, dies by the sword*’.

Additionally, the retentionist opinion formers were asked which of a series of options they would prefer instead of complete abolition (Q4). Three of the four respondents chose further restriction of the death penalty, with *additional* limits on the types of offenders who can be sentenced to death or the crimes for which it can be imposed. When asked ‘what changes would you like to see introduced?’, suggestions included ‘*robbery with violence should not be a capital offence*’.

Hence, though four people were opposed to abolition, three of them wanted further restrictions on the use of capital punishment. Only one respondent stated ‘the death penalty should be retained but made less restrictive, with *fewer* limits on the types of offenders who can be sentenced to death or the crimes for which it can be imposed’. When asked ‘what changes would you like to see introduced?’, this respondent replied: ‘*Execution should occur within a stated timeframe after exhaustion of final appeal*.’

Three of the four believed that certain groups of people should never be sentenced to death (Q7), including children, pregnant women, and elderly people<sup>46</sup>, though the fourth argued that ‘*the law should be blind to demographic dynamics*’. Notwithstanding, in response to a further question he conceded that those under the age of 18 should not be eligible for a death sentence, as is stipulated by Kenyan and international law.

Retentionist participants were asked specifically whether there are any types of crimes for which a death penalty should never be imposed (Q6). All four answered in the affirmative, and when asked to elaborate, their responses included:

**‘Treason, as it could ‘be used as a political tool.’**

**‘Crimes that are not injurious to life and health of people.’**

**‘Robbery with violence and treason. It should be limited to murder’.**

Abolition of the death penalty for robbery was a recurring theme through many of the interviews, with many abolitionist participants – in addition to this retentionist respondent – arguing that the death penalty for the offence of robbery with violence is flawed and the law ‘*poorly drafted*’.<sup>47</sup> As one participant stated, the ‘*ingredients*’ required to constitute robbery with violence create arbitrariness:

**‘If I slapped you and snatched your phone, I would go to prison and be sentenced to death.’**

<sup>46</sup> While elderly people are not currently exempt from capital punishment under Kenyan law, pregnant women and those under the age of 18 at the time of the commission of the capital offence are exempt (in addition to those who are mentally ill).Kenya is party to the Convention on the Rights of the Child, as well as the African Charter on the Rights and Welfare of the Child, both of which prohibit the execution of a person under the age of 18 (Cornell Center on the Death Penalty Worldwide, n.d.).  
<sup>47</sup> International research suggests that the death penalty does not deter robbery with violence, with a study from Nigeria demonstrating no consistent relationship between the number of executions carried out and the rates of armed robbery; indeed, the introduction of the death sentence for armed robbery in 1970 was followed by an increase in incidences of this crime: Adeyemi A A, *Death Penalty: Criminological Perspectives – The Nigerian Situation*, *Revue Internationale de Droit Penal* 58 1987, pp485-502.

A recent media report provides one such example from Nairobi; Michael Odhiambo was sentenced to death after being convicted on three counts of robbery with violence<sup>48</sup> after he used his car to block his victims’ vehicle and rob them of money and mobile phones.<sup>49</sup>

2.2 Relationship between knowledge and support for the death penalty

To understand the level of knowledge upon which opinion formers base their views of the death penalty, at the start of the interview they were presented with a Showcard [see Q.1, Appendix] with a series of short statements that provided a summary of the current scope and use of the death penalty in Kenya, and participants were asked to report which, if any, of these facts they already knew (Q1a). Overall, as Table 3 illustrates, opinion formers were very familiar with the workings of the Kenyan death penalty system. Only one participant had no knowledge of any of the facts presented. This accords with previous research showing that opinion formers are well informed about the operation of the death penalty in Zimbabwe, Indonesia, and the Eastern Caribbean.<sup>50</sup>

Table 3: Knowledge about the death penalty

Fact	Proportion of participants who already knew this fact
Kenya has not carried out an execution for over 30 years	93%
In the past, a few thousand prisoners on death row have had their death sentence commuted to life in prison	93%
The death penalty has not been a mandatory punishment for murder since 2017	88%
Kenya retains the death penalty by hanging as a punishment for murder, other offences resulting in death, robbery not resulting in death and treason	86%
There are currently about 600 prisoners under sentence of death	69%
Most years, more than 100 people are sentenced to death, mostly for murder or robbery	62%
In December 2020, at the last UN General Assembly resolution on a worldwide moratorium on the use of the death penalty, Kenya abstained	40%

Opinion formers were subsequently asked if they were surprised by any of the facts that they were not aware of (Q1b). Participants were least knowledgeable (31%) about Kenya’s abstention at the latest UN General Assembly resolution on a worldwide moratorium on the use of the death penalty – and, indeed, it was noted that the abstention had not been widely publicised at the time (December 2020). Many wondered why Kenya had abstained, particularly as no executions have occurred in more than 30 years.

<sup>48</sup> Contrary to s. 295 and 296(2) of the penal code.  
<sup>49</sup> Ndunda J, ‘Mobile Phone Thief Receives Death Penalty’, *Nairobi News*, 21 January 2022.  
<sup>50</sup> Hoyle C, *Investigating Attitudes to the Death Penalty in Indonesia: Opinion Formers: An Appetite for Change* (The Death Penalty Project 2021); Hoyle C, *Time to Abolish the Death Penalty in Zimbabwe: Exploring the Views of its Opinion Leaders* (The Death Penalty Project 2020); Hood R and Seemungal F, *Sentenced to Death Without Execution: Why Capital Punishment has not yet been Abolished in the Eastern Caribbean and Barbados* (The Death Penalty Project 2020).

A fifth (19%) of opinion formers were unfamiliar with the exact number of those who are currently on death row, and just more than a quarter (26%) were surprised by the average number of people who are sentenced to death each year, with some remarking that it is ‘*very high*’. They were not surprised by the other facts, though some participants took exception to our statement that ‘Kenya has not carried out an execution for more than 30 years’, referring to troubling rates of extra-judicial killings by agents of the state – namely, police officers.

Participants were asked about their knowledge of the death penalty in an international context, to ascertain whether their views on capital punishment are informed by practice in other countries, or whether they are mainly focused on what is right for Kenya. They were told that ‘110 of 192 countries worldwide have completely abolished the death penalty’, and to relate this to the African context, they were also told that this includes Sierra Leone, where the death penalty had been abolished that year (July 2021) (Q10a). The majority of participants (69%) were not surprised by this information, with many acknowledging the strength of the global human rights movement. They explained:

‘No, I’m not surprised. In Latin America, they began abolishing the death penalty in the early 19th century.’

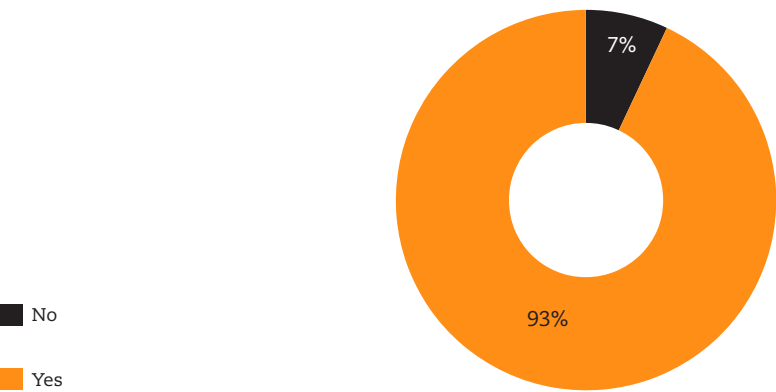
‘I am not surprised – it has no deterrent effect.’

A few were surprised by this information, though, and particularly surprised that Sierra Leone has abolished the death penalty, given the ‘*high rates of human rights abuses*’ in that country.

Regardless of whether they were ‘surprised’, there was a consensus among abolitionists that it was a positive thing that many countries were ‘*seeing the light*’; as one participant put it, ‘*it gives me hope*’, while another expressed that ‘*it is concerning that [Kenya is] lagging behind*’ on abolition. Others asserted that, if information on abolition is to shift the politics in Kenya, it would be more persuasive to present data from the African continent, or at least from the global south.

Participants were asked whether this information on the number of countries worldwide that have completely abolished the death penalty should influence Kenyan government policy about the retention or abolition of the death penalty (Q10b). Here, there was a clearer consensus, with 93% of participants answering in the affirmative.

Figure 2: Should information about the number of abolitionist countries influence government policy?



Interestingly, this 93% includes two respondents who had stated they were in favour of retaining the death penalty; they explained:

**‘It should because we pride ourselves on being one of the most progressive countries in Africa.’**

**‘Yes, because Kenya sees itself as a key leader in East Africa.’**

Some participants were clear that, even if this information should influence the Kenyan government, they were not persuaded that it would in practice:

**‘They [politicians] have their head in the sand – like an ostrich.’**

**‘In an ideal world, yes, it should. But knowing how our state agencies and government officials reason, I don’t think this will influence them.’**

Moreover, some participants did not consider this to be the most compelling evidence upon which the government should base its policy: instead, they thought the government should focus on human rights.

The three respondents who thought this information should not influence Kenyan government policy, argued that *‘every country should sit and weigh the merits’*. This argument – that death penalty policy is a matter for a sovereign state to decide upon, irrespective of international human rights mandates – is often invoked by retentionist politicians in Southeast Asian states.

2.2.1 Knowledge gaps between opinion formers and their politicians

In all studies of opinion formers commissioned by The Death Penalty Project, they have indicated that they believe themselves to be better informed about the death penalty than their politicians. Kenya was no exception.

To gain a better understanding of whether opinion formers keep abreast of international research on the death penalty, participants were asked how well informed they are about research evidence from other countries regarding the lack of any extra deterrent effect of the death penalty on the murder rate, compared with the

deterrent effect of long-term imprisonment (Q16a).<sup>51</sup> For this question, the highest-ranked answer was ‘not very well informed’ (42%), with just less than a third being very well informed. However, while half of the participants were not well informed or knew nothing about the specific research publications, some claimed the research aligned with their views on the lack of deterrent effect:

**‘I was not aware this was the position in several other countries, but the position of this research aligns with my personal opinions with regards to the death penalty.’**

Subsequently, opinion formers were asked how well informed they think politicians are about this research, and the majority of participants answered, ‘not very well informed’ (63%), with only 11% thinking politicians are well informed (Q16b). There was a consensus that, if the politicians were well informed about this research, the government would have amended death penalty policy to reflect that evidence. Some respondents went so far as to say that politicians are *‘clueless’* about this research, and another joked that there should have been a fifth choice, which is *‘they don’t care’*, as, in his opinion, that better reflects politicians’ position on the matter.

Opinion formers were also asked how well informed they are about research evidence from other countries regarding the inevitability of error and the conviction of the innocent (Q17a). Participants were more confident with this research, and indeed half said they were ‘very well informed’, and only one admitted to knowing nothing about it. Again, it seemed the participants did not have knowledge of *‘particular research’*, but they agreed that there have been wrongful convictions in death penalty cases, and they attributed this to the lack of adequate legal representation and to corruption in the criminal process. Others were cognisant of wrongful convictions from their legal training and from stories about high-profile cases in the media and popular culture.

Conversely, almost half (43%) thought politicians were not very well informed about such research, with only 16% saying that politicians were ‘very well informed’, with some suggesting that politicians might be in denial about this issue and certainly not well versed on specific research. Overall, it is interesting to note that opinion formers have little confidence in politicians’ knowledge of research on the death penalty.

2.2.2 The influence of public opinion data on opinion formers

To a greater or lesser extent, in all jurisdictions that retain the death penalty, those in positions of power or influence worry about the political fallout from abolition. They may presume the public is not only in favour of retaining the ultimate punishment, but also strongly in favour. Rigorous empirical research commissioned by The Death Penalty Project demonstrates that this is not so – that public opinion is not an impediment to abolition.<sup>52</sup>

In the closing months of 2019, The Death Penalty Project commissioned a survey on public opinion on the death penalty in Kenya.<sup>53</sup> Some of the key findings were presented to opinion formers to ascertain their views on public opinion, whether the survey findings were surprising to them, and whether they thought that

<sup>51</sup> In this section, it should be noted that for Questions 16a, 16b, and 17a only 38 participants answered, and for Q17b only 37 participants answered. Therefore, the following percentages reflect the proportion of those who answered the question.  
<sup>52</sup> See Sato M, *12 Years Without an Execution: Is Zimbabwe Ready for Abolition* (The Death Penalty Project 2018); Hei-Yuan C and Hood R, *For or Against Abolition of the Death Penalty: Evidence from Taiwan* (The Death Penalty Project 2019); Hoyle C, *Investigating Attitudes to the Death Penalty in Indonesia: Public Opinion: No Barrier to Abolition* (The Death Penalty Project 2021).  
<sup>53</sup> Hoyle C and Batchelor D, *The Death Penalty in Kenya: A Punishment that has Died Out in Practice. Part One: A Public Ready to Accept Abolition* (The Death Penalty Project 2022).



public views on the death penalty should influence government policy on abolition or retention. To begin with, opinion formers were presented with the following information:

**The public survey found that only 51% of respondents thought that the death penalty should be kept and only 32% thought that the death penalty should definitely be kept. This is the lowest support for the death penalty in all surveys we have carried out in Africa and Asia.<sup>54</sup>**

Almost half (45%) said they were surprised by this finding (Q11a). However, though this survey had shown that public support for the death penalty in Kenya is comparatively low, participants implied that it is high, because there was a narrow majority in favour of its retention. Indeed, one opinion former stated: *I'm very surprised... I would have said only 35% [supported the death penalty] if I was very generous!*

Given that countries that have abolished around the world have done so while most of the public remains in favour of retention, with political elites driving reform, their comments about Kenyan public support for the death penalty being higher than it should be were unexpected. They imply that opinion formers had presumed the public's views were much more closely aligned with their own. Notwithstanding, participants offered suggestions as to why the majority of the Kenyan public – known colloquially as the *mwanachie* – support the death penalty:

**‘What I know about the Kenyan public is that any retentionist claims are usually based on emotions, especially with regards to violent crime.’**

**‘The majority of the public does not understand the implications of the death penalty, and also there is a high level of crime in Kenya, and the public tends to think that having the death penalty will reduce the high number of crimes.’**

There was near consensus across respondents that the public still support the death penalty because people are ill informed about its application and use (*‘because of misinformation about the death penalty’*), and that it is an *‘issue of sensitisation’*:

**‘It is not a surprise for me, because we have an information deficit when it comes to abolition of the death penalty. Our community is not well educated nor well informed.’**

**‘I am not surprised... [the level of public support] may be because the majority of the population who were participating in the survey may not have known what crimes attract the death penalty. So people are supporting the death penalty because they might think certain crimes like political crimes and corruption attract the death penalty, when this is not the case in Kenya.’**

**‘I believe that with proper advocacy and education of the public the numbers [supporting the death penalty] should go down.’**

<sup>54</sup> By way of examples, this is much lower support than in Taiwan (85%), Indonesia (69%) and Zimbabwe (61%) (see Hei-Yuan C and Hood R, *For or Against Abolition of the Death Penalty: Evidence from Taiwan* (The Death Penalty Project 2019); Hoyle C, *Investigating Attitudes to the Death Penalty in Indonesia: Public Opinion: No Barrier to Abolition* (The Death Penalty Project 2021); Sato M, *12 Years Without an Execution: Is Zimbabwe Ready for Abolition* (The Death Penalty Project 2018).

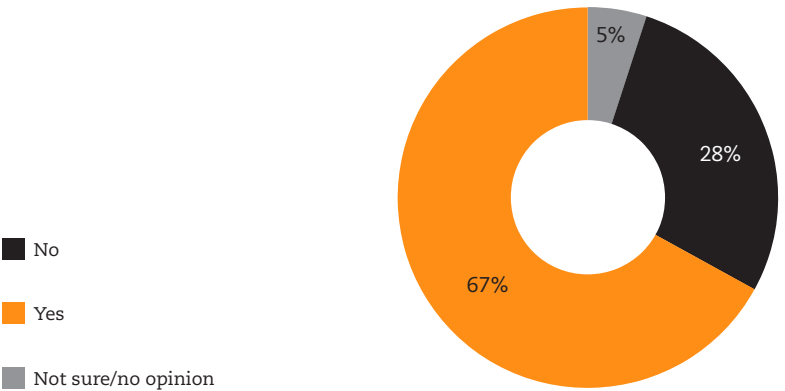
In response to a follow-up question (Q11b), the majority of participants (67%) made clear that information on relatively low public support should influence government policy on the death penalty (see Figure 3). Overwhelmingly, they justified this by reference to the *‘duty of a democratic government’* to listen to the views of the public on important matters and *‘to serve the people’*:

**‘Definitely – at the end of the day, the government works for the people, not the other way around.’**

**‘The public has a right to voice their views on issues – especially public policy issues.’**

**‘Policy should be informed by empirical data.’**

**Figure 3: Should public opinion on the death penalty influence government policy?**



The minority (28%<sup>55</sup>) who did not want this information to inform government policy on the death penalty were concerned that, given (just) more than half of the public were in support of capital punishment, this data could be used to justify the retention of the death penalty, which would be unfortunate given their concerns that the majority of the population are ill informed about capital punishment:

**‘It is very tricky... because it shows almost 50-50, so the government will probably say “retain it and maintain the status quo”.’**

**‘I don’t think I would want that influencing Kenyan government policies, because that means half of the population is saying yes, keep it!... This would make their work easier!’**

**‘I do not think it should influence it, because the majority may not be well informed.’**

Of course, a few felt that the government should abolish the death penalty because it is an abuse of human rights, irrespective of public opinion:

**‘I don’t think so, because what is right is what is right, not because lots of people support it, that is not what should influence it; it should be a matter of looking at it as a human rights issue, and being guided by principles and not by numbers.’**

<sup>55</sup> Two interviewees answered that they were unsure.

In the following question, participants were informed that:

**The survey found that 67% of those who definitely thought the death penalty should be retained would be likely to accept abolition if that was the government policy.**

Again, opinion formers were asked if they were surprised that even committed retentionists would probably accept abolition if it was government policy (Q12a). The majority were not surprised by this information (60%), because they believed that where the government led, the public would follow:

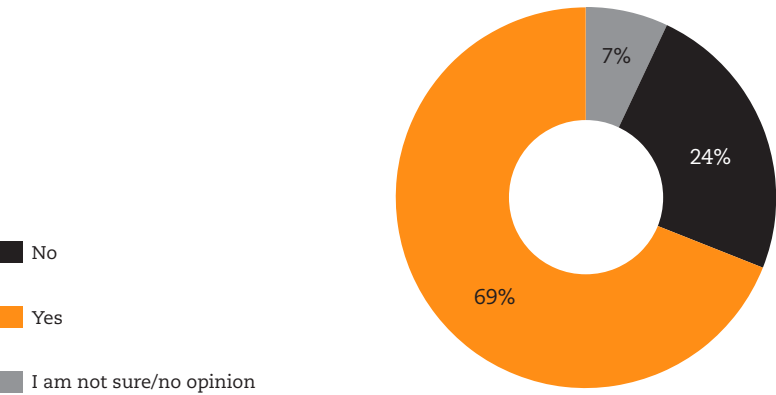
**‘Generally, the belief is that the government is right.’**

**‘Most people take their cue from the government.’**

The minority (31%<sup>56</sup>) that were surprised that committed retentionists would be willing to accept abolition of the death penalty if that was government policy had thought that people would not move away from a principled position.

As a follow-up, participants were asked whether this information *should* influence Kenyan government policy on the death penalty, and the majority said ‘yes’ (69%) (see Figure 4). This is probably because the data are helpful for the advancement of abolition, which was the preference of 90% of the opinion formers we interviewed.

**Figure 4: Should public opinion on willingness to accept abolition influence government policy?**



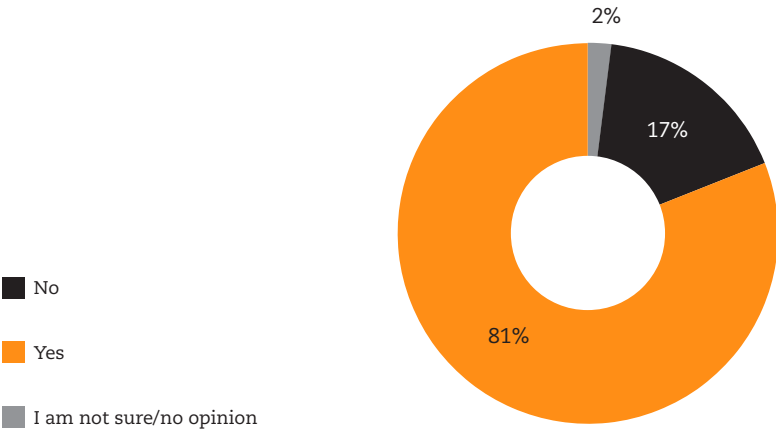
Subsequently, opinion formers were told that the public opinion survey ‘*found that a majority (67%) of people believed that innocent people had been sentenced to death*’, and were asked if they were surprised by this information (Q13a). Most participants (79%) were not surprised, because, as many explained, ‘*people have no faith in the criminal justice system*’, an assessment they shared (see s.2.3 below). Of the minority who were surprised (19%<sup>57</sup>), several thought that it was incongruous for people to support capital punishment even though they believe that people have been wrongfully convicted and sentenced to death.

<sup>56</sup> Four were unsure.  
<sup>57</sup> One interviewee was unsure.

Moreover, a clear majority (81%) thought that this information should influence government policy on whether to retain or abolish the death penalty (see Figure 5). As one opinion former asserted: ‘*The government should look at such information critically – why do 67% of Kenyans believe people have been sentenced [to death] yet could be innocent?*’ While another urged that the ‘*government should move at speed*’ to address this situation.

The minority (17%) who thought that this information should not influence government policy on the death penalty justified this by claiming ‘*it is just perception, it is not factual*’, while others felt that criminal law should be informed by public policy research, not public opinion.

**Figure 5: Should public opinion on wrongful convictions influence government policy?**



Responses to these questions establish that opinion formers have little faith in the public’s knowledge about the death penalty. Accordingly, some offered suggestions for how best to ‘*sensitise*’ the public to this issue. Measures included engaging with local radio stations, community leaders and local religious leaders. It was thought that it would be effective for civil society groups to travel to rural areas to provide communities with information on the death penalty, in various languages. Additionally, it was assumed that Kenya-specific research on the death penalty would be more persuasive than information from international research.

2.3 Trust in the criminal justice system

Opinion surveys consistently show that support for capital punishment is contingent on a belief in the safety and efficacy of the criminal justice system and falters once people realise that, in all countries, criminal justice systems are fallible. Therefore, in retentionist countries, innocent people and those who did not receive due process of law may be sentenced to death and executed.<sup>58</sup> Given the overwhelming evidence of failures across all retentionist countries to abide by international – and even national – standards to protect suspects and defendants in capital cases,<sup>59</sup> it should not be surprising that the opinion formers interviewed across a range of jurisdictions have expressed relatively low trust in their criminal justice systems, and that this low trust is correlated with relatively low support for capital punishment.<sup>60</sup>

<sup>58</sup> Hood R, Is Public Opinion a Justifiable Reason Not to Abolish the Death Penalty? A Comparative Analysis of Surveys in Eight Countries, *Berkeley Journal of Criminal Law* 23 2018, pp218–242.  
<sup>59</sup> Hood R and Hoyle C, Towards the Global Elimination of the Death Penalty: A Cruel, Inhuman and Degrading Punishment, in Carlen P and Franca L (eds.), *Alternative Criminologies* (Routledge 2018) ch 24.  
<sup>60</sup> For example, Hoyle C, *Investigating Attitudes to the Death Penalty in Indonesia: Opinion Formers: An Appetite for Change* (The Death Penalty Project 2021); Hoyle C, *Time to Abolish the Death Penalty in Zimbabwe: Exploring the Views of its Opinion Leaders* (The Death Penalty Project 2020); Hoyle C, *Legislators’ Opinions on the Death Penalty in Taiwan* (The Death Penalty Project 2021).

Kenyan opinion formers were asked a general question about whether they think their criminal justice system offers adequate and fair procedural safeguards for defendants to prevent miscarriages of justice. To help orientate their thoughts, we provided some examples: ‘*recording police interrogations, providing effective counsel, and ensuring that evidence is gathered in a fair process*’ (Q23). Fewer than one in five (19%) believed that safeguards are always (9.5%) or *mostly* (9.5%) adequate, with the majority (55%) believing that safeguards are *never* or *rarely* adequate.<sup>61</sup> While the constitution has improved the situation somewhat, by setting out ‘procedural safeguards’ (Articles 49-51), many participants felt that ‘*the problem is the implementation of safeguards*’, and that ‘*the accused are not aware of these procedures or the safeguards that are put in place*’. Others felt that access to safeguards ‘*depends on your status in society*’; those who cannot afford a lawyer will not get adequate protection. Indeed, most opinion formers thought that inadequate access to counsel accounted for the failure of safeguards to protect suspects and defendants:

**‘If you have a system where people are not given counsel, you will never have a system where safeguards are adequately enforced.’**

Kenyan opinion formers were asked four further questions that have been put to their contemporaries in other countries, about their levels of trust in specific aspects of the criminal justice system: How often do you think wrongful convictions occur in Kenya? (Q22); Do you think the police can be trusted to ensure that suspects are treated fairly? (Q24); Do you think prosecutors can be trusted to ensure that suspects are treated fairly? (Q25); Do you think that defendants are treated fairly in court at trial? (Q26). As Table 4 shows, most participants thought wrongful convictions happened often, and they had low trust in police and prosecutors to treat suspects fairly, with only a minority believing these agencies often or very often do so. Their trust in courts was somewhat higher, but only 40% thought that defendants were treated fairly in courts at trial often or very often.

Table 4: Participants’ trust in the Kenyan justice system

	Never	Rarely	Sometimes	Often	Very often	Unsure
Wrongful convictions (Q22)	0%	10%	31%	28.5%	28.5%	2%
Police (Q24)	21%	33%	36%	10%	0%	0%
Prosecutors (Q25)	7%	14%	43%	24%	10%	2%
Courts (Q26)	5%	14%	31%	38%	12%	0%

Considering the data in Table 4 more closely, we see that, in response to the question about wrongful convictions (Q22), more than half of the participants (57%) thought that these occurred in Kenya ‘often’ or ‘very often’, and almost a third (31%) thought they ‘sometimes’ occurred. None thought they ‘never’ occurred. In other words, almost all (88%) believed wrongful convictions were a fairly regular feature of the Kenyan justice system.

Many participants talked about how the criminal justice system is plagued by bribery and corruption. Several claimed that some defendants were charged and convicted on ‘*very flimsy*’ evidence. Some suggested this may be because of the long duration between date of arrest and court appearance, providing time for evidence

<sup>61</sup> 26% thought that safeguards are ‘always inadequate’, 29% that they are ‘rarely adequate’, with a further 24% believing them to be adequate only some of the time (2% were unsure).

tampering; others blamed poor investigative services or believed that the ‘*overstretched*’ criminal justice system creates due process ‘*casualties*’. They revisited the issue of legal representation, suggesting that despite legal aid and *pro bono* services, people from low socio-economic backgrounds often receive inadequate counsel, or no representation at all, and are therefore at higher risk of wrongful conviction. On a more positive note, opinion formers were generally in agreement that the risk of wrongful conviction had reduced since the establishment of the Director of Public Prosecutions under the 2010 constitution.

Only just more than a third (36%) thought that the police could ‘sometimes’ be trusted to ensure that suspects are treated fairly (Q24), explaining that, while the *system* is corrupt, some individual officers are good, acknowledging that the establishment of the Independent Policing and Oversight Authority (IPOA) had improved the service. More than a half (54%) thought suspects were ‘never’ (21%) or only ‘rarely’ (33%) treated fairly, referring to a police service marred by brutality and public mistrust, with some police officers engaging in cruel and inhumane treatment of suspects. Several pointed out that this was especially so for suspects from informal settlements, who are ‘*treated like animals*’ by police. One insisted that it is generally accepted that ‘*the most corrupt institution in Kenya is the police*’. As well as referring to extra-judicial killings and enforced disappearances, opinion formers also spoke about police collusion with suspects, with some suggesting that witnesses ‘*disappear*’ under their watch. When asked a follow-up question about what effect – if any – the constitution has had on the police, one opinion former explained in detail:

**‘We had it good for a couple of years, from 2010 to 2015, when we were hopeful that the reforms with the police were taking a positive trajectory. Then there was an omnibus amendment to security laws through legislation called the Security Amendment Act of 2015, which clawed back most of the reform agenda that we had with the police, so I will blame the problem on the Security Amendment Laws and the political culture... the regime that came in 2013 has politicised the police service and clawed back on the reform agenda.’**

As Table 4 shows, trust in the prosecutorial service was somewhat higher than in the police, but still only a third (34%) of our respondents thought that prosecutors could *usually* or *always* be trusted to ensure that suspects are treated fairly (Q25). They were of the view that the prosecutorial service has improved since the introduction of the 2010 constitution, which ‘*professionalised*’ the service, ensuring it is staffed by trained lawyers instead of police officers (as it was previously). However, they suggested that prosecutors’ ability to function is limited by mistakes made by the police; as one interviewee put it:

**‘The prosecution gets the file from the police. Most of the cases are bungled at the police station... your hands are tied, there is nothing you can do. You are a mortician, the patient died long ago in the waiting room.’**

Others reflected on the high levels of staff turnover caused by inadequate pay, and resulting in poor service.

Finally, opinion formers were questioned about whether, overall, they think ‘*defendants are treated fairly in court at trial*’ (Q26). As Table 4 shows, more than a half thought this usually happened (‘often’ or ‘very often’), but still only one in five believed this ‘never’ or only ‘rarely’ happened. Hence, while there is clearly more trust in the courts than in the police, for example – as has been found in all surveys of opinion formers across other jurisdictions – the rates of trust are still not high.



Participants explained that improvements to the criminal justice process brought about by the constitution included avenues for redress if defendants feel they have been mistreated at any stage of the criminal process, including at trial. However, they repeated concerns about the lack of a proper legal aid system and indigent defendants: ‘*Our court system is basically about how much you can pay.*’ Some also referred to significant delays in the system, with one adding: ‘*Justice delayed is justice denied*’ and another claiming that, during delays, there have been ‘*countless instances*’ of court files ‘*disappearing*’. Finally, one opinion former explained that, in some areas outside of Nairobi, defendants may not speak English or Swahili, and face language barriers at court.

2.4. Views on the purpose of the death penalty

Over the two decades following independence in December 1963, 280 prisoners were executed, with the last execution occurring in 1987, when three people were hanged as a result of their role in the 1982 coup d’état attempt to overthrow the then President Daniel arap Moi. Since those executions, Kenya has been abolitionist *de facto*. It has not executed anyone for more than 30 years. In light of this, participants were asked to rank possible reasons why they think that the death penalty has not yet been completely abolished and removed from the statutes (Q2). As Table 5 shows, the three highest-ranked responses were related to a lack of political will.

Table 5: Views on why Kenya retains the death penalty

Ranking	Why Kenya retains the death penalty
1	Because the government believes that it is necessary as a deterrent to control the incidence of crime
2	Because there is an absence of political leadership to make the legal change
3	Because politicians think support for abolition would make them unpopular with their electorate AND/OR stir up opposition in the media
4	Because the majority of citizens are still in favour of the death penalty, there is no pressure to do so
5	Because of the ideological or religious beliefs of those with the power to abolish
6	Because this is a matter for each nation to decide according to their own circumstances
7	Because the judges are not in favour of abolition

These views were reflected in more discursive responses to this question and to a later open-ended question that directly asked opinion formers why the Kenyan government has not yet abolished the death penalty (Q19). Responses alluded to the fact that the death penalty is not a pressing issue, allowing political leaders to ‘*sit on the fence*’ as ‘*there hasn’t been enough pressure on the politicians to abolish it*’:

**‘It is never worthwhile for a politician to be against the death penalty, particularly in a place where the death penalty isn’t stirring up much controversy. It is hard to crusade on this when no-one has been executed and no-one innocent has been executed.’**

In this regard, the death penalty was seen as a ‘*sleeping law*’, as ‘*not hurting anyone*’ because ‘*no-one is being executed*’. These comments reflect a sense of political apathy: ‘*Let it be the problem of the next government.*’ Moreover, some participants thought that politicians fear public ‘*backlash*’ and so ‘*it is not in their interests*’.

Of course, the highest-ranked response to this question was not only about the lack of political will, but also about deterrence, which has been a key justification for retention across all surveys commissioned by The Death Penalty Project. Here, the issue of deterrence was addressed in relation to violent crimes and government concerns about the threat of terrorism. As one opinion former put it: ‘[It is necessary to keep as a deterrent] *that is the position the state has conversed in court* [as was made clear by the Attorney General in the *Muratetu v. Republic of Kenya* (2017) case<sup>62</sup>]. Another explained:

**‘The government thinks it is crucial to have the option of the death penalty for somebody who is convicted of murder as part of a terrorism-related offence – so I think that is one of the reasons why the government doesn’t want to get rid of the potential of the death penalty, with the lingering threat of Al-Shabaab and people who are currently facing trial for terrorism-related offences.’**

In addition to these two questions on why the government may wish to retain capital punishment, both retentionist and abolitionist participants were asked an open-ended question about their own views on the main purpose of sentencing an offender to death (Q21). Not surprisingly, many of the abolitionist opinion formers remarked that ‘*there is no purpose*’; they felt that retention of the death penalty was futile, given Kenya has not executed anyone for so long:

**‘I don’t think there is any purpose... because there are other sentences that can substitute the death sentence that are equally punitive. Because, for example, if you sentence someone to life imprisonment without even the possibility of parole... they will die in prison.’**

In revisiting their earlier references to government rationales, they made clear that evidence on deterrence contradicts the government position and that the death penalty ‘*no longer serves [the] purpose*’ of ‘*ensur[ing] government stability*’. Others referred to religious doctrine and the retributive principle of ‘*an eye for an eye*’, and to incapacitation: ‘*To remove the offender from us, so that he will never do another crime again*’ – though that, of course, can be achieved through a sentence of life imprisonment.

While they thought that deterrence was a key government rationale for retention, when opinion formers were asked ‘what measures do *you* think are most likely to be able to reduce violence crimes in Kenya?’ (Q18), the majority further distanced themselves from their political leaders; they did not turn to the death penalty or even to other punishments. As in all other surveys of opinion formers commissioned by The Death Penalty Project, while their responses revealed concerns about violent crime, particularly among young people, their solutions were to be found in social justice and educative measures (Table 6 presents the order in which participants ranked the possible solutions provided to them on a showcard).

<sup>62</sup> Indeed, the *Muratetu* judgment refers to the role of deterrence and, in so doing, cites the Kenyan case, *Dahir Hussein v Republic Criminal Appeal No. 1 of 2015*, as well as the 2016 Judiciary of Kenya Sentencing Policy Guidelines.

Table 6: Measures thought most likely to reduce violent crime in Kenya

Ranking	Measures to reduce violent crime
1	Better moral education of young people against the use of violence
2	Efforts to reduce poverty
3	More effective policing in bringing offenders to justice
4	Better preventive treatment of the mentally ill
5	Better services to prevent domestic violence
6	Better control of the drug trade
7	More therapeutic (health care) interventions for drug users
8	Longer prison sentences
9	More executions
10	More death sentences

The results reflect the belief of several opinion formers, that there *‘is a crisis among the young people in this country’* and hence *‘better moral education of young people against the use of violence’* was the highest-ranked option. Some respondents expressed the view that, because of unemployment, *‘young people... become criminals’* and are recruited by illicit gangs. One claimed that roughly 40% of criminal court matters involve young men from informal settlements, who engage in petty offending – *‘crimes of poverty’*. However, others strongly disputed the rhetoric about the *‘crisis among the young’*, and considered the problem to be the *‘criminalisation of young people’*, with a few asserting that *‘the Kenyan government is much more violent than the young’*.

The second highest-ranked option – *‘efforts to reduce poverty’* – drew on similar concerns. Indeed, participants talked about how *‘violent crimes here relate a lot to survival crimes’* and *‘violent crimes are largely a product of frustration and lack’*; as one participant explained succinctly:

**‘When we have high poverty rates, we have high crime rates... most of the productive generation are left unemployed. So where do they take their energy? How do they earn their basic needs? They will turn to crime.’**

*‘More effective policing in bringing offenders to justice’* was the third most popular option, with participants elaborating on the need to reform policing to eliminate systematic corruption and abuse of human rights, including extra-judicial killings and enforced disappearances. Not only did the opinion formers we interviewed unanimously prefer preventative and social measures over punitive options, but there was also a general consensus that the latter would be ineffective; indeed, some believed that incarceration is criminogenic. Notably, no respondent chose *‘more executions’* and only one chose *‘more death sentences’*.

2.5. Appetite and potential for abolition

Towards the end of the interview, participants were asked if they would personally be willing to either support, or not to oppose, an act of parliament to abolish capital punishment completely in Kenya (Q20). The ranking of the responses in Table 7 is revealing. On the face of it, 81% of participants indicating that they would be willing to support an act of parliament, and 67% saying they would strongly and vigorously support such an act, demonstrates overwhelming support for timely legislative change. However, the number does not exactly

align with the 90% who expressed abolitionist views at the start of the interview (Q3, see s.2.1). This gap is likely to be accounted for by the views of four abolitionists (9%), of the five, who supported abolition but not strongly (they *‘tended to favour’* abolition). Their qualitative comments in response to other questions suggest that, while these four interviewees tended to favour abolition, they would prefer abolition only for *‘certain crimes’*, retaining it for only the most ‘heinous’ murders. For example, all were firm in their belief that it should be abolished for the crime of ‘robbery with violence’.

Table 7: Respondents’ support for abolition

I would strongly and vigorously support abolition and would take the lead	67%
I would be willing to support abolition but not to take the lead	14%
I would only support abolition for certain crimes	12%
I would not be in favour of abolition, but I would not oppose it	5%
I would tend to oppose abolition; for example, I might raise objections	2%
I would strongly and vigorously oppose abolition and would definitely vote against it	0%

Table 5, above (see s.2.4), makes clear that opinion formers believe the government has little political will to abolish the death penalty, in part because politicians think support for abolition would make them unpopular with their electorate or stir up opposition in the media. It is interesting, therefore, to assess their views on the possible public response to abolition (Q14). Table 8 illustrates the order in which the respondents ranked the possible reactions. The highest-ranking option in Kenya is the same as in all the studies of opinion formers commissioned by The Death Penalty Project: respondents believe that, though there may be dissatisfaction in the run-up to abolition, the majority of the public would come to accept it once the law was passed. Almost half of our interviewees (45%) chose this as their first or only response, and for another 12% this was ranked second. A further third of our interviewees chose the second-ranked possible response, that the public would immediately accept it. Some explained that *‘people will be more or less ambivalent’* because there has not been an execution in 35 years. Overall, combining these two rankings, we can see that more than three-quarters of our interviewees felt that abolition would not be detrimental to the government’s reputation among the public; it would not risk a legitimacy deficit.

Table 8: Views on the possible public response to abolition

Ranking	Possible public response to abolition
1	There might be SOME demonstrations or expressions of dissatisfaction leading up to abolition, but the majority of the public would come to ACCEPT IT once the law was passed
2	A majority of the public would IMMEDIATELY ACCEPT IT
3	Relatives of victims or others might seek to take the law INTO THEIR OWN HANDS
4	ANY OTHER RESPONSE? <i>‘It is highly dependent upon how it is announced’</i>
5	There would be demonstrations of STRONG public dissatisfaction, in the media and elsewhere against the decision and REPEATED calls for its reinstatement

Some opinion formers clarified that the public response to abolition would depend on *‘how it is passed’*; *‘if the government comes out with clear constitutional measures that will support this verdict, then nobody will fight it’*, in part because the public *‘still respects authority’*. Another respondent added that *‘public sensitisation’* and *‘public participation’* leading up to abolition is key. One made the astute point that it would be necessary to clarify to the general public that death penalty abolition does not mean that those on death row would be set free from prison, but their sentences would be converted to a term of imprisonment. He was clear that this would deter members of the public from wishing to take *‘justice’* into their own hands.

Our interviewees were asked whether the possible public response to abolition influenced their personal views on whether Kenya should retain or abolish the death penalty (Q15). As Figure 6 shows, the majority (86%) were not influenced, and they explained why:

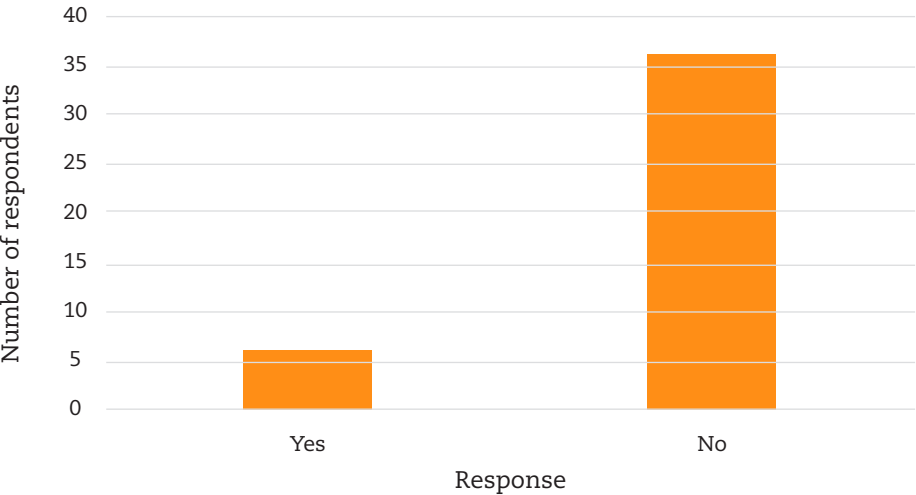
‘I am influenced by principles, not by what the public thinks.’

‘I am expressing what I feel is logically correct without the influence of others.’

‘No, I am guided by my holy book.’

‘I have explained my religious and personal beliefs on the sentence, and they are not influenced by public reaction.’

Figure 6: Does a possible public response to abolition influence respondents’ views on whether Kenya should abolish the death penalty?



If opinion formers believe that abolition is desirable, that the public will accept it, and that, in any event, penal policy should be made according to principles and not the whims of an uninformed public, the obvious question to ask is how they think abolition could begin to be achieved in Kenya (Q9). Again, they were asked to rank possible abolition strategies, and the results are shown in Table 9.

Table 9: Preferred abolition strategies

Ranking	Abolition strategy
1	By amending the criminal law to abolish the death penalty
2	Through a civil society pressure group
3	By a legal challenge to the constitutionality of the death penalty
4	By persuading community leaders to lead a movement for abolition
5	By the president granting a pardon to all prisoners facing death and converting their sentences to life imprisonment
6	Through a public referendum
7	By creating an abolitionist lobby in the legislature
8	By the government announcing an official moratorium
9	By persuading the president to lead a movement for abolition
10	Other: ‘through campaigning by religious groups; abolition as a condition of international aid’
11	By persuading the government to establish a high-level commission to report on the subject
12	By persuading a leading newspaper to mount a campaign

The highest-ranked option was ‘by amending the criminal law to abolish the death penalty’, as *‘ultimately you are working to change the law’*. This finding mirrors that of other studies of opinion formers; in both Indonesia and Zimbabwe, this was the preferred abolition strategy.<sup>63</sup> However, many respondents chose other responses too, and, importantly, there was considerable consensus that no single option would be enough. Instead, it would be necessary to apply several strategies *‘concurrently’*. The following suggestions were proffered, with some participants talking about *‘top down’* as opposed to *‘bottom up’* approaches, as well as *‘short-term’* versus *‘long-term’* solutions:

‘The single most effective way would be amending the criminal law to abolish the death penalty; that just takes care of it right there. The problem with that is that you would need a legislative body that would do that. And I think that if you had civil society pressure groups, as well as an abolitionist lobby in the legislature, that would be necessary, but I don’t think it is sufficient. I don’t think you are going to get movement on this unless you get the churches involved. They are the ones who drive individual opinions on many policy issues, so if churches are not saying [the death penalty] is a bad idea, it is not going to resonate with people, and so that becomes one of the more powerful ways that social policy is done; so you would need civil society pressure groups, an abolitionist lobby in the government, and you would need the church.’

‘Courts can provide a short-term solution... what is coming from the courts is interpretations that it is unconstitutional, but we still have active legislation in the criminal law justice system that still allows trial courts to sentence people to death, so I am looking at the long-term solution; the long-term solution number one is the legislature revising the penal code that allows the death sentence. Number two, is lobbying for Kenya to sign the Second Optional Protocol of the ICCPR aiming at

<sup>63</sup> Hoyle C, *Investigating Attitudes to the Death Penalty in Indonesia: Opinion Formers: An Appetite for Change* (The Death Penalty Project 2021); Hoyle C, *Time to Abolish the Death Penalty in Zimbabwe: Exploring the Views of its Opinion Leaders* (The Death Penalty Project 2020).



**the abolition of the death penalty; this would bind Kenya by the international instruments that have a bearing on the death penalty.'**

**'For me, it would begin with an official moratorium, then let's have a sensitisation bottom-up approach, and then let's have the leadership actually owning the process as well. And then, now on the sidelines or as alternative methods, let's have the judiciary pronouncing their position on the issue, through legal challenge to the constitutionality. The issue of the law would come way at the bottom, because you can't amend the law if there is no appeal from the community, because the law is there to serve the community.'**

**'Challenging the constitutionality of the death penalty might work if we have the context for it in place, and I think it needs to be phased in a bit, so we would challenge all of the provisions of the mandatory death penalty and, once all of those are done, then we have set the stage for the next stage, which will be the death penalty. Because, if you read the judgment of the Supreme Court on the mandatory death penalty [Muratetu], it seemed to suggest they don't want to touch the issue of the death penalty at all, so it might not be ripe for litigation right now... There is a need for sustained civil society campaigning... We can start creating buy-in in high-level places, like the parliament, the executive... then, hopefully, we have the situation necessary to do a constitutionality challenge.'**

As we can see from the above rich and nuanced quotations, participants suggested options that were not prompted by our showcard; these included: a role for the churches; signing the Second Optional Protocol of the ICCPR; and one participant suggested making international aid conditional upon death penalty abolition. The need for '*grassroots engagement*' and '*civic education*' was emphasised, but participants did not think that local communities could be engaged via '*a leading newspaper*' (as suggested by the showcard), but instead through local radio stations. They were adamant that it would be necessary to engage with community and religious leaders to gain the public's support, and to ensure there would be no public backlash following abolition.

While ranking the most effective options, participants were quick to opine on those measures they assumed would be ineffective. Some thought that persuading the president to lead a movement for abolition would be unsustainable, as abolition should not be tied to a president, given that the role is '*time bound*' and abolition '*may be undone by the next government*'. A public referendum was also given low priority, as participants were worried that the public are ill-informed about the death penalty. Additionally, it was thought that the legislature would not be responsive to a referendum on this matter. It was noted that the government announcing an official moratorium would not help progress as moratoria are related to executions, not sentencing, and there have been no executions for decades. It is not possible to impose a moratorium on sentencing, so people would continue to be sentenced to death. Finally, while commutations already occur periodically when prisons are overcrowded, this has not yet resulted in abolition, and it was pointed out that a presidential pardon to all prisoners facing death, with sentences converted to life imprisonment, would be '*like having a clogged drain; you empty out the silt, but then every month more people are being sentenced to death*'.

# PARATHR

## Concussion



In the past three decades, while Kenya's death penalty system has remained quiescent, there has been an unprecedented rate of abolition of the death penalty around the world. At present, of the United Nations' 193 member states, 109 countries have abolished the death penalty in law for all crimes, and a further eight have abolished for ordinary crimes. More than two-thirds of countries in the world have abolished capital punishment in law or practice. Furthermore, the number of executions occurring globally has decreased each year, with 2020 seeing the fewest executions in more than a decade,<sup>64</sup> with only 18 countries executing anyone.<sup>65</sup>

In December 2020, the plenary session of the United Nations General Assembly (UNGA) adopted a resolution calling for a moratorium on global executions, with a view towards full abolition.<sup>66</sup> This is the eighth time the UNGA has adopted such a resolution since 2007. The number of states voting in favour has risen from 104 in 2007 to 123 in 2020, and there has been a steady decline in those voting against, providing irrefutable evidence of a dynamic towards the universal abolition of the death penalty.

While the death penalty is used reasonably frequently across much of Asia and the Middle East, in sub-Saharan Africa only Botswana, Somalia, South Sudan and Sudan carried out executions in the past few years. In West Africa, Guinea joined Benin, Côte d'Ivoire, Senegal, and Togo in abolition of the death penalty in 2016, and Burkina Faso abolished the death penalty for ordinary crimes in 2018. In 2020, the Gambia's president commuted the death sentences of 22 prisoners and became a state party to the Second Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR).<sup>67</sup>

In other parts of the African Union there has been marked progress towards abolition. In April 2019, Equatorial Guinea put forward a draft law to abolish the death penalty and Zambia announced it was open to a consultative process towards abolition.<sup>68</sup> In 2020, Chad abolished the death penalty for all crimes,<sup>69</sup> and in October 2021, Sierra Leone became the 22nd African country to abolish the death penalty. President Julius Maada Bio marked a new era in penal policy by avowing that 'we should not, we shall not and we will never again execute any persons in this sovereign republic'. Denouncing capital punishment as 'inhumane', he declared that Sierra Leone had 'exorcised horrors of a cruel past' through this legislation.<sup>70</sup> Kenya has yet to take this decisive step, but it is primed to do so. This and our companion report on public opinion suggests the time is right.

Our rigorous public opinion survey, the findings of which reflect the views of the nation, showed that the people are ready; they will accept abolition as government policy. Half will enthusiastically embrace it, others will accept it as preferable to executing citizens, and only a small minority would be disconcerted by such a policy. Kenyan opinion formers interviewed for this report were overwhelmingly in support of abolition of

the death penalty, expressing persuasive reasons for their views that were based on reliable knowledge about its use and ineffectiveness.

In part, their support for abolition drew on their concerns about the reliability and safety of the criminal process. They demonstrated low trust in justice institutions, particularly the police, who they see as corrupt and capable of considerable abuses of suspects' and defendants' human rights. The rights to life and to a fair trial under the African Charter on Human and Peoples' Rights mirror those enshrined under the ICCPR. Article 7 mandates certain minimum procedural protections, including the presumption of innocence, the right to a defence, and the right to be tried within a reasonable time.<sup>71</sup> Yet our data suggest that the majority of opinion formers believe that these and other safeguards are *never* or *rarely* adequate in Kenya.

Many opinion formers thought that their government should base penal policy on the reliable research evidence that suggests high risks of wrongful convictions and that the death penalty is not a deterrent to serious violent crime, rather than an erroneous assumption that executions would reduce homicide rates, a belief they put down to misinformation among political leaders and public alike. While opinion leaders shared public concerns about high crime rates, and worried that there '*is a crisis among the young people in this country*', they were clear that social measures – such as better moral education of young people and reducing poverty – were the best ways to reduce crime.

Some worried that the government would be reluctant to abolish the death penalty while the country remained vulnerable to terrorism. This is a common concern among retentionist countries and can lead to executions in dormant death penalty systems, as was seen in Pakistan in 2014, when the Taliban massacre of schoolchildren led to a swift resumption of executions. Fears about terrorism in Kenya are understandable. Since the attack on the US embassy in Nairobi in 1998, when more than 200 people died, Al-Shabab has claimed responsibility for various attacks, including in Nairobi in 2013 and 2019, Mpeketoni in 2014, and Garissa in 2015, which, between them, have killed more than 270 people.

Terrorism, crimes against humanity and war crimes are among the gravest, most brutal acts – offences that attempt to destroy the fabric of societies. Yet all international tribunals, including the Special Court for Sierra Leone, the International Criminal Tribunal for Rwanda, and the International Criminal Court, that were established to adjudicate these crimes have rejected capital punishment as a sanction. If the death penalty is not available in these international institutions for the most atrocious crimes against humanity, how can it be justified for lesser crimes?

In Sierra Leone, principled leadership led to abolition in 2021, when President Bio acknowledged abolition as a progressive part of his legacy in Sierra Leone, though the country is still recovering from the 1991–2002 civil war characterised by atrocities and extreme violence. Similarly, Rwanda abolished the death penalty notwithstanding recent genocide, as did South Africa following decades of cruelties and discrimination under the apartheid regime. Clearly, countries can deal effectively with the most serious offences without recourse to state-sanctioned executions or to death sentences imposed but not executed.

Kenya inherited its death penalty system from the British, under whose rule it was deployed widely. Following independence, it was retained as part of the penal code and an exception to the right-to-life provision in the new constitution. For more than 20 years, it was used to suppress political opposition, but there have been no

<sup>64</sup> Amnesty International Global Report: *Death Sentences and Executions 2020*, (2021), 57, [www.amnesty.org/en/wp-content/uploads/2021/05/ACT5037602021ENGLISH.pdf](http://www.amnesty.org/en/wp-content/uploads/2021/05/ACT5037602021ENGLISH.pdf) (hereinafter referred to as '2020 Global Report').

<sup>65</sup> 2020 Global Report at 10.

<sup>66</sup> *UN: Opposition to the Death Penalty Continues to Grow*, Amnesty International, 16 December 2020, [www.amnesty.org/en/latest/news/2020/12/un-opposition-to-the-death-penalty-continues-to-grow](http://www.amnesty.org/en/latest/news/2020/12/un-opposition-to-the-death-penalty-continues-to-grow) – accessed: 8 March 2022

<sup>67</sup> Report of the Secretary-General on the Question of the Death Penalty, UN Doc. A/HRC/45/20, 2 (13 August 2020) (hereinafter 'Report of the Secretary-General').

<sup>68</sup> *Zambia Gov't Says Ready for Talks to Abolish Death Penalty*, Xinhua, 10 December 2019, [www.xinhuanet.com/english/2019-12/10/c\\_138621147.htm](http://www.xinhuanet.com/english/2019-12/10/c_138621147.htm) – accessed: 8 March 2022

<sup>69</sup> Report of the Secretary-General, at 2. According to the UN Human Rights Office of the High Commissioner, '[a]t the end of April 2020, the 155 members of the Chadian National Assembly adopted an amendment to law 003/PR/2020, the so-called 'anti-terrorism' law, to remove a provision that maintained capital punishment for terrorism-related offences. That revision enabled Chad to fully abolish capital punishment, after the National Assembly had promulgated a penal code in 2017 that abolished the death penalty for ordinary crimes.' See *Civil Society Organizations Pave the Road to End Capital Punishment in Chad*, UN Human Rights Office of the High Commissioner, 9 October 2020, [www.ohchr.org/EN/NewsEvents/Pages/chad-death-penalty.aspx](http://www.ohchr.org/EN/NewsEvents/Pages/chad-death-penalty.aspx) – accessed: 5 February 2022

<sup>70</sup> *Sierra Leone Abolishes the Death Penalty*, Equal Justice Initiative, 15 October 2021, [eji.org/news/sierra-leone-abolishes-the-death-penalty](http://eji.org/news/sierra-leone-abolishes-the-death-penalty) – accessed: 16 February 2022

<sup>71</sup> African Charter on Human and Peoples' Rights art. 4, adopted 1 June 1981 (entered into force 21 October 1986) art. 7.



executions since 1987, giving Kenya the status of ‘abolitionist *de facto*’. In this, Kenya is not unusual in sub-Saharan Africa, with other countries – such as Cameroon, Eswatini, Ghana, Malawi, Mali, Tanzania, Uganda and Zambia – being abolitionist in practice.

However, when countries do not execute, and yet continue to sentence people to death, the inevitable result is large populations of people living in inhumane conditions on death row, always fearful that the government could resume executions. This includes several hundred prisoners in each of Cameroon, Ghana, Nigeria, Tanzania, Uganda and Zambia. And, of course, there are about 600 prisoners under sentence of death in Kenya. In some of these countries, including Kenya, commutations are used to control numbers on death row, given that the courts continue to impose death penalties, suggesting that the death penalty in Kenya is merely symbolic. Nevertheless, there are clear risks to retention.

The first is that tens of years on death row, with the possibility of execution ever present, amounts to inhuman and degrading treatment and punishment because of the mental suffering inflicted on the condemned prisoner, who experiences stigmatisation and the psychological impact of living under a sentence of death. This speaks to the additional suffering occasioned by a long period on death row under conditions that could be described as torture. For these reasons, in some jurisdictions, the death penalty has been ruled to be unconstitutional where the prisoner has been under sentence of death for more than a set period – five years in some countries,<sup>72</sup> but three years in Uganda.<sup>73</sup> Those in Kenya waiting 10 or 20 years or more, knowing that an execution is possible, must experience severe psychological harm. They may not be able to work in prisons while under sentence of death, and therefore cannot earn money to assist their families, all of which speaks to the futility of sentencing people to death under such a regime.<sup>74</sup>

The second risk of maintaining a dormant death penalty is that, while the current government is opposed to executing prisoners, a future government may not be. Moratoriums, even long-established ones, can be fragile; they are at risk at times of emergency, particularly in the wake of terrorist attacks. Another president serving a different regime, keen to make political capital from uncompromising responses to political instability, for example, may reignite a latent punishment. This would inevitably create arbitrariness in how serious offences are punished, not least because many death sentences will have been commuted by previous regimes.

Given the risks of a ‘*sleeping law*’ – erroneously considered to be ‘*not hurting anyone*’, as acknowledged by the opinion formers interviewed for this study – Kenya should move swiftly and resolutely towards abolition. The question for those intent on reform is how to manage what our interviewees referred to as ‘*political apathy*’. They suggested the lack of political will could partly be accounted for by government fears of a backlash from the public should it move ahead with abolition. Our public opinion data suggest this is unlikely and can be marshalled to good effect in challenging these concerns. We concur with our interviewees that, while the government must be persuaded to amend the penal code to remove capital punishment, the public must be primed for this change, sensitised and informed about, for example, the risks of arbitrariness, discrimination, wrongful convictions – and about the evidence that the death penalty serves no greater deterrent function than long prison sentences, and that in reducing violent crimes, social justice measures are much more effective than criminal justice.

<sup>72</sup> In 1993, in the case of *Pratt & Morgan v AG of Jamaica*, (1995), the Privy Council ruled that a period of more than five years’ delay in carrying out a death sentence constituted cruel and inhuman punishment, and therefore violated Jamaica’s constitution.

<sup>73</sup> *Kigula & others v AG*, 2009.

<sup>74</sup> We are currently conducting a large study of the lives and experiences of those on death row, or whose death sentences have been commuted, across Kenya.

In so doing, opinion formers were of a mind that applying several strategies ‘*concurrently*’ may be efficacious, those that trickle down from government, policy-makers and some opinion formers themselves, as well as grassroots educative initiatives from community elders and religious leaders – those people who understand the experiences of the people of Kenya and have their respect – to ensure there would be little or no public backlash following abolition.

Our respondents recognised that, though there may be dissatisfaction in the run-up to abolition, most of the people would accept abolition once the law was passed if the public are allowed to participate in the process through engagement and information; it would not be detrimental to the government’s reputation or risk a legitimacy deficit, as the people respect legitimate authority.

Ending the death penalty sends a powerful message that a country seeks to advance human rights, to recognise the dignity inherent in all its people, and to acknowledge the ongoing flaws in their own criminal justice systems. History demonstrates that it secures a legacy of recognising and respecting human dignity as a fundamental national principle. A country concerned for human rights should not justify retaining the death penalty by reference to public opinion – which is so often based on misconceptions about its assumed deterrent effect, the fairness and safety of its application, the absence of error, and other human rights considerations. However, nor should the public be ignored. They must be taken on the journey.

# APPENDIX

## Survey Instruments



The Views of Opinion Formers on the Death Penalty in Kenya

[Interviewer to record the following data by hand; only record discursive (qualitative) responses if the interviewee does not consent to the interview being recorded]

NAME OF INTERVIEWEE -----

DATE OF INTERVIEW -----

TYPE OF ELITE (occupation/position?) -----

Thank you for agreeing to respond to the invitation to take part in this research.

The purpose of this interview is to ask you about your views on the death penalty in Kenya.

When the findings are published, the views you express in this interview will not be attributable to you personally or in a way that would enable you to be identified. Your anonymity will be preserved.

You have been sent a participant information form which asks if you are happy to consent to being interviewed. Are you happy to consent? [if yes] do you consent to my recording our interview so that I can be sure to record your responses fully and accurately?

Some of the questions will involve me sharing with you (on my screen) cards with information or possible responses. If that doesn't work, I can read them out to you.

1. I would like to read you a series of short statements which provides a summary of the current scope and use of the death penalty in Kenya. Can you tell me which of these facts you already knew?

[Interviewer: read each statement and CIRCLE the code for those that the interviewee already knew]

[Showcard 1]

MAIN FACTS: KENYA	CODE
Kenya retains the death penalty by hanging as a punishment for murder, other offences resulting in death, robbery not resulting in death and treason	1
Kenya has not carried out an execution for over 30 years	2
Most years, more than 100 people are sentenced to death, mostly for murder or robbery with violence	3
There are currently about 600 prisoners under sentence of death	4
The death penalty has not been a mandatory punishment for murder since 2017	5
In the past, a few thousand prisoners on death row have had their death sentence commuted to life in prison	6
In December 2020, at the last UN General Assembly resolution on a worldwide moratorium on the use of the death penalty, Kenya abstained	7

1b. For the facts that you are not aware of, do any of them surprise you?

If SO, which ones?

[Interviewer: Please TICK those mentioned]

2. Given that Kenya has not executed anyone for over 30 years, why do you think it has not abolished the death penalty?

[Interviewer: Please show card 2 & ask the interviewee to RANK the MAIN reason with 1, and ANY others they think might be a reason in order of importance (from 2-7). Make it clear – and in similarly worded ranking questions – that there is no need to rank ALL the statements, only those they think are relevant.]

[Showcard 2]

MAIN REASONS	RANK
Because the majority of citizens are still in favour of the death penalty, there is no pressure to do so	1
Because politicians think support for abolition would make them unpopular with their electorate AND/OR stir up opposition in the media	2
Because there is an absence of political leadership to make the legal change	7
Because the judges are not in favour of abolition	6
Because the government believes that it is necessary as a deterrent to control the incidence of crime	5
Because this is a matter for each nation to decide according to their own circumstances	3
Because of the ideological or religious beliefs of those with the power to abolish	4

3. Are you personally in favour of Kenya retaining the death penalty in its legislation or abolishing it altogether?

OPINION	CODE
I am strongly/firmly in favour of retaining it	1
I tend to favour retaining it	2
I tend to favour abolishing it [move straight to Q8]	3
I am strongly/firmly in favour of abolishing it [move straight to Q8]	4

[Interviewer: If the respondent is in favour of retaining the death penalty but wishes to change it in some way, code as 1 or 2 (according to their strength of feeling) and explain that the next question will explore their views on the changes that they wish to make].

[Interviewer: Qs 4 – 7 FOR RETENTIONISTS ONLY, i.e. those who answered Q3 with 1 or 2]



4. Which of these options would you prefer instead of complete abolition?

[Showcard 3]

	CODE
The death penalty should be retained and left as it is ( <b>status quo</b> )	1
I would like to see it further <b>restricted</b> , with <i>additional</i> limits on the types of offenders who can be sentenced to death or the crimes for which it can be imposed	2
The death penalty should be retained but made <b>less restrictive</b> , with <i>fewer</i> limits on the types of offenders who can be sentenced to death or the crimes for which it can be imposed	3
The death penalty should be retained and executions should resume	3

4a. [if interviewee prefers the status quo]: Why are you content to leave the law and practice as it is?

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4b. [if interviewee would like to see change]: What changes would you like to see introduced?

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5. Why are you personally in favour of retaining the death penalty?

[Interviewer: Please show card 4 & ask the interviewee to RANK the MAIN reason with 1, and ANY others they think might be a reason in order of importance (from 2-7).

[Showcard 4]

REASONS	RANK
It's necessary to deter people from crime	
Because I believe the public want the death penalty for serious crimes	
There will always be some criminals who deserve to be executed	
Relatives of victims need to be satisfied	
Relatives and others might take matters into their own hands without the death penalty	
My ideological beliefs support the death penalty	
Other reason (Please specify)	

6. In your view, are there any types of crime for which a death penalty should never be imposed?

	CODE
YES	1
NO	2
I am not sure/no opinion	3

6a. If YES: which crimes?

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7. In your view, are there any groups of people in the population who should never be sentenced to death?

	CODE
YES	1
NO	2
I am not sure/no opinion	3

7a. If YES: which groups of people?

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[Interviewer: for RETENTIONISTS, move straight to Q10]

ASK Qs 8 & 9 to ABOLITIONISTS ONLY (i.e. those who answered 3 or 4 to QUESTION 3)

8. What are your reasons for supporting complete abolition?

[Interviewer: Please show card 5 & ask the interviewee to RANK the MAIN reason with 1, and ANY others they think might be a reason in order of importance (from 2–10).

[Showcard 5]

REASONS	RANK
It is pointless to impose a punishment that will not be carried out by execution for a long time, and maybe never	
It has no special or extra deterrent effect than a long term of imprisonment	
People may be wrongfully convicted and executed	
It cannot be carried out in a non-arbitrary/fair way	
Indigent defendants have such limited access to justice that a fair trial cannot be guaranteed	
Every criminal deserves an opportunity to be rehabilitated	
It is an abuse of human rights	
It is a stain on the reputation of this country	
My ideological beliefs forbid the use of the death penalty	
Other reason (please specify) ----- ----- -----	

9. How do you think abolition could begin to be achieved in your country?

[Interviewer: Please show card 6 & ask the interviewee to RANK the MAIN reason with 1, and ANY others they think might be a reason in order of importance (from 2–12).

[Showcard 6]

REASONS	RANK
Through a civil society pressure group	
By amending the criminal law to abolish the death penalty	
By creating an abolitionist lobby in the legislature	
By persuading government to establish a High-level Commission to report on the subject	
By the government announcing an official moratorium	
By the President granting a pardon to all prisoners facing death and converting their sentences to life imprisonment	
By a legal challenge to the constitutionality of the death penalty	
By persuading the President to lead a movement for abolition	
By persuading a leading newspaper to mount a campaign	
By persuading Community Leaders to lead a movement for abolition	
Through a public referendum	
Other	

FOR ALL REMAINING QUESTIONS, ASK ALL (RETENTIONISTS AND ABOLITIONISTS)

10a. 110 of 192 countries worldwide have completely abolished the death penalty, including, this year, Sierra Leone. Are you surprised that so many countries have abolished the death penalty?

	CODE
YES	1
NO	2
I am not sure/no opinion	3

10b. Do you think this information should influence government policy about retention or abolition of the death penalty?

	CODE
YES	1
NO	2
I am not sure/no opinion	3

Interviewer: Tell the interviewee:

Recently, a public opinion survey of a representative sample of over 1,600 Kenyan citizens was carried out. I am going to give you some information from that survey and ask for your views on the findings.

11a. That survey found that only 51% of respondents thought that the death penalty should be kept and only 32% thought that the death penalty should definitely be kept. This is the lowest support for the death penalty in all the surveys we have carried out in Africa and Asia. Are you surprised that support for the death penalty in Kenya is not very high?

	CODE
YES	1
NO	2
I am not sure/no opinion	3

11b. Do you think this information should influence government policy about retention or abolition of the death penalty?

	CODE
YES	1
NO	2
I am not sure/no opinion	3

12a. The survey found that 67% of those who definitely thought the death penalty should be retained would be likely to accept abolition if that was government policy.

Are you surprised that even committed retentionists would likely accept abolition if it was government policy?

	CODE
YES	1
NO	2
I am not sure/no opinion	3

12b. Do you think this information should influence government policy about retention or abolition of the death penalty?

	CODE
YES	1
NO	2
I am not sure/no opinion	3

13a. The survey found that a majority (67%) of people believed that innocent people had been sentenced to death.

Are you surprised by this information?

	CODE
YES	1
NO	2
I am not sure/no opinion	3

13b. Do you think this information should influence government policy about retention or abolition of the death penalty?

	CODE
YES	1
NO	2
I am not sure/no opinion	3

14. What do you think would happen if the government were to abolish the death penalty?  
[Interviewer: Please show card 7 & ask the interviewee to RANK the MAIN consequence with 1, and ANY others they think might happen in order of importance (from 2-5)].

[Showcard 7]

POTENTIAL CONSEQUENCES	RANK
There would be demonstrations of STRONG public dissatisfaction, in the media and elsewhere against the decision and REPEATED calls for its reinstatement.	
There might be SOME demonstrations or expressions of dissatisfaction leading up to abolition, but the majority of the public would come to ACCEPT IT once the law was passed.	
A majority of the public would IMMEDIATELY ACCEPT IT.	
Relatives of victims or others might seek to take the law INTO THEIR OWN HANDS.	
Other reason (please specify) ----- ----- -----	

15. Do your feelings about the possible public response to abolition influence your personal views on whether Kenya should retain or abolish the death penalty?

	CODE
YES	1
NO	2
I am not sure/no opinion	3

IFYES: Why?  
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IFNO: Why not?  
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16a. How well informed are **YOU PERSONALLY** about research evidence from other countries regarding the lack of any **extra deterrent effect** of the death penalty on the murder rate, compared to the deterrent effect of long-term imprisonment?

	(CODE 16A)
Very well informed	1
Know something about it	2
Not very well informed	3
Uninformed: I know nothing about it	4

16b. How well informed are **POLITICIANS** about research evidence from other countries regarding the lack of any **extra deterrent effect** of the death penalty on the murder rate, compared with the deterrent effect of long-term imprisonment?

	(CODE 16B)
Very well informed	1
Know something about it	2
Not very well informed	3
Uninformed: I know nothing about it	4

17a. How well informed are **YOU PERSONALLY** about the research evidence from other countries regarding the **inevitability of error and conviction of the innocent** in countries that retain the death penalty?

	(CODE 17A)
Very well informed	1
Know something about it	2
Not very well informed	3
Uninformed: I know nothing about it	4

17b. How well informed are **POLITICIANS** about the research evidence from other countries regarding the **inevitability of error and conviction of the innocent** in countries that retain the death penalty?

	(CODE 17B)
Very well informed	1
Know something about it	2
Not very well informed	3
Uninformed: I know nothing about it	4

18. What measures do you think are most likely to be able to reduce **violent crimes** in Kenya?  
*[Interviewer: Please show card 8 & ask the interviewee to RANK the measure most likely to reduce violent crime with 1, and ANY others in order of importance (from 2–10).*

*[Showcard 8]*

MEASURES TO REDUCE VIOLENT CRIME	RANK
Better moral education of young people against the use of violence	
More effective policing in bringing offenders to justice	
Better preventive treatment of the mentally ill	
Better control of the drug trade	
More therapeutic (health care) interventions for drug users	
Better services to prevent domestic violence	
Efforts to reduce poverty	
Longer prison sentences	
More death sentences	
More executions	

19. Why do you think the Kenyan government has not yet abolished the death penalty?

20. Would you personally be willing to either support, or not to oppose, an act of parliament to abolish capital punishment completely in Kenya?

[Interviewer: Please show card 9 and ask the interviewee which of the statements best reflects their opinion.]

[Showcard 9]

OPINION	CODE
I would strongly and vigorously support abolition and will take the lead	1
I would be willing to support abolition but not to take the lead	2
I would only support abolition for certain crimes (please explain which crimes below)	3
I would not be in favour of abolition, but I would not oppose it	4
I would tend to oppose abolition; for example, I might raise objections	5
I would strongly and vigorously oppose abolition and would definitely vote against it	6

21. In your view, what is the main purpose of sentencing an offender to death?

[Interviewer: Tell the interviewee that you will now ask some questions about trust in the criminal process in Kenya]

22. How often do you think wrongful convictions occur in Kenya?

	Never	Rarely	Sometimes	Often	Very often	Not sure/No opinion
Code:	1	2	3	4	5	6

23. Do you think the Kenyan criminal justice system offers adequate and fair procedural safeguards for defendants to prevent miscarriages of justice, such as recording police interrogations, providing effective counsel, and ensuring that evidence is gathered in a fair process?

	Safeguards are always inadequate	Safeguards are rarely adequate	The safe-guards are adequate only some of the time	Safeguards are adequate in most cases	Safeguards are always adequate	Not sure/No opinion
Code:	1	2	3	4	5	6

24. Do you think the police can be trusted to ensure that suspects are treated fairly?

	Never	Rarely	Sometimes	Usually	Always	Not sure/No opinion
Code:	1	2	3	4	5	6

25. Do you think prosecutors can be trusted to ensure that suspects are treated fairly?

	Never	Rarely	Sometimes	Usually	Always	Not sure/No opinion
Code:	1	2	3	4	5	6

26. Do you think that defendants are treated fairly in court at trial?

	Never	Rarely	Sometimes	Usually	Always	Not sure/No opinion
Code:	1	2	3	4	5	6

27. Do you have any final comments or thoughts on what we have discussed?

## About the authors



### **Carolyn Hoyle**

Professor Carolyn Hoyle has been at the University of Oxford Centre for Criminology since 1991 and was Centre Director from 2012-17. She is Director of the Oxford Death Penalty Research Unit, and co-author of the leading international study on the death penalty, *The Death Penalty: A Worldwide Perspective*, the last edition of which was published in 2015 by Oxford University Press.

She has published empirical and theoretical research on a wide range of criminological topics in addition to the death penalty: wrongful convictions, policing, domestic violence, and restorative justice. She lectures extensively, and supervises research students on these and other criminological topics.

Hoyle has conducted several studies for The Death Penalty Project, including studies of opinion formers' views on the death penalty in India, Bangladesh, Zimbabwe, Indonesia and Taiwan. She is also working closely with The Death Penalty Project and other leading international and national NGOs on a study of foreign nationals at risk of the death penalty in Asia and the Middle East.



### **Lucy Harry**

Lucy Harry is a doctoral candidate at the University of Oxford Centre for Criminology, and Gregory Kulkes Scholar in Law at Balliol College. Her research focuses on the experiences of women who have been sentenced to death for drug trafficking in Malaysia. She is a member of the Death Penalty Research Unit (DPRU). She holds a MSc in criminology and criminal justice from the University of Oxford (with Distinction), as well as a first-class undergraduate degree from the University of St Andrews.



# The Death Penalty Project

The Death Penalty Project is a legal action NGO based in the UK, with special consultative status before the United Nations Economic and Social Council.

For more than three decades, it has provided free legal representation to death row prisoners around the world, to highlight miscarriages of justice and breaches of human rights. It also assists other vulnerable prisoners, including juveniles, those who suffer from mental health issues, and prisoners who are serving long-term sentences.

The Death Penalty Project has been commissioning, supporting and publishing independent academic research on attitudes towards the death penalty for almost a decade. It uses original data from public opinion surveys and other empirical research to engage in dialogue with policy-makers and politicians, and challenge popular misconceptions around the death penalty.

All publications by The Death Penalty Project are available to view and download at:  
[www.deathpenaltyproject.org](http://www.deathpenaltyproject.org)

## Kenya National Commission on Human Rights

The Kenya National Commission on Human Rights (KNCHR) is an independent national human rights institution created by Article 59 of the Constitution of Kenya and established through the KNCHR Act of Parliament (the Kenya National Commission on Human Rights Act, 2011). It is the state's lead agency in the promotion and protection of human rights. The operations of the KNCHR are guided by the United Nations-approved Paris Principles on the establishment and functioning of independent national human rights institutions. The National Commission has been accredited by the International Coordinating Committee of National Human Rights Institutions (ICC) and is a member of the Network of African National Human Rights Institutions, the ICC's regional grouping for Africa.

The Commission plays two key broad mandates by acting as a watchdog over the government in the area of human rights and providing key leadership in moving Kenya towards upholding human rights as a state. The main goal of the KNCHR is to investigate and provide redress for human rights violations, to research and monitor the compliance of human rights norms and standards, to conduct human rights education, to facilitate training, campaigns and advocacy on human rights, and collaborate with other stakeholders in Kenya.

For further information please visit: [www.knchr.org](http://www.knchr.org)



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