

## 2. PRISONERS' DECISIONS TO OFFEND

Living With a Death Sentence in Kenya: Prisoners' Experiences of Crime, Punishment and Death Row



In many jurisdictions – including those such as Kenya which have long been abolitionist de facto, with many years having elapsed since an execution – the most prominent argument made by death penalty retentionists is that the availability of capital punishment continues to act as a deterrent to offending. Our study presents compelling data that in Kenya, this cannot possibly be the case, for the extraordinary but simple reason that an overwhelming majority of death row prisoners were unaware they were running the risk of being sentenced to death when they took the decision to commit their offence, and did not therefore consider it.

Deterrence theorists argue that, for potential offenders to be deterred, they need to see the risks as salient. It is claimed that they will make rational choices about whether to offend, and in order to do so, deploy knowledge about the applicable laws and punishments, and then weigh up the costs and benefits of the possible offence. They may be deterred if they think it is likely that they will be caught and convicted, and that the negative prospect of the possible punishment outweighs the rewards.

The sample of our study is overwhelmingly poorly educated, and since its participants mainly use local and tribal languages, most may have been unable to access the English or Swahili media at the time of their offence. This may explain why most did not know that the death penalty was the likely punishment for their crime.

As for their ability to make a rational choice, there was little evidence this was done by those convicted of murder, whose responses suggested that they were in a heightened state of emotion when deciding to commit an offence and largely motivated by this, rather than reason. The most common reasons given by participants for murder were ‘extreme emotional situation’ (13%), anger (27%), provocation (23%) and self-defence (17%).

However, 72% of those convicted of robbery gave financial gain as their reason, not surprising given their relative poverty. Some 13% of those convicted of murder did not consider possible punishment at all.

Arguably the study’s most remarkable findings are that only 4% of those convicted of robbery and 8% of murder thought about the possibility they might be sentenced to death – although 48% of murderers and 69% of robbers said they had contemplated they might go to prison. Hence it is clear that the overwhelming majority of death row prisoners cannot have been deterred by the existence of the death penalty. In responses to another question, just 1% said they knew that the death penalty was a punishment available for their offence.

Moreover, while the majority of participants said that they would have behaved differently had they known the punishment for their offence would likely be death, less than a third of participants said that knowledge of the law and possible punishments had affected their behaviour at all. Almost half (46%) said they were not worried about imprisonment. While less than a quarter of those convicted of robbery had hesitated to consider potential consequences before committing their crime, only 15% of those convicted of murder had done so.

Overall, our data show that few prisoners who committed crimes that resulted in a sentence of death had – at the time of the crime – been worried about this potential outcome: they had not been worried, had not hesitated and had not been influenced in their decisions about whether to offend by concerns about a likely punishment.

Furthermore, when they were making the decision to commit their crime, the vast majority (85%) of participants thought it was ‘unlikely’ or ‘very unlikely’ that they would be arrested, and 89% said it was ‘unlikely’ or ‘very unlikely’ that they would be imprisoned.

## Conclusion

Our findings make clear that the necessary preconditions for being deterred from committing capital crimes were not met in most of our cases. Not only were participants not deterred, given that they had committed their offences, but they could not have been so as they had neither the knowledge nor concerns about risks, and most were not acting particularly rationally. While most of those who committed robberies were motivated by financial gains and could therefore be said to have a rational reason for criminal behaviour, their understanding of the likely or even possible punishments was so low that they cannot have made a sensible risk-reward calculus.

Here our data are so robust that they imply that arguments drawn from deterrence theory should no longer play any part in the debate about whether Kenya should move to *de jure* abolition of the death penalty. Indeed our study makes it unsustainable to insist that keeping the death penalty on the statute book deters murder or robbery with violence in Kenya.



This is one of three short papers drawn from the longer report '*Living With a Death Sentence in Kenya: Prisoners' Experiences of Crime, Punishment and Death Row*'. It is based on structured interviews conducted by our colleagues from the Kenya National Commission on Human Rights with a statistically significant sample of 671 prisoners (of whom 33 were women) sentenced to death in Kenya for murder (44% of the total) and robbery with violence (56%). Just over a quarter of the total sample have had their sentences commuted to life. The sample is large, covers the whole of Kenya, and is representative of all prisoners sentenced to death in the country.

### Download the report

The report is available to download from our website: [deathpenaltyproject.org](http://deathpenaltyproject.org)  
For more information email [press@deathpenaltyproject.org](mailto:press@deathpenaltyproject.org)

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