Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya

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The death penalty is rapidly receding in the former British colonies of common-law Africa. Although proposals to institute or retain the death penalty for a wide assortment of crimes are not uncommon, actual judicial executions have grown extremely rare south of the Sahara Desert. The views presented in the article, however, are those of the author alone.

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2. Lillian Manka Chenwi, Toward the Abolition of the Death Penalty in Africa: A Human Rights Perspective 53-56 (2007). For purposes of this article, “common-law Africa” is defined as those countries in Sub-Saharan Africa formerly colonized by Britain in the late nineteenth and early twentieth centuries, or, in the case of Namibia, colonized by a British colony: Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Namibia, Nigeria, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe. Because Sudan is currently operating under modified Islamic law and not British common law, its death penalty regime has a different theoretical basis and is not included here. See William A. Schabas, Islam and the Death Penalty, 9 WM. & MARY BILL RTS. J. 223, 223-24 (2000) (noting Islamic states view capital punishment according to the principles embodied in the Qu’ran). However, South Sudan, independent after July 9, 2011, would theoretically be in the common-law category. Although Botswana, Lesotho, Namibia, South Africa, Swaziland, and, to a lesser extent, Zimbabwe operate under mixed civil-law–common-law legal systems as the distant descendants of the Dutch colony in South Africa, their twentieth-century penal codes reflect primarily common-law concepts. Simon Coldham, Criminal Justice Policies in Commonwealth Africa: Trends and Prospects, 44 J. AFR. L. 218, 219 (2000). Where this paper uses “Commonwealth Africa,” it is referring to “common-law Africa” and not necessarily the members of the modern Commonwealth of Nations (consequently, Zimbabwe is included but Mozambique and Rwanda are not).

3. Even in the past two years, for instance, proposals have appeared to resurrect or implement the death penalty for electoral corruption (Nigeria), illegal possession of a gun (Kenya), “aggravated homosexuality” and HIV transmission (Uganda), kidnapping for ransom (Uganda), and drug trafficking (Nigeria). Segun Adelaye, Group Seeks Death Penalty for Fake Drug Hawkers, DAILY INDEP. (Lagos) (July 20, 2010), http://allafrica.com/stories/201007210303.html; Peter Mugagga, Tips on Ending Kidnap for Ransom, NEW VISION (Kampala) (Aug. 4, 2010); Kenneth Ogosia, Owning AK-47 Soon to be Hanging Offence, DAILY NATION (Oct. 6, 2009), http://allafrica.com/stories/201008050646.html; Modupe Olawale, Death Penalty: Panacea Against Corruption, DAILY INDEP. (Lagos) (July 22, 2010), http://allafrica.com/stories/201007230171.html; see also Anti-Homosexuality Bill, No. 18 of 2009, 102(47) UGANDA GAZETTE (Sept. 25, 2009) (on file with author). Despite proposals to increase the number of capital crimes, the death penalty is almost never implemented. See Chenwi, supra note 2, at 56. According to Chenwi, two countries in Africa performed executions in 2005; four in 2004; nine in 2003; four in 2002; six in 2001; and two in 2000. Id. If Egypt, Libya, Somalia, and Sudan are excluded, the numbers are zero in 2005, one in 2004, six in 2003, two in 2002, four in 2001, and one in 2000. Id.
penalty has fallen into disuse in most of common-law Africa, and many of these countries are now considered de facto abolitionist. As in other parts of the retentionist world, death-penalty abolition is an incremental process, nurtured more by small steps—stays of execution, grants of clemency, judicial clarification—than by dramatic ones, the most important of which for the continent of Africa was the 1995 decision of the Constitutional Court of South Africa, deeming the death penalty unconstitutional. Upon independence, former British colonies inherited nearly identical constitutions drafted at Lancaster House in London, each of which specifically saved the death penalty from constitutional challenge. Although common-law African constitutions

4. According to Amnesty International, the following countries in Sub-Saharan Africa are abolitionist for all crimes: Angola, Burundi, Cape Verde, Cote d’Ivoire, Djibouti, Guinea-Bissau, Mauritius, Mozambique, Namibia, Rwanda, Sao Tome e Principe, Senegal, Seychelles, South Africa, and Togo. The following countries are abolitionist in practice, defined as countries that have not performed a judicial execution in ten years and are believed to have an implicit or explicit policy against executions: Benin, Burkina Faso, Cameroon, Central African Republic, Congo (Republic of), Eritrea, Gabon, Gambia, Ghana, Kenya, Liberia, Madagascar, Malawi, Mali, Mauritania, Niger, Swaziland, Tanzania, and Zambia. Amnesty defines the following countries as retentionist: Botswana, Chad, Comoros, Democratic Republic of Congo, Equatorial Guinea, Ethiopia, Guinea, Lesotho, Nigeria, Sierra Leone, Somalia, Sudan, Uganda, and Zimbabwe. See Abolitionist and Retentionist Countries, AMNESTY INT’L, http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries (last visited Aug. 22, 2010). Amnesty’s list is somewhat subjective. According to Capital Punishment UK, for instance, Lesotho has not carried out an execution since 1984; Sierra Leone since 1998; Uganda and Zimbabwe since 2003. See Capital Punishment in the Commonwealth, CAPITAL PUNISHMENT U.K., http://www.capitalpunishmentuk.org/common.html (last visited Aug. 22, 2010). According to Hands Off Cain, an Italy-based anti-death-penalty organization, Comoros has not carried out an execution since 1997; in addition, it also classifies Lesotho and Sierra Leone as de facto abolitionist. Country Status on the Death Penalty, HANDS OFF CAIN, http://www.handsofcain.info/bancadati/index.php?tipotema=arg&idtema=13000554 (last visited Dec. 10, 2011). Amnesty’s list may overstate how commonly capital punishment is used in Africa. As of independence in 2011, South Sudan is also a retentionist country.

5. State v Makwanyane and Mchunu 1995 (3) SA 391 (CC) (S. Afr.) (holding death penalty violated the rights to life and human dignity because of arbitrariness and possibility of error, and state interest in retribution did not outweigh these factors because other alternatives such as life imprisonment existed). The literature on the abolition of the death penalty in South Africa is voluminous. For an analysis of how the Court drew on and interpreted foreign and international sources, see Sydney Kentridge, Comparative Law in Constitutional Adjudication: The South African Experience, 80 TUL. L. REV. 245, 247-50 (2005). The author was an acting justice of the Constitutional Court of South Africa from 1995 to 1996 and drafted a concurring opinion in Makwanyane. Id.; see also D.M. Davis, Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience, 1 INT’L J. CONST. L. 181, 194-95 (noting once a new legal system begins to develop its own jurisprudence, it relies less on comparative approaches). However, despite the Court’s reliance on the global body of death-penalty jurisprudence in the Makwanyane decision, local and indigenous legal concepts played a mediating role. Davis, supra, at 195.

6. Departing colonial officials worked from a template, drafting new constitutions on the eve of decolonization. See William Dale, The Making and Remaking of Commonwealth Constitutions, 42 INT’L & COMP. L.Q. 67, 67-68 (1993). Every constitution in common-law Africa except for Namibia and South Africa possesses a death-penalty savings clause, specifically immunizing the death penalty from constitutional challenge. All of these savings clauses are based on the original formulation in the European Convention on Human Rights (1950) at art. 2(1): “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law” (emphasis added). After 1953, the European Convention on Human Rights applied to all British colonies with the understanding that it would lapse upon independence. See
have been written and rewritten since independence during the eras of one-party rule in the 1970s, of economic adjustment in the 1980s, and democratization in the 1990s, most former British colonies retain similar constitutional and legal structures, including retention of the death penalty in national penal codes.7 The mandatory death penalty, a relic of nineteenth century Britain, is the most constitutionally vulnerable aspect of African death-penalty regimes, and is facing sustained challenge in a number of countries.8

On July 30, 2010, the Kenyan Court of Appeal invalidated the mandatory death penalty for murder, becoming the third national court in common-law Africa to do so.9 The mandatory death penalty provided an automatic death sentence for any person convicted of murder, without judicial discretion to substitute a lesser sentence.10 The penalty was transplanted from Great Britain

7. Nearly every former British colony in Africa heavily altered its constitutional structure in the two decades after independence, particularly as to the structure of the executive and legislative branches. Only Botswana’s constitutional structure survives from independence largely unreformed. Dale, supra note 6, at 67-68. That having been said, the common-law death penalty was not a widely amended provision. Where the constitutional structure of the death penalty was altered, it was generally to broaden application, not restrict it, at least through the mid-1990s. For Zimbabwe, see Adrian de Bourbon, Human Rights Litigation in Zimbabwe: Past, Present and Future, 3 AFR. HUM. RTS. L.J. 195, 209-10 (2003) (describing how number of constitutional amendments passed by the Zimbabwean parliament in the late 1980s and early 1990s reversed many of the groundbreaking human-rights decisions of the Supreme Court of Zimbabwe). Nonetheless, on the whole, no postcolonial common-law African country engaged in more than incremental penal reform. “Dramatically changing the character of a legal system was an expensive and difficult thing to do, and there was already too much on the post-independence agenda,” Widner writes. WIDNER, supra note 6, at 79. “In the end, most of the common-law countries of eastern and southern Africa settled on incremental change. New legislatures ratified the earlier reception statutes. The codes that existed at the time of independence usually continued in effect until legislatures got around to revising them, which they were able to do only piecemeal.” Id.


10. The mandatory death sentence exists for four offenses in Kenya. Kenya Penal Code § 204 (“Any person convicted of murder shall be sentenced to death”); § 40(3) (“Any person who is guilty of the offence of
to the colonies without any benefit from the major criminal-justice reforms, including death-penalty abolition, passed by the British Parliament in the 1950s and 1960s.11 Since the 1977 decision of the United States Supreme Court in Woodson v. North Carolina, which invalidated the mandatory sentence in favor of a discretionary regime, the mandatory death penalty has been on the sharp and rapid retreat worldwide.12 Kenya joins a long line of former British colonies in finding the mandatory death penalty incompatible with global human-rights norms.13 The courts of each of these former colonies, relying on similar constitutional texts originally drawn up by departing British officials, cite each others’ case law and form a body of global “common law” death-penalty jurisprudence.14

This Article first addresses the retreat of the mandatory death penalty worldwide and constitutional challenges brought against the penalty on four continents. The Kenyan Court of Appeal’s decision in Mutiso v. Republic is placed in both this global context, and a historical and cultural one, through a detailed analysis of the history of the death penalty and its use in colonial and independent Kenya. The Article then compares the Court’s decision in Mutiso with the case law from other common-law countries, particularly the recent decisions arising out of the Supreme Court of Uganda and the Supreme Court of Appeal of Malawi.15 Finally, this Article will discuss the contribution of the
treason shall be sentenced to death"); § 296(2) (armed robbery); § 297(2) (attempted robbery with violence).
Both section 296(2) and section 297(2) contain the clause, “If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other persons or weapons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.” § 296(2); § 297(2).

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11. “The Penal Codes [of colonial Africa] were, of course, based closely on nineteenth-century English criminal law, and the principles of criminal liability, the definition of offences and the type and scale of penalties that they contained made no concession to the African context, nor was any attempt made to amend the codes in line with changes in the substantive law and criminological thinking that occurred in England and elsewhere during the first half of the twentieth century.” Coldham, supra note 1, at 219.


13. Besides India and Swaziland, see supra note 12, the mandatory death penalty has been struck down in Bahamas, Belize, Grenada, Jamaica, Malawi, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Uganda. See supra note 9; infra notes 68, 73, 77.

14. See Paolo G. Carozza, ‘My Friend is a Stranger’: The Death Penalty and the Global Ius Commune of Human Rights, 81 TEX. L. REV. 1031, 1036 (2002). Carozza describes how this global “common law” of death-penalty jurisprudence is being internalized into domestic legal systems through judicial decisions. Id.

15. Kafantayeni v. Attorney Gen., [2007] MWHC 1 at 6-7 (Malawi H.C.); Attorney Gen. v. Kigula (SC),
three decisions—in particular, Mutiso—to the global corpus of death-penalty jurisprudence and their expected impact on similar challenges percolating in other African common-law nations.

Like Malawi and Uganda, the death-penalty regime in Kenya is largely a foreign import that has fallen into disuse after abuses during the colonial era and periods of authoritarian one-party rule after independence. Unlike Malawi and Uganda, which constructed entirely new and progressive constitutions during the transition to multiparty democracy in the 1990s, Kenya continued to operate under an amended version of its independence constitution, which had certain flaws as to the structure of government and protection of fundamental rights. On August 4, 2010, less than a week after the Court of Appeal’s decision in Mutiso, Kenyan voters went to the polls to overwhelmingly approve a new constitution, the second since Kenya’s independence on December 12, 1963. As one of the most legally mature countries in Commonwealth Africa, the fall of the mandatory death penalty in Kenya may have far-reaching implications for other African countries working under a similar constitutional framework. The new Kenyan Constitution will eventually lead to the establishment of a Kenyan Supreme Court, as an additional layer of appellate review above the Court of Appeal. Should Kenya’s 2010 Constitution usher in an era of stability and peace, particularly after the failure of the 2005 constitutional referendum and the 2007 election crisis, the stature of the Kenyan judiciary may increase even further.

THE CONTRACTION OF THE MANDATORY DEATH PENALTY WORLDWIDE

The mandatory death penalty, which passed from Britain to the world via the British imperial project, has faced a sustained retreat worldwide since the abolition of the death sentence in Great Britain in 1965. The penalty first fell


17. For results, see Comprehensive Election Results, INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (on file with author).

18. KENYAN CONST. ch. 10. The Supreme Court has not yet come into existence.

in the major retentionist common-law powers, the United States and India, and then spread to smaller retentionist legal systems in the developing world.20 Beginning in the late 1990s, a new wave of abolition swept through thirteen countries of the Commonwealth Caribbean and, in the first decade of the twenty-first century, common-law Africa as well. From its inception, this wave of abolition was intentional and coordinated.21 As the mandatory death penalty retreats, death-penalty regimes will continue to be harmonized across borders and better reflect international norms of human rights in criminal-sentencing regimes.

**WOODSON v. NORTH CAROLINA AND ITS PROGENY**

In 1976, the United States Supreme Court struck down the mandatory death penalty for murder in *Woodson v. North Carolina*.22 Mandatory capital-punishment statutes had never been popular in the United States and had generally died out by the early twentieth century, but they faced a brief revival after the Supreme Court struck down Georgia’s death penalty in 1972.23 Once the Supreme Court declared a standardless discretionary sentence unconstitutional, thirteen states adopted a Model Penal Code regime with sentencing guidelines and weighing of aggravating and mitigating circumstances, and twenty-two states reverted to the common-law, nondiscretionary capital-sentencing regime.24 Accepting appeals against the North Carolina and Louisiana statutes,25 a 5-4 Supreme Court held that the

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24. Id. at 226-27.

25. The Court accepted an appeal in Roberts v. Louisiana with that of *Woodson v. North Carolina*. The Louisiana statute was intended to be more standardized and narrowly tailored than the North Carolina law. Louisiana created a new capital murder offense confined only to murderers who possess actual intent to kill, and thus avoided North Carolina’s hard cases involving felony murder and accomplice liability. To some surprise, the Louisiana law also fell, 5-4, with the same voting lineup as in *Woodson*. Roberts v. Louisiana, 428 U.S. 325, 335-36 (1976). As the Court noted, “As in North Carolina, there are no standards provided to guide the jury in the exercise of its power to select those first-degree murderers who will receive death sentences, and there is no meaningful appellate review of the jury’s decision.” Id. The Supreme Court forever closed the door on the mandatory death sentence when it invalidated as unconstitutional the mandatory punishment of death for prisoners who commit first-degree homicide while already under a sentence of life imprisonment, the narrowest and most defensible class of cases. Sumner v. Shuman, 483 U.S. 66 (1987). The Court found that the essential
statutes providing for a mandatory death sentence violated the Eighth and Fourteenth Amendments.  

The Court identified several fundamental flaws with a mandatory capital-punishment regime, which have been widely cited by death-penalty reformers and later courts. First, a mandatory sentence “simply papered over the problem of unguided and unchecked jury discretion,” because it exacerbated the problem of jury nullification: juries acquit at higher rates in mandatory death-penalty regimes. As the Court noted, such a scheme actually exacerbates the Furman problem of unfettered discretion. In essence, because a jury was deciding guilt and sentence simultaneously, they risked merging the two decisions. In addition, a mandatory sentence failed to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant and consider appropriate mitigating factors. The sentence treats individuals “as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.” While individualization is not necessarily required for all criminal sentencing, death is different; the Court noted that the “fundamental respect for humanity” underlying the Eighth Amendment required consideration of the person of the offender and the circumstances of the crime.

The mandatory death sentence for murder had been on the decline in the Commonwealth for decades by the time Woodson was decided. Although the sentence was not abolished in the United Kingdom until 1965, the death sentence was not really mandatory in actual practice; the Home Office reviewed every death sentence and granted clemency in nearly half of cases. “Executive clemency exists in most, if not all American states, but its incorporation into the machinery of capital punishment is not as complete as that of the Home Office in Britain.” Even in South Africa, where the machinery of judicial execution saw frequent use, the mandatory death-penalty regime allowed consideration of extenuating circumstances after 1935.  

problem still remained: the penalty did not “permit consideration of the circumstances surrounding the offense or the degree of the inmate’s participation.” Id. at 80. For a comparative summary of Woodson and Roberts, see Poulos, supra note 23, at 230-31.

26. The Eighth Amendment forbids “cruel and unusual punishments.” U.S. Const. amend. VIII. Although the Eighth Amendment originally applied only to the federal government, it was applied to the states via the Incorporation Clause of the Fourteenth Amendment in the 1962 case Robinson v. California, 360 U.S. 660 (1962), triggering a long series of challenges to state death-penalty schemes throughout the 1970s.

27. Woodson, 428 U.S. at 303.


29. Id. at 303-04.

30. Id. at 304.

31. Id.


33. Id. at 188.

to the consideration of individualized circumstances in sentencing in South Africa, the Governor-General commuted sentences in the overwhelming majority of cases, emphasizing the *Woodson* Court’s criticism that the mandatory death penalty simply swept too broadly.35

Since 1976, *Woodson* v. *North Carolina* has gone global. *Woodson* is a seminal case in what Professor Carozza refers to as the global common law of the death penalty, one cited by courts across the common-law world in decisions invalidating the mandatory death penalty.36 In 1983, the Supreme Court of India decided *Mithu* v. *State of Punjab*, which tracked *Woodson* closely.37 Chief Justice Yeshwant Vishnu Chandrachud’s opinion carried echoes of the elegant decision by Justice Potter Stewart in *Woodson*:

A provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair. The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a pre-ordained sentence of death.38

With *Woodson* and *Mithu*, the mandatory death penalty receded from the major retentionist common-law powers, and a new front opened in the post-
Abolition of the Mandatory Death Penalty in Kenya

2012

ABOLITION OF THE MANDATORY DEATH PENALTY IN KENYA

293

colonial developing world. Here, too, challengers had precedent: after the European Court of Human Rights in 1989 found that delay and the conditions of death row could make a permissible death sentence unconstitutional, international death-penalty attorneys, relying on that case, brought successful challenges in Canada, the Caribbean, and Zimbabwe. Challenges to the mandatory death penalty followed a similar pattern ten years later, using human-rights case law from international tribunals in domestic courts in the developing world. While it is too soon to tell, challenges to hanging as a cruel and degrading method of execution appear to be gaining traction; they may be the next incremental challenge.

The mandatory death penalty is peculiarly vulnerable to these incremental challenges because of two fundamental assumptions about post-colonial common-law countries. First, because the mandatory death penalty exists in similar form in almost all former British colonies, it possesses common characteristics across borders and is generally a colonial relic in the criminal justice systems in which it exists. Second, most former British colonies share common constitutional frameworks and adhere to most international human-rights covenants. Consequently, like a row of dominoes, legal challenges in one jurisdiction have implications for neighboring countries with similar bills of rights. As the next section shows, where these two assumptions are true, as in the Commonwealth Caribbean and the African countries of Malawi, Uganda, and Kenya, the mandatory death penalty has fallen. Where these assumptions are modified, as in Malaysia and Singapore, the penalty, at least temporarily, has survived challenge.

COMMONWEALTH CARIBBEAN

The mandatory death penalty has been repealed or found unconstitutional in almost every Commonwealth country in the Caribbean region since the year 2000. The near-extinction of the penalty is the result of a coordinated series of challenges brought initially by a core of international pro bono lawyers and legal consultants before international tribunals, such as the United Nations Human Rights Committee and the Inter-American Human Rights System. Using the reasoning of these early precedents, the lawyers brought challenges in binding national and supranational courts such as the national high courts, the Eastern Caribbean Court of Appeal, the Privy Council in London, and, later,

39. See infra note 48.

40. This may overstate the status of these challenges, but for the first time a judge found that hanging itself is unconstitutional in Attorney Gen. v. Kigula (SC), [2009] UGSC 6 at 70 (Uganda Sup. Ct.) (Egonda-Ntende, J., dissenting).

41. As noted below, thirteen Commonwealth Caribbean nations have invalidated or repealed their mandatory death sentences since the year 2000. Only Barbados and Trinidad and Tobago retain it, although Barbados has committed to abolishing the penalty. See infra notes 77-78 and accompanying text.

42. See infra note 54.
the Privy Council’s partial successor, the Caribbean Court of Justice.43 As the jurisdiction of the Privy Council continues to contract due to the maturation of national and regional court systems in the Commonwealth Caribbean, the Caribbean Court of Justice—once characterized by critics as a “hanging court”—looks poised to make its own contribution to regional death-penalty jurisprudence, one that does not stray far from the path set by the Privy Council.44

The interplay of common constitutional clauses within English-speaking Caribbean constitutions provided a window to challenge the mandatory death penalty, assisted by an evolving jurisprudence that made the Privy Council more receptive to the change. The first of these clauses was a right-to-life provision, which contained a death-penalty exception, or savings clause.45 The second provision was the prohibition on cruel, inhuman, and degrading treatment or punishment, which exists in each of the fourteen Commonwealth Caribbean constitutions.46 These clauses closely resemble international human-rights treaties, also in force in much of the Caribbean, which allow appeal to the United Nations Human Rights Committee or to the Inter-American Human Rights System.47 These clauses also provided an opportunity to bring the first

43. This is a point I have made elsewhere. Novak, Malawi Uganda, supra note 15, at 20. Other scholars have focused on how the jurisprudence of the regional tribunals and national courts are linked on the issue of the mandatory death penalty. See Carozza, supra note 14, at 1069-77. However, Carozza does not emphasize that the global network of attorneys who bring these cases intends this jurisprudential interconnectedness. The ius commune that he identifies—the common core of global death-penalty jurisprudence—was deliberately constructed. See Personal conversation with Parvais Jabbar (Mar. 29, 2011).

44. For an overview of the “hanging court” debate, see Leonard Birdsong, The Formation of the Caribbean Court of Justice: The Sunset of British Colonial Rule in the English Speaking Caribbean, 36 U. MIAMI INTER-AM. L. REV. 197, 203-05 (2005) (noting that several Caribbean nations left Privy Council jurisdiction solely over the death-penalty jurisprudence and sought a more pro-death-penalty forum). However, the criticisms appear overstated. In 2006, the Caribbean Court of Justice refused to reinstate the death penalty for two prisoners after the sentences were commuted by the Barbados Court of Appeal after the Inter-American Court of Human Rights found the mandatory death penalty to violate Barbados’s international treaty obligations. Boyce and Joseph v. Barbados, Appeal No. CV 2 of 2005 (2006) (Carib. Ct. Just.). The Caribbean Court of Justice cited Privy Council jurisprudence to find that the two defendants could not be executed anyway because five years had passed since they were placed on death row. Id.

45. Antigua & Barbuda Const. art. 4(1); Bahamas Const. art. 16(1); Barbados Const. art. 12(1); Belize Const. art. 4(1); Dominica Const. art. 2(1); Grenada Const. art. 2(1); Guyana Const. art. 138(1); Jamaica Const. art. 14(1); St. Kitts & Nevis Const. art. 4(1); St. Lucia Const. art. 2(1); St. Vincent & Grenadines Const. art. 2(1); Trinidad & Tobago Const. art. 4(a).

46. Antigua & Barbuda Const. art. 7(1); Bahamas Const. art. 17(1); Barbados Const. art. 15(1); Belize Const. art. 7; Dominica Const. art. 5; Grenada Const. art. 5(1); Guyana Const. art. 141(1); Jamaica Const. art. 17(1); St. Kitts & Nevis Const. art. 7; St. Lucia Const. art. 5; St. Vincent & Grenadines Const. art. 5; Trinidad & Tobago Const. art. 5(2)(b).

47. The United Nations Human Rights Committee has light jurisdiction throughout the Caribbean. Only Barbados and Saint Vincent and the Grenadines have ratified the protocol establishing the Committee’s jurisdiction. Guyana, Jamaica, and Trinidad and Tobago have either denounced their ratification or prevented the Committee from hearing death-penalty appeals. First Optional Protocol to the International Convention on Civil and Political Rights [hereinafter ICCPR], 999 U.N.T.S. 171 opened for signature Dec. 16, 1966, (entered into force Mar. 23, 1976).
incremental challenge to the death penalty in the Caribbean in the early 1990s, against the “death row syndrome,” or the theory that prolonged delay and conditions of death row could render a constitutional death sentence unconstitutional.\footnote{For more on the death-row “syndrome” or “phenomenon,” see Richard B. Lillich, Harmonizing Human Rights Law Nationally and Internationally: The Death Row Phenomenon as a Case Study, 40 St. Louis U. L.J. 699, passim (1996) (analyzing European, Canadian, Zimbabwean, and Jamaican decisions regarding the death-row “syndrome” or “phenomenon”); Patrick Hudson, Does the Death Row Phenomenon Violate Human Rights Under International Law?, 11 Eur. J. Int’l L. 833, 834-37 (2000) (analyzing international law). For the more troubled history of the doctrine in the United States, see Jessica Feldman, Comment, A Death Row Incarceration Calculus: When Prolonged Death Row Imprisonment Becomes Unconstitutional, 40 Santa Clara L. Rev. 187, 187-89 (1999).} The first court to recognize the death-row syndrome and strike down a death sentence was the European Court of Human Rights in the 1989 case \textit{Soering v. United Kingdom}.\footnote{The European Court of Human Rights was eventually followed by the Supreme Court of Canada. Soering v. United Kingdom, 11 Eur. H.R. Rep. 439 (1989); United States v. Burns [2001] 1 S.C.R. 283, reversing \textit{Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779 (Can.). } Soering, Burns, and Kindler each involved extradition of capital defendants to the United States, where they could face the death penalty. In \textit{Soering} and \textit{Burns}, the U.K. and Canada refused to extradite the defendant because the psychological consequences of being on death row constituted cruel, inhuman, and degrading punishment. In \textit{Kindler}, Canada extradited the defendant to the United States.} By the time the mandatory-death challenges arose in the late 1990s, several other incremental challenges had produced settled law in the Caribbean.\footnote{For partial savings clauses, see, e.g., \textit{Antigua & Barbuda Const.} art. 7(2); \textit{Bahamas Const.} art. 17(2); \textit{Barbados Const.} art. 15(2); \textit{Grenada Const.} art. 5(2); \textit{Guyana Const.} art. 141(2); \textit{Jamaica Const.} art. 17(2); \textit{Trinidad & Tobago Const.} art. 6. For general savings clauses, see \textit{Barbados Const.} art. 26(1); \textit{Jamaica Const.} art. 26(8); \textit{Trinidad & Tobago Const.} art. 6(1). Guyana had a partial savings clause in its 1970 (independence) constitution, but a broader savings clause in its 1980 constitution. See \textit{Guyana Const.} art. 141 (1970); \textit{Guyana Const.} art. 151 (1980). Because Guyana is outside of Privy Council jurisdiction, its constitution does not need to recognize the doctrine.} Each Caribbean constitution contains another clause of relevance to constitutional death-penalty challenges that forbids challenge to forms of judicial punishment in existence at the time of independence from Great Britain, on the grounds that those punishments were cruel, inhuman, or degrading. These clauses were of two types. Of the fourteen Commonwealth Caribbean countries, eleven possessed a “partial” savings clause, limited solely to judicial punishments, and three possessed “general” savings clauses, protecting any law in force at the time of independence, including judicial punishments, from challenge.\footnote{See \textit{Thomas v. Baptiste, [1999] 3 W.L.R. 249 (P.C.)} (holding clemency committee must consider reports of international bodies in weighing a due-process challenge); Lewis v. Attorney Gen. of Jamaica, [2000] 3 W.L.R. 1785 (P.C.) (commuting sentence where conditions in detention fall below internationally recognized standards).} The latter three constitutions produced an
added layer of complexity. While the Privy Council could hold that the mandatory nature of the death penalty was not a “punishment,” but rather only a sentencing method and consequently not saved, under the Privy Council’s logic, the mandatory nature of the death penalty would be saved under a clause saving all laws.\textsuperscript{53}

The first wave of challenges appeared before international and regional tribunals and involved not constitutional violations, but rather human-rights treaty violations. In 2000, the United Nations Human Rights Committee, which has jurisdiction over those countries that have ratified the First Optional Protocol to the International Covenant on Civil and Political Rights, found the mandatory death penalty to violate the Covenant in a challenge to the mandatory death penalty of St. Vincent and the Grenadines.\textsuperscript{54} In a split decision, the Committee found that the mandatory death penalty violated the right to life because it was not individually tailored to fit the crime.\textsuperscript{55} In two subsequent cases involving more controversial death sentences based on felony murder and accomplice liability, instead of intentional murder, the Committee unanimously found violations of the Covenant.\textsuperscript{56} In each case, arising from Trinidad and Tobago and Guyana, respectively, the accused person was not able to present evidence that he lacked actual intent to kill.\textsuperscript{57} According to the

\textsuperscript{53} Margaret A. Burnham, Saving Constitutional Rights from Judicial Scrutiny: The Savings Clause in the Law of the Commonwealth Caribbean, 36 U. MIAMI INTER-AM. L. REV. 249, 264-65 (2005). But see Saul Lehrfreund, International Legal Trends and the ‘Mandatory’ Death Penalty in the Commonwealth Caribbean, 1 OXFORD U. COMMW. L.J. 171, 185 (2001). Lehrfreund argued that a separation of powers argument still existed against the mandatory death penalty, because a legislature unconstitutionally delegated judicial sentencing discretion to the executive, something the legislature is not permitted to do. \textit{Id}. The Privy Council did not buy the argument. See Matthew v. State, [2004] 3 W.L.R. 812 (from Trinidad and Tobago) (“[T]he principle of the separation of powers is not an overriding supra-constitutional principle.”). Lehrfreund’s argument was based on an earlier Privy Council decision invalidating a death sentence from St. Kitts and Nevis where a law permitted the Governor-General to substitute his sentencing judgment for that of a trial judge in certain cases involving minors sentenced to death. Browne v. The Queen, [1999] 3 W.L.R. 1158 (P.C.). The Privy Council declined to follow \textit{Browne} in \textit{Matthew}. Lehrfreund’s argument was successful, however, when the Supreme Court of Uganda accepted the separation of power objection to the mandatory death penalty. Kigula v. Attorney Gen. (SC), [2009] UGSC 6 at 44-45 (Uganda Sup. Ct.) (“Any law passed by Parliament which has the effect of tying the hands of the judiciary in executing its function to administer justice is inconsistent with the constitution.”).


\textsuperscript{55} Thompson, U.N. Doc. CPR/C/70/D/806/1998, ¶ 8.2. The dissenters argued that the Covenant only contained two limitations on the death penalty, namely, that that the death penalty not be applied in a cruel, inhuman, or degrading manner, and that it only be applied to the most serious crimes. \textit{See} ICCPR, art. 6.2, 7. The Covenant did not require that courts have sentencing discretion. \textit{Id}. ¶ 9 (dissenting).


Committee, felony murder was not a “most serious crime” as required for imposition of the death penalty in Article 6.2.58

Soon after, the Inter-American Commission on Human Rights determined that the mandatory death penalty violated the 1969 American Convention on Human Rights.59 In a pair of cases arising from Grenada and Jamaica, the Commission found that the mandatory death sentence violated Article 4, the right to life; Article 5, the right to humane treatment or punishment; and Article 8, the right to a fair trial.60 A year later, the Commission extended this holding to the Bahamas, which was not a party to the Convention but did ratify the 1948 American Declaration on the Rights and Duties of Man.61 Unlike the Convention, which permits the death penalty but restricts it to the “most serious offenses,” the Declaration provides for an unqualified right to life.62 In Edwards v. Bahamas, the Commission found that the mandatory death penalty violated the right-to-life and the due-process provisions of the Declaration.63 In 2002, the Inter-American Court of Human Rights followed the Commission’s jurisprudence in cases arising from Barbados and Trinidad and Tobago.64 According to the Court, it was no defense to violating international obligations under a duly ratified treaty that the death penalty had not yet been found

59. American Convention on Human Rights, 22 November 1969, 1144 U.N.T.S. 143, O.A.S.T.S. No. 36 (entered into force 18 July 1978), art. 4. According to Article 4, a ratifying state may only apply the death penalty to the “most serious crimes” and may not reestablish the death penalty after it had been abolished. Id. at art. 4(2)-(3). The Article forbids use of the death penalty for political crimes, where the offender was under age 18 or over age 70 at the time of the crime, or where the defendant is pregnant at the time of execution. Id. at art. 4(4)-(5). The Article further guarantees the right to apply for amnesty, commutation, or pardon and forbids executions when a clemency petition is still pending. Id. at art. 4(6).
62. American Declaration on the Rights and Duties of Man, adopted at the Ninth Annual International Conference of American States, Bogata, Colombia, 1948, art. 1 (“Every human being has the right to life, liberty, and the security of his person.”). This unqualified right to life is the only provision bearing on the death penalty in the Declaration.
unconstitutional in a respective domestic legal system. 65

This early, nonbinding jurisprudence of international tribunals developed a body of persuasive law available to national and supranational constitutional courts. Of the eleven countries with partial savings clauses, one had unique provision, an expiration date: the constitution of Belize, the last to be written when Belize belatedly received independence in 1981, contained a partial savings clause that expired five years after independence, in 1986. 66 By the time of Belize’s independence, general and partial savings clauses were seen as anachronisms, constraints on developing human-rights jurisprudence in postcolonial nations. 67 For this reason, Belize was particularly vulnerable to a mandatory death-penalty challenge.

In early 2000, the Judicial Committee of the Privy Council in London, then the court of final resort for most of the Commonwealth Caribbean, accepted a petition from the Belize Court of Appeal and combined it with cases arising from the Eastern Caribbean Court of Appeal, appealed from the national courts of Saint Kitts and Nevis, Saint Vincent and the Grenadines, and Saint Lucia. 68 Unlike Belize, the three island states had constitutions possessing extant partial savings clauses. 69 Nonetheless, the Eastern Caribbean Court of Appeal had invalidated the mandatory death sentence in the three island countries as unconstitutional; the Belize Court of Appeal had not. 70 The Privy Council did not distinguish the countries; it found all of the mandatory death sentences unconstitutional. The Council found that the mandatory nature of the death sentence was not constitutionally saved and that it was cruel, inhuman, and degrading because it did not permit mitigating evidence and, consequently,


66. Godfrey Smith, Constitutionalism in Belize: Lessons for the Commonwealth Caribbean?, Univ. of the West Indies Faculty Working Paper 12 (Sept. 18, 2008). According to Smith, the framers of the Belizean constitution were “alert to some of the challenges that had emerged from the region’s experience with constitutional interpretation,” the clearest example of which were the savings law clauses. Id.

67. Lehrfreund, supra note 53, at 181 (“In contrast to the constitutions of other Caribbean jurisdictions Belize has a living instrument which is no longer tied to the colonial status quo [ante].”).

68. Reyes v. The Queen, [2002] 2 W.L.R. 1034, 2 A.C. 235 (P.C.) (Belize); The Queen v. Hughes, [2002] 2 W.L.R. 1058, 2 A.C. 259 (P.C.) (St. Lucia); Fox v. The Queen, [2002] 2 W.L.R. 10, 2 A.C. 284 (P.C.) (St. Kitts and Nevis). The case arising from St. Vincent and the Grenadines was not appealed with respect to the mandatory death sentence because the defendant was successful on other grounds and received a retrial. Joanna Harrington, The Challenge to the Mandatory Death Penalty in the Commonwealth Caribbean, 98 AMER. J. INT’L L. 126, 132 n.56 (2004). The attorneys general of Saint Vincent and the Grenadines, Antigua and Barbuda, and Grenada intervened in the Hughes appeal arising from St. Lucia, although they did not make separate submissions. Id. at 132.

69. ST. LUCIA CONST. sched. 2 ¶ 10 (“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of Section 5 of the Constitution to the extent that the law in question authorises the infliction of any description of punishment that was lawful in St. Lucia immediate before 1 March 1969.”); accord ST. VINCENT & THE GRENADINES CONST. sched. 2 ¶ 10; ST. KITTS & NEVIS CONST. sched. 2 ¶ 9.

produced disproportionately harsh results. In addition, the Council found that executive clemency discretion could not save a mandatory death sentence, as trial judges were in a better position to consider mitigating circumstances transparently. In 2006, the Privy Council extended this holding to the Bahamas.

For countries that possessed savings clauses preventing constitutional challenge of any law in existence at the time of independence—Barbados, Jamaica, and Trinidad and Tobago—the question was closer. In 2003, a Privy Council panel ruled 3-2 that because the mandatory death penalty violated Trinidad and Tobago’s international obligations under treaties that the country had ratified, the death-penalty statute should be interpreted as discretionary, not mandatory. The full Council, however, reversed that decision the following year in a case arising from Barbados, finding the mandatory death penalty to be saved by the general savings clause. More controversially, the full Privy Council followed these decisions by upholding the mandatory death penalty for felony murder, reversing a second panel decision striking it down. However, because Jamaica’s death-penalty statute was enacted after independence, even though the change was to narrow the law’s application rather than to broaden it, Jamaica’s mandatory death penalty fell. The mandatory death-penalty statutes of Barbados and Trinidad and Tobago, upheld by the Privy Council and

73. Bowe v. The Queen, [2006] UKPC 10 (P.C.) (Bahamas).
77. Watson v. The Queen, [2004] 3 W.L.R. 841 (P.C.) (Jamaica). In Watson, the Council found that Jamaica’s death-penalty statute was enacted after independence, even though the mandatory death penalty existed prior to independence. This holding is hard to distinguish from Matthew v. State, in which the Council upheld Trinidad and Tobago’s mandatory death-penalty statute even though Trinidad and Tobago had had several constitutions since independence, each saving the laws in existence under the prior constitutions. See Matthew, [2004] 3 W.L.R. 812. Griffith was equally hard to reconcile with Watson: the felony death sentence, at issue in Griffith, had been abolished and later reenacted. The Council could have found that the current law was not in existence at the time the constitution went into effect and thus not saved. Instead, the Council found that a legislature could change the definition of murder without invalidating the sentence; the Constitution saved the 1868 felony-murder law notwithstanding the 1996 changes to the law. Griffith, [2004] UKPC 58 ¶ 19. The Privy Council jurisprudence has been rightly criticized. Jamaica’s mandatory death penalty fell because the statute was altered after independence and not saved; Trinidad and Tobago’s penalty survived even though the statute had been repealed and then reenacted. This is a subtle distinction. For more on the contradictory nature of the Watson case and its potential conflict with not only the Privy Council’s prior decisions but also the jurisprudence of the UN Human Rights Committee, see Stephen Vasciannie, The Decision of the Judicial Committee of the Privy Council in the Lambert Watson Case from Jamaica on the Mandatory Death Penalty and the Question of Fragmentation, 41 N.Y.U. J. INT’L. L. & POL. 837, 867-69 (2009).
Guyana, outside the Council’s jurisdiction, continued to survive. However, Guyana abolished the mandatory death penalty by statute in 2010; Barbados committed to doing so a year earlier, although it has not done so yet. In total, thirteen Commonwealth Caribbean nations have abolished the mandatory death sentence for murder, while only Barbados and Trinidad and Tobago retain it.

**COMMON-LAW AFRICA**

The Constitutional Court of Malawi invalidated the mandatory death penalty in 2007, and the Supreme Court of Uganda followed suit in 2009. Constitutional challenges have been filed against the mandatory death penalty in most other common-law African countries, including Ghana, Nigeria, Sierra Leone, Tanzania, Zambia, and Zimbabwe. In Southern Africa, the doctrine of extenuating circumstances has softened the mandatory death penalty by allowing a person convicted of murder to present evidence in mitigation, but the defendant has the burden of showing extenuating circumstances beyond a fair preponderance of the evidence. The doctrine of extenuating circumstances was adopted by the legislature of apartheid South Africa in 1935, of Southern Rhodesia (now Zimbabwe) in 1949, and of Zambia in 1990. By operation of common law, the doctrine also applies in capital cases in Botswana and Lesotho, as well as Swaziland until the 2005 constitution abolished the mandatory death penalty.

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82. Ntanda-Nsereko, Extenuating Circumstances, supra note 12, at 264 (explaining burden-shifting in Botswana context). For the Zambian context, see Feltoe, supra note 12, at 60. For the South African context, see Davis, supra note 5, at 205.


common-law mandatory death penalty are helping harmonize the criminal-justice regimes of common-law Africa.

The mandatory death penalty was always inappropriate for the young legal systems of postcolonial common-law Africa. First, by sentencing every prisoner to death, regardless of the circumstances of the crime, African countries developed enormous death rows, which continue to grow even as the number of actual executions dwindle. Second, as each common-law African constitution contains a provision for executive clemency, the mandatory death penalty has the effect of expanding the power of the head of state. Third, a long-standing criticism, regardless of the legal jurisdiction, is that the mandatory death sentence confuses a guilt inquiry with a sentencing one, producing inconsistent results because a judge may avoid the death sentence by acquitting a guilty defendant. Replacing the mandatory death-penalty regime

e.g., see Mkhwanazi v. Rex, [2001] SZSC 12 (Swaziland Ct. App.) (detailing elements of doctrine of extenuating circumstances and discussing witchcraft as extenuating circumstance). Both Moratele and Mkhwanazi cite Dlamini (Daniel) v. Rex, appeal case No. 11/1998 (unrep.). These cases also cite the Botswana case, Kelaletswe v. State, 1995 B.L.R. 100 (Botswana Ct. App.). The present author believes the Swazi court’s reading of Kelaletswe is too generous; the Botswana Court of Appeals may have said that the accused did not have the onus, but it is not clear that it meant this in the same way the Swazi court did. Regardless, the Botswana court found no extenuating circumstances to exist and Kelaletswe was executed; Dlamini was not executed in Swaziland because extenuating circumstances were found. The Dlamini consensus in Swaziland, confirmed in reported cases by Moratele and Mkhwanazi, was enshrined in Swaziland’s new 2005 constitution, which forbids the mandatory death penalty. See SWAZILAND CONST. art. 15(2). For Lesotho, see Rex v. Ntobo, [2001] LSCA 137 (Lesotho High Ct.); Molise v. Rex, [2007] LSCA 6 (Lesotho Ct. App.) (applying doctrine of extenuating circumstances). 85. African death rows tend to be proportionally large. According to the numbers used by Chenwi, drawn from a variety of sources, roughly 487 inmates were on death row in Nigeria (July 2003), 525 in Uganda (December 2004), 533 in Burundi (December 2004), 400 in Tanzania (December 2005), and at least 200 in the Democratic Republic of Congo (December 2004). See Chenwi, supra note 2, at 55. Kenya had anywhere between 1000 and 2000 between 2004 and 2005. Id. By comparison, Texas currently has about 330 death-row prisoners for a population of about 25 million people, smaller than Kenya or Nigeria, but larger than Burundi, and on par with Uganda. For a continually updated list of people on death row in Texas, see OFFENDERS ON DEATH ROW, TEX. DEP’T CRIM. JUST., http://www.tdcj.state.tx.us/stat/dr_offenders_on_dr.html (last visited Jan. 18, 2011). 86. This is my own criticism. African executives are generally quite powerful, and by placing primary sentencing discretion with the executive branch as opposed to the judicial branch has the consequence of inflating executive power. As Chenwi writes of Uganda, the clemency committee is composed of the Attorney-General, typically a member of the ruling party and of the president’s cabinet, and six other members appointed by the president. The Committee’s membership thus takes on a political bent. See Lilian Chenwi, Fair Trial Rights and Their Relation to the Death Penalty in Africa, 55 INT’L & COMP. L.Q. 609, 631 (2006). 87. This is one of the most long-standing and most fundamental criticisms of a mandatory death penalty: if a fact finder does not believe a defendant deserves death, the fact finder may acquit a guilty defendant in order to avoid the death penalty. In jury trial systems, this is jury nullification, one of the most objectionable aspects of a mandatory death penalty for the Woodson court. WALTER BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY 181 (1979); see also Woodson v. North Carolina, 428 U.S. 280, 302-03 (1976). On a broader scale, a mandatory death penalty simply shifts sentencing discretion to other points in the judicial process: prosecutors will seek manslaughter charges in problematic cases rather than murder charges; defendants will be less willing to plead guilty; and reviewing courts or pardoning bodies will review sentences more intensively. This problem is inherent with an automatic death sentence, regardless of legal context. In South Africa prior to the adoption of the doctrine of extenuating circumstances in 1935, which
with an American- or Indian-style discretionary regime, weighing aggravating and mitigating circumstances, would ultimately be more transparent and more in line with human-rights norms. 88

Apartheid South Africa had the broadest and harshest death-penalty regime on the African continent. 89 In 1990, however, a host of political and legal
reforms led to the replacement of South Africa’s modified mandatory-death statute with an American-style discretionary one.90 A moratorium on executions, a precondition to negotiations with the African National Congress led by Nelson Mandela, was put in place, and no executions were carried out before the abolition of the death penalty in 1995 with the Constitutional Court’s decision in State v. Makwanyane and Mchunu.91 In Makwanyane, one of the most sweeping and far-reaching death-penalty decisions ever handed down by a court of final appeal, the Constitutional Court extensively analyzed foreign and international case law, interpreted public opinion and cultural attitudes, and cited the abuses of the apartheid regime in its decision to forever close the door on capital punishment.92 The decision, despite its symbolic importance, did not lead to direct challenges elsewhere in Sub-Saharan Africa due to South Africa’s different constitutional structure, which did not explicitly save the death penalty, as was the case in other common-law countries.93

Although the South African decision did not lead to a wave of challenges in the countries to the north, the mandatory death-penalty decisions in the Caribbean provided an opportunity to bring suit in African courts. In 2007, the Constitutional Court of Malawi struck down the mandatory death sentence for murder in a targeted challenge, finding that the penalty was cruel and inhuman punishment and violated the right to a fair trial and the right of access to courts because it did not allow appellate review of guilt and sentencing separately.94


91. State v. Makwanyane and Mchunu 1995 (3) SA 391 (CC) (S. Afr.).


93. South Africa’s constitution does not contain a death-penalty savings clause. The right to life is unqualified. See S. Afr. Const. art. 11.

94. Kafantayeni v. Attorney Gen., [2007] MWHC 1 (Malawi High Ct.) (upholding right to life and death-penalty savings clause), relying on Malawi Const. art. 16, Malawi Const. art. 19(3); Malawi Const. art. 42(2)(f) (right to a fair trial), and Malawi Const. art. 41(2) (right of access to justice, including effective appellate review). The Court did not reach the separation of powers grounds, but the fact that it raised grounds not articulated by the parties indicates that the Court was engaged in strict and searching review.

98. whites—80% of Afrikaners and 56% of English-speaking South Africans—favored retention. Devenish, supra note 87, at 10.
In 2009, the Ugandan Supreme Court struck down the mandatory death sentence in an omnibus challenge arguing, in the alternative, that the death penalty was per se unconstitutional. \(^{95}\) Although the Court found that the death penalty itself was permitted under the constitution, it held that the mandatory sentence was cruel and inhuman punishment, violated the right to a fair trial, and unconstitutionally delegated judicial sentencing discretion to the legislative branch. \(^{96}\) The two decisions were different in form and style: the Ugandan decision, more than five times the length of the Malawian decision, focused heavily on textual interpretation and Ugandan precedent, while the Malawian decision relied entirely on foreign legal sources. \(^{97}\)

When the Kenyan Court of Appeal faced a mandatory death-penalty challenge in 2010, the Court placed special emphasis on the Ugandan Supreme Court’s decision in Kigula. As neighbors and, with Tanzania, components of British East Africa, Kenya and Uganda have a close relationship among their legal systems, which is generally unusual even among common-law African countries. Created before independence, the East African Court of Appeal was the court of last resort for all three countries until 1977; regional cooperation through the East African Law Society and sharing of judicial and legal education resources became a hallmark of the practice of law in all three countries beginning in the late 1990s. \(^{98}\) Besides Malawi, Uganda, and now Kenya, mandatory death-penalty test cases are pending in the lower courts of perhaps a half dozen other common-law African countries. \(^{99}\) As these challenges succeed, death-penalty regimes will be harmonized across borders and will operate closer to conformity with international human-rights norms.

**BANGLADESH**

After a decade and a half of litigating a sensational criminal trial, the Supreme Court of Bangladesh invalidated the mandatory death penalty as applied to an accused person who was fourteen years old when he raped and murdered a seven-year-old girl. \(^{100}\) The May 2010 decision, Bangladesh Legal Aid and Services Trust (Shukur Ali) v. Bangladesh, reversed a 2001 death

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\(^{95}\) Attorney Gen. v. Kigula (SC), [2009] UGSC 6 at 1-2 (Uganda Sup. Ct.).

\(^{96}\) Id. at 37-45.

\(^{97}\) For this comparison, see Novak, Malawi Uganda, supra note 15, at 70 n.294, 74 (discussing Ugandan precedent cited and comparing length of two decisions).

\(^{98}\) Widner, supra note 6, at 135-36, 398.

\(^{99}\) Human Rights Litigation in African Countries, supra note 8.

\(^{100}\) Shukur Ali was originally convicted of rape and murder in 1999. The case produced intense media coverage over its history. Rape, Murder Case Against Sukur Ali Gets New Turn, BD NEWS 24 (Dec. 6, 2005), http://www.bdnews24.com/pdetails.php?id=23836. The law under which Ali was convicted was the Oppression of Women and Children (Special Enactment) Act, Act No. 18/2005 (July 17, 2005), available at http://www.commonlii.org/bd/legis/num_act/owacea1995466/. Under Article 6(2) of the Act, “Whoever causes the death of any child or woman in or after committing rape shall be punishable with death.” Id. at art. 6(2).
sentence that had been affirmed by the High Court Division in 2004 and the Appellate Division in 2005. A constitutional challenge to the law was filed by the legal aid agency BLAST shortly after the conviction was affirmed, and the High Court Division found the mandatory death sentence for “rape and murder” committed by “any person” to be unconstitutional. As Professor Hoque explains, it was unlikely that the legislature responsible for the statute could have meant “any person” to include children, and the Court did not go so far as to invalidate the death penalty for juveniles per se. Although Hoque argues that the other places in the Bangladeshi penal code that authorize a mandatory death sentence are unaffected by the ruling, other observers have favored a more generous interpretation. Bangladesh does not employ a mandatory death sentence for ordinary murder or treason. However, the Court did cite the ICCPR and the Universal Declaration of Human Rights in its decision, and a window has appeared for a future challenge to the mandatory death penalty for other crimes on the model of those in the Caribbean and Africa.

MALAYSIA AND SINGAPORE

Malaysia and Singapore stand out in the common-law world because the two countries, uniquely, have upheld their mandatory death-penalty schemes from constitutional challenge. Both countries historically have had high execution rates, even for the region: in 2000, Singapore, with 5.2 executions per million, was second only to China in per capita executions; Malaysia, with 0.092 executions per million, was fifth. As the decade wore on, however, the number of executions in both countries declined. By 2007, Singapore only had 0.45 executions per million; Malaysia had zero that year. Singapore in particular had long been known as the “world execution capital” for having such a high execution rate; the statistics seem even more out of place because

103. Id.
104. Compare id., with INT’L FED’N FOR HUMAN RIGHTS, Bangladesh: Criminal Justice Through the Prism of Capital Punishment and the Fight Against Terrorism 13 (2010), available at http://www.fidh.org/IMG/pdf/Report_eng.pdf (“The Court ruled that, regardless of the nature of the offence, legislation may not require that the death penalty is the only punishment available.” (emphasis added)).
105. Bangladesh Penal Code (1860), Secs. 121 (Treason), 300 (Murder).
107. See infra note 133 et seq.
109. Id.
Singapore has the third highest per capita income in Asia, and wealth is generally correlated with abolition. The explanation for this phenomenon lies in the political culture in both countries: a strong executive with relatively weak judicial power, a law-and-order ethos, and a general intolerance of political dissent.

Malaysia and Singapore are factually distinguishable from the former British colonies in the Caribbean and Sub-Saharan Africa for several reasons. First, the constitutions of Malaysia and Singapore, unlike virtually all other former British colonies, do not prohibit cruel, inhuman, and degrading treatment or punishment. Indeed, both countries have mandatory judicial caning. In Singapore, strokes of a cane are mandatory for convictions of rape, robbery, drug trafficking, and vandalism, except where the death penalty is imposed. Second, the legal systems of Malaysia and Singapore do not recognize a right to a fair trial or a right to access the judicial system per se, either in the constitutional document itself or through acceptance of international customary law or ratification of treaties. Finally, both constitutions allow broad derogations and the suspension of certain liberties if “necessary or expedient in the interest of the security” of the government.

Most troubling about the mandatory death penalty in Malaysia and Singapore is the extensive application of the penalty to drug-related crimes. The execution rate in Singapore increased even as the homicide rate declined during the 1990s because of an increasingly aggressive drug-enforcement policy that punished possession with intent to distribute 15 grams of heroin, 30 grams of cocaine, 250 grams of methamphetamines, or 500 grams of cannabis. The mandatory death penalty is disproportionately applied to...
drug-trafficking offenses in both countries, which may account for as many as 69% of judicial executions in Malaysia\(^{117}\) and 76% of executions in Singapore.\(^{118}\) These numbers, however, are not high in absolute terms.\(^{119}\) As Harring writes with respect to Malaysia, the judicial and political branches have reached equilibrium with respect to the law’s enforcement, resulting in few actual executions.\(^{120}\) Malaysia extended the mandatory death penalty to drug trafficking in 1983, although trafficking had been a capital crime since 1975.\(^{121}\) Originally a component of Malaysia’s much-hailed war on drugs, about 300 persons had been sentenced to death by hanging for trafficking in the first fifteen years of the statute’s existence, and about 100 were executed.\(^{122}\)

Only a handful of other countries besides Singapore and Malaysia treat drug trafficking as a capital crime.\(^{123}\) The mandatory death penalty for drug trafficking appears to fall most heavily on foreign nationals, in particular migrant workers, in Singapore and likely in Malaysia as well.\(^{124}\) The 2005


\(^{118}\) The Singapore statistics are for the period between 1994 and 1999. Id.


\(^{120}\) Id. at 367, 401.

\(^{121}\) Id. at 365.

\(^{122}\) Id. The law has a high level of acquittals, and prosecutors do not hesitate to seek the lesser penalties for drug possession in close cases. The judiciary has developed a number of legal devices that remove defendants from the threat of mandatory death by hanging, such as providing effective controls over police involvement and other strict interpretations of the Dangerous Drugs Act. “As the process works out, the state gets its perceived deterrent benefit of the threat of mandatory death, but is spared both much of the difficulty of administering it and the international embarrassment of too many executions.” Id. at 404. In fact, so broad are the exceptions that the author, Professor Harring, calls the mandatory death sentence for drug trafficking, “in reality, not mandatory because so many trafficking arrests lead to dispositions other than the death penalty.” Id. This accords with one of the primary arguments against the mandatory death penalty: it does not remove discretion from the courtroom; rather it reallocates that discretion to other, less transparent, actors such as the prosecutor, appellate judges, and executive clemency reviewers.

\(^{123}\) These countries include Egypt, Indonesia, Kuwait, Peoples’ Republic of China, Saudi Arabia, Thailand, and Vietnam. Id. This trend has only recently touched the African continent with legislative proposals in countries such as the Gambia and Nigeria. For the recent Gambian proposal, see Death Sentence for Drug Dealers as Assembly Amends Drug Control Bill, DAILY OBSERVER (Banjul), Oct. 6, 2010 (noting National Assembly of Gambia unanimously passed amendments to drug-control law requiring application of death penalty to any person found in possession of 250 grams of cocaine or heroin). The use of the death penalty in this manner is unconstitutional on its face. According to the Gambian constitution, “No court in The Gambia shall be competent to impose a sentence of death for any offence unless the sentence is prescribed by law and the offence involves violence, or the administration of any toxic substance, resulting in the death of another person.” GAMBIA CONST. art. 18(2). According to Schedule 2 of the Constitution, any law providing a death sentence for a crime other than aggravated murder is presumed to read life imprisonment. GAMBIA CONST. sched. 2, ¶ 16. Because the death penalty for drug trafficking was constitutionally inoperable, the law was repealed in April 2011. Andrew Novak, Legislative Note, The Abolition of the Death Penalty for Drug Offences in The Gambia, 38 COMMUNW. L. BULL. 61 (forthcoming Mar. 2012).

\(^{124}\) Johnson and Zimring note that 53% of executions in Singapore between 1993 and 2003 were of foreign nationals. JOHNSON & ZIMRING, supra note 108, at 416. They also note that Malaysia is one of the few
execution in Singapore of a prominent athlete and civil servant, for possession of a kilogram of marijuana, prompted the first outpouring of dissent and even anti-death-penalty sentiment by civil society, despite media censorship.\footnote{125}

The weight of the international consensus generally treats mandatory capital punishment as disproportionate, and, consequently, cruel, inhuman, and degrading, for crimes in which death or a small number of other violent offenses do not ultimately occur.\footnote{126} At the very least, international customary law would certainly prohibit executing an innocent person, and even Singapore would likely consider this a violation of the right to life.\footnote{127} Neither Malaysia nor Singapore are signatory to the International Covenant on Civil and Political Rights, which states that a “sentence of death may be imposed only for the most serious crimes” in retentionist countries.\footnote{128} Neither Malaysia nor Singapore recognize the jurisprudence of the Covenant’s enforcing judicial body, the United Nations Human Rights Committee, which has found that a death sentence for drug trafficking violates Article 6(2) of the Covenant.\footnote{129} In addition, mental health and addiction professionals have criticized the death penalty for drug trafficking because the penalty falls most heavily on drug runners and “mules” rather than on big-time traffickers, undermining the deterrence arguments in favor of the law.\footnote{130}

The mandatory death sentence for drug trafficking has come under constitutional attack in both countries. In 1981, the Privy Council, then the highest court of appeal for cases arising from Singapore, ruled that the mandatory death penalty did not violate Articles 9(1), 12(1), and 93 of the Constitution, which provide for, respectively, the fundamental liberty of the person, equal protection of the law, and the separation of powers.\footnote{131} The case, Ong An Chuan v. Public Prosecutor, has formed the basis of Malaysian and Singaporean jurisprudence, even though the Privy Council decided this case...
before the Caribbean appeals in the early 2000s. Ong An Chuan provided the basis for the Malaysian challenge upholding the mandatory death sentence for drug trafficking in Public Prosecutor v. Lau Kee Hoo and the Singaporean challenge in Nguyen Tuong Van v. Public Prosecutor.

In the 2004 case Nguyen Tuong Van v. Public Prosecutor, the Singapore Court of Appeal upheld the mandatory death sentence against constitutional challenge by a twenty-four-year-old Australian national of Vietnamese origin, who had been sentenced to death for importing nearly 400 grams of diamorphine. In addition to challenging his conviction on the basis of his status as a foreign national, a faulty confession, and possible evidence tampering, the appellant also challenged the mandatory death sentence on the grounds that: (a) the sentence prescribed under the Misuse of Drugs Act was not a mandatory one; and (b) if it were mandatory, the sentence would be constitutionally impermissible. Considering the line of Privy Council decisions arising from the Caribbean, the Court determined that, for the Privy Council at least, Ong An Chuan was no longer good law. According to the appellant, the mandatory death penalty was not “in accordance with law” and consequently not saved, because the constitutional foundation for upholding the law had since been reversed. The Court found that the Act permitted only one sentence against a convicted defendant—the death sentence—and that the sentence was constitutional.

The Court also found that customary international law did not import the prohibition of cruel, inhuman, or degrading punishment into Singaporean constitutional law, which did not contain such a prohibition. “We agree with the trial judge’s reasoning on the effect of a conflict between a customary international law rule and a domestic statute,” the Court indicated. “The trial judge held that even if there was a customary international law rule prohibiting execution by hanging, the domestic statute providing for such punishment, [i.e.,

132. Id. This case would be reversed by the Reyes, Hughes, and Fox trilogy arising from the Commonwealth Caribbean. See supra note 68 et seq.
135. Id. ¶¶ 18-19.
136. Id. ¶ 62.
137. Id. ¶¶ 82-84. The Court distinguished the Caribbean jurisprudence because it was based on the prohibition on cruel, inhuman, and degrading punishment, which did not exist in Singapore’s constitution. Id.
138. Id. ¶ 88. In other words, “in accordance with law” did not include international customary human rights law when such law conflicted with a statute of Parliament.
139. Id. ¶ 88. The trial judge held that even if there was a customary international law rule prohibiting execution by hanging, the domestic statute providing for such punishment, [i.e.,
the Misuse of Drugs Act], would prevail in the event of inconsistency. The Court upheld the law on this basis and also foreclosed other constitutional arguments. Although the European Convention on Human Rights applied to Britain’s colonies after 1953, ten years before Singapore received independence (and four years before colonial Malaya did), the Singapore Court of Appeal rejected the suggestion that the Convention was indicative of present international customary law. In addition, the Court rejected the argument that the mandatory death penalty violates the constitutionally enshrined separation of powers because the legislature delegates judicial sentencing power to the executive branch. These holdings were not necessarily inevitable, and they should be reassessed.

An appeal in the case of Yong Vui Kong reached the Court of Appeal in 2010 and allowed the Court an even more detailed analysis of the constitutionality of the mandatory death penalty, under the Misuse of Drugs Act. The appellant argued that the mandatory death penalty violates the right to life and was not “in accordance with law” because the mandatory death penalty was an inhuman form of punishment and conflicted with international customary law. Singapore was, in fact, a persistent objector. In addition, the differentia laid out in the Misuse of Drugs Act among the amounts of drugs that triggered prescribed penalties, including death, were arbitrary and, consequently, violated

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141. Id.
142. Id. ¶ 86-87 (distinguishing the Privy Council’s assumption that the European Convention on Human Rights as applied to the colonies was relevant in interpreting international customary law in Watson v. Queen, the Jamaican appeal). The argument has been accepted in other courts. The Supreme Court of Uganda noted that articles 2(1) and 3 of the European Convention on Human Rights mirrored articles 22(1) and 24 of the Ugandan Constitution, respectively, and consequently found the jurisprudence of the European Court of Human Rights “quite persuasive.” Attorney Gen. v. Kigula (SC), [2009] UGSC 6 at 78 (Uganda Sup. Ct.).
143. Nguyen Tuong Van, [2005] 1 S.L.R. 103 ¶ 95-98. The argument here is that the legislature cannot delegate sentencing power from the judicial branch to the executive branch, as this simply shifts the discretion from a sentencing judge to the wielder of clemency powers. See Lehrfreund, supra note 53, at 185. This argument has been accepted in other cases. The Privy Council invalidated a death sentence arising from St. Kitts and Nevis, as the law allowed the Governor-General to substitute his sentencing judgment for that of a trial judge in certain cases involving minors sentenced to death. See Browne v. The Queen (1999) 3 WLR 1158 (PC). The Court distinguished the argument in Matthew v. State, arising from Trinidad and Tobago. Matthew v. State, [2004] UKPC 33 ¶ 28 (“[T]he principle of the separation of powers is not an overriding supra-constitutional principle but a description of how the powers under a real constitution are divided. Most constitutions have some overlap between legislative, executive, and judicial functions.”). The Supreme Court of Uganda, however, accepted the argument. Kigula (SC), [2009] UGSC 6 at 44-45 (“Any law passed by Parliament which has the effect of tying the hands of the judiciary in executing its function to administer justice is inconsistent with the Constitution”).
144. Of the two holdings, the separation of powers argument is stronger in the context of Malaysia and Singapore. Although the two constitutions do not mirror the fundamental-rights portions of the European Convention on Human Rights, they do provide for a separation of powers, albeit ones with strong executives. See SINGAPORE CONST. pt. 5; MALAYSIA CONST. arts. 39-40.
146. Id. at 3-4.
Article 12 of the constitution, providing for the equal protection of law. The Court interpreted *Woodson, Mithu,* and the Caribbean jurisprudence in great detail, distinguishing them on the basis of Singapore’s different constitutional structure, and ultimately upheld the penalty. The appellant’s argument in *Yong Vui Kong* never overcame a kind of circularity that would have allowed the conservative judges to invalidate the mandatory death penalty for reasons that are unique to the Singaporean context. The appellant argued that the mandatory death penalty was not saved because it constituted cruel, inhuman, and degrading punishment under customary international law, but failed to convince the judges of a mechanism by which the customary international law of the death penalty could be incorporated in Singapore’s constitution, because Singapore had never recognized a prohibition on cruel, inhuman, or degrading punishment under its domestic law or international treaties. The Court also failed to uphold the appellant’s Article 12 challenge against unequal protection of the law because Parliament had constitutionally justifiable reasons for setting up a schedule of drug-trafficking penalties that could result in automatic death. This argument was, essentially, that two drug traffickers carrying different amounts of drugs could be subjected to different penalties even though their mental state and legal culpability were the same. The Court found that two drug traffickers carrying different amounts of drugs were not equal at all; they were, in fact, distinguishable, and Parliament could distinguish them by assigning differing penalties, with mandatory death being the most severe. Unlike the mandatory death penalty for murder, this was no colonial relic; the outcome was intended by the Singaporean legislature.

This is not to say that international law was completely irrelevant. The Singapore government conceded that it employs the death penalty only for the “most serious crimes,” although it defines “most serious crimes” to include drug trafficking. As mentioned, even in Singapore the execution of an innocent person would be unconstitutional, and thus a due-process violation that could lead to the execution of an innocent person would be unconstitutional as well, even in the absence of a formal constitutional right to

147. *Id.* at 4.
148. See *id.* at 18-25. The Court even looked at the decisions of the Constitutional Court of Malawi and the Supreme Court of Uganda. *Id.* at 18-19.
149. *Yong Vui Kong,* [2010] SGCA 20 at 36-38. The Court placed special emphasis on the constitutional commission’s findings in 1966 specifically recommending that Singapore not adopt a prohibition on cruel, inhuman, or degrading treatment or punishment.
150. *Id.* at 59.
152. Hor, *supra* note 127, at 106. As Hor notes, it is possible to imagine borderline cases, such as negligent or reckless trafficking of drugs by people unaware of what they are carrying. An execution for this reason may very well violate international customary law. *Id.* at 109 n.36.
a fair trial.\textsuperscript{153} Singapore does not recognize the death-row “syndrome” or “phenomenon,” and the Singapore Court of Appeal is one of the few national courts to have rejected such a constitutional challenge outright.\textsuperscript{154} However, the test case did not have ideal facts, as the delay was largely the result of the accused, and the problem for prisoners in general appears to be quite the reverse—executions are carried out with speedy efficiency.\textsuperscript{155} This makes Singapore a particularly slippery target for international death-penalty experts, and the country may be running “against what is widely perceived to be a strong move in the international community, if not to abolish the death penalty, then to use it more parsimoniously and with greater due process rights than is usual.”\textsuperscript{156}

As a result of the unique structure of the Singaporean and Malaysian constitutional orders—strong executive branches, weak fundamental rights protections, and an isolation from international human-rights treaties—the mandatory death penalty continues to survive in both countries and likely will for the foreseeable future. But these are the exceptions rather than the rule; nearly every other former British colony outside of North Africa and the Middle East has a constitution that is \textit{in pari materia} with the others.\textsuperscript{157} Like a row of dominoes, common-law high courts on four continents have found the mandatory death penalty unconstitutional over the past decade. In 2010, Kenya became the next domino.

\textsuperscript{153} Id. at 113. As Hor notes, the Privy Council in \textit{Ong Ah Chuan} established a rebuttable presumption that a person possessing a sufficiently great amount of drugs was engaged in trafficking; the accused could rebut with evidence that the drugs were actually for personal use. Singapore apparently still recognizes that burden-shifting framework. \textit{Id.} at 113-14. He notes that, other than in Malaysia, it is hard to imagine a jurisdiction that employs a rebuttable presumption in favor of death for any crime, and that international customary law may be solidifying against such a mechanism. \textit{Id.} However, the doctrine of extenuating circumstances as exists in Southern Africa may be such a presumption, weak though it tends to be.

\textsuperscript{154} Id. at 115 (citing Jabar v. Public Prosecutor, [1995] Sing.L.R. 617 ¶ 53, 64 (Singapore Ct. App.)).

\textsuperscript{155} Id.

\textsuperscript{156} Id.\textsuperscript{ supra note 127}, at 116. As Hor writes, since independence Singapore has increased the number of capital offenses to include kidnapping, drug trafficking, and arms offenses; presumptions in favor of death in both arms and drug trafficking cases make convictions easier. Capital trial courts have abolished jury trials and replaced panels of judges with a single judge. While it was once a capital offense to traffic in a certain quantity of drugs, now it is enough to possess that amount; the intention to traffic will be assumed. All of these points suggest that Singapore is moving sharply against the international grain. \textit{Id.}

\textsuperscript{157} Again I note that former British colonies north of the Sahara Desert and west of Pakistan have constitutional orders that make significant concessions to Islamic law and legal culture, which provide an alternate theoretical basis for the existence of the death penalty. That having been said, many of these countries still possess death-penalty savings clauses, including restrictive ones that are similar to other common-law constitutional death-penalty provisions. \textsuperscript{See Sudan Const. art. 33(1)-(2) (“The death penalty may not be imposed except as chastisement or punishment for the most serious crimes in accordance with law,” and exempting most crimes committed by persons below eighteen years of age or above the age of seventy, and preventing execution of pregnant or recently pregnant women).}
A SOCIO-LEGAL HISTORY OF THE DEATH PENALTY IN KENYA

Kenya, a pentagonal-shaped country about 225,000 square miles in area, is a heterogenous country home to five large ethnic groups comprising the overwhelming majority of the population: the Kikuyu, Luhya, Luo, Kalenjin, and Kamba, two smaller ethnic groups, the Kisii and the Meru, and a wide array of other groups, including South Asians and populations straddling the borders with Somalia and Ethiopia. Prior to colonialism, these societies were extremely diverse as to political organization, economic sophistication, and social livelihoods. Colonized by Great Britain in the mid-1890s, Kenya received British conceptions of law and justice through both the installation of the colonial state and the large numbers of white settlers who moved to the country for economic mobility, particularly during the Great Depression and post-World War II era. As the British imposed their rule on rapidly changing African societies, colonialism hastened and altered migration, land ownership, and trade patterns in the region, producing later challenges for their administration.

As with other aspects of the British criminal-justice system, the mandatory death penalty increasingly became a misfit for Kenya’s legal system. Rarely used by precolonial societies in East Africa, except in those culturally Islamic regions tributary to the Sultanate of Zanzibar, the death penalty for the crimes of murder, treason, and other violent felonies was instituted by Great Britain in

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158. Generally speaking, Kenya is divided into three broad ethnic and linguistic bands: the Bantu linguistic family, including the Luhya, the Kikuyu, the Gusii, the Meru, and the Embu; the Nilotic group, including the Luo, in the Lake Victoria basin, and the Kalenjin in the Rift Valley highlands, and the plains-inhabiting Masai and Turkana; and the Cushitic peoples inhabiting Northern and Northeastern Kenya, including Somali speakers. John O. Ocho, Undercurrents of Ethnic Conflict in Kenya 38-41 (2002). As of 2010, the largest tribe in Kenya is the Kikuyu, based in the central region (20%), followed by the Kalenjin in the Rift Valley (15%), the Luhya of Western Kenya (14%), the Luo from Nyanza Province (12%), and the Kamba from the region east of Nairobi (11%). Richard Trillo, The Rough Guide to Kenya 548 (2010).

159. Kenya had a number of highly developed societies at the outset of colonial rule, and the late eighteenth century proved to be of enormous consequence. A series of civil wars among the Maasai led to the disintegration of Maasai society. The Mijikenda were migrating toward the coast; the Arab and Swahili peoples were migrating inland. The Kikuyu, with significant population growth, were expanding southward into Kiambu. The Kikuyu thus had significant advantages over the other Kenyan peoples because of their proximity to the center of white colonial settlement and, consequently, their integration into the market economy. Colonization halted Kikuyu expansion for about sixty years and contributed to a land crisis. The Nandi emerged as a strong, well-knit military power by this point. The Luo had evolved from a small semi-nomadic group to a strong settled community with a mixed economy. See Bethwell A. Ogot, Kenya Under the British, 1895 to 1963, in Zamani: A Survey of East African History 258-60 (Bethwell A. Ogot ed. 1974). By the time colonial rule was on the horizon, the Kikuyu and the Kamba tended to be headless, nonhierarchical societies that were less centralized. The Maasai were even less hierarchical and settled. The Luo were more hierarchical and centralized. See Basil Davidson, A History of East and Central Africa to the Late Nineteenth Century 172-76 (1969).

160. Ogot, supra note 159, at 266.
the late nineteenth century. The implementation of the death penalty was ragged and harsh for ordinary crimes, such as murder and aggravated robbery, during the colonial era. “British administration of justice during the early years was solely concerned with the preservation of law and order in the territories under British control” and with the settlement of disputes involving white settlers and merchants. The outbreak of the Mau-Mau rebellion in central Kenya, in 1952, and the resulting state of emergency, changed the calculus for British officials, leading to widespread use of the death penalty for political crimes. Upon independence, Kenya inherited a death-penalty regime largely out of sync with its legal and political environment, and the disparity only continued to grow. The mandatory death penalty was too harsh of a sentence: about 4000 people were on death row in 2009, nearly one-fourth of the world’s total death-row population, in a country that had not executed a prisoner since 1987. Kenya’s mandatory death-penalty regime sent enormous numbers of men to death row but almost never sent them to the gallows.

CRIME AND PUNISHMENT IN BRITISH EAST AFRICA

More than the other colonial systems, the unique imprint of British colonialism was characterized by an overwhelming flexibility. No single constitutional document governed the relationship between Britain and her colonies; indeed, the Empire was a patchwork quilt of dominions, colonies, territories, protectorates, mandates, and condominiums that was variously governed by the Foreign Secretary, the Colonial Secretary, the Secretary of State for India, or none of the above. British rule was guided by the policy

161. Contemporaneous sources tend to show that the death penalty existed in precolonial Zanzibar in accordance with a version of Islamic law, including for apostasy or heresy to Islam. See Arthur H. Hardinge, Legislative Methods in the Zanzibar and East Africa Protectorates, 1-2 J. SOC’Y COMP. LEGIS. 4-5 (1899). However, Zanzibar does not appear to have enforced Islamic law strictly as in, for instance, stoning as punishment for adultery. See F.D. Lugard, Slavery Under the British Flag, 39 THE NINETEENTH CENTURY 349 (James Knowles ed., 1896).


163. See infra note 245 et seq. and accompanying text.


165. They were almost always men. During the colonial era, forty-one women faced capital charges for ordinary crimes; only one was executed (this does not include extraordinary crimes, as during the Mau Mau emergency between 1952 and 1960). Twenty-two of those forty-one had their sentences commuted, and two were found guilty but insane. Stacey Hynd, Deadlier Than the Male? Women and the Death Penalty in Colonial Kenya and Nyasaland, c. 1920-57, 12 WIENER ZEITSCHRIFT FÜR KRITISCHE AFRIKASTUDIEN (VIENNA J. AFR. STUD.) 13, 16 (2007) [hereinafter Hynd, Deadlier]. From the piecemeal numbers we have, a striking gender disparity continues to exist on death row in many African countries. At the end of 2005, for instance, 555 prisoners were on death row in Uganda, only twenty-seven of them (4.87%) of them were women. Chenwi, supra note 2, at 55.

of “indirect rule,” in which the colonial system incorporated existing indigenous power structures where still intact, theoretically saving resources and inviting at least marginal African involvement in governing.\footnote{The theory of indirect rule complemented British frugality and the lack of overwhelming enthusiasm for Empire among the British elites and public. The British pioneered indirect rule in Northern Nigeria, which had been a drag on colonial accounts and ran deficits compared to the more economically developed South. Precolonial ruling elites such as the Fulani in Northern Nigeria, the Yoruba in western Nigeria, and the Ashanti in Ghana were willing partners in the indirect rule experiment. “The Fulani rulers soon realized that the imposition of colonial rule was, in fact, to their advantage, for now that they were sanctioned in office by the British they could scarcely be overthrown by popular revolt.” \textsc{John E. Flint}, \textit{Nigeria & Ghana} 150 (1966). For the Yoruba and Ashanti, see \textit{id.} at 153, 155. Indirect rule also had a divide-and-conquer strategy behind it. A scholar writing during the colonial era described the theory behind indirect rule as “[t]he British hold the reins; the Africans do the work. The Africans have the responsibility for such unpleasant details as tax collection; then the British spend the money.” \textsc{John Gunther}, \textit{Inside Africa} 337 (1955). As Gunther notes, with some paternalism, that the legacy of indirect rule was mixed. “Indirect Rule gave thousands upon thousands of Africans concrete training in the arduous and complex business of governmental administration” and helped to preserve at least some traditional precolonial social structures. \textit{Id.} He concedes, however, that indirect rule broke down in urban areas, and given urbanization trends, the days of indirect rule were likely “numbered.” \textit{Id.} at 337-38.} The result was some unevenness among British colonies and a social distance from Britain herself, particularly as compared to French and Portuguese colonies, which were more heavily centralized and incorporated as part of each European metropolitan country.\footnote{Traditionally, scholars note that French, Portuguese, and Belgian colonies in Africa tended to be more centralized and more closely associated to the colonial metropole in Europe. “The French system of colonial government is highly centralized. All legislation emanates from Paris and consultation with unofficial opinion prior to legislation is effected through the parliamentary representatives of the colonies,” Bostock wrote of then-contemporary French Africa. Bostock, \textit{supra} note 166, at 80. The French tended to support integrating the colonies into metropolitan France. French Africa, unlike British Africa, was represented in the French Assembly in Paris. \textit{See id.} at 79. Portuguese and Belgian rule were, if anything, even more direct. Belgian subjects, whether Africans or European settlers, possessed almost no role in the government of their colony. \textit{See id.} at 81. In Portuguese Africa, he wrote contemporaneously, “Administration and control are highly centralized and the colonies enjoy representation in the metropolitan assembly,” with the Minister for the Colonies possessing almost unfettered control over major decisions. \textit{Id.} at 82. On the other hand, Hargreaves discounts the differences between French and British colonialism. He writes that both powers were constrained due to resource and skilled manpower limitations; both were governed by authoritarian paternalism, as exercised by a largely autocratic district commissioner; and that both French and British scholars tended to emphasize this artificial difference between indirect and direct rule so as to justify their own preferred brand of colonial rule (i.e., French commentators emphasized assimilation with metropolitan France in a French empire of equals that could not exist in the patchwork British Empire, while British commentators emphasized protection of indigenous African social structures that the French tended to abolish; both positions are somewhat imaginary). \textit{See John D. Hargreaves, \textit{West Africa: The Former French States} 139-41 (1967).}} Despite uniform legal codes and doctrines, British colonial rule varied based on locality and convenience probably more than was true for other colonial powers, as these legal concepts adjusted to the societies and cultures of the subject peoples in limited ways.

The system of indirect rule involved first a reliance on chiefly hierarchies to provide local administration, confirming existing chiefs in their local authority word not often heard in British social circles.” \textsc{George H.T. Kimble}, \textit{Tropical Africa, Vol 2: Society and Polity} 314 (1962).\footnote{Traditionally, scholars note that French, Portuguese, and Belgian colonies in Africa tended to be more centralized and more closely associated to the colonial metropole in Europe. “The French system of colonial government is highly centralized. All legislation emanates from Paris and consultation with unofficial opinion prior to legislation is effected through the parliamentary representatives of the colonies,” Bostock wrote of then-contemporary French Africa. Bostock, \textit{supra} note 166, at 80. The French tended to support integrating the colonies into metropolitan France. French Africa, unlike British Africa, was represented in the French Assembly in Paris. \textit{See id.} at 79. Portuguese and Belgian rule were, if anything, even more direct. Belgian subjects, whether Africans or European settlers, possessed almost no role in the government of their colony. \textit{See id.} at 81. In Portuguese Africa, he wrote contemporaneously, “Administration and control are highly centralized and the colonies enjoy representation in the metropolitan assembly,” with the Minister for the Colonies possessing almost unfettered control over major decisions. \textit{Id.} at 82. On the other hand, Hargreaves discounts the differences between French and British colonialism. He writes that both powers were constrained due to resource and skilled manpower limitations; both were governed by authoritarian paternalism, as exercised by a largely autocratic district commissioner; and that both French and British scholars tended to emphasize this artificial difference between indirect and direct rule so as to justify their own preferred brand of colonial rule (i.e., French commentators emphasized assimilation with metropolitan France in a French empire of equals that could not exist in the patchwork British Empire, while British commentators emphasized protection of indigenous African social structures that the French tended to abolish; both positions are somewhat imaginary). \textit{See John D. Hargreaves, \textit{West Africa: The Former French States} 139-41 (1967).}
(or creating them in chiefless societies) but incorporating them into the structure of governance; and secondly, the establishment of separate court systems, usually called Native Courts, to administer African customary law between colonial subjects. Customary law “is not professional law,” taught in schools and practiced by lawyers; rather, it is uncodified law, based on habits and common usages of the members of society. “Indigenous law is far from being a static body of rules even though it is based on oral tradition,” but, although the system of law generally responds slowly to social and political change, it evolved at a faster tempo during the colonial era, given the sweeping economic and political upheaval.

The establishment of a separate customary court system to adjudicate customary law in codified form was one element of the British policy of indirect rule. Customary courts often interpreted matters of family law, probate law, simple land law, the equivalent of small claims, and occasionally criminal misdemeanors, often with simplified rules of procedure with proceedings in indigenous African languages. Although, generally, the British divided customary and common-law court systems based on the personal jurisdiction of the litigants and the subject matter of the dispute, the separation was never truly complete, as customary disputes could generally appeal to common-law courts, common-law courts could strike down customary laws through a “repugnancy clause,” and disputes between members of different ethnic groups or between white settlers and colonial subjects arose in common-law courts only. After independence, a number of African countries merged the court systems, with customary legal matters arising in lower primary courts and criminal and higher-value claims arising in higher courts; however, a fair number of African countries maintained dual-court systems after independence, sometimes accompanied by due-process abuses.

Relying on precolonial systems of local authority and law enforcement allowed the British to bring large populations under its control, often without overt military force. Slowly, the understaffed British colonial

169. Bostock, supra note 166, at 76-77 (describing the characteristics of British indirect rule).
170. Schiller, supra note 162, at 167.
171. Id. at 172.
172. Id. at 192.
173. Widner, supra note 6, at 86-87 (describing choice-of-law issues); id. at 92-95 (codification and repugnancy clauses); id. at 95-96 (forum shopping problem).
174. Id. at 84-85 (noting Uganda and Kenya integrated their common-law and customary-law courts, while Zambia and Zimbabwe created special courts). Botswana possesses a dual-court system as well. In Malawi abolished appeals to common-law courts and even allowed customary tribunals to dispense the death penalty, which became a source of due process violations because of relaxed rules of evidence and ability to politically manipulate prosecutions. See Peter Forster, Law and Society Under a Democratic Dictatorship: Dr. Banda and Malawi, 36 J. ASIAN & AFR. STUD. 275, 283 (2001). But see Roland Young, Legal System Development, in THE AFRICAN EXPERIENCE, VOL. 1: ESSAYS 473, 490 (John N. Paden & Edward W. Soja eds., 1970) (noting trend to integrate law into a single, national legal system).
175. The East African Protectorate was originally colonized as an ancillary to British involvement in
administration began extending authority across the country by using established precolonial authorities in its mission. With colonization, Kenya received British conceptions of crime and punishment. The British generally worked from a template and established codified penal codes in African colonies that were “very similar in form.” East Africa received a modified version of the Indian Penal Code, and the East African code would itself become the basis of new penal codes in countries such as Gambia, Cyprus, Fiji, and the Seychelles. “One thing is clear: the actual crimes, defenses and punishments defined in the Penal Codes make few concessions to their African contexts.” The Penal Code is paramount today in Kenya; a person may only be convicted of a crime that is provided for in written law; customary and common-law offenses are abolished. Precolonial conceptions of punishment, including the heavy weight placed on compensation for both civil and criminal offenses, survived British rule in several minor ways, just as it did elsewhere in British Africa and in India. In this way, the British division between civil and criminal cases was never as complete in British colonies as it was in the metropolis.

Zanzibar and the Indian Ocean trade, as well as a strategic military zone for protecting British control of Uganda and the Nile Valley. Ogot, supra note 159, at 249. Originally incorporated by the undercapitalized and grossly mismanaged Imperial British East Africa Company, the protectorate was transferred to the Foreign Office in 1895, with the primary goal of completing construction of the Uganda Railway to connect the densely populated region around Lake Victoria with the Indian Ocean. Id. at 250. After 1905, East Africa became a crown colony governed from the Colonial Office, and British administrators encouraged white settlement in Kenya and Uganda. Id. at 251-52. By the end of the first decade of the twentieth century, the center of British operations in Kenya had shifted from old Mombasa, with its historical Swahili culture, to Nairobi, an old safari outpost that became the center of European settlement. Id. at 256-57. Nairobi was founded as a transport depot in 1896 and replaced Mombasa as the headquarters of the Uganda railway in July 1899. The headquarters of the East African Protectorate were moved from Mombasa to Nairobi in 1907. “It would have been contradictory for the protectorate government, which was bent on creating a new society based on British values, to have used Mombasa, with its oriental background, as a base.” Id. at 256. Ogot continues, “In Kenya, the founding of Nairobi in effect meant the rejection of Swahili culture and its replacement by a European culture.” Id. at 257.

This is the essence of indirect rule. Unlike Uganda, Kenya did not have a strong, centralized kingdom that could be used to extend authority over the colony. See id. at 260 (referring to Buganda kingdom).

176. This is the essence of indirect rule. Unlike Uganda, Kenya did not have a strong, centralized kingdom that could be used to extend authority over the colony. See id. at 260 (referring to Buganda kingdom).


178. Id.

179. Id. In some ways, this may have been a strength. As Read explains, while it is difficult to find any provisions that relate to East Africa in particular, the Codes were “moderately good examples of criminal codification in the abstract, suitable for application in diverse countries irrespective of their particular traditions or conditions.” Id. Unwritten crimes were abolished in Kenya’s independence constitution. Singh, supra note 16, at 937 (citing KENYA CONST. art. 21(8)).

180. Read, supra note 177, at 166. Shortly before independence, Kenya began codifying certain customary criminal offenses, such as adultery and sexual crimes, certain kinds of theft, witchcraft, and involuntary circumcision, in order to retain them in law. Id. at 172-73.


182. Id. at 33.
The colonial criminal-justice apparatus was heavily gendered and relied “on direct violence and racialized application of legal violence.” As in twentieth-century Britain, the harsh imposition of the death penalty exempted offenders under eighteen years-of-age and pregnant women. In general, women were rarely executed; when they were, traditional gender-role stereotypes influenced the treatment of female offenders in male-dominated criminal-justice systems, particularly at the clemency stage. “Where women were executed in colonial Africa it was due to the perceived ‘excessive’ violence of their acts, premeditation, or acting for personal gain.” In the mid-1920s, Kenya adopted so-called “black peril” laws punishing, as a capital offense, the rape of a white woman by a black man. The numbers of such incidents were extremely small, and the new law did not necessarily reduce the frequency of the crime; generally, public perception greatly exaggerated the threat of sexual assault. “To be convicted and killed, the African murderer had to be created as dangerously ‘Other,’ something violent, uncivilized and less than fully human.” In this sense, colonial conceptions of crime and punishment reflected broader stereotypes and prejudices inherent in the imperial project itself.

The risk of error was not negligible in the British system of justice. In capital cases, an accused often did not understand the language of the

On one important matter customary law was, in the opinion of many, superior to modified English law: it disposed of the criminal and civil aspects of a case at a single hearing. In the ‘English courts’ the judges and magistrates were always careful to preserve the English division. Thus if a wrongful act was both a crime and a tort, two separate hearings might be necessary. Until customary law was compelled to change its ways, the court could and did order both punishment and damages at the same hearing.

Id. However, the article gives examples of times when courts in East Africa did order compensation during criminal proceedings, such as apportioning a portion of a criminal fine to the victim. Id. at 35. For a more robust context, as in Botswana, see Daniel Ntanda-Nsereko, Compensating the Victims of Crime in Botswana, 33 J. AFR. L. 157, 157 (1989) [hereinafter Ntanda-Nsereko, Compensating].


184. Hynd, Deadlier, supra note 165, at 15.

185. Id. at 17.

186. Id.


188. Id. at 64, 66. Professor Anderson interprets the research of Jock McCulloch on the “black peril” scare in Rhodesia. Although Kenya’s scares were less substantive than those in Rhodesia, and the reported cases were fewer in number, “the exceptional nature of individual reported incidents of sexual assault was highly significant in shaping public perceptions of the real (or imagined) threat to ‘white purity’.” Id. at 48. Unlike in Rhodesia, where a fear of attacks on mature white women drove the public debate on black peril laws, in Kenya the focus appeared to have been more on sexual assault of the innocent and helpless, such as children and the elderly. See id. at 49. Professor Anderson’s article compares and contrasts three highly publicized incidents of “black peril” over twenty years in Kenya and he compares these episodes to similar and probably more extensive political debates in Rhodesia arising out of similar crimes.

189. Hynd, Killing, supra note 183, at 405.
courtroom, and even if an interpreter was present, important culturally specific contextual information may not have been communicated.  

“In broad human terms there is a case here for the abolition of capital punishment irrespective of its possible deterrent effect,” given the reliance on language interpretation, cultural mediation, and possible judicial bias.  

As elsewhere in colonial Africa, capital sentences were heavily scrutinized by colonial administrators, and clemency and pardons were generously dispensed. For instance, inadmissible evidence, including hearsay, would be considered at the clemency phase of the proceeding. Colonial officials occasionally conflicted with community elders and traditional leaders in their leniency. Overall, the rate of mercy was relatively high; it was not unusual for half of the death sentences in a year to be commuted. Where execution ultimately did occur, it was generally for premeditated crime, unusually brutal killings, attacks on colonial officials, or interracial killing (primarily black on white). Between 1908 and early 1956, 459 persons were executed in Kenya, excluding Mau Mau-related crimes.

Similar to the capital punishment abolition movement, law reformers have considered corporal punishment to be cruel, inhuman, or degrading. Corporal punishment existed in colonial and independent Kenya until its abolition in 2003. For adults in colonial Kenya, a sentence of ten strokes was compulsory for rape, robbery, assault with intent to commit rape or robbery, breaking and entering with intent to commit an offense, and theft and receipt of stolen property. Both corporal and capital punishment have typically enjoyed relatively wide support, despite the nonuse of the punishments in many precolonial societies if a wrong could be compensated in property. A sentence of corporal punishment required certification from a medical officer that the prisoner was fit to undergo the sentence; it was only passed on males, never on females, and never on death-row prisoners.

Like corporal punishment, imprisonment reflected culturally British penal goals. With British rule came the advent of the prison, something unknown to

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191. Id.
192. Id.
193. Id. at 36-37.
195. Id. As Hynd notes, the majority of murders involving Africans were regarded as unpunished and resultant from quarrels between friends and family, “types of murder which were regarded as less threatening to law and order and which consequently did not warrant the ‘extreme penalty of the law.’” Id.
196. Id. at 406.
198. Tanner, supra note 190, at 37.
199. Id. at 38.
most of precolonial Sub-Saharan Africa, the first of which was inaugurated in Mombasa in 1896.\textsuperscript{201} Although the number of prisons grew rapidly, and the trend was in line with contemporary British criminal-justice policy, “a dearth of cultural relevance threatened the legitimacy of the prison” as Kenyan subjects had to serve sentences in foreign institutions with little meaning for activities they would not themselves have considered criminal.\textsuperscript{202} Kenyan authorities always had a particular affinity for incarceration. In 1938, Tanganyika only had 54 prisoners per 100,000 people while Uganda had 114 per 100,000 and Kenya had 145 per 100,000.\textsuperscript{203} In these terms, Kenya imprisoned a larger proportion of its population than any other colony in the British Empire.\textsuperscript{204} During the colonial period, imprisonment often accompanied other forms of punishment, such as restrictions on diet and corporal punishment.\textsuperscript{205} “Kenya’s prisoners were more likely to die than those elsewhere in Britain’s East and Central African colonies, as a consequence of overcrowding, dietary punishments, and poor conditions.”\textsuperscript{206}

THE DEATH PENALTY AND AFRICAN SOCIETY IN PRECOLONIAL AND COLONIAL KENYA

Use of the death penalty varied enormously among precolonial African societies, particularly outside of the Islamic zone.\textsuperscript{207} Where the penalty did exist, it was often used only when other forms of economic compensation were inadequate, and the method by which it was effected was closely related to


\textsuperscript{202} Id. at 244.


\textsuperscript{204} Id.

\textsuperscript{205} Branch, supra note 201, at 261.

\textsuperscript{206} Id. As Branch notes, “Imprisonment in colonial Kenya was defined not by confinement, but instead by its punitive character.” Id.

\textsuperscript{207} Precolonial African societies ranged from those in which capital punishment was largely unknown to those in which justice was bloody and brutal. The death penalty was used among precolonial Batswana, but not among precolonial Shona. See Novak, \textit{Botsswana}, supra note 8, at 191; Dumbutshena, supra note 83, at 521. There are plenty of examples of the brutal application of the death penalty by rulers with absolute power in more centralized societies. One king in northern Guinea-Bissau would order the beheading of a person who disobeyed his laws and the placement of the head on a stake on the road. Peter Mark, \textit{Portugal in West Africa: The Afro-Portuguese Ivories}, in \textit{ENCOMPASSING THE GLOBE: PORTUGAL AND THE WORLD IN THE 16TH AND 17TH CENTURIES: ESSAYS} 77, 79 (Jay A. Levenson ed., 2007). The diversity in the implementation of capital punishment exists throughout Africa. The death penalty was known among the precolonial Asante in Ghana. Tom C. McCaskie, Custom, Tradition, and Law in Precolonial Asante, in \textit{Sovereignty, Legitimacy, and Power in West African Societies: Perspectives from Legal Anthropology} 25, 34 (E. Adriaan B. van Rouvery van Nieuwaa & Werner Zips eds., 1998). In Nigeria and elsewhere, witchcraft was considered the most intolerable offense, and thus merited the death penalty. Peter Okoro Nwankwo, \textit{Criminal Justice in the Pre-Colonial, Colonial, and Post-Colonial Eras} 339 (2010).
societal notions of death, burial, and afterlife. Other forms of punishment in precolonial Kenya could involve banishment or ostracism for crimes of witchcraft and sorcery, as among the Abanyole people of the Luyha ethnic group in Western Province, or even beating or execution of witches, as among the Kisii in Nyanza Province. Generally speaking, indigenous African law did not recognize a sharp distinction between criminal and civil offenses. Even today, a number of modern legal systems in common-law Africa continue to recognize compensation for victims of crime, including Kenya, although the amount is limited by law.

As with many other customary legal sanctions in precolonial Africa, the penalty for murder among the Maasai people of Kenya was compensatory in nature, such as repayment to the family of the victim for the economic loss of a person. A Maasai man could only be found guilty of murder if he killed someone also of the Maasai ethnic group. The practice of treating the murder of a kinsman more harshly than the murder of someone outside the group was not unusual in Sub-Saharan Africa. While revenge killing could, and did, take place among the Maasai, the family of the murderer usually engaged in peaceful negotiations with the family of the victim, most often involving a transfer of cattle or sheep.

208. See Robin Law, ‘My Head Belongs to the King’: On the Political and Ritual Significance of Decapitation in Pre-Colonial Dahomey, 30 J. AFRA. HIST. 399, 415 (1989) (describing how king of Dahomey “owned” heads of his subjects; consequently, executions took place by decapitation). This was also the case in Kenya. “A funeral is a very important social event that is believed to be vital in keeping touch with the spirits of ancestors of the ethnic group,” van Doren writes of the Luo. “Where one member of the society had engaged in deviant behavior, the clan has the responsibility as a group to restore equilibrium by joint efforts,” such as ridding the society of the problem person. Criminal punishment might have had supernatural or spiritual undertones. John W. van Doren, Death African Style: The Case of S.M. Otieno, 36 AMER. SOC’Y COMP. L. 329, 337-38 (1988). Among the Luo and other patrilineal societies, death and burial was a gendered process, and closely tied to the community’s notions of female and male social roles. See April Gordon, Gender, Ethnicity, and Class in Kenya: ‘Burying Otieno’ Revisited, 20 SIGNS 883, 883-85 (describing a court case of a woman who sought legal custody of her husband’s body and her inheritance from the state, which conflicted with Luo customary law passing the estate to a man’s male blood relatives).


211. Specifically, compensation is only permitted when a crime is punishable by a fine and only when a substantial amount would be recoverable by a civil suit. See Ntanda-Nserek, Compensating, supra note 182, at 158-59. Nserek notes that Botswana in particular has a robust compensation regime for victims of crime, although the scheme still has limitations. Id. at 159; see also Kenya Criminal Procedure Code, sec. 175 (2009) (limiting compensation to crime punishable by fine, and only when an amount of substantial value is at stake).


214. Because of the symbolic significance of the numbers eight and nine, a murderer of a man would pay a
could also raid the sub-clans of the murderer for economic compensation, typically cattle.\textsuperscript{215} This was also the case for the Turkana peoples of Coast Province, who punished murder with the compensation of cattle as blood money. In contrast, execution was reserved for serious crimes of witchcraft or incest.\textsuperscript{216} Compensation was a common penalty—crimes of theft would require the restoration of the stolen value, and crimes of injury would require payment for the victim’s care and rehabilitation.\textsuperscript{217} 

The Kikuyu people rarely practiced capital punishment, reserving it for habitual murderers and major sexual offenses.\textsuperscript{218} The condemned person would be bound and die of exposure.\textsuperscript{219} In less serious cases, the Kikuyu also practiced a system of compensation to be paid to an injured victim or a deceased person’s family.\textsuperscript{220} Writing of the Kikuyu people, former President Jomo Kenyatta wrote that all criminal cases were treated the same way as civil ones, with compensation rather than imprisonment as the paradigmatic sanction.\textsuperscript{221} Perhaps even more than that, ostracism played a major role—the stigma attached to a criminal offense was much worse than that attached to European-derived imprisonment.\textsuperscript{222} Among the Luo of Western Kenya, the compensation required after murder was that the killer marry the wife of the victim; the idea was to prevent two fatherless households by executing a killer.\textsuperscript{223}

The economic nature of murder was also recognized among the Kamba people. Clan elders would settle a dispute involving a murder with the payment of cattle, which often would number eleven or fourteen cows, one or two bulls, and a goat.\textsuperscript{224} More specific rules governed the disposition of the cattle: one would go to the senior wife or mother of the deceased, for instance; another would go to the father’s family, and a third would be used for a purification ceremony.\textsuperscript{225} Even after the onset of British rule, this “blood price” would still
be payable, although it could be reduced according to the severity of the
criminal punishment. If the murderer was put to death, no blood price would
be payable.226 As the economic loss of a person to the community is not related
to the intent of the murderer, Kamba law did not distinguish among murder,
manslaughter, or accidental death, nor did it distinguish between children and
adults.227 The full blood price would be payable in every case. Under British
administration, these customary penalties were codified and enforceable by the
Native Tribunal, the clan’s customary court.228

The death penalty was known among the Luhya people of Western Province,
Kenya. An offender was typically tried and, if convicted, given a life sentence
or executed, although lesser sentences or acquittals were apparently possible.229
“Whichever way it goes, the perpetrators and their families are ostracized or
evicted and their homestead burnt to ashes,” in part, as a deterrent to other
would-be murderers.230

That precolonial African societies often tended not to use the death penalty
underscores its imported nature and may suggest a lack of historical legitimacy
for the practice.231 The argument that the death penalty did not have clear
precolonial roots has been cited as a reason for abolition. In voting with the
majority to strike down capital punishment in South Africa, Constitutional
Court Justice Albie Sachs noted that “the relatively well-developed judicial
processes of indigenous societies did not in general encompass capital
punishment for murder.”232 He noted that extrajudicial executions did take
place, particularly where witchcraft was implicated, but the reluctance of
societies such as those of the Nguni, the Sotho, and the Zulu to carry out
judicial executions was well-documented.233 The argument, however, risks
“being conceptually shallow and ahistorical,” and it has its limits.234

226. Id. at 80-81. If the murderer went to prison and was released, half the price would be payable. Id.
227. Id. at 81-83. In line with the compensatory nature of the penalty for economic loss, the blood price
might be reduced if the victim was elderly, as the economic contribution of the deceased person was not as
high. Id. at 83. Likewise, blood price would be payable for a stillborn child or a miscarriage, but not if a man
kills his childless wife for whom he has already paid the full bride price, as the economic loss is his own. Id. at
83.

228. PENWILL, supra note 224, at 82.
229. Alembi, supra note 209, at 19.
230. Id.
232. State v Makwanyane and Mchunu 1995 (3) SA 391 (CC) ¶ 381 (S. Afr.) (Sachs, J., concurring).
233. Id. ¶¶ 376-80.
234. van Zyl Smit, supra note 231, at 15.
(Twinomujuni, J., concurring).
limitation: perhaps the century-long existence of capital punishment in East Africa had firmly legitimized the penalty in legal culture and tradition.

THE DEATH PENALTY FOR EXTRAORDINARY CRIMES IN LATE COLONIAL KENYA

The Colonial Office began devolving power to Britain’s African colonies after World War II and India’s independence with West Africa in mind.236 In West Africa, a thin veneer of British colonial officials governed a large African population. This was not true for East and Southern Africa, which had significant European and South Asian populations. In these colonies, demands for the Colonial Office to devolve power came from the minority white and Asian settlers.237 By the end of World War II, white settlers had secured significant and disproportionate representation in colonial legislatures in the British colonies of Kenya, Northern Rhodesia (colonial Zambia), Nyasaland (colonial Malawi), Tanganyika (mainland Tanzania), and Uganda; in Southern Rhodesia (colonial Zimbabwe), white settlers had been almost completely self-governing since 1923.238 As the British began devolving power to majority-ruled governments in West Africa, the complicating presence of significant numbers of white settlers in East and Southern Africa led the Colonial Office to implement a new paradigm for decolonization—multiracial power sharing.239 The colonial East African governors, especially the governor of Kenya, Sir Phillip Mitchell, reacted strongly to the Colonial Office’s efforts, beginning in 1947, to increase the numbers of black African representatives in the legislatures and participation of Africans in colonial governance.240 The Colonial Office’s efforts to create power-sharing regimes in East and Central Africa uniformly met with failure, as white settlers refused to cede power, and African nationalists viewed the policy as a sham.241

About 80,000 British settlers lived in Kenya, primarily inhabiting the White Highlands, a plateau area around Nairobi.242 White settlers steadfastly opposed

237. Id.
238. Id. at 261, 273-74.
240. Pratt, supra note 236, at 260.
241. Id. at 261.
242. In this, Kenya was similar to the colony of Rhodesia in south-central Africa, the home of about 250,000 white settlers by 1960. White settlers in Rhodesia were more powerful than in Kenya as they had largely achieved self-government and had their own military and police force. One consequence of indirect rule was that British white settlers tended to be more powerful than their counterparts in French or Portuguese Africa because of Britain’s generally laissez-faire form of governance. Rhodesia had no Mau Mau War that would require military intervention by Britain and allow Britain to hand power to African nationalists. Instead, white settlers seized the reins of power and seceded from the British Empire in 1965. Rhodesia was quickly sanctioned and isolated but for the next fifteen years, remained a brutal white-ruled police state. This could
independence, believing their lifestyle to be unsustainable in a black majorityruled state. 243 Their presence was already doomed. By the time the Great Depression hit, British colonizers recognized that settlement colonization in Africa on the pattern of Canada, Australia, and New Zealand had failed. White settlers in Kenya, not unlike French settlers in Algeria, were heavily dependent on metropolitan London for market subsidies and protections in order for their agricultural and manufacturing production to be economically competitive. 244

In the 1950s, it became clear that the settlers were dependent on metropolitan Britain for military and police security as well. The settlers proved unable to resist a peasant uprising by local populations, primarily the Kikuyu, which broke out in 1952. 245 This uprising would come to be known as the Mau Mau War, after the name given to the religio-political Kikuyu movement. Although Mau Mau were defeated, the Emergency broke the strength of the white-settler community. British security forces had to intervene on behalf of the white settlers and allowed colonial officials to overrule settler objections and continue the transitional process toward independence. 246 In that sense, the Mau Mau War had two losers, the radical guerillas and the right-wing settlers, and two winners, the departing British colonial officials and the moderate Kikuyu politicians, such as Jomo Kenyatta, to whom the British would entrust the reins
The British only very sparingly employed the death penalty for political crimes in their twentieth-century Empire. There was one exception. During the Mau Mau Emergency in Kenya between 1952 and 1958, 2509 mostly-Kikuyu people were tried on capital charges; of these, 1090 Kikuyu were executed.248 "At no other place, and at no other time in the history of British imperialism, was state execution used on such a scale as this," Oxford historian David Anderson writes of the Mau Mau Emergency.249 This was more than double the number of executions of political criminals by the French during the Algerian War, and many times more than the number carried out by the British in the other postwar emergencies in Palestine, Cyprus, and Aden.250 Even the emergency in British colonial Malaya, the nearest analogy to the Mau Mau

247. Although I characterize Jomo Kenyatta as a “moderate” here, this is not to imply that he necessarily opposed the Mau Mau War, although he was aloof from it, and indeed the white settlers and commercial farmers saw him, at least initially, as a chief instigator. See CAROLINE ELKINS, IMPERIAL RECKONING: THE UNTOLD STORY OF BRITAIN’S GULAG IN KENYA 38 (2005). The guerrillas often targeted those Kikuyu who cooperated with the British military and police response. Dubbed “loyalists” by Elkins, these collaborators—often chiefs who worked within the British administrative structure or soldiers in the military regiment King’s African Rifles—were both perpetrators and victims of atrocities. Id. at 72. Kenyatta was no loyalist. I refer to him as a “moderate” in this context because, over the course of the Emergency, the British came to view him as the only person with enough legitimacy among the Kikuyu to bring the Mau Mau War to a close. As the power of the white settlers waned, the British colonial officials could increasingly rely on Kenyatta to mediate between the radicals and the loyalists. The rise of a white-settler left wing in Kenya, led by the New Kenya Group and Blundell, helped to moderate settler demands. Kenyatta on the one hand and Blundell on the other may have brought the opposing factions closer together. For the complexities of Kikuyu and African nationalist politics leading up to Kenya’s independence, see GEOFF LAMB, PEASANT POLITICS: CONFLICT AND DEVELOPMENT IN MURANG’A chs. 1-2 (1974). For the complexities of Kenyan white-settler politics, particularly the battles between Blundell’s faction and the hard-line elements led by the speaker of the Kenyan Legislative Council, Cavendish-Bentinck, see WASSERMAN, supra note 242.

248. ANDERSON, HISTORIES, supra note 203, at 6-7. The Mau Mau War has traditionally received short shrift by African historians, who did not view the Mau Mau movement as a legitimate political movement because it did not fit the traditional nationalist paradigm. See ROLAND OLIVER & J.D. FAGE, A SHORT HISTORY OF AFRICA 214 (1988) (detailing iconic history of Africa). According to Oliver and Fage, the Mau Mau movement was “as much a psychological and magico-religious as a political reaction to alien pressures.” Id. In the very next sentence, Oliver and Fage state that African nationalist movements, even those that were nonviolent, were “[u]ltimately much more significant.” Id. On the other hand, early Kenyan politician Tom Mboya presented the opposing counter-historical argument that the Mau Mau uprising led to independence.

It is also true that it was not until Mau Mau had erupted that logical changes began to take place towards improving African conditions in Kenya. The colour-bar began to disappear, racial discrimination in the civil service was ruled out . . . , wages improved and in many other ways Africans were given fuller recognition.

TOM MB OYA, FREEDOM AND AFTER 51 (1963). He also noted the constitutional changes during the Emergency in which the numbers of African members of the Legislative Council were increased. He concludes, “‘[H]ad it not been for Mau Mau, perhaps these changes would never have taken place; at any rate, they would never have come as quickly as they did.’” MBOYA, supra.

249. ANDERSON, HISTORIES, supra note 203, at 7.

250. Id. at 7, 292.
War, was on a considerably smaller scale than the Kenyan conflict. The number of Mau Mau prisoners hanged was more than double the number of people executed for ordinary crimes during nearly the entire colonial period in Kenya.

For eight years after October 1952, Kenya was ruled under a State of Emergency that resulted in the deaths of 11,500 Mau Mau fighters and the arrest or detention of nearly 30,000 more, according to government statistics, which are likely understated. Professor Elkins puts the number of detained in the hundreds of thousands, possibly 1.5 million if collectivized villages are included. The vast majority of the detained were never formally convicted in court; suspicion of association with Mau Mau, by itself, was sufficient. The British law-and-order response to the Mau Mau uprising in the 1950s involved repressive police action, an unsophisticated justice system, and an intricate series of detention camps called the “Pipeline.” Mau Mau detainees were circulated through a network of approximately 100 detention camps and prisons, many of which had been created for this purpose, despite the historic lack of resources allotted to Kenya’s penal system. Although the European


252. See Hynd, Killing, supra note 183, at 406.


254. Elkins, supra note 247, at xiv (explaining 1.5 million estimate “nearly the entire Kikuyu population”).


256. The British response to Mau Mau was to: (a) isolate the military force of the movement and cut off its popular support; and (b) to recapture the political loyalty of the Kikuyu population through detention and internment, reeducation, propaganda, and a measure of development assistance for rural populations. See Presley, supra note 245, at 504. As Elkins explains, the British efforts to “rehabilitate” the Kikuyu during the Emergency led to the placement of at least 80,000 Kikuyu—and likely tens of thousands more—in about 100 detention and reeducation camps where they would pass through “the Pipeline.” Caroline Elkins, The Struggle for Mau Mau Rehabilitation in Late Colonial Kenya, 33 INT’L J. AFR. HIST. STUD. 25, 25-26 (2000). The Pipeline was intended to capture the “hearts and minds” of the Mau Mau adherents. It was not intended to be punitive; rather it was cast in terms of reform-minded liberal paternalism. “Ultimately a detainee was to be transformed into a progressive citizen through an integrated program of cleansing, manual labor, and systematic re-education.” Id. Despite this justifying myth for the brutal methods of the Emergency, the detention camps bred lawlessness and contributed to the colonial state’s loss of legitimacy and control that led to the British abandonment of the rehabilitation effort in favor of other tactics, such as negotiating a political transition with moderate Kikuyu like Jomo Kenyatta. Id. at 54-55. No doubt the entire process was counterproductive. Attitudes hardened in the detention camps and the underlying causes of the Mau Mau War, such as food insecurity, economic disempowerment, and especially friction over land, remained wholly unaddressed. In the end, the brutal methods of the Pipeline, discredited after the Hola Massacre in 1959, hastened the fall of British East Africa. Id. at 56-57.

257. Branch, supra note 201, at 262.
Convention on Human Rights applied to Kenya after October 1953, the colonial government could derogate the Convention during States of Emergency, at least as to detention without trial (but not as to the torture or inhuman or degrading punishment provisions).258 “As a critical component of the counterinsurgency campaign, the penal system consumed a disproportionate share of a vast influx of capital into the colony during the war against Mau Mau.”259 The prisons and camps remained staffed by inadequately trained personnel, violence was commonplace, and the institutions were extremely unhealthy; overcrowding was endemic.260

As Anderson explains, it could have been worse—more than 400 Mau Mau fighters, including all female offenders, were granted clemency because they were under age eighteen or had mitigating circumstances in their cases.261 They were not, however, released and often remained in detention on lesser charges for years. This was a fundamental contradiction in British colonial justice; it was blunt, brutal, and unsophisticated, despite the British obsession with paper and process, including volumes of transcripts, witness statements, confessions, and pleadings dating from the Mau Mau trials.262 Of the 1090 Kikuyu men executed during the Emergency, 346 were convicted of murder, mostly of loyalists rather than white settlers, 472 of capital possession of arms or ammunition, 62 of administering the Mau Mau oath, and 210 of consorting with terrorists.263 During the same period, 247 Kenyan subjects were convicted on ordinary capital charges unconnected with Mau Mau, all of which were for murder.264 Of these 247 convictions, 36 were reversed on appeal, 5 stayed for insanity on the part of the convict, and 106 commuted, for an overall clemency rate of about three-fifths; to the contrary, only 27 persons out of 1499 who had been convicted of capital Mau Mau-related offenses had their sentences commuted.265 “Mau Mau offenders were more harshly treated than others,” Anderson writes. “State judicial execution, the highest form of institutional violence available under the rule of law, was ruthlessly deployed in the suppression of the rebellion.”266

Eventually, the abuses of British power during the Mau Mau War would lead to political scandal, as the major newspapers and the opposition Labour Party began bringing the atrocities to light.267 President Kenyatta, a hero of the Mau Mau guerrillas, but not one of them, had no intention of perpetuating the

259. Branch, supra note 201, at 263.
260. Id.
261. ANDERSON, HISTORIES, supra note 203, at 7.
262. Id.
263. Id. at 291.
264. Id.
265. ANDERSON, HISTORIES, supra note 203, at 291.
266. Id.
267. ELKINS, supra note 247, at 344, 350-51.
Mau Mau divisions after independence; the country was too ethnically fractious to permit a full accounting, and, at least initially, the Kikuyu-Luo alliance that brought Kenyatta to power was still too fragile. Additionally, doing so would have been out of character. He was Muigwathania, the Reconciler, and he had always shown a moderate temperament, remaining above of the Mau Mau movement and its agenda. For purposes of this history of the death penalty in Kenya, the use of capital punishment for extraordinary crimes during the State of Emergency in the 1950s was *sui generis*; there has never been, and will likely never be, a pattern of state-sponsored judicial execution on as broad a scale as during the Mau Mau War, not only in Kenya but anywhere in common-law Africa.

**THE CRIMINAL JUSTICE SYSTEM AND ERODING DEMOCRACY AFTER INDEPENDENCE**

Upon independence, Kenya adopted a constitution that provided for a multiparty democracy, a freely elected bicameral Parliament, and guaranteed judicial independence. Despite this progressive constitutional framework, "the post-colonial state was autocratic at its inception because it wholly inherited the laws, culture, and practices of the colonial state." The independence constitution contained numerous exceptions and "claw back" clauses that qualified or limited many fundamental rights. In addition, the constitution allowed derogations to fundamental rights during states of emergency. The rigid 1962 Lancaster House constitution, in place at the time of Kenya’s independence in 1963, was amended in December 1964 to make important changes to the structure of Kenya’s government, including an effective ban on opposition parties. The devolution of power to the regions

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268. *Id.* at 360-63. Elkins also suggests that Kenyatta rewarded loyalists at the expense of the Mau Mau supporters because he did not support the movement. *Id.* at 361.

269. ANDERSON, *HISTORIES*, supra note 203, at 335.

270. Except for the darkest days of apartheid South Africa. The number of persons executed at Pretoria Central Prison between 1967 and 1989 rivals the number of convicted prisoners executed in Kenya during the entire colonial and post-colonial periods combined, including the Mau Mau convicts. See Novak, *Botswana*, supra note 8, at 177.


272. *Id.*


274. *Id.* at 154-55 (citing KENYA CONST. art. 83(1) (former constitution)). Implicit in Article 83(1) is that some fundamental human rights are nonderogable. *Id.* at 155.

275. This was not a new constitution per se. Amending the constitution required a 90% vote in the Senate and 75% in the House of Representatives, and the Kenyan African National Union, the ruling party, could not muster the 90% in the Senate. Consequently, the law as passed was somewhat wonky, and enjoyed enough defectors in the Senate to pass. For more, see Singh, supra note 16, at 926-28. “The Independence
in the original constitution was a product of an alliance between the political opposition and white-settler interests; border flare-ups and ethnic irredentism made a more centralized structure particularly attractive to the ruling party, the Kenyan African National Union (KANU).276

Although the amended constitution gave the executive branch more power over the judiciary, the original constitution’s extensive fundamental human-rights provisions remained intact.277 Constitutional bills of rights were not original components of British independence constitutions, in the tradition of Great Britain herself; they first appeared in the homegrown constitutions of India (1950) and Pakistan (1957).278 This trend changed in 1959 with the Nigerian Independence Constitution, which delineated fundamental rights; after that point, colonial authorities required bills of rights as a precondition to independence, including in Kenya.279 Implementation of a bill of rights coincided with British intentions to protect business operations and the rights of minorities, with white-settler interests in mind.280 The strength of a constitutional bill of rights during periods of authoritarian rule was questionable. This was particularly true in Kenya where the bill of rights would be “reduced to a mere declaration” during the Kenyatta and Daniel arap Moi eras.281 The Kenyan bill of rights closely tracked the European Convention on Human Rights and other international instruments protecting civil and political rights, including an explicit right-to-life provision with a death-penalty savings clause.282 Other rights protected include due-process and fair-trial rights, protections on forced labor and slavery, the freedom of movement, freedoms of conscience and expression, and property rights.283
President Kenyatta died in 1978 and power peacefully passed to Moi, the vice president, as the consensus choice in an effectively one-party election. During the reign of President Moi, from 1978 to 2002, the independence of the judiciary and the legal profession eroded. Moi politicized the office of the attorney general and the auditor general and oversaw the passage of a constitutional amendment allowing for easier impeachment and removal of judges. In 1986 and 1987, Moi sparked widespread scrutiny from domestic and international legal communities with a series of arrests of prominent attorneys for representing detainees and filing habeas petitions. Both Kenyatta and Moi frequently appointed expatriate contract judges to the national courts; these judges tended to be more supportive of the positions of government because their contracts were temporary and required renewal. The government reacted with hostility toward judges who expressed a desire for more independence. In addition, the reputation of the judiciary and the legal profession in Kenya was further tarnished with the failure to investigate and prosecute those responsible for the Goldenberg scandal, the longest-running scheme of massive corruption in Kenya’s history.

Constitutional protections for prisoners and criminal defendants eroded during the Moi era. Although Kenya enjoyed a Bill of Rights, during the Moi reign the High Court held that it had no jurisdiction to hear certain cases, rendering several constitutional rights nonjusticiable. The Moi regime was particularly fond of abusing the prosecution of the crime of robbery with violence, which carried the mandatory death penalty but, unlike other capital offenses, did not entitle an indigent defendant to free legal aid. By accusing political opponents of ordinary crimes rather than political offenses or detention without charge, the Kenyan government could resist international protest. The charge of robbery with violence was brought against Kenyan opposition politician and human-rights attorney Koigi wa Wamwere, in November 1993,

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286. Id. at 102.
287. Id. at 107-10.
288. Id. at 116-18. The Goldenberg scandal was an $800 million scam involving government rebates for fake diamond exports during the Moi administration. In 2004, the Kibaki government appointed a judicial commission to investigate the scandal, releasing its findings in February 2006, implicating high level government officials both in the ruling party and in the opposition. Despite high-level prosecutions, no one was ever convicted in conjunction with the scandal. Michael Chege, Kenya: Back from the Brink?, 19 J. Democracy 125, 129 (2008).
289. This was in direct conflict with article 84 of the Kenyan constitution, which grants redress before the High Court for any violation of its provisions. See Stanley D. Ross, The Rule of Law and Lawyers in Kenya, 30 J. Mod. Afr. Stud. 421, 424 (1992).
291. Id. at 265.
in a public trial that divided public opinion along a Kikuyu-Kalenjin fault line deliberately inflamed by the Moi government.\textfootnote{\textit{Id.}} According to Amnesty International’s report for 1995, at least eight other political opponents of the Moi regime were charged with robbery with violence and were considered prisoners of conscience.\textfootnote{Amnesty International Report 1995: Kenya, AMNESTY INT’L, available at http://www.unhcr.org/refworld/docid/3ae6a9fb4c.html.} Amnesty International also noted “widespread reports of torture and ill-treatment of prisoners,” and added that a total of 568 people were under sentence of death at the end of 1995.\textfootnote{\textit{Id.}}

Penal policy fared no better than criminal-justice policy. In 1992, Attorney General Amos Wako reported that the prisons had a total population of 28,914 inmates, exceeding capacity by more than 56\%.\textfootnote{Vyas, supra note 200, at 76.} In addition to overcrowding, food rations were inadequate and nutritionally poor, toilet facilities were strained, insects infested the facilities, uniforms could not be replaced, and disease was rampant in the facilities.\textfootnote{\textit{Id.}} Beatings and hard labor were routine and often inflicted permanent psychological damage; some inmates actually died of torture.\textfootnote{\textit{Id.} at 76, 80.} This strain existed despite the existence of a number of alternative punishments to incarceration authorized by the Kenyan Penal Code, such as fines, forfeiture of property, disqualification from licenses or other privileges, deportation for noncitizens, conditional discharge and probation, release with police supervision, compensation to the victim, restitution for financial crimes, and early release on parole or pardon.\textfootnote{See \textit{id.} at 79-95.} In Kenya’s sentencing regime, “gross sentencing disparities exist[ed] among similarly situated individuals convicted of the same offense.”\textfootnote{Muthoga & Bowman, supra note 197, at 249.} Appellate courts only irregularly corrected the most-egregious abuses.\textfootnote{\textit{Id.}}

\section*{Constitutional Reform and the Death Penalty After 1987}

Since the date of Kenya’s independence, December 12, 1963, a total of 280 prisoners have been executed.\textfootnote{Weighton, supra note 164.} Between 1963 and 1987, 3584 people were sentenced to death and 135 received clemency.\textfootnote{Robert Odoul, Capital Punishment: Texas to Kenya, GENERATOR 21 (2000), http://generator21.net/g21archive/africa8.html.} The last to die, Hezekiah Ochuka, was condemned in 1982 for treason after leading a nearly successful coup against the Moi regime; he was executed in 1987.\textfootnote{Weighton, supra note 164.} Kenya’s de facto
one-party state became de jure with a constitutional amendment in 1982, inciting Ochuka’s coup attempt and resulting in nationwide repression. Agitation for a replacement to Kenya’s heavily modified independence constitution began in the early 1990s. Although President Moi had ushered in multiparty rule, he did so in a way that preserved the dominance of the party in power since independence, the KANU. Moi won two irregular election campaigns, marred by inconsistencies and targeted violence, the first with only 36% of the vote against a divided opposition in 1992 and the second against another splintered field in 1997. “Since 1992, the state periodically has engineered and orchestrated inter-ethnic violence,” particularly against those who supported opposition candidates. As Mutua writes, “police and security force constantly invoke colonial era legislation to restrict the activities of the press and civic and human rights groups,” while the judiciary, lacking independence, “continues to be a captive instrument of repression.”

The 1992 multiparty election was fractious and produced significant waves of intercommunal violence and significant election irregularities. Malapportionment ensured that opposition areas of the country were politically underrepresented, a trend that continued after the elections. Following the victory, Moi and KANU “returned to one-party style politics, suppressing dissent, harassing opponents, and fanning the killings of innocents in opposition eras.” Before his very narrow victory in 1992, President Moi reshaped the electoral commission and forced through a constitutional amendment requiring any presidential candidate to win not only a plurality of the popular vote, but at least 25% in no fewer than five of Kenya’s eight provinces, which no other candidate could do as each opposition campaign had geographical and ethnic limitations.

307. Mutua, supra note 304, at 98.
308. Id.
311. Mutua, State Despotism, supra note 309, at 51.
312. Moi alone met that threshold, receiving more than 25% of the vote in Coast, Northeast, Eastern, Rift Valley, and Western Provinces. Kenneth Matiba met the threshold in Nairobi, Central, and Western. Mwai Kibaki met it in Eastern and Central, and Oginga Odinga met it in Nyanza Province alone. The final tally was Moi 36.4%, Matiba 26%, Kibaki 19.5%, and Odinga 17.5%. Walter O. Oyugi, Ethnicity in the Electoral Process: The 1992 General Elections in Kenya, 2 AFR. J. POL. SCI. 41, 58-60 (1997) (describing, among other
overrepresented smaller ethnic communities and rural areas at the expense of the large ethnic groups and urban areas, one of the major reasons for Moi’s continued electoral success.\(^{313}\) The 1997 presidential election produced fewer irregularities in the conduct of the election itself, but a troubling trend of harassment and interference with the opposition party and civil-society activities, as well as a boycott by several major candidates, ensured that Moi again won an illegitimate election.\(^{314}\)

The first major voices in favor of constitutional reform came forward in 1995 by a group of reformist lawyers who sought to reduce the president’s executive power and create a comprehensive and enforceable bill of rights.\(^{315}\) The legal profession had long been under siege in Kenya. Important members of the Law Society of Kenya, the national bar association, were opposition leaders who faced continual threat of prosecution under the Public Order Act.\(^{316}\) Political detention, torture, arbitrary arrest, police brutality, and even assassination were carried out against political opponents during the Moi era, and a number of prominent human-rights lawyers fled the country.\(^{317}\) Civil society became mobilized in Kenya during the mid-1990s, led by organizations such as the Kenyan Human Rights Commission and Mwangaza Trust.\(^{318}\) Moi’s efforts to eliminate security of tenure for judges aroused considerable criticism even in the ruling party, and his most-sweeping proposals were not implemented.\(^{319}\) Lawyers were frequently arrested for political activities, and the bar association became a site of contested political control between Moi

\(^{313}\) Fox, supra note 310, at 600-01.

\(^{314}\) The 1997 elections looked similar to the 1992 elections. Moi took 40% of the vote and reached the 25% threshold in five of eight provinces. Mwai Kibaki took 31% of the vote and reached the threshold in three provinces. Raila Odinga reached the threshold only in Nyanza Province, and took 11% of the vote. Kijana Wamalwa reached the threshold in Western Province and took 8% of the vote. Charity Ngilu reached the 25% threshold only in Eastern Province and received 8% of the vote. D. Focken & T. Dietz, Of Ethnicity, Manipulation and Observation: The 1992 and 1997 Elections in Kenya, in ELECTION OBSERVATION AND DEMOCRATIZATION IN AFRICA 144 (Jon Abbink & Gerti Hesseling eds., 2000); see also African Elections Database, Elections in Kenya, http://africanelections.tripod.com/ke.html (last visited Jan. 23, 2011). The lack of comprehensive, institutional restructuring after the legalization of multiparty elections in Kenya led to the failure of the 1997 elections, which were in many ways more problematic than those of 1992. Constitutional and legal limits on fundamental freedoms, which had never been repaired after 1992, and skewed electoral arrangements that privileged rural at the expense of urban and the Kalenjin alliance at the expense of the Kikuyu ensured that Kenya would not transition to democracy while Moi was president. Stephen N. Ndegwa, The Incomplete Transition: The Constitutional and Electoral Context in Kenya, 45 AFR. TODAY 193, 209 (1998).

\(^{315}\) Barkan & Ng’ethe, supra note 306, at 35 (describing how group of reformist lawyers published proposal for reduced presidential power in Nairobi Law Monthly).

\(^{316}\) Mutua, State Despotism, supra note 309, at 53.


\(^{318}\) Mutua, State Despotism, supra note 309, at 54-55.

loyalists and opposition members. An internationally famous court battle over burial rights between a widow and her late husband’s family revealed just how limited the Kenyan bill of rights was and how deeply judicial tampering had succeeded by the beginning of the 1990s.

Under civil-society pressure, the Constitution of Kenya Review Act was enacted in 1997, outlining a three-part constitutional review process, including initial consultation and drafting, draft revisions by a national constitutional convention, and ratification by Parliament. The goal was to install a new constitution by the 2002 elections. In June 2002, Moi announced he was stepping down as president, with elections to be held in December. In the months prior to the 2002 elections, President Moi dissolved Parliament, a power he had under the independence constitution, and prevented it from ratifying a new constitution. In those elections, the opposition National Rainbow Coalition (NARC) agreed to a unity pact between coalition leader Mwai Kibaki and opposition leader Raila Odinga in which Kibaki would become President and Odinga Prime Minister under the new constitution, once it was ratified. Consequently, Odinga sat out the election and NARC surprisingly defeated KANU-endorsed candidate Uruhu Kenyatta by a wide margin.

The draft constitution, known as the Bomas Draft, named after the location of the talks, was never enacted by Parliament or presented for a referendum. At issue was the creation of a powerful prime-minister position, supported by the convention delegates, a position that Odinga endorsed and Kibaki opposed; once delegates voted down a consensus draft, Kibaki walked

320. Id. at 437-38.
321. Id. at 430. Probably no single court case during the Moi regime in Kenya has produced as much scholarly commentary as that which arose over the burial dispute of S.M. Otieno, a prominent criminal lawyer who died intestate in 1986. See supra note 208. Otieno’s widow, Wambui Otieno, was a member of the Kikuyu tribe and sought to bury her husband in Nairobi; Otieno himself was Luo, and his clan demanded that he be buried in western Kenya, the Luo homeland. Wambui’s attorneys argued that given Otieno’s Christian religion, lifestyle, residence, and choice of a Luo partner, Kenyan common law should apply and not Luo customary law. In May 1987, the Kenya Court of Appeal ruled in favor of Otieno’s Luo clansmen and his body returned to western Kenya. The decision inflamed ethnic tensions and set back women’s rights, according to some observers. The funeral was treated as a major vindication of the Luo ethnic group; Wambui refused to attend, as required of widows under Luo customary law, and Otieno was buried as a single man. Wambui herself was subjected to intensely personal attacks from prominent political and legal figures, and was vilified in the national press. The court case has faced particularly intense scrutiny from feminist scholars. Patricia Stamp, *Burying Otieno: The Politics of Gender and Ethnicity in Kenya*, 16 SIGNS 808, 808-09 (1991).
324. Bannon, supra note 322, at 1834.
away from the negotiations.327

Alarmed by the transfer of power from the presidency to a strong prime minister, members of President Mwai Kibaki’s cabinet watered down the Bomas Draft to widespread opposition.328 The Kenya electorate voted on this revised document, the so-called Wako or Kilifi Draft, in November 2005. Odinga’s political base, crucial to NARC’s victory in 2002, joined KANU in opposing the draft, due in part to Kibaki’s spurning of Odinga. The constitution lost, as 57% of the electorate and seven out of eight provinces turned it down.329 They were motivated, in part, by the failure of Kibaki to address the all-encompassing corruption problem plaguing the country. The explosion of the Anglo-Leasing scandal in 2005 rivaled Moi’s Goldenberg scandal and implicated officials at the very highest rungs in Kenyan politics—including Kibaki—in a classic procurement scam to defraud the government into noncompetitive contracts worth hundreds of millions of dollars for passport-technology services that were never delivered.330

The failure of the constitutional referendum proved to be a serious point of contention between Odinga and Kibaki in the 2007 general election, the outcome of which was extremely close and shrouded in controversy; more than 1000 people died in the violence that followed.331 Neutral observers tend to agree that Raila Odinga likely defeated President Kibaki in the election.332 This would be consistent with the parliamentary election results, which showed Raila’s Orange Democratic Movement winning more than double the number of Kibaki’s Party of National Unity.333 “Although sparked by the controversial election results, the violence grew out of long-standing economic and political tensions among various groups, and thus took on an ethnic dimension,” including attacks on Kikuyu in the Rift Valley and reprisal attacks on Luo and

327. Bannon, supra note 322, at 1838.
328. Id. at 1838-39.
329. Id. at 1839-41.
330. See generally MICHELA WRONG, IT’S OUR TURN TO EAT: THE STORY OF A KENYAN WHISTLEBLOWER 168 (2009) (“While Goldenberg involved financial strategems so complex even economists had difficulty grasping them all, Anglo Leasing was so simple a child could master the technique.”). Wrong’s portraits of the Goldenberg whistleblower, who died a pauper, and the Anglo-Leasing whistleblower, now persona non grata, are especially cogent metaphors for the failure of the Kibaki administration to root out the culture of corruption under Daniel arap Moi. Id. at 317-32.
332. Election day went relatively smoothly, but delays and irregularities in the counting process generated tension. “Initial tallies gathered from polling stations showed Odinga in the lead, but the results reported by the Electoral Commission of Kenya from Kibaki’s strongholds seemed to shift totals in his favor.” Beth Elise Whitaker & Jason Giersch, Voting on a Constitution: Implications for Democracy in Kenya, 27 J. CONTEMP. AFR. STUD. 1, 14-15 (2009). On December 30, the Commission had stopped reporting results and hastily declared Kibaki the winner. Within hours, protests erupted. In addition to the 1000 killed around the country, 500,000 Kenyans were displaced by the violence. Id.
333. W RONG, supra note 330, at 306.
Kalenjin in the west. Kibaki’s administration suffered from a sharp turn of public opinion since NARC’s overwhelming victory in 2002, due to his failure to address corruption and displace entrenched elites, and a series of political miscalculations, such as spurning Odinga. In fact, pre-election opinion polls long showed overwhelmingly negative approval ratings and Kibaki’s trailing not only KANU’s Uhuru Kenyatta in a rematch, but also the Liberal Democratic Party’s 2007 candidate, Kalonzo Musyoka.

The violence following the 2007 elections produced an interim power-sharing agreement, the National Accord and Reconciliation Act, which would govern until a new constitutional structure went into effect. The agreement created the post of prime minister for Raila Odinga, and the posts of deputy prime minister for each party in the interim coalition and balanced cabinet portfolios between the two major parties. The rewriting of Kenya’s Constitution following the election crisis provided an occasion to reassess public opinion on the death penalty. Civil-society organizations and newspaper editorial boards called for the abolition of the death penalty in light of Kenya’s vote to abstain on a United Nations General Assembly resolution in December 2007 calling for a worldwide moratorium on executions, which passed by a majority vote of 104 to 54, with 29 abstentions. An overwhelming majority of African states either voted in favor of the resolution or abstained, a vastly different outcome than the hostile response engendered by the 2002 resolution on the death penalty put forth before the UN Commission on Human Rights.

The death penalty looked as if it would be a controversial topic during the period before the referendum, particularly as Kenya abstained in 2007 and 2008 votes of the UN General Assembly on a worldwide moratorium on executions and President Kibaki commuted all death sentences in August 2009.

334. Whitaker & Giersch, supra note 332, at 14-15. The ethnic clashes were not caused by some ancient, pre-existing ethnic rivalry. Rather, they were deliberately fomented by members of the political elite, who used the language of ethnicity to mobilize supporters to violence (the basis of charges pending against members of the Kibaki administration at the International Criminal Court). For an absolutely devastating account of how the political elites manipulated ethnic identity in Kenya after the 2007 elections, see WRONG, supra note 330, at 295-316.


336. Id. at 5.


339. van Zyl Smit, supra note 231, at 2.

340. See UN Department of Public Information, General Assembly Will Reaffirm Resolution on Death Penalty Moratorium, GA/SHC/39/939 (Nov. 20, 2008); Kenyan President Praised for Commuting 4,000 Death
commutation of death sentences sparked calls by victims’-rights groups for restitution to taxpayers and compensation to victims.341 In February 2010, Kenya notified the United Nations Human Rights Council that a de facto moratorium, in place since 1987, would remain in place, although it rejected calls to abolish the death penalty.342 It did, however, inform the Council that an exhaustive review was underway to assess empirical evidence as to whether the death penalty had any value or impact in the fight against crime.343 A periodic review by the Council, in May 2010, produced a series of recommendations that included death-penalty abolition, which was not accepted by Kenya despite the support of the Kenyan member of the Human Rights Council, Laurence Mute, of the Kenya National Human Rights Commission.344 Proposals to broaden the scope of the death penalty in Kenya have met with skepticism in the media and civil society.345 Despite commendation from the Council members that the country had made progress toward death-penalty abolition, the Kenyan government noted the “widespread public support for its retention, as had been observed during the constitutional review,” but the government was working to create public awareness about death-penalty abolition.346

Ultimately, however, public debate over the status of the death penalty was eclipsed by two constitutional issues in particular, with churches leading the opposition: the legal status of abortion, and the existence of separate customary courts, so-called Kadhis’ Courts, that would apply Islamic law to certain property, family, and probate disputes.347 The dispute over abortion is the more

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343. Id.; see also Death Penalty and Ban on Gay Unions to Stay, DAILY NATION (May 11, 2010), available at http://www.nation.co.ke/News/Death%20penalty%20and%20ban%20on%20gay%20unions%20to%20stay%202010511/1056/916594/-/l89fu5z/-/index.html.


346. Human Rights Council, Draft Report of the Working Group on the Universal Periodic Review, 8th Sess., U.N. Doc. A/HRC/WG.6/8/L.7 (May 10, 2010). The Holy See delegation objected to the use of the death penalty for crimes other than the most serious crimes. Id. ¶ 86. Although Kenya accepted the Holy See’s recommendation to review its death-penalty legislation, it did not accept the recommendation to abolish the death penalty or declare a formal moratorium, as suggested by Argentina, Australia, Austria, Belgium, Germany, Ireland, Spain, and Uruguay during the Council review. Id. ¶¶ 101-42, 103-2-103-3.

perplexing of the two, as Article 26(2) of the Constitution states, “[t]he life of a person begins at conception,” and Article 26(4) states, “Abortion is not permitted unless, in the opinion of a trained professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.” Nonetheless, a major challenge to the Constitution’s adoption came from the pro-life movement, who felt that the Constitution broadened existing abortion access.

The creation of Islamic customary courts, or Kadhis’ Courts, also proved to be controversial, and the failure to clearly resolve the status of the courts contributed to the failure of the 2005 constitution. By the time the British had taken power in East Africa, a complex judicial system based on Islamic law already existed. The British retained the structures of the Sultan of Zanzibar, including the coastal phenomenon of Kadhis’ Courts. In order to protect the legal expectations of the Muslim minority, currently amounting to between 15% and 30% of the population, the Kadhis’ Courts were enshrined in Kenya’s independence constitution, with jurisdiction established by implementing legislation. Kadhis’ Courts are not uncommon in Africa, and such courts on the island of Zanzibar in Tanzania possess powerful authority. Research shows that decision-making in Kadhis’ Courts is similar to decision-making in courts of general jurisdiction and is relatively uniform in practice, despite fears of judicial bias, arbitrariness, or inconsistent results.

Despite these challenges, the Constitution passed with 67% in favor and 31% opposed. It won in seven of the eight provinces, losing only in Rift Valley Province, a sharp change from the 2005 referendum results. The following figures show the vote by district in 2005 (left) and 2010 (right):

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350. Anne Cussac, *Muslims and Politics in Kenya: The Issue of the Kadhis’ Courts in the Constitutional Review Process*, 28 J. MUSLIM MINORITY AFF. 289, 299 (2008) (indicating provinces with highest number of Muslims rejected constitution by over 75%). Some Christian groups felt that the existence of the courts were discriminatory. *Id.* at 297.

351. *Id.* at 291. Five of the judicial offices were in Coast Province, one in Western Province, and one in North-Eastern Province. “Muslims could benefit from the existence of specialized institutions throughout almost all of Kenya.” *Id.* Kenya was governed in two pieces until independence in 1963: a coast-based protectorate, overwhelmingly Muslim, and a former tributary region to the Sultan of Zanzibar, and an interior colony, based at Nairobi. The merger of the two produced some trepidation. *Id.* at 292.

352. *Id.* at 293; *see also* *Kenya Const.* art. 66 (former constitution); Kadhis’ Courts Act (1967).

353. WEISSNER, supra note 6, at 83.

354. *Id.* Kadhis’ Courts apply broad principles across cases, although they may reflect local standards of fairness. Judges typically have less discretion because they closely interpret religious texts. Cases of first impression are referred to higher authorities within the Islamic legal schools. *Id.* at 82.
White areas indicate districts where the constitution won by more than a 10% margin; gray areas indicate where the constitution won narrowly, by less than 10%; and black areas indicate where the constitution lost. Of the 210 constituencies in Kenya, the constitution won in 166 and lost in 44. Of the 70 traditional districts, the constitution clearly lost in 12, with at least another 4 or 5 constituencies nearly evenly divided.

The map also suggests that geography and ethnicity played some role in the political process. In both cases, the base of President Mwai Kibaki, the Kikuyu regions in central Kenya, voted overwhelmingly for both constitutional drafts. In similar fashion, the base of former President Daniel arap Moi, the Kalenjin regions in west central Kenya, voted heavily against both constitutional drafts. Moi had been the most-powerful voice opposed to ratification. The Swahili, Somali, and Islamic zones in the north and east of the country proved to be swing districts, as was the Luo ethnic base of Prime Minister Raila Odinga in the southwest. Odinga’s support of the constitution

355. The maps are somewhat rough. Because Kenya releases the results by constituency and province, but not by district, the present author had to calculate the voting margins for each district. Interim Independent Electoral Commission, Referendum Results, August 4, 2010 (on file with author).
356. Compare the 2010 election results map with this one showing rough boundaries of three important ethnic groups in Kenya:

The black areas represent roughly those that are majority Kalenjin; the dark gray represent those areas which are generally plurality Maasai; and the light gray areas are those districts that are majority Kamba. All three of those ethnic communities were part of the base of Daniel arap Moi’s support, and their lukewarm support of (or, in the case of the Kalenjin, outright hostility toward) the new constitution may be related to Moi’s opposition. As the reader can see, the correlation between the 2010 election results map and the boundaries of these ethnic communities is actually relatively close.
helped deliver Nyanza Province by an enormous margin, unlike in 2005; the constitutional protections of Islamic customary courts ensured victories of over 90% in Coast, Eastern, and Northeastern Provinces in the heavily Muslim Indian Ocean zone. The constitution polled weaker in the gray areas, which have pluralities of Maasai and Kamba ethnic communities, both of whom were members of Moi’s KANU coalition. Although ethnic cleavages do not entirely explain the outcome of the vote, given the great number of economic and political variables in play, the support of the Luo in particular was a major change from the 2005 referendum leading to the failure of the Bomas Draft, which the Luo population tended to oppose. Likewise, Muslim communities strongly opposed the 2005 draft but strongly supported the 2010 draft.

The Constitution went into force on August 27, 2010. It generally sets up an American-style system of checks and balances by creating a bicameral legislature and a Supreme Court, with the entire government headed by a president, who is both head of state and head of government. A number of other provisions are also intended to increase transparency of the national treasury, reduce corruption, and establish an independent electoral oversight body. Other notable provisions include the legalization of dual citizenship and a process by which gradual land reform can take place. Most importantly, the document provides parliamentary oversight of political appointments and strict independence of the judiciary as bulwarks against corruption. The interim post of prime minister, held by Raila Odinga, was abolished, and a second house of parliament was created as an additional check on presidential power.

THE ABOLITION OF THE MANDATORY DEATH PENALTY IN KENYA

Godfrey Ngotho Mutiso was convicted of a premeditated murder involving a dispute over petty larceny. On November 4, 2004, according to the

358. Whitaker & Giersch, supra note 332, at 1-2.
360. Whitaker & Giersch, supra note 332, at 1-2.
361. The failure of both Christians and Muslims to be satisfied with the Islamic courts (Kadhis’ Courts) provision of the Bomas Draft contributed to the defeat of the 2005 Constitution. See Cussac, supra note 350, at 289.
362. See generally KENYA CONST. Chs. 8-10 (2010).
363. See id. Ch. 11.
364. See id. Ch. 6 (leadership and integrity); id. Ch. 7 (electoral system); id. Ch. 12 (public finance).
365. See id. art. 16 (dual citizenship); id. Ch. 6 (land).
368. For the facts of the case, see Mutiso v. Republic, Crim. App. No. 17 of 2008 at 4-7 (July 30, 2010)
prosecution’s account, Mutiso entered a bar located in the village of Mkomani in Mombasa District looking for a man named Patrick Waweru Gachoki, who he believed had stolen two mobile phones. When Gachoki arrived at the bar later in the evening, he was told to go to Mutiso’s house because Mutiso was searching for him. Three witnesses, including Gachoki’s girlfriend, went to Mutiso’s residence, and witnessed Mutiso assaulting a half-naked and bound Gachoki with a whip outside his house. The beating attracted a large crowd. Two of the three witnesses attempted to rescue Gachoki, but they were chased away, and upon their later inquiry, they discovered that police had already recovered the body and arrested Mutiso.369 Other witnesses also testified to rescue attempts during the assault. Gachoki ultimately died of intracranial hemorrhage due to head injury.

According to Mutiso’s version of the events, he witnessed a group of people beating Gachoki for alleged theft, and Mutiso made an attempt to save the victim.370 When he sought help, the perpetrators left Mutiso to face the police when they arrived. He stated that he saw Gachoki’s girlfriend flee the scene. He accompanied police to assist them in contacting Gachoki’s family members; only later, when he followed up his complaint at the police department the next day, was he arrested as a suspect. He stated that he saw Gachoki’s girlfriend flee the scene. He accompanied police to assist them in contacting Gachoki’s family members; only later, when he followed up his complaint at the police department the next day, was he arrested as a suspect. With four highly corroborative witnesses against only Mutiso’s unsworn statement in his defense, the trial court judge found that Mutiso committed the murder with intent to cause bodily harm; even if Mutiso had accomplices, which appeared to be the case, he nonetheless possessed the malice aforethought required by the Kenyan Penal Code.371 Once convicted, Judge Joseph Sergon gave Mutiso the only sentence permitted under the Penal Code: death by hanging.372

On appeal, Mutiso was represented by a pair of Kenyan lawyers acting pro bono and CLEAR Trust, a nongovernmental organization that provides free legal representation to indigent defendants, supported by a team of London-based experts in constitutional death-penalty law.373 The appellate court sought the attorney general’s position on the ultimate legal question at issue: whether the mandatory nature of the death penalty was constitutional. After some months of delay during which the attorney general consulted key ministries in

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369. The decision does not explain why Gachoki’s girlfriend left to go to work as the assault, which she witnessed, was still occurring. The present author assumes this was an oversight by the opinion’s drafter and not a relevant detail. The summary of the facts in the appellate opinion says that Mutiso chased away Gachoki’s girlfriend. Mutiso, Crim App. No. 17 of 2008 at 5. The appellate opinion placed particular emphasis on the testimony of Gachoki’s girlfriend. Id. at 3-7.

370. The defendant’s version of events is contained at Republic v. Mutiso, Crim. Case No. 55 of 2004 at 3 (Feb. 29, 2008) (Kenya High Ct.).

371. Id. at 4.

372. Id. at 6.

the Kenyan government, the attorney general conceded that the mandatory death penalty should be abolished and withdrew the government’s prior submissions. The attorney general reported to the Court the Government of Kenya’s new position:

We now concede that notwithstanding the mandatory provisions of Sec. 204 of the Penal Code, a trial judge still retains a discretion not to impose the death penalty and instead impose such sentence as may be warranted by the circumstances and facts of the particular case. That is our position. The word “shall” in section 204 should now be read as “may.”

The attorney general did not concede to abolition of the mandatory death penalty for crimes other than murder, namely treason and aggravated robbery. Because Mutiso appealed against both guilt and sentence, the concession of the constitutional challenge did not make his appeal moot, the Court found, nor did the fact that Mutiso was no longer on death row after the August 2009 mass commutation by President Kibaki. Consequently, the Court issued a decision on the merits.

THE COURT OF APPEAL’S MANDATORY DEATH-PENALTY HOLDING

The Court of Appeal unanimously invalidated the mandatory death sentence for murder on the grounds that it violated the right to life and was not saved by the death-penalty savings clause; that it constituted cruel, inhuman, and degrading treatment or punishment; and that it violated the right to a fair trial. These grounds were not novel; both the Ugandan case, *Kigula*, and the Malawian case, *Kafantayeni*, relied on similar grounds. Of the three


376. *Id.* at 11.

377. *Id.* at 10.

378. The Court also dispensed with another preliminary matter involving the raising of constitutional issues on appeal. According to the Court, Mutiso could raise constitutional issues on first or second appeal without first having raised them at the High Court. *Id.* at 19. This differed from Malawi and Uganda, both of which raised the issue in the intermediate court in the defendant’s first appeal. In Malawi, the state did not appeal from the Constitutional Court to the Supreme Court of Appeal; in Uganda, the state did appeal from the Constitutional Court to the Supreme Court. In Kenya, the issues were not raised until the final appeal.


grounds, the Court emphasized the right-to-life provision most heavily and cited to a large number of cases from national courts and international tribunals. The panel of three judges, Philip Waki, Riaga Omolo, and John Onyango-Otieno, found that the plaintiff was entitled to have his sentence reassessed with a superior court judge weighing mitigating and aggravating factors.

The Court noted that the mandatory death challenge raised an issue of “singular historical moment” as the first serious challenge to the death penalty for murder. The offense of murder, as summarized by the Court, required malice aforethought, which could be established either through direct intention or constructive intent based on knowledge that an action could cause death and indifference to whether death occurred, the commission of felony murder, or accomplice liability. Kenya does not distinguish between first and second degrees of murder; any unlawful killing that does not meet the definition of murder qualifies as manslaughter, punished by imprisonment up to life. These provisions are similar to the penal codes of Malawi and Uganda, both of which prescribe the death penalty for intentional murder and do not divide the offense of murder into degrees.

The judges found that the mandatory death penalty violated the Kenyan constitution on three grounds. First, the Court found that the mandatory nature of the death penalty violates the right to life guaranteed by Kenya’s bill of rights as it does not permit consideration of mitigating factors. The argument accepted by the Kenyan court was that although the death penalty itself was not cruel, inhuman, or degrading, not every person convicted of murder deserved to die. Where the death penalty was not warranted, executing a convicted person amounted to a violation of the right to life. Neither the Constitutional Court of Malawi nor the Supreme Court of Uganda explicitly found a violation of the right to life. The Malawian court did not reach the right-to-life ground because they invalidated the penalty on other grounds.

381. Mutiso v. Republic, Crim. App. No. 17 of 2008 at 27-28 (July 30, 2010) (Kenya Ct. App.). The Court cited to the Malawi Supreme Court of Appeal, Uganda Supreme Court, Privy Council, Indian Supreme Court, and United States Supreme Court. Id. In addition, the Court cited Kenyan precedent and two decisions of the African Commission on Human and Peoples’ Rights. Id. Of these, the Court cited most extensively to the Ugandan case Kigula v. Attorney General and the Privy Council case arising from Belize, Reyes v. The Queen. See id. at 16, 30-35. The Court also quoted the Privy Council case arising from St. Lucia and St. Vincent and the Grenadines, Spence and Hughes v. The Queen. Id. at 32.

382. Id. at 37.

383. Id. at 1-2.

384. Id. at 2 (citing Kenya Penal Code § 206).


The Ugandan court found that the death penalty could not violate the right to life because it was explicitly saved; however, although the judges found that the mandatory death penalty was not explicitly saved, they did not find that the mandatory nature of the death penalty violated the right to life. The Kenyan decision was more explicit than the earlier decisions.

Second, the Court found that because the penalty does not distinguish among accused persons, the result may be “wholly disproportionate to the accused’s criminal responsibility,” and, consequently, cruel, inhuman, and degrading punishment. Here, the Court’s scrutiny was no less searching. The Court quoted Reyes v. The Queen, which held that murder covers, on one hand, the actions of a sadistic serial torturer and terrorist atrocities and, on the other, mercy killing and provoked killings. According to the Privy Council in Reyes, “[T]here is perhaps no single class of offences that varies so widely both in character and in culpability as the class comprising those which may fall within the comprehensive common-law definition of murder.” According to the Kenyan court: “We are in no doubt that if a similar survey was conducted in Kenya, a similar array of offenders would register.” The Court then quoted the Privy Council’s Hughes finding that to impose a sentence of death without considering mitigating circumstances is inhuman, based on constitutional provisions similar to those in Kenya. The Court also noted that the Kigula court came to the same conclusion. The holding of the Court of Appeal—concluding that the mandatory death penalty is cruel, inhuman, and degrading—follows the long line of international jurisprudence before national and regional courts.

Third, the Court also suggested that because the mandatory death penalty did not permit a sentencing hearing, the mandatory death penalty may violate the right to a fair trial. According to the Court, normal procedure in all noncapital cases is that an accused person can present mitigating circumstances before sentencing, an element of the fair-trial rights of the accused. Perhaps

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391. Mutiso, Crim. App. No. 17 of 2008 at 25.; see also supra note 9. The prohibition on cruel, inhuman, and degrading treatment and punishment is at KENYA CONST. art. 74(1) (former constitution); art. 29(f) (new constitution).
395. Id. at 32-33.
396. This is less explicitly stated. See id. at 29, 33-34 (stating appellant’s position and quoting from Supreme Court of Uganda). Likewise, the Court also considered the separation of powers argument (i.e., that the mandatory death penalty unconstitutionally denies the judicial branch sentencing power) and cited the Ugandan Supreme Court in Kigula. Id. at 29, 34.
397. Id. at 29. The right to a fair trial has a particularly active history in Kenya. For a summary of Kenyan case law on due process rights, including the right to appear before an impartial tribunal, the right to bail, the right to defend oneself in court, the right to be tried in a language that one understood, the right to prevent
broader than the narrow issue of the right to a fair trial, the Court also suggested that it was a violation of fundamental rights not to allow a convicted person an opportunity to show why the death penalty should not be passed against him or her.\textsuperscript{398} The Privy Council and the Inter-American Commission on Human Rights had long considered the mandatory death penalty a violation of the right to a fair trial, and \textit{Edwards v. Bahamas} remains the seminal case for the proposition that the right to a fair trial encompasses not only a hearing but the right to appellate review, appeal to international tribunals, and petition to clemency or pardon bodies.\textsuperscript{399} The Malawian court was even broader in \textit{Kafantayeni}, finding that the mandatory death penalty violated the fundamental right of accessing the court system for the resolution of disputes.\textsuperscript{400} The Kenyan Court of Appeal took a broad and generous view of the right to a fair trial, in line with the emerging global consensus on the mandatory death penalty.

The Court did not explicitly state that the mandatory death penalty violated the separation of powers because the legislature essentially delegated judicial sentencing authority to the executive branch. The Court noted the argument in the appellant’s submissions and cited the portion of the Ugandan decision in \textit{Kigula} finding a violation of the separation of powers.\textsuperscript{401} Given the uncertainty surrounding the ratification of the new constitution, some caution was warranted; the separation of powers was one of the most extensively altered provisions of the new Kenyan constitution. The Court’s reading, however, was favorable and, in a later case, the Court may have an opportunity to expand on this reasoning.

By dismissing the argument that sentencing discretion was unnecessary because of the executive’s pardon and clemency power, the Court’s ruling was in accordance with \textit{Reyes v. Queen} and later decisions.\textsuperscript{402} “It is an open secret that in Kenya, despite hundreds, possibly thousands of serious crime offenders, having been sent to the gallows by the courts since independence in 1963, only

\begin{itemize}
  \item admission of evidence obtained by torture, the right to receive legal representation, and the right to be tried within a reasonable time, see Jamil Ddamulira Mujuzi, \textit{The Constitution in Practice: An Appraisal of the Kenyan Case Law on the Right to a Fair Trial}, 2 MALAWI L.J. 135, passim (2008). The Kenyan Court of Appeal may have missed an opportunity to rely on its own jurisprudence in \textit{Mutiso}.
  \item \textsuperscript{398} Mutiso, Crim. App. No. 17 of 2008 at 28.
  \item \textsuperscript{400} Kafantayeni v. Attorney Gen., Const. Case No. 12 of 2005 at 14 (Apr. 27, 2007) (Malawi Const. Ct.);
  \item \textsuperscript{see also} Mwiza Jo Nkhata, \textit{Bidding Farewell to Mandatory Capital Punishment}: Francis Kafantayeni and Others v. Attorney General, 1 MALAWI L.J. 103, 108 (2007).
  \item \textsuperscript{401} Mutiso v. Republic, Crim. App. No. 17 of 2008 at 34-35 (July 30, 2010) (Kenya Ct. App.).
  \item \textsuperscript{402} Reyes v. The Queen, [2002] UKPC 11 ¶ 44. In reaching this decision, the Privy Council noted that the executive mercy committee “has a most important function to perform. But it is not a sentencing function and the Advisory Council is not an independent and impartial court within the meaning of section 6(2) of the constitution.” \textit{Id.} The Council cited \textit{Edwards v. Bahamas} and concluded, “The opportunity to seek mercy from a body such as the Advisory Council cannot cure a constitutional defect in the sentencing process.” \textit{Id.}
a handful of them have been executed leaving the prisons inundated with a huge number of death-row inmates.\textsuperscript{403} The Court suggested that the executive branch, which wields clemency and pardon power, was in part responsible for the overcrowding and delay on death row. The Court cited the provisions of the Kenyan constitution providing for an Advisory Committee on the Prerogative of Mercy, a pardon and clemency body led by the attorney general, which also exists in similar form in Uganda and Malawi as well.\textsuperscript{404} By finding that the existence of a process for seeking executive clemency does not solve the fundamental problem with the mandatory death penalty, the Kenyan Court of Appeal was acting in accordance with the solid weight of the body of prior case law.

The Court cited a wide array of foreign jurisprudence, especially relying on the decisions of the Malawian and Ugandan high courts, which interpreted constitutions that were \textit{in pari materia} with Kenya’s constitution.\textsuperscript{405} After citing a list of foreign authorities submitted by the appellant, the Court wrote that it was “satisfied . . . that those decisions are persuasive in our jurisdiction and we make no apology for applying them.”\textsuperscript{406} Among the foreign and international sources cited by the Court of Appeal was the U.S. Supreme Court decision in \textit{Woodson v. North Carolina}.\textsuperscript{407} Nonetheless, the Court indicated that it found the Privy Council jurisprudence, along with \textit{Kigula} and \textit{Kafantayeni}, to be the most persuasive given the similarities of constitutional framework.\textsuperscript{408} This reliance on foreign and international jurisprudence was similar to the decisions in \textit{Kigula in Uganda} and \textit{Kafantayeni in Malawi}.\textsuperscript{409} All three African courts emphasized the Privy Council’s decision in \textit{Reyes v. Queen}, the Privy Council decision arising out of Belize, and \textit{Spence and Hughes v. Queen}, the Privy Council decision on appeal from the Eastern Caribbean Court of Appeal.\textsuperscript{410}

One of the more surprising aspects of the Court’s decision was the treatment of Kenya’s partial savings clause at Article 74(2):

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in

\begin{footnotes}
\footnotetext{403}{Mutiso, Crim. App. No. 17 of 2008 at 12.}
\footnotetext{404}{KENYA CONST. arts. 27-29 (former constitution); cf. UGANDA CONST. art. 121; MALAWI CONST. art. 89(2).}
\footnotetext{405}{Mutiso, Crim. App. No. 17 of 2008 at 30.}
\footnotetext{406}{Id.}
\footnotetext{408}{Id. at 30.}
\end{footnotes}
question authorizes the infliction of any description of punishment that was lawful in Kenya on 11th December 1963. 411

This constitutional provision is similar to those at issue in Belize, Saint Lucia, and Saint Kitts and Nevis when the Privy Council decided the trilogy of *Reyes*, *Fox*, and *Hughes* in 2002, decisions that the Kenyan court cited. 412  The purpose of the partial savings clause, now widely considered to be a constitutional anachronism, was to prevent challenges to forms of judicial punishment that were legal at independence. 413  This problem did not arise before the Malawian or Ugandan courts in *Kafantayeni* or *Kigula*, respectively, as both Malawi and Uganda had more modern constitutions dating from the 1990s that did not possess savings clauses protecting forms of judicial punishment from challenge. 414  The Kenyan court’s decision imported Privy Council precedent to the African continent in a way that may be relevant for other African constitutional systems that face similar savings-clause challenges, such as Botswana. 415

The Kenyan Penal Code authorized death by hanging as a mandatory sentence for murder, armed robbery, attempted aggravated robbery, and treason. 416  Although the specific challenge was for murder, the three judges noted, “Without making conclusive determination” on those other crimes, they “doubt[ed] if different arguments could be raised in respect of other capital offenses” such as treason and aggravated robbery. 417  The Supreme Court of Uganda, in *Kigula*, likewise separated the mandatory death penalty from the specific crime of murder, striking down “all those laws on the statute book in Uganda which provide for a mandatory death sentence are inconsistent with the Constitution and therefore are void to the extent of that inconsistency.” 418

Historically, in Kenya, the use of the mandatory death penalty for crimes other than murder had been a notoriously convenient means by which to target

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411. *KENYA CONST.* art. 74(2) (former constitution; no equivalent in new constitution).
412. Belize’s savings clause has expired, but those of St. Lucia and St. Vincent and the Grenadines are still extant. *BELIZE CONST.* art. 21; *ST. LUCIA CONST.* sched. 2 ¶ 10; *ST. VINCENT & THE GRENDINES CONST.* sched. 2 ¶ 10.
413. “Intended to transport the colonial legal systems into the independence era gradually, the savings clause has become a constitutional Frankenstein’s monster, destroying the founding instruments’ central covenants and leaving behind a pitiful pile of unrealized hopes.” Margaret A. Burnham, *Indigenous Constitutionalism and the Death Penalty: The Case of the Commonwealth Caribbean, 3* *INT’L J. CONST. L.* 582, 606 (2005) (noting savings clauses have had “grotesque consequences for constitutional law”).
415. Botswana has a partial savings clause. *See BOTSWANA CONST.* art. 19(2)-(3).
political opponents. While the mandatory death penalty for crimes other than murder was not before the justices, as it had been in Uganda, such penalties appear almost certain to fall. By basing the decision on three essential provisions of the Bill of Rights, the Court of Appeals ensured that the mandatory death penalty would not be resurrected under the new constitutional order. The three constitutional provisions at issue in the case had exact parallels in both the old and new constitutions: the right to life, enshrined at Sec. 71(1) of the 1963 Constitution and Sec. 23(1) of the 2010 Constitution; the right to be free from cruel, inhuman, or degrading treatment or punishment, at Sec. 74(1) of the 1963 Constitution and Sec. 29(f) of the 2010 Constitution; and the right to a fair trial at Sec. 77(1) of the 1963 Constitution and Sec. 50(1) of the 2010 Constitution. Unlike in Uganda, the appellant did not argue, in the alternative, that the death sentence was per se unconstitutional. To do so, the judges warned, would have placed appellant “on very thin ice” because Kenya did not have a constitutional provision protecting the unqualified right to life. In fact, the Court of Appeal of Kenya had upheld the per se constitutionality of the death penalty decades earlier, although it did not then reach the question of whether the death penalty was unconstitutional on the grounds that it was a cruel, inhuman, or degrading form of punishment. Like the Ugandan courts, the Kenyan Court of Appeal seemed especially cool to a South African-style total challenge to the death penalty.

The Kenyan Court of Appeal also looked to drafters’ intent in determining whether to question the constitutionality of the death penalty. As in Kigula, in which the Supreme Court of Uganda looked to the constitutional convention and public comments on the 1995 constitutional draft as evidence that the drafters intended to retain the death penalty, the Kenyan Court of Appeal looked to the intention of the founders of the 2010 constitutional draft as support for retaining the penalty. According to the Court, the constitutional debate reemphasized that Kenya intended to be a retentionist country; as the new draft “was arrived at through a consultative and public process, it could be safely concluded that the people of Kenya, owing to their own philosophy and circumstances, have resolved to qualify the right to life and retain the death penalty in the statute books.” The death penalty, despite a core civil-society movement advocating abolition, had not been among the more-contentious

420. See Kigula (SC), [2009] UGSC 6 at 37.
constitutional provisions. From the Court’s perspective, the death penalty appeared likely to remain a lawful sentence in Kenya for “a long time to come.”

**THE COURT OF APPEAL’S DICTA ON THE DEATH-ROW SYNDROME**

Godfrey Mutiso was no longer on death row by the time the Court of Appeal took his case, because a mass commutation by President Kibaki in August 2009 reduced all death sentences in the country to life imprisonment. Consequently, Mutiso was not an appropriate case in which to challenge the conditions of death row. The Court indicated that President Kibaki, perhaps emboldened by the Kigula decision in Uganda, may have been acting to prevent the so-called “death-row syndrome,” i.e., that harsh prison conditions or excessive delay in carrying out an execution can make an otherwise constitutional sentence unconstitutional on the grounds of cruel and inhuman punishment. The Court characterized the death-row syndrome as an “obvious injustice,” and quoted a South African inmate imprisoned by the apartheid regime: “to live knowing that you will be told when you are going to die, is like death itself.”

As the sympathetic dicta indicate, the Court clearly left the door open to a death-row-syndrome challenge in the future. The Court cited the Ugandan decision, Kigula, and Zimbabwean decision, Catholic Commission, which both found that excessive delay in carrying out death sentences may render them unconstitutional, due to the physical and psychological effects on the prisoner. The Catholic Commission court took a generous view of delay, starting the clock ticking—a death sentence must be carried out within three years or it becomes unconstitutional—from when a death sentence is levied (with a mandatory death penalty, from conviction), regardless of whether the delay is due to the defendant’s appeals, prolonged clemency proceedings, or simply administrative backlog. Not all decisions recognizing the death-row

425. Id. at 24.
428. Id. at 14-15.
430. According to the Supreme Court of Zimbabwe in Catholic Commission, “[T]he period the prisoner has spent in the condemned cell must be taken to start with the imposition of the sentence of death. After all, it is from that date that he begins to suffer what is termed the ‘death row phenomenon.’” Catholic Comm’n, (1993) 2 L.R.C. 277. The Supreme Court of Zimbabwe reasoned that because the death penalty was mandatory in Zimbabwe, the sentence of death was final even where a higher court did not confirm it, and thus it distinguished case law from India and Trinidad and Tobago. Catholic Comm’n, (1993) 2 L.R.C. 277 at 334-35. The Court also noted that the lack of legal representation for most convicted persons weighs in favor of
phenomenon take as broad a view; the clock may start ticking only when appeals are exhausted and the death sentence is confirmed, and the time may be tolled while the defendant is taking actions on his own behalf to delay the death sentence.\footnote{431} By citing Catholic Commission, and extensively quoting the Kigula holding, the Court is suggesting that it is taking the generous view. The portion quoted from Kigula even includes a requirement that the executive branch consider clemency appeals without unreasonable delay, and the president himself must carry out his duty so that no prisoner is on death row for longer than three years.\footnote{432} The Court noted that “[u]nfortunately” no one raised the issue of the constitutionality of the death-row syndrome in the Mutiso case.\footnote{433} The decision by President Kibaki commuting all death sentences was an “act of grace and magnanimity,” but did not “address the issues arising now and in the future since courts in our country continue to hand out death sentences . . . .”\footnote{434} The mass commutation, in other words, ended the death-row phenomenon only for the prisoners currently on death row; it does not solve the fundamental constitutional objection. The Mutiso decision was a positive sign for death-penalty opponents and provides a window for a second incremental challenge to Kenya’s death-penalty regime. A decision by the Kenya Court of Appeal recognizing the death-row syndrome or phenomenon would help solidify a growing international consensus that undue delay or conditions on death row violate human-rights norms.\footnote{435}

forgiving any delay that is the fault of the defendant. \textit{Id.} at 335. Kigula is less generous, with the clock ticking from three years after the confirmation of a sentence by an appellate court, apparently on the theory that a defendant does not suffer the death-row phenomenon while there is still hope of reversal. However, Kigula followed Catholic Commission by not waiting for the final determination of executive clemency to begin the ticking of the clock. Attorney Gen. v. Kigula (SC), [2009] UGSC 6 at 48-49, 54-55 (Uganda Sup. Ct.); see also Mutiso v. Republic, Crim. App. No. 17 of 2008 at 16 (July 30, 2010) (Kenya Ct. App.); supra note 9.


\footnote{433} \textit{Id.} at 17 (citing Kigula (SC), [2009] UGSC 6 at 63-64; Catholic Comm’n, (1993) 2 L.R.C. 277)).

\footnote{434} \textit{Id.} at 17-18.

\footnote{435} But see the Botswana Court of Appeal ruling in Kobedi v. State, in which the Court refused to recognize the death-row phenomenon in part because the facts of the case were not ideal—although ten years had passed between Kobedi’s arrest and his constitutional challenge, he had only been on death row for ten
AFTER MUTISO

The Mutiso decision has faced problems of implementation given the enormity of the task confronting the justice system of over 4000 death-row prisoners requiring resentencing. The Court clarified Mutiso in Gichane v. Republic, in which it rested its holding abolishing the mandatory death penalty for attempted robbery with violence, in part on the Mutiso holding. However, in October 2011, the Kenyan Court of Appeal, in Obuoka v. Republic, turned away a request for resentencing under Mutiso because the defendant was no longer on death row as a result of Kibaki’s commutation of all death sentences in the country to life imprisonment in 2009. Obuoka is inconsistent with Mutiso because, as the Court stated then, the mass commutation did not cure the constitutional defect of the mandatory death penalty, and the defendant in Obuoka never had a sentencing hearing at which a judge could consider mitigating factors. The Mutiso holding was the right one, but defendants may face further challenges in winning resentencing hearings due to resource constraints in the criminal-justice system.

Although the Kenyan Court of Appeal claimed to close the door on a South African-style omnibus challenge to the death penalty, the death-penalty savings clause in the new constitution is intentionally vaguer than it was in the old constitution, which reads in full:

26(1) Every person has the right to life.
26(2) The life of a person begins at conception.
26(3) A person shall not be deprived of life intentionally, except to the extent authorized by this constitution or other written law.

months between the confirmation of his sentence and his challenge—and in part because Botswana’s constitution, unique in Africa, possessed a partial savings clause dating from independence that insulated the death penalty from constitutional challenge. [2003] BwLR 22 (Botswana Ct. App.). Unlike in the Commonwealth Caribbean jurisprudence, the Botswana Court of Appeal did not interpret the savings clause narrowly. Kealeboga Bojosi, The Death Row Phenomenon and the Prohibition Against Torture and Cruel, Inhuman, or Degrading Treatment, 4 AFR. HUM. RTS. L.J. 303, 313-14 (2004) (citing BOTSWANA CONST. art. 7(2); Kobedi v. State, [2003] BwLR 22 (Botswana Ct. App.)). However, as Maxwell and Mogwe write, the door has not been definitively closed on such a challenge if an appeal with a better factual scenario. ELIZABETH MAXWELL ET AL., IN THE SHADOW OF THE NOOSE 52 (2006) (“Because Judge Reynolds never ruled on the constitutionality of hanging as a form of execution or the excessive delay between sentencing and execution, either of these challenges may still be good reasons for requesting a stay of execution.”). In this sense, Kobedi is distinguishable from Catholic Commission.

436. Some of these problems are spelled out in a forthcoming article by the present author. Andrew Novak, The Abolition of the Mandatory Death Penalty in Africa: A Comparative Constitutional Analysis, 22 IND. INT’L & COMP. L. REV. ___ (forthcoming 2012). The Indiana article is intended to be a practitioner-friendly comparative-law piece rather than a deep case study.
26(4) Abortion is not permitted [with exceptions omitted].\textsuperscript{439}

The interpretive problem is obvious: the constitution does not permit the taking of human life except to the extent authorized by the constitution (or “other written law” that would presumably need to be consistent with the constitution), and yet provides no authorization except for abortion where certain medical necessity requirements are satisfied.\textsuperscript{440} On June 10, 2011, High Court Justice Matthew Anyara Emukule found the death penalty unconstitutional under the new constitution on the basis of this ambiguity.\textsuperscript{441} This case and others are awaiting the official inception of the newly created Supreme Court of Kenya, and are themselves a reason to be cautiously optimistic about the prospects of an eventual Makwanyane-style abolition of the death penalty in the country.

CONCLUSION: THE AFRICAN CONTRIBUTION TO GLOBAL DEATH-PENALTY JURISPRUDENCE

The mandatory death penalty is on the rapid retreat worldwide as postcolonial common-law countries integrate international human-rights norms into their domestic legal systems. Over several decades in many cultural contexts, including the Caribbean, Africa, and South Asia, the mandatory death penalty was replaced by a discretionary death-penalty regime that allowed a judge to consider mitigating and aggravating circumstances at the sentencing phase of a trial. The mandatory death penalty almost uniformly led to bloated death rows, even in countries that rarely perform executions, and in no country was the contradiction as great as in Kenya. The decision of the Kenya Court of Appeal, striking down the mandatory death penalty for murder, aligns Kenya with an emerging global consensus that finds an automatic sentence of death to be cruel, inhuman, and degrading punishment.

The death penalty has a particularly troubled history in Kenya, and, given the maturity of Kenya’s legal order and the constitutional changes underway, the country was ripe for such a challenge. First imposed by British colonizers in the late nineteenth century, the death penalty was used regularly as a means not only of criminal punishment but also of showcasing imperial power. During the state of emergency in the 1950s, the death penalty was used extensively on a scale that the British had never employed before or since. After independence, eroding democracy in Kenya led to a weakening of the independence of the judiciary and the legal profession, which in turn led to capital prosecutions of political opponents. Since 2002, with the fall of the

\textsuperscript{439} KENYA CONST. art. 26 (New constitution).

\textsuperscript{440} This ambiguity is intentional, as the author learned in personal email correspondence with a member of the Constitutional Review Commission (on file with author).

Kenyan African National Union and President Daniel arap Moi, Kenya has been renegotiating a constitutional order that appears finally to have succeeded with the new constitution of 2010. The Court of Appeal’s ruling in Mutiso ensures that this new constitutional order will have regard to international human-rights norms, as interpreted by an active and independent judiciary.

In addition to solidifying an emerging consensus on the mandatory death penalty, following the highest courts of Malawi and Uganda on the African continent, the Kenyan Court of Appeal, in turn, made a contribution of its own. To the extent that the Court of Appeal suggested that the mandatory death penalty was unconstitutional for crimes other than murder—in particular, treason, armed robbery, and attempted robbery with violence—the Court went further than most of its predecessors. The International Covenant on Civil and Political Rights codified increasingly accepted state practice that the death penalty should be reserved for only the most-heinous crimes, and especially premeditated murder. The crime of attempted robbery with violence, in particular, has a history of political prosecutions, and it likely does not qualify as a “most serious crime.”

The Kenyan Court of Appeal decision in Mutiso was also notable for its emphasis on the constitutional right-to-life provision, one unaddressed by the Constitutional Court of Malawi and the Supreme Court of Uganda. The right-to-life provision has a particularly long and controversial history in Kenyan constitutional history. Even in the 2010 constitutional debate, the scope of the right-to-life clause was the most controversial issue, particularly because of the abortion claw-back clause. According to the Kenyan Court of Appeal, because the mandatory death penalty is not constitutionally saved, the application of the penalty to a person not meriting death is a violation of the right to life. This was a somewhat novel holding, as the Court framed it, and

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443. ICCPR, supra note 54, art. 6(2).
will likely appear in future mandatory death-penalty challenges in Africa.

Another aspect of the Kenyan decision that made the Court’s ruling even more remarkable is that the Court took an extremely restrictive approach in interpreting Kenya’s partial savings clause at Sec. 74(2) of the Constitution, which prevented constitutional challenge to a law that “authorizes the infliction of any description of punishment that was lawful in Kenya on 11th December, 1963.” As the Malawian and Ugandan courts did not reach this issue because of their more modern constitutional orders, this ruling could have important implications for challenges in countries with modified independence constitutions, such as Botswana and Tanzania.

The Court’s reasoning, that the existence of a mechanism for executive clemency does not solve the essential constitutional problem of a mandatory death penalty, is likewise in accord with the emerging consensus. Shifting sentencing discretion from the trial judge to an executive body removes it from a credible, transparent actor who can assess credibility of the parties, interact with legal representatives in an adversarial proceeding that safeguards the rights of the accused, and explain his or her reasoning in a written decision reviewable by higher courts. Executive clemency is an opaque procedure; legal representation is often not permitted in a closed hearing and the accused may not be informed of the outcome or have any right to participate in the proceeding. Indeed, the trial represents the most open and transparent aspect of the criminal justice system; in many countries in common-law Africa, other aspects, including parole, actual executions, and burial of a deceased prisoner, are shrouded in secrecy.

447. The Tanzanian Constitution specifically fails to save any preexisting law not in conformity with principles of fundamental rights; thus, it is not strictly a Caribbean-style general or partial savings clause. Botswana has a partial savings clause protecting criminal punishments from challenge based on the fundamental rights portions of the constitution. Tanzania does have a broad derogation power, which has been used as the basis for upholding the death penalty. See BOTSWANA CONST. art. 19(2)-(3) (partial savings clause); TANZANIA CONST. 30(2) (derogations clause); Mbushu v. Republic, 1995 T.L.R.A. 97 (Tanz. Ct. App.), reversing Republic v. Mbushu, [1994] T.L.R. 335 (Tanz. High Ct.) (upholding death penalty based on derogations clause in 30(2)); see also James Mwalusanya, The Protection of Human Rights in the Criminal Justice Proceedings: The Tanzania Experience, in THE PROTECTION OF HUMAN RIGHTS IN AFRICAN CRIMINAL PROCEEDINGS 296 (M. Cherif Bassiouni & Ziyad Motala eds., 1995).
449. In practice, the clemency process is shrouded in secrecy. The reports presented to mercy committees in death-penalty committees are confidential in countries like Zambia and Zimbabwe, and the accused does not know the contents of the report or the recommendation that the mercy committee provides to the chief executive. “Such secrecy allows for arbitrariness in the exercise of clemency and disparity in the granting of pardon or clemency.” Lillian Chenwi, Fair Trial Rights and Their Relation to the Death Penalty in Africa, 55 INT’L & COMP. L.Q. 609, 632 (2006) [hereinafter Chenwi, Fair Trial]. For Botswana, see Novak, Botswana, supra note 8, at 197-200.
The Kenyan Court of Appeal, in dicta, brought the country’s constitutional criminal law in accord with the increasing weight of Commonwealth authorities on another point as well: the death-row “syndrome” or “phenomenon.”\textsuperscript{451} Even though Kenya is a de facto abolitionist country—it hasn’t performed an execution in nearly twenty-five years and likely never will again—human-rights activists believe that this does not solve the essential problem, and the uncertainty may make the death-row phenomenon worse. The de facto moratorium on executions is due, at least in part, to the reluctance of Kenya’s ruling elites to sign death warrants, including President Kibaki and likely Prime Minister Raila Odinga as well, the frontrunner to be Kibaki’s successor.\textsuperscript{452} Political circumstances can and do change, and the death penalty remains a lawful sentence in Kenya, albeit one with a troubled history. “Death row inmates are kept as if they are cows in a slaughterhouse waiting to be slaughtered, yet the slaughter man is not around,” one human-rights activist noted.\textsuperscript{453} Roughly 800 criminals per year were sentenced to death in Kenya during the 2000s, and though that number will doubtlessly be smaller after Mutiso, death row will continue to grow even as executions do not resume.\textsuperscript{454} This ensures that the death-row phenomenon will continue, and the Court of Appeal may be receptive to a challenge.

A corpus of transnational death-penalty jurisprudence has formed on the subject of the mandatory death penalty, and national courts will continue to draw from it as persuasive, given the similarities of postcolonial constitutional regimes. With Kenya, three African high courts have now made their own contribution to this body of court decisions and customary law with celebrated rulings that have important implications for promoting judicial prestige and independence, for integrating international human rights into domestic legal systems, and for improving the transparency and the rationality of the criminal-sentencing process.

executed and buried. The men’s families and attorneys were not informed of the executions prior to the radio announcement. No notification is required under Botswana law, but the men’s attorneys had been preparing an application for clemency. The president apparently signed the death warrants without waiting for the application. Tim Curry, Cutting the Hangman’s Noose: African Initiatives to Abolish the Death Penalty, 13 HUM. RTS. BRIEF 40, 43 (2006).
\textsuperscript{451} Mutiso, Crim. App. No. 17 of 2008 at 17.
\textsuperscript{452} Weighton, supra note 164.
\textsuperscript{453} Id.