The Death Penalty Debate

by
Hon Justice Anthony Bahati,
Chairman, Tanzania Law Reform Commission

The Death Penalty has been a mode of punishment since time immemorial. The arguments for and against have not changed much over the years. Crimes as well as the mode of punishment correlate to the culture and form of civilization from which they emerge[1]

Christ was crucified on the cross by Jews for what was believed to be a crime of blasphemy.

Capital punishment is mentioned in the Holy Bible many times. In the book of Leviticus 24: 17-21, it is said, "He who kills a man shall be put to death." the "eye for an eye" principle applies here. Genesis 9:6 states, "Whoever sheds the blood of man, by man shall his blood be shed." Exodus 21:12-14 states: "whoever strikes a man so that he dies shall be put to death. But if he did not lie in wait for him, but God let him fall into his hand, then I will appoint for you a place to which he may flee. But if a man wilfully attacks another to kill him treacherously, you shall take him from my altar that he may die." Numbers 35:30-31 reads: "If anyone kills a person, the murderer shall be put to death on the evidence of witnesses; but no person shall be put to death on the testimony of one witness. Moreover you will accept no ransom for the life of a murderer, who is guilty of murder, but he shall be put to death". Mathew 26:52 reads: "Then Jesus said to him, 'put your sword back into its place; for all who take the sword will perish by the sword'. Finally in Revelation 13:10 it is provided, "If anyone is

[1] Consultation paper on Mode of Executive of Death Sentence and Incidental Matters: Law Commission of India

to be taken captive, to captivity he goes; if anyone slays with the sword, with the sword must he be slain".

The following cases discuss the concepts of 'human dignity' and "right to life" and the justification or otherwise of the death penalty. There is first the case of Republic v Mbushuu and another[2] which was decided by the High Court of Tanzania and went on appeal to the Court of Appeal of Tanzania[3]. In that case Mwalusanya J. held thus:

(i) Death penalty offends the right to dignity of a person in the way the sentence is executed and therefore it offends article 13(6) (d) of the Constitution of the United Republic of Tanzania

(ii) Death penalty is inherently cruel, inhuman and a degrading punishment and the process of execution by hanging is particularly gruesome, generally sordid, debasing and generally brutalizing, and it offends article 13(6) (e) of the Constitution of the United Republic of Tanzania.

(iii) Both the right to life and the right to protection of one's life by society is subject to the claw-back clause and is therefore not absolute according to Article 14 of the Constitution of the United Republic of Tanzania.

(iv) For a law to be lawful it should meet the proportionality test and it should not be arbitrary.

(v) The provisions of the Penal Code on the death penalty do not have adequate safeguards against arbitrary decisions and do not provide effective control against abuse of power by those in authority when using the law.

(iv) Death penalty is contrary to article 13(6) (a) of the Constitution of the United Republic of Tanzania because there is no appeal against the

[2] 1994 TLR 146
[3] 1995 TLR 97

decision of the President not to commute the sentence even if it is unreasonable or discriminatory.

(vii) In construction of provisions of the Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms, a generous and purposive method should be applied

The learned Judge found the death penalty in its present form to be unconstitutional. He went on to sentence the accused to life imprisonment.

The Court of Appeal on appeal by the Republic against sentence of life imprisonment instead of the mandatory death penalty discusses the grounds of appeal at great length. The Court stated that the international instruments declare the inherent and universal right to life, demand that right be protected by law and prohibit the arbitrary deprivation of that right. The Court said that it meant that the right can be denied by due process of law. The court went on to state that the six domestic constitutions which the court examined such as the Constitution of the Republic of Ghana, the Indian Constitution, Uganda Draft Constitution, and the Constitution of the People's Republic of Bangladesh, presume the existence of the inherent and universal right to life and its protection by law. The constitutions deal with when a person can be deprived of his life.

Article 14 of the Constitution of the United Republic of Tanzania lies in between the two sets, the court noted. The article declares the inherent and universal right and its protection by the society but then subjects both the right and its protection to law, the court observes. That means there can be instances in which the due process of law will deny a person his right to life or its protection. The right to life under article 14 is not absolute but qualified, the court concluded.

The issue which the Court of Appeal had to determine was whether the death penalty is one of such instances where the due process will deny a person his right to life and its protection.

Does the death penalty contravene article 13 (6) (d) and (e)? This is what the Court of Appeal had to address first. The Court observed that Article 13 (6) (d) seeks to protect the dignity of a person in the execution of a punishment. Article 13 (6) (e) states:-

> "It is prohibited to torture a person, to subject a person to inhuman punishment or to degrading punishment".

Paragraphs (d) and (e) of Article 13 (6) prohibit three things: torture, inhuman punishments and degrading punishments, the court observed. Does the death penalty offend any of these? The Court of Appeal first considered the definition of "torture" as defined by the United Nations General Assembly (UNGA) in its unanimously adopted 'Declaration on the Protection of All Persons from being subjected to Torture and other cruel, inhuman or Degrading Treatment or Punishment' of 9 December ,1975 (Resolution 3542 (XXX) which states: 'Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purpose as obtaining from him or a third person information or confession, punishing him for an act he has committed or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or accidental to, lawful sanctions'.

The Court found that any physical or severe mental pain or suffering brought about by the death penalty, does not constitute torture.

The Court noted that there is a lot of severe mental pain and suffering to a person under the sentence of death from the moment that sentence is pronounced to the date of its execution.

The Court also noted that concepts like 'torture, cruel, inhuman and degrading' are subject to evolving standards of decency, and held that the European Convention is a living instrument which must be interpreted in the light of present-day conditions as expressed by the European Court of Human Rights in Tyrer v United Kingdom[4]. The Court added that human rights concepts and terms like torture, inhuman and degrading punishment or treatment, have to be interpreted in the light of present-day conditions.

The Court went on to hold that death penalty has elements of torture. It noted however that all punishments might be cruel, but it is the degree of cruelty that matters. As for the other aspects prohibited by article 13 (6) (e) of inhuman and degrading punishments, the court agreed with decisions of other jurisdictions that the death penalty offends these provisions. It agreed with the decision of the United States Supreme Court in Furman v Georgia (1972) US 238 that the State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. The Court was of the opinion that hangings being conducted in private do not indicate the guilty conscience of the state, but that the privacy surrounding executions is a recognition that hangings are inhuman and degrading and so are done in such a way as to give some semblance of dignity and respect to the prisoner.

[4] 2 EHRRI

The Court agreed with the trial Judge that the death penalty is inherently inhuman, cruel and degrading punishment and that it is also so in its execution and that it offends article 13 (6) (d) and (e).

The Court asked the crucial question of whether the death penalty is saved by Article 30 (2) of the Constitution.
Article 30(2) provides:

"it is hereby declared that no provision contained in this part of this constitution, which stipulated the basic human rights, freedom and duties, shall be construed as invalidating any existing law or prohibiting the enactment of any law or the doing of any lawful act under such law, making provision for-

(a) Ensuring that the rights and freedom of other or the public interest are not prejudiced by the misuse of the individual rights and freedom.
(b) Ensuring the execution of the judgment or order of a court given or made in any civil or criminal proceedings".

The Court of Appeal on two occasions dealt with article 30 (2) in Daudi Pete V. A. G[5] and Kukutia Ole Pumbun v. A.G.[6] in Kukutia Ole Pumbun, the Court of Appeal said:

'the court in Pete's case laid down that a law which seeks to limit or derogate from the basic right of the individual on ground of public interest will be saved by article 30(2) of the Constitution only if it satisfies two essential requirements; First, such law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions, and provide effective control

[5] [1993] TLR 22
[6] [1993] TLR 159

against abuse by those in authority when using the law. Secondly, the limitation imposed by such law must not be more than is reasonably necessary to achieve the legitimate object. This is what is also known as the principle of proportionality. The principle requires that such law must not be drafted too widely so as to net everyone including even the untargeted members of the society. If the law which infringes a basic right does not meet both requirements, such law is not saved by article 30(2) of the Constitution, it is null and void. And any law that seeks to limit fundamental rights of the individual must be construed strictly to make sure that it conforms to those requirements, otherwise the guaranteed rights under the constitution may easily be rendered meaningless by the use of the derogative or claw back clauses of that very same constitution".

The Court of Appeal went on to consider the arguments and findings of the trial Judge. The Court put forward the definition of "arbitrary" according to chambers 20th century Dictionary as 'not bound by rules, despotic, absolute, capricious, arising from accident rather than from rule.'

The question was whether Section 197 of the Penal Code falls under that definition. Section 197 of the Penal Code reads:

"Any person convicted of murder shall be sentenced to death"

The Court held that section 197 cannot be arbitrary because it merely provides punishment to a person convicted under other provisions of law.

Is the death penalty in conformity with the principle of proportionality? Is the limitation imposed not more than is reasonably necessary to achieve the legitimate object? What is this legitimate object? The Court asked.

According to the Court of Appeal the legitimate object of the law is to protect society from killings with malice aforethought. Article 14 gives members of the society a right to life and requires the society to protect this right. So the society

has the constitutional duty to ensure that its law abiding members are not deprived of this right and society does this by deterring persons from killing others. Tanzania like many other societies, has decided to do so through the death penalty. The court of Appeal said that retribution is between the murderer and the relatives of the victim and not between the murderer and the state. For the purposes of the society to perform its duty under article 14, deterrence is the legitimate object, the Court concluded.

Is the death penalty more than necessary to deter from killing others? The Court of Appeal in answer to his question held that what measures are necessary to deter the commission of capital crimes or to protect society are matters for decision by every individual society.

The Court went on to state that whether the death penalty is not the most effective punishment there is no conclusive proof one way or the other.

Therefore the Court of Appeal found that the death penalty as provided by section 197 of the Penal Code offends article 13 (6) (a) and (e) but it is not arbitrary, hence a lawful law, and it is reasonably necessary and it is thus saved by Article 30(2). Therefore it is not unconstitutional.

The Court of Appeal quoted Paul Sieghart in "The International Law of Human Rights". (Oxford University Press) 1983 at page 130 which reads:
'As human rights can only attach to living beings, one might expect the right to life itself to be in some sense primary, since none of the other rights would have any value or utility without it. But the international instruments do not infact accord it any formal primacy; on the contrary…contain qualifications rendering the right less than absolute and allowing human life to be deliberately terminated in certain specified cases…. The right to life thus stands in marked

contrast to some of the other rights protected by the same instruments; for example the freedom from torture and other ill-treatment….and the freedom from slavery and servitude are both absolute, and subject to no exceptions of any kind. It may therefore be said that international human rights law assigns a higher value to the quality of living as a process than to the existence of life as a state….the law tends to regard acute or prolonged suffering (at all events in cases where it is inflicted by others, and so it is potentially avoidable) as a greater evil than death, which is ultimately un avoidable for everyone".

The second case is The State v T. Makwanyane and M. Mchumu.

The State versus T. Makwanyane and M Mchumu is a case from the Constitutional Court of South Africa[7]. The two accused in this matter were convicted in the Witwatersrand Local Division of the Supreme Court on four counts of murder, one count of attempted murder and one count of robbery with aggravating circumstances. They were sentenced to death on each of the counts of murder and to long terms of imprisonment on the other counts. They appealed to the Appellate Division of the Supreme Court against the convictions and sentences. The Appellate Division dismissed the appeals against the convictions and came to the conclusion that the circumstances of the murders were such that the accused should receive the heaviest sentence permissible according to law[8]

Section 277 (1) (a) of the Criminal Procedure Act no. 51 of 1977 prescribes that the death penalty is a competent sentence for murder. Counsel for the accused was invited to consider whether this provision was consistent with the Republic of South Africa Constitution 1993. He argued that it was not, contending that it was in conflict with the provisions of section 9 and 11(2) of the Constitution.

[7] case no.CCT/3/94
[8] Ibidem at page 1

The Appellate Division dismissed the appeals against sentences on the two counts of attempted murder and robbery, but postponed the further hearing of the appeals against the death sentence until the constitutional issues are decided by the Constitutional Court of South Africa. Two issues were raised, the constitutionality of section 277 (1) (a) of the Criminal Procedure Act, and the implications of section 241 (8) of the Constitution. Section 241 (8) provides:

> "All proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this constitution had not been passed. Provided that if an appeal in such proceedings is noted or review proceedings with regard thereto are instituted after such commencement such proceedings shall be brought before the court having jurisdiction under this constitution"

Section 277 (1) (a) dispenses with the mandatory death sentence for murder and grants the court discretionary powers. It stipulates that the death sentence shall be imposed when, after ruling on the presence or absence of extenuating or aggravating circumstances, the court is satisfied that the death sentence is the only proper sentence

Chapter 3 of the 1993 South African Constitution provides for fundamental rights these include the right to life and human dignity. The constitution provides in section 9

> "Every person shall have the right to life" and in section 10:
>
> "Every person shall have the right to respect for and protection of his or her dignity"

In section 11(2) the constitution prohibits "cruel, inhuman or degrading treatment or punishment, it also prohibits torture of any kind whether physical or emotional

The Constitutional Court of South Africa in this case (Makwanyane case) considered the provisions of section 11(2) of the constitution and said this:

> "Death is the most extreme form to which a convicted criminal can be subjected. Its execution is final and irrevocable. It puts an end not only to the right to life itself, but to all other personal rights which had vested in the deceased under Chapter Three of the Constitution. It leaves nothing except the memory in others of what has been and the property that passes to the deceased's heirs. In the ordinary meaning of the words, the death sentence is undoubtedly a cruel punishment. Once sentenced, the prisoner waits on death row in the company of other prisoners under sentence of death, for the processes of their appeals and the procedures for clemency to be carried out. Throughout this period, those who remain on death row are uncertain of their fate, not knowing whether they will ultimately be reprieved or taken to the gallows. Death is a cruel penalty and the legal processes which necessarily involve waiting in uncertainty for the sentence to be set aside or carried out, add to the cruelty. It is also an inhuman punishment for it involves, by its very nature, a denial of the executed person's humanity, and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state. The question is not, however, whether the death sentence is a cruel, inhuman or degrading punishment in the ordinary meaning of these words but whether it is cruel, inhuman or degrading punishment within the meaning of section 11 (2) of our Constitution. The accused, who rely on section 11(2) of the Constitution, carry the initial onus of establishing this proposition"

The principal arguments for the accused in support of the contention that the imposition of the death penalty is a cruel, inhuman or degrading punishment were that such a sentence is an affront to human dignity, is inconsistent with the unqualified right to life, cannot be corrected in case of error or enforced in a manner that is not arbitrary, and that it negates the essential content of the right to life and the other rights that flow from it. However, the Attorney General argued that the death penalty is recognized as a legitimate form of punishment in many parts of the world, it is a deterrent to violent crime, it meets society's need for adequate retribution for heinous offences, and it is regarded by South African society as an acceptable form of punishment. The A.G. asserted that it is, therefore, not cruel, inhuman or degrading within the meaning of section 11 (2) of the Constitution.

The Court went on to consider first the effect of the Disparity in the laws Governing Capital Punishment in the sense that the Criminal Procedure Act was in force only in the old Republic of South Africa but its operation did not extend to the former Transkei, Bophuthaswana, Venda or Ciskei. Then the Court considered International and Foreign Comparative Law. The Court said, inter alia, that capital punishment is not prohibited by public international law.

The Court stated that the South African Constitution expresses the right to life in an unqualified form, and prescribes the criteria that have to be met for the limitation of entrenched rights, including the prohibition of legislation that negates the essential content of an entrenched right.

Capital Punishment in the United States of America was also discussed. The 14th Amendment obliges the states not to deprive any person of life, liberty, or property, without due process of law.

Arbitrariness and inequality was also discussed by the court. Counsel for the accused (Mr. Trengove) contended that the imprecise languages of section 277, and the unbounded discretion vested by it in the courts, make its provisions unconstitutional.

Section 277 of the Criminal Procedure Act provides:

Sentence of death

(1) The sentence of death may be passed by a superior court only and only in the case of a conviction for-

(a) Murder;

(b) Treason committed when the Republic is in a state of war;

(c) Robbery or attempted robbery, if the court finds aggravating circumstances to have been present;

(d) Kidnapping;

(e) Child stealing;

(f) Rape

(2) The sentence of death shall be imposed-

(a) after the presiding judge conjointly with the assessors (if any), subject to the provisions s.145 (4)(a), or, in the case of trial by a special superior court, that court, with due regard to any evidence and argument on sentence in terms of section 274, has made a finding on the presence or absence of any mitigating or aggravating factors; and

(b) if the presiding judge or court, as the case may be with due regard to that finding, is satisfied that the sentence of death is the proper sentence.

(3)

(a) The Sentence of death shall not be imposed upon an accused who was under the age of 18 years at the time of the commission of the act which constituted the offence concerned.

(b) If in the application of paragraph (a) the age of an accused is placed in issue, the onus shall be on the state to show beyond reasonable doubt that the accused was 18 years of age or older at the relevant time.

The Court held that in capital cases, where it is likely that the death sentence may be imposed, judges sit with two assessors who have an equal vote with the judge on the issue of guilt and on any mitigating or aggravating factors relevant to sentence; but sentencing is the prerogative of the judge alone. There is a right of appeal after that and in any case that Appellate Division is required to review the case and to set aside the death sentence if it is of the opinion that it is not a proper sentence.

The Court conceded that at every stage of the process (i.e. trial up to sentence) there is an element of chance. The outcome may be dependent upon factors such as the way the case is prosecuted, how effectively the accused is dependent, the personality and particular attitude to capital punishment of the trial Judge and, if the case goes on appeal, the particular judges who are selected to hear the case. Race and poverty are also alleged to be factors.

The Court considered the Right to Dignity, The International Covenant on Civil and Political Rights, The European Convention on Human Rights and the court concluded that a holding by the court that the death penalty for murder is unconstitutional, does not involve a choice between freedom and death; it

involves a choice between death in the very few cases which would otherwise attract that penalty under section 277 (1) (a), and the severe penalty of life imprisonment.

The Court discussed capital punishment in India. It dealt next with the right to life. The Court stated that the unqualified right to life vested in every person by section 9 of the Constitution of South Africa is another factor crucially relevant to the question whether the death sentence is cruel, inhuman or degrading punishment within the meaning of section 11(2) of the Constitution. It went on to state:

> "In this respect our Constitution differs materially from the Constitutions of the United States and India. It also differs materially from the European Convention and the International Covenant. Yet in the cases decided under these constitutions and treaties there were judges who dissented and held that notwithstanding the specific language of the constitution or instrument concerned, capital punishment should not be permitted".

The Court also said that the fact that in both the United States and India, which sanction capital punishment, the highest courts have intervened on constitutional grounds in particular cases to prevent the execution of death sentence evidences the importance attached to the protection of life.

The Attorney General argued that what is cruel, inhuman or degrading depends to a large extent upon contemporary attitudes within society and that South African society does not regard the death sentence for extreme cases of murder as cruel, inhuman or degrading form of punishment. He went on to state that he was prepared to assume that public opinion would favour the death penalty even if informed of other considerations. The court however noted that the

question before the court is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence. The court has a duty vested in it to interpret the Constitution and to uphold its provisions without fear or favour, the court observed.

The Court considered the proportionality test. It said that proportionality is an ingredient to be taken into account in deciding whether a penalty is cruel, inhuman or degrading. No court would today uphold the constitutionality of a statute that makes the death sentence for cutting down of trees or the killing of deer, which were capital offences in England in the 18th century, it noted. The Court went on to state;

> "But murder is not to be equated with such "offences" (shown above). The wilful taking of an innocent life calls for a severe penalty, and there are many countries which still retain the death penalty…. Disparity between the crime and the penalty is not the only ingredient of proportionality; factors such as the enormity and irredeemable character of the death sentence in circumstances where neither error nor arbitrariness can be excluded, the expense and difficulty of addressing the disparities which exist in practice between accused persons facing similar charges, and which are due to factors such as race, poverty and ignorance, and the other subjective factors which have been mentioned, are also factors that can and should be taken into account in dealing with this issue, it may possibly be that none alone would be sufficient under our Constitution to justify a finding that the death sentence is cruel, inhuman or degrading. But those factors are not to be evaluated in isolation. They must be taken together, and in order to decide whether the threshold set by section 11(2) has been crossed they must be evaluated with other relevant factors, including the two fundamental rights on which the accused rely, the right to dignity and the right to life".

The court concluded on this issue thus:

> "The carrying out of the death sentence destroys life, which is protected without reservation under section 9 of our Constitution, it annihilates human dignity which is protected under section 10, elements of arbitrariness are present in its enforcement and it is irremediable. Taking these factors into account, as well as the assumption that I have made in regard to public opinion in South Africa, and giving the words of section 11(2) the broader meaning to which they are entitled at this stage of the enquiry, rather than a narrow meaning, I am satisfied that in the context of our Constitution the death penalty is indeed a cruel, inhuman and degrading punishment"

Is capital punishment for murder justifiable in the circumstances contemplated by section 277 (1) (a) 316A and 322 (2A) of the Criminal Procedure Act? This is the next question which was considered.

Section 33 (1) of the Constitution provides in part, thus:

> "The rights entrenched in this chapter may be limited by law of general application, provided that such limitation-
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> (a) Shall be permissible only to the extent that it is-
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> (i) Reasonable; and
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> (ii) Justifiable in an open and democratic society based on freedom and equality; and
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> (b) shall not negate the essential content of the right in question."

The Court referred to the Constitution and said that the Constitution deals with the limitation of rights through a general limitations clause. But it is a broad

rather than a narrow interpretation to be given to the fundamental rights enshrined in Chapter Three and limitations have to be justified through the application of section 33. According to the South African Constitution the position is not whether the decision of the State has been shown to be clearly wrong; it is whether the decision of the State is justifiable according to the criteria prescribed by section 33. It is not whether the infliction of death as a punishment for murder "is not without justification", it is whether the infliction of death as a punishment for murder has been shown to be both reasonable and necessary and to be consistent with other requirements of section 33. it is for the legislature, or the party relying on the legislation, to establish this justification and not for the party challenging it to show that it is not justified.

The criteria prescribed by section 33 (1) for any limitation of the rights contained in section 11 (2) are that the limitation must be justifiable in an open and democratic society based on freedom and equality and it must be both reasonable and necessary and it must not negate the essential content of the right

The Court went on to state that every person is entitled to claim the protection of the rights enshrined in Chapter Three, and no person shall be denied the protection that they offer. Respect for life and dignity which are at the heart of section 11 (2) are values of the highest order under the Constitution, the court said. It concluded that the carrying out of the death penalty would destroy these and all other rights that the convicted person has, and a clear and convincing case must be made out to justify such action.

The Attorney General contented that the imposition of the death penalty for murder in the most serious cases could be justified according to the prescribed criteria in that the death sentence meets the sentencing requirements for extreme cases of murder more effectively than any other sentence can do. It has a greater

deterrent effect than life imprisonment; it ensures that the worst murderers will not endanger the lives of prisoners and warders who would be at risk if the "worst of the murderers" were to be imprisoned and not executed; and it also meets the need for retribution which is demanded by society as a response to the high level of crime, the Attorney General contended. It was, therefore, a necessary component of the criminal system recognized by the Appellate Division,he concluded.

The Court referred to the judgment of the Tanzania Court of Appeal in the case of Mbushuu and another v. The Republic and went on to state that it is for the court, and not society, or parliament, to decide whether the death sentence is justifiable under the provisions of section 33 of the South African Constitution.

In answer to the Attorney General's argument on the need for a deterrent to violent crime, the court said that the need for a strong deterrent to violent crime is an end the validity of which is not open to question. But the question is not whether criminals should go free and be allowed to escape the consequences of their anti-social behaviour. The question is whether the death sentence for murder can legitimately be made part of the South African law, the court observed. The court also said that South Africans would be deluding themselves if they were made to believe that the execution of the few persons sentenced to death will provide the solution to the an acceptably high rate of crime because there were far more causes attributable to the high incidence of violent crime. The Court said that the greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. That is what is presently lacking in the criminal justice system, the court added.

The Court held that retribution is one of the objects of punishment, but it carries less weight than deterrence. It said that capital punishment is not the only way

that society has of expressing its moral outrage at the crime that has been committed. Society had outgrown the literal application of the biblical injunction of "an eye for an eye, and a tooth for a tooth" it noted. The state does not need to engage in the cold and calculated killing of murderers in order to express moral outrage at their conduct, the court observed. A very long prison sentence is also a way of expressing outrage and visiting retribution upon the criminal, the court concluded.

The Court went on to state:

> "The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge
>
> These can now be addressed on the basis that there is a need for understanding but not for vengeance a need for reparation but not for retaliation, a need for ubuntu but not for victimization"

The Court toyed around with the meaning of "The Essential Content of the Right". Section 33 (1) (d) provides that a limitation shall not negate the essential content of the right. The Court however found it not necessary to solve this problem of what is negation of the essential content of the right. It found that at the very least the provision [i.e. s. 33 (1) (b) evinces concern that, under the guise of limitation, rights should not be taken away altogether.

The Court went on to state that in the balancing process, deterrence, prevention and retribution must he weighed against the alternative punishment available to the state, and the factors which taken together make capital punishment cruel, inhuman and degrading; the destruction of life, the annihilation of dignity, the

elements of arbitrariness, inequality and the possibility of error in the enforcement of the penalty.

The Court considered the argument of the Attorney General on the concepts of the right to life and the right to human dignity which concept the Attorney General submitted were not absolute. It also considered among other things the argument that all punishment involves impairment of dignity.

The Court held that dignity is inevitably impaired by imprisonment or any other punishment, and that the undoubted power of the state to impose punishment as part of the criminal justice system, necessarily involves the power to encroach upon a prisoner's dignity, but a prisoner does not lose all his or her rights on entering prison. It went on to state that imprisonment is a severe punishment; but prisoners retain all the rights to which every person is entitled under Chapter Three subject only to limitations imposed by the prison regime that are justifiable under section 33. Of these, none are more important than section 11(2) right not to be subjected to torture of any kind…nor to cruel, inhuman or degrading treatment or punishment, it noted. The court concluded that there is a difference between encroaching upon rights for the purpose of punishment and destroying them altogether.

The Court therefore concluded the case thus;

> "The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying

murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby.

"In the balancing process the principal factors that have to be weighed are on the one hand the destruction of life and dignity that is a consequence of the implementation of the death sentence, the elements of arbitrariness and the possibility of error in the enforcement of capital punishment, and the existence of a severe alternative punishment (life imprisonment) and, on the other, the claim that the death sentence is a greater deterrent to murder, and will more effectively prevent its commission, than would a sentence of life imprisonment, and that there is a public demand for retributive justice to be imposed on murderers, which only the death sentence can meet.

"Retribution cannot be accorded the same weight under our Constitution as the rights to life and dignity, which are the most important of all rights in Chapter Three. It has not been shown that the death sentence would be materially more effective to deter or prevent murder than the alternative sentence of life imprisonment would be. Taking these factors into account, as well as the elements of arbitrariness and the possibility of error in enforcing the death penalty, the clear and convincing case that is required to justify the death sentence as a penalty for murder, has not been made out. The requirements of section 33 (1) have accordingly not been satisfied, and it follows that the provisions of section 277 (1) (a) of the Criminal Procedure Act, 1977 must be held to be inconsistent with section 11 (2) of the Constitution…"

It may be opportune at this juncture to consider the recent constitutional petition from the Constitutional Court of Uganda. This is Constitutional Petition No.6 of 2003, between

Susan Kigula and 416

and

The Attorney General

The Constitutional Court sat as a panel of 5 Justices of Appeal. The petition was brought under article 137 (3) of the Constitution of the Republic of Uganda challenging the constitutional validity of the death sentence. The 417 petitioners were, at the time of filing the petition, on the death row, having been convicted of offences under the laws of Uganda and were sentenced to death, the sentence provided for under the laws of Uganda.

The argument of the petitioners was that the imposition of the death sentence on them was unconstitutional because it is inconsistent with articles 24 and 44 of the Constitution which prohibit cruel, inhuman or degrading punishment or treatment. Indeed according to the petitioners the various provisions of the laws of Uganda which provide for mandatory death sentence are inconsistent with articles 20, 21, 22,24, 28 and 44 since the Constitution guarantees protection of the rights and freedoms such as equal treatment, rights to fair hearing but provisions for mandatory death sentence contravene those provisions.

The petitioners argued also that a long delay between pronouncement of the death sentence and the carrying out of the sentence, allows for a death row syndrome to set in.

The petitioners in the third alternative contend that section 99 (1) of the Trial on Indictments Act (cap 23 Laws of Uganda) which provides for hanging as a legal mode of carrying out death sentence, was cruel, inhuman and degrading as it contravenes articles 24 and 44 of the Constitution.

The petitioners asked for the following redresses

(i) that the death sentences imposed on them be set aside,

(ii) that the cases be remitted to the High Court which will determine appropriate sentences under article 137 (4) of the Constitution.

(iii) Any other relief the court feels appropriate.

The issues agreed upon by the parties at the scheduling conference for determination in the court were:

(1) whether the death penalty prescribed by various laws of Uganda constitutes inhuman or degrading treatment or punishment, contrary to article 24 of the Constitution;

(2) whether the various laws of Uganda that prescribe the death penalty upon conviction are inconsistent with or in contravention of articles 24 and 44 (a) or any other provisions of the Constitution;

(3) whether the various laws of Uganda that prescribe mandatory sentences of death upon conviction are inconsistent with or in contravention of articles 21, 22, 24, 44 or any other provisions of the Constitution;

(4) whether section 99 (1) of the Trial on Indictments Act which prescribes hanging as the legal penalty is inconsistent with

and in contravention of articles 24 and 44 and any other provisions of the Constitution;

(5) whether the execution of the petitioners who have been on death row for a long period of time is inconsistent with and in contravention of articles 24 and 44, or any other provisions of the constitution.

(6) whether the petitioners are entitled to the remedies prayed for.

The learned Justice of Appeal (Okello, JA) first pointed out the principles of constitutional interpretation which are:

(1) the widest construction possible to be given according to ordinary meaning of words used

(2) the constitution to be read together as an integrated whole

(3) all provisions bearing on a particular issue to be considered together

(4) a Constitution and in particular that part of it which protects and entrenches Fundamental Rights and Freedoms to be given a generous and purposive interpretation to realise the full benefit of the right guaranteed,

(5) in determining constitutionality both purpose and effect are relevant,

(6) Article 126 (1) of the Constitution enjoins courts to exercise judicial power in conformity with law and with the values, norms and aspirations of the people.

The learned Judge considered issues 1 and 2 together. After referring to the various arguments from both parties, he emphasised that the point for determination by the court is the constitutionality of the death penalty in Uganda and the constitutionality of the various provisions of the laws of Uganda which prescribe the death penalty. He referred to articles 24, 22 (1) and 44 of the Constitution. He said that the Uganda Supreme Court in Abuki's case[9] meant that the words in article 24 must be interpreted in the context of the Constitution in which they are used, but not in the abstract, when the supreme court said that the words in article 24 must be given their ordinary and plain meaning. He went on to argue that article 22 (1) recognises the death penalty in execution of a sentence passed in a fair trial. This section is an exception to the enjoyment of the right to life. Therefore, he said, the death penalty is constitutional. He referred to Makwanyane's case and Mbushuu's case when considering whether article 24 which outlaws any form of torture, cruel, inhuman and degrading treatment or punishment also outlaws article 22 (1). He stated that in Makwanyane's case the Constitutional Court of South Africa found the death penalty to be inherently, cruel, inhuman or degrading and therefore unconstitutional and that under the Constitution of South Africa, the right to life is unqualified. As for Mbushuu's case, the court of Appeal of Tanzania also found the death penalty inherently cruel, inhuman or degrading but still constitutional because it is saved by article 30 (2) of the Tanzania Constitution and that the right to life under the Tanzania Constitution is qualified just like under the Uganda Constitution. He referred further to Catholic Commission For Justice And Peace, a case of the supreme Court of Zimbabwe which held the death penalty constitutional. In Kalu vs the State[10] articles 22 (1) and 24 of the

[9] Attorney General vs Salvatory Abuki, Constitutional Appeal No.1 of 1998, Oder JSC.
[10] A Nigerian Case

Uganda Constitution are in pari materia with the Nigerian section 30 (1) and 31(1) of the Nigerian Constitution. The learned Judge endorsed the approach adopted in Kalu's case where it was held that the death penalty was constitutional and that if the legislature had intended to take away by section 31(1)(a) the right recognised in section 30)1) of the Nigerian constitution, it would have done so by clear terms and not by implication. He then came to the conclusion that in Uganda, the various provisions of the laws of Uganda which prescribe the death sentence are not inconsistent with or in contravention of articles 24 and 44 or any provisions of the Constitution. Therefore he answered issues 1 and 2 in the negative.

With regard to issue No.3, after hearing counsels for both sides the learned Judge said that Article 28 of the Uganda constitution did not exhaustively list all the elements for a fair hearing. Notably absent from the list is the right of the convict to be heard in mitigation before sentence is passed. Also the right of the court to make inquiries to inform itself before passing the sentence to determine the appropriateness of the sentence to pass is conspicuously absent from article 28 as well.

He argued further that in other jurisdictions mandatory death sentence has been held to be unconstitutional because it does not provide a fair hearing because it does not permit the convict to be heard in mitigation before sentence and it violates the principle of separation of power, as it does not give the court opportunity to exercise its discretion to determine the appropriateness of the sentence to pass. The court passes the sentence because the law compels it to do so.

He referred to Mithu vs State of Punjab[11] where the supreme court of India observed thus:

> "it is a travesty of justice not only to sentence a person to death, but to tell him that he shall not be heard why he should not be sentenced to death."
>
> He referred to section 98 of the Trial on Indictments Act in Uganda which provides the procedure to be followed by court after entering a conviction and before sentence. The section reads:
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> > "The court, before passing sentence other than a sentence of death, may make such inquiries as it thinks fit in order to inform itself as to the proper sentence to be passed and may inquire into the characters and antecedents of the accused person…."

Furthermore the learned judge referred to article 22 (1) which requires that both conviction and sentence of death be confirmed by the highest appellate court. The learned judge concluded that the various provisions of the laws of Uganda which prescribe mandatory death sentence are unconstitutional as they are inconsistent with articles 21, 22 (1), 24, 28, 44(9) and 44 (c) of the Uganda Constitution.

On issue no. 4, he referred to various arguments. He cited the Jamaican case of Earl Pratt and Another vs Attorney General for Jamaica and Another which shows that sections 14(1) and 17 (1) of the constitution of Jamaica which the court considered in this case are in pari materia with Uganda articles 22 (1) and 24. These sections make the right to life under the two Constitutions the same - both qualified. But the Uganda Constitution does not contain the equivalent of section 17(2) of the Jamaican Constitution which provides thus:

[11] An Indian Case

"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 question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."

In the Jamaica case Lord Griffith in the Privy Council held that hanging which was a lawful method of execution in Jamaica before Independence was saved by section 17(2) of the Constitution and it could not be held to be an inhuman mode of punishment for murder.

The learned judge concluded that notwithstanding the absence of an article equivalent to section 17(2) in the Uganda Constitution, execution by hanging may be cruel, but articles 24 and 44 (a) were not intended to apply to death sentence permitted by article 22(1). Therefore carrying out the death penalty by hanging cannot be held to be cruel, inhuman and degrading. Punishment by its nature must inflict some pain and unpleasantness, physically or mentally to achieve its objective. Section 99 (1) of the Trial on Indictments Act is Constitutional as it operationalises articles 22 (1), and not inconsistent with articles 24 and 44 (a), he concluded.

He answered issue No.4 in the negative.

Next for consideration was Issue No. 5. After hearing arguments for and against in this issue and after examining various cases such as Catholic Commission for Justice and Peace in Zimbabwe vs Attorney General and others and Earl Pratt & Morgan vs Attorney General of Jamaica and others (case No.27 Vol.3) No. 210 of 1986 and 225 of 1987, he went on to put the

imposing question that arises from the arguments of counsel of both parties which is:

> "Do condemned prisoners have any fundamental rights and freedoms left to be protected before they are executed?"

He said that the Catholic Commission for Justice and Peace case answered it in the affirmative. The learned judge agreed with that stand and expounded that condemned prisoners did not lose all their constitutional rights and freedoms, except those rights and freedoms that have inevitably been removed from them by law either expressly or impliedly. He said further that condemned prisoners are still entitled to the protection of articles 24 and 44 (a). He however cautioned that the burden to prove violation of fundamental rights and freedom is on the petitioners. He referred to the "death row phenomenon' which is brought about by long delay on the death row, coupled with harsh and difficult conditions, which renders the carrying out of the death sentence cruel and inhuman or degrading punishment prohibited by articles 24 and 44(a). He considered the effect of delay on the death row on condemned prisoners which is referred to as "death row syndrome" in the Zimbabwe and Jamaican cases. He considered also what is unreasonable delay before the President signs the death warrant or gives an amnesty. He found a delay beyond three years after a condemned prisoner's sentence has been confirmed by the highest appellate court to be unreasonable delay.

He therefore answered issue no.5 in the affirmative and allowed the appeal in part.

He declared as follows:

(a) the various provisions of the laws of Uganda that prescribe mandatory death sentences are inconsistent with Articles 21, 22 (1), 28, 44(a) and 44(c) of the constitution

(b) Section 132 of the Trial on Indictments Act that restricts the rights of appeal against sentence where mandatory sentences are imposed is inconsistent with articles 21, 22(1), 24, 28, 44(a) and 44(c) of the Constitution.

(c) That inordinate delay in carrying out the death sentence after it has been confirmed by the highest appellate court is inconsistent with Articles 24 and 44(a) of the constitution. A delay beyond 3 years after the highest appellate court has confirmed the sentence is considered inordinate.

The orders made were:

(1) For petitioners whose sentences have been confirmed by the Supreme Court, they will await 2 years to enable the Executive to exercise its discretion under article 121. They may return to court for redress after the 2 years.

(2) For those with pending appeals

(a) They shall be afforded a hearing in mitigation on sentence.

(b) The court shall exercise discretion whether or not to confirm the sentence,

(c) For those whose sentence of death will be confirmed, the discretion under article 121 should be exercised within three years.

Fifty years after the adoption of the Universal Declaration of Human Rights, the trend towards worldwide abolition of the death penalty is unmistakable. When the Declaration was adopted in 1948, eight countries had abolished the death penalty for all crimes; today, as of November 1998, the number stands at 63. More than half the countries in the world have abolished the death penalty in law or practice, and the numbers continue to grow[12]. By 2003 there were 77 countries which have abolished capital penalty for all crimes and 117 countries which had abolished capital punishment in law or practice. There were 78 countries who have retained capital punishment by February 1st 2004[13].

The American Civil Liberties Union holds that the death penalty inherently violates the constitutional ban against cruel and unusual punishment and the guarantee of due process of law and the equal protection of the laws. The American Civil Liberties Union continues to oppose capital punishment on moral and practical, as well as constitutional grounds even after Gregg v. Georgia, (428 U.S. 153) in which the Supreme Court ruled in July 1976 that the new capital punishment statutes after Furman v. Georgia (408 U.S. 238) contained objective standards to guide, regularize and make rationally renewable the process for imposing the death sentence. It held that the punishment of death does not invariably violate the Constitution.

The grounds for opposing capital punishment are that:

[12] Human Rights v. The Death Penalty: Abolition and Restriction in Law and Practice by Erick Prokosch: Theme Research Coordinator. A.I.
[13] A.I. index: ACT 50/005/2004

(a) capital punishment is cruel and unusual. It is a relic of the earliest days of penology, when slavery, branding and other corporal punishments were common place. Like them executions have no place in a civilized society.

(b) opposition to the death penalty does not arise from misplaced sympathy for convicted murderers but that murder demonstrates a lack of respect for human life and therefore abhorrent and any policy of state authorizing killings is immoral.

(c) capital punishment denies due process of law, its imposition is arbitrary and irrevocable. It forever deprives an individual of benefits of new evidence or new law that might warrant the reversal of a conviction or setting aside of the death sentence.

(d) executions give society the unmistakable message that human life no longer deserves respect when it is useful to take it and that homicide is legitimate when deemed justified by pragmatic concerns.

(e) capital punishment does not deter crime, and the death penalty is uncivilized in theory and unfair and inequitable in practice.

The two cases considered in this paper in extenso namely Mbushuu's case from Tanzania and Makwanyane's case from Republic of South Africa do not differ much in their reasoning. Both cases hold that capital punishment is cruel, inhuman and degrading punishment. In the RSA case the constitutional court found that the requirements of section 33(1) of Constitution had not been satisfied and hence section 277(1)(a) of the Criminal Procedure Act 1977 had to

be held to be inconsistent with section 11(2) of the Constitution. On the other hand the Tanzania Court of Appeal held that the death penalty offends Article 13(6)(a) and (e) of the Tanzania Constitution but it is not arbitrary hence a lawful law, and it is reasonably necessary hence it is saved by Article 30(2) and therefore not unconstitutional. The Tanzania Court of Appeal analyzed the situation thus:

The legitimate object of the law is to protect society from killings with malice aforethought. Article 14 gives members of the society a right to life and requires the society to protect this right. So the society has the constitutional duty to ensure that its law abiding members are not deprived of this right and society does this by deterring persons from killing others. Tanzania like many other societies, has decided to do so through the death penalty. What measures are necessary to deter the commission of capital crimes or to protect society are matters for decision by every individual society.

In the Uganda Constitutional case the court found the death penalty constitutional but the mandatory death penalty unconstitutional. Also it found the manner of execution constitutional but the delay in executing the sentence unconstitutional.

In the case of Catholic Commission of Justice and Peace vs. A.G. and others (1993(1) ZLR 242), the applicant brought an application in terms of section 24 of the Constitution to prevent the execution of 4 convicted murderers and to have the sentences of death set aside on the ground that the delay in carrying out the sentences, taken together with the conditions under which the 4 prisoners were being held in custody, was itself a breach of Declaration of Human Rights. The delays from the imposition of the sentences of death by the trial court to dates of proposed execution ranged from over six years to slightly over 4 years for the four men. The Supreme Court at Harare held that the delay by the Executive in carrying out the sentences of death imposed by the courts, together with the

conditions under which the condemned prisoners were incarcerated and the anguish that they are thereby subjected to, rendered the executions contrary to s.15 (1) of the Constitution as being inhuman and degrading punishment and treatment.

The warders kept on reminding the prisoners that they were soon to be hanged and every time a prisoner was hanged the warders would bang at the doors of the prisoners on death row that their turn was soon. Warders would tell the prisoners on death row how one prisoner did not die and clung on the executioner and the warders had to finish him off by a hammer. Such stories led to one prisoner to hang himself. This and the other prison conditions such as being kept in a dark room and being beaten by warders often led to the Supreme Court to hold as above.

John Grisham in "The Chamber" describes how one prisoner on the death row was kept waiting to be executed for many years. The prisoner known as Sam was eventually led to the gas chamber and executed.

What lessons can we draw from these cases? I am of the opinion that capital punishment should be abolished. The arguments in the cases together with those of the American Civil Liberties Union clearly demonstrate that capital punishment is unsuitable in a civilized society. It may have been fashionable in the old days but it is out of touch with to-day's civilization. A life sentence can satisfy the desire for retribution and vengeance. Indeed a long prison sentence would teach the murderer a better lesson than execution which would set him free as soon as he is executed. Many people commit suicide to run away from their problems. Execution would be just helping the offender to run away from his problems.

The way forward for Africa is the realization that a long prison sentence has a far reaching effect on the murderer than execution because after all many prisoners with long terms of imprisonment might commit suicide if they had the opportunity thereby ending their miseries in prison. It is the torment faced through a long sentence which really bears hard on a prisoner than execution. Such realization could lead to abolition of the capital punishment.

Throughout history, societies around the world have used the death penalty as a way to punish the most heinous crimes. While capital punishment is still practiced today, many countries have since abolished it. In fact, in the US, Californiaâ€™s governor recently put a moratorium on the death penalty, temporarily stopping it altogther. Given the moral complexities and depth of emotions involved, the death penalty remains a controversial debate the world over. The following are three arguments in support of the death penalty and three against it. Arguments supporting the death penalty. Prevents convicted killers from killing again. The death penalty guarantees that convicted murderers will never kill again. This debate will be about the death penalty. I shall be con saying that the death penalty should be illegal, for it is immoral. Pro will rebuttal and give statements on how the death penalty should be legal and that we should continue executing prisoners. The death penalty is rather pointless in my opinion because it costs us more money than the life sentence. The death penaltyâ€”does it bring back the victim? No it doesnâ€™t. The death penalty rather than showing us to not perpetrate heinous crimesâ€”shows that us Americans kill one another. Structure of the Debate. Round 1: Introductions, and first arguments for Con. Pro will show his rebuttals to my arguments and give his own arguments. FOR the death penalty. AGAINST the death penalty. 1. JUSTICEâ€¦ An eye for an eye. The death penalty is reserved for the most heinous of crimes, such as murder. Why should a murderer be allowed to live out the rest of their lives in relative comfort, paid for by the public? To continue to house, clothe and feed them for the remainder of their natural life at taxpayer expense makes a mockery of justice. They gave up their right to life when they took the life of another person, and justice can only be served by their lawful execution. 1. MISCARRIAGE OF JUSTICEâ€¦ You cannot un-execute someone. Miscarriages of justice are bad enough, but the wrongful execution of an innocent person takes it to the extremes. The death penalty, therefore, prevents crimes for recurring and protects society. Further moral arguments suggest that capital punishment provides closure for the families of the victims and that punishment should fit the crime in order for justice to be served. Finally, there are practical arguments put forward. The death penalty helps ease overpopulation in prisons and it ensures that less tax payers' money is spent for the maintenance of individuals that have acted against society in the most violent way.Â Where do you stand in this debate? After looking at death penalty's pros and cons, do you consider that capital punishment is a fair and appropriate measure for atrocious crimes or is it inhumane and should be banned? Watch these videos on the death penalty pros and cons debate. The Death Penalty Debate. Capital punishment is a difficult and emotional topic for many. Although it has been abolished in two-thirds of the world's countries, it has a long history and is still used in many places, including many states in the USA. Its use continues to divide people. To those in favor, the death penalty is seen as the most suitable punishment and effective deterrent for the worst crimes. Those who oppose it, however, see it as inhumane and expensive. They point to data and comparisons of societies with and without capital punishment and argue that there is no evidence that it deters crime. This article lists all the key pros and cons of executing people who have committed serious criminal offensesâ€”first, the arguments in favor, followed by the arguments against.