

HOW SHOULD THE MOST EVIL OF LAW BREAKERS BE PUNISHED? THE DEATH PENALTY VERSUS LIFE IMPRISONMENT IN UGANDA, 1993 – 2009

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ABSTRACT

Article 22(1) of 1995 Constitution of Uganda protects the right to life and provides that it can only be taken away in the ‘execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court.’ The death penalty is imposed for some crimes such as murder, treason and terrorism. During the constitution making process between 1989 and 1994 and when the constitution was being amended in 2005, there were arguments that the death penalty should be abolished and replaced with life imprisonment which means imprisonment until death. These attempts were unsuccessful. The constitutionality of the death penalty was unsuccessfully challenged in both the Constitutional Court and the Supreme Court. However, both courts appear to hold the view that if the death penalty is to be abolished, it should be substituted with life imprisonment. This article highlights the attempts and the arguments that have been made to abolish the death penalty in Uganda. The author argues, inter alia, that should the death penalty be abolished and substituted with life imprisonment, offenders sentenced to life imprisonment should not be detained until death as life imprisonment without the possibility of release has been found to be cruel and inhuman in some African countries such as South Africa and Namibia. Because the death penalty is no longer mandatory in Uganda and it is likely to be replaced by life imprisonment, the author discusses the objectives of punishment that courts in Uganda have always emphasized in sentencing offenders to life imprisonment.

I. INTRODUCTION

Article 22(1) of 1995 Constitution of Uganda protects the right to life and provides that it can only be taken away in the ‘execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court.’ The

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death penalty is imposed for some crimes such as murder, treason and terrorism. During the constitution making process between 1989 and 1994 and when the constitution was being amended in 2005, there were arguments that the death penalty should be abolished and replaced with life imprisonment which means imprisonment until death. These attempts were unsuccessful. The constitutionality of the death penalty was unsuccessfully challenged in both the Constitutional Court and the Supreme Court. However, both courts appear to hold the view that if the death penalty is to be abolished, it should be substituted with life imprisonment. This article highlights the attempts and the arguments that have been made to abolish the death penalty in Uganda. The author argues, *inter alia*, that should the death penalty be abolished and substituted with life imprisonment, offenders sentenced to life imprisonment should not be detained until death as life imprisonment without the possibility of release has been found to be cruel and inhuman in some African countries such as South Africa and Namibia.

Because the death penalty is no longer mandatory in Uganda, there is a possibility that many offenders found guilty of serious offences such as murder and armed robbery will be sentenced to life imprisonment where courts find mitigating circumstances. This means that apart from the existence of mitigating factors, courts will also invoke the objectives of punishment that the sentence of life imprisonment is likely or intended to achieve. It is against that background that the author highlights the objectives of punishment that courts in the past have emphasized in sentencing offenders to life imprisonment and argues that it is not unlikely that courts will continue emphasizing these objectives in the aftermath of the abolition of the mandatory death sentence. What follows is the discussion of the legislative and constitutional efforts taken to replace the death penalty with life imprisonment since 1992. A detailed account of the history of the death penalty in Uganda has been given somewhere else¹ and is not repeated here. The discussion starts with the work of the Uganda Constitutional Commission.

II. THE UGANDA CONSTITUTIONAL COMMISSION

The Uganda Constitutional Commission (the Odoki Commission) was established by the Uganda Constitution Commission Statute of 1988 to seek the views of Ugandans on which rights should be included in the new constitution. The Odoki Commission

1. *See*, Towards Abolition of the Death Penalty in Uganda (a publication of the Civil Society Coalition on the Abolition of the Death Penalty in Uganda) (2008), at 1 – 37.

consisted of 21 members, who were appointed by the President of Uganda.² Its terms of reference were:

- (a) To study and review the constitution with the view of making proposals for the enactment of a national constitution that would:
 - (i) guarantee the national independence and territorial integrity and sovereignty of Uganda;
 - (ii) establish a free and democratic system of government that will guarantee the fundamental rights and freedoms of the people of Uganda;
 - (iii) create viable political institutions that will ensure maximum consensus and orderly succession to government;
 - (iv) recognize and demarcate division of responsibility among the state organs of the Executive, the Legislature and the Judiciary and create viable checks and balances between them;
 - (v) endeavour to develop a system of government that ensures people's participation in the governance of their country;
 - (vi) endeavour to develop a democratic, free and fair electoral system that will ensure people's representation in the legislature and at other levels;
 - (vii) establish and uphold the principle of public accountability by the holders of public offices and political posts; and
 - (viii) guarantee the independence of the Judiciary.

- (b) Formulate and produce a draft constitution that will form the basis for the country's new national constitution.³

2. These members were: 1) Justice Benjamin J. Odoki (Chairman); 2) Dr. Dan Mudhoola (Vice Chairman); 3) Prof. Phares Mukasa Mutibwa (Secretary); 4) Dr. Edward Kiddu Makubuya; 5) Mr. Jonathan Kateera (Member); 6) Mr. Justine A.O. Okot (Member); 7) Dr. Rev. Fr. John Mary Waliggo (Member); 8) Mrs. Immaculate Damali Angena Maitum (Member); 9) Prof. Fredrick Ssempebwa (Member); 10) Mr. Cyprian Rwaheru (Member); 11) Prof. Andrew Otim (Member); 12) Dr. Eric Adriko (Member); 13) Mr. George Ofuyuru (Member); 14) Mrs. Gertrude Byekwaso (Member); 15) Mr. Sam Kirya Gole (Member); 16) Mr. Cuthbert Obwangor (Member); 17) Hon. Miria Matembe (Mrs.)(Member); 18) Mr. Medi Kaggwa (Member); 19) Lt. Col. Serwanga Lwanga (Member); 20) Hon. Jotham Tumwesigye (Member); and 21) Ms. Mary Amaitumu. For the qualifications and roles of each member during the constitutional making process, see B.J. ODOKI, *THE SEARCH FOR A NATIONAL CONSENSUS: THE MAKING OF THE 1995 CONSTITUTION OF UGANDA* (2005), at 1-18.

3. *Id.* D. MUKHOLI, *A COMPLETE GUIDE TO UGANDA'S FOURTH CONSTITUTION: HISTORY, POLITICS AND THE LAW* 29 (1995).

It is clear from the terms of reference that the Odoki Commission had the mandate to ensure that it came up with a constitution that established a government that would guarantee the rights and freedoms of the people of Uganda. This is because previous governments had committed gross human rights violations in blatant disregard of the human rights that had been enshrined in the successive constitutions.⁴ The Commission's terms of reference did not specify which human rights it should emphasize. What it was required to do was to ensure that the draft Constitution established 'a free and democratic system of government that w[ould] guarantee the fundamental rights and freedoms of the people of Uganda.' This meant that the Commission had a wide mandate with regard to which human rights it would consult the public and which submissions with regard to human rights should be included in the draft Constitution and how those rights should be phrased for debate by the Constituent Assembly.

III. PARTICIPATION OF UGANDANS IN THE CONSTITUTION-MAKING PROCESS

To understand how the 1995 Constitution would allow the right to life to be taken away in some circumstances, it is useful to understand how Ugandans participated in the Constitution-making process. This would explain the role of public opinion in the Constitution-making process. The Odoki Commission introduced mechanisms to ensure that all Ugandans participated in the constitution-making process. The Commission organized district and sub-county seminars in all the districts and sub-counties countrywide to brief local, civic and opinion leaders about the Constitution-making process and the important issues to be addressed.⁵ The aim of these initiatives was to 'enable the majority of Ugandans at the grassroots to actively participate in the constitution-making process.'⁶ Seminars for institutions and special interest groups, like women, were also organized.⁷ Odoki was of the view that the major objective of seminars for institutions and special interest groups was 'to stimulate discussion and debate and the secondary objective was to collect views.'⁸ Publicity campaigns were also launched 'to stimulate public discussion of constitutional issues amongst

4. See generally, REPORT OF THE COMMISSION OF INQUIRY INTO VIOLATIONS OF HUMAN RIGHTS: FINDINGS, CONCLUSIONS AND RECOMMENDATIONS (1992).

5. ODOKI, *supra* note 2, at 46-74.

6. *Id.*

7. *Id.*, at 75-84.

8. *Id.*, at 75.

individuals and groups throughout the country.⁹ Thousands of memoranda on what people thought should be included in the new Constitution were collected from all parts of Uganda and from special interest groups.¹⁰ Several non-governmental organizations (NGOs) also submitted their views.¹¹ Some of the issues raised in these memoranda were that the new constitution should include a comprehensive Bill of Rights and that it should incorporate international human rights.¹² According to Odoki, every major group—religious, political, professional, cultural, social or economic—presented a memorandum.¹³

A. *Death Penalty Provision In, Life Imprisonment Out*

The Commission of Inquiry into Violations of Human Rights was one of the interest groups that submitted proposals to the Odoki Commission. It proposed that ‘[t]he right to life should be protected. No life should be taken or death sentence imposed in the manner prescribed [sic] by law.’¹⁴ It is very unlikely that the authors of the proposal sought the prohibition of the death penalty under all circumstances. Arguably, what the authors meant was that no life should be taken or death sentence imposed in a manner ‘proscribed’ not ‘prescribed’ by law. In other words, the authors contemplated that the Constitution would incorporate safeguards that under no circumstances should the death penalty be imposed in a manner contrary to the law. Put differently, guaranteeing that the new Constitution should provide for circumstances where the death penalty could be imposed, but in accordance with the law. Thus, in its report to the Constituent Assembly, the Odoki Commission stated as follows:

We have seriously considered arguments of both sides, critically analyzed the international attitude to capital punishment, the praiseworthy campaign of Amnesty International for the abolition of the death penalty and consideration of the fact that the death penalty has been abolished in several countries, including a few African

9. *Id.*, at 107.

10. *Id.*, at 135-154.

11. *Id.*, at 145.

12. *Id.*, at 146.

13. *Id.*

14. Constitutional Proposals by the Commission of Inquiry into Violations of Human Rights to the Uganda Constitutional Commission, CHR. 105/91, 29 January 1992, ¶ 6.1; REPORT OF THE COMMISSION OF INQUIRY, *supra* note 4, Appendix 7.

countries. We fully understand the need for a change of attitude to capital punishment. We have, however, not found sufficient reasons to justify going against the majority views expressed and analysed.¹⁵

It is upon that background that the Odoki Commission recommended that:

a) Capital punishment should be retained in the new Constitution; (b) [c]apital punishment should be the maximum sentence for extremely serious crimes, namely murder, treason, aggravated robbery, and kidnaping with intent to murder; (c) it should be in the discretion of the Courts of Law to decide whether a conviction on the above crimes should deserve the maximum penalty of death or life imprisonment; (d) the issue of maintaining the death penalty should be regularly reviewed through national and public debates to discover whether the views of the people on it have changed to abolition or not.¹⁶

The above two paragraphs raise important points. The Odoki Commission weighed the views of the majority of Ugandans who supported the death penalty against those of international organizations such as Amnesty International, which wanted the death penalty abolished. The Commission ‘fully’ understood the ‘need for change of attitude to capital punishment’ but its hands were tied because the majority of Ugandans supported it and there were no sufficient justifications for its abolition. However, the Commission recommended that capital punishment should be the ‘maximum’ not ‘mandatory’ sentence for extremely serious offences and that courts should have the discretion to determine whether a person convicted of such serious offences ‘should deserve the maximum penalty of death or life imprisonment.’

It is argued that the Commission thought that whereas the court should be given the discretion to impose the death penalty, in the event that it did not impose it for ‘extremely serious crimes’, it had to impose life imprisonment. Put differently, the court had two options: either the death sentence or life imprisonment. However, the Commission recommended that the question of the death penalty should be reviewed regularly to establish whether or not Ugandans still supported its retention.

15. REPORT OF THE UGANDA CONSTITUTIONAL COMMISSION (1992), ¶7.106, *quoted in Attorney-General v. Susan Kigula & 417 others*, Const. Petition No. 03 of 2006 (Judgment of 21 January 2009, unreported, Supreme Court of Uganda), at 21 (hereinafter *Susan Kigula* case).

16. *Id.*, ¶7.107.

During the Constituent Assembly debates, three views emerged with respect to the way the death penalty should be treated in the new Constitution: '[o]ne which is the most extreme—to abolish it; the other one, to retain it generally on criminal offences; and the third one which specifies the types of criminal offences.'¹⁷ Because the Odoki Commission had recommended the retention of the death penalty in the new Constitution, the motion by some delegates that the death penalty be abolished prompted the Chairperson of the Constituent Assembly to state that '...these Amendments depart from the text. The one that departs furthest is one which seeks to totally abolish the concept of the death sentence or capital punishment...'¹⁸ Some of the Constituent Assembly delegates who opposed the death penalty argued that the death penalty does not achieve one of the major objectives of punishment – reform (in the sense that a person who has been executed cannot be reformed) and that the execution of the death penalty is not a punishment of the offender but 'instead it is a punishment to the rest of the family, relatives and friends' and that there is no 'sufficient information to conclude that death [the] sentence necessarily can deter [sic] people from committing ... crimes.'¹⁹

Delegates supporting the abolition of the death penalty advanced a variety of reasons in support of their contention. Some of reasons were: that (a) the 'better substitute' for the death penalty was life imprisonment, on condition that 'life imprisonment not meaning 16 years that are presently prescribed in Law. But actual life imprisonment...'²⁰ and that 'if life sentence means life sentence' the offender will not come out of prison and reoffend and that such an offender will be 'utilized in prison, he will be able first of all to reform and will probably render some service to this country through hard labour in prison;²¹ (b) that 'capital punishment originated from primitive society', (c) the argument that the death penalty is deterrent 'is false', (d) that the 'death penalty is not only wicked and cruel as a punishment but it is responsible for making human life as cheap as fish;²² (e) the death penalty was the same as revenge yet 'revenge is better' and that it could be used to eliminate political opponents;²³ and (f) the death penalty was 'barbaric' and that 'it is not a deterrent' but, controversially, that

17. PROCEEDINGS OF THE CONSTITUENT ASSEMBLY (OFFICIAL REPORT), 2 September 1994, Submission by Mr. M.L. Ojulla, at 1875.

18. *Id.*, Submission by the Chairman.

19. *Id.*, Submission by Dr. Magezi at 1875.

20. *Id.*

21. *Id.*, at 1895.

22. *Id.*, Submission by Mr. Odur, at 1876.

23. *Id.*, Submission by Mr. K. Pecos, at 1876-77.

‘death penalty is more lenient than giving someone life in prison ... [because] if you left [the offender] in prison ... he can suffer more than just this instant death.’²⁴ One delegate gave three reasons for his support for the death penalty, explaining, too, why he was opposed to life imprisonment as a substitute for the death penalty:

[T]he death sentence has been effective enough in reducing murder cases. Secondly ... we will be setting a dangerous precedent between the bereaved family and the murderer’s family in such a way that the bereaved family will be forced to appease them on their own. Thus reverting to the years where it used to be the only means of settling such cases. Thirdly ... from the economic point of view, this abolition of the maximum sentence from death to life imprisonment will create unnecessary ability to the Government in maintaining these murderers. (*Applause*). Even more or less it will increase cases of corruption because given time these murderers will want to buy their way out of prison.’²⁵

As mentioned earlier, Uganda’s history has been characterized by gross human rights violations especially by military regimes. It is upon that background that one of the military officers in the Constituent Assembly supported the retention of the death penalty by arguing that it was a deterrent because it ‘had worked very well in the Army’ and that the abolition of the death penalty would lead to ‘lawlessness’ because ‘a soldier will kill somebody in the village and will keep on rotating with his gun everywhere eating some food ... in prison, we shall not even administer this Army. (*Applause*).’²⁶ One delegate who rejected life imprisonment as the substitute for the death penalty

24. *Id.*, Submission by S.K. Kiwanuka, at 1877.

25. *Id.*, Submission by Mr. K. Robinson, at 1875. One delegate submitted that people from his constituency were ‘opposed to the abolition of the death sentence vigorously so. To them, they think and they are sure this punishment is deterrent [sic]. It deters more people who would commit murders. The only thing is that it is not possible to measure exactly how many are deterred but it has an effect on the community. The second reason is that although the death sentence does not compensate the bereaved ones, it creates or gives some mental satisfaction with [sic] the fact that he killed our person he is also dead (*Applause*). It also discourages people – bereaved ones from taking the Law into their own hands. Thirdly it will discourage mob justice. If the community knows that the person who killed the other will eventually get away, they will not arrest whoever is suspected. They will go in for him and kill him. They will not take him to Court. They appeal to Members to uphold a death sentence as par our Law books.’ *See*, Submission by Mr. Kiwagama, at 1876.

26. *Id.*, Submission by Lt. Col. Sserwanga Lwanga, at 1877.

argued that the death penalty is a deterrent, ‘it is a way of getting rid of the bad element from society. (*Applause*) Those Delegates who say that we give the man or woman life imprisonment if that man or woman is a bad element in society, wherever he or she goes, he can commit murder. He can commit murder in prison.’²⁷ One delegate argued that he supported the retention of the death penalty and that majority of the people in his constituency (30 of the 450 who discussed the issue) supported the retention of the death sentence on the ground that ‘life sentence ... is only to encourage people to go to Luzira [Uganda’s maximum security prison] and do management by remote-control for their families ... and the nation spends a lot of money on [them]...’²⁸

Some delegates argued for the retention of the death penalty while others argued for its abolition. It would have taken the Constituent Assembly longer to debate this issue if each and everyone was allowed to take to the floor and make submissions. The submissions for or against the death penalty also became repetitive, with delegates either agreeing with what others had already said or emphasizing the points made earlier. It is against this background that one of the delegates suggested to the Chairperson of the Constituent Assembly that since he (the Chairperson) had the names of those who were for or against the death penalty, ‘people by indication would give their views whether they support [the death penalty] or not without necessarily spending ten or twenty minutes debating the obvious principles.’²⁹ When the motion was put to vote, 144 delegates supported the retention of the death penalty, 26 supported the abolition of the death penalty, and three abstained.³⁰ When the Constitution was adopted and promulgated, it provided under Article 22(1) that

No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court.

Most supporters of abolition of the death penalty argued that life imprisonment, which meant that the offenders would spend the rest of their life in prison, would have been a better substitute. The supporters of the death penalty saw life imprisonment as not sufficiently deterring. They also argued that it would be expensive for the state to keep

27. *Id.*, Submission by Mr. S. Kizito, at 1878.

28. *Id.*, Submission by Mr. G. Kinyata, at 1878 – 1879.

29. *Id.*, Submission by Mr. R. Kajuka, at 1880.

30. *Id.*, at 1881 – 1884.

a person in prison for life. Although it is not a strong point to justify the retention of the death penalty, the financial consequences for a person who has been imprisoned for life cannot be underestimated. We are talking about people who would grow old in prisons, who cannot do any prison labour because of old age, and who need constant medical attention, which may not even be available in prisons. One has to recall that in many prisons in Uganda, prisoners are being detained under conditions that are below internationally accepted standards. This exposes them to many infectious diseases and could explain why the Supreme Court recommended that '[t]he government and all those who inspect prisons must ensure that the conditions under which all prisoners are kept strictly conforms [sic] to the law and to international standards.'³¹

IV. ATTEMPTS TO REVISE THE DEATH PENALTY PROVISION: THE LIFE IMPRISONMENT ISSUE RE-EMERGES

In 2002 the government appointed the Constitutional Review Commission whose mandate was to seek the views of Ugandans on whether or not several aspects of the Constitution needed to be amended, and if so, what the amendments should be.³² The Commission was required to elicit the public's views on whether or not some provisions of the Bill of Rights needed to be amended. In its report, the Commission stated that 'the people are in agreement that the [human rights] provisions in the Constitution are adequate.'³³ In respect to the Bill of Rights, the Commission was mandated also to consider particularly 'whether the death penalty should be abolished...'³⁴ After reviewing the relevant international human rights instruments, the Commission found

31. *Susan Kigula case*, *supra* note 15, at 50.

32. The mandate of the Constitutional Review Commission covered the following areas: political systems and good governance; executive authority in relation to the role of parliament and the judiciary; the role and function of parliament; the electoral process (elections and elections and succession to government); Bank of Uganda; local government and whether federalism should be introduced where required; human rights and the Uganda Human Rights Commission; citizenship; protection of children; death penalty; constitutional bodies (the Inspector General of Government, the Uganda Law Reform Commission, the Uganda Land Commission, and National Planning Authority); Service Commissions; land management, dispute resolution and compulsory acquisition of land; access to justice and efficiency of courts; cultural institutions; language (whether Uganda should adopt a national language and another official language). *See generally*, REPORT OF THE COMMISSION OF INQUIRY (CONSTITUTIONAL REVIEW) FINDINGS AND RECOMMENDATIONS (2003).

33. *Id.*, ¶ 10.2.

34. *Id.*, ¶ 1(r).

that ‘[i]t is apparent ... that the death penalty is not outlawed by international law. However, a trend towards its abolition is evident.’³⁵ The Commission reported that ‘[t]he people responded widely on this issue. The majority who responded argued in favour of retaining the death penalty’ for several reasons.³⁶ The Commission also added that ‘[a] substantial percentage of those who support the penalty want it to be retained for only the most heinous crimes.’³⁷

Some of the supporters of the death penalty also ‘expressed concern about the long stay of convicts before execution, a burden to the tax payer, and recommended expeditious executions.’³⁸ Those opposed to the death penalty supported their position with arguments ranging from human rights concerns to religious issues.³⁹ Of interest were the recommendations made by the Uganda Prisons Service, the institution charged not only with the imprisonment of those sentenced to life imprisonment, but also with the execution of the death sentence. Like many other people who supported the abolition of the death penalty, it recommended that the death penalty be substituted with life imprisonment without reprieve. The submission is worth reproducing:

As an alternative to the death penalty most of the people who want it abolished have proposed life imprisonment without any reprieve. Some have proposed that the convict be engaged in productive labour; that some of the proceeds of that labour should compensate the victims of the crime. The Uganda Prisons Service made a submission ... calling for the abolition of the [death] penalty. They stated that the execution of the death sentence is very traumatizing to the Prison staff. ‘It affects the life of the officers carrying it out because of their professional relationship to the inmates. They recommended that the

35. *Id.*, ¶ 13.4.

36. *Id.*, ¶ 13.5. The reasons were: it is a just penalty for serious crimes such as murder, rape and defilement of minors; it demonstrates society’s disapproval of serious crimes; without the death penalty, serious crimes will be on the increase; the people of Uganda approve of the death penalty, if it is abolished, the people will resort to mob justice; and that those who urge for the abolition of the death penalty are not concerned about the rights of the victims.

37. *Id.*, ¶ 13.5. These crimes include murder, kidnaping with intent to murder, defilement of minors, and intentionally spreading AIDS.

38. *Id.*, at 13-173.

39. *Id.*, at 13-173. The reasons were: the death penalty is a cruel and inhuman punishment; it simply terminates the life of the condemned person and therefore serves no purpose; there is no credible evidence that the existence of the death penalty deters people from committing crimes; God does not permit killing; and that civilized societies are abolishing the death penalty.

death penalty should be replaced by life imprisonment; that life imprisonment should imply “imprisonment until death.” “In this way, the death of the offender can be achieved without hanging him.”⁴⁰

This submission needs to be assessed in the light of the following two factors: One, the Uganda Prisons Service has never dealt with offenders who are to be imprisoned for the rest of their lives and therefore has never faced the challenge of dealing with prisoners who know that even if they misbehaved in prison all the sentences imposed on them will have no practical effect. Two, the only reason why the Uganda Prisons Service opposed the death penalty was because it traumatizes the officers who execute it. That explains why the Prison officers recommended to the Commission that ‘if executions have to continue, this gruesome exercise be privatized and performed away from prison.’⁴¹

The Commission finally recommended the retention of the death penalty because the majority of Ugandans still supported it. But recommended that the death penalty be retained and remain a mandatory sentence for the crimes of murder, aggravated robbery, kidnaping with intent to murder, and the defilement of minors below fifteen years of age.⁴² The Commission also recommended that since ‘[e]xecuting the sentence of death by hanging with the rope until the convict dies is painful[,] [that] [t]he sentence should be implemented by a method which ensures instant death.’⁴³

In its White Paper, the Government accepted the recommendations of the Commission on the death penalty and noted that ‘article 22 of the Constitution that relates to [the] protection of [the] right to life will not require any amendment.’⁴⁴ In its report on the Government White Paper, the Parliamentary Committee on Legal Affairs also agreed with the government’s recommendations that the death penalty should be retained and the mode of execution revised.⁴⁵ This meant that the only way that the death penalty could be challenged was through courts of law because the proposed amendments had retained Article 22 intact.

40. *Id.*, at 13-173.

41. *Id.*, at 13-174.

42. *Id.*, ¶ 13.7(i).

43. *Id.*, ¶ 13.7(ii).

44. GOVERNMENT WHITE PAPER ON THE REPORT OF THE COMMISSION OF INQUIRY (CONSTITUTIONAL REVIEW) AND GOVERNMENT PROPOSALS NOT ADDRESSED BY THE REPORT OF THE COMMISSION OF INQUIRY (CONSTITUTIONAL REVIEW) (2004), ¶ 12.3.

45. REPORT OF THE LEGAL AND PARLIAMENTARY AFFAIRS COMMITTEE ON THE GOVERNMENT WHITE PAPER ON CONSTITUTIONAL REVIEW AND POLITICAL TRANSITION (2004), at 49.

V. CHALLENGING THE CONSTITUTIONALITY OF THE DEATH PENALTY

On 21 January 2009, the Supreme Court of Uganda handed down the long-awaited judgment of the *Susan Kigula* case.⁴⁶ It was a result of an appeal against the Constitutional Court's ruling, *inter alia*, that the death penalty was not unconstitutional, but that the mandatory death sentence in the Penal Code Act for murder was.⁴⁷ Following the Constitutional Court's ruling, both the government and death row inmates appealed to the Supreme Court with the government arguing, *inter alia*, that the Constitutional Court erred in law when it found that mandatory death penalty for murder was unconstitutional.⁴⁸

On the other hand, the death row inmates appealed against the Constitutional Court's ruling that the death penalty was not unconstitutional and therefore not a cruel, inhuman and degrading form of punishment because it was provided for under the Constitution.⁴⁹ They also appealed against the Constitutional Court's finding that hanging, as a form of execution, was not a cruel and inhuman punishment within the meaning of Article 24 of the Constitution, and therefore not unconstitutional.⁵⁰

While the appeal against the Constitutional Court's judgment was pending before the Supreme Court,⁵¹ the sentencing of offenders who had been found guilty of murder became not only a source of considerable uncertainty at the High Court level but had also almost come to a standstill in the Court of Appeal and the Supreme Court. With regard to the High Court, some judges held the view that the death penalty was still a mandatory sentence for murder and sentenced offenders accordingly.⁵² Other

46. *See supra* note 15.

47. *See, Susan Kigula and 417 Others v. Attorney – General*, Const. Petition No. 6 of 2003 (Judgment of 5 June 2005). The Constitutional Court held that the mandatory death sentence was unconstitutional because it violated the accused's right to a fair trial in the sense that he could not be heard in mitigation once found guilty of murder. The Court also held that hanging as a method of execution did not violate Article 24 of the Constitution which prohibits cruel, inhuman and degrading punishment.

48. *Susan Kigula* case, *supra* note 15, at 10.

49. *Id.*

50. *Id.*, at 2.

51. Under Article 132 of the Constitution, the Supreme Court is the final Court of Appeal in constitutional matters.

52. For example, in *Uganda v. Wepondi Robert alias Mutto* [HCT-04-CR-SC-0003 of 2005][2005] (14 July 2005), which was decided just over a month after the Constitutional Court had declared the mandatory death sentence to be unconstitutional, the accused was convicted on three counts of murder and in sentencing him to death, the High Court observed that '[o]n counts 1, 2 and 3, there is only one sentence authorized by the law and that is that you shall suffer death in a manner authorised by

High Court (and also Court of Appeal) judges were of the view that the death sentence was a discretionary sentence in cases of murder, and imposed lesser sentences where there were mitigating circumstances.⁵³ At the Court of Appeal⁵⁴ and Supreme Court levels, sentencing in several judgments where the appeals of offenders who had been convicted of murder and sentenced to death had been dismissed and put on hold because the judges were waiting for the Supreme Court's ruling on the constitutionality of the death penalty and the constitutionality of the mandatory death sentence for murder.⁵⁵

the law.'

53. For example, in *Uganda v. Bizimana* (HC-00-CR-SC-0122 of 2005)[2006]UGHC 46 (16 January 2006) the accused was convicted of nine counts of murder (him and others murdered tourists) and the Court before sentencing him to 15 years' imprisonment instead of death held that '[i]n Constitutional Section [sic] No.6 of 2003 the Constitutional Court ruled and declared that Section 189 of the Penal Code which prescribes a mandatory death sentence is inconsistent with Article 21, 22(1), 24, 28, and 44(a) and 44(b) of the Constitution. The court ordered that in capital offences, the trial court must, before sentencing the convict afford him/ her a hearing on mitigation of [the] sentence.' In *Okwang William v. Uganda* (Criminal Appeal No. 69 of 2002)[2007]UGCA 59 (21 May 2007) the appellant's appeal against his conviction for murder was confirmed by the Court of Appeal which then observed that '[t]he death sentence was passed against the appellant on 8 May 2002. This was before the Constitutional Court pronounced itself on the mandatory death sentence... we have taken into account all the mitigating factors. We have found no mitigating factors deserving reduction of the sentence. We are of the considered view that this was a brutal murder... The ground on mitigation of the sentence that was imposed on the appellant also fails.' Of the 47 offenders who were serving life imprisonment in Uganda in July 2008, five had been convicted of murder and sentenced to life imprisonment instead of death. See, J.D. Mujuzi, *Why the Supreme Court of Uganda should Reject the Constitutional Court's Understanding of Imprisonment for Life*, 8 AFR. HUM. RTS L. J. 163 (2008), at 167.

54. For example, *Absolom Omolo Owiny v. Uganda* (Criminal Appeal No. 321 of 2003) [2008] UGCA 2 (8 April 2008) the appellant's appeal against his conviction for murder was dismissed and on the issue of the sentence of death imposed on him, the Court of Appeal 'regarding ground 4 of the memorandum of appeal which concerns mitigation of sentence, we would say that we cannot enforce our decision in ... *Susan Kigula and 416 Ors v. Attorney General* because it is pending confirmation of the Supreme Court, on appeal.'

55. For example, in *Enock v. Uganda* (Criminal Appeal No. 11 of 2004) [2007] UGSC 3 (30 May 2007) the Supreme Court dismissed the appellant's conviction for murder but held that 'because of the decision of the Constitutional Court in Constitutional Court Petition No. 6 of 2006 (*Susan Kigula & 417 Others v. Attorney General*) from which an appeal is pending in this Court, we exercise our discretion and postpone confirmation of sentence in this case under Article 22(1) of the Constitution, until determination of the pending Constitutional Appeal in this Court'; in *Susan Kigula Sserembe and Anor v. Uganda* (Criminal Appeal No. 1 of 2004)[2008] UGSC 15 (15 October 2008) the Supreme Court dismissed the appellants' appeal against their conviction for murder but held that '[t]he sentence of death imposed upon the appellants is suspended pending the determination of Constitutional Appeal No.3 of 2006.' See also, *Bagatenda Peter v. Uganda* (Criminal Appeal No. 10 of 2006) [2007] UGSC 15 (16 October 2007);

On 21 January 2009, the Supreme Court finally handed down its judgment and held: first, that the death penalty is constitutional because it is sanctioned under the Constitution and that the framers of the Constitution took into consideration Uganda's history of grave human rights violations before including Article 22(1) in the Constitution, which provides that the right to life can be taken away as long as the manner in which it is taken away is not 'arbitrary;' second, that the mandatory death sentence is unconstitutional because it violates the offender's right to a fair trial in the sense that he or she cannot be heard in mitigation at the sentencing stage.

It also infringed the doctrine of separation of powers because it eliminated the judge's discretion in determining which sentence fitted both the offence and the offender; thirdly, that hanging, as a form of execution, is not a cruel, inhuman and degrading punishment within the meaning of Article 24 of the Constitution. It was therefore not unconstitutional and that there was no evidence that other methods of execution, such as, lethal injection, were less painful than hanging; and third and most importantly for our discussion, that when a prisoner sentenced to death spends three years in detention after his appeal has been dismissed by the highest court and his application for the President to exercise his prerogative of mercy and commute his sentence has not been dealt with, to know whether he has been granted reprieve or remission or would be executed, the death row phenomenon sets in.

The Court held that the death row phenomenon is a cruel, inhuman and degrading treatment and that executing a prisoner who has spent three years on death row is cruel, inhuman and degrading. The Court ordered that a prisoner who has been on death row for three years and more his sentence should automatically be commuted to 'imprisonment for life without remission.'⁵⁶ The Court's ruling attracted considerable media coverage both in Uganda⁵⁷ and abroad.⁵⁸ However, it also had the effect of confusing prison authorities on how they should deal with prisoners who had

Sekandi Hasan v. Uganda (Criminal Appeal No. 12 of 2005) [2007] UGSC 12 (5 July 2007).

56. *Susan Kigula case*, *supra* note 15, at 63.

57. L. Afedaru et al, *Uganda Supreme Court Upholds Death Sentence*, DAILY MONITOR, 22 January 2009; Editorial, *Positives from Ruling on the Death Penalty*, DAILY MONITOR, 23 January 2009; A. Mugisa et al, *Death Sentence Judgment Puzzles Lawyers*, NEW VISION, 22 January 2008; A. Mugisa & H. Nsambu, *Supreme Court Retains Death Penalty*, NEW VISION, 21 January 2009; and J.D. Mujuzi, *Implications of the Death Penalty Ruling*, DAILY MONITOR, 28 January 2009.

58. <http://news.bbc.co.uk/2/hi/africa/7841749.stm>>, (accessed 24 January 2009); and *Uganda's Supreme Court Declares Death Penalty Right*, GUARDIAN NEWSPAPER, 22 January 2009.

exhausted their appeals and had been on death row for more than three years.⁵⁹ The Court should be applauded for declaring mandatory death sentence unconstitutional. At least this would save many people who would have been convicted of murder, but with mitigating circumstances, from being sentenced to death. In the words of the Court:

Not all murders are committed in the same circumstances, and all murderers are not necessarily of the same character. One may be a first offender, and the murder may have been committed in circumstances that the accused person deeply regrets and is very remorseful. We see no reason why these factors should not be put before the court before it passes the ultimate sentence.⁶⁰

Consequently, the Court ordered that:

[f]or those respondents whose sentences arose from the mandatory sentence provisions and are still pending before an appellate Court, their cases shall be remitted to the High Court for them to be heard only on mitigation of sentence, and the High Court may pass such sentence as it deems fit under the law.⁶¹

The South African experience shows that it is not unlikely that several offenders who were on death row could be re-sentenced to life imprisonment or lengthy prison terms pursuant to the Court's order after being heard in mitigation.⁶² However, in Uganda some offenders could still be sentenced to death when the High Court deems it fit that

59. See, T. Butagira et al, *Death Penalty Ruling Puzzles Prison Bosses*, SATURDAY MONITOR, 24 January 2009 (reporting that: 'The Supreme Court ruling that prisoners, who have stayed on death row for more than three years, after exhausting all appeals, should not be executed but imprisoned for life has confused prison officials. *Saturday Monitor* has learnt that the officials are puzzled about how to handle condemned persons still in formal confinement. Dr. Johnson Byabashaija, the [C]ommissioner [G]eneral of Uganda Prisons, said the government needs to clarify if the ... decision, arising from a petition by some 417 death row inmates to have the court quash the death sentence, would apply retrospectively. "We are going to write to the Attorney General...for advice because the Supreme Court ruling has got implications on all persons who have gone through all appeals [and stayed thereafter] on death row for more than three years").

60. *Susan Kigula case*, *supra* note 15, at 43.

61. *Id.*, at 64.

62. See, J.D. Mujuzi, *Life Imprisonment in South Africa: Yesterday, Today and Tomorrow*, 22 S. AFR. J. CRIM. JUSTICE (2009), at 11-20.

the aggravating circumstances outweigh the mitigating circumstances. The Court should also be applauded for holding that keeping death row inmates for longer than three years in detention after they have exhausted their appeals which allowed the death row phenomenon to set in was cruel, inhuman and degrading. The Court ordered that:

[f]or those respondents whose sentences were already confirmed by the highest Court, their petitions for mercy under article 121 of the Constitution must be processed and determined within three years from the date of confirmation of the sentence. Where after three years no decision has been made by the Executive, the death sentence shall be deemed commuted to imprisonment for life without remission.⁶³

The Court held that it should not be misunderstood as calling upon the government to execute expeditiously prisoners whose appeals and application for clemency have been dismissed. However, in what appears to be a contradiction, it held that ‘a delay [in] carrying out [a] sentence beyond three years from the date when the sentence of death was confirmed by the highest court constitutes unreasonable delay.’⁶⁴ Consequently, the execution of a prisoner after the expiry of that period would be cruel and inhuman and therefore unconstitutional.

It is argued that there are three possible implications that could flow from the above ruling. One, when all prisoners who have been sentenced to death apply for clemency, there is no requirement that the President must consider those applications on a first-come-first-serve basis. Therefore, there is a perceived danger that some applications (for example of political prisoners, ritual murderers or people who have committed the worst forms of murder) being fast-tracked and quickly declined so that the prisoner is executed as soon as possible before the death row syndrome sets in. This is not unlikely because in his reaction to the Supreme Court ruling, the President of Uganda, Yoweri Kaguta Museveni, reportedly said that he was happy that the Court had not abolished the death penalty and that ‘those who kill innocent Ugandans deserve nothing less than death.’⁶⁵ The second consequence is the most obvious one: if within three years of the application the President’s decision on the application for clemency is still pending, the death sentence is automatically commuted to life imprisonment without remission. The third consequence is that the President could commute many

63. *Susan Kigula case*, *supra* note 15, at 63.

64. *Id.*, at 57.

65. See, Vision Reporter, *Museveni Backs Court on Death Penalty*, NEW VISION, 26 January 2009.

death sentences to either lengthy prison terms or life imprisonment.

The Court could have gone too far in ordering that those prisoners whose applications for clemency have not been attended to within three years should have their death sentence deemed to have been commuted to imprisonment for life without remission. It should not have overlooked the fact that the prison authorities have the discretion to grant remission to offenders for meritorious behaviour in prison. This discretion derives from sections 84 to 86 of the Prisons Act.⁶⁶ Remission of a sentence is always an incentive for good conduct in prison. Evidence from other countries like Mauritius shows that prisoners who are aware that they are not entitled to remission are hard to manage and can be troublesome.⁶⁷ However, unlike the Constitutional Court, which held that if the death penalty is to be abolished life imprisonment should mean that the prisoner would be imprisoned for the rest of his life, the Supreme Court held that death sentences would be commuted to life imprisonment without remission.

It is argued that there is a difference between life imprisonment where the prisoner is imprisoned for the rest of his life on the one hand and life imprisonment without remission. In the latter case, a prisoner sentenced to life imprisonment would have to be imprisoned for 20 years because under the Uganda Prisons Act, life imprisonment means a maximum of 20 years' imprisonment. However, in practice, prisoners sentenced to life imprisonment are released after serving 16 years, 8 months and 10 days if they behaved well while in prison and earned credits.⁶⁸ However, in the former scenario, the prisoner would be imprisoned until death.

The Supreme Court's ruling could also be interpreted to mean that an offender whose death sentence has been commuted to life imprisonment without remission

66. Prisons Act, Act 17 of 2006.

67. The Mauritius National Commission on Human Rights reported that '[t]he Security Audit Committee commented on the fact that those convicted of drug offences are not entitled to any remission. Other prisoners are entitled as of right to one third of their sentence as remission. Misconduct on their part is sanctioned by a loss of remission. There is an incentive for them to be of good conduct. On the other hand, as drug offenders are not entitled to remission, they have no incentive to be of good behaviour. We endorse the view of the Security Audit Committee that a measure of remission would be of beneficial to both offenders and the prisons administration. It is hoped that the authorities will come forward with appropriate measures.' See, THE 2001 ANNUAL REPORT OF THE NATIONAL HUMAN RIGHTS COMMISSION OF MAURITIUS (February 2002), ¶¶ 76-77.

68. Personal interview with 10 prisoners who are serving life imprisonment in the Luzira Maximum Security prison, Kampala, Uganda on 14 January 2008. (One of the prisoners interviewed was to be released in the following month because he had served 16 years and 7 months). The prison officers also informed the author that it is true that prisoners sentenced to life imprisonment though could serve the maximum of 20 years and that in practice if they behaved well their sentence could be remitted to 16 years, 8 months and 10 days.

should remain in prison for the rest of his life. This interpretation would be disputable on at least two grounds: First, if the Supreme Court wanted to hold that life imprisonment should mean life imprisonment where the prisoner would be imprisoned for the rest of his life, it should have expressly stated so. But it chose to rule that such prisoners are not entitled to remission. Second, as indicated above, after the Supreme Court's ruling, the Prison authorities said they were in the process of seeking the Attorney-General's advice on whether or not the judgment applied retrospectively.⁶⁹ The Attorney-General's advice would guide them on when the relevant prisoners would be eligible for release. Practice has also shown that some former death-row prisoners have indeed been released following the Supreme Court's ruling.⁷⁰ Now that the death penalty is no longer a mandatory sentence, it is likely that the number of offenders sentenced to life imprisonment is likely to increase. The discussion of the objectives of punishment that courts have emphasized in sentencing offenders to life imprisonment is merited.

VI. SENTENCING OFFENDERS TO LIFE IMPRISONMENT: THE THEORIES OF PUNISHMENT THAT UGANDAN COURTS HAVE EMPHASIZED

In Uganda, unlike in South Africa and Mauritius where life imprisonment is a minimum sentence in some respects,⁷¹ courts have a wide discretion in deciding whether or not to impose a life sentence. There are no instances where life imprisonment is a mandatory or minimum sentence in Uganda.⁷² This means that courts weigh various factors before sentencing offenders to life imprisonment. These include the heinous manner in which the offence was committed and the remorseless conduct of the offender;⁷³ the effect the crime on the victim;⁷⁴ the manner in which the offence was

69. See, Butagira et al, *supra* note 59.

70. See, C. Ariko, *Five Death Row Inmates Pardoned*, NEW VISION, 15 November 2009; L. Afedraru, *Death Row Convicts Remission to Life Imprisonment is Legal*, DAILY MONITOR, 5 December 2009.

71. See generally, Mujuzi, *supra* note 62; J.D. Mujuzi, *The Evolution of the Meaning(s) of Penal Servitude for Life (Life Imprisonment) in Mauritius: The Human Rights and Jurisprudential Challenges Confronted So Far and Those Ahead*, 53 J. AFR. L. (2009).

72. In all cases where life imprisonment is provided for, the law says that an offender is 'liable' to be sentenced to such a sentence. See generally, Penal Code Act, Cap 120, Laws of Uganda.

73. For example, in *Sayson Muganga v. Uganda* (Criminal Appeal No.33/2005)[2008] UGCA 18 (22 September 2008) the appellant was convicted of attempted murder and sentenced to life imprisonment by the Chief Magistrate. While dismissing his appeal against the conviction and the sentence, the High Court held that 'I am persuaded by neither the circumstances of this case nor the

committed, the behaviour of the accused during arrest and the fact that the accused is a danger to society;⁷⁵ that the offence is rampant;⁷⁶ and the fact that the offender was a recidivist and appeared ‘to be taking pride in his crimes.’⁷⁷ With regard to theories of punishment, courts have emphasized deterrence,⁷⁸ protection of the society,⁷⁹ and a

arguments of counsel to disturb the sentence. The act was ghastly and revolting and no remorse whatsoever was shown by the appellant.’ In *Guloba Muzamiru v. Uganda*, Criminal Appeal No. 289/2003 (judgment of 22 January 2007, unreported), the Court of Appeal in dismissing the appellant’s appeal against his life imprisonment sentence for defiling a 2 ½ year old girl, held that ‘[t]he appellant acted savagely.’

74. *Uganda v. Matumbwe William*, Criminal Session No. 24 of 2000 (High Court of Mbale, judgment of 26 September 2002, unreported) the accused, a 40-year old man was convicted of defiling a five year old girl, and in sentencing the accused to life imprisonment, the Court held that offender made the victim’s ‘life traumatized till she dies;’ *Uganda v. Guloba Muzamiru*, *supra* note 73, at 7, where the accused, aged 22, was convicted of defiling a 2 ½ year old girl, the Court held that ‘[t]here is no excuse whatever for him to do such a thing to this innocent child. The child was penetrated bleeding....’

75. *Uganda v. Kasozi Lawrence*, Case No. HCT-00-CR-0001 of 2002 (judgment of the High Court of Kampala, 13 December 2003).

76. *Uganda v. Togolo Musa*, HCT-04-CV-SC-0207/2002 (Judgment of the High Court of Mbale of 13 August 2003) the accused, aged 25, was convicted of defiling a 7 year old girl.

77. *Uganda v. Baguma Moses*, High Court Criminal Session Case. No.72/2001 (High Court of Fort Portal, Judgment of 10 December 2002 [unreported]), where the accused was sentenced to 15 years’ imprisonment for rape which was to run consecutively to the sentence of 10 years’ imprisonment he was serving for rape.

78. For example, in *Kikonyogo Swaibu v. Uganda*, Criminal Appeal No. 27 of 2002, (Judgment of 26 September 2005, [unreported]). The appellant was convicted of defiling his one year old daughter and sentenced to life imprisonment. The Court of Appeal in dismissing his appeal against the sentence held that ‘the sentence of life imprisonment passed on the appellant was not illegal.... The offence committed by the appellant on his own baby daughter was a heinous one and warrants a deterrent sentence.’ In *Uganda v. Guloba Muzamiru*, *supra* note 73, at 7, where the accused, aged 22, was convicted of defiling a 2 ½ year old girl, the Court in sentencing him to life imprisonment held ‘[t]he child was penetrated [and] started bleeding, so I shall pass a deterrent sentence since this offence is so rampant and also the circumstances in which he did it were deadly.’ In *Uganda v. Togololo Musa*, *supra* note 76, at 7, the accused was convicted of defilement and in sentencing him to life imprisonment, the Court held that ‘[t]he ... convict is a first offender, this offence is rampant and when the circumstances are considered in which it was committed, it was so brutally done under threat that he would kill the victim if she raised an alarm...I shall therefore pass a deterring sentence and taking into account the period he has been on remand he is sentenced to life imprisonment (20) years. So that the other potential defilers can learn.’ In *Uganda v. Matumbwe William*, *supra* note 74, at 14, the accused, a 40-year old man was convicted of defiling a 5 year old girl, and in sentencing the accused to life imprisonment, the judge held that ‘I shall pass a deterrent sentence since he is a first offender... He is sentenced to life imprisonment.’

79. In *Uganda v. Wofeda Stephen*, HCT-04-CV-SC-0293/2002 (Judgment of the High Court of Mbale of 7 August 2003), the accused was convicted of defilement and in sentencing him to life imprisonment, the Court held that it had ‘a duty to protect the Society against such animalism as

combination of deterrence and protection of society.⁸⁰ In *Uganda v. Kikonyogo Swaibu*, the offender was sentenced to life imprisonment for defiling his one-year old baby and the High Court used a very strong language to justify the imposition of a life sentence:

The accused is a first offender. However, he is a first offender who has started his journey to crime in high gear. His act of seeking sexual gratification from a baby shows a dangerous level of sexual perversion which, unless the convict is put out of circulation for a long time, could manifest itself on yet another victim either in accused's home village or anywhere else in this country...The upcoming generation must be protected from people of the accused's insatiable sexual appetite especially for toddlers. Therefore, even if [the] convict is a first offender, the ends of justice require that he gets a harsh punishment. He is a brute who deserves incarceration throughout his life. For the reasons above, I sentence him to life imprisonment.⁸¹

The above quotation shows that the Court was of the view that the only sentence that could keep the accused 'out of circulation' for a very long period of time was life imprisonment. The Court was clear that the reason why the accused was being sentenced to life imprisonment was the need for the society as a whole and for future generations to be protected from people such as the likes of the accused. The Court did not hold that the sentence was meant to reform the offender so that by the time he gets out of prison, society would be safer as a result of his rehabilitation. It could be argued that in cases where courts have emphasized deterrence and protection of the society in sentencing offenders to life imprisonment, they are not concerned whether the offender will be rehabilitated while in prison or not. That is why the judge never mentions that the sentence would enable the appellant to be rehabilitated while in prison. In the case

demonstrated by the convict.' In *Uganda v. Kasozi Lawrence*, *supra* note 75, at 14, in sentencing the convict to life imprisonment for robbery, the Court held that '[t]he manner in which the offence was committed and the way he behaved when he was being arrested show clearly that this is a man that is dangerous to society. Court should protect society from the likes of the accused. He is sentenced to life imprisonment.'

80. In *Uganda v. Bahingana William*, CHT-01-CR-SC-0071-2001 (Judgment of the High Court of Fort Portal of 22 May 2002 [unreported]) the accused, a 55 year old man, was convicted of defiling a 2 ½ year old baby girl. In sentencing him to life imprisonment, the Court held that the 'court had to be merciless if society is to learn that' the severe penalty provided for under the law for defilement 'is not a formality but that it is meant to be a deterrent to would be defilers.'

81. *Uganda v. Kikonyogo Swaibu*, *supra* note 78, at 5.

where court was of the view that a lengthy prison term would serve a rehabilitative role, it mentioned so expressly.⁸² In some situations, the court although imposes a sentence of life imprisonment with a deterrent objective in mind, it does not expressly mention deterrence.⁸³

Of all the cases reviewed,⁸⁴ the author did not come across a case in which the court referred to retribution in sentencing an offender to life imprisonment.⁸⁵ This could be attributed to the fact that of all the cases reviewed, there was no instance where the prosecution directly asked court to impose a retributive sentence. In most cases, the prosecution asked court to impose a deterrent sentence.⁸⁶ However, there were cases where the prosecutor did not mention the objective the punishment imposed should

82. In *Kalibobo Jackson v. Uganda*, Criminal Appeal No. 45 of 2001 (judgment of 5 December 2001), the High Court convicted the appellant of rape and sentenced him to 17 years' imprisonment. In justifying the imposition of a lengthy sentence, the Court held that 'I shall pass a deterrent sentence taking into account the 2 years he has stayed on remand. Since the maximum sentence for this offence is death, the accused being a young man can reform. He is therefore sentenced to 17 years' imprisonment.' 4. However, on appeal the Court of Appeal reduced the sentence to seven years' imprisonment.

83. For example in *Uganda v. Tigo Stephen*, HCT-04-CV-SC-0176/2002 (judgment of 12 August 2003 [unreported]) the accused was convicted of defiling an eight year old girl and in sentencing him, the High Court held that 'I take into account the fact that he has been on remand for 2 years, so taking that in account he is sentenced to life imprisonment (20 years). So that the rest who intend to do the same can stand warned.' 8.

84. The author reviewed 23 cases on life imprisonment. The challenge was that most of the cases are not reported and the 23 cases were collected from different court registries in Uganda.

85. It would be a generalization to argue that courts in Uganda never refer to retribution in sentencing offenders to life imprisonment. It was not possible for the author to study all the cases in which offenders were sentenced to life imprisonment. This is because most of them are not reported. As regards those used in the study, the author had to visit different courts in Uganda and perused through volumes of files to identify them. Probably a study of all cases where life imprisonment was imposed could reveal that courts have in some instances emphasized retribution.

86. For example in *Uganda v. Tigo Stephen*, *supra* note 83, at 7–8, the accused was convicted of defiling an 8 year old and the prosecution submitted that '[t]he small girl has to be traumatized throughout her life. I therefore pray for a still deterring sentence.' In *Uganda v. Kasozi Lawrence*, *supra* note 75, at 13, the prosecution submitted that '[r]obbery is a rampant offence which has caused severe sufferings to victims. I pray that the accused is given a deterrent sentence.' In *Uganda v. Senyondo Umaru*, Criminal Session Case No. 0018/99 (Judgment of the High Court of Masaka of 5 April 2000) the offender was convicted of defiling a 7 month old baby, and before he was sentenced to life imprisonment, the prosecution prayed that 'a deterrent sentence be imposed on the accused and the would be defilers to respect other people.' In *Uganda v. Guloba Muzamiru*, *supra* note 73, the prosecution submitted that '[t]he child he defiled was so young. I therefore pray that a deterrent sentence be passed.' 6; and in *Uganda v Togolo Musa*, *supra* note 76, at 7, the prosecution prayed that 'the Court passes a sentence which is deterrent.'

serve and just called upon the court to, for example, impose a ‘severe sentence,’⁸⁷ ‘an appropriate sentence’⁸⁸ ‘a maximum sentence of death,’⁸⁹ ‘stiff punishment’⁹⁰ or the ‘maximum sentence.’⁹¹

One could argue that in such cases, the prosecution thought that the punishment would achieve a retributive objective because the offender was not being punished for purposes such as deterrence or rehabilitation but for breaking the law. Those who argue that punishment should serve a retributive role are of the view that punishment cannot be justified on grounds such as deterrence and rehabilitation. In one case where the offender was convicted of defilement, the prosecutor asked the court to impose a ‘stiff punishment’ because ‘society need [sic] protection.’⁹² This submission, one could argue, reflects both the retributive and deterrent objectives of punishment.

It is also vital to note that in most of the cases reviewed, although the prosecution called upon the court to impose a deterrent sentence, the defence did not directly submit that the court should not impose a deterrent sentence. The defence instead argued that the court should be lenient towards the offender and impose a light sentence without explaining which objective of punishment that light punishment would serve.⁹³

In *Uganda v. Twinomugisha Moses*,⁹⁴ the accused was convicted of manslaughter which carries a maximum sentence of life imprisonment. The Court took

87. In *Uganda v. Walubiri George*, Criminal Session No. 37/2001 (judgment of the High Court of Jinja of 22 November 2001), the offender was convicted of defilement and before he was sentenced to life imprisonment, the prosecution asked court that ‘a severe sentence be meted out.’

88. In *Uganda v. Wofeda Stephen*, *supra* note 79, at 6.

89. *Uganda v. Kikonyogo Swaibu*, *supra* note 78, at 5.

90. *Uganda v. Baguma Moses*, *supra* note 77, at 7.

91. *Uganda v. Bahingana William*, *supra* note 80, at 6.

92. *Uganda v. Baguma Moses* *supra* note 77, at 8.

93. In *Uganda v. Togolo Musa*, *supra* note 76, at 7, the defence prayed ‘for leniency’; in *Uganda v. Guloba Muzamiru*, *supra* note 73, at 7, the defence prayed ‘for leniency’; in *Uganda v. Bahingana William*, *supra* note 80, at 7, the defence prayed to ‘Court to impose a lenient sentence commensurate with the offence committed’; in *Uganda v. Wofeda Stephen*, *supra* note 79, at 7, the defence asked the court to exercise ‘mercy’ in sentencing the offender. However, in *Uganda v. Nuhuu Asuman Kibuka*, Criminal Session Case No.507/99 (Judgment of the High Court of Kampala of 5 May 2000) the accused was convicted of kidnapping with the intent to murder. At sentencing, the prosecution submitted that ‘[t]he offender [sic] attracts a maximum sentence of life imprisonment. A maximum sentence should be given.’ The defence argued that the accused had health problems and that he had spent some time on remand and that the ‘period on remand should be taken into account so that the accused can be reformed if released early,’ at 19 and 20.

94. *Uganda v. Twinomugisha Moses* (HCT-05-CR-SC-124 of 2003)[2005] UGHC 50 (15 September 2005).

into consideration the fact that the convict was young at the time he committed the offence (18 years old) and although the prosecution prayed for 'a deterrent sentence,' the Court sentenced him to 7 years imprisonment and held that it could not sentence the offender to life imprisonment because '[i]t is not in the interest of justice to convict such a young man to long custodial sentence. It will nor [sic] reform him. The convict should be given a chance to reform and live [as] a useful citizen.'⁹⁵ This could be interpreted to mean that the Court was of the view that lengthy prison terms, such as life imprisonment, are not good for rehabilitation and that if courts want offenders to reform, they should sentence them to short prison terms.

Whereas courts are justified in expressing their views with regard to the objective the sentence they have imposed should achieve, courts need to be careful not to phrase their judgments in a language that casts doubt on the ability of the prison authorities to rehabilitate offenders.⁹⁶ By holding that, if an offender is to reform he should not be sentenced to a long custodial sentence, the court is by implication suggesting that prison authorities have failed in their duty of rehabilitating offenders and that the court should try all it can to ensure that offenders capable of rehabilitation are sentenced to short prison terms. It is argued that the reasoning that courts should not sentence offenders to lengthy custodial terms if they want such offenders to reform could violate the doctrine of separation of powers. The judiciary should not interfere in the work of the executive (the prison authorities) unless the latter's actions or omission violates the Constitution.

There were cases where the defence counsel did not even mention the theory of punishment court should rely on in sentencing the offender although the prosecution called upon the court to impose a deterrent sentence.⁹⁷ However, in the cases reviewed, courts did not give reasons why they preferred deterrence over rehabilitation.

Another important factor is that there are cases where offenders have been sentenced to life imprisonment without the court mentioning which objective the punishment imposed is meant to achieve. What the court does is to emphasize the

95. *Id.*, at 57.

96. J.D. Mujuzi, *Don't Send Them to Prison Because They Can't Rehabilitate Them! The South African Judiciary Doubts the Executive's Ability to Rehabilitate Offenders: A Note on S v. Shilubane 2008(1) SACR 295(T)*, 24 S. AFR. J. HUM. RTS (2008).

97. For example in *Uganda v. Tigo Stephen*, *supra* note 83, at 8, where the accused was convicted of defiling an 8 year old girl, the court sentenced him to life imprisonment. Although the prosecution prayed for the imposition of 'a stiff deterring sentence' the defence submitted that '[t]he convict is remorseful and sorry. He has a family. He prays for leniency. He has been on remand for 2 years. I pray that, that is taken into account.'

seriousness of the offence and the aggravating factors and then impose a life sentence.⁹⁸ In all the cases reviewed, courts did not engage in a detailed discussion of the theories of punishment. Most of the offenders serving life imprisonment in Uganda were convicted of offences that attract the death sentence as the maximum sentence. In some of the cases, the prosecutors asked the court to impose ‘the maximum sentence’ a ‘stiff sentence’ or an ‘appropriate sentence’ without specifically asking the court to impose a life sentence. What this has meant is that courts have looked at life imprisonment as a lenient sentence resorting to statements such as the following:

The convict is a first offender who has been in detention for 2 years and 10 months. This offence is a serious one which attracts a maximum sentence of death ... I shall pass a deterrent sentence since he is a first offender having taken into account the period he has been on remand. He is sentenced to life imprisonment.⁹⁹

Or

I consider the convict a first offender. I also consider his age and health as pleaded to court by his counsel...Doing the best I can, the only leniency which this court can extend to him is to reduce the punishment from death to life imprisonment. I accordingly condemn and sentence the convict to life imprisonment... I have had to pass this harsh sentence in the hope that it will act as a deterrent to the accused who certainly deserves to be out of circulation for a long time and those with similar criminal inclinations.¹⁰⁰

There are cases where offenders have been sentenced to life imprisonment without the court mentioning that the offender has been sentenced to life imprisonment. All that the courts mention in such cases is the number of years of imprisonment to which the offender has been sentenced.¹⁰¹ For example, in *Uganda v. Muwonge John*,¹⁰² the

98. See, e.g., *Uganda v. Senyondo Umaru*, *supra* note 86, at 17–18, where the accused was convicted of defiling and the court sentenced him to life imprisonment without stipulating the objective the sentence it imposed was to achieve although it emphasized the seriousness of the offence; and *Sayson Muganga v. Uganda*, *supra* note 73, at 6.

99. *Uganda v. Mutumbwe William*, *supra* note 74, at 14. The offender was convicted of defiling a 5-year old girl.

100. *Uganda v. Walubiri George*, *supra* note 87, at 21–22.

101. In *Nuuu Asuman Kibuuka v. Uganda* (Criminal Appeal No.3 of 2004) (Judgment of 4 November 2005) the appellant was convicted of kidnapping with intent to murder and sentenced to 20 years imprisonment. In dismissing his appeal against both the sentence and the conviction, the Supreme

accused was convicted of defiling a 5-year old girl. The Court considered the fact that he was a first offender and had a family to care for and held that it 'will not pass the maximum sentence of death.

However, considering all the circumstances of this case, the Accused is sentenced to nineteen (19) years imprisonment. Sentence takes [in account] the fact that the Accused has been on remand for one years [sic] otherwise he would have been sentenced to 21 years imprisonment.¹⁰³ When the prison officials look at the number of years to which the offender has been sentenced, they notify him that he was in fact sentenced to a life sentence.¹⁰⁴ In some cases, courts have mentioned that the offender has been sentenced to life imprisonment and the judge goes to the extent of mentioning what the sentence means in practice. In *Uganda v. Tigo Stephen*, for example, the offender was convicted of defiling an 8-year old girl and while sentencing him, the court held that 'I take in account the fact that he has been on remand for 2 years, so taking that in account he is sentenced to life imprisonment (20 years).'¹⁰⁵

VII. CONCLUSION

The above discussion has illustrated the tension between the death penalty and life imprisonment in Uganda. It shows that those in support of the abolition of the death penalty have argued that it should be replaced with life imprisonment where the offender will be imprisoned until his/her death. Courts in South Africa and Namibia have held that life imprisonment without the possibility of release is a cruel and inhuman form of punishment.¹⁰⁶ Should the death penalty be abolished in Uganda, it

Court held that '[t]he sentence of 20 years imprisonment is not unlawful. The ground [of appeal] must therefore fail.' See also, *Nuuu Asuman Kibuuka v. Uganda* (Criminal Appeal No. 54 of 2002)[2004]UGCA 17 (20 July 2004) the decision which the appellant appealed against to the Supreme Court. In *Zungu Denis v. Uganda* (Criminal Appeal No. 287 of 2003)[2007]UGCA 61 (23 March 2007), the appellant had been convicted of defilement and sentenced to 20 years' imprisonment by the High Court although the Court of Appeal allowed his appeal and finally acquitted him.

102. *Uganda v. Muwonge John* (HCT-00-CR-SC-0116 of 2002)[2003]UGHC 10 (20 June 2003).

103. *Id.* It is argued that probably the Court could have intended to impose 20 years' imprisonment instead of 21 years' imprisonment because life imprisonment means 20 years' imprisonment. In *Baguma Fred v Uganda* (Criminal Appeal No.7 of 2004)[2005]UGSC 24 (4 November 2005) the appellant was convicted of defilement and sentenced to 20 years' imprisonment. In dismissing his appeal against the sentence, the Supreme Court held that '[t]he sentence of 20 years imprisonment is not unlawful. The ground [of appeal] must therefore fail.'

104. Interview with Uganda Prisons officials, Luzira Prison, 14 January 2008.

105. *Uganda v. Tigo Stephen*, *supra* note 83, at 8.

106. See, Mujuzi, *supra* note 53.

is recommended that offenders sentenced to life imprisonment should have the possibility of being released otherwise the sentence would violate Article 24 of the Constitution which prohibits cruel, inhuman and degrading treatment or punishment. In the event that the government introduced life imprisonment without the possibility of release, the Ugandan courts are urged to refer to international law and foreign case law, as they have done in other cases like in the death penalty decision,¹⁰⁷ to support their ruling that life imprisonment without possibility of release is cruel and inhuman.

The discussion has also illustrated that in sentencing offenders to life imprisonment, Ugandan courts have a wide discretion. They consider factors such as the personal circumstances of the accused, the manner in which the offence was committed and the effects the offence had on the victim. This wide discretion enables courts to ensure that the punishment imposed fits both the offender and the offence. Courts have put more emphasis on the deterrence and protection of society as the objectives that the sentence of life imprisonment should serve. This could be interpreted to mean that if the judge is of the view that the sentence he/she is to impose would serve a reformatory or rehabilitative objective, he/she would sentence the offender to a prison term shorter than life imprisonment. This could be gathered, for example, from the sentences imposed where offenders have been convicted of defilement.

From the above discussion, in most of the cases where offenders were sentenced to life imprisonment for defilement, the court either emphasized deterrence or protection of society or both. However, in some cases where offenders have been convicted of defilement and sentenced to prison terms of less than 10 years, courts have emphasized rehabilitation.¹⁰⁸ Ugandan courts have not emphasized retribution as an objective of punishment in sentencing offenders to life imprisonment. This, as has been mentioned earlier, could be attributed to the fact that the prosecutors at sentencing have often called upon courts to pass deterrent sentences. In the light of the fact that in some of the cases the accused were convicted of offences that attracted the death penalty as the ultimate sentence, courts have tended to regard life imprisonment as a lenient sentence.

107. See, J.D. Mujuzi, *International Human Rights Law and Foreign Case Law in Interpreting Constitutional Rights: The Supreme Court of Uganda and the Death Penalty Question*, 9 AFR. HUM. RTS L. J. (2009).

108. For example, in *Akampulira Samuel v. Uganda* (Criminal Appeal No. 209 of 2003)[2006]UGCA 12 (3 February 2006), the appellant was convicted of defilement and sentenced to six years' imprisonment. In dismissing the appeal against the sentence, the Court of Appeal held that '[t]he appellant is supposed to learn something while in prison if he is capable of doing so.'