

# A COMPARATIVE ANALYSIS OF THE DEATH PENALTY APPLICABLE LAWS

*Written by Stephen Anditi*

*Advocate, High Court of Kenya, Nairobi, Kenya*

---

## ABSTRACT

For a long time, the debate surrounding the pertinent issues of the death penalty has become a longstanding matter in the legal circles even to the present day. There are various justifications for the recourse to the death penalty sentence. The primary reasons include that the death penalty acts as a deterrent, it meets the retribution criteria, and that there is an increased public demand for its infliction. On the contrary, there are arguments against the death penalty. The primary reason for its opposition is that it is against human rights. The current global situation portrays Africa as being among the regions of the world where death penalty is rife. Most African nations still have death penalty in their Penal Codes despite there being an emerging trend within the international human rights standards that advocate for its abolition. Moreover, the African Charter on Human and Peoples' Rights does not mention death penalty. In Africa, the death penalty is thus an issue that necessitates more concern among law practitioners and citizens alike. Introspectively, this study examines the global, regional, and national matters pertaining the death penalty from a human rights perspective.

**Key words:** capital punishment, cruel, death penalty, infliction, degrading punishment, inhuman, human rights, fair trial, retribution, right to life, torture, execution, punishment, life imprisonment

## DEATH PENALTY FROM AN INTERNATIONAL PERSPECTIVE

### THE UNITED STATES OF AMERICA

Most states in the United States of America (the U.S.) still uphold the death penalty in their statutes for various offences. Nevertheless, the Federal law contains the death penalty. *The Violent Crime Control and Law Enforcement Act of 1994* is a federal law. The Act prescribes a death penalty for sixty crimes. The death sentence has faced constitutional challenges despite there being the stipulations as stated above. On the contrary, the Supreme Court has from time to time altered the law pertaining to the death penalty in spite of the country's robust jurisprudence. The debate regarding the constitutionality of the death penalty is hinged on the US Constitution's Eight Amendment that safeguards against unusual cruel punishment by providing for non-imposition of excessive bails and fines as well as the non-infliction of unusual cruel punishments.

The challenges on Constitutional validity of America's capital sentencing laws were significantly seen as from 1972. An examination of *Furman versus Georgia* case highlights the onset of the challenges. Furman, Jackson, and Branch were convicted on various cases had applied for an order of certiorari in the US Supreme Court. Furman had been sentenced to death for rape in Georgia State while Jackson and Branch were sentenced for murder in Texas. They all sought to have their judgments reviewed through a writ of certiorari to the Supreme Court. Their argument was that it was illegal for the State Supreme Courts to impose death sentences on them by pleading the Eight Amendment clause. The statutes that they sought to challenge provided discretionary powers to the jury to determine whether or not they could apply the death penalty when sentencing those before them. The petitioners were people of colour and their respective Supreme Courts confirmed their sentences. When the appeal was determined, the Supreme Court, in a 5-4 decision overturned the death sentences of Furman, Jackson, and Branch. The issue before the court was whether it was an unusual cruel punishment to impose and execute the death penalty under the applicable state laws. The Supreme Court, while reversing the judgments, upheld that indeed the imposition of the death penalty would be in violation of the Eight and Fourteenth Amendments. Essentially, the application of the death

penalty was discretionary, discriminatory, and haphazard due to its infliction on a small number of total possible cases and fundamentally against particular minority groups.

The *Furman decision (supra)* birthed a common belief that the death penalty had been deemed as unconstitutional. However, it ought to be noted that the fundamental upholding in that particular case was concerned only with the statutes providing for whimsical discretion to the jury over capital sentencing and not that the death penalty on its own accord was unconstitutional. The *Furman decision (supra)* also led to the emergence of numerous legislative sequels by States that attempted to correct the unconstitutionality and deficiencies of jury discretion that had been deemed as unguided when engaging in capital sentencing. Consequently, 35 States altered their death penalty statutes by seeking provisions for limitation of jury discretion when providing sentencing guidelines for the judge and jury. Georgia State was the first to constitute such a legislation. Essentially, the statute provided for a bifurcated trial whereby the determination of innocence and the sentence were done separately. After proving that an individual was guilty, there were additional guidelines that provided for the mitigation or aggravation factors that were imperative in guiding the jury in determining the sentence. The findings of the jury were then followed by a review conducted by the State Supreme Court that compared each death sentence with the sentences imposed on defendants with similar case scenarios to ensure that the death sentence in a particular case was not disproportionate.

In *Gregg versus Georgia* <sup>2</sup> Troy Gregg, who hailed from Georgia State, was charged with armed robbery and murder. Georgia's procedure for capital cases provided for the trial to contain two stages, namely, the guilt stage and penalty stage. At the guilt stage, Gregg was found guilty of two counts of armed robbery and two counts of murder. At the penalty stage, the jury was instructed by the trial judge to either recommend a death sentence or a life imprisonment on each count. It is worth noting that both the guilt stage and the penalty stage took place before the same jury. The jury's verdict was death on each count. There was an appeal and Georgia's Supreme Court upheld what had been determined on both the guilt and penalty stage. However, the Court vacated the death sentence on armed robbery. The reason for the vacation was that as a state, Georgia had rarely imposed the death penalty on armed

robbery. Ultimately, the matter was proceeded to the Supreme Court of the United States. At the US Supreme Court, the question to be determined was whether capital punishment was in violation of the provisions of the Eight Amendment. The verdict was that it did not violate because capital punishment is in accordance with the modern standards of decency, and that it could act as a deterrent or retribution that does not disregard humanity and man's dignity; and that under the challenge on Georgian law, capital punishment was no longer arbitrarily applied. The Supreme Court addressed the death penalty's constitutionality on the outset that even though Furman's case addressed the issue, the Court failed to resolve it. In essence, four Justices would have upheld that capital punishment is unconstitutional on its own accord; two Justices would have deemed it constitutional; and three Justices would have let the matter be open to further queries regarding whether such punishment would ever be applied again on the premise that the statutes before the Court had been invalid as determined. Consequently, the Supreme Court held that the death penalty does not invariably violate the Constitution.

Furthermore, the court determined that since the 19<sup>th</sup> Century, a significant proportion of America's society deemed the death penalty as being a relevant criminal sanction owing to the fact that 35 States had passed the legislation upholding the death sentence for some crimes since the determination of Furman's decision. The Court highlighted how the Federal government had upheld a similar initiative. However, the Court warned that popular opinion was not a primary parameter in determining the constitutionality of a particular punishment. Essentially, the determination ought to be founded on the ascertainment that, "*it comports with the basic concepts of dignity at the core of the Eighth Amendment.*"

In the opinion of Justice Stewart, the Georgian Court statute defended the legislative intent and justification by upholding that in aggregate, the Court was in no position to state Georgia's Legislature judgment that the need for capital capital punishment in some cases may be necessarily wrong. The State Court's conclusion regarding the infliction of the death sentence as a punishment for murder is founded on the consideration for federalism, the respect for legislative ability to evaluate the moral consensus regarding the death penalty, and the absence of additional implicating evidence. Introspectively, the State Court upheld that a death as a punishment for murder is justified as not being unconstitutionally severe.

As to whether death penalty is a disproportionate punishment in relation to the crime against which it is imposed, the Court upheld that the irrevocability and severity of the death penalty regarding its uniqueness is unquestionable. In the event that the defendant's life is at stake, the Court is mandated to assure the observation of every safeguard. However, the consideration of the death penalty regarding the matter at hand is the imposition of the capital punishment for murder. In a scenario whereby the offender has taken life deliberately, the punishment cannot be said to be invariably disproportionate to the crime committed. The Court further held that the death penalty was not a form of punishment that may never be imposed in future irrespective of the circumstances of the offense, the offender's character, and the procedure observed in the imposition of the penalty.

In dissent, Justice Brennan objected the decision arrived at by the majority on the basis that capital punishment was morally intolerable in a civilized society. In essence, the motive for applying capital punishment for retribution was against human dignity and that the punishment was excessive yet there existed other less severe punishments that would achieve the same penological goal.

Justice Thurgood Marshall also objected the majority's decision based on the premise that death penalty was invalid based on its excesses as outlined in the Eight Amendment. Moreover, he opposed the majority's view regarding the death penalty as being a hindrance measure to prevent further crimes and the penalty's retributive goal.

Introspectively, the Court upheld the constitutionality of the death penalty as based on the Eight Amendment. Gregg's case expounded on Furman decision (supra), which invalidated the penalty statutes of Georgia and Texas states. In Gregg's case, the majority determined that the death penalty on its own accord was not unconstitutional; rather, states had the option of drafting statutory provisions just like how Georgia had done, as a means of guiding the jury's decision regarding the infliction of the death penalty.

## **INDIA**

India's legal system contains the death penalty as enshrined in Section 302 of the country's Penal Code. Essentially, the Code contains provision for death or life imprisonment for a murder offense.

There has been a recent reckoning by India's Supreme Court regarding the country's Constitution recognition of the validity of the death penalty as enshrined in India's Penal Code of 1860. The reckoning is clearly articulated in *Devender Pal Singh Bhullar vs State of N.C.T of Delhi*<sup>3</sup> with the underlying justification being that India could not risk to abolish capital punishment even if it is a matter of experimentation how the society will run without it. The reason for upholding the death penalty is because the country's prevailing conditions, its citizens' social upbringing, the greater educational and moral disparity, the land mass, the nation's population diversity, and the paramount need for maintaining law and order.

The deliberation of the Devender case cited *Jagmohan Singh v State U.P*<sup>4</sup> and upheld that the Constitution permits the death penalty in the event that the judgment is passed in accordance with the procedure as established by law. Thus, the death penalty on its own accord could not be deemed unreasonable or as being against public interest.

The deliberation of *Bachan Singh v State of Punjab*<sup>5</sup> ended in a 4-1 verdict. The majority's opinion in the verdict upheld the constitutionality of section 302 of the Indian Penal Code that provides for the death penalty or life imprisonment for a murder offence. The deliberation was such that section 302 was being considered as a breach to Article 21 of the Indian Constitution of 1949 which outlines that no being shall be deprived of their life, except by law. While delivering the verdict, the Judge observed that there were various initiatives in India that championed for the necessity of capital punishment. Thus, the abolition would not be advantageous. Additionally, he stated that there had been amendments to the Code of Criminal Procedure in 1973 by the Indian Parliament that led to the insertion of sections 235(2) and 354(3) that pertained to the pre-sentence hearing and sentencing procedure for the conviction of capital offences and murder. Hence, section 302 of the Indian Penal Code that provided for death penalty as an alternative punishment for murder violated neither the letter nor Article 19 of the Constitution that protected particular rights.

On the contrary, the Supreme Court in deliberating on *Mithu versus State of Punjab*<sup>6</sup>, outlawed section 303 of the India Penal Code by terming it unconstitutional. The grounds for the unconstitutionality were that unreasonableness and arbitrary as well as authorizing the deprivation of life by a means regarded as unfair and unjust. Essentially, section 303 made it mandatory for a death penalty to be accorded to those who committed murder while under life imprisonment.

A distinction made between **Mithu case** and **Bachan Singh case** reveals that majority of the interpreters regard section 302 of the Indian Penal Code as being valid based on three primary reasons. Firstly, the death sentence as provided for in section 302 is an alternative to the life imprisonment sentence; secondly, that special reasons have to be outlined as under section 354 (3) – Criminal Procedure Code in the event that the normal rule is disregarded and the death sentence ought to be imposed; and thirdly, section 235 (2) of the Criminal Procedure Code entitles the accuser to be heard in matters pertaining to the sentence query. On the **Bachan Singh (supra) case**, the Court upheld, therefore, that the death sentence is constitutional in the event that it is prescribed as an alternative sentence for the offence of murder and when the conventional sentence prescribed by law for murder is imprisonment for life.

The fundamental difference between provisions of section 302 and section 303 of the Indian Penal Code, the deliberation of **Bachan Singh (supra)** could not govern the question pertaining to section 303's validity. The reason for the non-governance was that even though section 302 provides for death sentence as an alternative sentence to life imprisonment, the only sentence as prescribed by section 303 provided for death sentence. The same frame of reasoning is observed in Chinnapa's concurring explanation of **Bachan Singh (supra)** case that upheld section 302's validity based on the fact that a life imprisonment sentence and not a death penalty was the punishment for murder while the death sentence was an alternative that would be considered in the event of most exceptional cases. The discretion to issue or not issue the death penalty was granted to the judge.

The above examined case laws prove that India has retained death penalty in its statute books. However, the imposition of the sentence is subject to judicial discretion as provided by the law in the country's Criminal Procedure Code.

## DEATH PENALTY FROM A REGIONAL PERSPECTIVE

### UGANDA

In Uganda, it is deemed as unconstitutional for the compulsory application of the death penalty. The case that led to this consideration was *Susan Kigula & 416 others v Attorney General, Constitutional Petition*<sup>7</sup> whereby the Constitutional court deemed death sentence unconstitutional due to its prevention of the judge from considering mitigating scenarios. An appeal to the Supreme Court led to the upholding of the decision that a trial does not warrant the halting of conviction of an individual. Essentially, the sentencing process is included in the trial because the court considers the evidence, and the circumstances and nature of the case to determine the relevant sentence. The law makes this clear in providing for a maximum sentence. Consequently, the court exercises its role as an impartial tribunal when trying and sentencing an individual. However, the court is prevented from exercising this role when the sentence is already preordained by the legislature in instances such as capital cases. Thus, in the court's view, the above scenarios constitute the principle of fair trial. The court then proceeded to state that they were of the view that the Justice of the Constitutional court had properly addressed the matter regarding the death penalty and made the right decision. Therefore, the court was in agreement with the Constitutional court that there was an inconsistency regarding the laws and statutes providing for mandatory death sentence and the country's Constitution, and thus the laws and statutes were void to the extent of such inconsistency.

However, the Constitution of Uganda permits death penalty as enshrined in Article 22(1) whereby it states that no person shall be deprived of their life intentionally, except on grounds that the sentence was upheld in a fair trial by a court that is competent enough to pass such judgment with respect to a criminal offence as enshrined in the Uganda's laws and that the conviction and the sentence had been confirmed by the highest appellate court.

Notably, Article 24 of the Constitution of Uganda is a replica of the Kenyan position as enshrined in article 29 (f), while Article 44 of the Ugandan Constitution is similar to Article 25



of the Kenyan Constitution which provides for the enjoyment of rights and freedoms by the Ugandan citizens of freedom from inhumane, cruel, torture, or any punishment or degrading treatment; freedom from servitude or slavery; the right to an order of habeas corpus; and the right to fair hearing.

The High Court in arriving at a conclusion that death penalty under the Ugandan Constitution is constitutionally protected noted that the right to life under Article 22(1) is not unqualified neither was it protected by Article 44. This was endorsed by the Supreme Court on appeal. The settled law in Uganda, therefore is that a death penalty sentence can only be conducted under a law that accords a judge discretion to consider other circumstances relating to the offence, and which are material in guiding a relevant sentence, of death or any other. Uganda prefers the approach whereby the requirement of mitigating or aggravating circumstances acts as a guide to a tribunal in trying and sentencing a person to death. Also worthy of note is that the Supreme Court determined that a death sentence that is not enforced within three years is automatically commuted to the life sentence.

## TANZANIA

Tanzania's Penal Code in Section 197 provides that any individual convicted of murder shall be sentenced to death. However, the section exempts expectant women and any individual below the age of eighteen. Proceedings pertaining to the death penalty in Tanzania are seen whereby initially, the High Court determined in the case involving *Republic versus Mbushu alias Dominic Mnyaroje and Kalai Sangula*<sup>7</sup> that the death penalty violated the Tanzanian Constitution. What led to the ruling was that the penalty was considered cruel, degrading, and inhuman treatment or punishment. Nevertheless, it offended the right to man's dignity. Justice Mwalusanya, determined that the imposition of the death penalty was against Article 30(2) of the Constitution owing to the fact that it was unlawful and against the public interest. In making the rule, the Justice based his determination on factors such as "erroneous convictions," which implied that "a life imprisonment sentence would accord the same end goal of justice just like the death sentence," and that "the mode of execution, delays in effecting the executions, and

inhumane confinement conditions of death row convicts made the death sentence an antithesis to the interest of the public.”

On appeal, the Court of Appeal (**Mbushu v Republic**) agreed that capital punishment was cruel, degrading, and inhuman. Additionally, it determined that its execution would be in offence of human dignity. Nevertheless, there was no conclusive justification regarding its effectiveness and thus the final recourse regarding its necessity would be laid upon the citizens. The appellate court determined that the imposition of the sentence was lawful, not arbitrary thus constitutional.

It observed that the penalty was saved by Article 30 (2) of the Constitution of Tanzania, which provides for derogation from fundamental rights in the public interest. Although Tanzania retains the death penalty, in capital offenses such as murder, treason, and military related offences it has a *de facto* moratorium on executions since 1994. Despite this moratorium, the government has remained undecided on the issue of abolishing the death penalty.

## **BOTSWANA**

The Constitution of Botswana permits death sentence as enshrined in Article 4 (1) which states that no individual shall be deprived of their life intentionally except for scenarios requiring the execution of the Court sentence pertaining to an offence under the Botswana’s laws of which the individual is convicted of.

Section 4 of the Botswana Constitution is not the only section that makes provision for the death penalty. Sections 203(1) murder, 34(1) treason and 63(2) murder committed in the process of piracy recognizes death penalty under Penal Code. However the imposition of this sentence has limitations. Under section 203(2) a court has discretion to mete out any sentence other than death after hearing extenuating circumstances. Under section 203 (3) the court, while exercising this mandate is required to take into account standards of behavior of an ordinary person of the class of community to which the convicted person belongs.

The constitutionality of the death penalty was challenged in *Ntesang v The State*<sup>8</sup> whereby the trial judge determined that the appellant was guilty of murder and thus was convicted. Afterwards, the appellant was accorded the opportunity to submit the evidence outlining the mitigating factors in his case. Additionally, the circumstances surrounding the case would subject it to be regarded within the provisions of Section 203(2) of the Penal Code. The final judgment was that the Appellant was sentenced to death by hanging having there being factors that justified the sentence in his case. The appellant filed an appeal at Botswana's highest appellate Court on grounds that the death penalty was barbaric, archaic, and primal and raised concerning hanging as a form of executing the sentence, which he explained that it amounted to torture in addition to degradation and inhumanity. In urging the Court to accord comprehensive meaning to Section 4 (1) of the Constitution, the appellant argued that the Article provided for the right to life and that an individual could not be deprived of their life intentionally. However, in upholding the constitutionality of the death sentence, the Court of Appeal upheld that in the case (*Ntesang versus The State*), not only did the appellant ask the Court to isolate one provision and interpret it in its own accord but he also required of them to segregate the provision and divide it into two and furthermore refuse to accord an effect to one of the two parts of the divided provision. In the Court's view, they could not consider the appeal and thus the words of section 4 (1) ought to have been granted their full effect.

The court dismissed the appellant's claim and thus contented that death sentence by hanging violated the provisions against inhumanity, torture, and degrading treatment, and punishment against section 7 (1) of the Constitution. In its contention, the court cited that subsection 2 and remarked that despite there being a consideration of the death penalty as being inhumane, torturous, and degrading, it ought to be understood that Section 7 (2) reserves the sentence.

In another case *Lehlohonolo Bernard Kobedi v The State Court of Appeal*<sup>9</sup> the Applicant, a national of South Africa, had been convicted of *inter alia*, murder and sentenced to death. He appealed to the Court of Appeal which in turn dismissed the appeal and confirmed the conviction. However nine months and eighteen days lapsed while he was on death row and moved to the High Court challenging the execution of the death sentence in his matter on grounds that it would be in violation of the provisions of section 7 of the Constitution which

prohibits inhuman and degrading punishment or treatment by reason of delay. The Applicant being dissatisfied with the decision of the High Court appealed to the Court of Appeal on multiple grounds including:

- i. That sections 203(1) (2) and (3) of the Penal Code, which prescribed an obligatory sentence of death if no extenuating circumstances are present are unconstitutional in that they contravene the provisions of Section 3, Section 4 (1), Section 7(1) and Section 10(1) of the Constitution.
- ii. That section 26(1) of the Penal Code, which provides for the method of execution of the death sentence by hanging, is unconstitutional in that it contravenes Sections 7(1) of the Constitution which prohibits the imposition of inhuman and degrading punishment.
- iii. That his execution by hanging would be inhuman and degrading having regard to his physical health and mental state and the delay since the death sentence was imposed in October 1998.

The court endorsed the decision in *Ntesang v State (supra)* stating that the death sentence and its method of carrying it out are part of, and are enshrined in, the Constitution by Section 4 (1) and therefore cannot be said to be *ultra vires* it. In relation to the method of execution, the Court reaffirmed its decision in *Ntesang v The State* and held that the sentence of death by hanging was saved by section 7(2) of the Constitution.

In Botswana, therefore, sentencing of a convict is therefore guided by laid down legal procedures in their laws thus the issue of mandatory death sentence does not arise. Further death sentence is expressly recognized by article 4 (1) and 7(2) of the Constitution.

## **THE KENYAN PERSPECTIVE**

Kenya inflicts the death penalty on offences such as murder, robbery with violence, and treason as enshrined in the Penal Code. Section 204 provides that the death penalty is the only punishment for an offence of murder. Relevant excerpts of judicial pronouncements follow.

*Republic vs Patrick Lumonje Obote*<sup>10</sup> (Mshila J): “This court is persuaded that the death penalty which is the only sentence provided for the offence of murder, goes against the letter

and spirit of the Constitution. This court holds the opinion that the death penalty is the ultimate denial of a human right and violates the fundamental right to life.”

Another bench of the High Court differed with Lady Justice Mshila in *Hamisi Said Bakari & Anor V R H.C Mombasa*,<sup>11</sup> (Odero & Tuiyott, JJ) The appellants were each sentenced to death. That sentence is, without doubt, lawful. Yet it is not lost on us that no actual violence was used on the victim and that the appellants were first offenders. We are also persuaded that the decision in *Godfrey Ngotho Mutiso versus Republic*<sup>12</sup> would apply to punishment for offenders under Section 296(2) of The Penal Code. For these reasons we hereby set aside the death sentence and impose a jail term of 20 years for each appellant to run from the date of conviction, that is 31st February, 2008.

In *Godfrey Ngotho Mutiso versus R (supra)* it was determined that even though the Constitution is in acknowledgment of death penalty as being unlawful, there is the lack of a provision that in the event that murder conviction is recognized that the court will inflict a death sentence. The court’s assessment regarding the case concluded that the provision for mandatory death sentence as enshrined in section 204 of the Penal Code was antithetical to the Constitution’s provision on protection against degrading inhumane punishment. Essentially the extent to which section 204 provided for the death penalty as the only sentence for punishing murder had been inconsistent with the spirit of the Kenyan Constitution. The judgment regarding the case was confined to sentences regarding murder cases based on what was before the court and the Attorney General’s concession. The court doubted if there would have been any arguments arising concerning other capital offences in the Penal Code such as treason as contained in section 40 (3), robbery with violence in section 296 (2). The court’s arguments as based on section 203 and section 204 would apply to the case in the event that the court failed to make a conclusive determination based on the other sections.

Instructively, it is to be recognized that all these decisions were determining the validity of section 204 against section 77(1) of Kenya’s repealed Constitution of 1969. essentially, the section provided that an individual could not be deprived of their live except for situation involving sentences for a criminal offence under Kenya’s laws. The *Ngotho case (supra)* placed reliance on section 74(2) a proviso to section 74(1) against cruel or inhuman

punishment. Section 74(2) permitted such cruel or inhuman punishment for as long as they were recognized by law prior to 11<sup>th</sup> December, 1963.

In our instant, circumstances surrounding the case before the Court of Appeal then and the matter before this Court are by all means different. While the *Ngotho case (supra)* was determined under the repealed constitution, this Petition has been brought under the 2010 Constitution which embodies novel constitutional principles radically dissimilar to the 1969 Constitution. The 1969 Constitution permitted cruel and inhuman treatment under section 74(2) while the 2010 Constitution makes it non-derogable through freedoms from inhuman or degrading treatment, cruel, and torture. This is the legal context in which the Court of Appeal's decision should be viewed, notwithstanding that it declared section 204 unconstitutional. The rationale that informed the appellate court's decision appears to be that in its mandatory terms, section 204 violated the Constitution in so far as it does not accord judicial discretion to a judge to determine whether there are other factors in mitigation necessary for meting out lessor offences other than death. The Court regarded the mandatory nature of the death penalty as enshrined in section 204 curtailed the right of an individual to a fair hearing.

## **WHETHER DEATH SENTENCE IS CRUEL, INHUMAN OR DEGRADING PUNISHMENT OR TREATMENT**

The Constitution does not define the meaning of cruel, degrading, or inhuman punishment, implying that, in its interpretive role some meaning must be ascribed to these words by the Court. In doing so, we are cognizant of the rules relating to constitutional interpretation as contained *in the Matter of The Principle of Gender Representation In The National Assembly and the Senate*<sup>13</sup> where the court grappling with this issue stated in the majority opinion there was a need for perceiving particular provisions of the Kenyan Constitution through the lens of variability, as well as openness regarding the much needed public actions. The examination of various Constitutions highlights that they comprise of various expression modes and written in different styles. For instance, some are largely minimalist and legalistic on matters pertaining to public commitment and exclusive safeguards. However, Kenya's Constitution blends the minimalist and legalistic approach with the declarations of policy statements and abstract

principles. It is worth noting that the declarations and principles denote a culture, an ethos, a political environment, and a value system within which the citizens aim at conducting their activities as well as interact with those around them and their public institutions. In scenarios whereby the Constitution blends its terms, the majority ascertained that the Court of law needed to approach the interpretation of the provisions with an open mind. In such a scenario, the court is inclined to favour interpretations that ascertain the development of both the policy declarations and prescribed norms, and there is a need for caution to avoid instances whereby one substitutes the other. In the Court's opinion, the interpretation of the norm in question ought to be perceived in a way that would contribute to the portrayal and growth of the relevant principle, while the principle in question needs to favor content clarification and the norm's elements.

In the minority opinion per Mutunga CJ delivered himself thus the Supreme Court is obligated and would remain the exclusive custodian of the Constitution. These article form a basis on which the Supreme Court bases its interpretation of the Constitution. As a guide, the approach ought to promote the aspirations and dreams of Kenyans, purposive, while simultaneously being in accordance to Constitutional provisions.

What constitutes cruel, inhuman and degrading punishment can only be derived from a wholesome, objective and purposive interpretation of the Constitution, its norms, principles and declared policy. In the case involving the *State versus T Makwanyane and M Mchunu*<sup>14</sup> Chaskalson P in determination of what constituted inhuman, cruel, and degrading punishment in the context of the South African Constitution as enshrined in Article 11 (2) said that the Kenyan Constitution of 2010 acknowledges the mode of punishment in a death sentence as being lawful and as justified by constitutional validity despite there being perceptions that the sentence is inhumane, cruel, and degrading. In determining the validity of the sentence, there is a need for highlighting Article 26 of the Constitution which provides that every individual has the right to life, their life begins at conception, the individual shall not be deprived of life intentionally save for the extent to which such deprivation is authorized by the Constitution or any other written law, and that abortion is impermissible except as based on a trained health

professional's opinion in emergency treatment scenarios, life-and-death situations involving the mother, or when permitted by any other written law.

The Ugandan High Court in a decision adopted by Supreme Court in the **Kigula case (Supra)** came to the same conclusion that the right to life can be limited under the Constitution and that death penalty under Article 22(1) recognizes death penalty as an exception to the enjoyment of the right to life. The Court was of the opinion that the Kenyan formulation leaves little doubt that the Constitutional guarantee of right to life is indeed subject to limitation. To that end Parliament has been conferred the duty to make legislation for purposes of limiting the enjoyment of the right to life. Further, this "right to life" is not amongst the non-derogable rights provided for under Article 25 of the Constitution which outlines that individuals will be accorded the enjoyment of rights and freedoms by the Ugandan citizens of freedom from inhumane, cruel, torture, or any punishment or degrading treatment; freedom from servitude or slavery; the right to an order of habeas corpus; and the right to fair hearing in spite of the existence of any other provision within the Constitution.

The above notwithstanding, the constitutional formulation as regards limitation of rights to life is illuminated by Article 24. Article 24 (1) provides that a right or fundamental freedom shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors. The relevant factors enumerated include the nature of the right or freedom, the importance or purpose of limitation, the nature and extent of limitation and the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and freedoms of others.

Though the Penal Code was enacted by parliament prior to the adoption of the Constitution of Kenya, 2010 to the extent that it impacts on the enjoyment of an entrenched right in the Bill of Rights, by implication it is deemed to be a limitation to the enjoyment of a right or freedom. The Petitioner contends that the death sentence passed against him violates his rights under the Bill of Rights because it is inhuman, cruel and degrading therefore unconstitutional.



Considered as a limitation on the right to life, section 204 therefore elicits some pertinent questions founded on and informed by the confines of Article 24 of the Constitution.

1. Is the limitation reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all the relevant factors?
2. Does limitation contemplated by section 204 of the Penal Code derogate from the core or essential content of the right?

Although Article 24 is broad and elaborate dealing with general questions of right limitation, our consideration of its entire clauses concludes with the two questions above as most relevant in resolving the issue at hand.

The Canadian case Court in *R v Oakes* (1986) 1 S.C.R 103,<sup>15</sup> a Supreme Court decision propounded a test to be applied in ascertaining justifiability of limitation of rights and fundamental freedoms. In this case the Canadian Supreme court was called upon to determine whether section 8 of Narcotic Control Act was Constitutional. That section provided that if the Court finds the accused in possession of a narcotic, the accused was presumed to be in possession for the purpose of trafficking and that, absent the accused's establishing the contrary, he must be convicted of trafficking. The Ontario Court of Appeal found that this reverse onus was unconstitutional contrary to section 11 (d) of the Canadian Charter of Rights and Freedom on presumption of innocence. On appeal, the Supreme Court, in a unanimous decision proffered a two-stage test to be applied in addressing a question as to the justifiability of rights limitation under article 1.

**The OAKES TEST** requires that two basic criteria are satisfied in establishing that a limit is demonstrably justified and reasonable in a free democratic society. First, the objective to be served by the measures constraining a Charter right must meet a threshold that warrants overriding a right or freedom that is protected in the Constitution. Moreover, the objective must focus on the pressing concerns of a free democratic society before being regarded as sufficiently important. Secondly, the party that invokes Section 1 is charged with the responsibility of portraying a conduct worthy of being demonstrably and reasonably justified. Meeting this criterion entails the satisfaction of three components of the proportionality test,

namely, fairness and not arbitrary, little impairment of the right in question, and the existence of a proportionality between the objective and the consequences of the limiting measure.

From the test laid above, we think that the Supreme Court of Canada had the following conceived view: The reason for limiting the Charter right must be shown to be important enough to justify overriding a constitutionally protected right. The measure carried out to limit the right must be reasonable and logically connected to the objective for which it was enacted. The right must be limited as little as possible. The more severe the rights limitation, the more important the objective must be.

Put another way, and guided by the Oakes test which we find persuasive, it is our view that the limitation of any fundamental right or freedom must be prescribed by the Constitution or law enacted by parliament. Where questions as to unconstitutionality of a provision of a law arises, the court, to uphold its constitutionality, must be satisfied that the objective of that law is pressing and substantial in the best interest and welfare of the public.

Further, Parliament in achieving its legislative objectives, must be seen to have chosen proportional, or relative ways, to achieve those objectives. The limitation of the right must be rationally connected to the objective of the law in question which implies that any limitation to a right cannot be arbitrary, or unconnected to the purpose of the law. In order for a government action that infringes on rights to be permissible, the right must be infringed to as little a degree as possible. If alternative means of achieving the legislative objective are available, with less impairment on a right, the government must do so.

The court must also be satisfied that the limit on the right is proportional to the importance of that law's purpose. It must also be certain that the benefits of that law are greater than any negative effects produced by a limitation on a right. The Oakes test is an important parameter in the determination of the question as to whether section 204 is a justifiable limitation of the right to life under Articles 24 and 26 of the Kenyan Constitution.

Also relevant is the case of *REYES V THE QUEEN*<sup>16</sup> at *paragraph* 26 where the Court comprehended Constitutional interpretation as in the prevailing scenario that law had been regarded as being incompatible with the right for Constitutional protection, the Court

considered its duty as that of providing an interpretation. In the event that there is an issue pertaining to the enacted law, the Court is mandated to prioritize the resolution of the issue. Thereafter, the Court should proceed with interpreting the Constitution to determine the compatibility of the enacted law.

Past rulings across the globe have provided fundamental guidance regarding the relevant approach that Courts ought to adopt when engaging in Constitutional interpretation. As an imperative regarding the interpretation of any other instrument, the Court must first consider the language used in the Constitution when interpreting the provisions and statutes contained therein. However, such consideration ought not to follow the conditions followed when interpreting the language found in a deed, a will, or a charter party. An intentional interpretation is necessary when considering the constitutional provisions for the protection of human rights. Thus, the Court is not licensed to read its own predilections and moral values into the Constitution. However, the Court is obligated to consider the weight of the basic right at issue and guarantee fundamental protection of that right in light of evolving decency standards that act as an indicator of a maturing society.

In the Court's view, and guided by the *Oakes test*, they were of the view that the Court ought to address the following pertinent questions necessary for addressing whether section 204 is a justifiable limitation to the right to life under article 24 and 26: What pressing and substantial objectives in the interest of the public are germane to death penalty under section 204 of the Penal Code? What is the rational nexus between that objective and the Penal Code or its provision in question? Is the administration of death penalty devoid of any blemishes of arbitrariness? Can't the state exploit other options with less severity on one's life or its dignity? Has the government in executing its penological objectives experimented with these options and what proofs can be availed? Can it be shown what delicate balance, between adverse and beneficial attributes are fostered in the administration of death sentence in Kenya? **(These questions can be answered satisfactorily upon hearing position of the Attorney General)**

## **ARGUMENTS FOR THE DEATH PENALTY**

- We are alive to the fact that in a large sense, capital punishment is the ultimate warning against all crimes. It is arguable that many criminals who ride the fence on committing murder ultimately spare the victim's life if they know that when caught they face the death penalty.
- The death penalty can be argued to be a form of retribution. It can be said that all guilty people deserve to be punished and that the punishment should be in proportion to the severity of the crime. As such, the death penalty is seen to be a fitting punishment for the crime of murder. Society's cry for justice for victims of murder is heard. Justice demands that courts should impose punishment befitting the crime so that the courts reflect the public abhorrence of the crime of murder.
- Even though capital punishment has no deterrent effect, by failing to mete out the death penalty for the crime of murder, the judicial system will have allowed the killing of innocent victims.
- The recurrence of the crime of murder by the same perpetrator becomes non-existence.

## **ARGUMENTS AGAINST THE DEATH PENALTY**

The foregoing notwithstanding, we opine that the death sentence:

- Is irreversible and there is always the possibility that innocents might be subjected to it. Also, sometimes it is indeed possible to rehabilitate the criminal. If the death penalty is carried out, the person is taught precisely nothing as they are no longer alive to learn from it. Judicial notice must be taken that in Kenya the death sentence is rarely implemented.
- Has not been truly proven to deter criminals; a law is only as good as its functionality. In fact there is startling evidence to the contrary. Canada, 27 years after abolishing the death penalty, saw a 44% drop of murders across the country.
- There is no „humane way“ to kill. Further, don't the modes of execution only perpetuate the cycle of violence?

- Is hypocritical. We reason that it is peculiar that a country would denounce the practice of murder by committing the very same act. We believe that the judicial system should demonstrate the criminality of murder by refusing to take part in it.
- Capital punishment is brutal. We strongly feel that a society that prescribes in its criminal justice systems laws that contemplate and advances death as a mode of punishment to achieve the ends of justice, whether for the victims and the convicts perpetrates brutality.
- In the Kenyan constitutional context, it violates irredeemably the constitutional imperatives and values.
- The death sentence must be opposed even when it is applied to those who have committed atrocities. That is when the adherence to human rights is tested as the measure of a civilized country is how it treats those who have committed crimes.

## **CONCLUSION AND RECOMMENDATION**

Capital punishment is something that Kenyan courts should have a consistent stance on. We are of the view that the death penalty though constitutionally protected, is cruel, inhuman, degrading and robs of human dignity. It must not be allowed to be meted out by Kenyan courts especially in light of the fact that it is rarely carried out. It only subjects the death row inmates to experience mental anguish and psychological torture. However, should the honourable justices find that there is need to retain the death sentence, perhaps they can be persuaded by the Ugandan Supreme Court's finding that a death sentence not enforced within three years can be commuted to a life sentence. Lastly, we note that in jurisdictions where the constitutionality of a mandatory death sentence has been challenged with the Courts declining to strike it out, the underlying justification has been that enabling legislations accord discretion to judicial officers to determine whether to mete the death sentence or rationally consider, on sound and lawfully set guidelines, whether other lesser sentence is appropriate. This is the jurisprudence emerging from India, the US, Botswana, Canada among others where the need for proportionality (striking the right balance) and individualized sentencing guided by aggravating or mitigating factors is the cardinal rule of thumb; a relevant fact that guided

Chaskalson P in *State v Makwanyane (Supra)* in arriving at a conclusion that death penalty in South Africa was unconstitutional.

The Court may choose this latter option by upholding the death sentence under article 24 and 26 but striking out section 204 as being arbitrary and capricious in curtailing judicial discretion and also for violating the principle of separation of powers in trial and sentencing. In doing so, like in the **Gender case advisory opinion(Supra)**, the Court should recommend a time period within which Parliament should enact a legislation retaining the death sentence as a competent alternative punishment for certain offences of extreme nature, with legislation focusing prominently in according the court wider discretionary powers in sentencing.

## ENDNOTES

1. "Furman v. Georgia (1972)." Legal Information Institute. Legal Information Institute. Accessed March 12, 2021. [https://www.law.cornell.edu/wex/furman\\_v\\_georgia\\_\(1972\)](https://www.law.cornell.edu/wex/furman_v_georgia_(1972)).
2. "Gregg v. Georgia: Capital Punishment in Context." Gregg v. Georgia | Capital Punishment in Context. Accessed March 12, 2021. <https://capitalpunishmentincontext.org/resources/casesummaries/gregg>.
3. Devender Pal Singh v. State Of Nct Of Delhi And Another." CaseMine. Accessed March 12, 2021. <https://www.casemine.com/judgement/in/5609adb6e4b01497114120ca>.
4. 1973 AIR 947, 1973 SCR (2) 541
5. 1973 AIR 947, 1973 SCR (2) 541
6. 1983 (2) Scr 690
7. Constitutional Petition-2003/) [2005] UGCC 8
8. (1994) TLR 146 (H.C.).
9. [2007] 1 B.L.R. 387,
10. (277/2003) [2011] ACHPR 81
11. Eldoret Crim Appeal No. 32 of 2007
12. **Appeal No. 238 Of 2003**
13. **Criminal Appeal 17 of 2008**
14. *Advisory Opinion No. 2 Of 2012*
15. Case No. CCT/3/94
16. [1986] 1 SCR 10
17. (2002) 2 AC p 235