GONZAGA JOURNAL OF INTERNATIONAL LAW

Volume 28 2024/2025 *Number* 1

GONZAGA UNIVERSITY
SCHOOL OF LAW
SPOKANE, WASHINGTON 99220-3528

GONZAGA JOURNAL OF INTERNATIONAL LAW

***Volume* 28** **2024/2025** ***Number* 1**

GONZAGA JOURNAL OF INTERNATIONAL LAW

Volume 28 2024/2025 *Number* 1

GONZAGA UNIVERSITY SCHOOL OF LAW
FACULTY

GONZAGA JOURNAL OF INTERNATIONAL LAW

Volume 28 2024/2025 *Number* 1

DISCLAIMER

The views expressed in the Journal belong to the individual authors alone. It is our goal to publish content from a variety of points of view. In providing this platform, the views of our authors should not be construed to be those of the Gonzaga Journal of International Law, individual editors, other authors, or the institutions with which authors are affiliated.

GONZAGA JOURNAL OF INTERNATIONAL LAW

***Volume* 28** **2024/2025** ***Number* 1**

CONTENTS

ARTICLES

MANDATORY DEATH SENTENCE STATUTES AS A THREAT TO JUDICIAL INDEPENDENCE IN AFRICAN JURISDICTIONS

*John Mukum Mbaku**

* *John Mukum Mbaku* is an Attorney and Counselor at Law (licensed in the State of Utah) and Brady Presidential Distinguished Professor of Economics & John S. Hinckley Research Fellow at Weber State University (Ogden, Utah, USA). He is also a Nonresident Senior Fellow at the Brookings Institution, Washington, D.C. He received his J.D. and Graduate Certificate in Environmental and Natural Resources Law from the S.J. Quinney College of Law at the University of Utah, where he also served as Managing Editor of the *Utah Environmental Law Review*. He received his Ph.D. in economics from the University of Georgia. This article reflects only the present considerations and views of the author, which should not be attributed to either Weber State University or the Brookings Institution.

ABSTRACT

Throughout history, the legality of the death penalty has been challenged by human rights defenders at both the international and national levels. At the national level, opponents often argue that the death penalty is inconsistent with provisions of national constitutions, particularly the bill of rights. Over the years, these human rights advocates have fought to abolish the death penalty. In 1989 the international community achieved this goal by adopting the Second Optional Protocol to the International Covenant on Civil and Political Rights. As of 2024, 112 countries have completely abolished the death penalty, and 144 countries have abolished it in law or practice. In Africa, more than half of the continent's 55 member states of the African Union have abolished the death penalty in law, 15 have placed a moratorium on executions, and 15 still retain capital punishment. Among the African countries that still retain the death penalty are those that make it mandatory for murder. Cases challenging the constitutionality of mandatory death sentences show that these laws interfere with judicial independence and the court's ability to perform its constitutional functions, including adjudicating cases and determining appropriate sentences. The protection of human rights and fundamental freedoms requires not only a democratic system undergirded by adherence to the rule of law, but also one that is equipped with an independent judiciary with constitutionally defined roles. These roles must remain unaffected or abrogated by legislative enactments, such as mandatory death penalty statutes, or executive actions.

I. INTRODUCTION

Historians believe that the first known death penalty laws date back to the 18th Century BCE in the "Code of King Hammurabi of Babylon, which codified the death penalty for 25 different crimes."[1] The death penalty was also part of the laws of many other ancient societies, including the 14th Century BCE's Hittite Code, and the 5th Century BCE's Roman Law of the Twelve Tablets.[2] During these early times, the death penalty was usually carried out by "crucifixion, drowning, beating to death, burning alive, and

1. *History of the Death Penalty*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/curriculum/high-school/about-the-death-penalty/history-of-the-death-penalty (last visited May 29, 2024).

2. *Id*.

impalement."[3] During the reign of William the Conqueror in England (c. 1028–September 9, 1087), individuals were not allowed to be hanged "or otherwise executed for any crime, except in times of war."[4] However, this approach did not last because, in the 16th Century during the reign of Henry VIII, "as many as 72,000 people are estimated to have been executed" using methods, such as "boiling, burning at the stake, hanging, beheading, and drawing and quartering."[5] At this time, offenses punishable by the death penalty included "marrying a Jew, not confessing to a crime, and treason."[6]

During the following centuries, the number of capital crimes in Britain continued to rise. By the 1700s, as many as "222 crimes were punishable by death in Britain, including stealing, cutting down a tree, and robbing a rabbit warren."[7] Juries often hesitated to convict defendants for minor offenses due to the severity of the death penalty.[8] As a consequence, during the period 1823 to 1837, "the death penalty was eliminated for over 100 of the 222 crimes punishable by death."[9]

Discussing the historical evolution of death penalty laws in the United States is crucial, as Supreme Court decisions on capital punishment significantly influence abolition efforts worldwide. In fact, the courts of many countries, including those in Africa, have drawn inspiration from and relied on these decisions to determine the constitutionality of their own death penalty laws.

The adoption of the death penalty in the United States, like other aspects of their legal system, was greatly influenced by the laws of England.[10] The British settlers who came to the colonies that would eventually become the United States brought with them legal practices, including the death penalty, that shaped the development of American law.[11] Captain George Kendall's execution in the Jamestown Colony of Virginia in 1608 for spying for Spain is considered the first death penalty case in the new American colonies.[12] Enacted in 1612, Colonial Virginia Governor Sir Thomas Dale's Divine, Moral and Martial Laws was considered the first death penalty statute in the colonies which "provided the death penalty for even minor offenses such as stealing grapes, killing chickens, and trading with Indians."[13]

In the American colonies, individuals who were against the death penalty "found support in the writings of European theorists Montesquieu, Voltaire

3. *Id*.
4. *Id*.
5. *Id*.
6. *Id*.
7. *Id*.
8. *Id*.
9. *Id. See also* SOCIETY'S FINAL SOLUTION: A HISTORY AND DISCUSSION OF THE DEATH PENALTY (Laura E. Randa ed., 1997) (providing an overview of the historical evolution of the death penalty from ancient times to the late 20th century).
10. Death Penalty Info. Ctr., *supra* note 1.
11. *Id*.
12. *Id*.
13. *Id*.

and Bentham, and English Quakers John Bellers and John Howard."[14] Historians believe, however, that it was an essay by Cesare di Beccaria (Count Cesare Bonesana, Marquis of Beccaria), titled On Crimes and Punishments, which had a significant impact on death penalty dialogue around the world.[15] John Hostettler, who has written extensively on the Marquis of Beccaria's essay, argues that this seminal work, On Crimes and Punishments (Dei Delitti e delle Pene), published in Livorno on April 12, 1764, "raised issues of human rights to the forefront of penal thinking and created a watershed in the history of criminal justice in Europe when punishments were so brutal and harsh."[16] In this essay, the Marquis of Beccaria asked the question: "What is this right whereby men presume to slaughter their fellows?"[17] Cesare di Beccaria also argued that:

> . . . laws designed to temper human conduct should not embrace a savage example which is all the more baneful when the legally sanctioned death is inflicted deliberately and ceremoniously. To me it is an absurdity that the law which expresses the common will and detests and punishes homicide should itself commit one.[18]

The first bill to reform laws regulating the death penalty in the United States was introduced by Thomas Jefferson in Virginia.[19] However, Jefferson's bill, which had proposed that the death penalty apply only to the crimes of murder and treason, was defeated by a single vote.[20] One of the signers of the Declaration of Independence, Dr. Benjamin Rush, who was also the founder of the Pennsylvania Prison Society, challenged the death penalty and the belief that it served as a deterrent to various criminal activities.[21] In fact, he believed in the "brutalization effect" and argued that the death penalty actually exacerbated criminal activities.[22] In their study of state executions and homicides in New York State from 1907 to 1963, Bowers and Pierce determined that executions by the State of New York did not deter the

14. *Id*.

15. *See, e.g*., JOHN HOSTETTLER, CESARE BECCARIA: THE GENIUS OF 'ON CRIMES AND PUNISHMENTS' (2011) (providing a critical examination of Beccaria's essay and its role in the development of jurisprudence on the death penalty).

16. *Id.* at x.

17. WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 281 (2009) (quoting CESARE BECCARIA, ON CRIME AND PUNISHMENTS).

18. William J. Bowers & Glenn L. Pierce, *Deterrence or Brutalization: What Is the Effect of Executions?* 26 CRIME & DELINQUENCY 453, 456 (1980) (quoting CESARE BECCARIA, ON CRIME AND PUNISHMENTS).

19. Death Penalty Info. Ctr., *supra* note 1.

20. *Id*.

21. *Id*.

22. *Id*. *See* Bowers & Pierce, *supra* note 18 (examining the brutalizing effect of the death penalty in New York State).

commission of capital crimes but instead had "a brutalizing effect on society by promoting rather than preventing homicides."[23]

Pennsylvania was the first U.S. state to prohibit public executions. In 1834, the Commonwealth began to officially carry out executions in correction facilities instead of in public arenas.[24] In 1846, Michigan became the first U.S. state to abolish the death penalty for all crimes, except treason,[25] becoming the first government "in the English-speaking world to abolish capital punishment for murder and lesser crimes."[26] Eventually, the states of Rhode Island and Wisconsin abolished the death penalty for all crimes and, by the end of the century, many countries around the world, including Venezuela, Portugal, The Netherlands, Costa Rica, Brazil, and Ecuador, also abolished the death penalty.[27]

Many U.S. states, however, did not follow the example set by Michigan, Rhode Island, and Wisconsin. Most of them retained their capital punishment laws, while others increased the number of crimes that qualified as capital offenses.[28] In order to make the death penalty more acceptable to their constituents, some U.S. states enacted legislation abolishing mandatory death sentencing, replacing it with "discretionary death penalty statutes."[29] During the U.S. Civil War, those opposing the death penalty were pre-occupied with abolishing slavery and, as a result, opposition to the death penalty dropped significantly.[30] After the war, many U.S. states developed new ways to carry out the death penalty and the electric chair emerged as a preferred mechanism for its executions. The State of New York introduced the first electric chair in the United States in 1888 and on August 6, 1890, it was used to execute William Kemmler for the murder of his common-law wife, Matilda "Tillie" Ziegler, becoming the first time that a state had used the electric chair to execute a person.[31]

In the 1960s, the legality of the death penalty in the United States was challenged in several court cases. Opponents of the death penalty argued that it was a "cruel and unusual" punishment and hence, was unconstitutional under the Eighth Amendment to the U.S. Constitution.[32] In *Trop v. Dulles*, a U.S. Supreme Court case from 1958, the Court held that "[T]he [Eighth]

23. Bowers & Pierce, *supra* note 18, at 468.

24. Death Penalty Info. Ctr., *supra* note 1.

25. Carrie Sharlow, *Michigan Lawyers in History: Austin Blair*, 94 MICH. BAR J., 48 (May 2015) (noting that Michigan was the first U.S. state to abolish the death penalty).

26. Eugene G. Wanger, *Michigan Constitutional History: Michigan & Capital Punishment*, 81 MICH. BAR J. 38 (Sept. 2002).

27. Death Penalty Info. Ctr., *supra* note 1.

28. *Id*.

29. *Id*.

30. *Id*.

31. *125 Years Ago, First Execution Using Electric Chair was Botched*, Death Penalty Info. Ctr. (Jun. 11, 2024), https://deathpenaltyinfo.org/125-years-ago-first-execution-using-electric-chair-was-botched.

32. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[33] Even though *Trop* was not a death penalty case, opponents of this form of punishment "applied the [U.S. Supreme] Court's logic to executions and maintained that the United States had, in fact, progressed to a point that its 'standard of decency' should no longer tolerate the death penalty."[34]

Through many cases, the U.S. Supreme Court began to take a much closer look at the constitutionality of the death penalty. In 1968, for example, the Court was called upon to decide two cases that implicated the discretion available to juries and the prosecutor in capital cases. The first of these cases was *U.S. v. Jackson*.[35] In *Jackson*, the U.S. Supreme Court heard arguments regarding a provision of the Federal Kidnapping Act, which required that the death penalty be imposed only if "the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend."[36] The Court held that the practice was unconstitutional because the statute encourages defendants to plead guilty and waive their right to a jury trial in order to avoid being sentenced to death.[37] The second case was *Witherspoon v. Illinois*, where the Supreme Court ruled that a prospective juror's reservations about capital punishment are insufficient grounds to prevent that person from serving on the jury and "making an impartial decision as to the defendant's guilt." [38]

In 1972, the arbitrariness of the death penalty was argued before the U.S. Supreme Court in *Furman v. Georgia*.[39] In this case, the Supreme Court granted limited certiorari to address the following question: "Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment and a violation of the Eighth and Fourteenth Amendments?"[40] The Court held that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[41] *Furman*'s holding effectively voided 40 death penalty statutes.[42] While separate opinions by Justices Brennan and Marshall declared the death penalty unconstitutional, "the overall holding in *Furman* was that the specific death penalty statutes were unconstitutional," which effectively "opened the door to states to rewrite their death penalty statutes to eliminate the problems cited in *Furman*."[43]

33. Trop v. Dulles, 356 U.S. 86, 101 (1958).
34. Death Penalty Info. Ctr., *supra* note 1.
35. U.S. v. Jackson, 390 U.S. 570 (1968).
36. *Jackson*, 390 U.S. at 570 (quoting 18 U.S.C. §1201(a)).
37. *Jackson*, 390 U.S. at 583.
38. Witherspoon v. Illinois, 391 U.S. 510, 513 (1968).
39. Furman v. Georgia, 408 U.S. 238 (1972).
40. *Furman*, 408 U.S. at 239 (citing *Furman v. Georgia*, 403 U.S. 952 (1971)).
41. *Furman*, 408 U.S. at 239-40.
42. Death Penalty Info. Ctr., *supra* note 1.
43. *Id*.

Shortly after *Furman*, many states engaged in efforts to enact new death penalty statutes and address the issue of "unguided jury discretion," which had been declared unconstitutional in *Furman*.[44] In addition, capital punishment advocates began to propose new statutes, which they believed would eliminate arbitrariness in the sentencing of persons convicted of capital crimes. In an effort to address the issue of unguided jury discretion, some U.S. states reformed or eliminated jury discretion from their statutes by mandating the death penalty for all capital crime convictions.[45] However, in *Woodson v. North Carolina,* the Supreme Court declared this practice unconstitutional. [46] Specifically, the Court held that "North Carolina's mandatory death sentence statute violates the Eighth and Fourteenth Amendments" of the U.S. Constitution.[47]

Some states limited jury discretion by introducing sentencing guidelines with aggravating and mitigating factors for the judge and the jury to use in deciding whether to impose a death sentence.[48] In 1976, the U.S. Supreme Court approved these guided discretion statutes in its decision in *Gregg v. Georgia*, *Jurek v. Texas*, and *Proffitt v. Florida*.[49] In these cases, which are collectively referred to as the *Gregg* decision, the Court held that the new death penalty statutes in Florida, Georgia and Texas were constitutional and hence, effectively reinstated the death penalty in these three states.[50]

So far, the discussion in this article has involved primarily the United States, whose courts have developed a robust jurisprudence on the death penalty. Many of these U.S. Supreme Court rulings have dealt, not just with the constitutionality of the death penalty, but also with related issues, such as mandatory death penalty statutes[51] and the execution of persons who claim actual innocence.[52] Meanwhile, academic researchers and civil society members have engaged in discussions regarding public support for the death penalty, with particular focus on religious groups and the impact of death penalty statutes on vulnerable populations, including women, minority groups, persons with mental and other disabilities, and children.[53] There has

44. *Id*.

45. *Id*.

46. Woodson v. North Carolina, 428 U.S. 280 (1976).

47. *Id*.

48. *See Woodson*, 428 U.S. at 314-15 (Rehnquist, J., dissenting).

49. Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976).

50. Death Penalty Info. Ctr., *supra* note 1.

51. *See, e.g.,* Furman v. Georgia, 408 U.S. 238, 240 (1972) (invalidating existing death penalty laws because they constituted cruel and unusual punishment in violation of the Eighth Amendment to the Constitution).

52. *See* Herrera v. Collins, 506 U.S. 390, 399-400 (1993) (holding that a claim of actual innocence does not entitle a petitioner to federal habeas corpus relief by way of the Eighth Amendment ban on cruel and unusual punishment).

53. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 567 (2005) (holding that it is unconstitutional to impose the death sentence for crimes committed while the defendant was

been significant discussion about whether death penalty statutes enacted after the 1972 Supreme Court ruling in *Furman v. Georgia* were able to successfully eliminate racial disparities in capital cases.[54]

The United States, of course, is not the only country whose courts have developed a significant jurisprudence on the death penalty. Courts in other parts of the world, including those in Africa, have gradually contributed to the evolving international jurisprudence on the death penalty. Most African countries inherited their present legal and judicial systems from their former colonizers. For example, the common law of England and Wales forms the foundation for the legal systems of many former British colonies in Africa (e.g., The Gambia, Ghana, Kenya, Nigeria, Sierra Leone, Tanzania, and Uganda) while the legal systems of the former French colonies are undergirded by French civil law. However, since independence, many of these former European colonies have undertaken reforms and introduced new constitutions that reflect the views of their citizens on various human rights related issues, such as the right to life, the dignity of the human person, as well as, the worldview of their citizens and how they want to be governed.[55] However, before examining the death penalty in African jurisdictions, this article will provide an overview of how the death penalty is treated in international law.

under the age of 18 years). *See also Most Americans Favor the Death Penalty Despite Concerns About Its Administration*, PEW RESEARCH CENTER (June 2, 2021) https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration/ (last visited May 30, 2024).

54. *See, e.g.*, Michael L. Radelet, *Racial Characteristics and Imposition of the Death Penalty*, 46 AM. SOCIO. REV. 918, 918, 925-926 (1981) (explaining the impact of race on the probability of a first-degree murder indictment or the imposition of the death penalty).

55. *See, e.g.*, S. AFR. CONST., 1996. The Preamble states that South Africans recognize the injustices of their past and seek to "[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights." *Id.*at Preamble. In fact, in 1994, South Africans sought to disabuse themselves of apartheid institutions, which had been designed to oppress the African majority and enhance the ability of the white minority to continue to maintain a monopoly on power. One of the earliest cases decided by the Constitutional Court of South Africa ("CCSA"), which was established by the country's Interim Constitution of 1993, was *S v. Makwanyane*, in which the Court ruled that the death penalty was unconstitutional because it violated the country's Interim Constitution and the rights to life and dignity. *S v Makwanyane and Another* 1995 (3) SA 391 (CC) (S. Afr.). The CCSA was constituted under the Interim Constitution "in the latter half of 1994 and started its first official session in February 1995." Johann Kriegler, *Speech: The Constitutional Court of South Africa, Address to Cornell University Law Students* (Oct. 25, 2002), *in* 36 CORNELL INT'L L. J. 361 (2003) (providing an overview of the evolution of the Constitution Court of South Africa). *Makwanyane* was decided on June 6, 1995. *S v Makwanyane and Another* 1995 (3) SA 391 (CC) (S. Afr.).

II. INTERNATIONAL LAW AND THE DEATH PENALTY

A. Introduction

On December 10, 1948, the U.N. adopted the Universal Declaration of Human Rights ("UDHR"), which proclaimed that "[e]veryone has the right to life, liberty and the security of person"[56] and that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[57] In 1948, when the UDHR was adopted, the death penalty was routinely carried out in Member States of the U.N. that still had statutes allowing it.[58] In addition, the death penalty was recognized at this time as "an appropriate penalty for major war criminals and was imposed by the postwar tribunals at Nuremberg and Tokyo."[59]

When the UDHR's provisions were transformed and incorporated into treaty law in various international and regional human rights instruments, "the death penalty was specifically mentioned as a form of exception to the right to life."[60] For example, the International Covenant on Civil and Political Rights ("ICCPR") allows the death penalty "for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide."[61] More than 75 years after the UDHR was adopted, "the compatibility of the death penalty with international human rights norms seems less and less certain."[62] For example, ad hoc international criminal tribunals (e.g., the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), and the International Criminal Court ("ICC")) have ruled out "the possibility of the death penalty, even for the most heinous crimes."[63] For example, the Statutes of the ICTY and ICTR mandate that "[t]he penalty imposed by the Trial Chamber shall be limited to imprisonment."[64] Additionally, the Rome Statute of the ICC restricts penalties for individuals convicted of crimes enumerated in the statute to "[i]mprisonment for a specified number of years, which may not exceed a maximum of 30 years"; or "[a] term of life imprisonment when

56. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 3 (Dec. 10, 1948) [hereinafter UDHR].

57. *Id*. at art. 5.

58. William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797, 797 (1998).

59. *Id.*

60. *Id.*

61. *See* G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966 (entered into force March 23, 1976) [hereinafter ICCPR].

62. Schabas, *supra* note 58, at 797-98.

63. *Id*. at 798.

64. S.C. Res. 827, Statute of the Int'l Tribunal for the Former Yugoslavia, art. 24, ¶ 1 (May 25, 1993); *See also* S.C. Res. 995, Statute of the Int'l Tribunal for Rwanda, art. 23, ¶ 1, (Nov. 8, 1994).

justified by the extreme gravity of the crime and the individual circumstances of the convicted person."[65]

Core international human rights instruments have been armed with additional protocols that expressly prohibit the death penalty. For example, the Second Optional Protocol to the International Covenant on Civil and Political Rights, abolishes the death penalty ("Second Protocol to the ICCPR").[66] According to Article 1 of the Second Protocol to the ICCPR, "[n]o one within the jurisdiction of a State Party to the present Protocol shall be executed" and "[e]ach State Party shall take all necessary measures to abolish the death penalty within its jurisdiction."[67] According to Amnesty International ("AI"), more than "two-thirds of the countries in the world have now abolished the death penalty in law or practice."[68]

International human rights experts argue that the abolition of capital punishment is "an important element in democratic development," particularly for States that are seeking to break "with a past characterized by terror, injustice, and repression."[69] The abolition of capital punishment can be effected either through (i) direct reference in national constitutions to international human rights instruments that prohibit the death penalty; (ii) constitutional interpretation by judges, even if the constitution makes no reference to the death penalty, especially when the constitution enshrines the right to life and prohibits cruel, inhuman, and degrading treatment or punishment; (iii) a provision in the constitution that expressly prohibits the death penalty; or (iv) a legislative act that specifically abolishes the death penalty.[70] For example, in *S v. Makwanyane and Another*, the Constitutional Court of South Africa, Chaskalson P, writing for the majority, held that laws "sanctioning capital punishment which are in force in any part of [South Africa] in terms of section 229 [of the Constitution], are declared to be

65. Rome Statute of the International Criminal Court art. 77, ¶¶ a-b (Rome, 17 July 1998) UN Doc. A/CONF.183/9 of 17 July 1998 (entered into force July 1, 2002) [hereinafter Rome Statute].

66. G.A. Res. 44/128, *Second Optional Protocol to the Int'l Covenant on Civil and Political Rights, aiming at the abolition of the death penalty abolishes the death penalty* (Dec. 15, 1989) (entered into force July 7, 1991) [hereinafter *Second Optional Protocol to the ICCPR*].

67. *Id*. art. 1 ¶¶1-2.

68. *See* Amnesty Int'l, *Abolitionist and Retentionist Countries as of July 2018,* AI Index ACT 50/6665/2017 (Oct. 23, 2018) (finding that 106 countries have abolished the death penalty for all crimes, 8 countries provide the death penalty only under exceptional crimes, and 28 countries are abolitionist in practice, retaining the death penalty for ordinary crimes but have established a practice of not carrying out any executions within the past 10 years). *Id.*

69. Schabas, *supra* note 58, at 799.

70. *See, e.g.*, S v Makwanyane and Another 1995 (3) SA 391 (CC) (demonstrating that South Africa's highest court, the Constitutional Court, abolished the death penalty); *See also* Abolition of the Death Penalty *Act* 2022, art. 1 (Sierra Leone) ("A person shall not be liable to the punishment of death for any offence committed in Sierra Leone."); CONST. REP. CÔTE D'IVOIRE, art. 3 (2016) ("The death penalty is abolished.").

inconsistent with the Constitution and, accordingly, to be invalid."[71] After reviewing death penalty jurisprudence from around the world, Justice Chaskalson concluded as follows:

> The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three [of the Interim Constitution of South Africa]. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby.[72]

In reaching its decision in *Makwanyane*, the Constitutional Court made references to the ICCPR, the European Convention on Human Rights and Fundamental Freedoms, the Canadian Charter of Rights and Freedoms, and the African Charter on Human and Peoples' Rights.[73] In addition, the Court also drew insight from and relied on case law from the Hungarian Constitutional Court, the U.S. Supreme Court, the Federal Constitutional Court of Germany, the Canadian Supreme Court, the Indian Supreme Court, and the Tanzanian Court of Appeal.[74]

According to the ICCPR, "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[75] The ICCPR's Article 6 states further that "[i]n countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of [ICCPR] and to the Convention on the Prevention and Punishment of the Crime of Genocide."[76] The ICCPR prohibits the imposition of the death penalty "for crimes committed by persons below eighteen years of age," as well as "on

71. S v Makwanyane and Another 1995 (3) SA 391, ¶ 151(1), (CC). This case was decided under the Interim or Transitional Constitution. S. AFR. (INTERIM) CONST., 1993. Section 229 deals with "continuation of existing laws." *Id.* The Interim Constitution was South Africa's fundamental law during the transitional period and served as the foundation for the country's transition from apartheid to a non-racial democratic dispensation. The Interim Constitution came into effect on April 27, 1994, to administer the country's first democratic elections. *Id.* After the April 27, 1994, general election, the Interim Constitution was repealed by the final and permanent Constitution of the Republic of South Africa. *See* S. AFR. CONST., 1996.

72. *Makwanyane,* SA 391 ¶151(1) (Chapter Three was the Bill of Rights in the Interim Constitution).

73. *Id.* ¶¶ 63, 68, 110.

74. *Id.* ¶¶ 16, 38, 59, 70,114, 154.

75. ICCPR, *supra* note 61, at art. 6(1).

76. *Id.* at art. 6 ¶. 2

pregnant women."[77] Also, Article 7 of the ICCPR declares that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[78]

The ICCPR perceives and establishes the abolition of the death penalty as an important goal for the effective protection of human rights. This is made evident in Article 6(6), which states that "[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the [ICCPR]."[79] The ICCPR's goal of abolishing the death penalty was eventually fulfilled and codified in the Second Optional Protocol to the ICCPR, which was promulgated on December 15, 1989.[80] The Second Protocol abolishes the death penalty and imposes an obligation on each State Party to "take all necessary measures to abolish the death penalty within its jurisdiction."[81]

René Cassin, who is generally considered the father of the UDHR, and Eleanor Roosevelt, who played a major role in the drafting and adoption of the UDHR, "had rejected suggestions that the [UDHR] contain a reference to capital punishment as an exception to the right to life."[82] At the time, both Cassin and Roosevelt did not believe that "international law had reached the stage of abolition [of the death penalty]," however, "they saw such a trend emerging and wanted the [UDHR] to retain its relevance for decades and perhaps centuries to come."[83] Although it is still too early to declare "the death penalty prohibited by customary international law," argues Professor Schabas, an expert on international human rights law, "it is clear that we are somewhere in the midst of such a process, indeed considerably close to the goal."[84]

International and regional human rights instruments, as well as, national constitutions, usually associate the death penalty with two important human rights norms—the right to life and the protection against cruel, inhuman, and degrading punishments.[85] Legal scholars argue that these two international human rights norms "can trace their roots to the great instruments of Anglo-American constitutional law" and that "[t]he guarantee against 'cruel and unusual punishments' was set out in the English Bill of Rights of 1689."[86]

77. *Id.* at art. 6 ¶. 5.

78. *Id*. at art. 7.

79. *Id.* at art. 6 ¶. 6.

80. *See Second Optional Protocol to the ICCPR, supra* note 66. As of 2024, 91 countries have ratified the Second Protocol, with 17 of them being African countries. *See* U.N. Treaty Series, *Status of Treaties: Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, June 6, 2024*.

81. *Id.* at art. 1, ¶¶ 1&2.

82. Schabas, *supra* note 58, at 799.

83. *Id.*

84. *Id.*

85. *See e.g.,* S v. Makwanyane 1995 (3) SA 391 (CC) paras 1–26 (S. Afr.) (examining the death penalty as closely related to the following norms: the right to life and cruel, inhumane, or degrading punishment).

86. Schabas, *supra* note 58, at 800.

The latter was designed to deal with the significant levels of cruelty and savagery that undergirded the legal system in Stuart England, which included "drawing and quartering, disemboweling while alive, and amputation."[87] Thomas Jefferson, one of America's Founding Fathers and one of the authors of the 1776 Declaration of Independence, "immortalized" the "right to life" in the country's independence declaration.[88] The second paragraph of the American Declaration of Independence states as follows: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are *Life*, Liberty and the pursuit of Happiness."[89]

However, the founders of the American Republic tacitly allowed the death penalty so long as there was due process of law, a stance later confirmed by U.S. Supreme Court decisions upholding its constitutionality under the same condition.[90] Legal scholars have noted that neither of these two fundamental human rights norms—the right to life and the protection against cruel, inhuman, and degrading punishments—"could be considered to challenge capital punishment" in the United States.[91] However, "in their more modern formulation, both of these rights have served to restrict and in some cases to prohibit the death penalty."[92]

Given the importance of these norms to the evolution of modern human rights principles, it is important to examine them in more detail. Hence, in the sub-section that follows, this article will provide an overview of these two human rights norms and how they have been treated in the major international and regional human rights instruments.

B. International and Regional Human Rights Instruments and the Right to Life

Legal scholars have noted that those who drafted the UDHR, which was adopted by the U.N. General Assembly in 1948, "looked to domestic constitutions for inspiration in preparing a document which they 'termed a common standard of achievement for all peoples and all nations.'"[93] The drafters of the UDHR were inspired by "the principles of the English Bill of Rights, the American Declaration of Independence and Bill of Rights, and the French *[Déclaration] des droits de l'homme et du citoyen [de 1789]*."[94] Among the list of international human rights that were enumerated in the

87. *Id.*

88. *Id*.

89. *See* THE DECLARATION OF INDEPENDENCE ¶ 2 (U.S. 1776) (emphasis added).

90. *See* Callins v. Collins, 510 U.S. 1141, 1141 (1994) (Scalia, J., concurring) (noting that the U.S. Constitution permits capital punishment provided there is due process of law); Gregg v. Georgia, 428 U.S. 153, 177 (1976) (noting that the Framers explicitly allowed for the death penalty with due process in the Fifth Amendment).

91. Schabas, *supra* note 58, at 800.

92. *Id.*

93. *Id.*

94. *Id*. at 800–801.

UDHR was the *right to life*, whose scope, however, had changed considerably since it was first mentioned by the American Founders in the eighteenth century.[95]

Unlike the national constitutions from which it was derived, the UDHR, however, does not "explicitly refer to the death penalty as an exception to the right to life."[96] During the drafting of the UDHR, one of the drafters, John P. Humphrey, had, in 1947 "recognized a right to life that 'can be denied only to persons who have been convicted under general law of some crime to which the death penalty is attached.'"[97] However, Eleanor Roosevelt, Chair of the Drafting Committee for the UDHR, objected and "cited movement underway in some states to abolish the death penalty and suggested that it might be better not to make any explicit mention of the matter."[98] René Cassin, the French jurist who is credited as being the co-author of the UDHR, cautioned that "even countries that had no death penalty must take into account the fact that some are in the process of abolishing it."[99] Cassin eventually restructured the draft developed by Humphrey and deleted all references to the death penalty.[100] The final version of the UDHR contained Cassin's proposal, virtually unchanged.[101]

According to Professor Schabas and other legal scholars, "[i]t is clear from the *travaux préparatoires* that the death penalty was considered to be fundamentally incompatible with the protection of the right to life, and that its abolition, although not immediately realizable, should be the 'common standard of achievement' of the Member States of the United Nations."[102] Through its resolution 1745 of May 16, 1973, the U.N. Economic and Social Council ("ESC") instructed the U.N. Secretary-General "to submit to it, at five-year intervals starting from 1975, periodic updated and analytical reports on capital punishment."[103] The Secretary-General's report submitted in April 2015 confirmed "the continuation of a very marked trend towards abolition and restriction of the use of capital punishment in most countries" and that those countries that "retain the death penalty are, with rare exceptions, significantly reducing the numbers of persons executed and the crimes for which it may be imposed."[104] However, the report also noted that "where capital punishment remains in force, there are serious problems with regard to international norms and standards, notably in the limitation of the death

95. *Id*. at 801.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 801–802 (emphasis in original).
103. U.N. ESCOR, 2015 Sess., 49th mtg. at 1, U.N. Doc. E/2015/49 (Apr. 13, 2015).
104. *Id.*

penalty to the most serious crimes, the exclusion of juvenile offenders from its scope and guarantees of a fair trial."[105]

The UDHR, however, was not designed to impose or establish binding treaty obligations on U.N. Member States. Nevertheless, it provided the foundation and "normative framework" for many international and regional human rights instruments (e.g., ICCPR, European Convention on Human Rights and Fundamental Freedoms ("ECHR"), the African Charter on Human and Peoples' Rights ("Banjul Charter"), and the American Convention on Human Rights ("ACHR")). In addition, although the UDHR is considered a hortatory declaration of principles and aspirations, lacking the legal status of a treaty, international human rights experts have noted that "the years have further blurred the threshold contrast between 'binding' and 'hortatory' instruments."[106] Since its adoption by the UN General on December 10, 1948, the UDHR's "position in international law has changed significantly, and it has received favorable treatment in many domestic legal systems."[107] As a result, many international human rights experts argue that "all or parts of [the UDHR should be viewed] as legally binding, either as a matter of customary international law or as an authoritative interpretation of the UN Charter."[108]

The ECHR, which was adopted less than two years after the UDHR, recognizes the right to life "save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."[109] The ECHR was adopted by twelve Member States of the Council of Europe on November 4, 1950, just a few years after the end of World War II, and entered into force on September 3, 1953.[110] The treaty was adopted at a time "when war crimes trials (and the resulting executions) were still fresh on the collective memory" of Europeans.[111] However, despite the existence of a provision in the ECHR permitting the death penalty when it is provided by law, available evidence shows that "[t]here have been only a handful of executions within Member States of the Council of Europe since 1950."[112]

In 1983, the Council of Europe adopted Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty ("Protocol No. 6").[113] Article 1 of Protocol No. 6 abolishes the death penalty, while Article 2 permits States Parties to

105. *Id.*

106. HENRY J. STEINER, ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 152 (3rd ed. 2008).

107. John Mukum Mbaku, *Protecting Human Rights in African Countries: International Law, Domestic Constitutional Interpretation, the Responsibility to Protect, and Presidential Immunities*, 16 S.C. J. INT'L L. & BUS. 1, 21 (2019).

108. STEINER, ET AL., *supra* note 106, at 152.

109. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, ¶ 1, *opened for signature* Nov. 4, 1950, E.T.S. 213 (entered into force Sept. 3, 1953) [hereinafter European Convention on Human Rights].

110. *Id.*

111. Schabas, *supra* note 58, at 802.

112. *Id.* at 802–803.

113. European Convention on Human Rights, *supra* note 109, at Protocol No. 6.

include provisions in their national laws permitting the death penalty "in respect of acts committed in time of war or of imminent threat of war."[114] However, these exceptions mandate that they must be carried out "only in the instances laid down in the law and in accordance with its provisions" and that the Secretary General of the Council of Europe must be informed by the relevant State Party of the "relevant provisions of that law."[115] In the *Case of Soering v. The United Kingdom*, the European Court of Human Rights ("ECtHR") ruled that "[d]e facto the death penalty no longer exists in time of peace in the Contracting States to the [European] Convention [on Human Rights and Fundamental Freedoms]."[116]

Unlike Member States of the Council of Europe, those of the U.N. took much longer to draft and adopt a human rights treaty to accompany the UDHR. Nevertheless, drafting began in 1947 to create the International Covenant on Civil and Political Rights ("ICCPR") which was finally adopted by the U.N. General Assembly on December 16, 1966, through Resolution 2200A (XXI). It entered into force ten years later on March 23, 1976 after it had obtained the mandatory thirty-five ratifications in accordance with Article 49.[117] The right to life is enumerated in Article 6(1) and "includes the death penalty as an exception to the right to life."[118] However, Article 6 also enumerates several "safeguards and restrictions" governing the implementation of the death penalty.[119] For example, Article 6(4) states that "[a]nyone sentenced to death shall have the right to seek pardon or commutation of the sentence" and that "[a]mnesty, pardon or commutation of the sentence of death may be granted in all cases."[120]

The American Convention on Human Rights ("American Convention") is the second regional human rights treaty whose provisions show progress towards the abolition of the death penalty.[121] Utilizing the ICCPR's Article 6 as a model, the American Convention significantly increased restrictions on the death penalty and provides that "[t]he death penalty shall not be reestablished in states that have abolished it."[122] Professor Schabas has argued that Article 4(3) "renders the American Convention an abolitionist instrument, to the extent that ratifying states that have already abolished the death penalty are now bound as a matter of international law not to use the death penalty."[123] Finally, on June 8, 1990 at Asunción, Paraguay, the

114. *Id.*

115. *Id.*

116. Case of Soering v. The United Kingdom, App. No. 14038/88, ¶ 102 (July 7, 1989), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57619%22]}.

117. *See* ICCPR, *supra* note 61, at art. 49; *see especially id.*, art. 49 (elaborating the conditions under which the treaty could come into force).

118. Schabas, *supra* note 58, at 804; *see also* ICCPR, *supra* note 61, at art. 6 para. 2.

119. Schabas, *supra* note 58, at 804; *see also* ICCPR, *supra* note 61, at art. 6 ¶¶ 4,5,6.

120. ICCPR, *supra* note 61, at art. 6 ¶ 4.

121. American Convention on Human Rights: "Pact of San José, Costa Rica," Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter Pact of San José].

122. *Id.* at art. 4 ¶ 3.

123. Schabas, *supra* note 58, at 805.

American States adopted the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.[124] According to Article 1, "[t]he States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction."[125]

The African Charter on Human and Peoples' Rights ("Banjul Charter"), which was adopted by the Organization of African Unity ("OAU") in 1981 and came into force in 1986, is the third major regional human rights treaty that enshrines the right to life.[126] However, unlike the American, European and other international human rights instruments, the Banjul Charter does not mention capital punishment as an exception or limitation on the right to life.[127] Instead, it states that "[h]uman beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."[128]

The African Commission on Human and Peoples' Rights ("African Commission") is the quasi-judicial body tasked with promoting and protecting human rights and collective rights throughout Africa, as outlined in the Banjul Charter. It is empowered to interpret the Banjul Charter, address individual complaints of rights violations, investigate human rights abuses, and support efforts by States Parties to recognize and protect human rights.[129] In performing its mandate to interpret all the provisions of the Banjul Charter, the African Commission usually issues general comments on the charter's various articles. Accordingly, the African Commission adopted its General Comment No. 3 on the Banjul Charter on the right to life (Article 4) during its 57th Ordinary Session, which was held at Banjul (The Gambia), in November 2015.[130]

In the Preface to the African Commission's General Comment No. 3, Kayitesi Zainabo Sylvie, African Commissioner and Chairperson of the Working Group on the Death Penalty and Extrajudicial, Summary or Arbitrary Killings in Africa ("Death Penalty Working Group"), noted that "[t]he jurisprudence of the African Commission on Human and Peoples' Rights (the Commission) has widely recognized the right to life as a foundational right" and that "[w]ithout the right to life, other rights cannot be implemented."[131] She noted further that General Comment No. 3 "is founded on this fundamental character of the right to life and the necessity to focus on

124. Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, 10 NETH. Q. HUM. RTS. 243. [hereinafter Protocol to the American Convention]

125. *Id.* at art. 1.

126. Org. of African Unity [OAU], *African Charter on Human and Peoples' Rights*, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [hereinafter Banjul Charter].

127. *See, e.g.*, *id.*, at art. 4.

128. *Id.*

129. *Id.* at art. 45-46.

130. African Commission on Human and Peoples' Rights [ACHPR], *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)* (Dec. 12, 2015), https://achpr.au.int/en/node/851. [hereinafter *General Comment No. 3 on the African Charter*]

131. *Id.* at 5.

this right."[132] General Comment No. 3, Commissioner Kayitesi remarked, was drafted by the Death Penalty Working Group, which has, for many years, been "a focal point for the African Commission . . . on the question of the death penalty."[133] Also, remarked Commissioner Kayitesi, "as more and more African States move progressively away from that barbaric and ineffective form of criminal justice, it is important for the Working Group also to underline the many other threats posed to the right to life, as reflected in [General Comment No. 3]."[134] Finally, noted Commissioner Kayitesi, the African Commission hopes that General Comment No. 3 will provide States Parties to the Banjul Charter, as well as, "National Human Rights Institutions and civil society a useful guide to the range of application of Article 4 of the [Banjul] Charter," and that the African Commission will collaborate with all States Parties to enhance the protection of the right to life in the continent.[135]

The right to life, explained the African Commission, is the "fulcrum of all other rights" and "[i]t is non-derogable, and applies to all persons at all times."[136] General Comment No. 3, the African Commission noted, is designed "to guide the interpretation and application of the right to life under the [Banjul] Charter and to ensure its coherent application to a range of situations, including its implementation at the domestic level."[137] However, Comment No. 3 does not create new standards "or highlight best practices."[138] Instead, it "sets out the Commission's perspective on dimensions of this universally recognised right."[139]

With respect to the nature of the right to life and of the obligations of the State Party in respect of the right to life, the African Commission states that "[t]he right not to be arbitrarily deprived of one's life is recognised as part of customary international law and the general principles of law, and is also recognised as a *jus cogens* norm, universally binding at all times."[140] This right, explains the African Commission, is enumerated in the constitutions and "other legal provisions of the vast majority of African countries and other States."[141] In addition "[a]ll national legal systems criminalise murder, and arbitrary killings committed or tolerated by the State are a matter of the utmost gravity."[142]

States are responsible for all violations of the right to life, including those made in times of emergency, by the executive, legislative, and judicial branches of government and "other public or governmental authorities, at all

132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 7.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 8.
141. *Id.*
142. *Id.*

levels (national, regional or local)."[143] A State Party to the Banjul Charter "can be held responsible for killings by non-State actors if it approves, supports or acquiesces in those acts or if it fails to exercise due diligence to prevent such killings or to ensure proper investigation and accountability."[144] In the case of armed conflict, the African Commission explains that the right to life must be interpreted in accordance with international humanitarian law and that any "intentional deprivation of life is prohibited unless strictly unavoidable to protect another life or other lives."[145] States must build an effective system for the protection of the right to life by enacting "appropriate domestic laws that protect the right to life and define any limitations on the right in accordance with international standards, a law enforcement system with necessary equipment and training, and a competent, independent and impartial judiciary and legal profession based on the rule of law."[146]

In terms of the scope of the prohibition on the "arbitrary" deprivation of life, the African Commission explained that

> "[a] deprivation of life is arbitrary if it is impermissible under international law, or under more protective domestic law provisions" and that "[a]ny deprivation of life resulting from a violation of the procedural or substantive safeguards in the [Banjul] Charter, including on the basis of discriminatory grounds or practices, is arbitrary and as a result unlawful."[147]

The African Commission's Comment No. 3 also deals with the abolition of the death penalty. First, it notes that the Banjul Charter does not have any provision recognizing the death penalty, "even in limited circumstances" and that "the Commission has on several occasions passed resolutions calling on States to abolish the death penalty, or to establish a moratorium in line with the continental and global trend."[148]

Second, it states that most African States have already abolished the death penalty "in law or in practice" and that international law "requires those States that have not yet abolished the death penalty to take steps towards its abolition in order to secure the rights to life and to dignity, in addition to other rights such as the right to be free from torture, and cruel, inhuman or degrading treatment."[149]

Third, all States that have legally abolished the death penalty "shall not reintroduce it, nor facilitate executions in retentionist States through *refoulement*, extradition, deportation, or other means including the provision of support or assistance that could lead to a death sentence."[150] In addition,

143. *Id.* at 9.
144. *Id.*
145. *Id.*
146. *Id.* at 8-9.
147. *Id.* at 10.
148. *Id.* at 12.
149. *Id*.
150. *Id*.

all States that have "moratoria on the death penalty must take steps to formalize abolition in law, allowing no further executions" and in States, which have not yet abolished it, the death penalty must be reserved only for "the most serious crimes—understood to be crimes involving intentional killing."[151]

Fourth, mass trials that result in the death penalty "without due consideration to fair trial standards are illegal and should not take place."[152] Most importantly, the African Commission holds that under no circumstances shall "the imposition of the death penalty be mandatory for an offence."[153] In line with provisions of the African Charter on the Rights and Welfare of the Child ("African Child Charter"), the African Commission declares that the death penalty "shall not be imposed for crimes committed by children" and that the state bears the burden of proving the defendant's age.[154] Article 5(3) of the African Child Charter reinforces that the "[d]eath sentence shall not be pronounced for crimes committed by children."[155]

Fifth, the African Commission declared that military courts must not be granted the power to impose the death penalty and, in addition, "the execution of pregnant or nursing women, children, elderly persons or persons with psycho-social or intellectual disabilities, will always amount to a violation of the right to life."[156] Finally, if a State still has the death penalty in law or practice, "it shall be used in a completely transparent manner, with States giving reasonable advance notice of the timing, manner, and number of executions to those involved, including those under sentence of death, their families and lawyers, and to the public at large."[157]

This article examines *mandatory death sentence statutes* and their impact on judicial independence in African countries. To fully understand how these statutes impact courts' ability to independently adjudicate capital cases, it is important to provide an overview of the abolition of the death penalty in the continent. Once an African State has abolished the death penalty, the issue of the mandatory death sentences become irrelevant. Therefore, the next section will briefly examine the abolition of the death penalty in Africa.

III. THE ABOLITION OF THE DEATH PENALTY IN AFRICA

The International Federation of Action by Christians for the Abolition of Torture ("FIACAT"), a non-governmental human rights organization that

151. *Id.* at 12-13.

152. *Id.* at 13.

153. *Id.*

154. *Id.*

155. Org. Of African Unity [OAU], *African Charter on the Rights and Welfare of the Child*, art. 5 ¶ 3, OAU Doc. CAB/LEG/24.9/49 (1990) [hereinafter *African Child Charter*], https://www.refworld.org/legal/agreements/oau/1990/en/13798.

156. ACHPR, *supra* note 130, at 13.

157. *Id.* at 10.

seeks to end torture and the death penalty globally, in its 2023 annual report, stated that the abolition of the death penalty "has evolved significantly over the past few years" and that although it was widely tolerated, its application has since "gradually been restricted and more than two-thirds of countries have now abolished it in law and practice."[158] The death penalty's acceptance "under national, regional and international law," notes FIACAT, "has thus evolved alongside a gradual ban on corporal punishment, the recognition at national and regional levels of the violation of the ban on torture and the emergence of a new international customary norm forbidding recourse to capital punishment in any circumstances whatsoever."[159]

Since 2012, FIACAT has worked cooperatively with ACATs (Action by Christians for the Abolition of Torture),[160] which operate in Africa, to help abolish the death penalty in all countries within the continent.[161] Since 2015, FIACAT's activities in Africa have been "run jointly with the World Coalition against the death penalty," with emphasis on 23 African countries.[162] According to FIACAT, the majority of countries in Africa favor the abolition of the death penalty.[163] In addition, the death penalty has been abolished in Rwanda (2007); Burundi and Togo (2009); Gabon (2010); Benin (2012); Congo and Madagascar (2015); Guinea (2016 for ordinary crimes and 2017 for military crimes); Burkina Faso (2018); Chad (2020); Sierra Leone (2021); Central African Republic, Equatorial Guinea and Zambia (2022).[164]

As of January 1, 2023, 26 of the African Union's 55 Member States had abolished the death penalty for all crimes.[165] More specifically, 25 African States are *abolitionist*, 16 are *de facto abolitionist*, and 14 are *retentionist*.[166] On May 3, 2024, Côte d'Ivoire took a major step towards the abolition of the

158. FIACAT, *Activity Report 2023,* at 4 (Apr. 19, 2024), https://www.fiacat.org/en/publications-en/annual-report/3216-fiacat-activity-report-2023.

159. *Id.*

160. ACAT was founded in 1974, and it has devoted its efforts to campaign "on behalf of people who are tortured,
detained in inhuman conditions, sentenced to death or 'disappeared,' whatever their origins, political opinions or
religious beliefs." *Our Network*, FIACAT, https://www.fiacat.org/en/our-network (last visited June 13, 2024).

161. *Abolition of the Death Penalty in Africa*, FIACAT, https://www.fiacat.org/en/our-actions/project-for-the-abolition-of-the-death-penalty-in-subsaharan-africa (last visited June 13, 2024).

162. *Id*.

163. *Id*.

164. *Id*.

165. *Id*.

166. *Id*. An abolitionist state is one that has abolished the death penalty, except in extraordinary circumstances. A de facto abolitionist state (ADF) is a country that has not abolished the death penalty for ordinary crimes but has not executed anyone in over 10 years. A retentionist state is one that continues to implement the death penalty and undertake executions for ordinary crimes. *See, e.g.*, *Abolitionist and Retentionist Countries*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/policy-issues/international/abolitionist-and-retentionist-countries (Last visited June 13, 2024).

death penalty by depositing its instrument of accession to the Second Optional Protocol to the International Covenant on Civil and Political Rights (2OP-ICCPR) with the U.N. Secretary General.[167] FIACAT has noted that in 2000, the death penalty was abolished by Côte d'Ivoire's constitution and that "[i]n 2015, life imprisonment replaced capital punishment in the Penal Code."[168] This position was reinforced by the country's 2016 Constitution.[169] According to Article 3 of Côte d'Ivoire's 2016 Constitution, "[t]he right to life is inviolable. No one has the right to take the life of another person. The death penalty is abolished."[170] Finally, on June 6, 2023, Côte d'Ivoire's "Senate voted in favor of the bill authorizing ratification of the [2OP-ICCPR], following a unanimous vote by the National Assembly."[171] Finally, by depositing its instrument of accession to the 2OP-ICCPR, authorities in Abidjan confirmed their "determination to make [the country] a champion of abolition [of the death penalty] on the [continent]."[172]

In an article in *The Telegraph* (UK), Ben Farmer and Peta Thornycroft reported that in February of 2024, Zimbabwe's President Emmerson Mnangagwa agreed to abolish the death penalty.[173] Although the abolition must still be approved by the legislature, Farmer and Thornycroft noted that since the measure is quite popular and enjoys widespread support in the country, it "is expected to pass easily."[174] Should Zimbabwe successfully abolish the death penalty, it will join a growing group of African States that are opting to end capital punishment.[175] On July 23, 2021, the Parliament of Sierra Leone voted unanimously to repeal capital punishment and replace it with life imprisonment or a term of not less than 30 years.[176] Similarly, on May 27, 2022, the Central African Republic's National Assembly enacted

167. *See [Press Release] Côte d'Ivoire*, *Towards the Definitive and Irreversible Abolition of the Death Penalty* [hereinafter *[Press Release] Côte d'Ivoire*], FIACAT, June 5, 2024, https://www.fiacat.org/en/media-press/press-releases/3223-release; *See also,* U.N. Secretary-General (Depositary Notification), *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, Côte d'Ivoire: Accession* C.N.154.2024 (May 3, 2024).

168. *[Press Release] Côte d'Ivoire*, *supra* note 167. Côte d'Ivoire abolished the death penalty through Article 2 of its 2000 Constitution. *See* Const. Rep. Côte d'Ivoire, July 24, 2000, art. 2.

169. CONST. REP. COTE D'IVOIRE, art. 3 (2016).

170. *Id*.

171. *[Press Release] Côte d'Ivoire*, *supra* note 167.

172. *Id*.

173. Ben Farmer and Peta Thornycroft, *Will Africa be the next continent to abolish the death penalty?* The Telegraph, (Apr. 16, 2024, 3:19 PM), https://www.telegraph.co.uk/global-health/terror-and-security/death-penalty-abolishment-africa-capital-punishment/.

174. *Id*.

175. *Id*.

176. *Sierra Leone: UN Human Rights recommendations help lead to end of death penalty*, Office of the U.N. Human Rights Office of the High Commissioner, (July 21, 2022), https://www.ohchr.org/en/stories/2022/07/sierra-leone-un-human-rights-recommendations-help-lead-end-death-penalty.

legislation abolishing the death penalty.[177] Finally, on July 25, 2023, Ghana abolished the death penalty for all crimes except high treason.[178] All these countries have joined the growing list of African States that have opted to abolish capital punishment, improve the protection of human rights, and safeguard the right to life.

Article 5(3) of the African Charter on the Rights and Welfare of the Child ("African Child Charter") prohibits the application of the death penalty to children.[179] Specifically, Article 5(3) states as follows: "Death sentence shall not be pronounced for crimes committed by children."[180] Although international human rights law and the African Child Charter prohibit the use of the death penalty for crimes committed by children—that is, persons under 18 years of age—some African countries still retain the death penalty in law and are known to have executed children, in violation of international law.[181] According to Amnesty International ("AI"), these types of executions "calls into question the commitment of the executing states to respect international law, and in particular, children's human rights."[182] AI has documented at least 163 executions of individuals who were children "at the time of the offence for which they had been convicted in 10 countries."[183] Since 1990, Amnesty International has documented the execution of children in the Democratic Republic of Congo, Nigeria, Republic of Sudan, and South Sudan.[184]

Human rights advocates have argued that "a child's best interest[s] should be of primordial consideration in the context of judicial matters," including matters dealing with the execution of children.[185] The African Child Charter protects not only the rights of persons under the age of 18 (i.e.,

177. ACAT-RCA, ECPM, FIACAT, *Central African Republic Becomes 24 African State to Abolish the Death Penalty*, World Coal. Against the Death Penalty, (June 26, 2022), https://worldcoalition.org/2022/06/26/central-african-republic-abolishes-the-death-penalty/.

178. Saeed Kamali Dehghan, *Ghana Abolishes death penalty, with expected reprieve for 176 condemned prisoners*, THE GUARDIAN, (July 26, 2023, 8:33 AM), https://www.theguardian.com/global-development/2023/jul/26/ghana-abolishes-death-penalty-with-expected-reprieve-for-176-condemned-prisoners.

179. *African Child Charter*, *supra* note 155.

180. *Id*.

181. Amnesty Int'l, *Executions of persons who were children at the time of the offence: 1990–2022*, AI Index ACT 50/6630/2023 (May 2023), https://www.amnesty.org/en/documents/act50/6630/2023/en/.

182. *Id*.

183. *Id*.

184. *Id*.

185. Connie Numbi & Bronwyn Dudley, *Children and the death penalty in Sub-Saharan Africa: NGO Forum and the 65 ACHPR Session* (Dec. 9, 2019), https://worldcoalition.org/2019/12/09/children-and-the-death-penalty-in-sub-saharan-africa-ngo-forum-and-the-65th-achpr-session/. Article 4 of the African Child Charter states that "[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration." *African Child Charter*, *supra* note 155, at art. 4. Executing children can hardly be considered to be in their best interests.

children) by prohibiting their execution, but also the rights of those who are not yet born.[186]

Despite the progress that has been made throughout Africa to abolish capital punishment, several African countries still maintain the death penalty in law and practice.[187] According to a report in *Al Jazeera* in 2023, "[s]ome 90 percent of the world's known executions outside China [in 2022] were carried out in just three countries: Iran [576+], Saudi Arabia [196], and Egypt [24]."[188] Among the African countries that still retain the death penalty, 13 mandate its use for various crimes.[189]

In the section that follows, this article will provide an overview of selected mandatory death penalty statutes in Africa, review case law from several African countries on the constitutionality of mandatory death penalty statutes, and demonstrate how the continued mandatory imposition of the death penalty interferes with judicial independence and disregards procedural due process requirements.[190]

IV. MANDATORY DEATH PENALTY STATUTES AND JUDICIAL INDEPENDENCE IN AFRICA

A. Introduction

Although there has been a de facto moratorium on executions in Tanzania since 1994, as of April 2024, the country has not formally abolished the death penalty. In addition to the fact that its courts continue to sentence people to death, Tanzania's Penal Code ("TPC") provides for a mandatory sentence of death for any person convicted or found guilty of murder.[191] According to the TPC, a person commits murder if, with "malice aforethought," he "causes the death of another person by an unlawful act or omission."[192] However, pregnant women and persons under 18 (i.e., children) are exempt from the death penalty. Instead, they are sentenced to life imprisonment for murder, and juveniles are detained at the discretion of the

186. *See African Child Charter*, *supra* note 155, at art. 30(e).

187. *See* Hanna Duggal & Marium Ali, *Map: Which countries still have the death penalty?*, AL JAZEERA (May 16, 2023), https://www.aljazeera.com/news/2023/5/16/map-which-countries-still-have-the-death-penalty-2023.

188. *Id*. Egypt led African countries in the number of death executions in 2022. *See id*.

189. Akshaya Mohan, *Ensure African States Don't Flout Court Judgment Striking Down Mandatory Death Penalty Laws*, THE ADVOCATES FOR HUMAN RIGHTS, (May 5, 2021), https://www.theadvocatesforhumanrights.org/News/A/Index?id=159.

190. *See id*.

191. Penal Code Chapter 16 of the Laws (Revised) (Principal Legislation) Ch. XIXA, § 197 (issued under Cap. 1, s. 18) (Tanz.).

192. *Id*. § 196.

President of the Republic.[193] Section 197 of Tanzania's Penal Code states as follows:

> Any person convicted of murder shall be sentenced to death: Provided that, if a woman convicted of an offence punishable with death is alleged to be pregnant, the court shall inquire into the fact and, if it is proved to the satisfaction of such court that she is pregnant the sentence to be passed on her shall be a sentence of imprisonment for life instead of death.[194]

On November 25, 2011, the High Court of Tanzania at Moshi sentenced Tanzanian citizens Ally Rajabu, Angaja Kazeni alias Oria, Geofrey Stanley alias Babu, Emmanuel Michael alias Atuu and Julius Michael, to death for murder.[195] The death sentences were confirmed by the Court of Appeal, Tanzania's highest Court, on March 25, 2013.[196] On March 26, the defendants filed an application with the African Human Rights Court, praying the latter to, inter alia, "[d]eclare that by not amending Section 197 of its Penal Code, which provides for the mandatory imposition of the death penalty in cases of murder, the Respondent State [i.e., Tanzania] violated the right to life and does not uphold the obligation to give effect to that right as guaranteed in the [Banjul Charter]" and "[d]eclare that the mandatory imposition of the death penalty by the High Court and its confirmation by the Court of Appeal violates their rights to life and to dignity."[197]

The African Human Rights Court held unanimously that Tanzania (the Respondent State) had violated the right to life guaranteed under Article 4 of the Banjul Charter "in relation to the provision in its Penal Code for the mandatory imposition of the death penalty as it removes the discretion of the judicial officer."[198] The Court also held that the Respondent State had violated the right to dignity, which is protected under Article 5 of the Banjul Charter "in relation to the provision for the execution of the death penalty imposed in a mandatory manner."[199] The Court then ordered the Respondent State to "take all necessary measures, within one (1) year from the notification of this Judgment, to remove the mandatory imposition of the death penalty from its Penal Code" and undertake "the rehearing of the case on the sentencing of

193. *Id*. §§ 26, 197; *See also* Seraphina M. Bakta, *Detention during the President's Pleasure for Children Convicted of Homicide in Tanzania vis-à-vis the Last Resort Threshold*, 5 BiLD L. J. 9 (2012) (examining the imposition of detention during the President's pleasure on juveniles convicted of homicide in Tanzania).

194. *Id*. § 197.

195. *See, e.g*., In re Rajabu v. United Republic of Tanzania, Application No. 007/2015, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], para. 1, 2 (Mar. 18, 2016), https://www.african-court.org/cpmt/storage/app/uploads/public/62b/c1a/c72/62bc1ac72cfd8925958630.pdf.

196. *Id*.

197. In re Rajabu, Application No. 007/2015, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], para. 14 (vii, viii) (Nov. 28, 2019).

198. *Id*. para. 171 (viii).

199. *Id*. para. 171 (ix).

the Applicants through a procedure that does not allow the mandatory imposition of the death sentence and uphold the full discretion of the judicial officer."[200]

Given the importance of the African Human Rights Court's decision in *Ally Rajabu & Others*, particularly with respect to the mandatory death penalty and whether it violates provisions of the Banjul Charter, which is the premier human rights treaty in Africa, it is informative to take a closer look at the reasoning behind the Court's decision. Hence, the next sub-section is devoted to an examination of the decision on the merits of *Ally Rajabu & Others*.

B. In the Matter of Ally Rajabu & Others (African Human Rights Court)

This case was an application from Ally Rajabu, Angaja Kazeni *alias* Oria, Geofrey Stanley *alias* Babu, Emmanuel Michael *alias* Atuu, and Julius Petro (hereinafter "Applicants"), all nationals of the United Republic of Tanzania who had been convicted of and sentenced to death for murder and were, at the time, being detained at the Arusha Central Prison.[201] The Application was filed before the African Court on Human and Peoples' Rights ("African Human Rights Court") against the United Republic of Tanzania ("Respondent State").[202] In its introduction to the case, the African Human Rights Court noted that the Respondent State had become a party to the Banjul Charter on October 21, 1986 and to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights on February 10, 2006 ("African Court Protocol.")[203] Finally, on March 29, 2010, the Respondent State had deposited its Declaration under Article 34(6) of the African Court Protocol, effectively accepting the Court's jurisdiction to receive cases from individuals and non-governmental organizations ("NGOs") in Tanzania.[204]

The Applicants prayed the African Human Rights Court to, inter alia, "[d]eclare that by not amending Section 197 of its Penal Code, which provides for the mandatory imposition of the death penalty in cases of murder, the Respondent State violated the right to life and does not uphold the obligation to give effect to that right as guaranteed in the [Banjul] Charter"and "[d]eclare that the mandatory imposition of the death penalty by the High Court and its confirmation by the Court of Appeal violates their rights to life and to dignity."[205] Before the Court, the Applicants averred that the Respondent State had failed to recognize that "human rights are inviolable, and that human beings," who include the Applicants, "are entitled to respect for their life and the integrity of person as guaranteed under Article

200. *Id*. para. 171 (xv), (xvi).
201. *Rajabu*, para. 1 (vii, viii) (Nov. 28, 2019).
202. *Id*. para. 2.
203. *Id*.
204. *Id*.
205. *Id*. para. 14 (vii & viii).

4 of the [Banjul] Charter."[206] The Applicants averred before the Court that the failure of the Respondent State to amend the provision of its Penal Code that imposes a mandatory sentence of death on anyone convicted of murder violates their right to life, which is guaranteed in Article 4 of the Banjul Charter.[207] That provision of Tanzania's Penal Code (§ 197) states that: "Any person convicted of murder shall be sentenced to death."[208] The question for the African Human Rights Court to answer was whether the Respondent State's "legal provision for the mandatory imposition of the death sentence in cases of murder violates the right to life guaranteed in Article 4 of the [Banjul] Charter."[209] In its analysis of the merits of the case, the Court noted that Article 4 of the Banjul Charter "provides for the inviolability of life" and "it contemplates deprivation thereof as long as such is not done arbitrarily."[210] Thus, explained the Court, "the death sentence is permissible as an exception to the right to life under Article 4 as long as it is not imposed arbitrarily."[211]

The Court noted that there is an abundance of "well-established international human rights case-law on the criteria to apply in assessing the arbitrariness of a sentence of death."[212] For example, in *Interights and Others (on behalf of Bosch) v. Botswana*,[213] the African Commission on Human and Peoples' Rights ("African Commission") delineated two requirements for imposing such a sentence. First, the sentence must be provided by law, and second, the sentence must be imposed by a competent court.[214] In the case of *International Pen and Others (Ken Saro-Wiwa) v. Nigeria*,[215] the African Commission declared that "[g]iven that the trial which ordered the executions itself violates Article 7, any subsequent implementation of sentences renders the resulting deprivation of life arbitrary and in violation of Article 4."[216] In addition, after placing greater emphasis on due process, the African Commission also held in the case of *Forum of Conscience v. Sierra Leone*

206. *Id*. para. 92. Article 4 of the Banjul Charter states as follows: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right." Banjul Charter, *supra* note 126, at art. 4.

207. *Rajabu*, para. 97, (Nov. 28, 2019).

208. Penal Code (Tanz.), § 197.

209. *Rajabu*, para. 97.

210. *Id*. para. 98.

211. *Id*.

212. *Id*. para. 99.

213. Interights et al. v. Botswana, Communication No. 240/2001, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (Nov. 20, 2003), https://achpr.au.int/en/decisions-communications/interights-et-al-behalf-mariette-sonjaleen-bosch-botswana-24001.

214. *Rajabu*, para. 99 (Nov. 28, 2019); *see also Interights,* paras. 42–48.

215. Int'l Pen. v. Nigeria, Communications 137/94, 139/94, 154/96, 161/97, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], paras. 1–10, 103 (Oct. 31, 1998).

216. *Id*. para. 103.

that "any violation of this right without due process amounts to arbitrary deprivation of life."[217]

The African Human Rights Court then stated that "the factor relating to due process is affirmed by all main international human rights bodies which apply instruments that include, like Article 4 of the [Banjul] Charter, an exception to the right to life that permits the imposition of the death penalty."[218] With specific reference to the mandatory imposition of the death sentence for murder, the Court cited *Eversley Thompson v. St. Vincent & the Grenadines*,[219] a case in which the U.N. Human Rights Committee was asked to determine whether the Applicant's claim that "the mandatory nature of the imposition of the death sentence and its application in the circumstances constituted an arbitrary deprivation of life."[220] The Committee held that "such a system of mandatory capital punishment would deprive the author of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her case."[221] Finally, the U.N. Human Rights Committee held that "carrying out of the death penalty in the author's case would constitute an arbitrary deprivation of his life in violation of article 6, paragraph 1, of the [ICCPR]."[222]

The African Human Rights Court also noted that in interpreting Article 4 of the American Convention, the Inter-American Court of Human Rights ("IACtHR") has emphasized due process.[223] It cited *Hilaire, Constantine & Benjamin v. Trinidad & Tobago*, a case of the IACtHR that dealt with due process and the death penalty, particularly in states that have not yet abolished the death penalty. [224] The IACtHR held that States Parties to the American Convention on Human Rights that have not yet abolished the death penalty must adhere to specific procedural requirements including strict observance and review of the application and consideration of factors that may prevent the imposition of the death penalty.[225]

The IACtHR declared that Trinidad and Tobago's *Offences Against the Person Act of 1925*, which "automatically and generically mandates the application of the death penalty for murder, . . . is arbitrary in terms of Article 4(1) of the American Convention."[226] In the view of the IACtHR, the mandatory imposition of the death penalty effectively deprives the judicial

217. *F. of Conscience v. Sierra Leone*, Communication 223/98 African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], para. 20 (Nov. 6, 2000).

218. *Rajabu*, para. 101 (Nov. 28, 2019).

219. Thompson v. St. Vincent, OHCHR, Communication 806/1998, U.N. Doc. CCPR/C/70/D/806/1998 (Oct. 18, 2000).

220. *Rajabu*, para. 102 (Nov. 28, 2019).

221. *Thompson*, para. 8.2.

222. *Id*.

223. Rajabu, para. 103 (Nov. 28, 2019).

224. Hilaire v. Trin. & Tobago, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94, (Jun. 21, 2001).

225. *Id*. para. 100.

226. *Id*. para. 103.

officer of his or her discretion to consider the basic circumstances that establish the extent or degree of the accused's culpability and totally ignores the fact that murder has varying degrees of seriousness. In conclusion, the IACtHR held that Trinidad and Tobago's law, imposing a mandatory death penalty for murder is "arbitrary according to the terms of Article 4(1) of the [American Convention on Human Rights]."[227]

After discussing these international authorities, the African Human Rights Court concluded that "whether deprivation of life is arbitrary within the meaning of Article 4 of the [Banjul] Charter should be assessed against three criteria: first, it must be provided by law; second, it must be imposed by a competent court; and, third, it must abide by due process."[228] In applying these three criteria to the case at bar, the African Human Rights Court noted that in terms of legality, the mandatory imposition of the death penalty "is provided for in Section 197 of the Penal Code of Tanzania," meeting the first requirement.[229] Second, the Applicants never questioned the competency of the High Court to impose the sentence of death and hence, the second requirement is met.[230] Finally, is the issue of due process. The Court explained that "by a joint reading of Articles 1, 7(1), and 26 of the [Banjul] Charter, due process does not only encompass procedural rights, strictly speaking, such as the rights to have one's cause heard, to appeal, and to defence but also extends to the sentencing process."[231] The Court then noted that the mandatory nature of Tanzania's death sentence does not allow a person convicted of murder to present to an appropriate court or tribunal "mitigating evidence and therefore applies to all convicts without regard to the circumstances in which the offence was committed."[232] As such, in all murder cases, the trial court has no discretion and must impose the death penalty.[233] The Court is effectively deprived "of the discretion, which must inhere in every independent tribunal to consider both the facts and the applicability of the law, especially how proportionality should apply between the facts and the penalty to be imposed." [234]The court is also deprived of the discretion "to take into account

227. *Id*. at para. 109. Article 4(1) of the American Convention on Human Rights states as follows: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life." *American Convention on Human Rights, Adopted at the Inter-American Specialized Conference on Human Rights*, San José, Costa Rico, Nov. 22, 1969.*Id.* para. 103. Article 4(1) of the American Convention on Human Rights states as follows: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life." Organization of American States, American Convention on Human Rights art. 4, § 1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

228. *Rajabu*, para. 104 (Nov. 28, 2019).

229. *Id*. para. 105.

230. *Id*. para. 106.

231. *Id*. para. 107.

232. *Id*. para. 109.

233. *Id*.

234. *Id.*

specific and crucial circumstances such as the participation of each individual offender in the crime."[235]

The African Human Rights Court then notes that its "foregoing reasoning on the arbitrariness of the mandatory imposition of the death penalty and breach of fair trial rights, is affirmed by relevant international case-law" and that domestic courts in several African countries "have adopted the same interpretation in finding the mandatory imposition of the death penalty [to be] in violation of due process."[236] With respect to *Ally Rajabu & Others*, the African Human Rights Court held that the "mandatory imposition of the death penalty as provided for in Section 197 of the Respondent State's Penal Code and applied by the High Court in the case of the Applicants does not uphold fairness and due process as guaranteed under Article 7(1) of the [Banjul] Charter."[237] The failure of the mandatory imposition of the death sentence "to pass the test of fairness," notes the African Human Rights Court, "renders that penalty conflicting with the right to life under Article 4."[238]

The African Human Rights Court then held that "the mandatory nature of the imposition of the death penalty as provided for in Section 197 of the Penal Code of Tanzania constitutes an arbitrary deprivation of the right to life" and that the Respondent State had "violated Article 4 of the [Banjul] Charter."[239] The Applicants also alleged that by not amending its Penal Code to rid itself of the mandatory imposition of the death penalty, the Respondent State had failed to meet its obligations under Article 1 of the Banjul Charter.[240] The Court held that the Respondent State had violated Article 1 of the Banjul Charter "in relation to the provision of the mandatory imposition of the death penalty in the Penal Code, and its execution by hanging."[241] Regarding the Applicants' request to have the death sentence imposed by the High Court overturned, the African Human Rights Court held that although the mandatory imposition of the death penalty for murder in the Respondent State's "legal framework violates the right to life protected in Article 4 of the [Banjul] Charter," the violation did not affect the Applicants' guilt or conviction and instead, "*the sentencing is affected only to the extent of the mandatory nature of the penalty*."[242] Thus, the Court concluded that "[a] remedy is therefore warranted in that respect" and ordered the Respondent State to rehear the case for sentencing purposes where a mandatory death sentence is prohibited and judicial officers retain full discretion.[243] After

235. *Id*.

236. *Id*. para. 110.

237. *Id* para. 111.

238. *Id*. para. 112.

239. *Id*. para. 114.

240. *Id*. para. 121. Article 1 of the Banjul Charter provides that "[t]he Member States of the Organization of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them." Banjul Charter, *supra* note 126, at art. 1.

241. *Ally Rajabu & Others*, at para. 126.

242. *Id*. para. 158 (emphasis added).

243. *Id*.

unanimously finding "that the Respondent State [had] violated the right to life guaranteed under Article 4 of the [Banjul] Charter in relation to the provision in its Penal Code for the mandatory imposition of the death penalty as it removes the discretion of the judicial officer," the court ordered the Respondent State to "take all necessary measures, within one (1) year from the notification of this Judgement, to remove" this mandatory imposition for its failure to uphold the judiciary's discretion.[244]

The judgement in the case *Ally Rajabu & Others* is important because it made clear two important issues regarding mandatory death penalty statutes in Africa. First, the African Human Rights Court made clear that it would not interfere with or infringe upon the jurisdiction of national courts in the African countries to adjudicate and rule on cases that fall within their respective jurisdictions. Second, with respect to mandatory death sentence statutes, the African Human Rights Court ruled that a mandatory death penalty which prohibits a national court from taking into consideration mitigating factors, such as the defendant's "social history and the proportionality between the facts and the sentence arbitrarily deprive [] the defendants of their right to life."[245]

In other words, through the mandatory death sentence statute, the legislative branch is interfering with the independence of the judiciary to freely and fully adjudicate cases brought before it. Research shows that mandatory sentencing laws:

> eliminate judicial discretion to impose a prison term lower than the statutory floor, making case-specific information about the offense and offender irrelevant, at least to the extent that these facts might call a below-minimum sentence. For this reason, mandatory minimums are unaffected by proportionality concerns and can pierce retributive boundaries with excessive punishment.[246]

In *Godfrey Ngotho Mutiso v. Republic*,[247] Kenya's Court of Appeal defined the process of a trial as consisting of the entire process from "the arraignment of an accused person to his/her sentencing" and that "[b]y fixing a mandatory death penalty, Parliament removed the power to determine sentence from the Court and that, in our view, is inconsistent with . . . the Constitution."[248] In the sub-sections that follow, this article will examine case

244. *Id*. para. 171 (viii) & (xv).

245. Akshaya Mohan, *Ensure African States Don't Flout Court Judgment Striking Down Mandatory Death Penalty Laws*, The Advocates for Human Rights (May 5, 2021), https://www.theadvocatesforhumanrights.org/News/A/Index?id=159.

246. Erik Luna, *Mandatory Minimums*, in REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 117, 126 (Erik Luna ed., 2017).

247. Godfrey Ngotho Mutiso v. Republic (2010) eKLR (C.A.K.) (Kenya). (This case was adjudicated under the 2008 Constitution of the Republic of Kenya. At the time, the Court of Appeal was the country's highest court.)

248. *Id.* at 25.

law from a few African jurisdictions that deal with the mandatory death penalty and their impact on the independence of the judiciary to conduct fair trials. However, before examining cases from different African jurisdictions, this article will provide an overview of the concept of judicial independence and why it is critical to the exercise of the individual's right to a fair trial.

C. Judicial Independence and the Right to a Fair Trial

The independence of the judiciary is crucial to ensuring the right to a fair trial. An important element of judicial independence, vital for individuals to effectively exercise their right to a fair trial, is the judiciary's freedom from any form of external influence, whether direct or indirect.[249] Such external influence or interference can come from both state- and non-state actors which may include legislators and bureaucrats, independent media, private business enterprises, and members of civil society. For example, through legislative enactments, legislators can hamstring the ability of judges to fully apply the facts adduced in court to the relevant laws and arrive at fair and just outcomes. In a very important case that was decided in post-apartheid South Africa by its newly-established Constitutional Court ("ZACC"), Justice Chaskalson, writing for the majority, underscored the importance of a legal order undergirded by a judiciary that is separate from and independent of the political branches of government.[250]

In *Makwanyane & Another*, Justice Chaskalson declared that the establishment, in South Africa, of a new legal order that vested "the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process."[251] He noted further that although it can prove relevant to the inquiry into many legal issues (e.g., the constitutionality of the death penalty), public opinion is not a "substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour" and that "[i]f public opinion were to be decisive there would be no need for constitutional adjudication."[252]

Justice Chaskalson was particularly interested in explaining why post-apartheid South Africa had chosen to establish a new democratic system undergirded by separation of powers with checks and balances, with an independent judiciary being one of those checks and balances.[253] The country's new constitution should specifically withdraw certain subjects (e.g., constitutional interpretation and the administration of justice) from the "vicissitudes of political controversy" and entrust them to the judiciary.

249. U.N. Counter-Terrorism Implementation Task Force (CTITF), *Basic Human Rights Reference Guide: Right to a Fair Trail and Due Process in the Context of Countering Terrorism*, 1, 14, CTITF PUBLICATION SERIES, (Oct. 2014), https://www.un.org/counterterrorism/human-rights/publications.

250. *See Makwanyane & Another*, SA 391 para. 88.

251. *Id*.

252. *Id*.

253. *Id.* para. 89.

Justice Chaskalson then cited *West Virginia State Board of Education v. Barnette*, a case of the U.S. Supreme Court in which Justice Jackson held as follows:

> The very purpose of a Bill of Rights was to *withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts*.[254]

Justice Jackson stated further that an individual's human and fundamental rights (e.g., the right to life) should not be submitted or more appropriately, subjected to the vagaries of political decision making, nor made dependent on the results of elections, but should be left in the hands of an independent judiciary, one free of interference by the political branches.[255] The effective protection of human rights, including, for example, the right to a fair trial, requires the existence of, not just a democratic order, but a robust judiciary, one that is independent enough to perform its constitutionally mandated functions without interference by other branches of government. Legislators, for example, must not use their legislative enactments to interfere with the performance of the judicial function.[256]

In a study of sentencing guidelines in the United States, Professor Jeannine Bell has determined that "three-strikes law, and mandatory minima are more commonly used legislative initiatives to limit judicial discretion."[257] Many American judges "who are often opposed to sentencing guidelines," noted Professor Bell, "argue that guidelines requiring mandatory sentencing for particular crimes violate the separation of powers and impede their ability to render justice."[258] Professor Bell cited a judge from the State of Florida who had "remarked that sentencing guidelines result 'in the truly evil avoiding punishment and the technically guilty being senselessly incarcerated more than should be tolerated in a free society.'"[259]

In many States in the United States, three-strikes laws "require judges to impose a long sentence on any defendant guilty of three felonies."[260] For example, in the State of California, whose three-strikes laws were enacted in 1994, "defendants with two previous convictions for violent felonies [have] to receive a sentence of twenty-five years to life for their third felony."[261] Such a sentence is mandatory, regardless of "whether violence was used

254. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (emphasis added).

255. *Id*. at 638-39.

256. *See, e.g., Makwanyane,* SA 391 at para. 88 (noting Justice Chaskalson's affirmation of the reason for the establishment of a new legal order in post-apartheid South Africa).

257. Jeannine Bell, *The Politics of Crime and the Threat to Judicial Independence,* A.B.A., JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION ON THE 21ST CENTURY JUDICIARY (2003).

258. *Id*.

259. *Id*.

260. *Id*.

261. *Id*.

during the commission of the third felony."[262] Judges have complained that "these types of laws [compromise] judicial independence by taking the power away from judges to decide whether the defendant should [have] been shown mercy or if rehabilitation is possible and would serve the public interest more than meting out a long sentence."[263] In *People v. Superior Court (Romero)*, the California Supreme Court held that three-strikes laws interfere with and limit judicial discretion and as a consequence, violate the separation of powers.[264]

Judicial independence, free from interference by the political branches, is critical for the effective administration of justice and the exercise of the right to a fair trial by all citizens and individuals under the jurisdiction of a country. The constitutions of many countries in Africa guarantee such judicial independence. For example, the Constitution of the Republic of Kenya guarantees judicial independence through § 160(1), which states as follows: "In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority."[265]

Similarly, the Constitution of the Republic of Ghana also guarantees judicial independence. According to Article 127(1), "[i]n the exercise of the judicial power of, Ghana, the Judiciary, in both its judicial and administrative functions, including financial administration, is subject only to this Constitution and shall not be [] subject to the control or direction of any person or authority."[266] While the Constitution of Ghana provides more information regarding what judicial independence constitutes, most other African constitutions do not; it is left to their courts to fully explain what judicial independence entails and what its elements are.

The Constitution of South Africa guarantees judicial independence through § 165, which states that "[t]he courts are independent and subject only to the Constitution and the law, which they must imply impartially and without fear, favour or prejudice."[267] The Constitution states further that "[n]o person or organ of state may interfere with the functioning of the courts" and that "[o]rgans of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."[268] Finally, the Constitutions provides that "[a]n order or decision issued by a court binds all persons to whom and organs of state to which it applies."[269]

262. *Id*.

263. *Id*.

264. People v. Superior Court (Romero), 13 Cal. 4th 497, 529-32, 917 P.2d 628, 647-49 (Cal. 1996).

265. CONSTITUTION art. 160(1) (2010) (Kenya).

266. CONST. REP. GHANA 1992 (rev. 1996), at § 127(1).

267. S. AFR. CONST., *supra* note 55, at §1 65(2).

268. *Id*. at § 165 (3), (4).

269. *Id*. at § 165(5).

South Africa's highest court, the Constitutional Court, which is empowered to interpret the constitution, has developed jurisprudence on judicial independence. For example, in *De Lange v. Smuts NO & Others*, Justice Ackermann, writing for the majority, held that "judicial independence . . . is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law."[270] Additionally, he declared, "[t]his independence, of which structural independence is an indispensable part, is expressly proclaimed, protected and promoted by subsections (2), (3) and (4) of section 165 of the Constitution."[271] Justice O'Regan, in the minority opinion in *De Lange*, cited *Valente v. The Queen*[272] a case of the Canadian Supreme Court, in which Justice Le Dain held as follows:

> It is generally agreed that judicial independence involves both *individual and institutional relationships*: the *individual independence of a judge*, as reflected in such matters as *security of tenure*, and the *institutional independence of the court or tribunal* over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government . . . The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.[273]

In *The Queen v. Beauregard*, then Chief Justice Dickson (Canada), explaining the concept of judicial independence, declared that "[t]he ability of individual judges to make decisions in discrete cases free from external interference or influence continues, of course, to be an important and necessary component of the principle [of judicial independence]."[274] Chief Justice Dickson continued and stated that today's much broader understanding of the concept of judicial independence involves "both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government."[275] The mandatory death sentence, which is predetermined by the legislature, effectively undermines the judge's sentencing discretion and violates the accused's right to a fair trial.

270. De Lange v. Smuts NO and *Others* 1998 (3) SA 785 (CC), at 50–51 (para. 59).
271. *Id*.
272. Valente v. The Queen, [1985] 2 S.C.R. 673 (Can.).
273. *Id*. at 687 (emphasis added).
274. The Queen v. Beauregard, [1986] 2 S.C.R. 56, 69 (Can.).
275. *Id*. at 70.

In *Beauregard*, Chief Justice Dickson also spoke further about the "two-pronged modern understanding of judicial independence" when he held that this understanding of judicial independence is a reflection of the "recognition that the courts are not charged solely with the adjudication of individual cases" and that while adjudication is one role of the courts, there is a second and equally important one, which is for the courts to serve as "protector of the Constitution and the fundamental values embodied in it—rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important."[276] In performing the role of protecting fundamental justice, courts must be granted the discretion to consider, for example, mitigating circumstances during the sentencing part of the trial in order to determine a sentence that is just and equitable.

In the sub-section that follows, this article will examine the Supreme Court of Kenya's decision in *Francis Karioko Muruatetu and Another v. Republic*,[277] a case that was decided under the Constitution of Kenya 2010 and which dealt with the constitutionality of § 204 of the Penal Code of Kenya.[278] Section 204 states that "[a]ny person convicted of murder shall be sentenced to death."[279] The Supreme Court found that the mandatory nature of the death penalty is unconstitutional, representing an important addition to the growing and evolving African jurisprudence on the death penalty in general and mandatory death sentence statutes in particular.

D. Francis Karioko Muruatetu & Another v. Republic (Supreme Court of Kenya)

The Petitioners in this case were Francis Karioko Muruatetu and Wilson Thirimbu Mwangi who had been convicted by the High Court of Kenya and subsequently sentenced to death in accordance with § 204 of the Penal Code, Chapter 63 of the Laws of Kenya (Penal Code).[280] After their appeals to the Court of Appeal (sitting in Nairobi) against both their conviction and sentence were dismissed, they filed separate appeals to the Supreme Court, which subsequently consolidated the two cases into one petition.[281] At the time that the Petitioners brought their appeal to the Supreme Court, they had already served 17 years of what was an indefinite prison term, after the sentence had been commuted to by "an administrative fiat to life imprisonment."[282]

The two Petitioners contented "that both the mandatory death sentence imposed upon them and its subsequent commutation to life imprisonment were unconstitutional."[283] More specifically, the Petitioners had submitted to

276. *Id*.

277. Francis Karioko Muruatetu v. Republic, (2017) 2 K.L.R. (Kenya).

278. Penal Code (2023) Cap. 63 (Kenya).

279. *Id*. § 204.

280. *Muruatetu,* 2 K.L.R. para. 2.

281. *Id*.

282. *Id*. para. 4.

283. Jacquelene Mwangi, *Case Note, Supreme Court of Kenya Death Penalty Decision,* Francis Karioko Muruatetu v. Republic, 112 AM. J. INT'L L. 707, 707–708 (2018).

the Supreme Court that "the mandatory nature of the death penalty under Section 204 of the Penal Code jettisons the discretion of the trial [court] forcing it to hand down a sentence pre-determined by the Legislature thus fouling the doctrine of the separation of powers."[284] They submitted further that "the sentencing process is part of the right to a fair trial enshrined in Article 50(2) of the Constitution [of the Republic of Kenya]" and that the mandatory death penalty provided in § 204 of the Penal Code violates that right to a fair trial because it denies the trial judge necessary discretion in sentencing.[285] Instead, the mandatory death penalty provision removes the sentencing part of the trial from the purview of the courts and transfers it to the legislative branch of government.

The Petitioners also contended that Article 50(2)(q) of the Constitution of Kenya 2010 guarantees every accused person the right to a fair trial, which includes the right—"If convicted, to appeal to, or apply for review by, a higher court as prescribed by law."[286] In addition to relying on several other provisions of the Constitution, the Petitioners also relied on several "authorities in case law, including the decision in *Patrick Reyes v. The Queen*" to support their petition.[287] In *Patrick Reyes*, the Privy Council was called upon to consider the mandatory death sentence, which had been imposed on Patrick Reyes, the appellant who had been convicted of murder and sentenced to death according to § 102 of the Criminal Code of Belize, which states that "[e]very person who commits murder shall suffer death."[288]

The Privy Council unanimously quashed the appellant's death sentence and ruled that the case should be "remitted to the Supreme Court of Belize in order that a judge of that court may pass appropriate sentence on the appellant having heard or received such evidence and submissions as may be presented and made."[289] The Kenyan Supreme Court noted that in reaching the decision in *Patrick Reyes*, the Privy Council had

> cited with approval the 1989 House of Lords Select Committee's Report on Murder and Life Imprisonment which had concluded that murders differ so greatly from each other and as such it is wrong to prescribe the same punishment for all murders and the observation of the Inter-American Commission that the mandatory imposition of the death sentence is unconstitutional as it disregards an offender's personal circumstances thus robbing him of personal dignity.[290]

284. *Muruatetu,* 2 K.L.R. para. 6.

285. *Id*.

286. CONSTITUTION. art. 50(2)(q) (2010) (Kenya)

287. *Muruatetu,* 2 K.L.R. para. 8. *See* also Reyes v. The Queen [2002] 2 AC 235 (PC) (appeal taken from Belize).

288. *Reyes,* [2002] UKPC 11 para. 1.

289. *Id*. para. 1, 4.

290. *Id.* para. 49.

The Supreme Court of Kenya also noted that in making its decision in *Patrick Reyes*, the Privy Council also cited decisions of the U.S. Supreme Court and the Supreme Court of India.[291] The authorities from the U.S. Supreme Court included *Woodson v. The State of North Carolina* and *Robertson v. Louisiana*, which both dealt with statutes that prescribe a mandatory sentence on conviction.[292] In *Woodson*, the U.S. Supreme Court held that North Carolina's statute prescribing a mandatory sentence upon conviction, effectively and "impermissibly treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty."[293] In *Robertson*, the U.S. Supreme Court ruled that a statute prescribing the mandatory death penalty for an individual convicted of certain categories of homicide is unconstitutional.[294]

The third authority that the Supreme Court of Kenya referred to was *Mithu v. State of Punjab*, a case of the Supreme Court of India.[295] In *Mithu*, the Supreme Court of India, held that "a standardized mandatory death sentence that excludes the involvement of the judicial mind fails to take into account the facts and circumstances of each particular case and must therefore be stigmatized as arbitrary and oppressive."[296] The Supreme Court of Kenya also noted that the Petitioners relied on cases from the Constitutional Court of Uganda (*Susan Kigula and 416 Others v. AG*)[297] and the Constitutional Court of Malawi (*Francis Kafantayeni & 5 Others v. the Attorney General*).[298] In *Susan Kigula & 416 Others*, the Constitutional Court of Uganda held that "the various provisions of the laws of Uganda which prescribe mandatory death sentence are unconstitutional."[299] In *Francis Kafantayeni & 5 Others*, the Constitutional Court of Malawi ruled that "the principle of 'fair trial' requires fairness of the trial at all stages of the trial including sentencing."[300]

In further support of the arguments, the Petitioners in *Muruatetu* cited the Kenyan Court of Appeal's decision in *Godfrey Ngotho Mutiso v. Republic*.[301] In this case, the Kenyan Court of Appeal held that "there is a denial to a fair hearing when no opportunity is given to an accused person to

291. *Muruatetu,* 2 K.L.R. para. 8.

292. Woodson v. North Carolina, 428 U.S. 280 (1976); Robertson v. Louisiana, 431 U.S. 633 (1977).

293. *Woodson*, 428 U.S. at 281.

294. *Muruatetu*, 2 K.L.R. at para. 9. *See also Robertson*, at 638.

295. Mithu v. State of Punjab [1983] 2 SCR 690.

296. *Muruatetu*, 2 K.L.R. at para. 9. *See also Mithu*.

297. *Susan Kigula & 416 Ors v. Attorney General* (Constitutional Petition No. 6 of 2003) [2005] UGCC 8 (June 10, 2005) (Uganda).

298. Muruatetu v. Republic (2017) 2 K.L.R, para. 10 (S.C.K.) (Kenya) (citing Kafantayeni v. Att'y Gen. (2007) 46 ILM 556 (Malawi)).

299. *Kigula*, [2005] UGCC 8 at 40.

300. *Kafantayeni,* 46 ILM at 570.

301. *Muruatetu,* 2 K.L.R. para. 11 (citing Mutiso v. Republic (2010) Criminal Appeal 17 of 2008, 2 K.L.R. (C.A.K.) (Kenya)).

offer mitigating circumstances before sentence, which is the normal procedure in all other trials for non-capital offences" and that "[s]entencing was part of the trial and mitigation was an element of fair trial."[302]

The Petitioners in *Muruatetu* prayed the Supreme Court of Kenya to "overturn the Court of Appeal decision in *Mwaura & 2 Others v. R*, . . . that *the death penalty is grounded in the Constitution* as bad law."[303] They urged the Supreme Court to "find that the Appellate Court [had] grossly erred by failing to find that the mandatory nature of the death sentence set out in Section 204 of the Penal Code is unconstitutional."[304] In *Mwaura*, a five-judge bench of the Court of Appeal had overruled *Mutiso*. Contending that only "a valid sentence in law can be commuted by the President of the Republic," the Petitioners' counsel "dismissed the commutation of the petitioners' death sentence to life imprisonment as untenable given that the mandatory death sentence imposed upon them was unconstitutional."[305] Taking these findings into consideration, the Petitioners had prayed the Court to set aside the mandatory death sentence, which had subsequently been commuted to life imprisonment.[306]

The Petitioners also prayed that the Supreme Court's "declaration that the mandatory death sentence prescribed by Section 204 of the Penal Code is unconstitutional and the consequent award of damages for that illegality should apply to all convicts suffering the same fate."[307] The Director of Public Prosecutions ("DPP"), who was representing the State of Kenya, supported the arguments adduced by the Petitioners and conceded that while the death penalty was legal under Article 26 of the Constitution of Kenya 2010, "the mandatory aspect of such sentence is unconstitutional."[308] Such a mandatory sentence undermines the principle of the separation of powers.[309] Finally, conceded the DPP, failure to "consider mitigating factors and other statutory and policy pre-sentencing requirements" violated the right to a fair trial under Article 50(2) of the Constitution.[310]

The first five amici curiae generally agreed with the Petitioners' submissions and added that the mandatory death sentence for murder violated international law and customs, which form part of the laws of Kenya pursuant to Articles 2(5) & (6) of the Constitution, as well as the independence of the

302. *Mutiso,* 2 K.L.R. para. 30
303. *Muruatetu*, 2 K.L.R. para. 12.
304. *Id*.
305. *Id*.
306. *Id*.
307. *Id*. para. 14.
308. *Id*. para. 15.
309. *Id*.
310. *Id*. para. 16.

judiciary under Articles 159 and 160 of the Constitution.[311] After citing cases from several jurisdictions,

> counsel for the amici curiae echoed those presented for the petitioner that the mandatory death sentence robbed the offender an opportunity for an individualized sentence that took into consideration factors relating to the offender; prohibits the offender from presenting mitigating evidence to the Court thereby depriving the offender of his right to a fair trial under Article 25(c) of the Constitution; and that, contrary to the doctrine of separation of powers, it prevents the Court from exercising its discretion in sentencing thus leaving it to Parliament to control sentences in all murder cases.[312]

The amici curiae then urged the Court "to be guided by experience from other jurisdictions[,] especially Uganda and Malawi, where the mandatory death penalty has most recently been abolished and declare the mandatory nature of the life sentence under Section 204 of the Penal Code unconstitutional and remit the matter to the High Court for resentencing."[313] After thoroughly reviewing the "pleadings, written and oral submissions of the parties," the Court declared that the issues it had to determine were:

> a) Whether the mandatory nature of the death penalty provided for in the Penal Code under section 204 is unconstitutional?
> b) Whether the indeterminate life sentence should be declared unconstitutional?
> c) Whether this Court can or should define the parameters of a life sentence; and
> d) What remedies, if any, accrue to the petitioners?[314]

The Court began the analysis of the issues by noting that the mandatory nature of the death penalty is the primary issue in the present appeal and then cited *Mutiso*, a case which had been decided under the repealed Constitution and held that the mandatory death sentence was arbitrary and unconstitutional.[315] In doing so, the Court of Appeal in *Mutiso* declared as follows:

> On our own assessment of the issue at hand and the material placed before us, we are persuaded, and now so hold, that section 204 of

311. *Id*. paras. 19–20. Articles 2(5) and (6) of the Constitution of Kenya 2010 state, respectively, as follows: "The general rules of international law shall form part of the law of Kenya" and "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution." CONSTITUTION art.2 §§5–6 (2010) (Kenya).

312. *Muruatetu*, 2 K.L.R. para. 20 (emphasis omitted).

313. *Id*. para. 23.

314. *Id*. para. 25.

315. *Id.* para. 27; *Mutiso*, 2 K.L.R. para. 36; CONSTITUTION (2008) (Kenya), *repealed by* CONSTITUTION (2010) (Kenya).

> the Penal Code which provides for a mandatory death sentence is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the Constitution itself recongises the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. We declare that section 204 shall, to the extent that it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the constitution, which as we have said, makes no such mandatory provision.[316]

However, the Supreme Court noted that *Mutiso* was good law until the Court of Appeal's decision in *Mwaura & 2 Others v. Republic*.[317] In *Mwaura*, the Supreme Court noted that the Court of Appeal had "changed its holding that by the use of the word 'shall' Section 204 of the Penal Code was couched in mandatory terms leaving the court with no discretion but to impose the death penalty."[318] The Court of Appeal in *Mwaura* then concluded as follows: "We hold that the decision in *Godfrey Mutiso v R* to be per incuriam in so far as it purports to grant discretion in sentencing with regard to capital offences."[319] The Supreme Court then noted that even though some High Court Justices have questioned the "propriety of the *Mwaura* decision, they have nonetheless deferred to the doctrine of stare decisis and followed it."[320] The Court then cited several decisions of the High Court of Kenya where judges had opted to follow the *Mwaura* precedent.[321]

The Supreme Court explained that the importance of the *Mwaura* decision is that the use of the word "shall" in Section 204 of the Penal Code, as in "Any person convicted of murder *shall* be sentenced to death,"[322] deprives trial judges of all discretion with respect to sentencing and leaves them with only one sentence, and that is, death.[323] Some courts in Kenya, noted the Supreme Court, "have even observed that mitigating factors in such cases were at best, superfluous in terms of the sentence provided"[324] and that, as such, it was no longer necessary for trial judges "to hear mitigating factors from convicts in [cases involving the mandatory death sentence]."[325]

The Supreme Court then noted that most international jurisdictions have declared both "the mandatory" and the "discretionary death penalty"

316. *Mutiso*, 2 K.L.R. para. 36 (emphasis omitted).

317. *Muruatetu*, 2 K.L.R. para. 28; Mwaura v. Republic (2013) Criminal Appeal 5 of 2008 eK.L.R. at 12 (Kenya).

318. *Muruatetu*, 2 K.L.R. para. 28.

319. *Muruatetu*, 2 K.L.R. para. 28 (quoting *Mwaura*, at 12).

320. *Muruatetu*, 2 K.L.R. para. 29.

321. *Id*.

322. The Penal Code Act (2023) Cap. 63 § 204 (Kenya) (emphasis added).

323. *Muruatetu*, 2 K.L.R. para. 30.

324. *Id*.

325. *Id*.

unconstitutional.[326] For example, the Supreme Court cited *Roberts v. Louisiana*,[327] where the U.S. Supreme Court held that Louisiana's death penalty statute was unconstitutional under the Eighth Amendment because it makes capital punishment mandatory for many different crimes of varying severity.[328] The Supreme Court of Kenya then cited *Reyes*, a case in which the Privy Council held that "[a] law which denies a defendant the opportunity, after conviction, to seek to avoid imposition of the ultimate penalty, which he may not deserve, is incompatible with section 7 [of the Constitution of Belize] because it fails to respect his basic humanity."[329]

After citing two additional cases, *Spence v. The Queen* and *Hughes v. The Queen,* in which the Privy Council held that the mandatory death sentence "did not take into account that persons convicted of murder could have committed the crime with varying degrees of gravity and culpability,"[330] the Supreme Court of Kenya then added that two cases from the Indian Supreme Court merit mentioning.[331] In the first case, *Mithu v. State of Punjab*, the Indian Supreme Court held that "[a] provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair."[332] In the second case, *Bachan Singh v. The State of Punjab*, the Indian Supreme Court held that "[i]f the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence."[333]

After examining foreign comparative law on the mandatory death penalty, the Supreme Court of Kenya then turned to international law and cited *Eversley Thomson v. St. Vincent*, which was a communication to the U.N. Human Rights Committee pursuant to Article 26 of the ICCPR.[334] The

326. *Id*. para. 31.

327. *See* Roberts v. Louisiana, 428 U.S. 325, 335-36 (1976).

328. *Muruatetu*, 2 K.L.R. para. 31 (citing *Roberts*, at 335-36).

329. *Muruatetu*, 2 K.L.R. para. 31 (citing Reyes v. The Queen, [2002] UKPC 11, Appeal No. 64 of 2001, § 7 para. 29 (Belize)). This case was an appeal from the Court of Appeal of Belize to the Privy Council.

330. *Muruatetu*, 2 K.L.R. para. 31.

331. *See id*. para. 32.

332. Mithu v. Punjab, (1983) 2 SCR 690, 692 (India).

333. Singh v. Punjab, (1980) 1 SCR 898, para. 165(b) (India).

334. Eversley Thompson v. St. Vincent and Grenadines, Communication No. 806 (1998), U.N. Doc. CCPR/C/70/D/806/1998 (2000). Article 26 of the ICCPR states as follows: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status." ICCPR, *supra* note 61, at art. 26. *Muruatetu*, 2 K.L.R. para. 33 (citing Thompson v. St. Vincent, Communication No. 806 (1998), CCPR/C/70/D/806/1998, U.N.

Committee held in *Eversley Thompson* that "such a system of mandatory capital punishment would deprive the [offender] of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her case."[335] After examining these authorities on the mandatory death penalty, the Supreme Court then proceeded to make a determination as to "whether the mandatory nature of the death penalty under Section 204 of the Penal Code [Laws of Kenya] meets the constitutional standard."[336]

The Supreme Court began analysis of the mandatory nature of the death penalty as provided in § 204 of the Penal Code by examining certain provisions of the Constitution of Kenya that are related to the mandatory death penalty provision. Specifically, the Supreme Court examined Article 19(3)(a), which states that the "rights and fundamental freedoms" enumerated in the Bill of Rights belong to "each and every individual and are not granted by the State"; Article 20(1) and (2), which states that the "Bill of Rights applies to all law and binds all state organs and all persons" and that "[e]very person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom"; Article 28, which provides that every person "has inherent dignity and the right to have that dignity protected"; Article 48, which imposes an obligation on the State to "ensure justice for all persons"; and finally, Article 50(2), which guarantees every accused person the right to a fair trial and this right is absolute because it is one of the rights that cannot be limited pursuant to Article 25.[337]

The Supreme Court then returns to international law and notes that the U.N. Human Rights Committee has recommended, in its Resolution 2005/59, that the mandatory death sentence should be abolished.[338] The Court then clarified that these provisions of the Constitution of Kenya and the ICCPR[339] "bring to the fore a number of principles" which include the following: (i) the rights and fundamental freedoms enumerated in and guaranteed by international and regional human rights instruments and the Constitution of Kenya, belong to "each individual"; (ii) the Bill of Rights applies to "all law

Human Rights Committee (Dec. 5, 2000)). Article 26 of the ICCPR states as follows: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status." ICCPR, *supra* note 61, at art. 26.

335. *Thompson*, para. 8.2.

336. *Muruatetu*, 2 K.L.R. para. 34. The Court noted that the section under review states that "[a]ny person convicted of murder shall be sentenced to death." *Id*. (citing The Penal Code Act (2023) Cap. 63 § 204 (Kenya)).

337. *Muruatetu*, 2 K.L.R. paras. 35–37 (citing CONSTITUTION arts. 19(3)(a), 20(1), 28, 48, 50(2), 25 (2010) (Kenya)).

338. *Muruatetu*, 2 K.L.R. para. 39 (citing Human Rights Committee Res. 2005/59, U.N. Doc. E/CN.4, para. 5 (April 20, 2005)).

339. *See* ICCPR, *supra* note 61, at art. 14.

and binds all persons"; (iii) all people "have inherent dignity which must be respected and protected"; (iv) the State must ensure that all people within its jurisdiction have access to justice; (v) every person is entitled to a fair trial; and (vi) the right to a fair trial is non-derogable.[340] The Supreme Court then concluded that in order for § 204 of the Penal Code (Laws of Kenya) to remain good law, it must conform to or be in accord with the provisions just examined.[341]

The Supreme Court of Kenya explained that the trial process does not end after the accused is convicted. There is still sentencing, which is "a crucial component of a trial" and during which time the Court receives submissions that can significantly impact sentencing.[342] The Court then cited §§ 216 and 329 of the Criminal Procedure Code (Laws of Kenya).[343] Section 216 makes mitigation part of the trial process and Section 329 grants the trial court permission to receive "evidence" it thinks can help it to arrive at the "proper sentence to be passed."[344] Pursuant to these provisions, the trial court should take into account "the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence."[345]

The Supreme Court then cited *Sango Mohamed Sango & Another v. Republic*, where Makhandia, Ouko, M'inoti JJA held that "Sections 216 and 329 of the Criminal Procedure Code empower the trial court, before passing sentence to receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed" and that, although these "provisions are couched in permissive terms, [the Court of Appeal] has held over time that it is imperative for the trial Court to afford an accused person an opportunity to mitigate before he or she is sentenced, even in offences where the prescribed sentence is death."[346]

Additionally, the Court explained that Section 204 of the Penal Code, "is essentially saying to a convict" that "he or she cannot be heard on why, in all circumstances of his or her case, the death penalty should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless."[347] The Court concluded that although mitigation is not explicitly mentioned as a right in the Constitution, this "does not deprive it of its necessity and essence in the fair trial process."[348]

The right to a fair trial, recognized as a "fundamental right" and "one of the inalienable rights enshrined in Article 10 of the [UDHR]," is further

340. *Muruatetu*, 2 K.L.R. para. 40.
341. *Id*.
342. *Id*. at para. 41.
343. *Muruatetu*, 2 K.L.R. para. 40 (citing Criminal Procedure Code (2012) Ch. 75 (Kenya).
344. Criminal Procedure Code §§ 216, 329.
345. *Muruatetu*, 2 K.L.R. para. 43.
346. Sango v Republic, (2015) Criminal Appeal No. 1 of 2013 eKLR (Kenya).
347. *Muruatetu*, 2 K.L.R. para. 45.
348. *Id*. para. 46.

protected by Article 25(c) of the Constitution as "a non-derogable right which cannot be limited or taken away from a litigant."[349] The Court explained that the right to a fair trial "is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse."[350] However, § 204 of the Penal Code "deprives the Court of the use of judicial discretion in a matter of life and death," an outcome classified as "harsh, unjust and unfair."[351] In addition, the mandatory nature of the death penalty "deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases."[352]

The Supreme Court cited *Woodson v. North Carolina*, where the U.S. Supreme Court had struck down the death penalty and in doing so, the Court had "decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors."[353] The Kenyan Supreme Court also noted that in *Woodson*, the U.S. Supreme Court emphasized that a mandatory death sentence treats "offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them."[354]

After further analysis, the Supreme Court of Kenya concluded that Section 204's mandatory nature "long predates any international agreements for the protection of Human Rights" and that, the mandatory death sentence is "a colonial relic that has no place in Kenya today."[355] The Court noted further that although the making of laws is within the purview of Parliament, "it is the duty of [the Supreme Court] to evaluate, without fear or favour, whether the laws passed by Parliament contravene the Constitution."[356] The Court then held that "Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder" and that to avoid any doubt, "*this decision does not outlaw the death penalty*, which is still applicable as a discretionary maximum punishment."[357]

The Supreme Court of Kenya then issued the following orders:

> a) The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.

349. *Id*. para. 47.
350. *Id*.
351. *Id*. para. 48.
352. *Id*.
353. *Id*. para. 49. *See also* Woodson v. North Carolina, 428 U.S. 280 (1976).
354. *Muruatetu*, 2 K.L.R. para. 49.
355. *Id*. para. 67.
356. *Id*.
357. *Id*. para. 69.

b) This matter is hereby remitted to the High Court for re-hearing on sentence only, on a priority basis, and in conformity with this judgment.
c) The Attorney General, the Director of Public Prosecutions and other relevant agencies shall prepare a detailed professional review in the context of this Judgment and Order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this Court on the same.
d) We direct that this Judgment be placed before the Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, attended with a signal of the utmost urgency, for any necessary amendments, formulation and enactment of statute law, to give effect to this judgment on the mandatory nature of the death sentence and the parameters of what ought [to] constitute life imprisonment.[358]

The Supreme Court of Kenya's judgment in *Muruatetu* represents an important contribution to Africa's jurisprudence on the mandatory death penalty and its impact on the institutional independence of courts. The Court emphasized that mandatory death penalty statues deprive the courts of their legitimate jurisdiction to exercise discretion and impose alternative sentences when the evidence adduced at trial warrants an alternative outcome. A fair trial does not end at the conviction of the accused. Sentencing is considered an integral part of a fair trial and must remain within the purview of the judiciary and not that of the legislative branch. Courts in other African jurisdictions have made similar rulings. For example, in *Susan Kigula & 416 Others v. The Attorney General*, the Constitutional Court of Uganda held that "it is the duty of the judiciary to impose an appropriate sentence after due process" and that "[m]andatory sentences deny an accused the right to be heard on the question of sentence, which amounts to denial of a fair trial."[359] Additionally, the Constitutional Court of Uganda declared that "[s]entencing is a judicial function. It is not a legislative function. It is also not an executive function. The exercise of the Prerogative of Mercy should only be done after the judicial process on both conviction and sentencing have been finalized."[360]

With respect to mitigation, the Kenyan Supreme Court declared that "[t]he dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to

358. *Id*. para. 112 (emphasis omitted).

359. Kigula v. Attorney General, Constitutional Petition No. 6 of 2003 (2005) UGCC 8, at 83 (Uganda).

360. *Id*.

mitigate."[361] The Court stated further that it could not shut its eyes "to the distinct possibility of the differing culpability of different murderers" and that "[s]uch differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence."[362] Thus, the Kenyan Supreme Court concluded that depriving trial judges of the discretion to consider and take into account mitigating circumstances, can result in courts overlooking "some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability."[363] Finally, a failure to individualize the circumstances of an offense or an offender, concluded the Supreme Court, "may result in the undesirable effect of 'overpunishing' the convict."[364]

The Kenyan Supreme Court also noted that the Court of Appeal (Kenya) "has consistently reiterated on the need for noting down mitigating factors. Not only because they might affect the sentence but also for futuristic endeavors such as when the appeal is placed before another body for clemency."[365] A defendant's opportunity to place mitigation factors into the official record, even in cases where the offense prescribes the death sentence, is crucial because the "mitigating circumstances would be relevant if the matter went on appeal or before a clemency board or with regards to the age of the offender or pregnancy in the case of women convicts."[366] Under the mandatory death sentence provision, a person is denied the right to appeal their sentence if they are convicted of murder and sentenced to death; such an outcome interferes with the convicted person's right to a fair trial as provided in Article 14(1) of the ICCPR and § 50 of Kenya's 2010 Constitution.[367]

Until it was amended in 2011, Malawi's penal code also prescribed a mandatory death sentence for anyone convicted of murder. Before 2011, § 210 stated as follows: "Any person convicted of murder shall be sentenced to death."[368] Malawi has since amended Section 210 and it now states that: "Any person convicted of murder shall be liable to be punished with death or with imprisonment for life."[369] In the sub-section that follows, this article will examine the case *Twoboy Jacob v. The Republic* (Malawi Supreme Court of Appeal) which deals with the mandatory death sentence and was decided before § 210 was amended.

361. *Id*. para. 51.
362. *Id*.
363. *Id*. para. 53.
364. *Id*.
365. *Id*. para. 43.
366. *Id*. para. 44.
367. CONST. art. 50 (2010) (Kenya); *See also* ICCPR, *supra* note 61, at art. 14(1).
368. MALAWI PENAL CODE Ch. 7 :01 (2000), § 210.
369. MALAWI PENAL CODE Ch. 7:01, § 210 (2014) (rev. 2023).

E. Twoboy Jacob v. The Republic (Malawi Supreme Court of Appeal)

This case was an appeal from the High Court of Malawi at Balaka prior to the § 210 amendment. Mtambo JA, writing for the Supreme Court of Appeal explained that the appellant, Twoboy Jacob, had been convicted in the High Court and pursuant to § 210 of the Penal Code, had been sentenced to death.[370] Justice of Appeal Mtambo noted that it was clear from reading the official record that the High Court had imposed the death penalty on the appellant, "not necessarily because it felt the sentence was merited but rather because it felt bound by s. 210."[371] Mtambo JA then cited *Francis Kafantayeni and Five Others v. Attorney General*[372] in which the High Court held that:

> the mandatory requirement of the death sentence for the offence of murder as provided by section 210 of the Penal Code is in violation of the constitutional guarantees of rights under section 19(1), (2), and (3) of the Constitution on the protection of the dignity of all persons as being inviolable, the requirement to have regard to the dignity of every human being and the protection of every person against inhuman treatment or punishment; the right of an accused to a fair trial under section 42(2)(f) of the Constitution; and the right of access to justice, in particular the right of access to the court of final settlement of legal issues under section 41(2) of the Constitution.[373]

Mtambo JA then noted that he and his fellow justices on this case (Tambala & Msosa JJA) had read *Kafantayeni & Five Others* and agreed with the High Court that "the execution of the death penalty in [Malawi] is sanctioned by the Constitution under s. 16 thereof as follows:"[374]

> Every person has the right to life and no person shall be arbitrarily deprived of his or her life:
>
> Provided that the execution of the death sentence imposed by a competent on a person in respect of a criminal offence under the laws of Malawi of which he or she has been convicted shall not be regarded as arbitrary deprivation of his or her right to life.[375]

Mtambo JA also noted that the Supreme Court of Appeal would agree with the High Court that the "*proviso* to the section only saves the execution of the penalty and not the mandatory requirement for it" and that "the

370. The death penalty was the only sentence available to the trial court. *See* Malawi Penal Code Cap: 7:01, § 210. *See also* Jacob v. The Republic, [2007] MWSC 471 (Malawi).

371. *Jacob*, [2007] MWSC 471 at 2.

372. Kafantayeni v. Attorney General, [2007] MWHC 1 (Malawi).

373. *Id*.

374. *Jacob*, [2007] MWSC 471 at 2.

375. *Id*; *CONST*. OF MALAWI, § 16 (2017).

constitutionality of the mandatory requirement is an aspect not saved by the *proviso* and, therefore, susceptible to judicial examination and determination."[376] Justice of Appeal Mtambo then began his analysis by examining § 19(1) of the Constitution of Malawi, which provides that "[t]he dignity of all persons shall be inviolable."[377] In addition, Mtambo JA also looked at § 19(2) and § 19(3), which, respectively, guarantee respect for human dignity in any judicial proceedings, and prohibit subjecting any person to torture of any kind or to cruel, inhuman or degrading treatment or punishment.[378]

The High Court was largely persuaded by the decision of the Privy Council ("PC") in *Reyes v. The Queen*, an appeal from Belize, where the PC ruled on the constitutionality of the mandatory death sentence.[379] One of the grounds for appeal in *Reyes* was that the mandatory death sentence "violated the protection against subjection to inhuman or degrading punishment enshrined in section 5 of the Constitution of [Belize] which is to the same effect, and of the same wording, as s. 19 [of the Constitution of Malawi]."[380]

Justice of Appeal Mtambo then referenced what he described as "a very valuable passage" from *Reyes*, which states as follows:

> Under the common law of England there was one sentence only which could be judicially pronounced upon a defendant convicted of murder and that was sentence of death. This simple and undiscriminating rule was introduced into many states now independent but once colonies of the crown.
>
> It has however been recognised for very many years that the crime of murder embraces a range of offences of widely varying degrees of criminal culpability. It covers at one extreme the sadistic murder of a child for purposes of sexual gratification, a terrorist atrocity causing multiple deaths or a contract killing, at the other the mercy killing of a loved one suffering unbearable pain in a terminal illness or a killing which results from an excessive response to a perceived threat. All killings which satisfy the definition of murder are by no means equally heinous.[381]

Mtambo JA, also referred to another passage from *Reyes*, which states as follows:

> a sentencing regime which imposes a mandatory sentence of death on all murderers, or all murderers within specified categories, is

376. *Jacob*, [2007] MWSC 471 at 3.

377. CONST. OF MALAWI, *supra* note 375, at §19(1)-(3).

378. *Id.*

379. Reyes v. The Queen*,* UKPC 11 (Appeal No. 64, 2001) (Privy Council) (2002).

380. Jacob v. The Republic, (Appeal No. 18, 2006) (MSCA) (High Court Criminal No. 55) 3 (2002).

381. *Reyes,* UKPC 11 *para*. 10-11.

> inhuman and degrading because it requires sentence of death, with all the consequences such a sentence must have for the individual defendant, to be passed without any opportunity for the defendant to show why such sentence should be mitigated, without any consideration of the detailed facts of the particular case or the personal history and circumstances of the offender and in cases where such a sentence might be wholly disproportionate to the defendant's criminal culpability.[382]

Mtambo JA then cited, yet another comparative foreign law authority dealing with the mandatory death sentence and the efficacy of considering mitigating factors. In *Newton Spence v. The Queen* (1988), Chief Justice Byron held as follows:

> The issue here is whether it is inhuman to impose a sentence of death without considering mitigating circumstances of the commission of the offence and the offender, whether the dignity of humanity is ignored if this final and irrevocable sentence is imposed without the individual having any chance to mitigate; whether the lawful punishment of death should be imposed after there is a judicial consideration of mitigating factors relative to the offence itself and the offender. [383]

After making reference to and considering passages from other foreign and comparative case law, the Supreme Court of Appeal of Malawi concluded that the "offences of murder differ, and will always differ, so greatly from each other that we think it is wrong and unjust that they should attract the same penalty or punishment."[384] The court a quo (i.e., the High Court), considered the constitutionality of the mandatory death sentence *vis-à-vis* section 41(2) of the Constitution of Malawi, which guarantees that "[e]very person shall have access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues."[385] Justice of Appeal Mtambo then explained that the Supreme Court of Appeal agreed with the High Court's view that sentencing, following a conviction, is "a legal issue for judicial examination and determination, notwithstanding that by convention the prosecution will adopt a neutral attitude at that stage by not seeking to influence the court in favour of a heavy sentence."[386]

Additionally, the Supreme Court of Appeal (Malawi) agreed with the High Court of Malawi at Balaka that the issue under consideration by the Supreme Court of Appeal is within the "purview of s. 41(2)" of the Constitution of Malawi.[387] The High Court, also considered the

382. *Reyes,* UKPC 11 para. 29.
383. Spence v. The Queen*,* (Appeal No. 18, 1998) (St. Vincent), para. 30.
384. *Jacob,* [2007] MWSC 471 at 5.
385. CONST. OF MALAWI, *supra* note 375, at §41(2).
386. *Jacob,* [2007] MWSC 471 at 6.
387. *Id.*

constitutionality of the mandatory death sentence "in relation to s. 42(2)(f) which provides, in the relevant part, that every person arrested for, or accused of, the alleged commission of an offence shall have the right, as an accused person, to a fair trial."[388] Mtambo JA then explained the concept of a fair trial and added that the right to a fair trial "includes, under sub-paragraph (iv) of that section, the right to adduce and challenge evidence."[389]

The Supreme Court of Appeal then proceeded to determine "whether a trial includes sentencing."[390] As there was no precedent on this issue, Mtambo JA sought help from the Sixth Edition of Black's Law Dictionary, which defined a trial as "[a] judicial examination, in accordance with law of the land, of a cause, either civil or criminal, of the issues between the parties, whether of law or fact, before a court that has jurisdiction over it."[391] The Supreme Court of Appeal, noted Mtambo JA, had already decided that sentencing is a "legal issue for judicial examination and determination" and that "evidence may be adduced at that stage as well."[392] The Supreme Court of Appeal then concluded that a trial "in the case of a person accused of a crime includes sentencing."[393] After noting that the High Court of Malawi had the "same view" in *Kafantayeni*, the Supreme Court of Appeal concluded that "the mandatory requirement for death sentence under s. 210 of the Penal Code denies an offender the right to fair trial under s. 42(2) of the Constitution [of Malawi] by prohibiting the court from judicial examination and determination of sentence."[394]

The High Court's decision in *Kafantayeni* was endorsed "to the extent only that the mandatory requirement of the death sentence for the offence of murder as stipulated in s. 210 of the Penal Code is a violation of the ss. 19(1), (2) and (3), 42(2)(f) of the Constitution of the Republic of Malawi, and to that extent s. 210 is hereby invalid pursuant to s. 5 of the Constitution [of Malawi]."[395] Mtambo JA then explained that according to the facts of the case adduced in the trial court, the appellant had murdered his second wife in cold blood on suspicion that she had bewitched him so that he would not be able to make love to his first wife.[396] The Supreme Court of Appeal concluded that based on the facts presented to the trial court, a lesser sentence than the one imposed by the High Court was not appropriate, explaining that the sentence given to Twoboy Jacob for the murder of his second wife was "well merited."[397] The Court noted further that Jacob's death sentence had been commuted to life imprisonment and that although "the points raised in the

388. *Id.*
389. *Id.*
390. *Id.*
391. *Trial*, BLACK'S LAW DICTIONARY (6th ed. 1990)
392. *Jacob,* [2007] MWSC 471 at 7.
393. *Id.*
394. *Id.*
395. *Id.*
396. *Id.*
397. *Id.*

appeal have been decided in favour of the appellant," the Supreme Court of Appeal dismissed the case because they believed "no substantial miscarriage of justice [had] actually occurred thereby."[398]

The Malawi Supreme Court of Appeal's decision in *Jacob v. The Republic* is an important addition to the evolving African jurisprudence on the mandatory death penalty. Similar to the Supreme Court of Kenya's decision in *Muruatetu*, the Malawi Supreme Court of Appeal concluded that the mandatory death sentence deprives the defendant of the opportunity to present information to the trial court that can help mitigate his sentence. In addition, the Malawi Supreme Court of Appeal also showed that the mandatory death sentence deprives the court of the right to consider mitigating circumstances of the commission of the offense so that it can arrive at a sentence that reflects the accused's right to a fair trial.

Courts in Uganda have also adjudicated cases involving the death penalty in general and the mandatory death sentence in particular.[399] In these cases, petitioners have prayed the courts to declare both the death penalty and the mandatory death penalty unconstitutional, arguing that the imposition of this type of punishment violates the right to life and other rights enumerated and guaranteed in various international and regional human rights instruments to which Uganda is a State Party and the constitution of the Republic of Uganda. The following sub-section examines *Attorney General v. Susan Kigula & 417 Others*, Constitutional Appeal No. 03 of 2006, which was brought before the Supreme Court of Uganda at Mengo.

F. Attorney General v. Susan Kigula & 417 Others (Supreme Court of Uganda)

In *Attorney General v. Susan Kigula & 417 Others* ("*Kigula 2009*") the applicant was the Attorney General of Uganda ("AG-U") and the respondents were Susan Kigula and several other individuals who had previously been convicted of various capital offenses under the Penal Code Act and had subsequently been sentenced to death.[400] This case resulted from an appeal against the judgment of the Constitutional Court in *Susan Kigula & 416 Others v. The Attorney General (*"*Kigula 2005*").[401] In *Kigula 2005*, the Applicants (who were now Respondents in the case before the Supreme Court (i.e., *Kigula 2009*) had contended that imposing the death penalty on them was inconsistent with provisions of the Constitution of Uganda.[402]

398. *Id.* at 7-8.

399. *See, eg*., *Kigula* 2005, [2005] UGCC 8.

400. Attorney General v. Susan Kigula & 417 Others, Constitutional Appeal No. 3 of 2006 [2009] UGSC 6 (judgment of January 21, 2009, unreported), at 1.

401. *See Kigula* 2005, [2005] UGCC 8.

402. *See Kigula*, Constitutional Appeal No. 3 of 2006, at 1 (The Applicants argued that provisions of the laws of Uganda which prescribe the death sentence are inconsistent with Articles 24 and 44 of the Constitution of Uganda). *See also* CONST. REP. UGANDA 1995, art. 24 (2017) (stating, "[N]o person shall be subjected to any form of torture, cruel, inhuman or

The *Kigula 2005* Applicants petitioned further in the alternative as follows:

> First, that the various provisions of the laws of Uganda which provide for a mandatory death sentence are unconstitutional because they are inconsistent with Articles 20, 21, 22, 24, 28 and 44(a) of the Constitution. They contended that the provisions contravene the Constitution because they deny the convicted person the right to appeal against sentence, thereby denying them the right of equality before the law and the right to fair hearing as provided for in the Constitution.
>
> Second, that the long delay between the pronouncement by Court of the death sentence and the actual execution, allows for the death row syndrome to set in. Therefore [,] the carrying out of the death sentence after such a long delay constitutes cruel, inhuman and degrading treatment contrary to Articles 24 and 44(a) of the Constitution.
>
> Third, that Section 99(1) of the Trial on Indictments Act which provides for hanging as the legal mode of carrying out the death sentence, is cruel, inhuman and degrading contrary to Articles 24 and 44 of the Constitution.[403]

The Attorney General, who was the Respondent in *Kigula 2005* (but is now the Appellant in *Kigula 2009*), opposed the entire petition contending that the Constitution of Uganda allows the death penalty and that "its imposition, whether as a mandatory sentence or as a maximum sentence was Constitutional."[404] After hearing the petition, the Constitutional Court agreed in part, holding, inter alia, that (i) imposition of the death penalty was constitutional since it was permitted by the Constitution of Uganda; (ii) the mandatory death sentence, as prescribed by various provisions of the laws of Uganda, is unconstitutional; (iii) using hanging as a method of implementing the death penalty is constitutional since it "operationalizes Article 22(1) of the Constitution"; and (iv) failing to carry out a death sentence beyond three years after it has been confirmed by the country's highest appellate court is "an inordinate delay" and "would be unconstitutional to carry out the death sentence as it would be inconsistent with Articles 24 and 44(a) of the Constitution."[405]

degrading treatment or punishment," and "[N]otwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms—a. freedom from torture, cruel, inhuman or degrading treatment or punishment; b. freedom from slavery or servitude; c. the right to a fair hearing; d. the right to an order of habeas corpus."). *Id.* at art. 44.

403. *Kigula 2009*, [2009] UGSC 6, at 2.

404. *Id*.

405. *Id*. at 3.

Not wholly satisfied with the Constitutional Court's ruling in *Kigula 2005*, the Attorney General, representing the government of Uganda, appealed to the Supreme Court arguing, inter alia, that the justices of the Constitutional Court had erred by holding that the various laws prescribing mandatory death sentences are inconsistent with the Constitution of Uganda.[406] Susan Kigula and the other death row inmates, the Petitioners in *Kigula 2005*, were also dissatisfied with the Constitutional Court's ruling and subsequently lodged a cross-appeal to the Supreme Court, challenging the finding that the death penalty and hanging, as a form of execution, were not unconstitutional nor a cruel, inhuman and degrading form of punishment under Article 24 of the Constitution.[407]

On January 21, 2009, the Supreme Court of Uganda handed down its ruling in *Kigula 2009*. Ultimately, the court held that the death penalty was constitutional since it was sanctioned by the Constitution.[408] The Supreme Court considered the perspectives of the framers of Uganda's Constitution when the provisions regarding the death penalty were established.[409]

The framers, the Supreme Court noted, further considered Uganda's history of gross human rights violations, including extra judicial killings, and armed the Constitution with a Bill of Rights.[410] However, they also provided exceptions, modelled on international human rights instruments, where necessary.[411] For example, the Supreme Court remarked that Article 22(1) of the Constitution, which is "clearly meant to deal with and do away with extra judicial killings by the state," acknowledges the "sanctity of human life but recognizes also that under certain circumstances acceptable in the country, that right might be taken away."[412] The framers further provided that "life is sacrosanct and may only be taken away after due process up to the highest court, and after the President has had [the] opportunity to exercise the prerogative of mercy."[413] However, the Supreme Court stated, "there must not be torture or cruel, inhuman or degrading punishment under any circumstances."[414]

Specifically, the Supreme Court held that "there is no conflict between article 22(1) and 44(a)" and that article 44(a), which provides that there can be "no derogation from the enjoyment of . . . freedom from torture, cruel, inhuman or degrading treatment or punishment," was not intended "to apply to article 22(1) as long as the sentence of death was passed by a competent court after a fair trial and it had been confirmed by the highest appellate

406. *Id*. at 4.
407. *Id*. at 4, 7.
408. *Id*. at 31–34.
409. *Id*. at 31.
410. *Id*. at 32.
411. *Id*.
412. *Id*. at 32–33.
413. *Id*. at 33.
414. *Id*.

Court."[415] In addition, the Supreme Court held, "[s]uch a sentence could not be torture, cruel or degrading punishment in the context of Article 24."[416]

The Supreme Court next considered the constitutionality of the provisions in Uganda's laws that mandate the death sentence for certain offenses.[417] After examining foreign comparative law on the mandatory death penalty, especially as it relates to mitigation, the Supreme Court explained that the trial does not stop when the accused is convicted and that sentencing of the convicted person is an important part of the trial.[418] This, noted the Supreme Court, is due to the fact that the trial court usually takes into consideration "the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence."[419] However, in the situation where the sentence has already been "pre-ordained by the Legislature, as in capital cases," this effectively compromises the ability of the trial court to perform its function as "an impartial tribunal in trying and sentencing a person" and the principle of a fair trial.[420]

The Supreme Court further noted that "if there is one situation where the framers of the Constitution expected an inquiry, it is the one involving a death penalty" and that the judge's report is "so important that it forms a basis for advising the President on the exercise of the prerogative of mercy."[421] In addition, the Supreme Court emphasized that Uganda's Constitution entrusts the judiciary with the administration of justice, as outlined in Article 126, stating that "[t]he entire process of trial from the arraignment of an accused person to his/her sentencing is, in our view, what constitutes administration of justice."[422] However, the Supreme Court explained, "[b]y fixing a mandatory death penalty Parliament removed the power to determine sentence from the Courts and that, in our view, is inconsistent with article 126 of the Constitution."[423]

The Supreme Court stated further that Uganda's Constitution provides for the separation of powers between the country's three branches—the Executive, the Legislature, and the Judiciary—and that "[a]ny law passed by Parliament which has the effect of tying the hands of the judiciary in executing its function to administer justice is inconsistent with the

415. *Id*. *See* CONST. REP. UGANDA 1995, art. 22(1) (2017) (stating that "[n]o 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.").

416. *Kigula 2009*, [2009] UGSC 6, at 33. *See* CONST. REP. UGANDA 1995, art. 24 (2017) (prohibiting "any form of torture, cruel, inhuman or degrading treatment or punishment.").

417. *Kigula 2009*, [2009] UGSC 6, at 37.

418. *Id*. at 39–41.

419. *Id*. at 41.

420. *Id*.

421. *Id*. at 44.

422. *Id*. at 44. *See* CONST. REP. UGANDA 1995, art. 24 (2017) (prohibiting "any form of torture, cruel, inhuman or degrading treatment or punishment.").

423. *Kigula 2009*, [2009] UGSC 6, at 44.

Constitution."[424] Thus, the Supreme Court held that any law that interferes with or "fetters" the court's discretion "to confirm both conviction and sentence" is inconsistent with Article 22(1) of the Constitution.[425] The Supreme Court then concluded by declaring as follows: "We therefore agree with the Constitutional Court that all those laws on the statute book in Uganda which provide for a mandatory death sentence are inconsistent with the Constitution and therefore are void to the extent of that inconsistency."[426]

The Supreme Court then proceeded to address the issue of delay in the execution of the death sentence.[427] After a thorough analysis and drawing inspiration from international and comparative foreign case law, the Supreme Court agreed with the Constitutional Court that "a period of more than three years from the time when the death penalty was confirmed by the highest court would constitute inordinate delay."[428] The Supreme Court clarified that that in Uganda, a person convicted of murder and sentenced to death retains the constitutional right to appeal to a higher court and to "legally argue against his conviction even at the expense of the state in terms of legal representation."[429]

Under the laws of Uganda, the death sentence cannot be carried out until it is confirmed by the highest appellate court, and it is only after that confirmation is made "that the person now realistically faces the death penalty, as he is now at the mercy of the President."[430] The Supreme Court then posed the following question: "What is the effect of an unreasonable delay on an otherwise constitutional death sentence"?[431] The Court answered that "a delay carrying out sentence beyond three years from the date the sentence of death was confirmed by the highest court constitutes unreasonable delay" and that "[a]t the end of a period of three years after the highest appellate court confirmed the sentence, and if the President shall not have exercised his prerogative one way or the other, the death sentence shall be deemed to be commuted to life imprisonment without remission."[432]

The next issue that the Supreme Court examined is the constitutionality of hanging as a method to carry out the death penalty.[433]Counsel for the death row inmates criticized the Constitutional Court's holding that hanging is allowed because the death penalty is permitted by Article 22 and that if "the reasoning of the Constitutional Court were to be upheld it would mean that any method of execution would be constitutionally acceptable."[434] Counsel

424. *Id*. at 44-45.
425. *Id*. at 45.
426. *Id*.
427. *Id*.
428. *Id*. at 54.
429. *Id*. at 55.
430. *Id*. at 55–56.
431. *Id*. at 56.
432. *Id*. at 57.
433. *Id*. at 58.
434. *Id*.

for the Respondents argued further that since hanging is provided for in § 99 of the Trial on Indictments Act and not the Constitution, "it can be challenged if it is inconsistent with or in contravention of any provision of the Constitution."[435] The Court then cited *Republic v. Mbushuu* (High Court of Tanzania) and *R v. Mkwanyane* (Constitutional Court of South Africa), cases in which, he claimed, the courts had held that hanging is a cruel, inhuman, and degrading punishment.[436] With respect to *Kigula 2009*, the Supreme Court declared, however, that it was "inclined to the view that the pain and suffering experienced during the hanging process is inherent in the punishment of the death penalty which has been provided for in the constitution."[437] As such, the Court held that hanging as a method of execution is not unconstitutional under Article 24 of the Constitution.[438]

The Supreme Court's decision in *Attorney General v. Susan Kigula & 417 Others* ended a ten-year challenge to the constitutionality of the death penalty in Uganda.[439] In its analysis of the case, the Supreme Court sought inspiration from and relied on international human rights instruments and comparative foreign case law. The Court noted that, historically, the death penalty "was arbitrarily imposed and carried out in all sorts of manner as for example burning on the stake, crucifixion, beheading, shooting, etc."[440] As a result of the crimes committed during World War II, especially by the Nazi regime in Germany, the global community, through the U.N. General Assembly, adopted the Universal Declaration of Human Rights ("UDHR") on December 10, 1948.[441] The Court noted that all Member States of the U.N. were expected to follow and adhere to minimum international standards regarding human rights set by the UDHR.[442]

For example, noted the Supreme Court, the UDHR declares that "[e]veryone has the right to life, liberty and security of person"[443] and that "[n]o one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment."[444] Despite this declaration by the UDHR, it did not abolish the death penalty outright and at its time of adoption by the U.N. General Assembly, war criminals in both Germany and Japan were being executed.[445]

435. *Id*.

436. *Id.* (citing *Makwanyane & Another,* ¶76) (citing *Republic v. Mbushuu Alias Dominic Mnyaroje & Kalia Sangula* [1994] TLR 146 (Tanzania))

437. *Kigula 2009*, [2009] UGSC 6, at 62.

438. *Id*.

439. *Id.* at 63. Barrie Sander, *Capital Punishment Jurisprudence: A Critical Assessment of the Supreme Court of Uganda's Judgment in Attorney General v. Susan Kigula & 417 Others*, 55 J. AFR. L. 261, 261 (2011) (examining the impact of *AG v. Kigula & 417 Others* on the development of capital punishment in Uganda) (citing *Kigula 2009*, [2009] UGSC 6, at 33).

440. *Kigula 2009*, [2009] UGSC 6, at 12.

441. *Id.* at 12–13.

442. *Id.* at 13.

443. UDHR, *supra* note 56, at art. 3.

444. *Id.* at art. 5.

445. *Kigula 2009*, [2009] UGSC 6 at 13.

Next, the Supreme Court of Uganda drew inspiration from the International Covenant on Civil and Political Rights ("ICCPR").[446] Specifically, the Supreme Court cited Article 6(1) of the ICCPR, which states as follows: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[447] The Court acknowledged the significance of this provision for its utilization of the word "arbitrarily," which implies that an individual can, indeed, be lawfully sentenced to death or deprived of his life under certain conditions.[448] The Court then noted that this position is reinforced or "further acknowledged" by Articles 6(2), 6(4) and 6(5) of the ICCPR, which explain the conditions for legally imposing the death penalty by a State Party.[449]

The Court further cited Article 7 of the ICCPR, which provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" and that "[i]n particular no one shall be subjected without his free consent to medical or scientific experimentation."[450] The Court concluded, as did the U.N. Human Rights Committee ("UNHRC") in *Ng v. Canada*, that it did not see or find any conflict between Articles 6 and 7 of the ICCPR.[451] After examining the decision in *Ng*, the Supreme Court summarized the relevant holding of the majority of the UNHRC as follows:

> the majority of the [UNHRC] held that because the [ICCPR] contained provisions that permitted the imposition of capital punishment for the most serious crimes, but subject to certain qualifications, and notwithstanding the view of the [UNHRC] that the execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the [ICCPR], the extradition of a fugitive to a country which enforces the death sentence in accordance with the requirements of the [ICCPR] could not be regarded as a breach of the obligations of the extraditing country.[452]

The Supreme Court noted that since Articles 6 and 7 are in "*pari materia*," or of the same matter, with Articles 22(1) and 24 of the Constitution of Uganda, it did not find it difficult to dismiss the "the suggestion that the framers of the Constitution had 'inadvertently created confusion and conflict between two important provisions of the Constitution.'"[453] The Supreme Court, instead, held that "[h]ad the framers [of the Constitution of Uganda] intended to provide for the non-derogable right to life, they would have so

446. *Id.* at 14. *See* ICCPR, *supra* note 61, at art. 6(1).

447. ICCPR, *supra* note 61, at art. 6(1).

448. *Kigula 2009*, [2009] UGSC 6 at 14.

449. *Id.* at 14-15. *See also* Sander, *supra* note 439, at 264.

450. ICCPR, *supra* note 61, at art. 7

451. *Kigula 2009*, [2009] UGSC 6 at 15-16. *See* Human Rights Committee, Ng v. Canada, U.N. Doc. CCPR/C/49/D/469/1991 (Jan. 7, 1994).

452. *Kigula 2009*, [2009] UGSC 6 at 16.

453. Sander, *supra* note 439, at 265. *See also Kigula 2009*, [2009] UGSC 6 at 26.

provided expressly."[454] In the context of the Constitution of Uganda which expressly permits the death sentence as an exception to the right to life,[455] the Supreme Court held that "as long as the sentence of death was passed by a competent court after a fair trial and it had been confirmed by the highest appellate Court" in the country, "such a sentence could not be torture, cruel or degrading punishment in the context of Article 24" of the Constitution.[456]

The Supreme Court noted that the ICCPR's provisions should not be interpreted as hindering the abolition of capital punishment and emphasized that despite Uganda's Constitution allowing the death penalty, the country, as a U.N. Member State, is free to introduce "legislation to amend the Constitution and abolish the death sentence."[457] Internationally, noted the Supreme Court, the U.N. General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, through which each State Party pledged to "take all necessary measures to abolish the death penalty within its jurisdiction."[458]

The Court also noted that after dealing with the abolition of the death penalty in The Second Optional Protocol, the U.N. General Assembly moved on to confront the issues of "torture, cruel or inhuman punishment separately."[459] In December 1975, the U.N. General Assembly adopted the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and subsequently on December 10, 1984, adopted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("The Torture Convention").[460] The Torture Convention offers a definition for torture, which the Supreme Court of Uganda concluded "does not apply to a lawful death sentence."[461] Then, on December 1, 2002, the U.N. General Assembly adopted the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment whose objective is "to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty in order to prevent torture and other cruel, inhuman or degrading treatment or punishment."[462]

454. *Kigula 2009*, [2009] UGSC 6 at 33.

455. *See Id*.

456. *Id.*

457. *Id.* at 16.

458. *Second Optional Protocol to the ICCPR*, *supra* note 66, art. 1, ¶ 2. *See also Kigula 2009*, [2009] UGSC 6 at 17.

459. *Kigula 2009*, [2009] UGSC 6 at 17.

460. *See* G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984) [hereinafter Torture Convention].

461. *Kigula 2009*, [2009] UGSC 6 at 17. *See also* Torture Convention, *supra* note 460, at art. 1 para. 1.

462. G.A. Res 57/199 Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, at art. 1 (Dec 18, 2002).

The Supreme Court highlighted other international human rights instruments with similar provisions on the right to life and freedom from torture, cruel, inhuman, or degrading treatment or punishment, including the African Charter on Human and Peoples' Rights ("Banjul Charter"), which provides at Article 4 that "[h]uman beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be *arbitrarily* deprived of this right."[463] The Supreme Court emphasized the use of the word "arbitrarily" in the Banjul Charter, nothing that, like other international human rights instruments, it treats "the freedom from cruel, inhuman or degrading treatment" separately.[464]

In *Kigula 2009*, the Supreme Court of Uganda, made clear that "there are common standards of humanity that all constitutions set out to achieve" and that in deciding on the issues before it, it would "make reference to international [human rights] instruments on the subject [of the death penalty]."[465] International human rights advocates and legal scholars hope that Ugandan courts will "maintain [this] open and receptive attitude towards public international law [in future constitutional interpretations]."[466]

The subject matter of this article and an important issue that the Supreme Court of Uganda was also called upon to determine was *the constitutionality of the mandatory death sentence*.[467] Unlike its discussion of the death penalty, the Supreme Court did not seek inspiration from international human rights law in its examination. Instead, it conducted "a purely constitutional analysis" and made two important points.[468] The Supreme Court held, first, that the mandatory death penalty "compromises the principle of a fair trial"[469] and is "inconsistent with the principle of equality before and under the law."[470] Further stating that: "A trial does not stop at convicting a person. The process of sentencing a person is part of the trial. This is because the court will take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence."[471] However, noted the Supreme Court, the trial court is "denied the exercise of this function where the sentence has already been pre-ordained by the Legislature, as in capital cases."[472]

In addition the mandatory death sentence interferes with Uganda's separation of powers principle provided by the Constitution.[473] According to Article 126(1) of the Constitution of Uganda, "[j]udicial power is derived

463. Banjul Charter, *supra* note 126, at art. 4.
464. *Kigula 2009*, [2009] UGSC 6 at 18.
465. *Id.* at 12.
466. Sander, *supra* note 439, at 266.
467. *See Kigula 2009*, [2009] UGSC 6 at 37 (emphasis added).
468. Sander, *supra* note 439, at 270.
469. *Kigula 2009*, [2009] UGSC 6 at 41.
470. *Id.* at 43.
471. *Id*. at 41.
472. *Id*.
473. *Id.* at 44-45.

from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with values, norms and aspirations of the people."[474] The Supreme Court noted that "[t]he entire process of trial from the arraignment of an accused person to his/her sentencing is, in our view, what constitutes administration of justice," which is within the exclusive purview of the judiciary.[475] The Supreme Court added that "[b]y fixing a mandatory death penalty Parliament removed the power to determine sentence from the Courts and that, in our view, is inconsistent with article 126 of the Constitution [of Uganda]."[476]

While there are many lessons to be gleamed from the Supreme Court of Uganda's decision in *Kigula 2009*, the most important concern the Court's decision on the mandatory death sentence. In addition to holding that the "various provisions of the laws of Uganda which provide for a mandatory death sentence are unconstitutional because they are inconsistent with [various articles] of the Constitution,"[477] the Supreme Court also held that the mandatory death sentence effectively deprives the judiciary of its ability to conduct fair trials, which include sentencing.[478]

Mandatory death sentence statutes remove the sentencing phase of the trial from the judiciary and places it in the purview of the legislative branch of government and hence, interferes with the principle of the separation of powers, which is guaranteed by the constitution. As made clear by Justice Jackson in *West Virginia Board of Education v. Barnette*, an important function of a Bill of Rights is to "withdraw certain subjects from the vicissitudes of political controversy" and place them "beyond the reach of majorities and officials" and "establish them as legal principles to be applied by the courts."[479] Thus, the effective protection of human rights – especially the right to a fair trial – depends not only on a democratic political order but, above all, on a robust judiciary with clearly defined constitutional roles, which should not be interfered with by the other branches of government. A legislatively imposed mandatory death sentence represents such an interference with the right of the judiciary to perform its constitutionally mandated functions.

V. SUMMARY AND CONCLUSION

In *Pagdayawon Rolando v. Philippines*, the U.N. Human Rights Committee held that "the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the [ICCPR], in circumstances where the death penalty is imposed *without any possibility of taking into account the defendant's*

474. CONST. REP. UGANDA 1995 at art. 126(1) (2017).
475. *Kigula 2009*, [2009] UGSC 6 at 44.
476. *Id*.
477. *Id.* at 2
478. *Id.* at 44.
479. *Barnette* 319 U.S. at 638.

personal circumstances or the circumstances of the particular offence."[480] The U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, in his report to the U.N. Commission on Human Rights on civil and political rights, including the questions of disappearances and summary executions, stated that "[t]he mandatory death penalty which precludes the possibility of a lesser sentence being imposed regardless of the circumstances, is inconsistent with the prohibition of cruel, inhuman or degrading treatment or punishment."[481]

Historians believe that it was an essay by Cesare di Beccaria (Count Cesare Bonesana, Marquis of Beccaria, Italy) that gave impetus to the global discussion on the death penalty and particularly, on its abolition.[482] Over the years, courts in many countries have developed a significant jurisprudence on the death penalty. However, because of colonialism, courts in African countries did not begin to make serious contributions to death penalty jurisprudence until after independence in the 1950s and 1960s. Today, courts in countries, such as Kenya, Malawi, South Africa, and Zimbabwe, have significantly contributed to global jurisprudence on the death penalty, addressing both its general application and the effects of mandatory death sentences on the court's administration of justice

The international community's work on human rights and fundamental freedoms has also greatly enhanced our understanding of the death penalty's impact on an individual's ability to enjoy their human rights, including the right to life and the prohibition on torture or cruel, inhuman or degrading treatment or punishment.[483] In 1948, the U.N. General Assembly adopted the Universal Declaration of Human Rights ("UDHR") and through this resolution, declared that "[e]veryone has the right to life, liberty and the security of person" and that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[484] However, at this time, the majority of the Member States of the U.N. still retained death penalty statues as part of their laws.[485] In fact, in the immediate post-war period, the death sentence was "recognized as an appropriate penalty" for war crimes by tribunals at Nuremberg (Germany) and Tokyo (Japan).[486]

The UDHR provisions were eventually transformed and incorporated into treaty law and appeared in various international and regional human rights instruments. These instruments specifically mention the death penalty

480. U.N. Hum. Rts. Comm., *Pagdayawon Rolando v. Philippines*, ¶ 5.2, U.N. Doc. CCPR/C/82/D/1110/2002 (Dec. 8, 2004) (emphasis added).

481. Philip Alston (Special Rapporteur), *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, ¶ 80, U.N. Doc. E/CN.4/2005/7 (Dec. 22, 2004).

482. *See* Schabas, *supra* note 58, at 806.

483. *See, e.g.*, ICCPR, *supra* note 61, at arts. 6-7.

484. UDHR, *supra* note 56, at art. 3, 5.

485. Schabas, *supra* note 58, at 797.

486. *Id.*

as "a form of exception to the right to life."[487] For example, the ICCPR permits the death penalty "for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide."[488] However, more than 75 years after the adoption of the UDHR, the compatibility of the death penalty with international human rights norms remains uncertain.[489] For example, the ICTR and the ICTY have ruled out "the possibility of the death penalty, even for the most heinous crimes."[490] According to the Statutes of the ICTY and ICTR "[t]he penalty imposed by the Trial Chamber shall be limited to imprisonment."[491] In addition, the Rome Statute of the International Criminal Court limits penalties for individuals convicted of crimes under the Statute to a maximum of 30 years' imprisonment or life imprisonment "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person."[492]

Most of the core international human rights instruments have been armed with additional protocols that expressly prohibit the death penalty for all crimes. For example, Article 1 of the Second Protocol to the ICCPR states that "[n]o one within the jurisdiction of a State Party to the present Protocol shall be executed."[493] Research by Amnesty International reveals that about two-thirds of today's Member States of the U.N. have "abolished the death penalty in law or practice."[494] International legal experts argue that the abolition of the death penalty is an important element of democratic development, particularly for countries that are seeking to break away from a history "characterized by terror, injustice, and repression."[495]

States seeking to abolish capital punishment can do so either by amending their constitution to expressly outlaw or prohibit the death penalty or through court interpretation of death penalty statutes. For example, in *S. v. Makwanyane*, Justice Chaskalson writing for the Constitutional Court of South Africa, held that laws "sanctioning capital punishment which are in force in any part of [South Africa] in terms of section 229 [of the Constitution], are declared to be inconsistent with the Constitution and, accordingly, to be invalid."[496]

Although the UDHR does not impose binding treaty obligations on U.N. Member States, it has, nevertheless, provided a foundation and "normative

487. *Id.*
488. ICCPR, *supra* note 61, at art. 6 ¶ 2.
489. Schabas, *supra* note 58, at 797-98.
490. *Id.* at 798.
491. S.C. Res 995, *supra* note 64, at art. 21, ¶ 1; S.C. Res. 827, *supra* note 64, at art. 24.
492. Rome Statute, *supra* note 65, at art. 77, ¶ 7.
493. *Second Optional Protocol to the ICCPR*, *supra* note 66, at art. 1.
494. *Abolitionist and Retentionist Countries as of July 2018*, *supra* note 68.
495. Schabas, *supra* note 58, at 799.
496. S. v. Makwanyane, 1995 (3) SA 391 (CC) at 95, para. 151(1) (S. Afr.).

framework" for many international and regional human rights instruments[497] and has received favorable treatment since its adoption.[498] In addition, many international human rights experts have concluded that "all or parts of [the UDHR should be viewed] as legally binding, either as a matter of customary international law or as an authoritative interpretation of the UN Charter."[499]

Two years after the UDHR was adopted, the Council of Europe adopted the European Convention on Human Rights ("ECHR") (formally known as the Convention for the Protection of Human Rights and Fundamental Freedoms).[500] The ECHR was adopted at a time when war crimes trials were taking place, some of which resulted in the imposition of the death penalty on those found guilty. In 1983, the Council of Europe adopted Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty and effectively abolished the death penalty. Article 1 of Protocol No. 6 states as follows: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed."[501] However, Protocol 6's Article 2 allows States Parties to include provisions in their laws permitting the death penalty "in respect of acts committed in time of war or of imminent threat of war."[502] The penalty provided for in Article 2, however, can only be applied "in the instances laid down in the law and in accordance with its provisions" and, in addition, "[t]he State shall communicate to the Secretary General of the Council of Europe the relevant provisions of the law."[503]

In the *Case of Soering v. The United Kingdom*, the European Court of Human Rights ("ECtHR") held that "[d]e facto the death penalty no longer exists in time of peace in the Contracting States to the [European] Convention [on Human Rights and Fundamental Freedoms]."[504] Member States of the U.N., however, took much longer to finally draft and adopt a human rights treaty. It was not until 1966 that the U.N. General Assembly adopted the ICCPR which entered into force on March 23, 1976.[505] Article 6 of the ICCPR includes the death penalty "as an exception to the right to life" but also provides safeguards and restrictions that govern its implementation.[506]

497. These instruments include the ICCPR, the Banjul Charter, and the American Convention on Human Rights; International Covenant on Civil and Political Rights art. 6, Dec. 19, 1966, 999 U.N.T.S. 17, 174-175 (entered into force March 23, 1976); Banjul Charter, *supra* note 126; American Convention on Human Rights: "Pact of San José, Costa Rica," Nov. 22, 1969, 1144 U.N.T.S. 123.

498. Mbaku, *supra* note 107.

499. STEINER, ET AL., *supra* note 106.

500. *See* European Convention on Human Rights, *supra* note 109, at Convention of the Protection of Human Rights and Fundamental Freedoms.

501. *Id.* at Protocol No. 6, art. 1.

502. *Id.* at art. 2.

503. *Id*.

504. Soering v. United Kingdom, App. No. 14038/88, ¶102 (1989).

505. ICCPR, *supra* note 61, at art. 49.

506. *Id*. at art. 6(1). *See also* Schabas, *supra* note 58, at 804.

The second regional human rights instrument containing provisions showing progress toward the abolition of the death penalty is the American Convention on Human Rights ("Pact of San José"), which was adopted on November 22, 1969.[507] Article 4(3) greatly restricts the application of the death penalty by declaring that "[t]he death penalty shall not be reestablished in states that have abolished it."[508] Finally, on June 8, 1990, the American States adopted the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.[509]

The third major regional human rights instrument that enshrines the right to life is the Banjul Charter, which was adopted in 1981 and became effective in 1986.[510] The African Commission on Human and Peoples' Rights ("African Commission"), the quasi-judicial body that interprets the Banjul Charter, issued General Comment No. 3 on the Banjul Charter's Article 4 (right to life) in which it provided guidance to States Parties on the abolition of the death penalty.[511]

Although this article has examined the death penalty and its abolition, the emphasis is on the mandatory death penalty statutes and how they affect the independence of the judiciary in African countries. This is achieved by examining case law from Kenya, Malawi, and Uganda. Additionally, this article examined a case of the African Court on Human and Peoples' Rights ("African Human Rights Court") that deals with the mandatory death penalty. In *Rajabu & Others*, five citizens of Tanzania had been convicted of murder and sentenced to death by the High Court on November 11, 2011 pursuant to § 197 of the country's Penal Code.[512] They subsequently appealed to the Court of Appeal which dismissed the appeal on March 22, 2013.[513] On March 24, 2013, they filed an application for review and while their review application was still pending before the Court of Appeal, the death row inmates ("the Applicants") brought their case to the African Human Rights Court.[514]

Before the African Human Rights Court, the Applicants argued that the failure of the Respondent State (i.e., the United Republic of Tanzania) to amend § 197 of its Penal Code, which provides for the mandatory death sentence for murder, is a violation of their right to life.[515] The Applicants prayed the Court to declare that "the mandatory imposition of the death penalty by the High Court and its confirmation by the Court of Appeal violates their rights to life and to dignity."[516] Specifically, in *Rajabu &*

507. Pact of San José, *supra* note 121, at art. 4.
508. *Id.* at art. 4(3).
509. Protocol to the American Convention, *supra* note 124.
510. Banjul Charter, *supra* note 126.
511. *General Comment No. 3 on the African Charter*, *supra* note 130.
512. *Rajabu*, ¶¶ 4, 14(vii).
513. *Id.* ¶ 5.
514. *Id.*
515. *Id.* ¶ 14(vii).
516. *Id.* ¶ 14(viii).

Others, the African Human Rights Court was called upon to determine whether Tanzania's "legal provision for the mandatory imposition of the death sentence in cases of murder violates the right to life guaranteed in Article 4 of the [Banjul] Charter."[517]

After relying on and drawing inspiration from international and comparative foreign case law, the African Human Rights Court held that the "mandatory imposition of the death penalty as provided for in Section 197 of the Respondent State's Penal Code and applied by the High Court in the case of the Applicants does not uphold fairness and due process as guaranteed under Article 1 of the [Banjul] Charter."[518] The African Human Rights Court declared further that the failure of the mandatory death sentence "to pass the test of fairness" puts the mandatory death sentence in conflict with the right to life provided under Article 4.[519] The Applicants prayed the African Human Rights Court would set aside the death sentences imposed on them by the High Court of Tanzania but the Court held that since the "violations did not impact on the Applicants' guilt and conviction, *the sentencing is affected only to the extent of the mandatory nature of the penalty*."[520] The Court then ordered the Respondent State to "[t]ake all necessary measures, within one (1) year from the notification of this Judgment, to remove the mandatory imposition of the death penalty from its Penal Code as it takes away the discretion of the judicial officer."[521]

In addition to contributing significantly to the African jurisprudence on the death penalty in general and the mandatory death penalty in particular, the African Human Rights Court's ruling in *Rajabu & Others* also provides two important lessons for African countries. First, the Court made clear that it would not interfere with or infringe upon the trial and sentencing jurisdictions of national courts with respect to cases that fall within their respective jurisdictions. Second, with respect to mandatory death penalty laws, the Court held that mandatory death sentence laws prevent trial courts from considering mitigating factors, such as the defendant's "social history and the proportionality between the facts and the sentence arbitrarily deprive [] the defendants of their right to life."[522]

Thus, through a mandatory death sentence statute, a country's legislative branch can effectively undermine the independence of the judiciary to freely and fully adjudicate cases brought before it. Legal researchers have determined that mandatory sentencing statutes interfere with or eliminate judicial discretion to impose a sentence (i.e., a "prison term") that is "lower than the statutory floor," effectively rendering irrelevant, "case-specific information about the offense and [the] offender."[523] Allowing courts to

517. *Id.* ¶ 98.
518. *Id.* ¶ 111.
519. *Id.* ¶ 112.
520. *Id.* ¶ 158 (emphasis added).
521. *Id.* ¶ 171(xv).
522. Mohan, *supra* note 245.
523. Luna, *supra* note 246, at 126.

utilize these facts in the sentencing process could result in a "below-minimum sentence."[524] Mandatory minimums, it can be argued, do not take into consideration proportionality concerns and, in addition, "can pierce retributive boundaries with excessive punishment."[525]

In *Mutiso*, the Kenya Court of Appeal held that a trial starts with the arraignment of the accused and extends to the sentencing, where the individual is convicted of the offense. In other words, sentencing is an important part of a fair trial. Thus, the Court held that when the Parliament of Kenya fixed a mandatory death penalty, it effectively "removed the power to determine sentence from the Court" which in the view of the Court of Appeal, was inconsistent with the Constitution of Kenya.[526] An independent judiciary is a sine qua non for the exercise of the right to a fair trial. Freedom of the judiciary from external influence, whether directly or indirectly or by state- or non-state actors, is critical for the judiciary to perform its constitutional functions effectively and fully to administer justice. *Makwanyane & Another*, further underscores the importance of ensuring that the country's legal system is undergirded by a judiciary that is separate from and independent of the other branches of government.[527] Justice Chaskalson cited *West Virginia State Board of Education v. Barnette*, where the U.S. Supreme Court made clear that certain subjects be withdrawn from popular discourse and the "vicissitudes of political controversy" and placed beyond the reach of "majorities and officials," and established as "legal principles to be applied by the courts."[528] The U.S. has further held that mandatory minimums and three strike laws promulgated by legislators interfere with and limit the discretion of judges and, as a consequence, violate the separation of powers doctrine.[529]

While many African constitutions guarantee judicial independence, the courts of these countries have not developed significant jurisprudence on what constitutes independence of the judiciary or what its elements are. However, South African courts are an exception. In *De Lange v. Smuts NO & Other*s, Justice Ackermann held that "judicial independence . . . is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law."[530] In the minority opinion in *De Lange*, Justice O'Regan cited *Valente v. The Queen*, where the Canadian Supreme Court held that judicial independence "involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive

524. *Id.*
525. *Id.*
526. Godfrey Ngotho Mutiso v. Republic (2010) eKLR (C.A.K.) (Kenya) ¶ 35.
527. *Makwanyane*, ¶ 88.
528. *Barnette,* at 638.
529. *See generally Romero*, at 529–532. *See also* Bell, *supra* note 257, at 11.
530. *De Lange*, para. 59.

and legislative branches of government."[531] In the Canadian case, *The Queen v. Beauregard*, Chief Justice Dickson held that in addition to adjudicating individual cases, courts also have a second and quite important role to play, which is to serve as "protector of the Constitution and the fundamental values embodied in it," which include "fundamental justice equality, and preservation of the democratic process."[532] To fully administer justice generally and protect fundamental justice in particular, the judiciary must be granted independence so that courts have the discretion to make sentencing decisions and in doing so, they can consider mitigating circumstances and determine a sentence that is legally appropriate.

The first African case dealing with the mandatory death sentence that this article examined was *Francis Karioko Muruatetu & Another v. Republic*.[533] In *Muruatetu*, the Petitioners, who had been convicted of murder by the High Court and sentenced to death in accordance with § 204 of the Penal Code of Kenya, argued that both the mandatory death sentence, which had been imposed on them and the subsequent commutation to life imprisonment were unconstitutional.[534] More specifically, the Petitioners had maintained before the Supreme Court that "the sentencing process is part of the right to a fair trial" and that "the mandatory nature of the death penalty under Section 204 of the Penal Code jettisons the discretion of the trial court forcing it to hand down a sentence pre-determined by the Legislature thus fouling the doctrine of the separation of powers."[535] The sentencing process, the Petitioners in *Muruatetu* argued, is part of the right to a fair trial, which is enshrined in Article 50(2) of the Constitution of Kenya and the mandatory death penalty provision in the Penal Code violates that right to a fair trial by removing the sentencing jurisdiction of the courts and transferring it to the legislative branch of government.[536]

After relying on and drawing inspiration from international and comparative foreign case law, the Supreme Court of Kenya concluded that in order for § 204 of the Penal Code to remain good law, it must conform to or be in accord with the provisions of international human rights law and those of the Constitution.[537] The Supreme Court explained that a trial does not end after the accused is convicted but includes sentencing as part of the trial, a period during which the court is obliged to receive submissions that can have a significant impact on sentencing.[538] The Supreme Court further clarified that under § 204 of the Penal Code, each accused individual "cannot be heard on

531. *Valente*, at 687.
532. The Queen v. Beauregard, [1986] 2 S.C.R. 56 (Can.).
533. *Muruatetu*, at para. 2.
534. Mwangi, *supra* note 283, at 707–708.
535. *Muruatetu*, at para. 6.
536. *Id*.
537. *Id*. para. 40.
538. *Id*. para. 41.

why" circumstances surrounding their case might warrant a sentence other than death.[539]

Finally, the Supreme Court of Kenya held that § 204 of the Penal Code is inconsistent with the Constitution of Kenya and invalid to the extent that "it provides for the mandatory death sentence for murder."[540] Important lessons from the *Muruatetu* decision include the following: (1) mandatory death sentence statutes deprive the courts of their legitimate jurisdiction to try a case and impose a sentence based on the evidence adduced in trial; (2) sentencing must be made part of a fair trial, where courts, and not the legislature, have the power to control the entire sentencing process; (3) substantive and procedural due process requires that the accused be granted the right to be heard on the question of sentencing ;[541] and (4) the failure to individualize the circumstances of an offense "may result in the undesirable effect of 'overpunishing' the convict"; and (5) depriving trial judges of the discretion to take into consideration "mitigating circumstances" can force courts to overlook "some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability."[542]

The next case that this article examined was Malawi Supreme Court of Appeal case, *Twoboy Jacob v. The Republic*.[543] In this case, Twoboy Jacob, the Appellant, had been convicted and sentenced to death by the High Court and pursuant to § 210 of the Penal Code of Malawi.[544] However, Mtambo JA noted that the trial court had reluctantly imposed the death penalty on the Appellant, not necessarily because the High Court felt that the sentence was "merited but rather because it felt bound by s. 210" of the Penal Code.[545]

After examining and drawing inspiration from foreign and comparative case law, Mtambo JA concluded that "offences of murder differ, and will always differ, so greatly from each other that we think it is wrong and unjust that they should attract the same penalty or punishment."[546] The Court, like that of the High Court of Malawi in *Kafantayeni*, also concluded that sentencing is included as part of a trial.[547] More specifically, the Supreme Court of Appeal held that sentencing is a "legal issue" within the purview of the courts for "examination and determination."[548] As part of the sentencing process, the convicted individual is entitled to present evidence, including any that help mitigate the sentence imposed by the trial judge.[549] The Supreme

539. *Id*. para. 45.
540. *Id*. para. 69.
541. *Id*. para. 51.
542. *Id*. at para. 53.
543. Jacob v. Republic, [2007] MWSC 471 (Malawi).
544. *Id*. at 2.
545. *Id*.
546. *Id*. at 5.
547. *Id*. at 11. *See also* Kafantayeni v. Attorney General, [2007] MWHC 1 (Malawi).
548. Jacob, at 6-7.
549. *Jacob*, at 7.

Court of Appeal then held that § 210's the mandatory death sentence denies the accused person the right to a fair trial under § 42(2) of the Constitution of Malawi by prohibiting the trial court from properly examining and determining the appropriate sentence.[550]

The last case that this article examined on the mandatory death sentence is the Supreme Court of Uganda case, *Attorney General v. Susan Kigula & 417 Others* ("*Kigula 2009*").[551] This case was an appeal against the decision of the Constitutional Court in *Susan Kigula & 416 Others v. Attorney General* ("*Kigula 2005*").[552] In *Kigula 2005*, the death row inmates contended that the mandatory imposition of the death penalty on them was inconsistent with various provisions of the Constitution of Uganda and was therefore unconstitutional.[553]

Before the Supreme Court, Respondents contended, first, that the "imposition of the death sentence on them was inconsistent with Articles 24 and 44 of the Constitution."[554] Second, they claimed that Uganda's laws mandating the death sentence for murder convictions were unconstitutional because they are inconsistent with the Constitution.[555] Third, they argued that these provisions denied the right to appeal the sentence and as a result, effectively deprived them of the right to equality before the law and the right to a fair hearing granted by the Constitution.[556] Fourth, they claimed that the long delay between the sentencing and its actual execution "allows for the death row syndrome to set in" and constitutes cruel, inhuman, and degrading treatment contrary to the Constitution.[557] Fifth, they argued that hanging, as a method of execution, is cruel, inhuman, and degrading contrary to the Constitution of Uganda.[558]

Again, the Court drew inspiration from foreign and comparative case law, concluding that a trial does not end when the accused is convicted but that the sentencing process is an integral part of a fair trial. In all trials, noted the Supreme Court, the trial court usually considers "the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence."[559] However, where the sentence is "pre-ordained by the Legislature, as in capital cases," the ability of the trial court to perform its function as "an impartial tribunal in trying and sentencing a person" is compromised.[560]

550. *Id*.
551. Attorney General v. Kigula, [2009] UGCC 8 (Uganda).
552. Kigula v. Attorney General, [2005] UGCC 8 (Uganda).
553. *Attorney General* [2009], at 1.
554. *Kigula* 2009, [2009] UGSC 6 at 1-2.
555. *Id*. at 2.
556. *Id*.
557. *Id*.
558. *Id*.
559. *Id*. at 41.
560. *Id*.

The Supreme Court further noted that the framers of Uganda's Constitution expected thorough judicial inquiry in death penalty cases, emphasizing that the judge's report of inquiry is crucial "for advising the President on the exercise of the prerogative of mercy."[561] The Court explained further that under Article 126, the Constitution entrusts the administration of justice to the judiciary, and that "[t]he entire process of trial from the arraignment of an accused person to his/her sentencing is, in our view, what constitutes administration of justice."[562] However, when the Parliament of Uganda fixed a mandatory death sentence, it effectively removed the power to determine the sentence for a convicted person from the trial courts and placed it within the hands of the legislature.

This supplantation of power was held to be inconsistent with Article 126 of the Constitution of Uganda which provides for separation of powers where any law enacted by Parliament that ties the hands of the judiciary "in executing its function to administer justice is inconsistent with the Constitution."[563] Thus, laws that interfere with the court's discretion to "confirm both conviction and sentence" are inconsistent with the Constitution and therefore, are void to the extent of that inconsistency.[564] With respect to the issue of delay in the execution of the death sentence, the Supreme Court held that "a period of more than three years from the time when the death penalty was confirmed by the highest court would constitute inordinate delay" and where the President has not exercised this prerogative "one way or the other, the death sentence shall be deemed to be commuted to life imprisonment without remission."[565]

The Supreme Court also examined the constitutionality of hanging as a legal method to carry out the death penalty. Counsel for the death row inmates criticized the Constitutional Court's ruling that hanging is constitutional since the death penalty is permitted by the Constitution.[566] They further argued that since this method of execution is outlined in § 99 of the Trial on Indictments Act but not the Constitution, it can be challenged before a court of law based on such inconsistency.[567] The Court then cited *Republic v. Mbushuu* (High Court of Tanzania) and *R v. Makwanyane* (Constitutional Court of South Africa), in which counsel for the death row inmates argued, the courts had held that hanging is a cruel, inhuman and degrading punishment.[568] However, with respect to *Kigula 2009*, the Supreme Court of Uganda held that hanging

561. *Id*. at 44.

562. *Id. See also* CONST. REP. UGANDA 1995, art. 126 (2017).

563. *Kigula 2009*, [2009] UGSC 6 at 44.

564. *Id*. at 45.

565. *Id*. at 57.

566. *Id*. at 58.

567. *Id*.

568. *See Makwanyane*, at para. 76. *See also* Republic v. Mbushuu, 1994 TLR 146 (High Court of Tanzania, June 22, 1994).

as a legal method of execution is not unconstitutional in the context of Article 24 of the Constitution.[569]

With its decision in *Attorney General v. Susan Kigula & 417 Others* dated January 21, 2009, the Supreme Court of Uganda ended a ten-year challenge to the constitutionality of the death sentence in Uganda.[570] In its analysis of the issues brought before it by both the Applicant and the Respondents, the Supreme Court sought inspiration from and relied on international human rights instruments and comparative foreign case law. Historically, many countries imposed the death penalty arbitrarily, followed by executions that were often undertaken by extremely cruel and degrading methods, which included burning at the stake, crucifixion, shooting, and beheading.[571] However, as a result of the crimes committed by the Nazi regime in Germany, the global community, through the U.N. General Assembly, adopted the UDHR, setting new minimum standards for the recognition and protection of human rights.[572]

The UDHR, however, did not abolish the death penalty and at its time of adoption, several international tribunals imposed death sentences and executed war criminals.[573] Although the Supreme Court made reference to the UDHR, it drew inspiration from and relied on the ICCPR. Specifically, the Court cited Article 6(1) of the ICCPR, which states that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[574] The Supreme Court then paid special attention to the word "arbitrarily" which implies that a convicted individual can be lawfully sentenced to death or deprived of his life under certain conditions.[575] The Court then explained that the position that it had taken is "further acknowledged" in Articles 6(2), 6(4) and 6(5) of the ICCPR, which enumerate the conditions for legally imposing a death sentence by a State Party to the Convention.[576]

One of the most important issues that the Supreme Court of Uganda was asked to determine was the constitutionality of the mandatory death sentence. The Court relied primarily on the Constitution of Uganda and made a two-part holding. First, the mandatory death sentence compromises the principle of a fair trial, which is guaranteed by the Constitution of Uganda. The mandatory death sentence, the Supreme Court declared, is inconsistent with the principle of equality before and under the law.[577] The Court made clear

569. *Kigula 2009*, [2009] UGSC 6 at 62; CONST. REP. UGANDA 1995, art. 24 ("No person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment.").

570. *See generally Kigula 2009,* [2009] UGSC 6.

571. *Id*. at 12.

572. *Id*. at 12-13. *See also* UDHR, *supra* note 56.

573. *Kigula 2009*, at 12-13.

574. ICCPR, *supra* note 61, at art. 6(1).

575. *Kigula 2009*, [2009] UGSC 6 at 14.

576. *Id*. at 14–15.

577. *Id*. at 43.

that a trial does not stop at the conviction of the accused but includes the process of sentencing, which allows the trial court to consider the evidence, the nature of the offense, and the circumstances of the case in order to arrive at an appropriate sentence. However, the mandatory death sentence, noted the Court, denies the trial court of the right to exercise its constitutional functions.[578]

Although there are many lessons that can be gleaned from the Supreme Court of Uganda's decision in *Kigula 2009*, the most important concerns the constitutionality of the mandatory death sentence. The Supreme Court had ruled that these provisions are unconstitutional because they are inconsistent with various articles of the Constitution by interfering with judiciary independence and depriving trial courts of their ability to carry out fair trials, which include sentencing, all of which interfere with the separation of powers.[579]

An important function of the Constitution's Bill of Rights is to take certain subjects out of the political arena, place them beyond the purview of majorities, and "establish them as legal principles to be applied by the courts."[580] Hence, the effective protection of human rights and fundamental freedoms, including the right to a fair trial, requires not just the existence of a democratic political order, but also an independent judiciary with constitutionally defined roles. Importantly, these judicial roles must not be interfered with or abrogated by other branches of government. Laws that provide for a mandatory death sentence represent such interference with the independence of the judiciary and its ability to perform its constitutionally mandated functions.

578. *Id*. at 41.
579. *Id*. at 44.
580. *Barnette*, 319 U.S. at 638.