# COURTS AND THE CONSTITUTIONAL DUTY TO PROTECT FUNDAMENTAL RIGHTS

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## I. INTRODUCTION

Uganda's Chief Justice, Justice Odoki[1] in an extra-judicial statement quoted article 22 of the 1995 Uganda Constitution and commented that it was clear to him that the prescription of a death by a law cannot be successfully challenged as unconstitutional, on the basis of Article 22 (1). However, it was his opinion that it may be possible to challenge the death penalty using other provisions of the Constitution and other international instruments and judicial decisions. Three years earlier I had argued that the exception contained in article 22(1) does not constitutionalize capital punishment.[2] Rather it simply recognizes its existence. But such recognition brings it into conflict with the absolute prohibition of any form of "torture, cruel, inhuman or degrading treatment or punishment" as provided by Article 24. Consequently the exception in Article 22(1) does not extend to Articles 24 and 44 because in the first instance under Article 44, no derogation is allowed for such treatment or punishment as the provision opens with the words "*notwithstanding anything in this constitution.*" Secondly because it is a rule of constitutional interpretation that when two provisions are in conflict, with one provision restrictive of rights that may be claimed under it and another favourable to them, the latter is to be preferred.[3]

The purpose of this article is to expand on these ideas in the light of some weighty decisions of the Judicial Committee of the Privy Council in *Rees v. The Queen,*[4] *Fox v. The Queen*[5] and *Roodal v. State*[6] and others which have now provided authority for my interpretation of Articles 24 and 44 of the Constitution of Uganda.

Before commenting on the latter case, I am constrained to set out a brief history of Trinidad and Tobago's struggles to maintain a mandatory death sentence.

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1. *Reforming the Sentencing System in Uganda,* 1 ULLJ 13 (2003).
2. *Id.*
3. G.P. Tumwine-Mukubwa, *The Promotion and Protection of Human Rights in East Africa*, 3 EAST AFR. J. PEACE HUM. RIGHTS 153 (2000).
4. (2002) UK PC II; Appeal No. 64 of 2001 (from Belize).
5. (2002) UKPC 13; Appeal No. 66 of 2000 (from St. Kitts & Nevis).
6. (2003) UKPC 78; Appeal No. 18 of 2003 (from Trinidad & Tobago) Reversed by *Matthew v. The State* (2004) UKPC 33; Appeal No. 12 of 2004 (from Trinidad & Tobago).

On becoming independent, Trinidad and Tobago became a member of the United Nations and was therefore bound by article 5 of the Universal Declaration of Human Rights, which prohibited subjecting a person to cruel, inhuman or degrading treatment or punishment. In December 1978, it acceded to International Covenant on Civil and Political Rights (ICCPR), article 7 of which prohibited the same. In November 1980, the state acceded again (after first withdrawing from it)[7] to the Optional Protocol recognizing the competence of the Human Rights Committee to receive communications from parties claiming to be the victims of violations of the Covenant, subject to a reservation seeking to exclude communications from prisoners under the sentence of death.[8] This reservation was held to be invalid[9] and the committee went on to hold that imposition of a mandatory death penalty particularly when coupled with the murder/felony rule violated the prisoner's right to life protected by Article 6.[10] No decision was made on the basis of article 7.

It is my contention that these decisions have dealt a fatal blow to the death penalty. Let me begin by setting out the relevant provisions of the 1995 Uganda Constitution for easy reference.

## II. SOME RELEVANT CONSTITUTIONAL PROVISIONS

Article 20 of the Constitution provides that the fundamental rights and freedoms of the individual are inherent and not granted by the state and that they must be upheld and promoted by all organs and agencies of government and by all persons. This implies that since human rights and freedoms are inherent they cannot be taken away by the state or by any other person. Article 22(1) states that no person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court. Another provision which mentions the death penalty is Article 121 on the prerogative of mercy. Sub-article *(5) provides that where a person is sentenced to death for an offence*, a written report of the case from the trial judge or judges or the person presiding over the court or tribunal, together with such other information derived from the record of the case or elsewhere as may be necessary, shall be submitted to the advisory committee on the prerogative of mercy. I do not regard the exception to Article 22(1) and the provisions of Article 121(5) as

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7. *Matthew v. The State* (2004) 20 UKPC 33; and *Mithu v. State of Punjab* (198), 2 SCR 690.
8. *Id.*
9. Communication No.845/1999 of 2nd November 1999.
10. *Kennedy v Trinidada and Tobago* Communication No.845/1998 decision of 26 March 2002.

constitutionalizing the death sentence but as merely recognizing its existence and providing procedural safeguards for its use. More will be said about this later. Suffice it to state here that the exception to Article 22(1) can be challenged as *unconstitutional ab initio* because it cannot be harmonized with the superior provisions of articles 24, 44 (a) and 44(c). In other words the exception to article 22 (1) should never have found its way into the Constitution. It is a constitutional cancer. This is another way of saying that the purpose of the exception to article 22(1) is constitutional but its effect is unconstitutional. Therefore, the provision can be declared unconstitutional in effect, but its purpose cannot be successfully challenged as unconstitutional. Accordingly, Hon. Mr. Justice Odoki's statement is only partly correct. I will return to this point after discussing the relevant judicial precedents.

Article 21(1) asserts that all persons are equal before and under the law and in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law. Article 24 stipulates in absolute terms that no person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment. This article is made non-derogable by article 44 which states that notwithstanding anything in this constitution, there shall be no derogation from *inter alia* freedom from torture, cruel, inhuman or degrading treatment or punishment. Article 79 which spells out the powers of Parliament, provides in sub-article (1) that it shall have power to make laws on any matter for the peace, order, development and good governance of Uganda.

These wide powers are circumscribed by Article 79(3), which provides that Parliament shall protect the Constitution and democratic governance of Uganda. For our purposes this means that Parliament cannot pass any law which would derogate from articles 24 and 44 as reproduced above. Nor can Parliament pass any law which takes away fundamental rights and freedoms. It can only limit them, not take them away. Moreover, any such limitation must be acceptable and demonstrably justifiable in a free and democratic society. And a democratic society is what has been recognized by modern liberal constitutional states as a democratic society.[11]

Article 273(1) is to the effect that the operation of the existing law after the coming into force of the constitution shall not be affected by the coming into force of the constitution but such existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution. Existing law is defined in Article 273(2) to mean any written and unwritten law or any part of it as existed immediately before the coming into force of the Constitution. It includes any Act of Parliament or statute or statutory instrument enacted or made before that date which came into force on

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11. *See,* Judgment of Mulenga, J.S.C. and that of Oder J.S.C., *in Onyango Obbo & Anor v. Attorney-General,* Const. App. No.2 of 2002.

or after that date. In simple language, the courts are constitutionally mandated to amend the existing laws which are in conflict with the Constitution in order to make them compliant. Therefore, if a law conflicts with the Constitution, the first duty of the court is to see if by modifications, adaptations, qualifications or exceptions such a law can be made compliant. If this is not possible, then article 2 comes into play. Article 2(1) provides that the constitution is the supreme law of Uganda and shall have the binding force on all authorities and persons. Article 2(2) categorically states that if any law or custom is inconsistent with any of the provisions of the constitution, the constitution shall prevail and that other law or custom shall, to the extent of the inconsistency, be void. It is important to note that the constitution uses the strong word *void* and not the mild word *voidable*. In other words such a law is a nullity and of no legal effect and nothing can be salvaged under a *void* law.

Article 45 states that rights specifically mentioned shall not be regarded as excluding others not specifically mentioned. Finally, article 52(1)(h) requires the government to comply with international treaties and conventions obligations on human rights. We now turn to those human rights instruments which Uganda has ratified and which are relevant to our discussion of the death penalty.

## III. THE POSITION IN INTERNATIONAL INSTRUMENTS

The International Covenant on Civil and Political Rights (ICCPR) provides that in countries which have not abolished the death penalty, a 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. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.[12] But more importantly, it states that no one shall be subjected to torture or to cruel or inhuman or degrading treatment or punishment.[13] Such action is also specifically prohibited by article 5 of the African Charter on Human and Peoples Rights. Article 4 of the same charter states that human beings are inviolable, the right to life must be highly respected, and it should not be attacked or taken away.[14] It goes on to say that every human being shall be entitled to respect for his life and integrity of his person and that no one may be arbitrarily deprived of this right. That these international human rights instruments are now applicable in African domestic courts is beyond any debate.[15]

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12. Art. 6.
13. Art. 7.
14. *See,* LONGMAN DICTIONARY OF CONTEMPORARY ENGLISH (New ed. 1987).
15. *See, Besigye v. Museveni,* Election Petition No. 1 of 2001 (unreported), judgment of Odoki C.J. (Sc); *Onyango Obbo & anor. v. Attorney-General, supra* note 6; G.P. Tumwine-Mukubwa *International Human Rights Norms in the Domestic Arena,* 3 EAST AFR. J. PEACE HUM. RTS 30 (1996); and G.P. TUMWINE-MUKUBWA. FREE AND FAIR ELECTIONS: A COMMENTARY ON THE UGANDAN CASE OF COL. (RTD) DR. BESIGYE KIZZA V. LT. GEN. KAGUTA MUSEVENI & ANOR (2004).

Both the ICCPR and the African Charter in very clear terms prohibit torture or cruel, inhuman or degrading treatment or punishment. The Uganda Constitution expressly prohibits any derogation from this right. The African Carter appears to allow no derogation from the right to life by the use of the word inviolable and not placing any exceptions to this bar. The provisions of the Constitution and the International human rights instruments should be kept in mind as I discuss the judgments.

## IV. MANDATORY DEATH SENTENCE UNACCEPTABLE

In *Reynes v. The Queen*[16] the facts were not disputed that the appellant shot a man and his wife in a fit of anger because the man was building a fence two feet away from his house. The law of Belize provided that "*every person who commits any murder by shooting or by causing an explosion shall suffer death*". This was classified as class A murder, which was deemed to be a mandatory penalty. In the case of class B, the death penalty was discretionary.

Section 4(1) of the Belize Constitution protected the right to life in similar terms to article 22(1) of the Uganda Constitution. Furthermore, S.7 prohibited torture, inhuman or degrading punishment or other treatment. The Constitution also established a committee on the prerogative of mercy, but apparently there is no equivalent of article 44 of the Constitution of Uganda.

The Reynes appeal raised two issues. The appellant did not challenge the death penalty as such, but rather the constitutionality of the mandatory death penalty. The second issue was a challenge to the constitutionality of hanging as a means of carrying out the sentence.

The Privy Council observed that under the Common Law of England there was one sentence only which could be judicially pronounced upon a defendant convicted of murder and that sentence was death. What the court called a simple and undiscriminating rule was introduced into many states now independent but once colonies of the Crown. The court noted that it has been recognized 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, 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 killing from an excessive response to a perceived threat.[17]

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16. *See supra* note 3.
17. *See supra* note 3, at 7-8.

The Board also noted that the motives for murder may be varied or entirely absent.

Murderous intent maybe unmistakable, or it may be absent, and the death itself may depend on an accident. The motives, springing from weakness as often as from wickedness, show some of the basest and some of the better emotions of humankind, viz., cupidity, revenge, lust, jealousy, anger, fear, pity, despair, duty, self-righteousness, political fanaticism; or there maybe no intelligible motive at all.[18]

Their lordships agreed with the House of Lords select committee's observation that murders differ so greatly from each other that it is wrong that they should attract the same punishment.[19] Also, a subsequent committee on Life Imprisonment observed that there is probably no offence in the criminal calendar that varies so widely both in character and degree of moral guilt as that which falls within the legal definition of murder. Moreover, murder is overwhelmingly a domestic crime in which men kill their wives, mistresses and children, and women kill their children.[20] The Board observed that in some jurisdictions, such as India, the death sentence is imposed in the most exceptional cases where there is no reasonable prospect of reformation and the object of punishment cannot be properly achieved by any other sentence.[21]

Section 302 of the Indian Penal Code authorizes the imposition of the capital punishment for the offence of murder. But the Supreme Court of India has ruled that the *normal rule* is that the offence of murder shall be punished with the sentence of life imprisonment.[22] The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence. The court went on to say that while considering the question of a sentence to be imposed for the offence of murder, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. It stated:

> If 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*

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18. *Quoting* THE ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953, Cmd 8932 at 6, ¶ 21.

19. Quoting A House of Lords Select Committee on *Murder and Life Imprisonment* H.L. Paper 78-1 (1989) Para 27.

20. PRISONS REFORM TRUST (1993), at 21-23.

21. *See supra* note 3, at 9. *See also, Ong Ah Chuan v. Public Prosecutor* (1981) A.C 648, at 674; *R v. Howe* (1987) A.C 417, at 433F; and *Rajendra Prasad v. State of Ultar Pradesh* (1979) 3 SCR 78, at 107.

22. *Matthew v. The State, supra* note 7.

*grave danger to the society at large, the court may impose the death sentence.*[23]

The Board noted that the mandatory penalty of death on conviction for murder long pre-dated international arrangements for the protection of human rights. But the last half century has seen two important developments relevant to the issue of death penalty. The first of these is the adoption of a series of international instruments to protect human rights.[24] The second important development has been the advance to independent statehood of many former colonies under entrenched constitutions expressed to be the Supreme Law of the state.[25]

The Board also considered the issue of interpretation. It was of the opinion that in a modern liberal democracy it is ordinarily the task of the democratically elected Parliament to decide what conduct should be treated as criminal, so as to attract penal consequences, and to decide what kind of measure of punishment such conduct should attract. The ordinary task of the courts is to give full and fair effect to the penal law which Parliament has enacted. The basic constitutional duty of the courts, which, in relation to enacted law, is to interpret and apply it. If there is an issue about the meaning of an enacted law, the court must first resolve that issue. Having done so it must interpret the constitution to decide whether the enacted law is compatible or not.[26] The court must begin its task of constitutional interpretation by carefully considering the language used in the constitution. But it does not treat the language of the constitution as if it were found in a will or a deed or charter party. A generous and purposive interpretation is to be given to constitutional

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23. *Bachan Singh v. State of Punjab* (1980) 2 SCR 475, at 515 (Emphasis added).

24. *See,* Universal Declaration of Human Rights, 1948. Article 3 thereof states that everyone has the right to life, liberty and security of person. Article 5 states that no one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment. Article 10 states that everyone is entitled to full equality to a fair and public hearing by an independent and impartial tribunal, in determination of his rights and obligations and of any criminal charge against him. *See also,* The American Declaration of Rights and Duties of Man, 1948. Articles XVIII and XXVI thereof provide for the right to resort to courts to protect one's rights; fair hearing and prohibition of cruel, infamous and unusual punishment. Articles 2, 3 and 6 of The European Convention on Human Rights, 1953 guarantee the right to life, prohibit torture and provides for the right to a fair trial. The International Covenant on Civil and Political Rights, 1966 and The American Convention on Human Rights, 1969 confer the right to life, humane treatment and fair trial.

25. *See supra* note 3, at 11-14.

26. See *inter alia: Tinyefuza v Attorney General* Const. Petition No.1 of 1997, *Attorney-General v Tinyefuza* Const Appeal No.1 of 1997. *Ssemogerere & anor. v Attorney General* Const. App. No.1 of 2000. *Ssemogerree & ors v. Attorney General Const. Appeal* No.1 of 2002. *Onyango Obbo & Anor. V Attorney General Const. Appeal* No.1 of 1998, *State v Zuma* 1995 (2) S.A 642, *State v Makwanyane* 1995 (3) S.A 391 *Matadeen v Pointu* (1999) I A.C 98, *Minister of Home Affairs v Fisher* (1980) A.C 319, *R v Big M. Drug Mart* (1985) I SCR 295, *Trop v Dulles* (19580 356 U.S 86 *Attorney-General of The Gambia v Momodou Jobe* (1984) A.C 689.

provisions protecting human rights.[27] But the court has no licence to read its own predilections and moral values into the constitutions, it is only required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a mature democratic society.[28]

In carrying out the task of constitutional interpretation, the court should not be concerned with evaluating and giving effect to public opinion.[29] Public opinion may have relevance to the inquiry but in itself, is no substitute for the duty vested in the courts to interpret the constitution and to uphold its provisions without fear or favour. The Board went on to say that if public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament which has a mandate from the public and is answerable to the public for the way its mandate is exercised. This would mark a retreat from the new constitutional order. Equally, the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view could prevail over the wishes of the minority. Because the very reason for establishing a new constitutional legal order, and for vesting 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. Those who are entitled to claim this protection include social outcasts and marginalised people in society.

Any country that subscribes to international human rights instruments, must accept the concept of humanity which has been read as incorporating the precept of the consideration of the culpability of the offender. Any potentially mitigating circumstances of the offence and the character of the individual offender should be regarded as a *sine qua non* to the humane imposition of a sentence of capital punishment.[30] The courts will not be astute to find that a constitution fails to conform with international standards of humanity and individual rights, unless it is clear, on proper interpretation of the constitution, that it does.

The Board proceeded to analyze the meaning of the words "inhuman or degrading treatment or punishment" and said that they were a compendious expression of a norm.[31] They mean whether the punishment prescribed is so excessive as to outrage standards of decency. Thus, although the state can impose punishment, the effect of that punishment must not be grossly disproportionate to

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27. *Supra* note 3 p.14.
28. *Id.*
29. [illegible] adopting the reasoning of Chaskalson P. in *State v. Makwanyane,* 1995 (3) S.A 391, ¶88.
30. *See supra* note 3, at 15.
31. *Id.*

what would have been appropriate.[32] Justice Odoki quotes a later Canadian case that *the death penalty is the supreme indignity to the individual, the ultimate corporal punishment, the final and complete lobotomy and the absolute and irrevocable castration. It is the ultimate discretion of human dignity.*[33] It is therefore inhuman or degrading treatment or punishment. To paraphrase South African Chief Justice Chaskalson P. in *State v. Makwanyane*[34] the question is not, however, whether the sentence of death is cruel, inhuman or degrading punishment in the ordinary meaning of these words but whether it is cruel, inhuman or degrading punishment within the meaning of articles 24 and 44(a) of the constitution of Uganda. The Board approved of this formulation as apt.[35]

In *Reyes v. The Queen*[36] there was no frontal attack on the death penalty as such. Rather the criticism was about its mandatory nature. There was evidence that the appellant was not a habitual criminal as evidenced by his attempted suicide and the psychiatric evidence that the appellant's state of mind was abnormal at the time of killings which could have mitigated the sentence. The Board was also of the view that an equivalent of an advisory committee on the Prerogative of Mercy which is a non-judicial body cannot decide what is the appropriate measure of punishment to be visited on the defendant. Accordingly, the death sentence was quashed and the case remitted to the Supreme Court in order for a judge of that court to pass an appropriate sentence. The Board did not rule on the constitutionality of hanging as a means of implementing the death sentence. The Board also declined to express any conclusion on Ss3 and 4 of the Constitution of Belize.[37]

In *Fox v. The Queen*[38] the appellant was convicted and sentenced to death for the murders his fiancée and her mother. He was convicted under an 1873 Act which provided that "*Whosoever is convicted of murder shall suffer death as a felon*". The constitution of Saint Kitts and Nevis is in *pari materia* with the Ugandan Constitution.

Section 2 provided for the supremacy of the constitution and any law inconsistent with it to be void.[39] Section 4 says that no one is to be deprived of his life save in execution of a sentence of a court in respect of a criminal offence of treason or murder under any law of which he has been convicted. Section 7 and 18

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32. *R v. Smith (Edward Dewey)* 1 SCR 1045, at 1072, adopting *Miller and Cockviell v. The Queen* (1977) 2 SC 680.

33. *See supra* note 1, at 15-16. Emphasis original.

34. 1995 (3) S.A 391, ¶ 26.

35. *See supra* note 2.

36. *Id.*

37. S3 (a) protected right to life; S4(1) says one cannot be deprived of his life intentionally save in execution of a sentence of a court in respect of a criminal offence under any law of which he has been convicted.

38. *See supra* note 4, adopting *Queen v. Hughes* (2002) UKPC 12.

39. Cf. Art. 2 Uganda Constitution.

(1) is in the same language as articles 24 and 50(i) of the Constitution of Uganda. It also has a provision similar to article 273 (1) of the Uganda Constitution. The appeal raised only one issue of the mandatory death sentence and the guarantee against inhuman or degrading punishment or treatment.

A similarly constituted Board as in *Reyes v. the Queen*[40] applied the equivalent of article 273 (1) of the Uganda Constitution and amended the penal section to read "*Whosoever is convicted of murder may suffer death as a felon*". The effect was that whenever anyone was convicted of murder, he or she might be sentenced to death or else he or she might be sentenced to a lesser punishment. The selection of the appropriate sentence will be a matter for the judge, having regard to all the circumstances of the case. Before sentence is imposed, the judge may be asked to hear submissions and, if appropriate, evidence relevant to the choice of sentence. In the result, the death sentence was quashed and the matter remitted to the High Court to decide on the sentence. Again, it should be noted that this case is limited to deciding that the mandatory death sentence was inhuman or degrading punishment or treatment.

The next case for consideration is *Roodal v. The State*[41] which was an appeal from the Court of Appeal of Trinidad and Tobago. The appellant was convicted and sentenced to death—a sentence considered mandatory by the judiciary. Section 4 under which he was sentenced provided that "every person convicted of murder shall suffer death." The Interpretation Act provided in s. 68 that:

1) Where a punishment is provided by any written law for an offence against the written law, the provision indicates that the offence is punishable by a punishment not exceeding that provided.
2) Where in any Act or statutory instrument provision is made for any minimum penalty or fine or for any fixed penalty or fine, as a punishment for a criminal offence, such Act or statutory instrument shall have affect as though no such minimum penalty or fine has been provided or as though the fixed penalty or fine was the maximum penalty or fine as the case may be.

For purposes of comparison the Interpretation Act[42] of Uganda provides that:

*Penalties prescribed to be maximum Penalties*

S37 Where in any Act, a fine or penalty has been imposed for an offence against that Act, that provision shall indicate

40. *Supra* note 3.
41. *Supra* note 5.
42. Cap. 3.

> that the offence shall be punishable upon conviction by a fine or penalty not exceeding the fine or penalty prescribed.

Sections 3, 4, 5(2)(b), 13 and 53 are in *pari materia* with articles 21(1), 22(1), 24, 43, 79, and 273 of the 1995 Constitution of Uganda. The appeal was on the grounds that firstly construed in the light of s. 68 of the Interpretation Act, s. 4 only prescribed death as a maximum and not the only penalty. Alternatively, s. 4 requires modification to provide for a discretionary death sentence in order to bring it in line with the Constitution. Or in the further alternative, it violated the constitutional principle of separation of powers.

By a majority of three to two, the Board held that the crime of murder is based on the English common law and covers an extraordinarily wide spectrum of homicide cases, most of which would not ordinarily be considered murder, including merely an intent to cause serious bodily harm and where in some cases normal sentence might be no more than five to six years imprisonment.

The Board relied on the case of *R v. Powell*, which deserves to be quoted at some length:

> In English law a defendant may be convicted of murder who is no ordinary sense a murderer. It is sufficient if it is established that the defendant had an intent to cause serious bodily injury. This rule turns murder into a constructive crime. The fault element does not correspond to the charge i.e the causing of death. A person is liable to conviction for a more serious crime than he foresaw or contemplated... a minority of defendants convicted of murder have been convicted on the basis that they had an intent to kill... What is the justification for this position? There is an argument that, given the unpredictability whether serious injury will result in death, an offender who intended to cause serious bodily injury cannot complain of a conviction of murder in the event of death. But this argument is outweighed by the practical consideration that immediately below murder there is the crime of manslaughter for which the court may impose a discretionary life sentence or a very long period of imprisonment. Accepting the need for a mandatory life sentence for murder, the problem is one of classification. The present definition of the mental element of murder results in defendants being classified as murderers... It results in the imposition of mandatory life sentences when neither justice nor the

> needs of society require the classification of the case as murder and the imposition of a mandatory life sentence.[43]

The Board concurred that for many of these crimes it would be monstrous to inflict the death penalty. Relying on the decision of the inter-American Court of Human Rights,[44] the court stated that s. 4 has two aspects. First of all, in the determination of criminal responsibility, it only authorizes the competent judicial authority to find a person guilty of murder solely based on the categorization of the crime, without taking into account the personal conditions of the defendant or the individual circumstances of the crime. Secondly, in the determination of the punishment it mechanically and generically imposes the death penalty for all persons found guilty of murder and prevents the modification of the punishment through a process of judicial review.

In considering s. 68 of the Interpretation Act, the Board rejected the argument that any reduction in punishment should be in the same currency as the fixed penalty i.e the lower fine could be substituted for a higher one but not imprisonment for the death penalty. The Board observed that for example reducing a driving disqualification to a fine is not *in the same currency*.[45] Moreover, s. 68 actually permits the substitution of a fine for a term of imprisonment. Therefore, such restrictive interpretation is not supported by anything in the language of the statute, neither inherent or implied. The Board also ruled that as a rule, legislation should be construed in the present and in the light of legal norms currently in force, rather than the circumstances when it was passed. This would obviate the need to search for an original intent. As Lord Reid warned, courts often say that they are looking for the intention of Parliament but that is not quite accurate. Courts are seeking the meaning of the words which Parliament used. "We are seeking not what Parliament meant but the true meaning of what they said."[46]

The House of Lords has also said that legislation should be construed *as always speaking* rather than tied to the circumstances existing when it was passed. The only problem is to determine whether a legislation is always speaking. In cases where the problem arises it is a matter of construction whether a court must search for the historical or original meaning of a statute or whether it is free to apply the

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43. (1999) 1 AC, at 14-15. They relied on WILLIAMS, TEXTBOOK OF CRIMINAL LAW 250-51 (2nd ed., 1983); ASHWORTH, PRINCIPLES OF CRIMINAL LAW 85, 261 (2nd ed., 1995); and CROSS & JONES, CRIMINAL LAW 203-4 (12th ed., 1992).

44. In *Hilaire Constantine and Benjamin et al v. Trinidad and Tobago*, 21 June 2002, ¶¶ 104-106.

45. This author had already rejected :"*the same currency*" approach. *See*, G.P. Tumwine-Mukubwa, *supra* note 2, at 154.

46. *Black-Clawson International Ltd v. Papierwerke Worldhof Aschaffenburg A.G* (1975) A.C 591, at 613G.

current meaning of the statute to present day conditions. Statutes dealing with a particular grievance or problem may sometimes require to be historically interpreted. But general statutes will generally be found to be of the "always speaking variety".[47] To paraphrase the Board, the court must adopt a more textured approach requiring an analysis of firstly, whether the provision in question can be modified under the equivalent of article 273(1) of the Uganda Constitution, and only if it cannot does article 2(2) come into operation to invalidate an existing law which has proved irremediable by resort to modification.[48] Before invalidity is considered, together with the recognition that exceptions contained in constitutional bills of rights must ordinarily be given a narrow construction. Issues of life and death regarding fundamental human rights require a generous interpretation rather than austere legalism. The Board stressed that as far as possible the constitution should be interpreted so as to conform to a state's international obligations.

Consequently, the Board modified s. 4 in using s. 5 of the Constitution and s. 68 of the Interpretation Act, in the light of current and international norms so that the death penalty is not a mandatory sentence for murder but only a discretionary maximum punishment with an obvious alternative of imprisonment. The majority of the Board did not find it necessary to examine the issue of separation of powers save to say—and this is the gist of this article—that the courts should not shirk their constitutional duties to protect fundamental rights or shift them onto Parliament.[49] These cases have unequivocally established that a mandatory death sentence is unacceptable. They did not decide that the death penalty was unconstitutional. I discuss this issue after a brief comment on the question of separation of powers.

## V. SEPARATION OF POWERS

As noted in the foregoing, the majority did not express themselves on the issue of separation of powers.[50] However, the two dissenting judges did.[51] They first considered the separation of powers between the judiciary and the executive. They said that when a person is sentenced to death for an offence, a report must be made to the committee and the President may on the advice of the committee substitute

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47. *R v. Ireland* [1998] A.C 147, at 158. Cf. *Onyango Obbo v. Attorney General*, Const. Appeal No. 2 of 2002, where the court unsuccessfully tried to find the original intention of Parliament.

48. This is the approach that the Supreme Court has adopted. *See especially, Onyango Obbo and anor v. Attorney General,* Const. App No.2 of 2003.

49. The import of this article is to show solidarity with the courts which have of late been under attack for the stance they have taken on the issues of constitutionalism, governance and protection of fundamental rights and freedoms. They should resist intimidation which seems to work with Parliamentarians.

50. Lords Bingham of Cornhill, Steyn and Walker of Gestingrhorpe.

51. Lords Millet and Rodger.

a less severe form of punishment for a punishment imposed on a person for an offence by a judge or judges.[52] This is the power which the President uses in appropriate cases to commute the death sentence and to substitute a period of imprisonment. They noted that the committee has the characteristics of an executive rather than a judicial body.

It was argued by the appellant that since all prisoners sentenced to death had to be referred to the committee, it was in effect the committee and not the judge who decided what sentence a prisoner should undergo. The committee therefore performed a critical role in sentencing those convicted of murder. This was contrary to the requirement for the separation of powers that was inherent in the constitution.[53]

Their Lordships rejected this argument on two grounds. First, that the argument meant that the section imposing the death penalty was unconstitutional because a section of the Constitution required that the cases of those sentenced to death under it should be referred to the committee. In other words the requirement of the constitution made the section imposing the death sentence unconstitutional. Their Lordships held that it was *impossible* to hold that something which the constitution prescribes makes a law unconstitutional. In my considered opinion, this holding is fatally flawed. The constitution itself provided for modification of existing law to bring it into conformity with the constitution. And if this was not possible such laws are declared void to the extent of the inconsistency. Therefore, the constitution itself recognized that some of its provisions could render existing laws unconstitutional. It follows that something which the constitution prescribes can make an existing law unconstitutional either in purpose or in effect.

Their Lordships tricked the appellant into admitting that if the provisions of the constitution providing for review of all death sentences which are for the benefit of the condemned persons were repealed and the mandatory sentences were carried out, the section imposing the death sentence would be constitutional. This is twisted logic. If there was no death sentence, those provisions relating to the death sentence would be unnecessary. They were included as a further safeguard to carrying out the death sentence. Therefore, the question should have been not what should happen to the constitutional provisions but rather what should happen to the provision imposing the death sentence. It is the supreme constitution to which all other laws must conform and not the other way around.[54]

The other reason for rejecting the appellants argument was that it sits uneasily with the reasoning of the Board in *Reyes v. The Queen*[55] to the effect that

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52. Cf. Article 121 (4)(c) & (5), Uganda Constitution.

53. This is the effect of the decisions in *Hinds v. The Queen* (1977) A.C 195, at 211-212, *D.P.P of Jamaica v. Mollison* (2003) 2 WLR 1160, and *Nicholas v. The Queen* (1998) 193 CLR 173.

54. Cf. *supra* note 20.

55. *Supra* note 3.

the function of the committee is not a sentencing function. Their Lordships who were part of the coram in that case were only being ingenious by quoting only part of what the Board had said. The Board clearly stated:

> It is plain that the Advisory Council has a most important function to perform. But it is not a sentencing function *and* the advisory Council is not an independent and impartial court within the meaning of Section 6 (2) of the Constitution.[56]

The Board went on to say that the opportunity to seek mercy from such a body such as the Advisory Council cannot cure a constitutional defect in the sentencing process. The Board reached this conclusion after an exhausting examination of an array of precedents from diverse jurisdictions which emphasize the duty of the court to give life and meaning to the high ideals and principles entrenched within the Constitution. The Board relied on the issue as stated by Byron C.J.,[57] whether it was 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 should only be imposed after there is judicial consideration of mitigating factors relative to the offence itself and the offender. Byron C.J and Saunder J.A (Ag.) held that the courts must have the discretion to take into account the specific circumstances of an individual offender and the offence in determining whether the death sentence can and should be imposed, if the sentencing is to be considered rational, humane and rendered in accordance with the requirements of due process.

The sentencing discretion should be guided by legislative or judicially prescribed principles and standards and should be subject to effective judicial review. The death penalty should be imposed only in the most exceptional and appropriate circumstances. That should be a requirement for individualized sentencing in implementing the death penalty.[58] The Board, in *Queen v. Hughes*

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56. It provided: "If a person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within reasonable time by an independent and impartial court established by law."

57. *See supra,* note 3, at 18-19.

58. *Cf. Woodson v. The State of North Carolina* (1976) 428 U.S280, at 303-305; *Roberts v. Louisiana* (1977) 431 US 633, at 636-637; *Sumner v. Shuman* (1987) 483 U.S 66; *R v. Smith* (Edward Dewy) (1987) 2SCR 1045, at 1073; *State v. Makwanyane* 1995 (3) SA 391; *R v. Offen* (2001) 1 WLR 253; *Edwards v. The Bahamas* (Report No.48/01 4 April 2001), ¶¶ 147 & 178; *Downer and Tracey v. Jamaica* (Report No.41/00 13 April 2000); *Baptiste v. Grenada* (Report No.38/00 13 April 2000); *Thompson v. Saint Vicent and Grenadines* (2002) UNDOC/CCPR/C/70/D/1906/1998.

rejected the argument that the prerogative of mercy could be regarded as providing the necessary individuation of the death sentence. While the act of mercy is, indeed, to be seen as part of the whole constitutional process of conviction, the sentence and carrying out of the sentence, it is an executive act and cannot be a substitute for the judicial determination of the appropriate sentence.

The Supreme Court of India has come to the same conclusion 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.[59] The scales of justice are removed from the hands of the judge as soon as he or she pronounces the accused guilty of the offence. So final, so irrevocable and so irrestitutable is the sentence of death that no law which provides for it without the involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatized as arbitrary and unreasonable. It must go the way of all bad laws.[60]

The minority also rejected the appellant's argument that by making the death sentence mandatory and so depriving the court of any discretion in fixing the appropriate sentence in the circumstances of the individual case, Parliament had acted in breach of the principle of separation of powers between courts and Parliament, which was also inherent in the constitution. They said that what was constitutionally unacceptable is that Parliament should prescribe the sentence that is to be imposed on any particular individual. It was further argued that there was nothing inconsistent with the constitutional separation of powers. In essence, these views negate the supremacy of the constitution and reinstate the doctrine of supremacy of Parliament. Nevertheless, the minority judgment influenced the Board in reversing this case by a full Board, in a five to four decision, in the subsequent case of *Matthew v. The State*[61] which was another Appeal from Trinidad and Tobago involving similar points of law. With effect from 27 June 2000,Trinidad and Tobago withdrew from the Optional Protocol of the ICCPR, but remains a party to the Covenant. Therefore, the Board's decision in *Roodal v. The State*[62] on 20 November 2003 must have come as a big shock to the state and may therefore have indirectly influence the majority decision in *Matthew v. The State*[63] to the anger and anguish of the minority.

As stated earlier, sections 4 and 5(2)(b) of the constitution protected the right to life and prohibited the imposition of cruel and inhumane treatment or

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59. *Mithu v. The State of Punjab, supra* note 7, at 704-13.
60. *Mithu v. State of Punjab* (1983) 2 SCR 690 per Chandrachud C.J., at 704, 707 & 713.
61. (2004) UKPC 33, Appeal No.12 of 2004, delivered 7th July 2004; and *Boyce & Joseph v. The Queen* (2004) UKPC 32 of the same day.
62. (2003) UKPC 78.
63. *Supra.*

punishment. However, section 6(1) provided that nothing in sections 4 and 5 shall invalidate an existing law and decreeing the mandatory death penalty was an existing law and therefore the issue was whether or not it is an infringement of the right to life or a cruel and unusual punishment. It could not be invalidated for inconsistency under section 2 of the constitution which declares the constitution supreme. They held that s. 6 (1) protects the validity of existing laws until such time as Parliament decides to change them. Their Lordships realized the absurdity of their decision when they stated:

> The result is that although the existence of the mandatory death penalty will not be consistent with current interpretation of sections 4 and 5, it is prevented by section 6(1) from being unconstitutional. It will likewise not be consistent with the current interpretation of various human rights treaties to which Trinidad and Tobago is a party. Their Lordships have anxiously considered whether there is some possible construction which would avoid these results and have concluded that none exists...It follows that the decision as to whether to abolish the mandatory death penalty must be, as the constitution intended it to be, a matter for the Parliament of Trinidad and Tobago...The effect of today's decision is to overrule the recent case of *Roodal v. The State*. Henceforth the sentence for murder will continue to be mandatory.[64]

By a stroke of the pen, the constitutional protection of human rights and the human rights instruments to which Trinidad and Tobago had freely and willingly acceded were reduced to mere "pious wishes." Their lordships hands were not tied by the constitution as they claimed. They should have been a bit more creative and used the purposive and generous rule of constitutional interpretation.

For example, the Board in *The Queen v. Hughes*[65] used the purposive and generous rule where the death penalty was not even mandatory. Section 178 of the Criminal Code of Saint Lucia provided that "whoever commits murder is liable indictably to suffer death." Section 5 of the constitution provided that no person shall be subjected to torture or inhuman or degrading punishment or other treatment. Another section provided that "nothing contained or done under authority of any law shall be held to be inconsistent or in contravention of section 5."

In this case, the Board accepted the appellants argument that while the law providing for the death sentence per se cannot be regarded as inconsistent with s. 5 of the constitution, it can be regarded as inconsistent with s. 5 to the extent that the

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64. *Id.*, ¶¶ 6 & 7. Cf. *Ssemogerere & Ors v. AG.*, Const. App. No. 1 of 2001.
65. (2002) UKPC 12; Appeal No. 91 2001; http//www.google.com

mandatory nature of the sentence makes it so disproportionate as to amount to inhuman punishment or treatment. The Board said that s. 178 does not only authorize the death sentence but actually requires the infliction of the death penalty on anyone convicted of murder. The Board was of the view that while every law which requires that an act be performed authorizes that act, no law which merely authorizes an act requires that it be performed. That there is a world of difference between a law that requires a judge to impose the death penalty in all cases of murder and a law that merely authorizes him or her to do so. More particularly, it is because the law requires, rather than merely authorizes the judge to impose the death sentence that there is no room for mitigation and no room for the consideration of the individual circumstances of the defendant or of the murder. Their Lordships concluded that to the extent that s. 178 is to be regarded as authorizing the infliction of the death penalty in all cases of murder, it cannot be held to be inconsistent with s. 5 of the constitution. But to the extent that it goes further and actually requires the infliction of the death penalty in all cases of murder, the exception in paragraph 10 does not apply. Section 178 which requires that an act be performed contains a crucial element that goes beyond mere authorisation. On that basis, the execution of a mandatory death sentence would be in contravention of section 5 of the constitution.

Similarly, in *Pratt v. Attorney-General of Jamaica*[66] the Board adopted the same approach. Section 17(1) of the Constitution of Jamaica provided that no person shall be subjected to torture or to inhuman or degrading punishment or treatment. Section 17(2) provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day. The state had argued that the Board could not hold that the executions would be contrary to s. 17(1) because of s. 17(2). The Board held that the purpose of s. 17(2) was to preserve all descriptions of punishment that were lawful immediately before independence and to prevent them from being attacked under s. 17(1) but that s. 17(2) did not address the question of delay in carrying out the punishment. They held that section 17 (2) is confined to authorizing descriptions of punishment for which the court may pass sentence and did not prevent the appellant from arguing that the circumstances in which the executive intended to carry out the sentence are in breach of s. 17(1). Consequently, the Board held that to carry out the executions after a delay of 14years would constitute inhuman punishment contrary to s. 17(1). The death sentences were quashed and terms of life imprisonment were substituted.

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66. (1994) 2 A.C1, at 29E-F.

In so doing, the Board departed from it's decision in *Riley v. A.G. of Jamaica*[67] and preferred the minority judgment who had interpreted S.7 (2) in a more limited way.

It is this approach to constitutional interpretation that has been adopted by the Supreme Court and the Constitutional Court of Uganda. Thus, Oder J.S.C stated that:

> The instruments being considered must be treated as a whole and all provisions having a bearing on the subject matter in dispute must be considered together as an integrated whole; provisions relating to fundamental rights and freedoms should be given purposive and generous interpretation in such a way as to secure maximum enjoyment of the rights and freedoms guaranteed; and when the state or any person or authority seeks to do an act or pass any law which derogates on the enjoyment of fundamental rights and freedoms...The burden is on such person or authority seeking derogation to show that the act or law is acceptable within the derogations permitted under article 43 of the constitution.[68]

Hon. Justice Odoki[69] has set out other criteria for testing the limitation. For one, there is the need to ensure that the limitation should impair as little as possible. Secondly, the need to make conflicting rights compatible or to protect the rights of other persons or important community interests. There is also the need to have the proportional rank and importance of the right at stake and the balancing of ends and means i.e.: the end must be a pressing social need and the means used must be proportionate to the attainment of such an end.[70]

It is because the minority judgment in *Matthew v. The State*[71] fulfils the above stated rules of interpretation and the criteria for limitation of rights that it must be preferred. The minority was right also to say that the majority decision was vitiated by its adoption of the austerity of tabulated legalism. They were also right to condemn the state and the majority for accepting that the mandatory death sentence amounts to inhuman treatment and still strive to uphold a right to subject

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67. (1983) A.C 719, at 286-298.

68. *Onyango Obbo & Anor v. Attorney-General*, Cosnt. Appeal No. 2 of 2002 (Unreproted SC) citing *Tinyefuza v. Attorney-General*, Const. Pet. No. 1 of 1997; *De Clerk & anor v. Du Plessis and ors* (1994) 6BLR 124, at 128-9 (SC of south Africa); *Troop v. Dulles* US ZL Ed 785 of 590 (1956).

69. *Supra*, No.1 at 18 based on *State v. Makwanyane* 1995 (3) SA 391 and accepted by the supreme Court in *Onyango Obbo and anor v. Attorney-General, id.; Abuki and anor v. Attorney-General* Const. Pet. No. 2 of 1997; and *Attorney-General v. Abuki*, Const. App. No. 1 of 1998.

70. *Supra* note 1. The criteria were applied in *Onyango Obbo and Anor v. Attorney General*, Const. App. No. 20 of 2002 (Unreported) Supreme Court of Uganda.

71. (2004) UKPC 33.

its citizens to what it acknowledges to be cruel and unusual punishment; but that is what it was seeking to do and the majority held that it was entitled to do so. The majority failed to heed the admonition that courts should not read the provisions of the constitution like a last will and testament lest it became one.[72]

The majority failed to appreciate that entrenching a bill of rights in the constitution has a salutary effect against the abuse of powers by both the Executive and Parliament. The courts must consider themselves in a peculiar manner the guardians of those rights. They must be an impenetrable bulwark against every assumption of power by Parliament and the Executive. They must naturally resist every encroachment upon rights expressly stipulated in the constitution. The protection of rights is supposed to remove risks of abuse of parliamentary power as well as the executive and also the body of people operating by the majority against the minority.[73]

Of the four dissenting Lordships, Lord Nicholls wrote an independent opinion reinforcing his colleagues. He said that years ago, no one thought mandatory sentences were an unusual or inhumane form of punishment.[74] But he noted that times had changed. Human rights values set higher standards today. The common endeavour—to rid the world of man's inhumanity to man—has not ceased. Conduct once tolerated is no longer acceptable. To condemn every person convicted of murder to death regardless of the circumstances is a form of inhumane punishment. *A sentence of death which lacks proportionality lacks humanity.* Constitutions should be interpreted by giving proper effect to their spirit and not being mesmerized by their letter. As was said in *Boodman v. Attorney-General*[75] although the text of the constitution could not be ignored, the courts should seek guidance in its spirit rather than from its imperfect language.

Most specifically, the judgment of the minority is to be preferred because they clearly recognized that though the purpose of the limitation was constitutional, its effect was unconstitutional. The minority was also right in accepting, though only implicitly, that the court has jurisdiction to adjudicate on a provision *of the constitution in relation to other provisions.*[76]

The minority started by looking at the preamble to the constitution in order to determine its spirit. The preamble declared faith in the fundamental rights and freedoms, the dignity of the human person and the rule of law. They also looked at the entrenched rights and freedoms and those contained in international human

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72. *Boyce & anor v. The Queen* (2004) UKPC 32.

73. B. SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 168 (1992).

74. *See Ongah Cuan v. Public Prosecutor* (1981) Act 648, at 674 where Lord Diplock said "there was nothing unusual in capital sentence being mandatory."

75. (1996) 3 CHRLD 383.

76. *Ssemogerere & ors v. A-G,* Const. App. No. 11 of 2002 Per Kanyeihamba J.S.C.

rights treaties. They examined a good number of precedents on the issue from many jurisdictions and came to the right conclusion that though the rights can be limited, they should not be negated and should be impaired as little as possible. Therefore, the majority decision should not be followed anywhere else in the Commonwealth other than in Trinidad and Tobago and in Barbados because of the decision in *Boyce and Joseph v. The Queen*[77] a decision of the Board given on the same day and adopted in deciding *Matthew v. The State.*[78] Both decisions suffer from similar infirmities.

The case of *Boyce and Joseph v. The Queen* was again a five to four majority decision. The majority approached the appeal on the footing that the mandatory death sentence is inconsistent with the international obligations of Bardados under the various Human Rights Instruments. On section 15(1) which provided that "no person shall be subjected to torture or to inhuman or degrading punishment or other treatment," their Lordships were of the opinion that it was inconsistent with a mandatory death penalty for murder. They approved the reasoning in *Reyes v. The Queen*[79] as applicable and compelling. That s. 15(1) could properly be regarded as now having a broad content than would have been generally thought when it was enacted. They even approved the Boards decision in *The Queen v. Hughes.*[80] However, they held that the Constitution did not give the courts power to modify the law and consequently s. 2(1) which provided that nothing contained or done under the authority of any law shall be held to be inconsistent with or in contravention of any provision of ss. 12 to 23 protected the mandatory sentence.

The minority repeated the same reasons that they gave in *Matthew v. The State.*[81] They restated the unanimous opinion of the court in *Reyes v. The Queen*[82] that the mandatory death penalty was inhuman or degrading punishment or treatment. The Board reached the same unanimous decision in *Lambert Watson v. The Queen* (*The Attorney-General intervening*)[83] an appeal heard at the same time as *Matthew v. The State*[84] and *Boyce Joseph v. The Queen.*[85] Barbados amended its constitution to give express constitutional protection to the mandatory death penalty. The Inter-American Commission sought an advisory opinion on the matter. The Commission advised the Government of Barbados that it remained of the view that

77. (2004) UKPC 32 Appeal No.99 of 2002.
78. (2004) UKPC 33 Appeal No.12 of 2004.
79. (2004) UKPC 11.
80. (2004) UKPC 17.
81. (2004) UKPC 33.
82. (2004) UKPC 11.
83. (2004) UKPC 34.
84. (2004) UKPC 33.
85. (2004) UKPC 32.

the mandatory imposition of the death penalty is incompatible with the protections stipulated under the Inter-American Human Rights Instruments. Barbados had argued that there were exceptions, defences and other circumstances to avoid capital punishment and there was the prerogative of mercy.[86] It appears however, that all these do not alleviate the requirement that the death penalty can only be imposed after a judicial hearing where the sentence is not mandated in advance and where all mitigating factors may be presented and taken into account by the judicial authority in determining whether death is the appropriate punishment. The Government was accordingly advised to reconsider the constitutional amendment relating to the death penalty.[87]

There is only one caveat regarding the minority judgment in *Matthew v. The State*.[88] They relied on the Interpretation Act which provides in S10(1) that every written law shall be construed as always speaking. They said that this general principle of statutory interpretation is of particular application to constitutions. In Uganda S2(3) of the Interpretation Act provides specifically that the *Act shall not apply to constitutional instruments.* But the "always speaking" rule as a general principle of interpretation is independent of the Interpretation Act.[89]

The Ugandan Courts are encouraged to follow the minority decisions of the Board in the above two cases which are consistent with the majority of the Boards other decisions[90] and which are in conformity with the Supreme Courts decisions,[91] the decision of the Court of Appeal[92] and of the constitutional court.[93] Moreover, the constitution of Uganda does not have similar saving or limiting provisions to those of the constitutions of Trinidad and Tobago and of Barbados. Apart from these two decisions, the others are consistent with the protection of the right to life and the prohibition against torture, inhuman or degrading treatment or punishment contained in articles 22, 24 and 44 (a) respectively. And as the Supreme Court of

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86. *Matthew v. The State, supra* note 7.

87. Commission's Note to the Government of Barbados of 17 March 2004, *quoted in Boyce and Joseph v. The Queen, supra* ¶ 81.

88. (2004) UKPC 33.

89. *See* cases cited *supra* note 20; and *Attorney-General v. Whiteman* (1991) A,C 240, at 247; *Attorney General of Gambia v. Momodu Jobe* (1984) AC 689, at 700; *Vasquez v. The Queen* (1994) 1 WLR 1304, at 1313; *Edwards v. Attorney-General of Canada* (1930) AC 124, at 136; *Reyes v. The Queen* (2002) UKPC 11; *Huntern v. Southam Inc* (1984) 2 SCR; *R v. Ireland* (1998) AC 147, at 155. *See also, supra* note 42.

90. *Reyes v. The Queen* (2002) UKPC 11; *Fox v. TheQueen* (2002) UKPC 13; *Hughes v. The Queen* (2002) UKPC 12; *Pratt & Morgan v. Attorney-General of Jamaiza* (1994) 2 A.C.1; *Lewis v. Attorney-General of Jamaica* (2001) 2 A.C 50; *Lambert Watson v. The Queen* (2004) UKPC 34.

91. *Attorney-General v. Abuki*, Const. App. No. 1 of 1998; *Onyango Obbo v. Attorney-General* Const. App. No. 2 of 2002 (both unreported)

92. *Sewankambo v. Uganda,* Criminal App. No. 14 of 2000 (Unreported).

93. *Kyamanywa v. Uganda,* Criminal App. No. 1 of 2000 (Unreported).

Uganda has held, the prohibitions under article 24 are absolute and unqualified. No question of justification can ever arise. In other words one cannot use the general limitation in article 43 to justify derogation from article 24 especially when read together with article 44 of the constitution. The minority judgment in the two cases and the Ugandan decisions are likewise consistent with the current interpretation of the various international human rights instruments to which Uganda is a willing party. Even the correctness of the *obiter dicta* in *D.P.P.v. Mollison*[94] and the reasoning in *Roodal v The State*[95] were not questioned except that the Board felt that the constitutions of Trinidad and Tabago and of Barbados did not allow the courts to modify existing laws to bring them into conformity with the Constitution and those countries' international human rights obligations. Moreover, the majority opinions in *Boyce and Joseph v. The Queen*[96] and *Mathew v. The State*[97] accepted that the death penalty is inherently inhuman, cruel and degrading punishment or treatment and does not conform to the countries international obligations under the various international human rights treaties. However, in as far as they seemed to suggest that international human rights treaties will only be called in aid where the local legislation is ambiguous, in the sense that it is capable of a meaning which either conforms to or conflicts with the treaty, they are, with greatest respect, out of date.[98] The modern trend shows judicial deference to international standards.[99]

## VI. CONCLUSION

A number of general principles have been established by the cases discussed in this paper. Murders differ greatly, with varying degrees of culpability and with varied motives and should, therefore, never attract the same punishment. The mandatory death sentence is a cruel, inhuman or degrading treatment or punishment. Where it still exists, it can be regarded as the maximum but not the only punishment. Legislation imposing the death sentence should be interpreted in such a way as to ensure the contemporary protection of rights and freedoms by taking into account the relevant circumstances of the offence and the offender and all other mitigating factors so as to preserve the international human rights instrument's concept of humanity. The existence of a committee on the prerogative of mercy does not

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94. (2003) UKPC 6, [2003] 2AC 411.
95. (2003) UKPC 78.
96. (2004) UPKC 32.
97. (2004) UPKC 33.
98. The minority judgment in *Boodal v. TheSstate* (2003) UKPC 78, and majority judgment in *Matthew v. The State* (2004) UKPC.
99. *See,* Tumwine-Mukubwa *supra* note 10, and *Besigye v. Museveni, supra* note 10. *See also,* ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN PRACTICE: THE ROLE OF JUDGES IN IMPLEMENTING ECONOMIC SOCIAL AND CULTURAL RIGHTS (Y. Ghai & J. Cottrell eds., 2004).

achieve this because a non-judicial body is not competent to decide on an appropriate punishment. Therefore, the prerogative of mercy cannot cure the defect in the sentencing process. It should involve a judicial mind which means that even for the most vile of crimes, the death sentence should only be discretionary.

Hon. Justice Odoki[100] agrees that article 22 (1) of the constitution of Uganda does not constitutionalise the death penalty but is a mere safeguard. So too article 121 (5) and (4) (c). He also advises that regard should be had to the proportional rank and importance of the right at stake. The cases discussed in this article are categorical that the mandatory death sentence is cruel, inhuman or degrading treatment or punishment. Therefore it is monstrous to inflict it. Consequently, because no derogation is acceptable to article 24 by virtue of the provisions of article 44, which supercedes all other articles of the constitution including the exception to article 22(1), the death penalty should be judicially declared void under article 2(2) because of its inconsistency with the said articles in addition to articles 20, 21 and 28.

The penalogical theories in support of the death sentence are so pedantic[101] and have been sufficiently and thoroughly debunked by academic writers and judicial precedents that they can only be referred to by reference rather than repetition.[102] As the report of the Constitution Review Commission observed, the punishment of death continues to be rationalized upon speculation and supposition.[103] However, it recommended retaining the penalty because a majority of Ugandans support it. In other words, they were of the view that the criminal justice system should enjoy the confidence of the people for it to be effective. Parliament is thus unlikely to abolish the death penalty because its decisions are sometimes influenced by public opinion. This is the reason why it will have to be the courts which do not decide cases on the strength of public opinion which should abolish this barbaric penalty. As a start, the courts should abolish the mandatory sentence so that it is made discretionary. This will be in fulfilment of Kenyeihamba J.S.C's solemn declaration that the courts in Uganda were established as bastions in the defence of the rights and freedoms of the individual and against oppressive

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100. *See supra* note 1, at 13 & 18. By the end of 2002, 354 persons were on death row, 240 for murder 105 for robbery, 7 for treason and 2 for kidnap. *See,* REPORT OF THE CONSTITUTIONAL COMMISSION (December 2003). Between 1989 and 1999, 55 had been executed 28 of these in year 1999 alone.

101. *Id.*

102. Among others see Tumwine-Mukubwa *supra* note 2, at 152-154. *See also,* G.P. Tumwine-Mukubwa, *An Open Letter to Constituent Assembly Delegates on the Death Penalty,* THE NEW VISION (October 18 1994), at 10; A. Makubuya, *The Constitutionality of the Death Penalty in Uganda: A Critical Inquiry,* 6 EAST AFR. PEACE & HUM. RIGHTS (2000); and the cases discussed in this article, particularly *State v. Makwanyane* 1995 (3) S.A 391, *Mithu v. State of Punjab* (1983) 2SCR 690, and *De Klerk & anor v. Du Plessis* (1994) 6 BLR 124.

103. *Matthew v. The State, supra* note 7, at 33.

and unjust laws and acts.[104] The courts must remain constantly vigilant in upholding the provisions of the constitution.[105] The courts would be upholding articles 24, 44 and 78 (3). It will also remove the forces of tyranny and oppression which the spirit of the constitution has expressed opposition to in the preamble. Article 273 gives courts the power to modify existing laws which they can use to change the words shall suffer death to "may suffer death" and also justify this change in the post October 1995 laws by applying s. 37 of the Interpretation Act.[106] This will make Uganda partly conform to international human rights treaties like the Universal Declaration of Human Rights, the ICCPR, and The African Charter,[107] and will be of immense educational value to the public against the death penalty; thus preparing the way for its total abolition.

Lest other abolitionists charge me with abandoning ship, there is need to justify the pragmatic approach of first attacking the mandatory death sentence. Let it be restated here that the retentionists do not have any good penological argument on their side. That is why they have been left only with the "public opinion" option. But the strongest motivation for the new stance to attack the mandatory death sentence first is that the Ugandan President is a self declared retentionist and, if the courts were to abolish it he may seek a constitutional amendment from a usually pliable Parliament to Constitutionalize it. That will be a giant step backwards for the abolitionist movement. As Makubuya has aptly observed:

> Our research has shown that convicts of capital offences that do not carry a mandatory sentence have rarely been sentenced to death in the recent past. This could therefore be a first step towards the abolition of the death penalty. Such proposed reform in the law serves a double purpose. It satisfies the retentionists who feel that the death penalty is still available, and the abolitionists who consider permitting judicial discretion as good as actual abolition.[108]

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104. *Ssemogerere & ors v. A-G, supra* note 76.

105. Const. App. No.1 of 2002 (Unreported S.C of Uganda).

106. Cap. 3.

107. Unfortunately, the modification under article 273 would only apply to existing laws, not to those passed after 22nd September 1995. However, those laws could be said to prescribe the maximum and not the only penalty by using s. 37 of the Interpretation Act, Cap 3. As to the value to be accorded to foreign judicial precedents the reader is referred to *Onyango Obbo v. attorney-General*, Const. App. No. 2 of 2002 (Unreported) S.C particularly the judgments of Tsekooko and Oder J.J.S.C.

108. Makubuya, *supra* note 95, at 248.

Hon. Justice Odoki writing three years later echoed similar views when he says that "the extension of capital punishment for rape and defilement may have had good motives but it seems unlikely to have any effect on the incidence of these crimes which seem on the increase or *on the sentencing policy of the courts which have so far not imposed any death sentence*.[109] Although we do not expect our courts to be forced into making certain decisions by executive intimidation, recent belligerent attacks and intimidatory utterances by the executive against the judiciary should not be totally ignored in order to guarantee the safety of judicial personnel. However, this does not mean that such intimidatory utterances should be welcomed or countenanced in any way.

However, the most important reason for attacking the mandatory death sentence is that there are now weighty human rights precedents from the highest court on constitutional provisions similar to the constitution of Uganda and international human rights treaties to which Uganda has acceded that have conclusively decided the issue. And as the Supreme Court has stated very clearly in *Onyango Obbo & Anor v. Attorney-General*:

> It is a anniversary acceptable practice that decided cases decided by the highest courts in jurisdictions with similar legal systems which bear on a particular case under consideration may not be binding but are of persuasive value, *and are usually followed unless there are special reasons for not doing so.*[110]

One can therefore be optimistic that challenging the mandatory sentence of death is likely to succeed in the Ugandan courts because of article 24 which cannot be derogated from by article 43 (1) nor can it be deemed to be acceptable and demonstrably justifiable under article 43 (2) (c) because of the constitutional superiority accorded to article 24 read together with article 44 (a) of the constitution. Moreover, article 44 (a) and by implication or infection article 24 is an entrenched provision of the constitution under articles 259(1) and 259(a) and (c). Article 44 (a) and for our purposes article 44 (c) concerning the right to a fair hearing, cannot be amended unless the bill is passed by a two-thirds majority of all members of Parliament at the second and third reading *and* has been referred to a decision of the people and approved by them in a referendum. So if the courts were to hold that a mandatory death sentence is cruel, inhuman or degrading treatment or punishment it would follow that all existing laws would have to be modified as mandated by article 273. Equally, it means that all subsequent laws have to be modified under the

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109. *See supra* note 1, at 19.

110. Const. App. No. 2 of 2002 S.C Unreported by Oder J.S.C. But also see judgment of Tsekooko J.S.C which is to the same effect.

Interpretation Act[111] as providing for the maximum and not the only sentence. If this technique fails, then under article 2(2) they must be held to be void. This is because, even though article 79 (1) gives Parliament general powers to make law, it has to protect the constitution under article 79(3) and cannot amend article 44(a) contrary to article 259. Consequently, Parliament cannot impose a penalty that is prohibited by article 24. The only question remaining now is what is the exact position of the law.

After the confusion caused by The privy Council's decisions in *Matthew v. The State*[112] and *Boyce* and *Joseph v The Queen*[113] in a unanimous judgment given on the same day as the first two cases has tried to restore some kind of sanity in the law in *Watson v The Queen.*[114] In this case, a man killed his daughter and her mother and was convicted and sentenced to death under a section 3 (1A) which was inserted in 1992 and made the death sentence mandatory if the offender has been convicted of another murder done on the same occasion. Section 17(1) of the constitution prohibited subjecting any person to torture or to inhuman or degrading punishment or other treatment. Section 17(2) provided that nothing shall be held to be inconsistent with or in contravention of the section to the extent that the law in question authorizes the infliction of any description of punishment which was lawful in Jamaica at the time of independence on July 19, 1962. The chapter on human rights also contained a derogation in section 26(8) that nothing done under the authority of any such law shall be held to be done in contravention of any of the human rights provisions. The appellant challenged his sentence based on article 17 (1) of the constitution.

A unanimous full Board held that, first the imposition of the mandatory death penalty on the appellant subjected him to inhuman or degrading treatment, thus upholding the Boards earlier decisions in *Reyes v. The Queen,*[115] *The Queen v. Hughes*[116] and *Fox v. The Queen.*[117] In effect, saying that the core right protected here is that no human being should be treated in a way that denies his or her basic humanity. To condemn a person to die without giving such a person an opportunity to persuade the court that this would his or her case be disproportionate and inappropriate is to treat him or her in a way that no human being should be treated. The Board said that *attempts to confine the mandatory death sentence to those categories of murder that are the most reprehensible will always fail to meet these objections.* The Board emphasized that it must be open to the judge to take into

111. Cap. 3.
112. (2004) UKPC 33.
113. (2004) UKPC 32.
114. (2004) UKPC 34.
115. (2004) UKPC 11.
116. (2004) UKPC 12.
117. (2004) UKPC 13.

account facts of the case and the person's background and personal circumstances. The judge must also be in a position to mitigate the sentence. The mandatory sentence flies in the face of these requirements as it precludes any consideration of the circumstances. Secondly, they held that the impugned criminal section was subject to s. 26(8) of the constitution and incompatible with s. 17(1) of the constitution. In the circumstances s. 3 (1A) should be read as if the word "*shall*" there had been substituted with the word "*may*". In other words, the section remained valid only to the extent that it authorized the imposition of that sentence and did not contain a crucial element which went beyond mere authorisation.[118]

It has already been demonstrated elsewhere in this paper that the Supreme Court of Uganda has held that international human rights treaties are applicable in the domestic arena. What is remaining, therefore, is to challenge the mandatory death sentence on the basis of those treaties and on the basis of the non-derogable provisions of the constitution contained in articles 24, 28 and 44(a) and (c) of the constitution. A total challenge for abolition is feasible though not advisable at the moment for the reasons given earlier.

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118. The case of *Watson v. The Queen* reversed Lord Diplock's statement in *Ong Ah Chuan v. Public Prosecutor* that there was nothing unusual in capital sentence being mandatory and that its efficacy as a deterrent might be to some extent diminished if it were not. The Board adopted the reasoning in *Reyes v. The Queen* that the mandatory penalty of death on conviction for murder long pre-dated any international arrangements for protection of human rights and was made at a time when international jurisprudence on human rights was rudimentary. This also means that the reasoning in *Roodal v. State* is valid though the decision was reversed. Also reversed was the decision in *D.P.P. v. Nasralla* (1967) A.C 238. Of particular importance was the Boards approval of the reasoning and the decision in *State v. Makwanyane* 1995 (3) S.A. 391.