

# REDUCING THE APPLICATION OF THE DEATH PENALTY IN UGANDA

*“In order to fully guarantee the right to life, provided for in article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment might be imposed, with a view to the desirability of abolishing this punishment in all countries’.* UN General Assembly, 1971<sup>1</sup>

## 1. INTRODUCTION

### Background

A death penalty is a sentence imposed on a person requiring that person to be deprived of life as a punishment for a crime.

There are two kinds of death penalties: discretionary or mandatory.

### Discretionary death penalty

This is where the court has discretion to sentence the offender to death or to a lesser sentence depending on the nature and circumstances of the offence, and the individual characteristics of the offender. An offender is allowed to present mitigating evidence in court to demonstrate why a death sentence is not a proportionate punishment. Mitigating factors that can be taken into consideration can include, but are limited to, the gravity of the offence, the nature and circumstances in which the offence was committed, the mental state of the defendant, whether there was provocation, lack of premeditation, remorse etc.

The Penal Code Act Cap 120, the Uganda Peoples Defence Forces Act, 2005 and the Anti Terrorism Act, 2002 prescribe a discretionary death sentence for the following offences:

1. rape;
2. defilement;
3. mutiny;

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<sup>1</sup> UN General Assembly resolutions 2857 (XXVI) of 20 December 1971 and 32/61 of 8 December 1977 on capital punishment, as well as resolution 44/128 of 15 December 1989, in which the Assembly adopted and opened for signature, ratification and accession the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.

4. Cowardice; and
5. Breaching concealment. etc.

### **Mandatory death penalty**

A mandatory death penalty is one in which the court, after convicting the offender of an offence for which a death sentence is prescribed by law, has no choice but to sentence the convict to death, even if there is mitigating evidence that a lesser sentence would be more proportionate. The court in this case has no power to examine the circumstances of the offence or the individual characteristics of the defendant in order to determine the appropriate sentence and also the convict has no right to mitigate the sentence.

Ugandan legislation prescribes a mandatory death sentence for the following offences:

1. murder;
2. treason;
3. aggravated robbery;
4. aggravated defilement;
5. terrorism (if it directly results in the death of any person);
6. not encouraging officers to fight courageously; and
7. giving premature orders to attack attract a mandatory death penalty<sup>2</sup>.

By implication, the death penalty is also prescribed for war crimes, genocide and crimes against humanity under the International Criminal Court Act, 2010<sup>3</sup>

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<sup>2</sup> Sections 188&189(murder), section 23 (treason), section 129(3)&(4) aggravated defilement ,sections 285 and 286(2) of the Penal Code Act cap 120. Section 7 of the Anti Terrorism Act,2002, section 128 of the Uganda Peoples Defense Forces Act, 2005.  
Sections, 7,8 and 9 of Act 11 of 2010.

## 2. DEATH PENALTY IN UGANDA

Article 22(1) of the Constitution provides 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.”

It is therefore not debatable that the Constitution explicitly recognizes the death penalty and authorises its prescription by law.

There are currently 29 offences for which the death penalty is prescribed. These are spread out in the Penal Code Act Cap 120, the Uganda Peoples Defense Forces Act, 2005<sup>4</sup> and the Anti- Terrorism Act, 2002.<sup>5</sup> Six of these offences are mandatory and 23 are discretionary.

## 3. JUSTIFICATION FOR CHANGE IN STATUS QUO

In Susan Kigula, the Supreme Court observed that:

*“We wish to add that the right to life is so important that the abolition of the death penalty requires specific progressive measures by the State to eventually expressly effect such abolition. This has been done by many countries all over the world who have specifically provided for no death penalty in their Constitutions, or who have acceded to the Optional Protocol on the Abolition of the Death Penalty.”*

The reforms proposed by the the Law Revision (Penalties in Criminal Matters) Miscellaneous Amendments Bill 2013 are based on legal requirements arising from:

1. **Attorney General v Susan Kigula & 417 Others (Constitutional Appeal No.3 of 2006).**
2. **“Most serious crimes” standard, as set out in Article 6(2) of the International Covenant on Civil and Political Rights (ICCPR).**

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<sup>4</sup> Act No 7 of 2005

<sup>5</sup> Act No 14 of 2002

### 3.1 ATTORNEY GENERAL V SUSAN KIGULA & 417 OTHERS<sup>6</sup>

The appellants in this case had all at different times been convicted and sentenced to death. They went to court and argued that the application of the death penalty contradicted several provisions of the Constitution including those that prohibit cruel, inhuman and degrading treatment.

The Court found that the death penalty in and of itself was not unconstitutional in Uganda, provided that the sentence was passed by a competent court after a fair trial and it had been confirmed by the highest appellate court, and hanging was not chosen as the means of execution.

However, both the Constitutional Court and the Supreme Court found that a mandatory death penalty was inconsistent with the principle of equality before the law.

*“Not all murders are committed in the same circumstances, and all murderers are not necessarily of the same character.”<sup>7</sup>*

In its decision, the Supreme Court observed that although the Constitution permits the death sentence, there is nothing to stop Uganda as a member of the United Nations from introducing legislation to amend the Constitution and abolish the death sentence. Indeed, the Supreme Court urged Parliament:

*“Reopen the debate on the desirability of the death penalty in our Constitution, particularly in light of findings that for many years no death sentences have been executed ... The failure, refusal or neglect by the Executive to decide on those death sentences would seem to indicate a desire to do away with the death penalty.”<sup>8</sup>*

While amending Article 22(1) of the Constitution would finally resolve the question of the death penalty in Uganda, even without it, it is still possible for Parliament to reduce the application of the death penalty by abolishing mandatory death sentences in accordance with the judgment of the Supreme

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<sup>6</sup> Constitutional Appeal No. 3 of 2006.

<sup>7</sup> *Attorney General v Susan Kigula & 417 Others* (Constitutional Appeal No. 03 of 2006) [2009] UGSC (21 January 2009), p. 43.

<sup>8</sup> *Attorney General v Susan Kigula & 417 Others* (Constitutional Appeal No. 03 of 2006) [2009] UGSC (21 January 2009), p. 63.

Court, and reducing the number of offences for which the death penalty is prescribed.

### 3.2 “MOST SERIOUS CRIMES” STANDARD

The right to life is the fundamental right on which all others depend and as such it requires the highest level of protection. When life is terminated all the other rights are automatically extinguished since the right to life is antecedent to all the other rights.

While international law does not prohibit the use of the death penalty, it places stringent constraints on the conditions under which the right to life may be infringed, either extra-judicially or judicially.

Since Uganda has reiterated its position to retain the death penalty<sup>9</sup>, it is critical that the penalty should be applied in accordance with the standards specified in the relevant international human rights instruments.

Article 6 of the *International Covenant on Civil and Political Rights*, ratified by Uganda on 21 June 1995, identifies the conditions in which the death penalty can be applied. A 1984 ECOSOC resolution (1984/50) sets out the minimum standards for those countries that retain the death penalty. The minimum standards include:

- No one shall be arbitrarily deprived of life.
- **The death should only be imposed for the 'most serious crimes'.**
- Access to adequate legal assistance at every stage of the proceedings.
- Access to interpretation or translation for defendants who do not sufficiently understand the language used in court.
- Time and facilities to prepare a defence.
- Access to consular assistance for defendants from another country.
- There must be a process of appeal and clemency.
- Pregnant women may not be executed.
- Persons under 18 years old may not be executed.
- Insane persons may not be executed.

This standard was emphasised in 2012 by the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions<sup>10</sup>, who called on States that

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<sup>9</sup> Uganda's Report to Working Group on Universal Periodic Review <http://reliefweb.int/report/uganda/report-working-group-universal-periodic-review-ahrc1916>

have not abolished the death penalty as a form of punishment to adhere to the strict conditions imposed upon its application by international law.

### The “most serious crime” standard

Interpretation of the phrase, the “most serious crimes” has led to restrictions on the number and type of offences for which death sentences can be imposed under international law.

In 1982, the UN Human Rights Committee, the UN body tasked with monitoring the implementation and interpretation of the ICCPR stated:

*“the expression ‘most serious crimes’ must be read restrictively to mean that the death penalty should be quite an **exceptional measure**”.*<sup>11</sup>

In 1984, the UN Economic and Social Council issued Safeguards Guaranteeing Protection of the Rights of those facing the Death Penalty<sup>12</sup> in which they stipulated that:

*“In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond **intentional crimes with lethal or other extremely grave consequences.**”*

In 1996, the UN Economic and Social Council emphasised this standard and called upon States to apply the safeguards contained in the standard<sup>13</sup>.

In fact, the UN Human Rights Committee has interpreted “most serious crimes” as not including:

- economic offences<sup>14</sup>,
- embezzlement by officials<sup>15</sup>,
- political offences<sup>16</sup>,

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<sup>10</sup> New York, 25<sup>th</sup> October, 2012. [www.ohchr.org](http://www.ohchr.org)

<sup>11</sup> General Comment No. 6 on article 6 of the ICCPR, adopted on 27 July 1982, para. 7.

<sup>12</sup> Resolution 1984/50 of 25 May 1984

<sup>13</sup> Resolution 1996/15

<sup>14</sup> UN document CCPR/C/79/Add.101, 6 November 1998, para. 8.

<sup>15</sup> UN document CCPR/C/79/Add.85, 19 November 1997, para. 8.

<sup>16</sup> UN document CCPR/C/79/Add.101, 6 November 1998, para. 8. In relation to political offences the Committee has, in particular, expressed concern about “very vague categories of offences relating to internal and external security” (UN document

- robbery<sup>17</sup>,
- abduction not resulting in death<sup>18</sup>,
- apostasy<sup>19</sup>, and
- Drug-related crimes.<sup>20</sup>

The UN Commission on Human Rights, a subsidiary body of the UN Economic and Social Council (ECOSOC), replaced by the Human Rights Council in 2006, has interpreted “most serious crimes” as not including:

- non-violent acts such as financial crimes, religious practice or expression of conscience; and
- sexual relations between consenting adults.<sup>21</sup>

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has interpreted Safeguard 1 as excluding the possibility of imposing death sentences for economic and other so-called victimless offences, or activities of a religious or political nature - including acts of treason, espionage and other vaguely defined acts usually described as crimes against the state or disloyalty. The Special Rapporteur’s interpretation would exclude the possibility of a death sentence for actions primarily related to prevailing moral values, such as adultery and prostitution, as well as matters of sexual orientation.<sup>22</sup>

In October 2012, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions gave the following guidance relating to the most serious crimes:

*“As part of an international treaty, the term ‘most serious crimes’ should be understood as an international standard applicable to all States. This consideration rules out the imposition of the death penalty for apostasy and*

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CCPR/CO/69/KWT, 27 July 2000, para. 13); about vaguely worded offences of opposition to order and national security violations (UN document CCPR/CO/75/VNM, 26 July 2002, para. 7); and about “political offences... couched in terms so broad that the imposition of the death penalty may be subject to essentially subjective criteria” (UN document CCPR/CO/72/PRK, 27 August 2001, para. 13).

<sup>17</sup> UN document CCPR/CO/83/KEN, 29 April 2005, para. 13.

<sup>18</sup> UN document CCPR/CO/72/GTM, 27 August 2001, para. 17.

<sup>19</sup> UN document CCPR/C/79/Add.85, 19 November 1997, para. 8.

<sup>20</sup> UN document CCPR/CO/69/KWT, 27 July 2000, para. 13.

<sup>21</sup> Resolution 2005/59 adopted by UN Human Rights Committee on 20 April 2005.

<sup>22</sup> UN document E/CN.4/1999/39, 6 January 1999, para. 63.

*homosexual conduct. In most countries these are not crimes at all, let alone viewed as 'most serious crimes'. Likewise, the death penalty should not be imposed for drug-related and economic offences. If used at all, the death penalty may be used only where someone was intentionally killed."*<sup>23</sup>

In the South African case of **State v Mukwanyane**<sup>24</sup> Justice Chaskalson noted that we have long outgrown the literal application of the biblical injunction of "an eye for an eye, and a tooth for a tooth". That punishment must to some extent be commensurate with the offence but there is no requirement that it be equal or identical to it.

The courts therefore recognize that a sentence must be commensurate to the offence of which the accused has been convicted<sup>25</sup> and have sentenced convicted persons to lesser punishments. Indeed in *Yanus Wanaba v Uganda*<sup>26</sup> the Court of Appeal upheld the conviction of the offender on defilement, an offence punishable by death but decided, because of the circumstances of the case, that the offender should be released immediately.

- Since from the international perspective, the death penalty restricts application of the death penalty to the "most serious crimes", and as Uganda has ratified and is therefore bound by the ICCPR, and since the most serious crimes are understood internationally to mean those crimes resulting in intentional killing of persons, there is need to examine the offences under the Penal Code Act, the Anti-Terrorism Act, 2002 and the Uganda Peoples Defence Forces Act, 2005 to ensure that the death penalty is prescribed only for the "most serious crimes".

## **Recent legislative reforms in other jurisdictions**

Rwanda abolished the death penalty in 2007 notwithstanding, a referendum in 2003 that overwhelmingly voted to retain it.

China: removed the death penalty from 13 offences in 2011 and exempted persons who are older than 75 years unless they commit murder with

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<sup>23</sup> New York, 25<sup>th</sup> October, 2012. [www.ohchr.org](http://www.ohchr.org)

<sup>24</sup> [1995] 1 LRC 289

<sup>25</sup> Uganda v Fred Oyuku, High Court Criminal Revision 160 of 1992.

<sup>26</sup> Criminal Appeal No 156 of 2001



exceptional cruelty. In China, the criterion was offences where the death penalty has been rarely applied.

In 2011, Gambia removed the death penalty for drug related offences.

Saint Vincent and the Grenadines: abolished the mandatory death penalty in 2011.

Guyana: Abolished the mandatory death penalty for murder in October 2010.

Grenada: abolished the mandatory death penalty in 2006.

Bangladesh: abolished the mandatory death penalty for murder after rape in March 2010.

Taiwan: abolished the death penalty for kidnapping, gunrunning, obstruction of military services, and counterfeiting of banknotes in 2011.

Gabon, Togo and Burundi have also heeded to the call by the UN General Assembly and abolished the death penalty in the recent past.