

# Tanzania's death penalty debate: An epilogue on *Republic v Mbushuu*

Aniceth Gaitan\*

Kongwa District Council Solicitor, Tanzania

Bernhard Kuschnik\*\*

Legal Clerk, Regional Court, Düsseldorf, Germany

## Summary

*The imposition of the death sentence seems to be a common method of punishing grave offenders in Africa. In Tanzania, the most famous case involving capital punishment is Republic v Mbushuu, where the accused were convicted of murder and sentenced to death in 1994. Yet, there seems to be a new trend – among other things sparked by developments in international criminal justice – to work towards the abolishment of capital punishment. The article gives insights into legal and interdisciplinary considerations from an African–European perspective and calls for a progressive approach to the death penalty debate that works hand in hand with the legal understanding of the international community.*

## 1 Introduction

Whereas the death penalty is one of the oldest forms of punishment, the strengthening of human rights law after World War II has led to a gradual global movement aimed at its abolition.<sup>1</sup> In Africa, the death penalty has until recently been used widely. As at 2007, 13 African

---

\* LLB (Mzumbe, Tanzania). This paper was presented to the Legal and Human Rights Centre (LHRC) in light of the hearing of 22 June 2009 regarding the petition of the LHRC and the Tanganyika Law Society to the High Court to press for the abolishment of the death penalty, filed on 10 October 2008.

\*\* LLM (Aberdeen), PhD (Eberhard Karls); B\_Kuschnik@gmx.de

<sup>1</sup> R Skillbeck 'The death penalty in international law: Tools for abolition' paper presented at the Conference on the Application of the Death Penalty in Commonwealth Africa, Entebbe, Uganda, 10-11 May 2004; see also Amnesty International 'The death penalty worldwide: Developments in 2003' <http://www.amnesty.org/en/library/info/ACT50/007/2004/en> (accessed 10 November 2009).

countries had decided in favour of its formal abolishment; 19 had abolished it *de facto*, among others Tanzania,<sup>2</sup> and 21 still retained the death penalty. Nonetheless, there seem to be signs that Africa intends to get rid of the death penalty. Rwanda's recent abolition of the death penalty serves as an example.<sup>3</sup> New tendencies in international criminal law policy, particularly the work of the International Criminal Tribunal for Rwanda (ICTR), started a process of thought that considers a stronger integration of norms of the international justice system into national systems as desirable. Yet, according to United Nations (UN) strategy, UN bodies such as the ICTR, or institutions which have affiliations with the UN, such as the Special Court for Sierra Leone (SCSL), are prohibited from using the death penalty when sentencing.<sup>4</sup> In Rwanda, the abolition of capital punishment was particularly influenced – yet not solely dependent upon – the existence of (revised) Rule 11*bis* of the ICTR Rules of Procedure and Evidence (RPE), which regulates the transfer of indicted defendants in ICTR custody to third states.<sup>5</sup> Boctor has recently concluded that, even though Rwanda may have faced pressure from the UN to abolish capital punishment in order to try such persons before local Rwandan courts, the original decision largely rested upon internal and free international considerations.<sup>6</sup> Naturally, opinions on the legality and legitimacy of the death penalty in Africa nevertheless differ. One may point to Liberia's re-introduction of capital punishment legislation in 2008, despite having ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), thus committing itself to work towards the global abolishment of capital punishment.<sup>7</sup> In Uganda, the death penalty was recently declared constitutional if the sentence is not imposed mandatorily, but 'passed by a competent court, in a fair trial and confirmed by the highest appellate court'.<sup>8</sup>

<sup>2</sup> L Chenwi *Towards the abolition of the death penalty in Africa: A human rights perspective* (2007) 29; K Bojosi 'The death row phenomenon and the prohibition against torture and cruel, inhuman treatment' (2004) 4 *African Human Rights Law Journal* 303 304 n 5.

<sup>3</sup> Organic Law 31/2007 of 25 July 2007, Official Gazette Special No of 25 July 2007 (art.2); also see V Johnson 'Ruanda schafft die Todesstrafe ab' *Die Tageszeitung* 23 July 2007.

<sup>4</sup> See arts 23 & 77 International Criminal Court (ICC) Statute; art 19 SCSL Statute in conjunction with Rule 101; and ICTR and SCSL Rule 11*bis* RPE.

<sup>5</sup> See *Prosecutor v Munyakazi, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda*, Case ICTR-97-36-R11*bis* (28 May 2008).

<sup>6</sup> A Boctor 'The abolition of the death penalty in Rwanda' (2009) 10 *Human Rights Review* 99 104.

<sup>7</sup> UN Human Rights Committee 'Rights panel concerned by clear breach of law in new Liberia Death penalty legislation', press release of 26 August 2008; <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/61384AE0E6D30F53C12574B10038C986?opendocument> (accessed 16 September 2009).

<sup>8</sup> See *Attorney-General v Susan Kigula & 417 Others* Constitutional Appeal 3 of 2006 (21 January 2009), [2009] UGSC 6 (21 January 2009) <http://www.saflii.org/ug/cases/UGSC/2009/6.html> (accessed 10 November 2009); Uganda ratified the ICC Statute on 14 June 2002.

This article argues that Tanzania should abolish capital punishment in the spirit of protection and promotion of human rights, and should strengthen the trend towards the abolition of this punishment for the rest of the African continent. In order to ascertain to what extent abolition is possible, Tanzanian and other arguments (*pro* and *contra*) are discussed and considered in perspective. A special focus has been on the Tanzanian landmark judgment, *Republic v Mbushuu*,<sup>9</sup> which was rendered by the Court of Appeal in 1994 and which demonstrates an uncertain understanding of the death penalty issue in the Tanzanian legal system.

## 2 Socio-historical influences

In order to comprehend the arguments brought forward in the Tanzanian death penalty debate, it is necessary to give a short introduction into the history and culture of the country, as the legal understanding of politicised law is highly influenced by social values (mirror theory).<sup>10</sup> Tanzania – due to its colonial history – has two separate, yet uniting cultural heritages, those of Christianity and Islam, traditionalist and modern (liberal) beliefs, all of which influence the debate on the abolition of the death penalty.

Tanzania's mainland (Tanganyika) is a former colony of Germany and Britain. Germany ruled the country from 1884 to 1918; thereafter the

<sup>9</sup> (1994) LRC 349. See also *Mbushuu v Republic* [1995] 1 LRC 216; (1994) TLR 154.

<sup>10</sup> The term 'mirror theory' was introduced by W Ewald in his seminal work on comparative jurisprudence. See W Ewald 'Comparative jurisprudence (II): The logic of legal transplants' (1995) 43 *American Journal of Comparative Law* 489 490. In this regard, it is to be made clear that such a thing as the one and only mirror theory does not exist. Instead, there are different types of mirror theories. For greater clarity we shall use a simple example: According to mirror theorists, law is dependent upon a specific (social) value, which we shall call 'X' (X1 = geography, X2 = religion, X3 = 'Weltgeist', X4 = geography + religion, etc). Furthermore, the connection between law and value 'X' varies in strength according to the respective type of mirror theory. 'Strong mirror theorists', like Legrand, believe that law is always dependent upon 'X', or as Ewald elaborates, 'Law is nothing but X' with the result that 'Given the knowledge of X, it is possible to calculate the rules of law that will hold in the given society' (493). Also see Montesquieu *De l'esprit des lois* (1748) I 3 : '[...] les lois politiques et civiles de chaque nation [...] doivent être tellement propres au peuple pour lequel elles sont faites, que c'est un très grand hazard si celles d'une nation peuvent convenir à une autre.' 'Weak mirror theorists', on the other hand, emphasise that 'Law and X are closely related' or, a knowledge of X is useful for understanding the rules of law that hold in a given society, but that law is not totally explicable in terms of X. Opponents of mirror theories, among others Watson, claim that law is mostly unconnected to culture as it is foremost applied by (legal) experts. However, Watson also admits that for particular areas of law, such as constitutional law, particularly the bill of rights and criminal law, the view whereby the non-detachment between law and culture exists, seems to be unfounded. See A Watson 'From legal transplants to legal formats' (1995) 43 *American Journal of Comparative Law* 469 470. The latter line of reasoning is *a fortiori* also applicable to death penalty debates.

British took over until 1961 when Tanganyika gained independence.<sup>11</sup> Zanzibar was under an Arab colonial regime and gained independence on 10 December 1963. One month later, on 12 January 1964, a revolution overthrew the sultan governing Zanzibar. The two separate states (Zanzibar and Tanganyika) united on 26 April 1964 after union leaders<sup>12</sup> of the two states met at Karimjee Hall in Dar es Salaam and drafted the 'articles of the Union'. Subsequently thereto, the name of the United Republic of Tanganyika and Zanzibar was changed to the United Republic of Tanzania.<sup>13</sup>

The union of Tanganyika and Zanzibar is considered peculiar in nature, as under the united Government of Tanzania, 'Tanganyika' disappeared while Zanzibar remained and has its own government, judiciary, president, and a house of representatives acting as the parliament of Zanzibar. Legal and policy matters are controlled by the two governments in accordance with its given powers. The government of the United Republic of Tanzania exercises authority over all union matters<sup>14</sup> in the United Republic of Tanzania and all non-union matters on mainland Tanzania. The Revolutionary Government of Zanzibar has authority over all non-union matters on Zanzibar.<sup>15</sup> Therefore, the

<sup>11</sup> Even though the national language of the Republic of Tanzania — until today — is Kiswahili, both Kiswahili and English remain official languages, thus having a direct effect on the interpretation of Tanzanian legal provisions, including the Constitution.

<sup>12</sup> Mwalimu Julius Kambarage Nyerere became the first President of the United Republic of Tanzania; Sheikh Abed Aman Karume became the Vice-President of the United Republic of Tanzania. Sheikh Abed Aman Karume stayed in power until 1972 when he was assassinated by a close relative. Mwalimu Julius Kambarage Nyerere led the country until 1985.

<sup>13</sup> Act 6, Cap 578.

<sup>14</sup> Union matters include the Constitution of the United Republic of Tanzania; Foreign Affairs; Defence and Security; Police; emergency powers; citizenship; immigration; external borrowing and trade; service in the government of the United Republic of Tanzania; income tax payable by individuals and by corporations, customs duty and excise duty on goods manufactured in Tanzania collected by the customs department; harbour matters relating to air transport, posts and telecommunications; all matters concerning coinage currency for the purpose of legal tenders and all banking business; foreign exchange and exchange control; industrial licensing and statistics; higher education; mineral oil resources, including crude oil and natural gas; National Examinations Council of Tanzania and all matters connected with the functions of that Council; civil aviation; research; statistics; the Court of the Appeal of Tanzania; registration of political parties and other matters related to political parties. All these matters are entrusted to the Vice-President's office.

<sup>15</sup> See arts 55(1) & 63(1) of the Zanzibar Constitution of 1984, which vest executive and legislative powers 'with respect to all matters in and for Zanzibar other than union matters' in the Revolutionary Government of Zanzibar, and the House of Representatives of Zanzibar respectively. The interaction between both Tanzanian and Zanzibarian governmental bodies is unclear even today, thus strengthening claims for an independent 'government of Tanganyika', even though the government of the United Republic of Tanzania strongly opposes this idea. In a speech representing the Nzega constituency when addressing parliament on 19 August 2008, Lukasi Seleli, member of parliament, categorically argued that, even though most of the Zanzibar

abolishment of the death penalty lies in the hands of the government of the United Republic of Tanzania.

### 3 The notion ‘death penalty’ from a Tanzanian perspective

The death penalty is carried out in Tanzania by sentencing the offender to suffer death by hanging. Its origins date back to colonial legislation which was passed to apply section 302 of the Indian Penal Code to the territory. Such legislation was replaced in 1921 by section 2 of the Punishment for Murder Ordinance 28 of the Tanganyika territory.<sup>16</sup> In Tanzania, capital punishment is today imposed for the crime of murder<sup>17</sup> in accordance with section 197 of the Penal Code, and for the crime of treason pursuant to sections 39 and 40. Even though Tanzania adopted the Penal Code that mirrored those of many former British colonies with a mandatory death penalty included as a sentence for heinous crimes such as murder,<sup>18</sup> the (political and social) justification<sup>19</sup> for capital punishment has regularly been linked to the maxim of *jino kwa jino*,<sup>20</sup> which literally means ‘a tooth for a tooth’ and translates into ‘he who kills a man must be put to death’.

---

population, including some of the ministers, claim that Zanzibar is known internationally as a complete independent country, Tanzanian ‘mainlanders’ were the ones to decide over union issues. Accordingly, at the end, Tanzania should go away from a bilateral governmental system (the Union Government and Revolutionary Government of Zanzibar) and resort to a single government (Government of United Republic of Tanzania). The said argument was also supported by Njelu Kasaka, the then member of parliament for Chunya and Lupa and leader of the G 55 Committee who advocated a three-government system in 1994 (Government of Tanganyika, Revolutionary Government of Zanzibar and Union Government). Kasaka contended that commitment is needed in order to keep the union alive, otherwise the beloved and cherished union will ‘break irreparably’; *Mtanzania* newspaper, 20 August 2008, *Viongozi wa Zanzibar wamkera Kasaka* 1 4.

<sup>16</sup> The United Republic of Tanzania, the Law Reform Commission of Tanzania, *Final report on designated legislation in the Nyalali Commission Report*; ch 3 (ii) 11 (1994).

<sup>17</sup> Sec 197 of Penal Act 6 of 2007 stipulates that ‘[a]ny person convicted of murder shall be sentenced to death’.

<sup>18</sup> CM Peter (ed) *Law and justice in Tanzania: Quarter a century of the Court of Appeal* (2007) 69.

<sup>19</sup> Given that under the Constitution the President may pardon any offender for any crime; and given that the Court of Appeals in *Mbushuu* linked the legality of the death penalty to its general acceptance within society, political and social justifications play an important role in the determination of the legality of the death penalty; see sec 4.2 below.

<sup>20</sup> Law Commission of India ‘Consultation paper on mode of execution of death sentence and incidental matters’ cited in A Bahati J (Chairperson, Tanzania Law Reform Commission), ‘The death penalty debate’ (undated) [http://www.doj.gov.za/alraesa/conferences/papers/ent\\_s4\\_bahati.pdf](http://www.doj.gov.za/alraesa/conferences/papers/ent_s4_bahati.pdf) (accessed 10 November 2009); PH Filikunjombe ‘Time to end the burden of waiting to execute death penalty’ 18 July 2005; <http://kurangu.com/ipp/guardian/2005/07/18/44713.html> (accessed 16 September 2009).

*Jino kwa jino*, ‘an eye for an eye’, sets the moral basis for the death penalty in Tanzania.<sup>21</sup> Supporters argue that — even today — the maxim correlates with domestic cultural thinking and forms of civilisation from which it emerges as, in Tanzania, disputes are settled on a threefold basis: either by means of mediation and conciliation, ‘drumming the scandal’, or ‘trial by ordeal’.<sup>22</sup> ‘Trial by ordeal’, in particular, is connected to *jino kwa jino*, thus providing proof that the death penalty in Tanzania is an established and justified form of punishment dating back to time immemorial, when it was applied to solve murder cases that were ‘committed’ by the use of witchcraft.<sup>23</sup> In such cases — which appeared before the Tanzanian courts up until 1947 — the suspected offender was forced to take drugs popularly known as *Mwavi*. If the suspect died, the commission of murder was proven; if the suspect survived, he or she was regarded as innocent.<sup>24</sup> Even though the use of *Mwavi* is considered an outdated concept to determine the guilt of the accused, traditional meta-physical beliefs are still deeply rooted in the Tanzanian understanding of criminal justice. In regard thereof, it is held that Christianity and Islam both support *jino kwa jino*. Christ was crucified for what was believed to be blasphemy, and convicted to protect society. In the book of Leviticus 24:17-21, it is *explicitly* stated that ‘[h]e who kills a man shall be put to death’. Comparable formulations can be found in Genesis 9:6; Exodus 21:12-14; 35:31-31; Matthew 26:52, 35:30-31; and Revelations 13:10. Islamic believers — including Tanzanian state officials — refer to the Holy Koran, particularly Surah 5:36.<sup>25</sup> Due to the principle which *jino kwa jino* embodies — *ius respicit aequitatem*<sup>26</sup> — it is claimed that the provisions of the Penal Code can be regarded as acceptable. If such an approach had been sound, sentencing to death by hanging *in public* would not create conflict either

<sup>21</sup> LP Shaidi ‘The death penalty in Tanzania — Law and practice’ (undated). ‘This penalty [of capital punishment] has received ideological justification from the main religions, in our case Christianity and Islam. Many believers would not wish to question anything which they consider to have been sanctioned by their religion as taught by their religious leaders. In penological terms, capital punishment is a reflection of retributive justice, embodying the ancient maxim of ‘an eye for an eye, a tooth for a tooth.’ It is based on vengeance channelling public outrage into a legalised form of punishment. It is argued by its proponents that, in its absence, outraged people may be forced to seek vengeance through mob justice or individualised forms of revenge’; [http://www.biiicl.org/files/2213\\_shaidi\\_death\\_penalty\\_tanzania.pdf](http://www.biiicl.org/files/2213_shaidi_death_penalty_tanzania.pdf) (accessed 16 September 2009)

<sup>22</sup> *Issack s/o Nguvumali v Petro s/o Bikulako* [1972] HCD 139; *Kapasuu v Mwandilemo* [1968] HCD 88.

<sup>23</sup> Also see J Narloch *Ritual murder and witchcraft in Southern Africa in relation to Unity Dow’s ‘The screaming of the innocent’* (2007).

<sup>24</sup> *R v Palamba s/o Fundikira* 14 EACA 96 (Tanganyika, 1947).

<sup>25</sup> CM Peter & H Kijo-Bisimba *Justice and rule of law in Tanzania: Selected judgments of Justice James L Mwalusanya and commentaries* (2005) 60.

<sup>26</sup> Comparably stated in the Holy Bible (*In iudiciis non est acceptio personarum habenda*), *Liber sextus* 5:13 12.

as, *inter alia*, crucifixion or stoning is stipulated in section 26(1) of the Holy Bible.

Even though *jino kwa jino* has continued to receive massive support in Tanzania's legal, and particularly political, thinking, the *execution* of death sentences were rather the exception than the rule. There were no hangings in Tanzania between the early 1970s and 1987<sup>27</sup> or between 1994 and the present date (though of course individuals are still regularly sentenced to death).<sup>28</sup> In August 2007, all death sentences in Tanzania — estimated at about 400 at that time<sup>29</sup> — were commuted to life imprisonment.<sup>30</sup> Furthermore, in the majority of cases, the charge of 'murder' is commonly changed by the Tanzanian courts to 'manslaughter', as set forth in section 195 of the Tanzanian Penal Code which does not provide for capital punishment.

The reasons for non-enforcement are unclear.<sup>31</sup> Explanations include pressure from human rights groups, Tanzanian obligations under international law, and the definition of 'malice' in the Tanzanian Penal Code, which includes recklessness, leading to the problem that regularly even unintentional homicide would amount to murder and thus have to be punished by the death sentence.<sup>32</sup>

#### 4 Municipal law regulating the death penalty

In order to comply with international legal instruments, particularly the Universal Declaration of Human Rights of 1948 (Universal Declaration),<sup>33</sup>

<sup>27</sup> Law Reform Commission of Tanzania 'Draft discussion paper on the review of capital punishment, corporal punishment and long term sentences in Tanzania' presented at the workshop held on 27 March 2008 in Dar es Salaam, 65 para 2.12; see also Prisons Headquarters, Ref.HQC.68/XIX/22 of June 2007.

<sup>28</sup> Speech delivered by Kofi Annan; contained in Daily Press Briefing by the Office of the Spokesman for the Secretary-General, 20001218, United Nations, 18 December 2000, <http://www.un.org/News/briefings/docs/2000/20001218.db121800.doc.html> (accessed 16 September 2009).

<sup>29</sup> Until 1 August 2004 Tanzania had 391 prisoners waiting to be hanged; see Amnesty International's website <http://www.amnesty.org/deathpenalty> (accessed 2009); Amnesty International 2007 Annual Report Tanzania; <http://www.amnestyusa.org/annualreport.php?id=ar&yr=2007&c=TZA> (accessed 16 September 2009)

<sup>30</sup> Amnesty International 2008 Annual Report Tanzania; <http://www.amnestyusa.org/annualreport.php?id=ar&yr=2008&c=TZA> (accessed 16 September 2009).

<sup>31</sup> It was held in *Mbushuu* (n 9 above) 232 that there is no research available on why the death sentences were not carried out. See also International Federation for Human Rights (FIDH), Report 414/2 — April 2005, *Tanzania: The death sentence institutionalised?* (2005) 7.

<sup>32</sup> Also note that one of the authors has elaborated on the related issue whether 'murder' — as a crime against humanity — necessarily requires an intentional commission under international criminal law; see B Kuschnik 'The legal findings of crimes against humanity in the Al-Dujail judgments of the Iraqi High Tribunal. A forerunner for the ICC?' (2008) 2 *Chinese Journal of International Law* (2008) 459 476.

<sup>33</sup> Adopted by the UN General Assembly through Resolution 217A (III) of the UN, 10 December 1948.

ICCPR<sup>34</sup> and the African Charter on Human and Peoples' Rights of 1981 (African Charter),<sup>35</sup> Tanzania decided to amend its Constitution in 1984 by an eighth constitutional amendment and to introduce a Bill of Rights. Rights mentioned include equality before the law, the right to dignity<sup>36</sup> and the right to life,<sup>37</sup> the latter provided for under article 14 of the Constitution.

In *Mbushuu* there was some argument as to the correct wording of article 14, since the English version of the Constitution held that '[e]very person has a right to life and subject to law, to protection of his life by the society', whereas the Kiswahili version made qualifications that such right may be restricted 'in accordance with the law'. The latter has now been included in the wording of article 14, stating that '[e]very person has a right to life and subject to law, to protection by the state according to the law'.<sup>38</sup>

In contrast, section 196 of the Tanzanian Penal Code holds: 'Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.' Section 197 of the Tanzanian Penal Code reads: 'Any person convicted of murder shall be sentenced to death.' Furthermore, the death sentence may be imposed for treason as set forth in sections 39 and 40, and the misconduct of commanders or any service man in the presence of the enemy in accordance with the First Schedule to the National Defence Act 24 of 1996 (even though the latter provisions have never been applied practically). Unlike the crime of treason, which gives interpretative freedom to impose the death penalty, the phrase 'shall be sentenced to death' within section 197 is taken as mandatory.<sup>39</sup>

Due to the incorporation of a Bill of Rights in the Constitution, one would expect that the law in existence, particularly sections 196 and 197 which allow for taking away the right to life, would have been abolished. This, however, never happened. Therefore, at first sight, Tanzania looks like 'a dog with two tails'; on the one hand ensuring the right to life and acting in accordance with international human rights standards, and on the other hand permitting the death penalty. The

<sup>34</sup> Adopted by the UN General Assembly through Resolution 2200A (XXI) of 16 December 1966, and entered into force on 23 March 1976.

<sup>35</sup> Adopted by the Organisation of African National Unity (OAU) Assembly of Heads of State and Government on 27 June 1981 at Banjul in The Gambia.

<sup>36</sup> The right to dignity is provided for under arts 9(a) & (f) and 13(6)(d) of the Tanzanian Constitution. It is concerned with the observance of dignity in the execution of a sentence. The right to dignity and the right against cruel, inhuman and degrading punishment are provided for under art 13(6)(e) of the Tanzanian Constitution.

<sup>37</sup> Arts 12 to 24 of the Tanzanian Constitution. The Zanzibar Constitution of 1984, through arts 13(1) and 13(2) respectively, states categorically that every person has the right to life and to the protection of his life from the society according to the law.

<sup>38</sup> Chenwi (n 2 above) 83 n 131.

<sup>39</sup> Shaidi (n 21 above) 2.



question, however, is more complex and connected to the problems of (i) how Tanzanian domestic law — including the Constitution and the Penal Code — is related to and influenced by international law; (ii) whether article 14 of the Constitution has a categorical effect and can be considered as a ‘non-derogation clause’, thus outlawing any levelling with other potentially contravening domestic law as well as international law; and (iii) whether there is sufficient public support to unequivocally decide on the abolishment of the death penalty in Tanzania. All three issues are discussed below.

#### 4.1 International law and the right to life in relation to Tanzanian domestic law

Tanzania favours a dualist approach for the domestic application of international law, meaning that ratified treaties have to be incorporated into the domestic legal system to be relied upon in domestic courts. In regard to the legitimacy of capital punishment, the High Court and the Court of Appeal of Tanzania considered in *Mbushuu* whether a prohibition under national law existed on the grounds that it may amount to torture under international law, and therefore may violate article 13 of the Constitution of Tanzania, resulting in sections 196 and 197 of the Tanzanian Penal Code being unconstitutional. Article 13(6) reads: ‘It is prohibited to torture a person, to subject a person to inhuman punishment or to degrading punishment.’ In order to determine whether the death penalty violates article 13(6), the Court of Appeal considered the definition of torture as it is defined in article 1(1) of the Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>40</sup> Accordingly, torture means:

- 1 ... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.
- 2 Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

Firstly, the Court of Appeal claimed — by relying on *Trop v Dulles*<sup>41</sup> and *Tyrer v UK*<sup>42</sup> — that the concept of torture should be assessed by evolving standards of decency, meaning that it must be interpreted in

<sup>40</sup> Adopted by the UN General Assembly through Resolution 3542, 9 December 1975.

<sup>41</sup> 356 US 86 (1958).

<sup>42</sup> [1978] 2 EHRR 1.

present-day conditions as expressed by international law.<sup>43</sup> The Court of Appeal then concurred with the comprehensive assessment of the High Court that, from the moment a death sentence is pronounced to the date of its execution, the offender may face severe mental pain and suffering. Due to its gravity of inherent cruelty, the Court of Appeal agreed with the High Court that the death penalty contains elements of torture.<sup>44</sup>

Certainly, torture does not include pain or suffering arising from, inherent in or accidental to, lawful functions. Therefore physical or severe pain or suffering brought about by the death penalty may not be unconstitutional. Moreover, the cited Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the wording of article 1(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (CAT) present a limitation on the scope of such terms.<sup>45</sup>

However, even though the 'lawful sanction' restriction makes sense *in abstracto* when subsuming acts under the legal notion of torture, and even though it is disputable whether the imposition of the death penalty *per se* would fall under the aforementioned exception of the 'lawful sanction requirement',<sup>46</sup> it is unclear why the Court of Appeal on the one hand held that the death penalty would amount to torture or cruel and inhuman treatment, yet on the other hand held that it must be legalised on grounds of the exception clause. One may won-

<sup>43</sup> This is a remarkable and highly encouraging line of reasoning by the Tanzanian courts, as it does not leave the decision of the Court blind to present conditions. The United States Supreme Court has taken an opposite view when considering the definition of torture under para 3(b)(1) of the Torture Victims Protection Act in regard to lawsuits under the US Alien Tort Claims Act; *Filartiga v Peña-Irala* 630 F2d (1980), 876 878 with *Sosa v Alvarez — Machian et al*, 542 US (2004) 692 ff.

<sup>44</sup> Peter & Kijo-Bisimba (n 25 above) 252: 'The case of *Mbushuu* gave the judiciary an important opportunity to pronounce on this [capital] punishment. At the High Court level, the death penalty was declared to amount to torture, cruel, inhuman and degrading form of punishment and also unconstitutional. The position was not fully supported by the Court of Appeal which, *while agreeing with the High Court that the death penalty contained some elements of torture, cruel, inhuman and degrading punishment* still held that the right to life as contained in article 14 of the Constitution of the United Republic of Tanzania of 1977 was not absolute' (our emphasis). Also see *the Kigula* case in Uganda (n 8 above) 59; and the Bahati Report (n 20 above) 5.

<sup>45</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 23 *International Legal Materials* 1027, in modified version (1985) 24 *International Legal Materials* 535. Art 1 defines torture as 'any act which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as [...] intimidating or coercing him [or her] or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising from, inherent in or incidental to lawful sanctions'.

<sup>46</sup> In this regard, see A Boulesbaa *The UN Convention on Torture and the prospects for enforcement* (1999) 31.

der how the conclusion of the Court of Appeal, whereby the death penalty was cruel and inhuman, yet not unconstitutional, may be compatible with article 9(f) of the Tanzanian Constitution, which calls for a recourse to the Universal Declaration when interpreting the Bill of Rights. Particularly, in article 5 of the Declaration it is held: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'

Moreover, it is unfortunate that the Tanzanian Court of Appeal did not read articles 1 and 2<sup>47</sup> of CAT conjunctively. If the Court had considered a conjunctive reading of both articles, it would then have realised that, pursuant to article 2 of CAT, acts of torture may not be justified *by any means*, not even to prevent political instability, war or any other public act of emergency<sup>48</sup> — let alone to justify it on grounds of 'lawful sanctions'. In this light, there was no room to justify torture, once it was (rightfully) declared that capital punishment would amount to torture or cruel, inhuman treatment. If the death penalty is labelled in such terms, it must amount to 'inhuman and degrading treatment *per se*'.<sup>49</sup>

Separate from the *Mbushuu* case, one may also argue (today) that, whereas it may have been reasonable in 1994 to declare the death penalty a legitimate practice, it is problematic to transfer such opinion to contemporary *opinio juris* in public international law. Even though the death penalty was not prohibited under customary international law in the last century, mostly due to the fact that article 6 of ICCPR and article 4 of the African Charter provided that '[n]o one shall be arbitrarily deprived of his life', but explicitly allowed for the death

<sup>47</sup> Art 2 of CAT reads: '(1) Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. (2) *No exceptional circumstances whatsoever*, whether a state of war or a threat or war, internal political instability or any other public emergency, *may be invoked as a justification of torture*. (3) An order from a superior officer or a public authority may not be invoked as a justification of torture' (our emphasis).

<sup>48</sup> *Al-Adsani v UK* (judgment of 21 November 2001), ECHR Rep of Judgments and Decisions, 2001-XI, para 59; *Chanhal v UK* (judgment 15 November 1996), 1996-V, 1855, para 79; *Aksoy v Turkey* (judgment 18 December 1996) para 62; *Soering v UK* (judgment 7 July 1989), Series A No 161, 34, para 88; *Filartiga v Peña-Irala* 630 F 2d (1980) 876 882; *Ireland v UK* (judgment 18 January 1978), Series A No 25, 65 para 163; *Pedro Pablo Camargo on behalf of Maria Fanny Suárez de Guerrero v Colombia* (decision 31 March 1982) HRC Committee, Communication No 045/1979.

<sup>49</sup> I Oh 'Islam and the reconsideration of human rights' University of Miami Paper Series (2005) 5. '[W]hile human rights norms remain the same across cultures at the core, these norms are blurry at the edges. [...] To illustrate, *few societies, whether formerly colonized or colonising, would contest the right to freedom from torture* (art 5 Universal Declaration), while many find the right to marry without restriction due to religion (art 16 Universal Declaration) disrespectful of traditional customs' (our emphasis); see further M Wagner 'The justification of torture: Some remarks on Alan M Dershowitz's 'Why terrorism works' (2003) 4 *German Law Journal* 5 515; E de Wet 'The prohibition of torture as an international norm of *jus cogens* and its implications for national and customary law' (2004) 15 *European Journal of International Law* 97.

penalty in exceptional circumstances,<sup>50</sup> there has been a major shift in state practice and *opinio juris* in the last decade.<sup>51</sup> This can be seen by looking at the *travaux préparatoires* of the Statute of the International Criminal Court (ICC), which — as of 16 September 2009 — has been ratified by 110 countries, and signed by 139 countries. Surely, the fact that the ICC Statute excludes capital punishment may not lead to the presumption that all states that have ratified the ICC Statute would favour the abolition of the death penalty. Article 80 was included in the ICC Statute to counter this assumption. It is notable, however, that during the debate in Rome, *most states opposed capital punishment*, thus giving evidence of an emerging trend in favour of its abolition.<sup>52</sup> One may therefore argue that nowadays there is wide agreement on the international stage that a reliance on article 6 of ICCPR to justify the death penalty has turned out to go foul on grounds of the maxims of *jus posterior derogat priori* and *leges posteriores priores contrarias abrogant*.<sup>53</sup>

Whereas the trend for abolishing the death penalty has recently gained strong international support, such understanding has a long European tradition, *inter alia* in Germany, on grounds of the idea that it violates human dignity. Here, the abolition of capital punishment is based on a ‘three step ladder’. Step 1: Articles 1 to 19 of the German Constitution of 1949, covering the German Bill of Rights, explicitly recognise the right to human dignity, the right to life, and the maintenance of human rights. Article 1(1) declares: ‘Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.’ Article 1(2) holds: ‘The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of

<sup>50</sup> Also see art 6(2) ICCPR and the General Comment of the Human Rights Committee 20(44) UN Doc CCPR/C/21/Rev/1/Add 3, para 6. It has been provided that ‘[t]he article [6] also refers generally to abolition in terms which strongly suggest (paras 2(2) and (6)) that abolition is desirable. [...] All measures of abolition should be considered as progress in the enjoyment of the right to life.’ ICCPR has been ratified by 50 African states, among others, Tanzania. Also see W Schabas *The abolition of death penalty in international law* (2002) 192; Chenwi (n 2 above) 62: ‘[T]he *travaux préparatoires* and subsequent interpretations of article 6 provide strong evidence of a growing trend in favour of the abolishment of the death penalty.’

<sup>51</sup> Schabas (n 49 above) 192.

<sup>52</sup> See Schabas (n 49 above) where he states: ‘Singapore again took the floor to affirm that “the debate in the conference clearly demonstrates that there is no international consensus on abolition of the death penalty”. In fact, what the debate in the working group showed is that a relatively small number of states favoured retention of the death penalty and a very large number were opposed. *This is a dramatic development when viewed from an historical perspective*’(258) (our emphasis).

<sup>53</sup> Schabas (n 49 above) further argues that ‘[t]he exclusion of the death penalty from the Rome Statute is a significant benchmark in the unquestionable trend towards universal abolition of capital punishment, although it shows that a few regions of the world continue to resist progress in this respect’ (258). Also see European Union Annual Report on Human Rights, EU Memorandum on the Death Penalty, 11317/00 81.

peace and of justice in the world.’ Article 2(2) declares: ‘Every person shall have the right to life and physical integrity ... These rights may be interfered with only pursuant to law.’ Step 2: Article 102 explicitly recognises the abolishment of the death penalty by declaring: ‘Capital punishment is abolished.’ Step 3: Article 79(3) declares article 1 to be unchangeable by any means (the so-called ‘eternity clause’) by stating: ‘Amendments to ... the principles laid down in articles 1 and 20 shall be inadmissible.’

Due to the ‘three steps’ of the German Constitution, it is impossible to (re-) introduce the death penalty, even via an amendment of the Constitution. Despite the fact that articles 2 and 102 do not fall under the scope of article 79(3)’s eternity clause, and thus in theory leave open the door to allow for the death penalty, it is general opinion that an introduction would violate human dignity and fundamental human rights and, thus, article 1. Since article 1(2) is protected by the eternity clause and prohibits any levelling with other rights (‘Human dignity shall be *inviolable*’), arguments for the introduction of the death penalty cannot be levelled against the preservation of human dignity. In the same light, article 79(3) itself cannot be changed (ie to then change article 1 to introduce capital punishment), as this would lead to *argumentum ad absurdum* of article 79(3)’s *raison d’être*, which has been written to ensure perpetuity. Similarly, the Charter of Fundamental Rights of the European Union declares in its article 1: ‘The human dignity is inviolable. It must be respected and protected.’<sup>54</sup> Article 1 of the Universal Declaration should be interpreted from this point of view when stating: ‘We, the peoples of the United Nations, determined ... to reaffirm faith in fundamental human rights, *in the dignity* and worth of the human person.’

The approach taken in *Mbushuu* to consider international human rights law when interpreting domestic Tanzanian law should be upheld and strengthened in the Tanzanian courts. Article 9(f) of the Constitution particularly calls for such inclusion by stating that ‘human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights’. Article 13(d) of the Constitution declares: ‘For the purposes of preserving the right or equality of human beings, *human dignity shall be protected in all activities pertaining to criminal investigations and process, and in any other matters for which a person is restrained, or in the execution of a sentence.*’ Article 13(e) holds: ‘No person shall be subjected to torture or inhuman and degrading punishment or treatment.’

<sup>54</sup> Charter of Fundamental Rights of the European Union, 2000/C 364/1 (2000). As a matter of fact, the drafting of this provision was mainly influenced by the former German Federal President and President of the Convent drafting the Charter, Roman Herzog. Also see O Schachter ‘Human dignity as a normative concept’ (1983) 77 *American Journal of International Law* 848.

Regarding the imposition of the death penalty, the Tanzanian Court of Appeal is invited to reconsider its position and declare that the protection of human dignity *categorically*<sup>55</sup> prohibits the imposition of the death penalty.<sup>56</sup> If nevertheless the Tanzanian Court of Appeal claims that the imposition of the death penalty does not violate the dignity of a person *per se*, at least international human rights law requires the punishment to take place in keeping with the fundamental respect for the intrinsic worth of human beings. It is thus illegal to impose capital punishment *via* hangings (*Furman v Georgia*)<sup>57</sup> or shootings. Finally, the death penalty must not be executed against minors,<sup>58</sup> pregnant women<sup>59</sup> and the mentally ill.<sup>60</sup>

#### 4.2 The right to life in Tanzanian constitutional context

In *Mbushuu*, the Court of Appeal ruled that the death penalty would amount to 'torture', finding that the death penalty as provided for under sections 196 and 197 of the Tanzanian Penal Code 'offends' article 13(6) *lit* (a) and (e) of the Constitution as it violates the inherent duty of the state to protect the right to life. Yet sections 196 and 197 were not considered to be unconstitutional due to the overriding principles incorporated in article 30(2) of the Tanzanian Constitution.<sup>61</sup>

<sup>55</sup> It is claimed here that the death penalty in whatever form (ie by hanging, gas chamber, lethal injection, use of electric chairs, etc) is a cruel and morbid method of punishment, and therefore not acceptable in any civilised society. Accordingly, in *Soering v UK* (judgment 7 July 1989), Series A No 161, 31, it was held that the death penalty, according to the evolving standards of Western Europe, was regarded as cruel and inhuman punishment.

<sup>56</sup> Also see the position of the High Court in *R v Mbushuu* (n 9 above).

<sup>57</sup> [1972] 408 US 238.

<sup>58</sup> Compare sec 26 of the Tanzanian Penal Code with *Lubasha Maderenya & Tegai Lebasha v Republic*, High Court Mwanza, Criminal Sessions Case 143 (1977); also see CM Peter *Human rights in Tanzania: Cases and materials* (1997) 30.

<sup>59</sup> See sec 197 of the Penal Code stating that 'if a woman convicted of an offence punishable with death is alleged to be pregnant, the court shall inquire into the fact and, if it is proved to the satisfaction of such court that she is pregnant the sentence to be passed shall be a sentence of imprisonment for life instead of a sentence of death'.

<sup>60</sup> As stated by FIDH (n 31 above) 24, the issue of insanity and the imposition of the death penalty is rather complicated in Tanzanian law. According to outdated legal provisions, an insane offender may still be sentenced to death, if he cannot show that the illness was a *conditio sine qua non* for the commission of the crime. This reversion of the principle *in dubio pro reo* — coined as 'M'Nagthen Rules' — dates back to the case *Rv M'Naghten* (1843) 10 CL and F, 200. Also see *Saidi Abdallah Mwamwindi v The Republic* HCD No 212 (1972); *Asha Mkwizu Hauli v The Republic*, High Court of Tanzania at Dar es Salaam, Criminal Session Case 3 of (1984); and *DPP v Leganzo Nyanje*, Court of Appeal of Tanzania, Criminal Appeal 68 (1980); *Agnes Doris Liundi v Republic*, 46 TLR (1980). 'It is possible, indeed likely, that our law on the issue of insanity is antiquated and out of date. Parliament, in its wisdom, may wish to amend this particular branch of the law and bring it into line with modern medical knowledge on the subject.'

<sup>61</sup> [1995] 1 LRC 216 232. Also see The Republic of Uganda in the Supreme Court of Uganda at Mengo, Constitutional Appeal 3 of 2006 (n 8 above) 35.

It has to be noted that the Tanzanian Constitution indeed allows civil rights to be weighed against public interests. Article 30(2) allows derogation on the following grounds:

It is hereby declared that no provision contained in this part of this Constitution, which stipulates the basic human rights, freedoms and duties, shall be construed as invalidating any existing law or prohibiting the enactment of any law or the doing of any lawful act under such law, making provision for:

- (a) ensuring the rights and freedoms of others or the public interest are not prejudiced by the misuse of the individual rights and freedoms;
- (b) ensuring the interests of defence, the public safety, public order, public morality, public health ...;
- (c) ensuring the execution of a judgment or order of a court given or made in any civil or criminal proceedings ...;
- (d) enabling any other thing to be done which promotes, enhances or protects the national interest generally.

As has been held by Bahati,<sup>62</sup> the Tanzanian courts dealt with the interpretation of article 30(2) in two cases, *Daudi Pete v AG*<sup>63</sup> and *Kukutia Ole Pumbum v AG*.<sup>64</sup> In the latter case it was held:

The court in Pete's case laid down that a law which seeks to limit or derogate from the basic right of the individual on ground of public interest will be saved by article 30(2) of the Constitution only if it satisfies two essential requirements: First, such law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions, and provide effective control against abuse by those in authority when using the law. Secondly, the limitation imposed by such law must not be more than is reasonably necessary to achieve the legitimate object. This is what is also known as the principle of proportionality. The principle requires that such law must not be drafted too widely so as to net everyone including even the untargeted members of the society. If the law which infringes a basic right does not meet both requirements, such law is not saved by article 30(2) of the Constitution, it is null and void. And any law that seeks to limit fundamental rights of the individual must be construed strictly to make sure that it conforms to those requirements, otherwise the guaranteed rights under the Constitution may easily be rendered meaningless by the use of the derogative or claw-back clauses of that very same Constitution.

In *Mbushuu*, the Court of Appeal labelled sections 196 and 197 as 'non-arbitrary', and therefore lawful and reasonably necessary in order not to violate the Constitution. Interestingly, the element of 'non-arbitrariness' is also included in article 6 of ICCPR. Despite the fact that article 6 of ICCPR and article 4 of the African Charter allow for the death penalty on a non-arbitrary basis, it seems doubtful whether such reasoning is

<sup>62</sup> Bahati (n 20 above) 6.

<sup>63</sup> [1993] TLR 22.

<sup>64</sup> [1993] TLR 159.

applicable to strict constitutional context,<sup>65</sup> if the *Kukutia* standard is applied seriously.

Clearly, 'arbitrary' can be understood in different ways: If considered in terms of article 6 of ICCPR, 'arbitrary' means 'illegally and unjustly'.<sup>66</sup> From a normative point of view, such interpretation lacks substance. It is hardly imaginable that unjust treatment could be legal nevertheless, as the fulfilment of justice should be the outcome of law. Hence, 'arbitrary', if understood this way, is nothing but 'fairness', yet in this case — due to its vagueness — hardly a justifiable constitutional assessment factor to determine whether the taking away of life may be legitimate.

The Court of Appeal interpreted 'arbitrarily' — by relying on the findings of *Kukutia* and the *Twentieth century dictionary* — to mean 'not bound by rules, despotic, absolute; capricious; arising from accident rather than from rule', or, in more simple words one may say, acts of randomness. From this definition, and due to the fact that a person convicted of murder must have undergone a full trial and then, in practice, an appeal, the Court concluded that the process leading to the imposition of the death penalty can 'never be despotic'.

The Court thereafter noted that if the law does not provide for diminished responsibility and while that 'may be unfortunate', it is 'definitely not arbitrary because the court arrives at its decisions following rules and not accidentally'. The Court then admitted that an innocent person may be executed in error, but even in such a case, it is not a matter of arbitrariness but rather of mistake or fraud. Responding to the defence attorney's concern about the role of the President in deciding whether to accept the recommendation of the Court, the Court of Appeal finally stated that the 'presidential pardon is outside the court process' and his decision whether to accept the recommendations or not 'cannot make matters any worse for the condemned prisoner'. In conclusion, section 197 'cannot be arbitrary because it merely provides punishment to a person convicted under the provisions of law'.

The findings of the Court of Appeal seem to be misleading. Firstly, it is circular to hold that the imposition of the death penalty could be justified by the system that is imposing the punishment. Secondly, there is a difference between the trial procedure and the enforcement of sentences. A trial can be fair in regard to due process and imposition of the verdict, yet unfair in regard to sentencing and execution. Particularly

<sup>65</sup> Also note that, according to art 60 of the African Charter, in the interpretation of the Charter, the African Commission on Human and Peoples Rights shall draw inspiration from international law on human and people's rights. The African Charter also requires that the death penalty should only be imposed where substantive and procedural safeguards and restrictions on the imposition of the penalty are respected. See further M Nowak 'Is the death penalty an inhuman punishment?' in TS Orlin *et al* (eds) *The jurisprudence of human rights law: A comparative interpretative approach* (2000) 42.

<sup>66</sup> NS Rodley *The treatment of prisoners under international law* (1999) 220.



the non-imposition of death sentences, and the creation of the ‘death row phenomenon’, render any link between trial proceedings and execution in regard to the justification of the death penalty valueless. Thirdly, the principle of ‘arbitrariness’ has been interpreted too narrowly in a constitutional context to conform to the *Kukutia* standard. ‘Arbitrary’, from a legal perspective, is hardly comparable to a decision based on formal randomness, but represents an infringement of the maxim of ‘equal treatment’. In this regard, ‘equal treatment’ is often described in such terms that the comparable must be treated comparably just as the non-comparable must be treated non-comparably (‘*Willkür* [= arbitration] Formula’).<sup>67</sup> A mere reliance on the formality of ‘legal rules’ to determine the randomness of an act – and thus constitutionality – cannot be convincing here, because in a constitutional context, it is questionable if the law *itself* is arbitrary.

The Court of Appeal (by at least formally applying the *Kukutia* standard) also reverted to a ‘proportionality test’ to assess whether the Constitution had been violated.<sup>68</sup> Yet again, the Court of Appeal came to a rather unusual finding by holding that a violation of human dignity can be levelled against state interests on the basis of common public opinion.<sup>69</sup> The Court of Appeal declared:

We have already made a finding that the death penalty is cruel, inhuman and degrading ... But the crucial question is whether it is reasonably necessary to protect the right to life. For this we say it is the society which decides. The trial judge acknowledges that presently the society deems the death penalty as reasonably necessary. So, we find that although the death penalty as provided by s[ection] 197 of the Penal Code offends art[icle] 13(6)(a) of the Constitution, it is not arbitrary, hence a lawful law, and it is reasonably necessary and it is thus saved by art 30(2). Therefore it is not unconstitutional.

Article 30(2) of the Tanzanian Constitution displays the bifurcation structure of every civil right in constitutional context. Surely, no legal provision may contravene *fundamental* values of society, as constitutional civil rights serve as an objective value order (*Objektive Werteordnung*) for the society as a whole, creating indirect horizontal effects (*mittelbare Drittwirkung*) between the citizens throughout the

<sup>67</sup> The *Willkür* Formula is concretised in Germany by the so-called ‘*Katzenstein* Formula’, also called ‘New Formula’, stating that unequal treatment must be grounded on such form and quality as to justify the inequality; see BVerfGE 88 87 85 191.

<sup>68</sup> [1995] TLR 232. The Court said: ‘Whether or not legislation which derogates from a basic right of an individual is in public interest depends on first, its lawfulness, that is, it should not be arbitrary and second, on the proportionality test, that is, the limitation imposed should not be more than reasonably.’

<sup>69</sup> The Supreme Court of Uganda adopted a similar interpretation in the *Kigula* case (n 8 above). The Court noted at 39 that ‘[i]n Tanzania the Court of Appeal in the *Mbushuu* [case] (*supra*) saved the death penalty under the general provisions on derogation from fundamental human rights. But in Uganda the Constitution specifically provides for it under a substantive article of the Constitution, ie article 22(1).’

socio-legal system.<sup>70</sup> However, laws are created through legal processes and institutions — particularly parliament. If it was the ‘opinion of society’ to concretely decide over the constitutionality of a legal provision, one must be aware of the consequences, let alone that *in casu* the Court of Appeal did not cite any authority which would support its finding.<sup>71</sup> In regard thereof, the Court’s burden of proof<sup>72</sup> would be vested in the fact that constitutional civil rights in a free society are *predominantly* defensive rights of the citizen against the government, thus requiring the state to base its intrusion on sound legal grounds, or refrain from such actions.<sup>73</sup>

Finally, one might wonder why the Court of Appeal considered international law, but then concluded that Tanzanian opinion should decide the case *in singularis*. Even if article 14 — as it is proclaimed by the Court — should ‘lie in between the two sets’ of international and domestic law, this is not adequately reflected by the outcome of the judgment as the Court of Appeal did not give sound justifications why the imposition of the death penalty should conform to international human rights law standards.

### 4.3 Interdisciplinary considerations in favour of the abolition of the death penalty in Tanzania

It is an assumption that the imposition of the death penalty is an effective and adequate measure for the reduction of crime.<sup>74</sup> Firstly, the protection of society does not require the physical elimination of criminals, which makes capital punishment an action that is not necessary and, thus, lacks proportionality and reasonability.

Secondly, it seems questionable if capital punishment is an ‘appropriate reward’ for the detained as the delay in carrying out the sentences, in conjunction with the conditions under which the detained are incarcerated, is a breach of the right not to be subjected to degrading treatment. Waiting for the execution of the death penalty for long periods of time may amount to torture — even if the ‘function’ is lawful, as has been held in *Republic v Mbushuu* — due to the inhumanity of

<sup>70</sup> F Selbmann *The drafting of a law against discrimination on the grounds of racial or ethnic origin in Germany — Constraints in constitutional and European community law* (2002) 3 4; J Kokott *The burden of proof in comparative and international human rights law: Civil and common law approaches with special reference to the American and German legal systems* (1997) 82.

<sup>71</sup> In the South African case of *S v Makwanyane & Mchunu* 1995 3 SA 391, Chaskalson P, notwithstanding the Court of Appeal’s *Mbushuu* decision above that was duly cited; de-emphasised the importance of public opinion in arriving at decisions on constitutional rights.

<sup>72</sup> As above.

<sup>73</sup> In support of this proposition, see the judgment of the High Court in *Mbushuu* (n 9 above).

<sup>74</sup> See J Donohue & JJ Wolfers ‘Uses and abuses of empirical evidence in the death penalty debate’ (2006) 58 *Stanford Law Review* 791.

form and length while treating the detained (the so-called 'death row phenomenon'<sup>75</sup>). The recent incidents at the (attempted) execution of Romell Broom in the Lucasville Prison in Ohio, USA, have showed that the procedure itself of putting a person to death may amount to horrible suffering.<sup>76</sup>

Thirdly, the ineffectiveness of the death penalty and other cruel punishment has been proven by a number of studies, conducted in different countries, which show that the death penalty does not contribute to a reduction in the crime rate.<sup>77</sup>

In Canada for example, the homicide rate per 100 000 people in 1975 (before the abolition of the death penalty for murder) was 3,09. The study carried out in 1980 after the abolition of death penalty showed that there was a decrease of the homicide rate per 100 000 to 2,41. Also, whereas in 2000, the United States of America had 5,5 homicides per 100 000 people, in Canada there was a rate of 1,8 per 100 000 people.<sup>78</sup> One of the surveys conducted by Hood even concluded that the increase in homicides in those countries that uphold the death penalty, could be reduced by diminishing their reliance upon capital punishment.<sup>79</sup> It is worthwhile to argue here that a criminal does not commit a capital crime by calculating the possible sanction, since the sentence will turn out to be grave, regardless whether the death penalty will be imposed or not. Moreover, many commissions of capital crimes are grounded on base motives, thus hardly dependent upon cool rationale. Due to the fact that the efficiency of the sanction is not yet felt, there is no reason as to why the death penalty should be upheld.

Finally, the political system in Tanzania creates room for abuse of power and arbitrariness, as the executive arm of the state has extreme influence over other organs and branches,<sup>80</sup> including the judiciary.

<sup>75</sup> Bojosi (n 2 above) 303.

<sup>76</sup> *Associated Press* 'Execution delayed one week after vein troubles' 15 September 2009 [http://www.10tv.com/live/content/onnews/stories/2009/09/15/execution\\_scheduled.html?type=rss&cat=&sid=102&title=Execution+Preparations+Halted+Pending+Appeal](http://www.10tv.com/live/content/onnews/stories/2009/09/15/execution_scheduled.html?type=rss&cat=&sid=102&title=Execution+Preparations+Halted+Pending+Appeal) (accessed 16 September 2009).

<sup>77</sup> Donohue & Wolfers (n 73 above); J Choe 'Another look at the deterrent effect of death penalty' available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1353165](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1353165) (accessed 16 September 2009).

<sup>78</sup> See the survey of research on this subject conducted by Roger Hood for the UN in 1988 and updated in 2002, concluding that 'the statistics ... continue to point in the same direction is persuasive evidence that countries need not fear sudden and serious changes in the curve of crime if they reduce their reliance upon the death penalty'; R Hood *The death penalty: A worldwide perspective* (2002) 214.

<sup>79</sup> FIDH (n 31 above) 5.

<sup>80</sup> While art 4 of the United Republic of Tanzania Constitution categorically analyses the power and functions of each organ, the President is empowered to constitute and abolish any office in the service of the government of the United Republic of Tanzania (see art 36(1) of the Constitution of the United Republic of Tanzania). The President of the United Republic of Tanzania and the President of the Revolutionary Government of Zanzibar are also empowered to promote, to remove, to dismiss

The Tanzanian Constitution guarantees the independence of judges. The Preamble of the Constitution calls for a judiciary 'which is independent and dispenses justice without fear or favour, thereby ensuring that all human rights are preserved and protected and that the duties of every person are faithfully discharged'.<sup>81</sup> Also, chapter V of the Constitution displays the functioning of the judicial system in comprehensive terms.

It is interesting to note, however, that the President can influence the judiciary through the persons he appoints. He appoints the following: the principal judge and other judges of the High Court;<sup>82</sup> the Chief Justice of the Court of Appeal<sup>83</sup> and other justices of the Court of Appeal after consultation with the Chief Justice;<sup>84</sup> the Registrar of the Court of Appeal and his or her deputy; and the Registrar of the High Court and his or her deputy.<sup>85</sup> The President also appoints two out of six members of the judicial service commission,<sup>86</sup> which has the power to discipline as well as to remove judicial officers other than the Chief Justice and higher judges,<sup>87</sup> and decides over the confirmation and promotion of such persons serving on the Commission.<sup>88</sup> The President may play a certain role in the removal of judges<sup>89</sup> and can elongate tenure of office of judges of the High Court and justices of the Court of Appeal beyond statutory requirements.<sup>90</sup>

Due to the President's decisive role in the selection and promotion of judges at the High Court and Court of Appeal level, he may put pressure

---

and to discipline such person in service of the government (see art 36(2) of the Tanzanian Constitution). The President also influences parliament in the following ways: He is empowered to appoint 10 members of parliament, and is empowered to dissolve parliament under the following circumstances: if the National Assembly refuses to approve a budget proposed by the government; if parliament fails to pass a bill which the President favours or if parliament insists on passing a bill that the President opposes; if parliament refuses to pass a motion considered of fundamental importance to government policies and the President considers that the way out is not to appoint another Prime Minister but to call a general election; having regard to the proportional representation of political parties in the National Assembly, the President considers that it is no longer legitimate for the government in power to continue in office and it is not feasible to form a new government.

<sup>81</sup> To ensure independence, any judge is prohibited from joining any political party save only that he shall have the right to vote; art 113A of the Tanzanian Constitution of 1977 (as amended).

<sup>82</sup> Art 109(2) of the Tanzanian Constitution of 1977 (as amended).

<sup>83</sup> Art 118(2) of the Tanzanian Constitution of 1977 (as amended).

<sup>84</sup> Art 118(3) of the Tanzanian Constitution of 1977 (as amended).

<sup>85</sup> Art 113(2) of the Tanzanian Constitution of 1977 (as amended).

<sup>86</sup> Art 112(1)(e) of the Tanzanian Constitution of 1977 (as amended).

<sup>87</sup> Arts 108, 110, 112, 113 & 118 of the Tanzanian Constitution of 1977 (as amended).

<sup>88</sup> Art 113(1)(a) of the Tanzanian Constitution of 1977 (as amended).

<sup>89</sup> Arts 110(6), (7) & (8) and 120(5) of the Tanzanian Constitution of 1977 (as amended).

<sup>90</sup> Arts 110(2) & (3) and 120(2) & (3) of the Tanzanian Constitution of 1977 (as amended).

on judicial independence in crucial issues, such as the constitutionality of the death penalty. It is important to realise that the President may also directly influence the outcome of court decisions, and thus render undesired decisions of the courts void. According to articles 45(1)(a) and (b) of the Constitution, the President may grant pardons to any person convicted by a court of law *of any offence* – including murder and treason – and may grant pardons for the execution of sentences for *any offence* – including capital punishment. Hence, the final question of whether a person must face the death penalty is dependent upon an arbitrary decision of the President,<sup>91</sup> and not based on a fair and impartial process.

The accumulation of power of the President already seemed to have real effects on the independence of the judiciary. There have been occasional allegations that the executive influences the judiciary to press for death penalty indictments against (innocent) people opposing the government, particularly by instituting cases of treason against them. Particularly, there has been a case of this nature in Zanzibar, though the accused were not convicted.<sup>92</sup> Also, the former President of Tanzania, Julius Kambarage Nyerere, expressed his concern that magistrates were giving – in his opinion – lesser sentences than he would like to have seen in relation to systemic criminal actions or civil unrest.

Finally, the issue of corruption has direct implications on the legitimacy of capital punishment. As corruption exists in the Tanzanian government, it hinders the impartial application of due process of the law (even) when the death penalty is to be imposed.<sup>93</sup>

<sup>91</sup> See Shaidi (n 21 above) 3 where he states: ‘The whole matter ... hinges on the goodwill of the President.’

<sup>92</sup> *SMZ v Machamo Khamisi Ali & 17 Others*, Court of Appeal of Tanzania, Criminal Application 8 of 3 April 2000 (unreported). Machamo *et al* were charged with treason under sec 26 of the Penal Decree (Cap 13) of Zanzibar. The charge alleged that these persons ‘by words and actions’ intended and plotted to overthrow the government of Zanzibar and to remove from authority the President of the Revolutionary Government of Zanzibar. Before the High Court of Zanzibar, presided over by the then Deputy Chief Justice of Zanzibar, Tumaka, the accused persons raised a number of preliminary issues. One of these, which was the subject-matter of the Court of Appeal’s ruling, stated that the offence of treason could not be committed or directed against the government of Zanzibar as it alleged in the indictment, since it is an offence against the Union only, ie United Republic of Tanzania. The Court of Appeal judges concurred with this objection and quashed the decision of the High Court of Zanzibar.

<sup>93</sup> Christina John ‘*Police wanaongoza kwa rushwa Nipashe*’, 2 December 2003. Mrs John, then acting head of the Tanzania Prevention of Corruption Bureau, in the above presentation at the prevention of corruption workshop held in Dar es Salaam, reported that among all government departments, the police had the highest number of corruption allegations compared to the judiciary and the central government.

## 5 The future

Due to legal and socio-cultural difficulties mentioned, Tanzania still has a long way to go to abolish the death penalty. Yet, Tanzania — despite all its problems — is a stabilising factor in the sub-Saharan region and has made serious efforts in regard to the promotion of human rights. Besides Tanzania's ratification of the African Charter on 10 February 1984, and ICCPR, it was a forerunner on the issue of refugee and diaspora treatment until the 1990s when the 'open door policy' was reversed.

It is argued here that Tanzania should revitalise this spirit by considering abolishing the death penalty. Indeed, after years of a lack of interest and despite current overweighing *opinio juris* that capital punishment should not be lifted,<sup>94</sup> there have been recent efforts, mainly created by non-governmental organisations (NGOs) active in the country. In June 2007, a death penalty report was launched by LHRC-Tanzania, ZLSC-Zanzibar, CARER-Malawi and DITSWANELO-Botswana, aiming at the abolishment of the death penalty in the SADC region through research to examine the legal status and trends of the death penalty in the respective countries and by using the information acquired from the research to determine effective strategies for campaigning. Although the effects of this report are not yet felt by ordinary citizens in Tanzania, the truth is that it remains a remarkable development. After the presentation of the NGO report, the ball was handed back to the government of Tanzania. In 2007, a Law Reform Commission was set up to evaluate changes in the Tanzanian legal system. The outcome was positive: Judge Bahati, the President of the Commission, is in favour of abolishment.<sup>95</sup> Furthermore, in an interview, Tanzania's Minister of Justice, Mary Nagu, declared that she would generally be open to its abolishment, if backed by the opinion of the people.<sup>96</sup> Convincing the public in a country where Albinos are still killed due to their alleged 'magic white powers'<sup>97</sup> will not be easy. However, there are grounds

---

<sup>94</sup> Speech by Omary Makungu (the then Minister of Constitution, Good Governance and Attorney-General of the Revolutionary Government of Zanzibar) on 1 October 2004; also see Peter (n 57 above) 27.

<sup>95</sup> Bahati (n 20 above).

<sup>96</sup> Press TV, 20/04/2007. An MP3 of the interview is available at: <http://www.voanews.com/english/archive/2007-04/2007-04-30-voa2.cfm> (accessed 16 September 2009).

<sup>97</sup> From October and mid-December 2007, more than 20 Albinos were killed in Tanzania. Most of these killings took place in Mara, Arusha, Shinyanga, Mwanza and Kagera; see LRHC Newsletter, January 2008. Information obtained by LHRC's information officer in an interview with Mr Samwel Mluge, General Secretary of the Tanzania Albinos Association. The information was reinforced by Vicky Mtetema, BBC reporter, who on 22 July 2008 reproduced a recorded interview with two witchdoctors from Sengerema, Mwanza who allegedly purchased Albino organs for some time, and who verified that human body parts of Albinos such as legs, hair and hands may cost

to believe that the majority of Tanzanians can be persuaded to abolish death penalty sentencing.

During a debate organised on World Day Against the Death Penalty (10 October 2004), almost all speakers except two were in favour of the abolition of capital punishment.<sup>98</sup> A report that was conducted by the Nyalali Commission as long as 13 years ago revealed that a considerable number of Tanzanians did not favour capital punishment.<sup>99</sup> Finally, Tanzanians gave attention to the practice of the ICTR, which has its seat in Arusha, Tanzania, and does not practise death penalty sentencing. It will be up to the Tanzanian government not to shy away from this mandate<sup>100</sup> to carry out impartial research on the subject and to turn words into actions. The High Court could strengthen the movement to abolish the death penalty by (again) declaring it to be unconstitutional. The LHRC, the Tanganyika Law Society, the Tanzania Chapter of the Southern Africa Human Rights NGO Network, and the ZLSC filed a petition in the High Court in October 2008 to have the death penalty declared unconstitutional.<sup>101</sup> As of 16 September 2009, the case awaits a trial date.<sup>102</sup>

---

up to 2 million Tanzania shillings. *Mwananchi* newspaper of 16 August 2008 also reported that the business of Albino organ trade in Tanzania is now at the highest level ever as it is conducted across borders. According to this report, one Tanzanian was caught with an Albino's head when travelling from the Democratic Republic of Congo to Tanzania. In his interrogation, the person pointed out that he took the head to Tanzania as it is valued there as a precious and expensive commodity.

<sup>98</sup> Speech by Omary Makungu (the former Minister of Constitution, Good Governance and Attorney-General of Revolutionary Government of Zanzibar) on 1 October 2004.

<sup>99</sup> Government of the United Republic of Tanzania: *Tume ya Rais ya Mfumo wa Chama Kimoja au Vyama Vingi vya Siasa*, 1991, Part III.

<sup>100</sup> The Tanzanian government declared in November 2008 that the proposal to abolish the death penalty would come at a wrong time, due to the aforementioned killing of Albinos; see [http://english.nessunotocchicaino.it/archivio\\_news/200811.php?iddocumento=10321363&mover=0](http://english.nessunotocchicaino.it/archivio_news/200811.php?iddocumento=10321363&mover=0) (accessed 16 September 2009).

<sup>101</sup> See L Philemon 'Rights activists seek end to death penalty' available at <http://ip-216-69-164-44.ip.secureserver.net/ipp/guardian/2008/10/11/124311.html> (accessed 16 September 2009).

<sup>102</sup> See message from the LHRC on 15 September 2009; [http://alpha.web2-netshine-hosting.co.uk/~lhrc/index.php?option=com\\_content&task=view&id=351&Itemid=52](http://alpha.web2-netshine-hosting.co.uk/~lhrc/index.php?option=com_content&task=view&id=351&Itemid=52) (accessed 16 September 2009).