

International human rights law and foreign case law in interpreting Constitutional rights: The Supreme Court of Uganda and the death penalty question

*Jamil Ddamulira Mujuzi**

Doctoral Researcher, Civil Society Prison Reform Initiative (CSPRI), Community Law Centre, University of the Western Cape; LLD Candidate, Faculty of Law, University of the Western Cape

Summary

On 21 January 2009, the Supreme Court of Uganda handed down a judgment in which it held that the death penalty was constitutional, that a mandatory death sentence was unconstitutional, that hanging as a mode of execution was not cruel and inhuman, and that the death row phenomenon is cruel and inhuman and therefore unconstitutional. Although the Constitution of Uganda does not empower or require the Court to refer to international law or foreign case law in interpreting the Constitution, the Court relied heavily on international human rights treaties and jurisprudence in arriving at its decision. This article has three purposes: one, to show how the Ugandan Court used international law and foreign case law in its judgment; two, to analyse the Court's orders; and third to recommend that the Constitution of Uganda be amended to empower or require courts to refer to international law and foreign case law in interpreting the country's Constitution.

*

LLB (Hons) (Makerere), LLM (Human Rights and Democratisation in Africa) (Pretoria), LLM (Human Rights Specialising in Reproductive and Sexual Health Rights) (Free State), LLD (Western Cape); djmujuzi@yahoo.com. I am grateful to Prof Julia Sloth-Nielsen, Faculty of Law, UWC, for providing me with the funding I used in accessing most of the materials used in this article and to the anonymous referees for their constructive comments. The funding by OSF-SA and Ford Foundation to CSPRI and CLC is acknowledged. The views expressed in this article are those of the author.

1 Introduction

On 21 January 2009, the Supreme Court of Uganda handed down the long-awaited judgment on appeal in the case of *Attorney-General v Susan Kigula and 417 Others (Kigula case)*.¹ This case was as a result of an appeal against the Constitutional Court's finding that, amongst other things, the death penalty was not unconstitutional as it was allowed for under the Constitution, but that the mandatory death sentence in the Penal Code Act² for murder was unconstitutional because it violated the accused's right to a fair trial in the sense that he or she could not be heard in mitigation once found guilty of murder, and that hanging, as a form of execution, did not violate article 24 of the Constitution which prohibits cruel, inhuman and degrading punishment.³ Following the Constitutional Court's judgment, both the government and death row inmates appealed to the Supreme Court with the government arguing, *inter alia*, that the Constitutional Court erred in law when it found that the mandatory death penalty for murder was unconstitutional.⁴ On the other hand, the death row inmates appealed against the Constitutional Court's ruling that the death penalty was not unconstitutional and therefore not a cruel, inhuman and degrading form of punishment because it was provided for under the Constitution.⁵ They also appealed against the Constitutional Court's finding that hanging, as form of execution, was not a cruel and inhuman punishment within the meaning of article 24 of the Constitution and therefore not unconstitutional.⁶

On 21 January 2009, the Supreme Court finally handed down its judgment. It held, first, that the death penalty was constitutional as it was sanctioned under the Constitution and that the framers of the Constitution took into consideration Uganda's history of grave human rights violations before including article 22(1) of the Constitution which provides that the right to life may be taken away as long as the manner in which it is taken away is not 'arbitrary'; second, that the mandatory death sentence was unconstitutional because it violated the offender's right to a fair trial in the sense that he cannot be heard in mitigation at sentencing and that it infringed the doctrine of separation of powers because it eliminated the judge's discretion in determining which sentence fitted both the offence and the offender; three, that hang-

¹ *Attorney-General v Susan Kigula & 417 Others* Constitutional Appeal 03 of 2006 (judgment of 21 January 2009, unreported) Supreme Court of Uganda <http://www.saflii.org> (accessed 20 September 2009).

² Penal Code Act, Cap 120.

³ *Susan Kigula & 417 Others v Attorney-General*, Constitutional Petition 6 of 2003 (judgment of 5 June 2005).

⁴ *Kigula* (n 1 above) 10.

⁵ As above.

⁶ *Kigula* (n 1 above) 2.

ing as a form of execution was not a cruel, inhuman and degrading punishment within the meaning of article 24 of the Constitution and therefore it was not unconstitutional and there was no evidence that other methods of execution, such as lethal injection, were less painful than hanging;⁷ and finally, that when a prisoner sentenced to death spends three years in detention after his appeal had been dismissed by the highest court and his application for the President to exercise his prerogative of mercy and commute his sentence has not been dealt with to know whether he has been granted reprieve or remission or would be executed, the death row phenomenon sets in, and that the death row phenomenon is cruel, inhuman and degrading treatment and that executing a prisoner who has spent three years on death row is cruel, inhuman and degrading. The Court ordered that a prisoner's sentence, who has been on death row for three years and more, should automatically be commuted to 'imprisonment for life without remission'.⁸

The Court's judgment attracted considerable media coverage both in Uganda⁹ and abroad.¹⁰ However, it also confused prison authorities on how they should deal with prisoners who had exhausted their appeals and had been on death row for more than three years.¹¹ One of the striking elements of the Court's judgment is the extent to which it relied on international human rights and foreign case law to resolve the issues it was dealing with. This article examines the status of inter-

⁷ For a detailed discussion of the Supreme Court's ruling on the question of hanging as a method of execution, see JD Mujuzi 'Execution by hanging not torture or cruel punishment? *Attorney-General v Susan Kigula and Others*' (2009) 3 *Malawi Law Journal* 133–146.

⁸ *Kigula* (n 1 above) 63.

⁹ L Afedraru *et al* 'Uganda Supreme Court upholds death sentence' *Daily Monitor* 22 January 2009 http://www.monitor.co.ug/artman/publish/news/Ugandan_Supreme_Court_upholds_death_sentence_78608.shtml (accessed 24 January 2009); Editorial 'Positives from ruling on the death penalty' *Daily Monitor* 23 January 2009 http://www.monitor.co.ug/artman/publish/opinions/Positives_from_ruling_on_the_death_penalty_78644.shtml (accessed 24 January 2009); A Mugisa *et al* 'Death sentence judgment puzzles lawyers' *The New Vision* 22 January 2008 <http://www.newvision.co.ug/D/8/13/668974> (accessed 24 January 2009); A Mugisa & H Nsambu 'Supreme Court retains death penalty' *The New Vision* 21 January 2009 <http://www.newvision.co.ug/D/8/12/668812> (accessed 24 January 2009).

¹⁰ 'Uganda court keeps death penalty' *BBC News* 21 January 2009 <http://news.bbc.co.uk/2/hi/africa/7841749.stm> (accessed 24 January 2009); 'Uganda's Supreme Court declares death penalty right' *Guardian Newspaper* 22 January 2009 http://www.ngrguardiannews.com/africa/article02//indexn3_html?pdate=220109&ptitle=Uganda's%20supreme%20cour%20declares%20death%20penalty%20right&cpdate=240109 (accessed 24 January 2009).

¹¹ See T Butagira *et al* 'Death penalty ruling puzzles prison bosses' *Saturday Monitor* 24 January 2009 http://www.monitor.co.ug/artman/publish/news/Death_penalty_ruling_puzzles_prison_bosses_78725.shtml (accessed 24 January 2009), where it is reported that '[t]he Supreme Court ruling that prisoners, who have stayed on death row for more than three years, after exhausting all appeals, should not be executed but imprisoned for life has confused prison officials. *Saturday Monitor* has learnt that the officials are puzzled about how to handle condemned persons still in formal confinement. Dr Johnson Byabashaija, the [C]ommissioner [G]eneral of

national law in the Constitution of Uganda and thereafter discusses the Court's reliance on international law.

2 International human rights instruments under the Constitution of Uganda and their relevance in interpreting the Bill of Rights

The history of Uganda has been characterised by gross human rights violations, a fact which the Supreme Court took judicial notice of.¹² Thus, during the debates that preceded the making of the 1995 Constitution,¹³ the Uganda Constitutional Commission¹⁴ and the Constituent Assembly¹⁵ emphasised that the new Constitution should contain most of the rights included in international human rights instruments to which Uganda was party at the time¹⁶ and the Universal Declaration of Human Rights (Universal Declaration). The Supreme Court observed that¹⁷

[t]he framers of the Constitution were aware of the various United Nations instruments, particularly those to which Uganda is a party. That is why article 287 provided for the continuation of treaties and conventions to which Uganda is a party.

The Bill of Rights indeed covers, at great length, all the rights in the International Covenant on Civil and Political Rights (ICCPR).

The Constitution of Uganda mentions international law in various respects: It provides that 'the foreign policy of Uganda shall be based on the principles of ... (b) respect for international law and treaty obligations';¹⁸ it empowers the Uganda Human Rights Commission 'to monitor the government's compliance with international treaty and convention obligations on human rights',¹⁹ and provides that any treaty or agreement to which Uganda was a state party before the coming into force of the Constitution (in 1995) was not to be affected by

Uganda Prisons, said the government needs to clarify if the ... decision, arising from a petition by some 417 death row inmates to have the court quash the death sentence, would apply retrospectively. "We are going to write to the Attorney-General ... for advice because the Supreme Court ruling has got implications on all persons who have gone through all appeals [and stayed thereafter] on death row for more than three years."

¹² *Kigula* (n 1 above) 20.

¹³ The 1995 Constitution repealed the 1967 Constitution.

¹⁴ See generally *Report of the Uganda Constitutional Commission: Analysis and Recommendations*, UPPC, Entebbe (1993).

¹⁵ *Proceedings of the Constituent Assembly (Official Report, Content)* August-September 1994 (when the draft Bill of Rights was being debated).

¹⁶ *Kigula* (n 1 above) 20.

¹⁷ *Kigula* (n 1 above) 22.

¹⁸ Objective XXVIII(b) of National Objectives and Directive Principles of State Policy.

¹⁹ Art 52(1)(h).

the coming into force of the Constitution and Uganda was to continue to be party to it.²⁰

Whereas the Constitution recognises the importance of international treaties to which Uganda is a party, neither the Constitutional Court nor the Supreme Court is empowered to refer to international human rights treaties to which Uganda is party in interpreting the Constitution, and especially the Bill of Rights.²¹ This position can be contrasted with that in the Constitutions of Malawi²² and South Africa,²³ where courts are expressly required to refer to international law and foreign law (in the case of South Africa) and comparable foreign case law (in the case of Malawi) in interpreting the Constitution. The lack of a provision expressly requiring the courts to consider international law in interpreting the Constitution has resulted in situations where, in some cases, international law is completely ignored in circumstances where it should have been considered to enrich the court's jurisprudence, for example where the applicants have referred to it in their submissions,²⁴ and also situations, like the case that forms the subject matter of this article, where international human rights law is given prominence although neither the respondents nor the appellants referred to it in their grounds of appeal and cross-appeal.²⁵ In the United States, where the Constitution does not require courts to refer to international law in reaching their decisions, it has been observed that²⁶

[t]here is a jurisprudential battle looming over the Supreme Court between the justices who support the use of international law in constitutional interpretation and the other side, headed unofficially by Justice Scalia, who considers the practice completely inappropriate.

In Uganda, at present, the Supreme Court and Constitutional Court judges have not, at least in public, shown that they are opposed to

²⁰ Art 287.

²¹ See arts 132 & 137 of the Constitution.

²² Art 11(2)(c) which provides that '[i]n interpreting the provisions of this Constitution a court of law shall — where applicable, have regard to current norms of public international law and comparable foreign case law'.

²³ Sec 39(1) provides that 'when interpreting the Bill of Rights, a court, tribunal or forum — (b) must consider international law; and (c) may consider foreign law'.

²⁴ Eg, *Law and Advocacy for Women in Uganda v Attorney-General of Uganda*, Constitutional Petitions 13/05 and 05/06 (judgment of 5 April 2007, unreported). Although the Constitutional Court held that some provisions of the Penal Code and Succession Act were unconstitutional for violating women's right to freedom from discrimination, it did not refer to international human rights instruments although the petitioners argued that the impugned provisions also violated these treaties to which Uganda is party, such as the Convention for the Elimination of All Forms of Discrimination Against Women.

²⁵ *Kigula* (n 1 above) 4–9.

²⁶ H Arnould '*Lawrence v Texas and Roper v Simmons: Enriching constitutional interpretation with international law*' (2008) 22 *Saint John's Journal of Legal Commentary* 685–686.

using international law in interpreting the Constitution.²⁷ What follows is a discussion of how the Supreme Court invoked international human rights law in arriving at its conclusions in the *Kigula* case.

3 The Supreme Court's reliance on international human rights instruments and jurisprudence

Uganda is a dualist country where, before a treaty can be relied upon by any court, it has to, at least in theory, first be domesticated through enabling legislation. However, although most of the treaties referred to by the Supreme Court were ratified by Uganda, they have never been domesticated. It could be argued that Ugandan judges have become like other common law judges in countries such as Botswana, Ghana and Nigeria,²⁸ who 'are increasingly abandoning their traditional dualistic orientation to treaties and are beginning to utilise human rights treaties despite the absence of implementing legislation giving domestic legal effect to the treaties'.²⁹ As mentioned earlier, in the *Kigula* case the Supreme Court was dealing with the following issues: the constitutionality of the death penalty; the constitutionality of the mandatory death penalty for murder; the constitutionality of hanging as a mode of execution; and the question regarding the death row phenomenon.

²⁷ In *Paul Kawanga Ssemwogerere & Others v Attorney-General of Uganda* (Constitutional Petition 5 of 2002) [2003] UGCC 4 (21 March 2003), in which the petitioners challenged the constitutionality of some provisions of the Political Parties and Organisations Act 18 of 2002, for, *inter alia*, imposing unjustifiable restrictions on the activities of political parties and organisations, thus rendering them non-functional and inoperative contrary to the Constitution. One of the issues was whether the impugned provisions violated the international human rights instruments mentioned in the petition. The Supreme Court unanimously held that, *inter alia*, '[t]he International Human Rights Conventions mentioned in the petition are not part of the Constitution of the Republic of Uganda. Therefore, a provision of an Act of Parliament cannot be interpreted against them. This issue was therefore misconceived.' See para 6. In *Charles Onyango Obbo & Another v Attorney-General* (Constitutional Appeal 2 of 2002) [2004] UGSC 1 (11 February 2004), Mulenga J of the Supreme Court, in holding that sec 50 of the Penal Code Act which criminalised the publication of false news was unconstitutional on the ground that the limitations it imposed could not be justified in a free and democratic society, referred to art 9 of the African Charter on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights' Declaration of Principles on Freedom of Expression in Africa (paras 1 and 2) and art 10 of ICCPR and concluded that, *inter alia*, '[f]rom the foregoing different definitions, it is evident that the right to freedom of expression extends to holding, receiving and imparting all forms of opinions, ideas and information. It is not confined to categories, such as correct opinions, sound ideas and truthful information'.

²⁸ RF Oppong 'Re-imagining international law: An examination of recent trends in the reception of international law into the national legal systems in Africa' (2007) 30 *Fordham International Law Journal* 296 313.

²⁹ MA Waters 'Creeping monism: The judicial trend towards interpretative incorporation of human rights treaties' (2007) 107 *Columbia Law Review* 628.

Unlike the case in countries like the United States, where ‘courts have long resisted attempts to construe their legal texts in light of biding [international human rights] instruments’,³⁰ at the outset, in dealing with the issue of the constitutionality of the death penalty, the Court observed that ‘[i]n discussing this matter we will make reference to international instruments on the subject matter’.³¹ This was so in spite of the fact that none of the counsel, either for the respondents or for the appellants, urged the Court to examine international law. The Court referred to the Preamble and to articles 3 (the rights to life, liberty and security of person) and 5 (freedom from torture, and so on) of the Universal Declaration, and held that the Universal Declaration did not abolish the death penalty, and that ‘even as the ... [Universal Declaration] was being proclaimed, death sentences passed by international tribunals were being carried out against war criminals in Germany and Japan’.³² The Court referred to articles 6(1), (2), (4) and 7 of ICCPR and held that those provisions did not abolish the death penalty, but that they require that the right to life should not be arbitrarily taken away and, according to the Court, the execution of the death penalty did not amount to torture.³³ The Court held that articles 6(1), (2), (4) and 7 of ICCPR ‘are in *pari materia* with articles 22(1) and 24 of the Constitution of Uganda’.³⁴ To emphasise its point that the death penalty is not unconstitutional and its imposition would not amount to Uganda’s violation of its international obligations under ICCPR, the Court referred to the Human Rights Committee’s decision in *Ng v Canada*³⁵ and observed that³⁶

... the extradition of a fugitive to a country which enforces the death sentence in accordance with the requirements of the ... [ICCPR] could not be regarded as a breach of the obligations of the extraditing country.

While referring to article 6(6) of ICCPR, which states that nothing in the Covenant shall prevent state parties from abolishing the death penalty, the Court ruled that ‘[i]n Uganda, although the Constitution provides for the death sentence, there is nothing to stop Uganda as a member of the United Nations (UN) from introducing legislation to amend the Constitution and abolish the death sentence’.³⁷ The Court also referred to article 4 of the African Charter on Human and Peoples’ Rights (African Charter) and held that what it prohibits is the

³⁰ Y Shany ‘How supreme is the supreme law of the land? Comparative analysis of the influence of international human rights treaties upon the interpretation of constitutional texts by domestic courts’ (2006) 31 *Brooklyn Journal of International Law* 341.

³¹ *Kigula* (n 1 above) 12.

³² *Kigula* (n 1 above) 13–14.

³³ *Kigula* (n 1 above) 14–15.

³⁴ *Kigula* (n 1 above) 15.

³⁵ Communication No 469/1991.

³⁶ *Kigula* (n 1 above) 16.

³⁷ As above.

'arbitrary' deprivation of the right to life and that a death sentence imposed and executed in accordance with the law does not amount to an arbitrary deprivation of the right to life,³⁸ and that the right to life in the Constitution of Uganda is not absolute because '[h]ad the framers intended to provide for a non-derogable right to life, they would have so provided expressly'.³⁹ The Court added that article 22(1) of the Constitution '[c]learly ... conforms to the international human instruments ... particularly the International Covenant on Civil and Political Rights to which Uganda is a party'.⁴⁰ In light of the above international human rights instruments, the Court concluded that '... it is recognised that for various reasons some countries still consider it desirable to have capital punishment on their statute books. The retention of capital punishment by itself is not illegal ... or a violation of international law'⁴¹ and that '[c]learly, inclusion of the death penalty in the Constitution was therefore not accidental or a mere afterthought. It was carefully deliberated upon',⁴² taking into consideration Uganda's international human rights obligations.

On the question of whether hanging, as a method of execution, is torture, cruel and inhuman, the Supreme Court referred to the definition of torture in article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and in particular emphasised the last part which is to the effect that torture 'does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions'⁴³ and held that the definition of torture under CAT 'leaves no doubt that it does not apply to a lawful death sentence'.⁴⁴ The Court also referred to the UN Resolution on Safeguards Guaranteeing Protection of the Rights of Those Facing Death Penalty,⁴⁵ especially paragraph 9 which provides that 'where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering' to conclude that '[w]hat is recognised is that suffering must necessarily be part of the death process, but that it must be minimised'.⁴⁶ The Court found that hanging 'caused death within minutes' and therefore met the 'standard of not causing excessive pain or suffering'.⁴⁷

In his partly dissenting judgment, Justice Egonda Ntende, after referring to the chilling affidavit which indicated what happens from the time

³⁸ *Kigula* (n 1 above) 18–19.

³⁹ *Kigula* (n 1 above) 33.

⁴⁰ *Kigula* (n 1 above) 23.

⁴¹ *Kigula* (n 1 above) 20.

⁴² *Kigula* (n 1 above) 22.

⁴³ *Kigula* (n 1 above) 18.

⁴⁴ *Kigula* (n 1 above) 17.

⁴⁵ Resolution 1996/15.

⁴⁶ *Kigula* (n 1 above) 61.

⁴⁷ *Kigula* (n 1 above) 63.

the President signs the death warrant to the moment the offender is executed,⁴⁸ held that, although the death penalty was constitutional, hanging as a mode of execution was cruel and inhuman and violated article 24 of the Constitution. Justice Ntende relied on the European Court of Human Rights' decision in *Soering v The United Kingdom*,⁴⁹ to hold that although the death penalty itself may not violate article 3 of the European Convention on Human Rights, its mode of execution may amount to a violation of article 3.⁵⁰ He observed that⁵¹

[t]he reasoning of the European Court is very persuasive. The European Convention on Human Rights is the forerunner of the bill of rights found in many independence constitutions, and post independence constitutions. The jurisprudence of the European Court is therefore quite persuasive.

He also relied on *Ng v Canada* and observed that the Human Rights Committee held that, although article 6 of ICCPR allowed the imposition of the death penalty in certain circumstances, its mode of execution should not be cruel and inhuman.⁵² He added that the Human Rights Committee's jurisprudence required that, in executing the death penalty, state parties to ICCPR should ensure that 'the least possible physical and mental suffering' is caused and that 'hanging as practised in Uganda fails to meet that test'.⁵³ He concluded in the following strong terms:⁵⁴

It is worthwhile noting that Uganda acceded to the International Covenant on Civil and Political rights on 21st September 1995 and to the First Optional Protocol on 14th February 1996. At the very least the decisions of the Human Rights Committee are therefore very persuasive in our jurisdiction. We ignore the same at peril of infringing our obligations under that treaty and international law. We ought to interpret our law so as not to be in conflict with the international obligations that Uganda assumed when it acceded to the International Covenant on Civil and Political Rights.

The above extracts from the Supreme Court's ruling show that, although the Constitution of Uganda does not oblige or require the Supreme Court to consider or refer to international law in interpreting the Constitution, the Court indeed referred not only to treaties to which Uganda is a party, but also to UN resolutions (soft law) and to the jurisprudence developed by the Human Rights Committee. The minority decision relied heavily on the jurisprudence of the European Court of Human Rights. If the Supreme Court's decision is compared with the 2007 judgment of the High Court of Malawi, in which the Court declared the mandatory death penalty to be unconstitutional,

⁴⁸ *Kigula* (n 1 above) 91–96.

⁴⁹ Application 14038/88.

⁵⁰ *Kigula* (n 1 above).

⁵¹ *Kigula* (n 1 above) 78.

⁵² *Kigula* (n 1 above) 78–80.

⁵³ *Kigula* (n 1 above) 97.

⁵⁴ *Kigula* (n 1 above) 80.

one realises that the Ugandan Court (which is not required to refer to international law in interpreting the Constitution) relied more on international law than the Malawian Court (which did not base its ruling on international jurisprudence although it referred to ICCPR).⁵⁵ However, the most frustrating aspect about the Uganda Supreme Court's decision is its complete disregard for the rich jurisprudence of the African Commission on Human and Peoples' Rights (African Commission) on the question of the death penalty.⁵⁶

4 The Supreme Court and foreign case law

Unlike the position in the United States, where '[t]he citation of foreign law has been a matter of controversy for several years' and this controversy has been 'reflected in vigorous exchanges between Supreme Court Justices'⁵⁷ and where 'Justice Breyer takes the position that foreign case law is simply information like any other source – the same as ... law journals, or academic lectures – and it should not receive any different treatment',⁵⁸ for many years, courts in Uganda, especially the highest courts, have referred to jurisprudence from other countries, especially Commonwealth countries, to resolve issues before them.⁵⁹ Courts in different countries, whether empowered or required or otherwise by domestic law to consider foreign law, refer to decisions from foreign courts that are of importance to the issues before them and this has resulted in what has come to be known as 'the migration of constitutional ideas'⁶⁰ – where ideas developed by interpreting the South Africa Constitution, for example, are followed in interpreting constitutions in other countries. The fact that courts in Uganda have always referred to or considered foreign case law in interpreting the Constitution and other pieces of legislation could explain why, in the *Kigula* case, the Supreme Court observed that '[o]ne must ... bear in mind that different constitutions may provide for different things precisely because each Constitution is dealing with a philosophy and

⁵⁵ See *Francis Kafantayeni v Attorney-General*, Constitutional Case 12 of 2005 (judgment of 27 April 2007). The court referred to foreign law extensively and to the jurisprudence of the Inter-American Court on Human Rights.

⁵⁶ For a detailed discussion of some of the jurisprudence of the African Commission on Human and Peoples' Rights on the death penalty, see L Chenwi *Towards the abolition of the death penalty in Africa: A human rights perspective* (2007) 66–73 103–105 158–165.

⁵⁷ R Reed 'Foreign precedents and judicial reasoning: The American debate and British practice' (2008) 124 *Law Quarterly Review* 253.

⁵⁸ JJ Zehnder 'Constitutional comparativism: The emerging risk of comparative law as a constitutional tiebreaker' (2007) 41 *Valparaiso University Law Review* 1739 1767.

⁵⁹ See, eg, *Paul Kawanga Ssemwogerere & Others v Attorney-General* Constitutional Appeal 1 of 2002, where the Supreme Court refers to judgments from several Commonwealth countries.

⁶⁰ See generally S Choudhry (ed) *The migration of constitutional ideas* (2006).

circumstances of a particular country', but that '[n]evertheless there are common standards of humanity that all constitutions set out to achieve'.⁶¹ It has been argued that⁶²

[w]hile foreign case law provides a fertile source of authorities for use under the reason-borrowing approach, it also generates many complications that would not arise in domestic analysis and that [r]ecognising the chief variations between ... [different legal systems] will help avoid unproductive or misleading reliance on foreign case law.

How did foreign case law find its way into the *Kigula* decision? Was it at the Court's own volition, as was the case with international human rights instruments and jurisprudence, that foreign case law found its way into this judgment? Unlike with regard to international law, it was counsel on both sides that invoked foreign case law to support their positions. In his submission counsel for the respondent argued that the death penalty was a cruel and inhuman punishment which violated article 24 of the Constitution. To support his argument, he cited the Tanzania High Court case of *Republic v Mbuushu* (1994) and the South African Constitutional Court case of *State v Makwanyane* (1995), in which both courts declared the death penalty to be a cruel and inhuman punishment.⁶³ In what appeared to be a foregone conclusion that the Supreme Court was likely to refer to case law from different countries, counsel for the respondent 'urged ... court not to rely on case law from jurisdictions [like Nigeria] that did not have ... [a provision that the right to freedom from torture was absolute] in their Constitutions'.⁶⁴ In determining whether the death penalty amounts to cruel, inhuman and degrading treatment, the Court cited several decisions from the Supreme Court of the United States on this question⁶⁵ and held that 'by majority in *Gregg v Georgia* ... [the US Supreme Court] rejected the decision in *Furman* that the death penalty is *per se* cruel and unusual'.⁶⁶ The Court added that '[w]e cannot say that those states in the United States of America, or indeed anywhere else in the world who retain the death penalty, have not evolved standards of decency'.⁶⁷ The Court distinguished the *Makwanyane* decision by holding that, unlike in the Ugandan Constitution, where the right to life is not absolute, the *Makwanyane* decision was based on a Constitution that provides for an absolute right to life.⁶⁸

⁶¹ *Kigula* (n 1 above) 12.

⁶² RR Zubaty 'Foreign law and the US Constitution: Delimiting the range of persuasive authority' (2007) 54 *UCLA Law Review* 1413 1440.

⁶³ *Kigula* (n 1 above) 10.

⁶⁴ *Kigula* (n 1 above) 11.

⁶⁵ *Kigula* (n 1 above) 27–29.

⁶⁶ *Kigula* (n 1 above) 30.

⁶⁷ *Kigula* (n 1 above) 31.

⁶⁸ *Kigula* (n 1 above) 34–37.

On the issue of the constitutionality of the mandatory death sentence, counsel for the respondent relied on case law from Pakistan and the Privy Council to argue that it violated the right to a fair trial in the sense that it denied the offender an opportunity to plead in mitigation, yet '[m]itigation is an element of fair trial'.⁶⁹ He also cited case law from the United States of America and the 2007 Malawian decision of *Kafantayeni and Others v Attorney-General* (in which the High Court of Malawi held that the mandatory death penalty was unconstitutional for, *inter alia*, violating the doctrine of separation of powers and the right to a fair trial) to support his argument that the mandatory death penalty violated the right to a fair trial.⁷⁰ Unlike on the question of the constitutionality of the death penalty, the Court, on the question of the constitutionality of the mandatory death sentence, did not discuss, let alone distinguish case law from other jurisdictions, even though counsel for the respondent, as shown, cited these cases.

On the question of whether to execute a person who has been on death row for more than three years (after the death row phenomenon has set in), counsel for the respondent cited cases from countries such as Jamaica and Zimbabwe to argue that it was inhuman and degrading to execute such a person.⁷¹ On the other hand, counsel for the appellant also cited case law from countries where it has been held that the delay in executing a person who has been sentenced to death is not unconstitutional.⁷² The Court referred to the Zimbabwean decision of *Catholic Commission for Peace and Justice in Zimbabwe v Attorney-General and Others*⁷³ and held that 'the Supreme Court of Zimbabwe set aside the death sentences because the appellants had been on death row for five years, in "demeaning conditions"'.⁷⁴ The Court held that being on death row for more than three years in poor prison conditions was unconstitutional as the offenders were serving a sentence of imprisonment, yet they were sentenced to a different sentence – that of death.

On the question of hanging as a method of executing the death penalty, the respondents argued that it was cruel and inhuman and that 'hanging had been stated to be a cruel, inhuman and degrading punishment in the *Mbuushu* and *Makwanyane* cases'.⁷⁵ The respondents also relied on the *Catholic Commission for Justice and Peace* case to argue that hanging was cruel, inhuman and degrading.⁷⁶ Counsel for the respondents 'conceded that every punishment involves pain,

⁶⁹ *Kigula* (n 1 above) 39.

⁷⁰ *Kigula* (n 1 above) 39.

⁷¹ *Kigula* (n 1 above) 46.

⁷² *Kigula* (n 1 above) 45–46.

⁷³ (1993) 2 LRC 279.

⁷⁴ *Kigula* (n 1 above) 48.

⁷⁵ *Kigula* (n 1 above) 58.

⁷⁶ *Kigula* (n 1 above) 57–58.

but submitted that the degree of pain in hanging was excessive'.⁷⁷ Counsel for the appellant conceded that 'even if it is found that the death penalty is provided for in the Constitution, then the manner of carrying it out by hanging is unconstitutional as it constitutes a cruel and degrading punishment'.⁷⁸ In responding to these arguments, the Court observed that⁷⁹

[i]n the *Mbuushu* case ... the High Court considered the totality of the death penalty, ie, the sentence itself *and* the manner of carrying it out, in coming to the conclusion that the death penalty was a cruel punishment.

However, the Court, without examining the decisions of *Mbuushu* and *Makwanyane*, found that there was no evidence that hanging caused excessive pain or suffering for it to amount to cruel and degrading punishment.

As in the case with international human rights law, the Supreme Court examined jurisprudence from other countries to reach some of the decisions. This was the case, as mentioned earlier, albeit that the Constitution does not empower or require it to do so. One could argue that reference to foreign case law is done as a matter of practice and that, although unlikely, it is not impossible that future judges of the Supreme Court could change this practice on the basis that those decisions are based on circumstances different from those in Uganda. In countries where the constitutions do not empower or require judges to refer to foreign case law, the question is 'whether it is legitimate for a judge to consult foreign case law to help decide a domestic case'.⁸⁰ In England, for example,⁸¹

Lord Bingham noted that even though the House of Lords has on a number of occasions 'gained valuable insights from the reasoning of Commonwealth judges deciding issues under different human rights instruments ... the United Kingdom courts must take their lead from Strasburg'.

The US Supreme Court, for example, has sometimes referred to foreign case law and international law in some of its decisions, notwithstanding the fact that the Constitution does not empower or oblige it to do so, apart from English law before the enactment of the US Constitution. However, the justices of the US Supreme Court are now sharply divided on whether international law and foreign law should be considered in interpreting the Constitution with '[t]hose who favour international law as an interpretative tool emphasise the "increasing number of domestic legal questions that directly implicate foreign or international law"'. They also stress that the growing number of constitutional issues

⁷⁷ *Kigula* (n 1 above) 59.

⁷⁸ *Kigula* (n 1 above) 60.

⁷⁹ *Kigula* (n 1 above) 59 (emphasis in original).

⁸⁰ A Hamann & HR Fabri 'Transnational networks and constitutionalism' (2008) 6 *International Journal of Constitutional Law* 481 501.

⁸¹ R Singh 'Interpreting bills of rights' (2008) 29 *Statute Law Review* 82–99 94.

addressed by foreign courts can serve as helpful comparisons. Those who oppose it claim that 'however enlightened' the justices of other nations are, their views 'cannot be imposed upon Americans through the Constitution'.⁸²

5 Conclusion and recommendations

The Supreme Court should be commended for relying on international and regional human rights treaties and jurisprudence in interpreting the relevant provisions of the Constitution. It is recommended that the Constitution of Uganda should be amended to expressly empower or require courts to refer to international law, especially to human rights treaties to which Uganda is a party, and foreign law in interpreting the Bill of Rights. The amendment should expressly require the Court to refer to jurisprudence, if any, developed by the African human rights bodies. This would ensure that courts give regional jurisprudence priority over jurisprudence developed by other bodies, like the European Court of Human Rights. A constitutional amendment requiring courts to refer to international law in interpreting the Bill of Rights will also enrich the jurisprudence of the Court. It would ensure that in the future, as it has happened in the USA, when judges who do not support reference to international law are appointed to the Court, they do not reverse the gains made so far in this area. An amendment to the Constitution to require or empower courts to refer to foreign case law should not mean that courts will be obliged to follow such case law. They will, of course, as they have done before, as in the *Kigula* case, treat foreign case law as persuasive as opposed to binding. Courts will also be at liberty to assess whether the utilisation of constitutional ideas from different courts interpreting constitutions adopted in different circumstances to deal with different issues would be to the advantage of the development of jurisprudence in Uganda.

⁸² Arnould (n 26 above) 686.