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THE DEATH PENALTY IN AFRICA

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Doctor of Philosophy

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KARIMUNDA MUYOBOKE Aimé

This study is dedicated to
Almighty God,
My parents,
My stepfamily,
My spouse Gaju Jeanne,
Professor Rwigamba Balinda and
All the victims of the human justice barbarity in Africa.

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Abstract

This study begins by addressing the issue of the death penalty in Africa prior to foreign legal influences. An Africanist view exhorts retentionist countries to repeal the death penalty simply because it is an imperialist legacy. The argument opposes those who contend that abolition is un-African. Retentionists retort that the death penalty is rooted in the culture and religion of Africans and abolitionist arguments are dismissed with charges of neo-colonialism. Establishing the deliberate exclusion of the death penalty in traditional Africa goes beyond abolition. It also implies that although painted as repugnant, primitive and savage, indigenous laws were imbued with more human values than Asian and European laws which influenced, accommodated and later suppressed them.

This study has found no definitive conclusion to this conundrum. In most organized states the death penalty was imposed for several offences. In other states, some of them strongly centralized as well and among numerous Bantu tribes, homicides were redressed by compensation. Tribes with no death penalty were compelled by catechist preaching and often by sword to convert to foreign religions that had a passion for retaliation. Later African people were barricaded inside arbitrary boundaries established by the colonizer who applied the death penalty without distinction to those who were used to it and those who had rejected it due to its outrageous effects. Whether provided for by foreign religious or secular laws, the death penalty served and continues to serve the same purpose, political domination.

All African independent leaders retained the death penalty primarily as a response to any challenge to their authority. In other words, they maintained the *status quo*. Thus, instead of being a neo-colonial dictate, abolition is one of the steps towards a complete political independence. Politicians have used the death penalty in order to secure their insolvent regimes. Abolition has often corresponded to moments of liberation from tyrannical regimes. Therefore, the more Africans embrace democracy and dispose of their predators, the faster the movement of abolition will be. Resistance to abolitionist calls is already crumbling and it is anticipated that the Arab awakening will increase chances of abolition in African Islamic states. That alone would marginalize remaining retentionist countries.

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1 GENERAL INTRODUCTION

In June 2010, the United Nations' eighth quinquennial report on capital punishment indicated that attitudes as regards the death penalty in Africa have improved. Thirty nine out of 54 African countries (72%) are now either *de jure* or *de facto* abolitionists and retentionist countries have become reluctant to carry out executions or are moving towards a minimal resort to death penalty.¹ The progress is significant as two decades ago; Africa was depicted as the most troubled continent where the abundance of human rights abuses (including but not limited to courts lacking independence and impartiality and politically motivated executions) overwhelmed the few examples of good practices.²

The classic arguments for the retention of the death penalty are retribution and deterrence.³ Retribution is built on the justifiability of the death penalty as a deserved punishment for serious crimes. Deterrence is based on the utilitarian approach that considers the imposition and more likely the execution of the death penalty to constitute a warning that keeps potential criminals law-abiding citizens. As early as 1764, Cesaria Beccaria disclosed the weaknesses of these arguments.⁴ Abolitionists have since upheld Beccaria's thesis and framed new arguments that systematically weaken any new grounds justifying the retention of the death penalty.

Thus, judicial errors leading to wrongful convictions and the execution of innocents, the danger of politicising criminal justice in resorting to capital punishment as a mechanism of crime control mainly at time of high rate of criminality or mass crimes and the subjective and versatile nature of public opinion in both retentionist and abolitionist countries⁵ are but few additional arguments that have strengthened the abolitionist movement. It follows that today, it is impossible to execute the death penalty without violating human rights.⁶

¹ UN Doc E/2010/10, para 38 and annex, tables 2 and 4.

² William A. Schabas, "African Perspectives on Abolition of the Death Penalty", in William A. Schabas, ed., *The International Sourcebook on Capital Punishment*, Boston: Northeastern University Press, 1997, pp.30-65, at p.30.

³ For a recent debate on "The Question of Deterrence" see Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective*, 4th edn, New York: Oxford University Press, 2008, at pp. 317-349.

⁴ Cesaria Beccaria, *On Crimes and Punishments*, Richard Bellamy, ed., Cambridge: Cambridge University Press, 1995.

⁵ Roger Hood and Carolyn Hoyle, "Abolishing the Death Penalty Worldwide: The Impact of a 'New Dynamic'", (2009) 38 *Crime and Justice* 17-18.

⁶ *Ibid.*, at p.7.

Even if these arguments have justified abolition elsewhere, it is said that the dynamism of Africa towards the repeal of the death penalty corresponds to social changes, periods of national unity and reconciliation, the divorce from totalitarian regimes and the realisation that since colonial times, resort to the death penalty has complied with a political agenda of oppression and repression.⁷ Tyrannical regimes continued the colonial policy of suppressing people's freedom and fundamental human rights. The death penalty is undemocratic.⁸ Therefore, capital punishment does not only violate the fundamental right to life as it constitutes also an antithesis of "the right to be free from excessive, repressive, and tortuous punishments".⁹

Today, it is strongly voiced that the death penalty was introduced in Africa by foreign laws for the purpose of colonial domination. Michello Hansugule argues that democracy and egalitarianism characterized traditional African societies. Indigenous justice condemned the offender without crashing his dignity.¹⁰ In the *Makwanyane* case, Justice Sachs confirmed in a concurring opinion that prior to the western invasion; the death penalty was unknown in Africa, at least for murder.¹¹ Prominent African lawyers tend to corroborate the view that capital punishment is a colonial legacy. Ross Kinemo, a Tanzanian lawyer, maintains that

[B]efore the coming of colonialism, Africa had never witnessed a hangman. The most severe form of punishment was ostracism... the fear of ostracism was one of the chief factors preventing people from committing crime. So hanging was handed down to us through colonialism. We have retained it but it is a great contradiction since the African by nature is a humanitarian.¹²

Although seductive as an argument, the foreign origin of the death penalty in Africa does not enjoy unanimity. Retentionists consider that abolition is rather un-African.¹³ Abolition is perceived as an attempt from former colonial powers to impose their views on

⁷ *Supra* note 2, at pp.30-32.

⁸ Robert Badinter, "Moving towards Universal Abolition of the Death Penalty", in *Death Penalty: Beyond Abolition*, Strasbourg: Council of Europe Publishing, 2004, at p.10.

⁹ *Supra* note 5, at p. 17.

¹⁰ Michello Hansugule, "The Historical Development of International Human Rights", in Azizur Rahman Chowdhury and Jahid Hossain Bhuiyan, eds., *An Introduction to International Human Rights Law*, The Hague: Martinus Nijhoff Publishers, 2010, pp.1-30, at p.20.

¹¹ *S v. Makwanyane and Another* 1995 (3) SA 391 (CC), at para 377D-E per Justice Sachs.

¹² Ross E.J. Kinemo, *Contemporary Tanzanian Penal Policy: A Critical Analysis*, Naivasha: British Institute in East Africa, at pp.23-24,

<http://www.tzonline.org/pdf/contemporarytanzanianpenalpolicy.pdf> (accessed 18 April 2007).

¹³ Dirk Van Zyl Smit, "The Death Penalty in Africa", (2004) 4 *African Human Rights Law Journal* 15.

independent countries “to override their sovereign rights to fashion their justice system according to their own judgment of the needs and culture of their country”.¹⁴ Taking advantage of cultural relativism, African Muslim countries further argue that the death penalty is un-abolishable because it is prescribed by sacred texts.¹⁵ This cultural argument is one of the barriers to the spread of abolition among current retentionist countries in Africa. It carries two messages: the death penalty is rooted in African culture and, even if it was not, states have sovereign rights in criminal matters.

Cultural relativism considers that cultural traditions, social customs and religious beliefs are so radically diverse that common human rights standards are unconceivable.¹⁶ Therefore, if the death penalty is rooted in the cultures and customs of Africans, abolishing the death penalty would mean abolishing a part of those cultures or customs. The state sovereignty argument holds that the question of the death penalty must be addressed locally.¹⁷ It emphasises the rejection of a universal and intangible human rights provision envisaging the abolition of the death penalty outside the national legal system and equates such initiatives with cultural imperialism.¹⁸ In other words, if the death penalty was not a colonial legacy then it should be retained until the people change their law.

Universal abolitionists, who are more concerned with the emerging international human rights norms that universalise the abolition of the death penalty,¹⁹ hold that cultural relativists and nationalists are merely nostalgic and intend to idealise their indigenous laws so that “the colonisers could be blamed for everything that deviated from the ideal”.²⁰ Universalists sustain that traditional African societies had no human rights, but rather had established concepts and practices of human dignity.²¹ Africans perceive this position as an

¹⁴ *Supra* note 5, at p.39.

¹⁵ *Supra* note 2, at p.30.

¹⁶ *Ibid.*, at p.31.

¹⁷ Roberto Toscano, “The United Nations and the Abolition of the Death Penalty”, in *The Death Penalty: Abolition in Europe*, Strasbourg: Council of Europe Publishing, 1999, pp.91-104, at p.96.

¹⁸ *Supra* note 2, at p.34

¹⁹ *Ibid.*, at p.35, Roberto Toscano, *Supra* note 16 and Nadia Bernaz, *Le droit international et la peine de mort*, Paris: La Documentation Française, 2008, at pp.23-27.

²⁰ William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd edn, Cambridge: Cambridge University Press, 2002, at pp.42-43.

²¹ Eva Brems, *Human Rights: Universality and Diversity*, The Hague: Martinus Nijhoff Publishers, 2001, at p.156.

²² Jack Donnelly, *Universal Human Rights in Theory and Practice*, London: Cornell University Press, 2003, at pp.78-79.

insult to African pride and a denial of any kind of civilisation to Africa and retort that human rights are no more than a means towards the goal of human dignity.²²

This study intends to address this antagonism in examining first whether or not the death penalty existed before foreign legal influences came into the equation. Bearing in mind that pre-colonial foreign laws and colonial laws contained death penalty provisions, the next concern is whether the death penalty is currently retained on the grounds of state sovereignty or to perpetuate the colonial ideology of domination.

1.1 Magnitude of the study

Addressing the nature and scope of the death penalty prior to foreign legal influences is our primary concern. What was then the status of the death penalty in Africa prior to foreign legal influences? The inference that the death penalty was not part of African indigenous laws would confirm that traditional laws were imbued with more human values than the laws that influenced them. To establish this fact is expected to strengthen the abolitionist movement in Africa. There is no reason to retain the death penalty today if it was originally introduced by imperialist laws.

Yet, the most recent research on the death penalty in Africa is conflicting. The death penalty was an exception rather than an institutionalised punishment. As predicted, the blame is on the colonizer, who introduced retributive and deterrent sentencing policies.²³ Later it was found that “there is no concrete evidence to show...that a murderer, for example was confined in a place (or prison) awaiting execution”.²⁴

The statement does not question the existence of the death penalty, but rather the process of execution. Apparently, the punishment existed under indigenous laws, regardless of whether the offender was executed immediately or otherwise. What foreign influences introduced into Africa was the method of execution, rather than the punishment itself: “the death penalty as practiced today is not in the African tradition” writes Lilian Chenwi in her study of capital punishment in Africa, explaining further that “the present death

²² *Supra* note 20, at pp.151 and 155. See also Michello Hansungule, *Supra* note 10, at pp.19-21.

²³ Lilian Chenwi, *Towards the Abolition of the Death Penalty in Africa: A Human Rights Perspective*, Pretoria: Pretoria University Law Press, 2007, at pp.18-20.

²⁴ *Ibid.*, at p.19.

penalty system is not as it was practiced in traditional African societies".²⁵ In fact, four years after the *Makwanyane* case, Professor Terblanche argued that the concept that was foreign to Africa was imprisonment rather than death penalty.²⁶

Furthermore, there cannot be a general conclusion applicable to the whole of Africa. There is diversity even among peoples who occupy a large territory and generally share common values, such as the Bantu. African people whose laws were death penalty free prior to colonization obviously took on the practice under foreign legal influences. Nevertheless, the existence of the death penalty under indigenous law is not an excuse to retain it. African states are the result of arbitrary frontiers. Retaining the death penalty because some tribes were or are still viscerally attached to it violates the rights of other compatriots who had historically realised the uselessness and atrocious effects of capital punishment. In the modern world, it is unthinkable to claim an historic or cultural right to kill. *A contrario*, any human being has the right to not to be killed irrespective of whether it is an indigenous right or not.

Moreover, there is no question that European and Asian laws contained the death penalty. The issue is rather what was the scope of death penalty provisions introduced by foreign laws in Africa? Foreign laws do not necessarily mean colonial laws. Anglo-American, Roman Dutch, *Shari'a* and Coptic laws were the first external legal influences in Africa. Although limited to small territories and likely to few people, they all contained death penalty provisions. At the beginning, the Roman Dutch law was limited to Dutch settlers at the Cape, Anglo-American law applied to former slaves in Liberia, Coptic law's jurisdiction applied in Ethiopian cities, *Shari'a* law applied to Muslims and rural areas remained under the influence of indigenous laws.

Colonial law accommodated or suppressed pre-colonial laws. Only Ethiopia and Liberia escaped colonisation. All over Africa, the pre-existing law and its mechanism of resolving conflicts was disregarded. The colonizer despised indigenous laws declaring them savage, primitive or even nonexistent²⁷ but simultaneously failed to set up legal systems that

²⁵ *Ibid.*

²⁶ Stephane S. Terblanche, *The Guide to Sentencing in South Africa*, Durban: Butterworths, 1999, at p.507. See also James S. Read, "Kenya, Tanzania and Uganda", in Alan Milner, ed., *African Penal Systems*, London: Routledge and Kegan Paul, 1969, pp.89-164, at p.103.

²⁷ Sandra Fullerton Joireman, "Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy", (2001) 4 *Journal of Modern African Studies* 571 and 578.

respected elementary human rights.²⁸ Westernization built discriminatory, racist legal systems, which created a maladjusted society with a permanent resort to exceptional and harsh punitive measures.²⁹ The death penalty was believed to be an effective means of forcing local people into submission.

There is no uniformity in colonial attitudes. Each colonizer introduced its own colonial policies. Sometimes, the same law was applied differently. Often the politics of the death penalty betrayed the true nature of the policy. Colonial domination was the major reason for the export of the death penalty in French, British, Belgian, Italian and Spanish colonies. Portugal never introduced the death penalty in its African colonies.³⁰ If we succeed in demonstrating that the use of the death penalty during colonial times had atrocious consequences for African civilization, we will have sent a message to the current political leadership in African retentionist states that the use of the death penalty today perpetuates colonial ideologies.

There can be no doubt that by the time of independence, the death penalty was normalized in many countries. This raises the concern as to which extent the modern law in Africa is imbued with colonial legacy or, is there any correlation between the current practices of the death penalty with the colonial legacy of state killing policy?

African leaders kept or introduced the death penalty for the same reason, to protect the fragile political regime. African countries where the death penalty was applied during colonial times continued to apply it for the same former colonial crimes. Countries where the colonizer had become reluctant to impose or execute the death penalty began following through with it. This was the case in Benin, Togo and the Ivory Coast. Countries where the colonizer had restricted the death penalty to only a few crimes extended the list of capital crimes. This was the case in the Democratic Republic of Congo, Rwanda and Burundi. Lastly, countries that did not have the death penalty under the colonial rule (Angola, Cape Verde, Guinea, Mozambique) eventually learnt from their neighbours that the death penalty was unavoidable in the quest for stability.

²⁸ Olivier Le Cour Grandmaison, "The Exception and the Rule: On French Colonial Law", (2006) 212 *Diogenes* 43.

²⁹ *Ibid.*, Frank Furendi, *Colonial Wars and the Politics of the Third World Nationalism*, London-New York: IB Tauris, 1994, at pp.123-124 and Kristin Mann and Richard Roberts, (eds.), *Law in Colonial Africa*, Portsmouth-London: Heinmann and James Currey, 1991, at p.35.

³⁰ Fernando O. Gouveia Da Veiga, «Portuguese Africa», in Alan Milner, ed., *African Penal Systems*, London: Routledge and Kegan Paul, 1969, at p.217.

Thus, instead of taking the abolition of the death penalty as a neo-colonial dictate, African leaders should consider it to be another step towards complete political independence. It is the rejection of totalitarian regimes and the need for social cohesion that made the continent to become the most dynamic as far abolition is concerned. We expect that there will not be any reinstatement of capital punishment in abolitionist states. We also expect retentionist countries to follow the path of abolitionists in becoming *de facto* abolitionists before complete legal abolition. In Africa, *de facto* abolition has established itself as a transitional phase to *de jure* abolition.

1.2 Rationale and originality of the study

Authoritative materials on capital punishment are scarce for many countries.³¹ That is more so as regards the historical and cultural background of the death penalty. In addition, most research on the African legal history stems from writers who described Africa in concepts and principles they were familiar with. The pioneers were anthropologists, historians, explorers and missionaries who were often commissioned by the coloniser. The consequence has been the creation of another world different to the described one but consistent with colonial policy.

This has created misconceptions, sometimes entertained by Africans themselves, that the death penalty complies with the savage and primitive nature in which the coloniser found the unsophisticated African. Accordingly, although it is common knowledge that modern law in African is a legacy of colonial law, the question of the death penalty under foreign legal influences, especially colonial law, has merely been overlooked. Few are those who researched the historical and cultural perspective of the death penalty in Africa. Aside from Professor Dirk Van Zyl Smit's article *The Death Penalty in Africa* where he dealt with the status of the death penalty on the continent in 2004 and recommended the repeal of the mandatory death penalty,³² only two important works can be selected from the numerous and valuable publications and reports on the subject.

³¹ Peter Hodgkinson, "Capital Punishment: Improve It or Remove It?", in Peter Hodgkinson and William A. Schabas, eds., *Capital Punishment: Strategies for Abolition*, Cambridge: Cambridge University Press, 2004, at p.3.

³² *Supra* note 13, pp.1-16.

In 1997, the *African Perspectives on Abolition of the Death Penalty* by Professor William A. Schabas had the merit of being the first to outline the historical and socio-cultural perspective of the death penalty in Africa.³³ This work, which was more focused on the status of capital punishment on the continent and important developments in the 1990s, maintains that, in Africa, the death penalty is a colonial legacy and incompatible with indigenous values.³⁴

In 2007, Lilian Chenwi published her doctoral thesis *Towards the Abolition of the Death Penalty in Africa: A Human Rights Perspective*.³⁵ The second chapter that also explores the historical background of the death penalty in Africa does not clearly confirm the colonial origin of the death penalty in Africa. Indeed, the author's main argument was demonstrating the need for an additional protocol to the African Charter for Human and Peoples' Rights aiming to abolish the death penalty in peace and wartime.

Researchers have often focused on the movement and strategies of abolition without questioning the past and the nature of the death penalty. In sum, most studies on the death penalty in Africa provide limited data on statistical trends, arguments criticized for being Eurocentric and predictions of the abolitionist movement.

It is therefore opportune to make a deep study of the historical and cultural background of the death penalty in Africa, to analyse the law and practice of the death penalty under European and Asian laws in Africa before independence, and to assess the grounds on which the death penalty is retained today and to balance arguments on the contemporaneous developments on the death penalty in Africa. We expect this broad picture to constitute a humble basis of new strategies for a complete abolition of the death penalty on the continent. As far as we can ascertain, research that focuses on the law and practice of the death penalty in Africa spanning from the pre-colonial period to the current time has not before been undertaken.

³³ *Supra* note 2, at p.30.

³⁴ *Ibid.*, at pp.30 and 33.

³⁵ *Supra* note 23. See also Lilian Chenwi, "Fair Trial Rights and Their Relation to the Death Penalty in Africa", (2006) 55 *International and Comparative Law Quarterly* 609-633; Lilian Chenwi, "Initiating Constructive Debate: A Critical Reflection on the Death Penalty in Africa", (2005) 38 *Comparative and International Law of Southern Africa* 474-491; Lilian Chenwi, "Breaking New Ground: The Need for a Protocol to the African Charter on the Abolition of the Death Penalty in Africa", (2005) 5 *African Human Rights Law Journal* 89-104.

1.3 Research methodology

We have combined different approaches to reach our conclusions. To begin with, the exegetic and comparative methods were the indispensable legal approaches that attempted to limit this work within its legal framework. Furthermore, the archival research (content analysis) filled gaps left by the documentary technique. The latter was unavoidable in a documented research like this.

Lastly, quantitative findings have been referred to in order to assist in expressing the richness of our conclusions.³⁶ We should caution that this is not a statistical analysis of the death penalty in Africa. Statistics on the death penalty are often inconsistent and incomplete.³⁷ It is impossible to find a complete picture of criminal cases, death sentences, executions and commutations. We have also followed the advice that “statistics cannot really be decisive in determining whether one should opt for the abolition or the retention of capital punishment... they can measure attitudes and dispositions, but they cannot really account for deeply rooted human convictions, beliefs and emotions”.³⁸

1.4 Study limitation and research outline

The primary concern is with the status of the death penalty in Africa from the period of indigenous laws to date. The first danger in covering a huge area, home to people with different backgrounds and perspectives, is that of simplistic generalizations. Two remedies to this have been adopted: time delimitation and case studies. This work is subdivided into five periods, each of which corresponds to one of five main chapters: the period of indigenous laws, the period of peaceful foreign legal influences, the colonial period, the early postcolonial period and the contemporary period.

In the second chapter, the laws of different tribes, chieftaincies and kingdoms are analysed in order to establish whether the death penalty existed as a method of punishment or not. In the third chapter, the way foreign laws were represented in pre-colonial Africa is

³⁶ Lee Cuba and John Cocking, *How to Write about the Social Sciences*, Harlow: Longman, 1997, at p.93.

³⁷ Ellison Kahn, “Crime and Punishment 1910-1960: Reflections on Changes since Union in the Law of Criminal Punishment and Its Application”, (1960) 191 *Acta Juridica* 202.

³⁸ Lourens M. Du Plessis, “Capital Punishment: A Legal Philosophical Appraisal”, (1989) 2 *South African Journal of Criminal Justice* 184.

considered with respect to four territorial spaces: South Africa, Liberia, Ethiopia and Islamized Africa.

There was no justification to study the death penalty under certain colonial laws simply because they were death penalty free (Portugal) or because circumstances prevented the colonizer from applying his law (Germany, Italy and Spain). Although the fourth chapter provides a general overview of the death penalty during colonial times, it focuses on British, French and Belgian colonial rule.

The question of whether the death penalty in independent Africa was retained on political grounds was canvassed for all African countries from 1960s. Detailed studies of the practice of the death penalty in South Africa, the Democratic Republic of Congo and Nigeria have sought to establish whether or not independent African leaders copied colonial attitudes. In a concluding chapter, we consider the movement of abolition with an emphasis on the development, scope, importance, fragility of *de facto* abolition and safeguards against the reinstatement of the death penalty in both *de facto* and *de jure* abolitionist states.

2 THE DEATH PENALTY: IDEAS AND PRACTICE IN PRECOLONIAL AFRICA

Introduction

In establishing whether the death penalty existed in African customary laws or not, it is important to outline the grounds on which it was imposed before exploring what justified its exclusion. Both approaches require an inquiry into the practice of those laws. However, there is no consensus among scientists on the existence of customary law, be it local, national³⁹ or African.⁴⁰ Even where a consensus exists, they disagree on its criminal law component or argue about the nature of criminal responsibility.

Lawyers and sociologists have been unable to find a mutually acceptable definition of customary law. Both have employed the definition that has best suited their own purposes.⁴¹ Customary law is not a set of commands or legislated rules. It consists of conventions and enforceable rules repeatedly recognized as rules of law by the community and its courts; these have spontaneously emerged and are agreed upon by people as they go about their daily business and try to solve problems threatening social peace.⁴² It must be distinguished from customary international law, which is traditionally defined as a consistent practice among states that has evolved over a period of time to the extent that states believe that the practice has created legal obligations.⁴³ The International Court of Justice insists that the practices that form customary international norms are those 'settled' and which prove the belief that they have become legally obligatory.⁴⁴

³⁹ Aberra Jembere argues that depending on whether it is acknowledged all over a particular country or limited to a certain area, tribe, or profession, legal custom may take two forms namely national or local. See Aberra Jembere, *Legal History of Ethiopia 1434-1974: Some Aspects of Substantive and Procedural Laws*, Thesis, Leiden: Erasmus Universiteit, 1997, at p.40.

⁴⁰ Elias T. Olewale, *The Nature of African Customary Law*, London: Manchester University Press, 1954, at p.25.

⁴¹ Gordon R. Woodman, "Some Realism About Customary Law-The West African Experience", in Gordon R. Woodman and Akintunde O. Obilade, eds., *African Law and Legal Theory*, Aldershot-Singapore-Sidney: Dartmouth, 1995, pp.145-170, at p.145.

⁴² Georges B.N. Ayittey, *Indigenous African Institutions*, New York: Transnational Publisher, 2006, at p.69.

⁴³ Article 38(1) (b) of the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, T.S. No 993, 3 Bevans 1179. See also Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications*, New York: Cambridge University Press, 2010, at p.6.

⁴⁴ *North Sea Continental Shelf, Judgment, IC.J. Reports 1969*, p.44 at para 77.

In Africa, customary law has also been referred to as native law⁴⁵ or indigenous law,⁴⁶ sometimes to dissociate its nature and characteristics from the so-called *ius commune* of the metropolis.⁴⁷ Difficulties in defining African customary law have resulted in the use of the expression indigenous law,⁴⁸ which is defined as a set of rules of conduct that regulate the behaviour of individuals and communities and which, by maintaining the society's equilibrium, are necessary for its survival as a corporate whole. Its main objective is to maintain equilibrium between interests and forces interacting within one human society and to ensure that nothing threatens to destroy the intergroup equilibrium.⁴⁹ Life-threatening sanctions that subject individuals to harsh and inhuman treatments were not necessarily required. Bearing in mind that the reception of foreign laws was made on different dates and certainly in various ways, we will consider data on the indigenous law as reported before foreign legal influences.

In addressing the issue of the death penalty however, it is worth bearing in mind that traditional Africa did not apply an indigenous law identical in form and content. Nevertheless, this does not imply the nonexistence of law, let alone criminal law. Sometimes, it is inaccurately thought that because of its restorative nature, the law applied in certain African areas did not differentiate between criminal law and civil law.⁵⁰ Some have gone so far as to state that if there is no difference between criminal law and civil law, then there is no law at all.⁵¹ This view overlooks the fact that tort law as a branch of private law is a recent development. African primitive societies like other ancient societies classified crimes on the basis of their severity. Only serious crimes called for public

⁴⁵ Diana Jeater, "'Their Idea of Justice is so Peculiar': Southern Rhodesia 1890-1910", in Peter Coss, (ed.), *The Moral World of the Law*, London: Cambridge University Press, 2000, at pp. 178-195.

⁴⁶ Ebo Chukwuemeka, "Indigenous Law and Justice: Some Major Concepts and Practices", in Gordon R. Woodman and Akintunde O. Obilade, eds., *African Law and Legal Theory*, Aldershot-Singapore-Sidney: Dartmouth, 1995, at pp.34-42.

⁴⁷ Paul Hyams, "Due Process versus the Maintenance of Order in European Law: The Contribution of the *Ius Commune*", in Peter Coss, ed., *The Moral World of the Law*, New York: Cambridge University Press, 2000, at p. 63.

⁴⁸ Kenneth Roberts-Wray, *Commonwealth and Colonial Law*, London: Stevens and Sons, 1966, at p.534.

⁴⁹ *Supra* note 46.

⁵⁰ *Ibid*, at p.36; Georges B.N. Ayittey, *Supra* note 42, at p.72; Eugene Cotran, "The Position of Customary Criminal Law in African Countries", in Akilagpa Sawyerr, ed., *East African Law and Social Change*, Nairobi: The East African Institute of Social and Cultural Affairs, 1967, at p.14

⁵¹ Johan F. Holleman, "An Anthropological Approach to Bantu Law (with Special Reference to Shona Law)", in Gordon R. Woodman and Akintunde O. Obilade, eds., *African Law and Legal Theory*, Aldershot-Singapore-Sidney: Dartmouth, 1995, at p.16.

intervention.⁵² Also, the idea of retribution overwhelmingly present in modern criminal law, specifically in today's punishments, has led to the wrongful assumption that in its absence, criminal law would not exist.

Therefore making any assertion about the death penalty requires that one bears in mind the legal disparities based on the area or people concerned. In addition, the death penalty has to be distinguished from, among other things, summary executions, poison ordeals, vengeance and ritual murders.

2.1. The death penalty in African indigenous laws

There cannot be punishment unless there are prohibited conducts against which that punishment is effectively applied. The effectiveness of the death penalty in African indigenous laws requires that the analysis be first based on real facts.

There is still the need to establish whether or not society distinguished crimes from civil wrongs, individual criminal responsibility from collective criminal responsibility and capital crimes from ordinary crimes. In doing so, it is worth noting the presence of numerous indigenous practices that threatened human life without meeting the criterion of a legal punishment. There is only one country where the existence of the death penalty before foreign legal influences is unchallenged, Egypt. However, the methods of execution in Egypt might lead to confusion between the death penalty and ritual murders.

2.1.1. Evidencing the death penalty in African indigenous laws

After identifying crimes that outraged society to the extent that they justified public intervention, the next issue will be whether, before foreign legal influences, Africans resorted to the death penalty to punish those crimes.

⁵² Ditlev Tamm, *Roman Law and European Legal History*, Copenhagen: Djof Publishing, 1997, at p.157.

2.1.1.1. Capital crimes

The nonexistence of crimes in indigenous laws is based on a wrongful comparison between modern European law and African indigenous laws that suggests that European law has always categorized crimes, their definitions and punishments, while African indigenous laws aimed at the diametrically opposite purpose of maintaining the social equilibrium.⁵³ However, like other ancient laws, African indigenous laws distinguished between those acts that disturbed the social equilibrium and fell within the scope of private law and those that negatively affected the conditions that made possible the maintenance of that equilibrium and which were part of public law.⁵⁴

Private law embraces all kinds of misconducts that are corrected without community intervention. Here the law of compensation is unavoidable. Theft of another's property is an example of private law because the offender only bears the responsibility of repairing the breach of equilibrium. Public law deals with grave misdeeds deemed anti-social due to their nature and cumulative effects. There is more to this than disturbing the social equilibrium. The whole community is interested. Offences affect the relationships between different groups or individuals or they endanger human life. Poisoning is a public offence because it threatens the security interests of the entire community.⁵⁵

The problem with this categorisation is still that African indigenous laws are only judged on the base of the social equilibrium that the law aims to maintain by any means. It seems as if the lack of distinction between criminal law and civil law in African indigenous laws implies confusion between crimes and civil wrongs.⁵⁶ However, this simplistic view overlooks the fact that before 1800, "the modern distinction between the criminal and civil aspects of a wrongful act, and thus between punishment and compensation, was foreign to almost all European legal systems".⁵⁷ In England, for example, the principle of justice was restitution rather than retribution.

⁵³ Primitive European law made no difference between civil law and criminal law. Ditlev Tamm, *Ibid.*

⁵⁴ *Supra* note 46.

⁵⁵ *Ibid.*

⁵⁶ *Supra* note 40, at pp.110-114.

⁵⁷ Bruce Lenman and Geoffrey Parker, "The State, the Community and the Criminal Law in Early Modern Europe", in V.A.C. Gatrell et al., eds., *Crime and the Law: The Social History of Crime in Western Europe since 1500*, London: Europa Publications Limited, 1980, pp.11-48, at p. 12.

Compensation was the most proper remedy for most wrongs committed and there was no police and no prisons. A criminal, however, caught red-handed was sentenced at once. Sentences of imprisonment were unknown; the punishment for theft was mutilation or the payment of compensation, while murder was avenged by death and in other homicides by compensation.⁵⁸

It is evident that crimes and their punishments have preceded their definitions. Previously, society did not define principles of criminal law before dealing with the daily misbehaviour threatening its existence and a peaceful coexistence of its members.⁵⁹ Therefore what matters is not the nomenclature of the crimes but the extent to which they are recognised and punished as crimes. The recognition and the sanction of prohibited conduct ultimately imply a classificatory criterion within a particular society.⁶⁰

By the mid-nineteenth century many African states had catalogued crimes and punishments.⁶¹ Crimes were acts whose nature and cumulative effects threatened the collective sentiment and menaced the security interest of the entire community.⁶² In Nigeria, these were witchcraft, incest, divulging the secrets of some religions and political organisations, pronouncing a curse, manslaughter, malicious wounding and poisoning.⁶³ In Ghana, the list of capital crimes varied from place to place and there was much difference in the degree to which the death penalty was applied. These crimes primarily included referring to the death of the King, not giving way to the wives of the King, witchcraft and sorcery. Other conducts that were sometimes punishable by death were growing hairs long (except for priests), mishandling of knives and public statement of the refusal to eat.⁶⁴

Among the AmaXosa of South Africa, crimes were listed as follows: political offences, sorcery and crimes against tribesmen.⁶⁵ In general, the Bantu recognised five serious crimes: homicide, witchcraft, theft, adultery and incest to which in Uganda they added

⁵⁸ Herbert R. Hone, "The Native of Uganda and the Criminal Law", (1939) 21 *Journal of Comparative Legislation and International Law* 186.

⁵⁹ Nyabirungu Mwene Songa, *Droit pénal général Zaïrois*, Kinshasa: DES, 1995, at p.21.

⁶⁰ *Supra* note 40, at p.121.

⁶¹ *Supra* note 58.

⁶² *Supra* note 46.

⁶³ *Ibid.*

⁶⁴ Clifford Williams, "Asante: Human Sacrifice or Capital Punishment? An Assessment of the Period 1807-1874", (1988) 21 *International Journal of African Historical Studies* 440.

⁶⁵ *Supra* note 40, at p.113.

sexual offences against nature.⁶⁶ Somali customary law provides the most comprehensive list of offences: homicide, assault, torture, rape, accidental wounding, kidnapping, abduction, robbery, burglary, theft, arson, extortion and fraud.⁶⁷ Jan Vansina lists Kuba violent crimes as follow: involuntary homicide, suicide (including involuntary homicide by relatives), simple injuries, injuries inflicted by a weapon of war and murder.⁶⁸

Depending on their nature and seriousness, these offences fall into one of five categories:

- Political offences: treason, divulging religious secrets or political secrets
- Offences committed with preternatural powers: witchcraft, sorcery, poisoning and pronouncing a curse
- Offences against human life: homicides
- Offences against bodily integrity: malicious injury
- Sexual offences: adultery, incest and sexual offences against nature (bestiality)

2.1.1.2. The reality of the death penalty in African indigenous laws

There is no consensus as to whether the death penalty existed and if it did, whether it was imposed for these offences. Regional disparities led researchers to equate some tribal laws with African law. Ross Kinemo describes 'African' indigenous law as the most humanitarian ever because the offender's misbehaviour was redressed without crushing his humaneness. Inhuman and degrading punishments were not used. After browsing the errors, cruelty and barbaric attitudes accompanying the imposition and execution of the death penalty, he submits that " Dr Junod... said ... that in Africa the idea of an executioner appointed by the State and paid for the job, is traditionally unknown..."⁶⁹ The finding was that hanging was brought to Africa through colonisation. The African is humanitarian by nature; therefore he had never witnessed hanging.⁷⁰

Justice Sachs dilutes this absolutism by stating that the African indigenous law did not encompass the death penalty for murder so long it was not provoked by witchcraft or related to military offences. He recalls also that in cases of witchcraft and assault on the

⁶⁶ *Ibid.*, at pp.113-116.

⁶⁷ *Supra* note 42, at p.78.

⁶⁸ Jan Vansina, "A Traditional Legal System: The Kuba", in Hilda Kuper and Leo Kuper, eds., *African Law: Adaptation and Development*, Berkeley: University of California Press, 1965, at p. 112.

⁶⁹ *Supra* note 12, at p.23.

⁷⁰ *Ibid.*

king's wives, summary executions were carried out as a result of spontaneous and irrational forms of a frenzied crowd's behaviour.⁷¹ Death sentences were therefore nonexistent in the Kingdoms of Tsonga, Zulu, Sotho and Barolong. It is further stated that among the Zulu, the white ruler replaced cattle fines with the death penalty in murder cases.⁷²

Both Ross Kinemo and Justice Sachs have pointed to 'African' indigenous law. Justice Sachs's research dealt with Southern (mainly South African) Bantu tribes whereas Ross Kinemo quoted Jomo Kenyatta's *Facing Mount Kenya* and Junod's 1966 conference paper on Penal problems in East Africa. Undoubtedly, the two were speaking on behalf of Bantu law in their respective areas. To equate Bantu indigenous law with African indigenous law would be a misleading inference.

It is submitted that in South Africa, "not all the Bantu tribes treat murder and culpable homicide in the same way..."⁷³ The death penalty existed among the Tswana and the Venda.⁷⁴ Among the Zulu a murderer was in a grave danger of a death sentence.⁷⁵ The Nguni, Venda and Tswana punished culpable homicide with a fine that amounted to a girl or the payment of *lobola* (dowry) among the Shangana-Tonga. The Venda imposed ostracism as an alternative to the death penalty.⁷⁶ The Tswana imposed no punishment for accidental homicide.⁷⁷

Many Bantu tribes that made a distinction between intent in homicides did so to distinguish between punishments for deliberate murder and accidental homicide based on the offender's moral blameworthiness. May be this is the reason that led some to associate the death penalty with the development of indigenous criminal laws.⁷⁸ There is no record that whether or not Dr Junod had changed his views in 1966. He had stated in 1962 that among the Tsonga, a Bantu tribe of South-Eastern Africa coast, "if the murder was

⁷¹ *S v. Makwanyane and Another*, *Supra* note 11, at para 381B per Justice Sachs.

⁷² *Ibid.*, at para 378 F per Justice Sachs.

⁷³ Isaac Schapera, *The Bantu Speaking Tribes of South Africa*, London: George Routledge and Sons, 1937, at p.209.

⁷⁴ *Ibid.*

⁷⁵ Ellen Jensen Krige, *The Social System of the Zulus*, Pietermaritzburg: Shuter and Shooter, 1936, at p.228.

⁷⁶ *Supra* note 73.

⁷⁷ *Ibid.*, at p.210.

⁷⁸ *Supra* note 40, at p.116. See also Herbert R. Hone, *Supra* note 58, at p.180.

deliberate, it is punished by death. At least such was the law in former times, when Native still possessed the power of condemning to death”.⁷⁹

It follows that the death penalty was a reality in a large part of Africa prior to foreign legal influences.

Traditionally a variety of punishments were used for various crimes. In ascending order of severity, they can be listed as a reprimand, removal from home, restriction to an area, a fine, corporal punishment, confiscation or destruction of property, banishment and death. Imprisonment or other form of taking away liberty was unknown. The *talio* principle was an important principle...⁸⁰

This sentence was applied for redressing the injury suffered by the society at large; its application corresponded to both retributive justice and restorative justice. While deterrence is the most powerful modern argument for retaining the death penalty, Hone stresses that

[w]here it [the death penalty] was exacted in pursuance of primitive native law, the fundamental justification was retribution and the restoration of balance, rather than that the public conscience was shocked into infliction of the extreme penalty as a warning and deterrent to lawless persons and as a protection to society at large.⁸¹

At times, the death penalty was however resorted to as a deterrent or preventive punishment. Speaking for Teso, Basoga, Bagishu, Banyoro and Baganda of Uganda, Hone reminds us that these communities were so shocked by witchcraft, incest and sexual offences against nature to the extent that they all exacted the death penalty for such crimes as the only remedy.⁸² Kamba of Kenya resorted also to the death penalty for offenders that Olewale calls “undesirable members of the community”.⁸³ They were usually executed in a bush but, by the order of the ‘King’ole’, they could also be “hanged by the

⁷⁹ Henri A. Junod, *The Life of a South African Tribe*, New York: University Book Inc., 1962, at p.442.

⁸⁰ *Supra* note 26. See also James S. Read, *Supra* note 26.

⁸¹ *Supra* note 58, at p.181.

⁸² *Ibid.*, at p.182. Critics on this misconception are generally summarized by Elias T. Olewale, *Supra* note 40, at pp.110-129.

⁸³ Elias T. Olewale, *Ibid.*, at p.113.

neck from some tree in a public thoroughfare as a warning to other potential wrongdoers”.⁸⁴

Boasting the humanitarian nature of Kuba law compared to other Bantu laws, Jan Vansina writes that “the Kuba have gone further in this respect [of limitation of use of physical force] than many other African states, including even the great lakes kingdoms, where feuds are still allowed provided the kings have given their permission to the lineage of the victim”.⁸⁵

In wondering whether the Kuba law was per se compensatory or retributive, he finds that “Kuba political structure has to react vigorously [against violent crimes], for the spirit of the feud-the principle of life for life-is not dead”.⁸⁶ For most of the Bantu tribes in Uganda, deliberate killing was also dealt with using the death penalty.⁸⁷

Contrary to the opinion that the death penalty and banishment were non-existent prior to colonisation,⁸⁸ it was an acknowledged sentence beside banishment, compensation, reprimand and destruction of property.⁸⁹ Therefore, the nonexistence of the death penalty in some areas for some offences cannot be used to make a general inference about Africa. It is inaccurate to accuse the colonizer of introducing the death penalty to Africans. In many parts of Africa, the colonizer only legalised and extended an existing practice and introduced new methods of execution.

Thus, on the basis of people’s culture and the law in force in their area, cases of actual application of the death penalty should be distinguished from those where there was no death penalty. This allows the identification of the nature of law itself as applied in each area. Bantu law which was deemed death penalty free is better qualified as a quasi-death penalty free law. In fact many Bantu laws imposed the death penalty. However, not all cases involving death should lead to the conclusion that there was a death sentence in place.

⁸⁴ *Ibid.*, at p.113.

⁸⁵ *Supra* note 68.

⁸⁶ *Ibid.*

⁸⁷ *Supra* note 58. See also Georges B.N. Ayittey, *Supra* note 42, at p.72

⁸⁸ *S v Makwanyane and Another*, *Supra* note 11, at para 377 D-E, per Justice Sachs.

⁸⁹ *Supra* note 26.

2.1.2. The practice of the death penalty in African indigenous laws

The death penalty was a relevant sentence for political offences, offences committed with the aid of supernatural powers, homicides, assault and sexual offences. In most centralised kingdoms, there were formally settled courts that regularly pronounced the death penalty. Every offence engages the individual offender's criminal responsibility. He is the focus of the sentence and the onus is on him to raise a criminal defences. Group intervention is justified in non harmful sanctions and only if the offender cannot afford the amount of compensation. The collectiveness of the law, which was so important for social harmony, does not exclude individual obligations. There cannot be a death penalty without individual criminal responsibility. In cases where a death sentence, mutilation or any corporal punishment is meted out, "the first and only subject to the particular punishment is the criminal himself".⁹⁰

2.1.2.1. Political offences

In Sierra Leone, the crime of treason as a political offence was punished with a death sentence.⁹¹ The Akan of Ghana and Cote d'Ivoire punished treason with a death sentence. Treason included breaches of the oath of allegiance to a ruler or the cowardice of a war leader in battle.⁹² The same applied to the Ba-Mbala people of the Democratic Republic of Congo, the Banyarwanda and the Barundi. In the Kingdoms of Rwanda and Burundi, the Mwami tried treason himself. The supreme council sitting at the Mwami's bench (*Abacamanza*) tried other serious offences such as murder.⁹³ In Rwanda, persons convicted of political crimes were hurled on the rock of *Nkuli* (at the time of Mwami Rwabugiri) or abandoned to wild beasts in the valley of *rwabayanga* (*Urwobo rwa Bayanga*).⁹⁴ In Southern African, military offences were generally punished with death penalty in the harshest way, while an assault on the King's wives called for a summary execution.⁹⁵

⁹⁰ *Supra* note 46, at p.90.

⁹¹ *Supra* note 42, at p.80.

⁹² *Ibid.*, at p.82.

⁹³ Augustin Buzora, *La Peine de Mort en Droit Rwandais*, Butare: Faculté de Droit, 1990, at p.8; Jan Vansina, *Les tribus Ba-Kuba et les peuplades apparentées*, London: International African Institute, 1954, at p.28; René Bourgeois, *Banyarwanda et Barundi: La coutume*, Brussels: Institut Royal Colonial Belge, 1954, at p.397.

⁹⁴ René Bourgeois, *Ibid.*, at p.398.

⁹⁵ *S v. Makwanyane and Another*, *Supra* note 11, at para 381B per Justice Sachs.

The Bamoum of Cameroon had a very long list of *lèse majesté* offences: the use of goods belonging to the King like goats or wine, eating buffalo meats, the illegal use of the Kingdom's insignia, any kind of behaviour from which lack of allegiance to the King could be inferred, friendships with the King's enemy, a long stay in the village, gifts to foreigners, commercial activities outside the Kingdom without the King's authorisation, defaming the King, adultery with the King's wives or lustful contemplation of the king's wives. All these offences incurred a death sentence.⁹⁶

A representative of the King or of the King's wives would publicly accuse the offender before the *Mitngu*. Cases of murder and adultery were never punished by compensation. Death was the appropriate sentence. Rebels were sentenced to death, their village was destroyed and their people dispersed.⁹⁷

The death penalty was a means of protecting the King's exclusive rights, his property and his wives and a weapon for combating any assumed or real opposition against his ruling.⁹⁸ Until the last King Njoya (early twentieth century), half *Titamfom*, the highest function in the Palace and deputy to the King, had been executed for political reasons.⁹⁹

Among the Zulu, any petty offence against the King was a capital crime. Entering *Isigodlo* (the King's wives apartments) or coughing, spitting or sneezing while the King was taking his lunch meant a death sentence.¹⁰⁰ A case was reported where King Shaka surprised his soldiers in sexual intercourse with the girls of the *Isigodlo*. The sentence was immediate. Nearly 175 boys and girls were sentenced to death and executed.¹⁰¹

It was also an offence to criticize rulers. In addition to their political position, Kings also held religious positions. Their authority derived from God. The Dagaaba (Ghana and Burkina Faso), as other Africans, held that law could not be separated from morality, ethics, religion and social norms. There was thought to be no way of invoking law and ignoring its moral or utilitarian qualities. It is for this reason that the system belonged to the living, individually and collectively, the dead and supernatural forces. This collective ownership

⁹⁶ Claude Tardits, *Le royaume Bamoum*, Paris: Armand Colin, 1980, at p.825.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*, at p.826

⁹⁹ *Ibid.*, at p.935.

¹⁰⁰ *Supra* note 75, at p.229.

¹⁰¹ *Ibid.*, at p.223.

guaranteed that the legal system conformed to moral and religious norms.¹⁰² Therefore, any disobedience or conspiracy against the ruler was a crime against society and constituted blasphemy. “The position of the rulers and authorities is similar throughout Africa...In the past; execution was the punishment for recalcitrant against the rulers... The kings were fathers, judges, counsellors and priests”.¹⁰³

Despotism was also a capital crime. The chief ruled for life as long as he showed no tendency towards dictatorship and tyranny. Otherwise, various punishments including the death penalty were applied. Despotism, dictatorship or tyranny were expressed through the chief’s life-style, decisions and treatment of his people: dispossessing people of their cattle, unjustified killing, waging war, seizing young girls of the tribe, etc. “In such cases, when it becomes evident that the ethnic group was discontent and not likely to tolerate such oppression much longer, the fathers (or advisers) ...would denounce the chief for his wrongdoings... A chief so deposed would be murdered...”¹⁰⁴

2.1.2.2. Supernatural crimes

Witchcraft and sorcery were themselves formal offences. Witches and sorceress were punished even if the result of their act did not qualify as an offence. This is a very relevant aspect of indigenous criminal laws. It further demonstrates that Africans distinguished formal offences from material offences. The latter exist when the result of the act is an offence. A witch was prosecuted and perhaps executed even when the victim did not die. A *contrario*, a person could not be prosecuted for murder if the injured party did not die or if death resulted from other causes such as neglecting to use available and appropriate medicines for his wounds. By way of legal logic and argumentation, Africans differentiated between murder and culpable homicide and theories of causation.¹⁰⁵

¹⁰² Yeplaala Kojo, “Circular Arguments and Self-Fulfilling Definition: ‘Statelessness’ and the Dagaaba”, (1983) 10 *History in Africa* 349-385.

¹⁰³ “Crimes and African Traditional Religions”, at www.afrikaworld.net/afrel/atr-crime.htm (accessed 16 May 2008).

¹⁰⁴ *Supra* note 42, at p.171

¹⁰⁵ Nkambo P.J. Mugerwa, “Status, Responsibility, and Liability: A Comparative Study of Two Types of Society in Uganda”, in Gluckman Max *et al.*, eds., *Ideas and Procedures in African Customary Law*, London: Oxford University Press, 1969, at p.284. See also *S v. Makwanyane and Another*, *Supra* note 11, at para 376A-B per Justice Sachs.

Witchcraft is different from sorcery, although they resemble each other and are often confused. The distinction lies in the fact that sorcery involves practising a magic that is illicit and immoral, while witchcraft is “a manifestation that is inherent in persons having a supposed psychic emanation from witchcraft-substance, a harmful material, thought to be present in the bodies of certain persons, that may be diagnosed by oracles in the living and discovered by autopsy in the dead.”¹⁰⁶ Scientifically and objectively, the process of witchcraft does not exist, although it is always dramatically described. But sorcery in which people use evil magic to harm others actually exists. However, false accusations of it are doubtlessly often made.¹⁰⁷

Although the killing of crocodile was not prohibited among the Banyarwanda, it remained a serious offence to be surprised cutting its skin or its pieces. The offender was immediately convicted of sorcery against the King. In fact, it is said that the poison that the *Abiru*, who had the praised function of keeping royal secrets, nominating and enthroning the monarch, gave to the King when he had his first gray hair was made from crocodile bile or gall. This product was highly toxic and had the properties of killing immediately.¹⁰⁸

Witchcraft and sorcery were and are still used in so-called “hired killings,” which occur on a very large scale in Africa. Many aggrieved persons frequently seek spells or potions from witch doctors with the intention of causing sickness or death. Relatives of the deceased will also pay frequent visits to diviners to discover who is bewitching them. The belief that someone is behind it provides a motive for further killing.¹⁰⁹

The Nandi sentenced a repeat-offender of witchcraft to death. If the witch was a woman the death would sometimes be preceded by torture. Women who were suspected of witchcraft were warned however. “An incorrigible witch... might ... be executed”.¹¹⁰ This was not a summary execution because “executions were carried into effect on the orders of the *kokwet* (council of elders of the tribe) by the condemned’s relatives”.¹¹¹ The same applies to Kapchhepsaos, Kapsamechei, Kamwagei, Kapchemuri, Kametere and Kapketui

¹⁰⁶ Simon Ottenberg and Phoebe Ottenberg, *Cultures and Societies of Africa*, New York: Random House, 1960, at p.63.

¹⁰⁷ *Ibid.*

¹⁰⁸ Georges Sandrat, *Cours de droit coutumier*, Partie II, Astrida: Groupe Scolaire, 1951, at p.66.

¹⁰⁹ Williams Clifford, *An Introduction to African Criminology*, Nairobi: Oxford University Press, 1974, at p.121.

¹¹⁰ Geoffrey S. Snell, *Nandi Customary Law*, Nairobi: East African Literature Bureau, 1954, at p.77.

¹¹¹ *Ibid.*

clans.¹¹² The practice is different from that of Laibons people. The Laibons community at large took part in the execution. Their condemned were executed by being clubbed to death.¹¹³

Witches known as *Mapamosavy* were much feared in Madagascar. It is believed that they were born witches and voluntarily harmed whomever they wanted. Bad spirits imposed this role on them. Although the community felt they were not primarily responsible for their fate, everything was done to execute them as soon as possible and in the most inhuman way.¹¹⁴

In the Democratic Republic of Congo, the Kuba had a very peculiar way of dealing with witchcraft. Most cases of murder were connected with witchcraft. They were tried by the village court. The poison ordeal was the only legal instrument restricted to this offence. After the accusation was formally voiced, the accused had to drink a poison. The guilty party died and the innocent remained.¹¹⁵ The Komo differentiated between involuntary and accidental homicides, which were punished by compensation except when connected with sorcery. When connected with sorcery, the offender was executed and the corpse thrown into a river or in a bush.¹¹⁶

In other areas, witches were summarily executed unless the chief or the public conscience opposed the execution. Olewale points out that "African law permit[ed] the summary execution of the so called sorcerer or witch by the social group".¹¹⁷ Among the Nguni of South Africa, capital punishment was practically limited to cases of suspected witchcraft. The sentence was spontaneously carried out after the diviner had established a case against the offender.¹¹⁸

Cursing was also a supernatural offence. This is one of the Kikuyu traditions that caused panic when elders pronounced it. Very recently Kikuyu elders pronounced a curse against whoever would devastate the sacred hill of Karima. It is traditionally believed that God uses

¹¹² *Ibid.*, at p.76.

¹¹³ *Ibid.*

¹¹⁴ Raymond Decay, *Mœurs et coutumes des Malgaches*, Paris: Payot, 1951, at p.203.

¹¹⁵ *Supra* note 68, at pp.113-114

¹¹⁶ Hans Van Geluwe, *Les Bira et les peuplades limitrophes*, London: International African Institute, 1957, at p.129.

¹¹⁷ *Supra* note 40, at p.127.

¹¹⁸ *S v. Makwanyane and Another*, *Supra* note 11, at para 377 C per Justice Sachs.

Karima as his stepping-stone on his walk to Mountain Kenya each day.¹¹⁹ For the Bali of the Democratic Republic of Congo, pronouncing a curse with bad side effects was a capital crime. The offender was tortured during the process of execution.¹²⁰

2.1.2.3. Homicides

The political structure of the state determined the way that homicide cases were dealt with. In organised States, the death penalty was a punishment for very limited offences and often imposed after a fair trial.

In the Democratic Republic of Congo, the death penalty was rare for murder but not absent among the Kongo.¹²¹ For the Ba-Mbala and Kuba, the Supreme Court could impose the death sentence for murder. The court clearly differentiated between accidental homicide and voluntary homicide. The role of the King was to exercise his royal rights in granting mercy as only he could take a human life. He was not directly involved in the judicial process.¹²²

If the judgment was upheld because the King had turned down the appeal of the *Mbeem* (headman of the culprit's village), who would beg the King to spare the life, the condemned would immediately be put in the area where the *Nkunkum* were chosen. *Nkunkum* were enslaved criminals on death row who were sacrificed at the King's death. *Nkunkum* waited for an execution that was not eventual but real. The length of wait depended on the longevity of the King. Each King's sickness and each tribal war increased the expectation of the execution, which might never happen if the *Nkunkum* died naturally before the King.¹²³

If the offender was not *Nkukum* and the death sentence was confirmed, special officers among the King's slaves accompanied the condemned to his home for a farewell. The royal decision and the death sentence were demonstrated to the headman of the village through symbolic objects and gestures. Afterwards, the condemned was urged to become intoxicated with palm wine and to hang himself in the forest. Execution of the condemned

¹¹⁹ Nick Wadhams, "Kenyan Tribe Punishes Developers with Curse", *The Telegraph*, 27 October 2007.

¹²⁰ Hans Van Geluwe, *Les Bali et les peuplades apparentées (Ndaka-Mbo-Beke-Lika-Budu-Nyari)*, London: International African Institute, 1960, at p.90.

¹²¹ Marcel Soret, *Les Kongo nord occidentaux*, Paris: P.U.F., 1959, at p.85.

¹²² *Supra* note 68. See also Jan Vansina, *Supra* note 93.

¹²³ *Supra* note 68, at p. 106 and 112.

was an eventuality and not a widespread principle. In addition, those in the lineage of the culprit were required to hand over a slave in compensation.¹²⁴

For the Banyoro of Uganda, the death penalty was the only recognised sentence for murder and was regularly carried out. Compensation was not an option in such cases. This practice differed from that of their neighbours, the Baganda where a death sentence was imposed when the deceased's relatives demanded it as a punishment for murder (itself rare).¹²⁵ The payment of blood-money was the general principle among the Baganda.¹²⁶ The Baganda knew that the death penalty was not a deterrent punishment and found retribution unnecessary.

The *lex talionis* existed among the Banyarwanda and Barundi. Murders were often sentenced to death by the Mwami's bench (*Abacamanza*). The Mwami could exercise his right of mercy and overturn the Supreme Council's sentence, commuting it to compensation.¹²⁷ In cases where the offender had fled, the victim's clan had the right of vengeance and could kill someone from the murderer's family (*guhora*). The blood feud would continue until the Mwami decided to end the matter through compensation.¹²⁸

In the Bamoum Kingdom of Cameroon, the *Mitngu* was the only court that could impose the death penalty, should the King have no objection. The death sentence was in principle imposed for the crime of murder. The field where the crime was committed was confiscated.¹²⁹ However a murder committed by a father against his son, between cousins, by the King's son or wife, except against her co-wives, and involuntary homicides were not capital crimes.¹³⁰

¹²⁴ *Ibid.*

¹²⁵ For example, Nkambo P.J. Mugerwa, *Supra* note 105, makes no reference at all to intentional or voluntary homicides in Buganda.

¹²⁶ *Supra* note 58, at pp. 183-184.

¹²⁷ René Bourgeois, *Supra* note 93.

¹²⁸ *Ibid.*

¹²⁹ *Supra* note 96, at p.824.

¹³⁰ *Ibid.*, at p.825.

2.1.2.4 Sexual offences

Among the Bantu, compensation was generally the punishment for adultery. In the Democratic Republic of Congo, the Bira¹³¹ and the Mangbetu imposed the death sentence on male adulterers.¹³² Among the North-Western Laadi, such men were buried alive at a market place. The offender's family carried out the execution.¹³³ For the Balese, the woman was executed whatever be the circumstances whereas the co-offender paid a fine of one goat. The Balese had always handed out death sentences to women convicted of adultery.¹³⁴ The harshest punishment for adultery existed among the Budu. There were two alternative punishments to the death sentence, namely castration and phallus ablation for male adulterers. Women convicted of adultery were sentenced to the burning of their genital parts.¹³⁵

In Uganda, the Baganda inflicted the death sentence for adultery. The woman was compelled by torture to name her seducer by indicating some peculiar marks on his body when the co-offender had denied the fact. An adulterer or *mussi* (murderer) was sentenced to death when discovered.¹³⁶ Adulterers with upper class women were often fully armed and killed those who surprised them. Therefore, a principle was drawn that all adulterers were potential murderers and deserved a death sentence.¹³⁷ A slave who committed adultery with his master's wife was invariably put to death.¹³⁸ Compensation could be resorted to mainly when the offence involved non-slaves from the peasant class. The offender was also maimed; he had to lose a limb and to have an eye gouged out to show to the public that he was convicted of such an offence. Among the Banyoro, the woman ran the risk of a death sentence if she committed adultery with a stranger. Adultery with one of her husband's relatives was praised as an act of hospitality.¹³⁹

¹³¹ It should be reminded that they are not Bantu people. See *Infra* note 220.

¹³² *Supra* note 116.

¹³³ *Supra* note 121, at p.86.

¹³⁴ Hans Van Geluwe, *Mamvu-Mangutu et Balese-Mvuba*, London: International African Institute, 1957, at p.150.

¹³⁵ *Supra* note 120.

¹³⁶ *Supra* note 105, at p.283.

¹³⁷ *Supra* note 58, at p.184.

¹³⁸ *Supra* note 105, at p.283.

¹³⁹ *Supra* note 58, at p.183.

The Asante (or Ashanti) of Ghana punished adultery by what they called the dance of death (*atopere-goru*), which resembled to a sacrificial capital punishment.¹⁴⁰ In Cameroon, the laws regulating adultery were exceedingly severe. The death penalty was seen as the right punishment. A King's wife who committed adultery was sentenced to death by flogging.¹⁴¹ In West Africa, adultery was simultaneously a religious and criminal offence. It was most commonly punished by death. The deceased was not mourned as capital punishment was a deserved punishment.¹⁴² The Ife (Nigeria) sacred scriptures that have influenced the Yoruba and most of the West African coast countries (Benin, Sierra Leone, and some parts of Ghana) warn against adultery:

She destroys the members of the household of the husband,
 She destroys the members of the household of the concubine.
 Thereafter she destroys herself
 And goes the far journey to heaven
 So declares the adulterous oracle of the woman who is servant of death.¹⁴³

In Southern Africa, King Gaika only abolished the death penalty for adultery in 1820. Prior to that date, a woman caught in adultery was executed.¹⁴⁴

In Rwanda, the law was particularly severe for girls. A girl's body and virginity were sacred matters. The law provided already that she was a diviner (*Umukobwa ni Nyampinga*). This was the reason that justified the execution of the boy when the mother gave birth to twins of different sex.¹⁴⁵ Therefore, a pre-marriage pregnancy (*ikinyendaro*), or girls whose breasts were not properly developed (*imhenebere*) or who did not menstruate at their age of puberty (*imha*) or who were far beyond the age of marriage and could not get a lover due to ugliness or misbehaviour (*igishubaziko*) were sentenced to death by drowning (*kwohera*).¹⁴⁶ Only the court could order this sentence. Royal officials had the task of

¹⁴⁰ *Supra* note 64, at p.437.

¹⁴¹ Mary H. Kingsley, *Travel in West Africa (Congo Français, Corisco and Cameroons)*, London: MacMillan and Co, 1897, at p.255.

¹⁴² *Ibid.* See also Elias T. Olewale, *Supra* note 40, at p.136.

¹⁴³ *Supra* note 103. See also Claude Tardits, *Supra* note 96, at p.829.

¹⁴⁴ *Supra* note 40, at p.138.

¹⁴⁵ Alexis Kagame, *Les organisations socio-familiales de l'ancien Rwanda*, Brussels: Académie Royale des Sciences Coloniales, 1954, at p.242.

¹⁴⁶ *Ibid.*, at pp.299-301.

carrying it out. The abomination would affect the entire country if the girl was not executed.¹⁴⁷

Among the Nguni, Venda, Shangana-Tonga and Tswana of South Africa, incest, bestiality and other perverse sexual aberrations were considered ill-omened actions deserving of a death sentence.¹⁴⁸ The Baganda sentenced sexual offences against nature to death as well.¹⁴⁹ There is no clear indication of what the Baganda classified as a sexual act against nature. Among these would have been homosexuality, obscenities and more than likely bestiality.¹⁵⁰

Incest was not a great concern in some African societies. Joseph Ki-Zerbo states that the Egyptian Pharaohs freely practiced incest.¹⁵¹ Elsewhere, it was an immoral act combated by severe punishments and taboos. Two reasons are provided for this. First, family unity and the basis of society were threatened when a father and his son shared the wife, when a mother and her daughter shared the husband or a girl was shared between her father and brother. This created tension among individuals and within the community at large. Exogamous marriage strengthened the family, extended its interests and security and promoted economic development. The second reason, 'the remarkable absence of erotic feeling' between relatives seems doubtful. The erotic argument implies that all cases of incest amounted to rape, which is not always the case.¹⁵²

Incest was a capital crime among the Bantu of Kavirondo in Tanzania¹⁵³ and the Baganda.¹⁵⁴ There is no justification for capital punishment for incest among these Bantu who punished murder through compensation as it shall be seen later.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Supra* note 73, at p.212.

¹⁴⁹ *Supra* note 58, at p.182.

¹⁵⁰ *Supra* note 109, at p.127.

¹⁵¹ Joseph Ki-Zerbo, *Histoire de l'Afrique noire*, Paris: Hatier, 1972, at p.75.

¹⁵² *Supra* note 109, at pp.125-126.

¹⁵³ *Supra* note 40, at p.113.

¹⁵⁴ *Supra* note 109, at p.124. See also Herbert R. Hone, *Supra* note 58, at p.182.

2.1.2.5. Dangerous and habitual offenders

The death penalty was imposed for heinous and shocking crimes or incorrigible criminals, even among indigenous people who resorted to compensation for murder.¹⁵⁵

The Baganda had aversion to theft. A man caught red-handed when stealing food was killed on the spot and the stolen food tied around his neck. His body was thrown into the road as a public message about the grounds of his execution. If he broke into a house, his relatives would disown him and were prevented to bury his body. Although a modern mind may see this as an extrajudicial execution, it was a punishment so long the public conscience was shocked and local leaders accepted the carrying out of the execution. It became an arbitrary killing when chiefs and the community did not support the execution.¹⁵⁶ The Banyarwanda and Barundi allowed the execution of a thief caught in the act without further consequences. Cattle and food thieves during famine were crucified or executed by impalement.¹⁵⁷

There is no easily understandable justification for the death penalty for food theft when murder was punished by compensation in Buganda. Theft was not even an offence in many African indigenous laws. This was the best example of a private wrong in Nigerian indigenous law.¹⁵⁸ The Odu-Ogbe Ale oracle made it rather a religious offence.¹⁵⁹ There is no indication that theft among the Baganda was more widespread than among other Ugandans so as to deserve summary execution. Rather, the Karamoja tribes (Karamojong) were the famous thieves in Uganda to the extent that early after independence, Parliament and the Minister of Justice passed legislation and regulations specifically related to Karamoja thieves.¹⁶⁰

¹⁵⁵ Herbert R. Hone, *Ibid.*, at p.181. See also *Rex v. Petero Mukasa and Katabazi Yamumbi* (1944) 11E.A.P.L.R. 115.

¹⁵⁶ *Supra* note 105, at p.283. See also Herbert R. Hone, *Supra* note 58, at p.184. For illegal summary executions see *Infra*, at p.44.

¹⁵⁷ René Bourgeois, *Supra* note 93.

¹⁵⁸ *Supra* note 46.

¹⁵⁹ *Supra* note 103.

¹⁶⁰ The Administration (Karamoja) Act 1963 as amended by The Administration (Karamoja) (Amendment) and The Administration of Justice (Karamoja) Act 1964, Karamoja (Maintenance of Public Order) Regulations, 1964 and The Restitution of Cattle and payment of Blood-Money

Apparently theft became a serious offence during the Kabaka dynasty.¹⁶¹ In the African mind, theft is immoral and is perceived as a sign of laziness that every tribesman must combat. Stealing tarnishes the entire family's reputation and integrity. Africans strived to maintain a good name and a good image. Even a family without a very good reputation would not like the disgrace of theft. A theft is always recalled when other family members or future generations are considered for positions or titles of honour or when demanding a girl in marriage from another family. A man who steals foods instead of earning it by the work of his hand corrupts the youth and dishonours his clan. This was the reason to treat differently male thieves and female thieves among the Baganda. The female simply paid a fine.¹⁶² We remain however unconvinced that death penalty aimed to combat the laziness and immorality associated with theft.

The Bantu of Kavirondo would not execute a habitual offender directly. They put him in a situation in which he could be rehabilitated or killed by a stranger. The offender was placed outside the legal protection of the tribe. Anyone could kill him if they caught him committing his next offence.¹⁶³ The Nandi had no death penalty except for incorrigible habitual offenders. The offender's family was also required to blood-money to the victim's clan.¹⁶⁴

2.1.3 The specificity of the Egyptian case

The richness of the Egyptian civilization goes back to antiquity and Egypt remains a country with unprecedented cultural depth and unique features.¹⁶⁵ Even prior to the prosperous period of the Pharaohs, the principal legal branches in Egypt had attained a higher level of

(Procedures) Regulations, 1965 respectively in Statutory Instruments no265 of 1964 and 101 of 1965 as quoted by Nkambo P.J. Mugerwa, *Supra* note 105, at pp.286- 287.

¹⁶¹ *Supra* note 58, at p. 184.

¹⁶² *Supra* note 105, at p.283.

¹⁶³ Gunther Wagner, "The Political Organization of the Bantu of Kavirondo", in Meyer Fortes and Edward Evans-Pritchard, eds., *African political systems*, London: Oxford University Press, 1970, at p.219.

¹⁶⁴ *Supra* note 110, at p.63.

¹⁶⁵ Ivan Hrbek, "Egypt, Nubia and the Eastern Desert", in Roland Oliver, ed., *The Cambridge History of Africa: From c.1050 to c.1600*, London, New York-Melbourne: Cambridge University Press, 1975, at pp10-98 and Peter M. Holt, "Egypt, the Funj and Darfur", in Richard Gray, ed., *The Cambridge History of Africa: From c.1600 to c.1790*, London, New York-Melbourne: Cambridge University Press, 1975, at pp.14-58.

perfection than in any other country.¹⁶⁶ Long before the Old Testament Ten Commandments were recorded,¹⁶⁷ the forty-two Egyptian commandments neatly divided human wrongs in three categories (transgressions against mankind, sins against god and personal wrongs).¹⁶⁸ There was no room for private justice.¹⁶⁹ Criminal cases were decided by the highest court of justice. Kings did not serve as judges¹⁷⁰ except for important cases where the Pharaoh or a special commission that he appointed could try the case.¹⁷¹

Ancient Egypt was a relatively crime free place and the death penalty was seldom applied. Neither the death penalty nor mutilation even existed before the eighth dynasty.¹⁷² There was also a period of 150 years that passed without any execution taking place. Even when the court was obliged to impose it, “there was some support of basic human rights”.¹⁷³ Respect for human rights can also be seen through the judicial process. “There is no arbitrariness, judgments are equals for everyone, the rich and the poor, the noble and the meek ...”¹⁷⁴ The harshness of ancient Egyptian punishments is sometimes associated with the influence of barbaric immigrants.¹⁷⁵

However, there is no doubt that “in extreme cases, capital punishment was inflicted by impalement on a stake, burning alive, drowning or decapitation”.¹⁷⁶ The death penalty was imposed on everyone who infringed Ma’at, or the universal law, by violating tombs, committing murder, treason or spying or by making an attempt on the life of Pharaoh who

¹⁶⁶ The first of their eight categories of law was related to crimes and police matters. King Bocchoris was eventually one of the great Egyptian legislators. See Arnold H. L. Heeren, trans., *Historical Researches into the Politics, Intercourse, and the Trade of the Carthaginians, Ethiopians and Egyptians*, Vol.1, Oxford: D.A. Talboys, 1832, at pp.165-166 and 341.

¹⁶⁷ Exodus 20:1-17, Deuteronomy 5:1-17.

¹⁶⁸ “The Egyptian Forty-Two Commandments: Ma’at Right and Truth”, at www.parankhgroup.com (accessed 16 October 2009)

¹⁶⁹ S. Allam, “Un Droit Pénal Existait-Il ‘Stricto Sensu’ en Egypte Pharaonique?”, (1978) 64 *Journal of Egyptian Archaeology* 66.

¹⁷⁰ *Supra* note 166, at p.342.

¹⁷¹ “Law and the Legal System in Ancient Egypt” at www.touregypt.net/featurestories/law/htm (accessed 16 October 2009). Violet MacDermot rejects the view that there existed a secular judicial system in ancient Egypt. She argues that judgments were “the prerogative of gods rather than men”. See Violet MacDermot, *The Cult of the Seer in the Ancient Middle East: A Contribution to Current Research on Hallucinations Drawn from Coptic and Other Texts*, London: Welcome Institute of the History of Medicine, 1971, at p.144.

¹⁷² Harco Willems, “Crime, Cult and Capital Punishment (Mo’alla Inscription)”, (1990) 75 *Journal of Egyptian Archeology* 33.

¹⁷³ *Supra* note 171.

¹⁷⁴ “The Death Penalty in Egyptian Ancient Law”, at www.reshafin.org.il (accessed 16 October 2009).

¹⁷⁵ *Supra* note 168.

¹⁷⁶ *Supra* note 171.

was seen as the guarantor of the law. All murders were punished equally regardless of the victim or offender's social status (freeman or slave).¹⁷⁷ The inscription no 09 on the Hekaib sanctuary, and the writings on the stela Cairo, the tombs III and IV at Assiut and the tomb of Chnumhotep II at Beni Hasan and the Graffiti in Lower Nibia indicate that the death penalty was indeed imposed and executed.¹⁷⁸ The Decree of King Demedjbtawi provided for the death sentence by burning of people who interfered with the Idy's cult installations in the Coptos temple. King Neferhotep I also decreed death sentence to anyone who would pass by the 'Holy land south of Abydos', which he declared to be a 'closed area' to the public. King Sesostris I once visited the temple of Tôd and found that it has fallen into ruin due to a group of hooligans. He ordered their arrest and they were sentenced to death by burning.¹⁷⁹

Sometimes the punishment was extended to the offender's children. However, there is no evidence that leads to the conclusion that wives could be held liable for crimes perpetrated by their husbands. Children were condemned to prevent them to inherit their fathers' ministries such as priesthoods, military services, etc. Wives could not inherit these. Death by burning turned the condemned into a sacrifice to the gods. Judgments themselves took place in the temple and culprits were burnt on the temple's altar. The imposition of the death penalty was exceptional and imposed by the highest court of justice.¹⁸⁰ The practice of the death penalty continued under the successive monotheist beliefs of Christianity and Islam.

2.2. The exclusion of unusual punishments and unclassifiable cases

In criminal law, a punishment can be meted out only if it meets four criteria: legality, equality, individualization and human dignity. The legality of a punishment is based on whether or not it is anticipatively provided for by the law. Furthermore, punishments do not vary according to social status or other subjective factors and they must be individual. This means that in cases of co-perpetrators, the sentence was individualised. The concept of human dignity was as well known. Now, it is questioned whether summary executions,

¹⁷⁷ *Supra* note 166, at p.342. See also *Supra* note 174.

¹⁷⁸ *Supra* note 172, at pp. 34-39.

¹⁷⁹ *Supra* note 172, at pp. 39-41.

¹⁸⁰ *Ibid.*, at pp. 42-51.

poison ordeal, vengeance and ritual executions as applied in the pre-colonial period met these criteria.

2.2.1. Unusual punishments

These are punishments that, although they do not comply with the above criteria, existed in African indigenous laws. In applying the modern understanding of punishments, they may be excluded from the range of penal punishments.

2.2.1.1. Summary executions

In the *Makwanyane* case, Justice Sachs states that summary executions as applied in the pre-colonial period were not punishments. They were extra-judicial, spontaneous and irrational reactions of an angered crowd against unfortunate suspects of witchcraft.¹⁸¹ Sorcery and witchcraft cannot be excluded from African indigenous laws. Studies on this phenomenon evoke even the existence of 'the law of sorcery' which in Guinea still allows certain parents to eat symbolically their relatives (symbolic anthropophagi) without reprisal unless rules are broken.¹⁸²

Witchcraft and sorcery are thought to be generally levelled at established institutions and important pursuits. Therefore, witches and sorcerers were summarily executed to prevent any disturbance of the delicate fabric of social life. In the African great lakes kingdoms summary executions were allowed, provided the King had given permission to the lineage of the victim.¹⁸³ The practice is still alive. In 2003, 87 witchcraft suspects were executed in Congo Brazzaville. In 2005, old Burkinabé (Burkina Faso) women accused of eating the souls of children were compelled to drink a poison potion after which many died. In May 2008, a crowd of more than 100 people of the Nyakeo village in Kenya went door to door to the homes of suspected witches and burned fifteen women alive.¹⁸⁴

¹⁸¹ *S v. Makwanyane and Another*, *Supra* note 11, at para 381B per Justice Sachs.

¹⁸² Maria Teixeira, "Sorcellerie et Contre Sorcellerie: Un Réajustement Permanent au Monde, les Manjak de Guinée Bissau et du Sénégal", (2008) 189-190 *Cahiers d'Etudes Africaines* 65.

¹⁸³ *Supra* note 68, at p.112.

¹⁸⁴ AFP, "15 Femmes Accusées de Sorcellerie Brûlées Vives dans l'Ouest", Pascal Airault "Forte croyance au Kindoki" and Charlotte Cans "Chasse aux sorcières" at http://www.jeuneafrique.com/jeune_afrique/article_depeche.asp? (accessed 24 August 2010).

The Zulu, Venda and Nguni mainly resorted to diviners and ordeal to identify witches, not only because the crime was so serious but also because no amount of witness could establish the innocence or guilty of a wizard due to the work of unseen forces. The judicial process could not work properly. After the diviner has found the guilty part, the latter was put to death, often by torture.¹⁸⁵

In indigenous African laws, summary executions were used as formal punishments when the execution was justified in people's minds or authorised by the King. Execution ceased to be a punishment and became an arbitrary and barbaric act in the absence of provocation or legitimate authorisation.¹⁸⁶ African laws allow summary executions mainly (but not exclusively) for supernatural crimes.¹⁸⁷

2.2.1.2. Poison ordeal

Another confusing aspect of punishment is the poison ordeal. In the African mind, this acts as both a punishment and a way of investigating. Kuba courts felt comfortable when trying witchcraft. Instead of ordering a summary execution, the proper technique was to ask for a poison ordeal. "The accused drinks poison; if he dies he is guilty; and if he survives he is innocent".¹⁸⁸ In the Democratic Republic of Congo, the Bira considered death by poison ordeal to be the most severe punishment.¹⁸⁹

The poison ordeal was familiar to various generations and in various areas. The second most common way to test defendants was the boiling water test. Suspects were compelled to plunge their hands in a container of boiling water and take out objects. Those who were not burnt were innocent. Husbands very often tested the fidelity of their wives in this way.¹⁹⁰

2.2.2. Unclassifiable cases

¹⁸⁵ *Supra* note 75, at p.225 and Isaac Schapera, *Supra* note 73, at p.211.

¹⁸⁶ *Supra* note 12, at p.3 and Jan Vansina, *Supra* note 68, at p.105.

¹⁸⁷ *Supra* note 40, at p.127.

¹⁸⁸ *Supra* note 68, at p.113.

¹⁸⁹ *Supra* note 116, at p.131.

¹⁹⁰ Emmet V. Mittlebeeler, *African Custom and Western Law: The Development of the Rhodesian Criminal Law for Africans*, New York-London: Africana, 1976, at p.159.

Other practices fall beyond any category of punishments. The death penalty was usually pronounced or authorized by a judicial body. In many areas, the principle was however that all blood belonged to the sovereign, who had the power of life and death. Sometimes, the sovereign abused his authority, allowed private justice, disregarded social anarchy and exacted death sentences on religious grounds.

2.2.2.1. The death penalty and the King's power of life and death

As an example, one could start with the Azande of the Democratic Republic of Congo and with a man who beat his wife every day. She could not take it any longer and took refuge at her friends' house. The husband brought the matter to the King Azanga. He was famous for his severity and cruelty. The sentence did not take long. The fugitive wife was condemned to death with the prohibition of funeral and mourning. The same evening the King's council gathered and celebrated the sentence by eating meats and drinking beer.¹⁹¹

Unfortunately this was the fate of animals as well. The death sentence was applied to animals that killed other animals. "A goat attacked by a dog hit the dog with its horns. Few hours later, the dog that belonged to an influential man died. The matter was discussed and much commented before being referred to the King. The King condemned the goat to death and ordered that its meat be shared among Mangbetu whereas the dog's meat was distributed to Medje".¹⁹²

In Rwanda, Mwami Rwabugiri is said to be famous for ordering the execution of people convicted of petty offences when he was drunk. When he became sober, he would take care of the orphans probably to honour the principle "*Ingoma irahaka ntihora*" (the drum does not revenge, it forgives).¹⁹³ The family of the murdered person had no further appeal. The Mwami enjoyed immunity of jurisdiction according to the principle "*Ntihica Umwami, hica Rubanda* (it is never the King that kills but it is his people that kill)".¹⁹⁴

¹⁹¹ Cyrille Van Overbergh, *Les Mangbetu (Congo Belge)*, Brussels: Institut International de Bibliographie, 1909, at p.485.

¹⁹² *Ibid.*, at p.486.

¹⁹³ The drum symbolized the kingship in most African Kingdoms. René Bourgeois, *Banyarwanda et Barundi: Ethnographie*, Brussels: Académie Royale des Sciences Coloniales, 1957, at p.760.

¹⁹⁴ René Bourgeois, *Supra* note 93, at p.65-66.

There were no safeguards against the King's abuse of his power of life and death. The death penalty was imposed and executed according to the sovereign's pleasure. The only exception was found among the Bamoum of Cameroon, where the King Njoya decreed a law against abuses of power and persecution that were driving people to commit suicide.

If someone hangs himself among the Nzi Pamom, a slave must be given to the King, three thousands couris to Taanggu and six hundreds to Mgbet Nyi [the deputy of Taanggu] and that is all. The King receives one slave because the master has ill-treated his slave who, due to anger, hanged himself. Do all people not belong to the King? The slave given as fine virtually replaces the dead.¹⁹⁵

This decree shows the extent to which King Njoya subjected all his people to power without tyranny.

2.2.2.2. Vengeance or heroism in relation to death penalty

In areas without capital punishment, the death penalty was a remedy for the failure to pay compensation. The Bukusu (Kenya) allowed the victim's clan to "kill a member of the opposite sex of the murderer's clan" when the latter failed to pay the blood-fine.¹⁹⁶ The Lango (Uganda) found no way of compensating the wronged party and restoring the social balance in interfamily homicide. Cattle belonged to the entire family, the offender and the offended included. The death penalty for patricide and fratricide was therefore a reaction to the inefficacy of compensation in cases of interfamily homicide.¹⁹⁷

The Teso and Karamajong (Uganda) historically settled homicides by killing the offender or taking revenge on a member of his family or clan, irrespective of whether the crime was intended or accidental.¹⁹⁸ However, the law developed to incorporate compensation for homicide when the offender was arrested. Members of the deceased's clan retained the right to kill a member of the offender's clan if the criminal escaped.¹⁹⁹ This also applied to

¹⁹⁵ *Supra* note 96, at p.829.

¹⁹⁶ *Supra* note 110, at p.75

¹⁹⁷ *Supra* note 58, at p.182.

¹⁹⁸ *Supra* note 105, at p.282.

¹⁹⁹ *Ibid.*

the Wakamba and Kikuyu of Kenya.²⁰⁰ The Basoga (Uganda) killed the murderer to appease the deceased's ghost. For them, the death penalty was a divine sanction.²⁰¹

2.2.2.3. Rituals murders: were victims sentenced or sacrificed?

Ritual killing was a common practice in many African Kingdoms. It is argued that human sacrifice and the death penalty served the same purpose of deterring political opponents, punishing those who violated traditional norms and "keeping the mass of the people in check".²⁰² However, it is worth noting that the executed persons were not necessarily criminals.

Among the Kuba, the king's death was always accompanied by sacrifices. The *Nkunkum* or enslaved criminals on death row constituted the human stock for sacrifice.²⁰³ A similar practice is found among the Swazi. The king had "a house where he commanded bodies of men who died at the hands of the law to be hung up, and where thus hanging all the humidity of their bodies falls into vases placed underneath..."²⁰⁴ That humidity was afterwards used by the king as an ointment oil that procured new strength.²⁰⁵

That is what occurred in cases where the death sentence was applied. The only issue was that the duration of the offender's stay on death row depended on the eventuality of the King's death among the Kuba.

Instances of ritual murder form part of indigenous laws.²⁰⁶ This refers to the killing of innocents or execution without judicial process for religious purposes. During the slave trade, West African kings enjoyed cheap lives. They organised annual carnivals to send messages of the king's filial loyalty and victory to his ancestors by killing slaves who could not be sold. Executions were carried out in public during periodic parties organised to commemorate ancestors and distribute war plunders. Sometimes, the abundance of unsold slaves transformed the festivities into scene of butchery. The Royal palace reserved a door

²⁰⁰ "Some Notes on Native Laws and Customs", in East Africa Protectorate, *Laws Reports*, Stevens and Sons, London, 1906, Appendix 1. See also Elias T. Olewale, *Supra* note 40, at pp.139-140.

²⁰¹ *Ibid.*

²⁰² *Supra* note 64, at p.438.

²⁰³ *Supra* note 68, at p.106.

²⁰⁴ Tor Irstam. *The King of Ganda*, Stockholm: Hakan Ohlssons Boktryckeri, 1944, at p.90.

²⁰⁵ *Ibid.*

²⁰⁶ *Supra* note 40, at p.126.

for the evacuation of slaves. The door was “with a macabre humour baptized ‘passage of luggage to the other world’”.²⁰⁷

In Ghana, the rate of human sacrifices on war prisoners, political opponents and returned slaves had led the first British witnesses to believe that the victims were condemned to capital punishment. It was common that slaves, wives or relatives accompany dignitaries at their death. It is reported that in early 19th century, 80 Fantis were decapitated for the King. Further 2000 Fantis war prisoners were sacrificed at the funeral of the Asantehene’s mother (the queen mother) of the Asante and in 1818-1819, 2000 Gyaman war prisoners were “slaughtered over the royal death stool”.²⁰⁸

War prisoners were kept in a special village of Akyerekuro as sacrificial stock. British authorities sought addressing this concern by demanding oath from the Asante who brought the unsold slaves to the Asante kingdom. The oath to the effect that misfortune would strike the Asante Kingdom if the slaves were mistreated became a powerful deterrent measure against human sacrifices. With the abolition of slave trade, British authorities felt compelled to be more vigilant in imposing fines or making demonstration of force against chiefs who abused the abundance of slaves. It is said that the chiefs preferred breaking the oath they made with the British than violating their traditional practices. It is in 1844 that coastal chiefs signed an agreement on the abolition of human sacrifice. The British continued using Christian preaching and education to deter the Asante over whom they had a limited influence.²⁰⁹

Jukun kings (Nigeria and Cameroon) also speared slaves as human sacrifices to maintain their longevity after seven years of reigning. The slave’s death symbolized the death of the king who would go in the bush afterwards. On his return, he was newly clothed and seated on a white horse as a sign of rebirth.²¹⁰ For the Falli of the Congo, the ceremony was to symbolise the slaying of an enemy and the head would be paraded before the chief. During the three days between the Bushongo King’s death and his funeral, people were hunted to

²⁰⁷ *Supra* note 151, at p.280.

²⁰⁸ *Supra* note 64, at pp.438-440.

²⁰⁹ *Ibid.*

²¹⁰ *Supra* note 204, at p.89.

be used as sacrifices.²¹¹ Baganda kings were famous for ritual murders, as summarized below.

²¹¹ Emile Torday, *On the Trail of the Bushongo*, London: Seeley, Service and Co Limited, 1925, at p.177

Table 1: Ritual murders in Buganda

Ritual Sacrifice	Period	Number of people killed	Purpose
New skin of Kaula (royal drum)	Whenever	One man	Human blood had to run into the drum when beaten. The victim's life refreshed the king's life
Coronation ceremonies	Whenever	Eight men	One man was shot by the king and another seven were killed at Segaku (the sacrificial place). Their bowels were hung around the neck of Kawonawo (another man chosen for that purpose). The killing increased the king's vigour and made Kawunawo strong and faithful
Leopard hunt	Two to three months after coronation	One man	The captive was killed in the evening at the King's palace and the body hidden forever.
Confirmation	Two to three months after coronation	One man	The king slightly wounded the man who was killed for the invigoration.
Strengthening the King	Two to three years after coronation	One man	The man was speared outside the enclosure of the Palace to give life-force to the king
Great feasts of the Kingdoms	According to the tradition of the kingdom	One man	All drums were beaten except one. The person who reminded the issue was killed and his blood put in that drum
Sickness of the King	Whenever	Many people	<i>Mutebi</i> , the priest, would identify people who had peculiar marks and ask that they be killed for the life of the king.
King's death	Whenever	One man	After the King's death, the chief of the king's fire was strangled.

Source: Tor Irstam²¹²

²¹² *Supra* note 204, at pp. 25, 33-34 and 90.

2.3. Methods of execution

Methods of execution again varied. According to Olewale, “[in] criminal cases such as sorcery or witchcraft, wilful murder and alike, the penalty is death by shooting, spearing, hanging, drowning or impalement of the convicted person. These penalties also avail for treason and certain types of political offences”.²¹³ However, this general rule did not prevent the executioner to enjoy a large discretion that enabled him to determine the appropriate method of carrying out the death penalty.²¹⁴ As it is mentioned above, the Egyptians preferred burning the culprit on the temple’s altar, whereas the Laadi of the Democratic Republic of Congo buried adulterers alive at a market place.

The most usual method of execution in Nandi customary law consisted of placing the noose of a rope made from a tree bark around the condemned’s neck. Then a group of the offender’s relatives would pull the rope in opposite directions until the victim died. Beating and stoning also took place among the Nandi.²¹⁵

Beside the drowning of girls, spearing and impalement in throwing a sharp stick from the anus to the chest, the primary methods of execution among the Banyarwanda, and Barundi included beating, torture, mutilation, cutting the throat with bamboos, crucifixion as the condemned lied to his back on the ground and was thrown by sharp sticks of wood in arms, legs and womb, strangling, abandoning the offender to wild beasts and hurling from a rock.²¹⁶

In Rwanda, the immediate execution by means of spear, beating or cutting the throat was perceived as a favour for old persons, royal personnel and women. Strangling was applied to royal personnel or sycophants that the King intended to execute discretely. They were forced to starve for four days before the execution in order to make easier the task of the executioner. The death penalty by amputation of hands and legs was reserved to robbers. The person was abandoned to carnivores while still bleeding. Similar practices existed among the Toro of Uganda, where it was reported that this method was used to execute Ndahura, the King of the Abatshwezi. Persons convicted of political crimes were drowned

²¹³ *Supra* note 40, at p.261.

²¹⁴ *Supra* note 108, at p.87.

²¹⁵ *Supra* note 110, at p.76.

²¹⁶ René Bourgeois, *Supra* note 93, at p.398.

in the abyss. This was the common method of executing the Abiru, who had the praised function of nominating and enthroning the King. They swore the oath of not disclosing royal secrets. The violation of the oath was a capital crime.²¹⁷

There were however more atrocious methods of executing the death penalty. Although very rare, the dismembering consisted of partially cutting human tissues on the offender's body. Afterwards, the executioner would release dogs in order to finish the execution. It is said that this was the method that Kings used to revenge. Impalement was the common method of executing incorrigible thieves of cattle or food during periods of famines. It was used as the most deterrent punishment. The corpse remained exposed to the public until predators and carnivores stripped the skeleton. As mentioned above, girls convicted of pre-marriage pregnancy or with no properly developed breasts or who were not getting married on time were drowned in one of the lakes located at the border of the country.²¹⁸ Crucifixion was common among the Banyoro and Bahima of Uganda and the Barundi who applied it on thieves of food during famine. It was rare in Rwanda.²¹⁹

2.4. The exclusion of the death penalty in pre-colonial Africa: selected case studies

Justice in some areas was built on principles of arbitration, mediation and restoration even in very sensitive criminal matters. The death penalty was inconsistent with the purpose of justice among some Bantu and in the horn of Africa.

The nonexistence of the death penalty in some Bantu law has created imbroglia in modern states. There is juxtaposition of tribes that applied the death penalty and those that were death penalty free. Given that modern states are the result of arbitrary boundaries that amalgamated tribes regardless of their indigenous values, the application of the death penalty represents a step backward if modern law cannot recognize fundamental rights that indigenous laws acknowledged. Accordingly, since the modern state cannot apply the death penalty only on those tribes customarily attached to it without violating the right to

²¹⁷ *Supra* note 108, at p.85.

²¹⁸ *Supra* note 145, at pp.299-301.

²¹⁹ *Supra* note 108, at pp. 86-87.

equality and breaching principles of criminal law, countries where the death penalty was nonexistent should simply abolish it.

In other countries, all tribes were not resorting to capital punishment. That penalty was introduced through colonisation (Lesotho) or modernisation (Ethiopia). Lesotho has been studied with other Bantu customary laws. The detailed study of the exclusion of the death penalty among the Ethiopians demonstrates that Ethiopian indigenous law speaks for itself as regards abolition.

2.4.1. The exclusion of the death penalty among the Bantu

Bantu are an African people who in their languages commonly call a human a “ntu” in the singular and use the prefix “Ba” or “A” for plural. This is how “Ba-ntu” or “Antu” is formed. The linguistic classification of Bantu has been preferred to the old classification that identified Bantu people with their economic *modus vivendi*, namely agriculture. The word ‘Bantu’ is still misused in many instances to refer invariably to all sub-Saharan Africans when in fact many do not meet the linguistic criterion.²²⁰

2.4.1.1 The unfitness of the death penalty for sexual offences

The term “sexual offence” can have a broad meaning, including sexual acts that are deemed unnatural like homosexuality and bestiality. Here, we are only concerned with classical sexual offences, namely adultery and rape. Similarly to modern law, indigenous laws define adultery as sexual intercourse between a married person and another person who is not his or her spouse.²²¹

²²⁰ For example, in South Africa and Botswana, Basotho, Bapedi and Batswana are Batho. In Swaziland, Swazi are Batchu. In Zambia, Lozi are Batu. In Namibia, Herero are Ovanu. In Angola and the Democratic Republic of Congo, Bayazi and Bambunda are Bar, whereas Kwanyama and Luena-Lubale are Ovanu. In these countries still, Mongo are Banto, Basakata are Bare, Bant are Bat, Mbala are Hadu, Kwese are Hatu and Umbundu are Omanu. In the Eastern Democratic Republic of Congo, Bakonjo and Banande are Avandu, Banyanga are Beya, Babira are Bahuhu, Huku are Vumbi and Bahamba are Bakpa. In Congo Brazzaville, Ifumu are Baru and Tege are Bari. In Gabon, Bakele are Batyi, Mpongwe and Galuwa are Oma and Fang are Bur. In Cameroon, Fang are Bur, Basa and Ewondo are Bot and Bakwiri, Bankom and Isubu are Botu or Boto. See Alexis Kagame, *La philosophie Bantu comparée*, Paris: Présence Africaine, 1976, at pp.52-55.

²²¹ *Supra* note 103.

Marriage is a very valuable institution. Religious rituals are performed to ensure its stability. Ancestors and divinities are approached and consulted for their support and blessings. Family members and friends provide their advice to the new couple and are involved in every single part of the process.²²² Infidelity is deemed an outrageous crime, striking out against the norm of society. When it results in conception, it inflicts a spurious offspring on the husband. Adultery is a crime not only against the husband but also against those corporate bodies related to him. It is a shameful act, the effects of which offend both the wife and husband's families and the ancestors, gods and others supernatural beings because of the sanctity of marriage.²²³ This is the reason that adultery can be considered very serious. Among the Basoga of Uganda, adultery (*bwenzi*) can describe simply having control over a woman in such a manner that sexual relations were possible.²²⁴ As mentioned above, adultery was a capital crime elsewhere.²²⁵

Some Bantu people reacted differently. Within the Shona (Mozambique and Zimbabwe), the guilty party would give a goat whose meat would be shared by both parties as a sign of public reconciliation.

In cases like adultery, or others in which one party feels grievously insulted or his reputation seriously impaired, the court may, if it fears further trouble between parties, insist that they be publicly reconciled [...] The guilty party is made to produce a goat or fowl which is killed at the court. The chief has a piece of meat prepared, which he divides between the parties making them eat together. Or they are required to take snuff together [as] one does not take food or snuff with one's enemy.²²⁶

The meat or snuff is shared also by members of the court and public as an expression of public support of the decision reached. The same sentence was applied *mutatis mutandis* to incest and unlawful sexual intercourse during a period of mourning.²²⁷

²²² *Ibid.*

²²³ *Ibid.*, See also Gluckman Max, "Limitations of The Case Method in the Study of Tribal Law", in Gordon R. Woodman and Akintunde O. Obidale, eds., *African Law and Legal Theory*, Aldershot-Singapore-Sidney: Dartmouth, 1995, at p.104

²²⁴ Lloyd A. Fallers, *Law without Precedent: Legal Ideas in Action in the Courts of Colonial Busoga*, Chicago: Chicago University Press, 1969, at pp.115- 118.

²²⁵ *Supra* note 103.

²²⁶ *Supra* note 51, at p.14.

²²⁷ *Supra* note 45, at p.194.

For Pokot of Kenya, two brothers from the Dove clan were accused of adultery with wives of Hawk, another clan. The sentence was compensation of a hut of goats and two calves.²²⁸ The *Iteso* of Uganda imposed a sentence from three goats to three heads of cattle for a confessed adultery.²²⁹ The Ndengese, Lulua, Tetela and Yansi of the Democratic Republic of Congo punished adultery using ritual purifications, as the gods had been insulted and the bodies of adulterers sullied. Adultery with the chief's wife was considered to be an attempt on the life of the Chief and became a political and capital crime.²³⁰ The practice of purification by a doctor also existed among the Tswana of Southern Africa. The woman is first washed with an irritant medicine to wash away any pollution that may prevent the fall of the rain.²³¹ It is worth noting that the same rule of compensation for adultery has been found among non-Bantu people like the Ibo of Nigeria.²³² Despite the sanctity of marriage for the Bantu, they found no reason to impose a harsh punishment. Compensation and ritual purifications were acceptable remedies.

Moreover, rape consists of non consensual sexual intercourse. The definition of rape has always been "a male having unlawful and intentional sexual intercourse with a female without her consent."²³³ Among the Shona (Zambia and Mozambique) and the Bemba (Zambia and the Democratic Republic of Congo), penetration was necessary.²³⁴ Consent is assumed if the woman did not call for help or immediately report the case. Then it is adultery instead of rape.²³⁵

Cases of pregnancy without any evidence of coercion were likewise treated as adultery or unlawful sexual intercourses. For the Bemba tribe, alleging to have been raped without witnesses was considered an abomination.²³⁶ In all instances, the victim had to lay down the relevant evidence, which was often irrational in terms of divination.²³⁷

²²⁸ Max Gluckman, *Supra* note 223, at p.101.

²²⁹ *Supra* note 105, at p. 281.

²³⁰ "Adultère chez les Ndengese, Lulua, Tetela et Yansi" at www.ceeba.at/so (accessed 20 May 2008).

²³¹ *Supra* note 73, at p.211.

²³² Otonti Nduka, "The Traditional Concept of Justice Among the Ibo of South-Eastern Nigeria", in Gordon R. Woodman and Akintunde O. Obidale, eds., *African Law and Legal Theory*, Aldershot-Singapore-Sidney: Dartmouth, 1995, at p.25.

²³³ Carel R. Snyman, *Criminal Law*, 4th edn, Durban: Butterworths, 2002, at p. 445.

²³⁴ *Supra* note 45, at p.183.

²³⁵ Max Gluckman *et al.*, eds., *Ideas and Procedures in African Customary Law*, London: Oxford University Press, 1969, at p.67.

²³⁶ *Ibidem*

²³⁷ *Supra* note 41, at p.17.

In principle, the rapist had to pay dowry if the victim was a girl or compensation to the husband or father should the victim be a wife or a widow staying with her parents. Compensation amounted to a certain number of goats or money.²³⁸ There was no room for a death sentence even when the victim was a teenager.

2.4.1.2. Compensation for assault and homicides.

Cases of assault were solved by compensation. Assault consists in unlawfully and intentionally applying force to the person of another either directly or indirectly.²³⁹ The first illustrative case comes from the Mbeere of Kenya. Ireri injured his father Njiru with an arrow and smashed his gourd of beer. They had engaged in hurtful verbal exchanges when drinking together. The father decided to kill his son physically or socially. When the matter was put before the court, the elders found that both men were wrong and ordered a goat in terms of compensation:²⁴⁰ The court explained its findings:

We have decided this because you beat an old man, although we know that Njiru made a mistake in throwing soil (issuing verbal insults). Even if you appeal anywhere else you will be told to provide a goat because you beat your father. Even if you go to London, you will be told to bring a goat. With the goat, Njiru will take an oath “may this oath kill me if I throw soil and curse my son”.²⁴¹

For the Kuba, the right sentence for an assault was a fine paid to the King and compensation in the form of a serf woman.²⁴²

Moreover, it is submitted that, before the middle of the 19th century, many Bantu laws did not differentiate between murder and involuntary homicide.²⁴³ This is not a general rule however. The offender had the same degree of culpability provided he was found guilty. For Kikuyu, Kamba and Pokot of Kenya,²⁴⁴ and Arusha of Tanzania,²⁴⁵ if the offender had inadvertently thrown a spear into his fellow hunter instead of striking lion, he would be

²³⁸ See generally Diana Jeater, *Supra* note 45, at pp.182-183.

²³⁹ *Supra* note 233, at p.430.

²⁴⁰ Jack Glazier, *Land and the Use of Tradition among the Mbeere of Kenya*, Lenham, MD: University Press of America, 1985, at p. 146.

²⁴¹ *Ibid.*

²⁴² *Supra* note 68, at p.105.

²⁴³ *Supra* note 58.

²⁴⁴ Max Gluckman, *Supra* note 223, at p. 100.

²⁴⁵ Philip H. Gulliver, *Social control in African Society: A study of the Arusha: Agricultural Masai of Northern Tanganyika*, London: Routledge and Kegan Paul, 1963, at pp.127-129.

held responsible in the same way as if he took such an opportunity to defeat a challenging concurrent or enemy. Be it a case of intentional homicide or culpable homicide, the sentence remained compensation. This provides insurance for the dependants of the victim. Compensation was called 'blood- debts'.

A case from the Pokot tribe elegantly illustrates this. A member of the Hawk clan fought against a member of the Doves clan and killed him. In the absence of immediate compensation, the Doves made military demonstration in the killer's village until the elders of both clans were obliged to settle the matter. Upon the agreement of compensation, the near kin of the deceased was asked to claim reasonable compensation. He asked for a hut of goats and a calf, this being the 'blood- debt'.²⁴⁶ An identical process is found within the Mbari, a clan of the Kikuyu tribe still in Kenya.²⁴⁷ For the Baganda of Uganda, deliberate killing was not common but it was generally punished by compensation. Killing one's slave or wife was not an offence unless the perpetrator lacked acceptable grounds.²⁴⁸

For the Luo (Kenya), restitution for homicide involves a girl from the clan of the murderer to bear progeny in the deceased's name.²⁴⁹ A similar practice exists among the Shona of Zimbabwe and Mozambique. The family of the victim found it inhumane to engage in bloodshed vengeance feeling that there was no reason to lose a second life. Therefore, the family of the offender had to pay with a woman or, sometimes, two girls as a sign of acknowledging the offence, expressing remorse and redressing the loss of a family member. That compensation is called *maropa*.²⁵⁰ The same practice might have existed among the AmaXosa of South Africa as well.²⁵¹

Furthermore, the death penalty did not exist for murder among the Tsonga and the Nguni of South Africa.²⁵² Montshiwa and Moshoeshoe, the Kings of Barolong and Basotho respectively, expressively opposed the death penalty even when applied in other kingdoms. They believed that such a punishment divided the community and that it was useless to

²⁴⁶ *Ibid.*, at p. 101.

²⁴⁷ Vincent G. Simiyu, "The Democratic Myth in the African Traditional Societies", in Walter O. Oyugi and Afrifa K. Gitonga, eds., *Democratic Theory And Practice In Africa*, 1988, Portsmouth: Heinemann, 1988, at p.65.

²⁴⁸ *Supra* note 58, at p.83.

²⁴⁹ *Supra* note 245, at p104.

²⁵⁰ *Supra* note 45, at pp186-187.

²⁵¹ John Henderson Soga, *The Ama- Xosa: Life and Customs*, Lovedale: Lovedale Press, 1932, at p.46.

²⁵² *Supra* note 73, at p.209.

take a second life.²⁵³ Two wrongs do not make a right. In all cases of murder, property of people and females constituted a reserve for justice debts.²⁵⁴

Compensation was not exclusive to Bantu law. The practice of blood money for intentional homicide and blood-payment for accidental homicide existed elsewhere such as in Kano (Nigeria).²⁵⁵ Even though the above mentioned Bantu tribes and kingdoms did not apply the physical death penalty, some of them resorted to social death, in terms of ostracism or banishment as the only appropriate sentence for serious cases. Although today's society considers murder to be the worst crime, at that time witchcraft was the gravest offence.

2.4.1.3. Ostracism as the ultimate punishment for witchcraft

Ostracism involves treating an individual as non-human. He or she ceases to enjoy social status within the community, which withdraws its support. The individual becomes a pariah to all intents and purposes, cannot take part in social activities and ends up as a *persona non grata*.²⁵⁶ This was the most feared punishment, because reciprocity plays a vital role in everyone's life.

Dangerous witches were sentenced to ostracism among the Bantu of Kavirondo. Driving the offender outside society was the paramount punishment, although at times there were extrajudicial killings of witches.²⁵⁷ In Zimbabwe, ostracism was also the appropriate sanction for witchcraft. Witches were entirely exiled from community. They were deprived of vital social support and denied their social identity. Despite that, their families remained liable for compensation to their victims.²⁵⁸

In the Democratic Republic of Congo, if it was proved that a death resulted from witchcraft, reparation was compulsory. Witchcraft and magic played a major role in traditional institutions and have a serious impact on individuals' behaviour. A chief of lineage found guilty of witchcraft was required to perform the *Nkwamur* rite to prevent vengeance. He

²⁵³ *S v. Makwanyane and Another*, *Supra* note 11, at para 377 C per Justice Sachs.

²⁵⁴ *Supra* note 45, at pp.185-194.

²⁵⁵ Allan Christelow, "Theft, Homicide and Oath in Early Twentieth Century Kano", in Kristin Mann and Richard Roberts, eds., *Law in Colonial Africa*, London: James Currey, 1991, at p.217.

²⁵⁶ *Supra* note 46.

²⁵⁷ *Supra* note 163.

²⁵⁸ *Supra* note 45, at p.184, Johan F. Holleman, *Supra* note 51, at p.16.

often handed a goat or a dog to the deceased's family. If the animal was productive then the deceased had accepted the rite, otherwise he had refused it.²⁵⁹

Ostracism was the most feared punishment among the Luo. Ogallo engaged in a fight when he was away from home and he and his adversary were seriously injured. Fearing a judicial process, he hid. Rumours started that he was killed or was dying somewhere. Her mother accused their neighbour Augustino of witchcraft and called on her wife to bear children in the name of Ogallo. She stated that Augustino's witchcraft was the reason for her son's involvement in the fight. "Witches are so greatly feared, they are generally avoided and Augustino was at least threatened with ostracism if the accusation was believed".²⁶⁰

It is obvious that there was no death penalty for the aforementioned crimes in Bantu laws. This has been affirmed in respect of the States and tribe concerned and no general rule can be drawn.

2.4.2 The Ethiopian model: the pride of a nation

Like anywhere in Africa, indigenous law formed the major part of the body of Ethiopian law. As regards to capital punishment, it is stated in *The Itinerario of Jeronimo Lobo*, under a chapter headed as "Of the customs, religion and civilization of the Abyssinians", that

many other customs, of the kind called civic, are in force and thoroughly accepted, and for us are very barbarous [...] A man's life, death and property are often dispatched in half an hour, unless more time is needed to examine witnesses. [...] If the offender does not wish to appeal, justice is done on the spot. The culprit is arrested and handed over to the judge; and if he is to die, he is delivered to his opponents who kill him in any way they wish, joined by the relatives of the dead man, and all of them take part in striking the poor condemned man.²⁶¹

²⁵⁹ Tayaya Lumbombo and Tango Muyay, "Sorcellerie Et Envoutement: Les Cauchemars de la Société" at www.ceeba.at/soc/soc-psychologie, (accessed 17 June 2008).

²⁶⁰ Abel L. Richard, "Customary Laws of Wrongs in Kenya: An Essay in Research Method", (1969) 17 *American Journal of Comparative Law* 573.

²⁶¹ Donald M. Lockhart, trans., *The Itinerario of Jeronimo Lobo*, London: The Hakluyt Society, 1984, at p. 174.

There is no indication whether this statement applies to a particular tribe or not. This implies that all Abyssinians (Ethiopians) had the same custom under which the death penalty was a valid sentence.

Yet when referring to the Ethiopian antic Kingdom of Meroë (probably in the eight century before Jesus Christ), the Greek historian Diodorus, stated that

[t]he laws of the Ethiopians differ in many respects from those of other nations, but in none so much as in the election of their kings; which is thus managed. The priests select the most distinguished of their own order [...]The person thus selected immediately enjoys all the prerogatives, which are conceded to him by the laws, in respect to his mode of life; but he can neither reward or punish anyone, beyond what the usages of their forefathers and the laws allow. It is a custom among them to inflict upon no subject the sentence of death, even though he should be legally condemned to that punishment; but they send to the malefactor one of servants of justice who bears the symbol of death. The Greek custom of escaping punishment by flight into a neighboring country is not here permitted. When the criminal sees this he goes immediately to his own house and deprives himself of life[...]²⁶²

But Diodorus's additional comments have been misunderstood and sometimes misinterpreted. The statement that "[i]t is a custom among them to inflict upon no subject the sentence of death" is veiled. Dr Richard Lepsius affirms that Diodorus meant the opposite as regards a judicial verdict.

Diodorus narrates exactly the same resignation to death in those who in Ethiopia were to die by judicial verdict; a person who had been condemned, and who had at first intended to save himself by flight, had nevertheless allowed himself to be strangled without resistance by his mother, who had obstructed him in his design.²⁶³

Ethiopian researchers corroborate Diodorus statement on the exclusion of the death penalty under indigenous law. *Guma* (blood money) was the right punishment for murder

²⁶² Diodorus, I, p.177, etc. as quoted by Arnold H. L. Heeren, *Supra* note 166, at p.412.

²⁶³ Richard Lepsius, *Letters from Egypt, Ethiopia and the Peninsula of Sinai*, London: Henry G. Bohn, 1858, at p.202.

among Ethiopian tribes.²⁶⁴ Recent researchers have inventoried 60 customary laws in Ethiopia and few of them have been studied by lawyers or anthropologists.²⁶⁵ However, as it shall be demonstrated by a sample of ten of them, the death penalty was not a valid punishment for homicide under Ethiopian customary laws.

The *Amhara* had a gradual process of imposing punishment starting with advices from relatives and neighbours, to the reprimand by the *guagne* (the local assembly), a warning from the *abat* (the people's nominee), being required to feed more people than he or she has capacity to feed, a conspiracy by the whole village and finally ostracism (*eroge*). All matters were resolved by arbitrator and the death penalty was unknown to them. The principle guiding them was "even a swarm of bees would not leave their hive and go to a new one before they settle down to a nearby tree or fence".²⁶⁶ All offences were compoundable.²⁶⁷

The Tigray (Tigreans or Tigrawi) are located in today's Eritrea. Their customary law was written and kept in the church or by elders. It is one of the most developed laws. Serious crimes were settled through agreements on blood money, the amount of which was confirmed by elders and submitted to the High Court for final approval. The High Court tried the case when no agreement was reached.²⁶⁸ It is argued that this court was entitled to impose a death sentence. Whether it did in fact impose such a sentence remains unproved.²⁶⁹ Tigreans usually resolved cases of homicides with blood money and sometimes the victim's family required girls.²⁷⁰ The giving of a girl aimed to prevent blood feuds between communities.

The Oromo were characterized by principles of fair justice and women played a major role in criminal cases. In old days they practiced the death penalty for homicide. Later the law developed to the extent that the death penalty was replaced by a payment of cattle when the victim was an Oromo. The *lubas* (representative of the village) were in charge of

²⁶⁴ *Supra* note 39.

²⁶⁵ Dolores A. Donovan and Getachew Assefa, "Homicide in Ethiopia: Human Rights, Federalism and Legal Pluralism", (2003) 52 *American Journal of Comparative Law* 507.

²⁶⁶ *Supra* note 39, at pp.48-49.

²⁶⁷ Stanley Z. Fisher, "Traditional Criminal Procedure in Ethiopia", (1971) 19 *American Journal of Comparative Law* 713.

²⁶⁸ *Supra* note 39, at p.44.

²⁶⁹ *Ibid.*

²⁷⁰ Franklin F. Russell, "Eritrean Customary Law", (1959) 3 *Journal of African Law* 100-101.

enforcing the judgment, taking the offender's cattle and feasting with it. If he had no cattle, he was flogged, warned and set free. Should the victim be a stranger, the offender would be anointed with perfumed butter and blood by his sister-in-law. Elders would bless him so that he would not be a victim of revenge. He was obliged to hide for three days at least.²⁷¹

Women were meanwhile sent to the victim's clan to beg for arbitration. Women played the role of messengers to avoid any revenge. The custom prohibited exacting vengeance against women. They were the peacemakers between clans. On their return, they informed the elders of the agreed date and place of meeting. The meeting had the purpose of determining the amount of blood money. On the due day, the culprit was required to say that he had accidentally killed the deceased and that he agreed to pay this and that as *Guma*.²⁷²

The Kunama used the *sanga nenay* as a conciliatory body. Any person fearing revenge would go to stay at a *sanga nenay* house. If the crime was perpetrated in an open place such as a market, the offender was required to run and embrace any member of the *sanga nenay* house, even a little child. That was the end of revenge. The matter then had to be brought before conciliators. During the event, a bull would be killed and eaten by all the members. Females from both sides would exchange utensils, males would exchange weapons and the offender and the victim's family would exchange butter. Afterwards, the *sanga nenay* would announce the amount of blood money.²⁷³

The Somali tribe of Ethiopia treated homicides similarly to the Kunama and revenge was rare. It is worth noting that the Somali customary law applies to all the Somalis in Ethiopia, Djibouti, Kenya and Somalia. They "claim solidarity and unity under shared norms of culture and self-governance".²⁷⁴ The offender stayed hidden and asked his relatives to beg for arbitration. If his cattle did not meet the requirements of blood money, the whole family rescued him with additional cattle.²⁷⁵ In some instances, the victim's family would demand a girl fitted out for marriage. The practice intended to tight further the two families in

²⁷¹ *Supra* note 39, at p.45.

²⁷² *Ibid.*

²⁷³ *Ibid.*, at p.56.

²⁷⁴ *Supra* note 265, at pp. 516 and 527

²⁷⁵ *Supra* note 39, at p.65.

conflict. The decision was not spontaneous. It resulted from inter-clan contracts that exist since immemorial times and which are upheld by the *Heer* (Somali customary law).²⁷⁶

The Gurage had a high court with jurisdiction over violent crimes such as murder, attempted murder, arson, etc. Homicides were punished by blood money. The offender and all the adults male in his lineage up to the third ascending generation were banned from the clan or tribe district until they had paid compensation. If they failed to pay, a blood feud would usually erupt and there would not be expectation of compensation should the criminal or one of his kinsmen be caught and executed. Only provocation was a valid defence. Vengeance after a court's decision was always severely punished. Vengeance was deemed to be an act of aggravated violence. The offender could suffer other punishments, the most severe being ostracism. Subsidiary punishments including not attending the offender's burial ceremonies, feast, refusal of fire from neighbours and keeping away his cattle could also be imposed.²⁷⁷

The Afar (or Danakil) had a penal code that determined criminal responsibility and matched offences with precise punishments. *Mada* determined "the nature and type of crimes, the degree of responsibility together with the corresponding penalty".²⁷⁸ It is pointed out that

[a]cts that are considered to constitute crimes were categorized into five: *Eido* (killing), *aymissiya* (assault), *rado* (looting), *sammo* (adultery) and *oaffu* (insult).

The corresponding types of punishment in descending order of their gravity are: *hane* (vengeance), *diat* (compensation for murder) and *deikha* (compensation for cases other than murder). *Maruso* (imposing fines) is also employed as a supplementary measure ...²⁷⁹

Whether vengeance was an institutionalized punishment, it is not clear. The use of the terms "killing" and "murder" is confusing. It is likely that murder corresponds to cases where the victim's family could not avenge the death and thus brought the matter to trial. Therefore, *hane* or vengeance should not be listed among punishments because it entails private justice. It is argued that "the highest penalty that might be imposed by any court

²⁷⁶ *Supra* note 265, at pp.526-527.

²⁷⁷ William A. Shak, "Guilt and Innocence: Problem and Method in the Gurage Judicial System", in Gluckman Max *et al.*, eds., *Ideas and Procedures in African Customary Law*, London: Oxford University Press, 1969, at pp.160-161 and Aberra Jembere, *Supra* note 39, at pp.57-59.

²⁷⁸ Aberra Jembere, *Ibid.*, at p.60.

²⁷⁹ *Ibid.*

having the competence to try serious crimes was expulsion from tribal membership, [i.e. ostracism]”.²⁸⁰

The Wolaitta belonged to the independent kingdom of Wolaitta until their absorption in 1894. All important criminal cases were tried by the *Balmola* (legislative and judicial council) which played the role of the Supreme Court in criminal trials. Only princes were sentenced to ostracism. Other people found guilty of homicide were executed.²⁸¹

Among the Kafecho (or Kafa), the *Tato* (the King) had among his functions the duty of presiding over the Supreme Court which was seated at the foot of *Bonga* hall. Although compensation was the most regular punishment, *Tato* had the power to pass death sentences.²⁸²

Punishments consisted of chaining, flogging, and enslaving, and compensation was to be paid in cattle or money. The most common forms of punishments were mutilation, i.e. cutting off of one hand, finger or toe; execution by beheading, or in case of a woman, pegging down to the ground. Violent robbery was punished by hanging, while a thief received from 40 to 50 lashes.²⁸³

The Anuak dwell in the Western Ethiopia. There is no indication of violent crimes within this group. This is the result of communalism and collective responsibility. It is argued that “since they live together and work together, the chance of conflicting opinions is very much reduced”.²⁸⁴

In conclusion, only three tribes imposed the death penalty, namely the Tigray, the Wolaitta and the Kafecho. But its practice remains doubtful in the case of the Tigray. The Wolaitta, who effectively practiced this sentence, joined Ethiopia only at the end of the nineteenth century. This same is true of the Kafecho who were annexed to the Kingdom of Abyssinia by Emperor Menelik II in 1894.²⁸⁵ This implies that before the influence of Coptic law in 1434, Wolaitta and Kafecho were independent kingdoms whose laws fell outside the

²⁸⁰ Jamuluddin A. Redo, *The Afar Customary Law* (unpublished Amharic manuscript), p.2 as quoted by Aberra Jembere, *Ibid.*, at p.62.

²⁸¹ *Ibid.*, at pp.66.

²⁸² *Ibid.*, at p.72.

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*, at p.75.

²⁸⁵ *Ibid.*

indigenous laws of Abyssinia. The logical conclusion is that of all studied Ethiopian tribes there was no death penalty.

The Kafecho were the only tribe to use mutilation and decapitation as punishments. It has not been established whether this resulted from any contact with a foreign legal system. Their geographical location (South-western Ethiopia) makes it likely that if any influence from canon law and *Shari'a* law existed, it would have first affected coastal tribes.²⁸⁶

Conclusion

The above development is intended to resolve the broad question of whether the death penalty existed in Africa before foreign legal influences arrived. As a punishment, it insinuates the presence of a rule of law and specifically of criminal law. Overgeneralizations have led to imply that criminal law exists only if serious crimes are harshly punished.

Accordingly, societies without the death penalty were thought to still be primitive. This conclusion deliberately ignores the fact that indigenous laws had already catalogued crimes and their punishments and distinguished between intentional homicide and accidental homicide. These brutal conclusions were likely influenced by a punitive mind and are blamed for their failure to consider the grounds on which the death penalty was either excluded or retained.

A lot of illegal conduct was simultaneously immoral and against religion. The death penalty was sometimes applied in the form of a divine punishment, or for preventing that the abomination resulting from the crime affects the entire community. The supernatural influenced both substantive and procedural law. In procedural law, because of their omniscience and superpowers, supernatural forces were resorted to when judging the probity and sincerity of a witness. In most African traditions, the witness's oath was made in the name of cosmic forces, ancestral spirits or God and witnesses swore to being struck

²⁸⁶The historical map of the ninth and ten centuries indicates that Kafecho or Kafa were (or are) located between the rivers Baro, Akobo and Omo. See Taddesse Tamrat, "Ethiopia, the Red Sea and the Horn", in Roland Oliver, ed., *The Cambridge History of Africa: from c. 1050 to c. 1600*, London: Cambridge University Press, vol.3, 1977, at p.99.

by lightning or to being killed if they perjure themselves. Ordeal evidences were also common all over Africa.²⁸⁷

In most of the organised States, a competent court imposed the death sentence only after a formal trial with the right of appeal and the right to seek the King's mercy.²⁸⁸ The death penalty was imposed for supernatural crimes such as witchcraft, poisoning, pronouncing a curse, political offences, homicides, malicious injuries and sexual offences. The conclusion is that the death penalty existed in Africa before foreign legal influences arrived. Many Bantu laws, thought to be the most humanitarian in Africa provided for the death penalty as well.

In other areas, harsh punishments including the death penalty were avoided on religious grounds. Restorative justice was itself lodged in religious beliefs. Sacred rituals and ceremonies were an integral part of the legal process. African gods and spirits were not focused on individual wrongdoing and punishment. They dealt with well being and good relationships within communities as a whole.

The law was regarded as a compensatory device, which often prescribed the amount of compensation to be paid by the offender or his family.²⁸⁹ It ceased to be punitive in the modern familiar sense. It was a tool of peace used to facilitate good relationships.²⁹⁰ An offence against the law is simultaneously an offence against religion and inevitably involves the community.²⁹¹ Thus, the exclusion of the death penalty in some indigenous laws was justified by the fact that an appropriate punishment should not destroy the offender. Any punishment looked beyond the culprit and the crime in considering the society at large, the potential widow and orphans included. Compensation better served the aim of justice as a tool of restoration, retribution, deterrence and rehabilitation. There was no reason to lose a second life, given that two wrongs do not make a right. Foreign laws introduced the death penalty where it did not exist and dealt with its scope where it existed and introduced new methods of execution.

²⁸⁷ *Supra* note 42, at pp.100-101.

²⁸⁸ *Ibid.*, at p.85

²⁸⁹ *Supra* note 46.

²⁹⁰ *Supra* note 42, at p. 80

²⁹¹ *Supra* note 46.

3 THE DEATH PENALTY DURING THE PERIOD OF PEACEFUL LEGAL INFLUENCES IN AFRICA

Introduction

Pre-colonial foreign legal influences started in the seventh century Common Era when, from the Arabic peninsula, Muslims invaded North and East Africa. Later, Islamic law extended to Maghreb and West Africa. Before the scramble of Africa in 1885, Muslim law had become an unchallengeable legal system on the continent.²⁹² Ethiopia adopted Christianity around the fourth century as a result of its long history with Israel since the time of King Solomon. It would have introduced Judaic law since then.²⁹³ However, the codification of this law only happened in the fourteenth century when Ethiopia adopted the Coptic law. There are also traces of Judaic law in North Africa (Morocco and Tunisia) and Hindu law in East Africa (Madagascar and Zanzibar). However, they left no substantive legacy in criminal matters. It is said that they were more concerned with family matters, personal status and commercial contracts.²⁹⁴

European legal systems were present in pre-colonial Africa too although a few need consideration before colonization. In the seventeenth Century, commercial interests led the Dutch Government to create a station in the Cap (South Africa) and imported the Roman Dutch law there. At the beginning of the nineteenth century the antislavery movement in America incited the American Government to create Liberia as a repository of free slaves so that they exercise and enjoy full social, civil and political rights there. Liberia declared its independence few decades before the scramble of Africa.

The period that goes from the introduction of Islamic law to the Scramble of Africa is commonly referred to as 'the period of imported laws' or the 'period of peaceful legal influences'.²⁹⁵ This does not mean that Africans welcomed pre-colonial foreign laws with open arms. It rather implies that, contrarily to colonial laws, pre-colonial foreign legal

²⁹² Jacques Vanderlinden, *Les systèmes juridiques Africains*, Paris: PUF, 1983, at p.27.

²⁹³ *Ibid.*, at pp.233-34.

²⁹⁴ *Ibid.*, at pp.39-41.

²⁹⁵ *Ibid.*, p.25.

influences peacefully coexisted with indigenous laws although they latter accommodated and unsuccessfully attempted to suppress them.

These influences eventually introduced the death penalty where it did not exist or extended it to apply to offences that had previously been punished in other ways. What is undisputed is the fact that these influences introduced new methods of execution. This chapter studies the extent to which they introduced or extended the death penalty and new methods of execution in Africa.

3.1 European peaceful legal influences in Africa

The Greeks, Romans, Portuguese and Spanish were among the first to interact with Africa through military invasions, trade, religious civilization and exploration. They did not leave a lasting legal heritage upon their departure however. This study is limited to Anglo-American law and Roman Dutch law both of which peacefully and effectively influenced indigenous laws in Africa.

It is commonly accepted that ancient European punishments consisted of outlawing the recalcitrant offender and placing him beyond the social pale.²⁹⁶ The law of homicide, for example, indicates that it was the duty of the family or of the tribe to avenge a victim by taking the life of his murderer.²⁹⁷ Then the law developed and the practice of private justice and private reprisals was supplanted by decisions of an organized justice system.²⁹⁸ Still, the law was characterized by punitive sanctions including death sentences.

In England as on the continent, several crimes were punishable by death which was often ritually executed.²⁹⁹ In 1820, there were over 200 capital crimes in England. These crimes were dispersed in at least 160 statutes and one provision could be interpreted as covering several capital crimes. It is said that “the actual scope of the death penalty was often as much as three or four times as extensive as the number of capital provisions would seem to

²⁹⁶ Henri S. Maine, *Dissertations on Early Law and Custom: Chiefly Selected from Lectures Delivered at Oxford*, London: John Murray, 1883, at pp. 36-45.

²⁹⁷ “Early Law and Custom”, (1885) 2 *Cape Law Journal* 28.

²⁹⁸ *Supra* note 296, at pp. 31-45.

²⁹⁹ *Supra* note 57, at p. 13.

indicate”.³⁰⁰ Capital crimes included witchcraft, treason and homicides. That was the result of the English law maturing under the influence of the Indo-European Legal system. This process ironically upgraded English law to the status of State law and left the death penalty in the hands of the State.³⁰¹

Afterwards, this same law crossed the Atlantic as the United States of America was colonized. English law became the absolute master of the land. Although American law is also seen as a symbiosis of English law, Native American customs and Spanish law, its main source is English law as contained in English legal practice, custom and philosophy.³⁰² This law returned in an American suit and established itself permanently in Liberia.

The Dutch had quite a different way of practicing justice. While in England foreigners were the most likely to face the death penalty when involved in serious crimes, the Dutch referred to foreigners as *amicitia* (a friendly group) and exacted from them a peaceful living oath, in which they swore “to live in love with [them]”.³⁰³ In terms of the death penalty, most criminal cases were resolved through a *compositie* or a peaceful extrajudicial agreement until the eighteenth century.³⁰⁴ Serious cases were punished by death until 1860.³⁰⁵

Dutch law remained a community law until the influence of Roman law in 1570. Establishing the date that Roman law penetrated The Netherlands has been and still is controversial; however it is generally accepted that in 1570 Roman law became effective in Holland due to the enforcement of the criminal ordinance. This led to the *Gelderland* revolt which the Dutch Republic survived in 1795. The revolt aimed to restore the old community law, sourced from local customs that the citizens were used to.³⁰⁶

Thus, Roman Dutch law is Roman law grafted into Dutch customs. From 1650, it enjoyed exclusive application at the Cape for almost 250 years until English law became a

³⁰⁰ Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750*, vol.1, London: Stevens and Sons Limited, 1948, at pp.4-5.

³⁰¹ “Early Law and Custom”, (1885) 2 *Cape Law Journal* 28.

³⁰² Lawrence M. Friedman, *American Law: An Introduction*, New York: Norton and Company, 1984, at p.37.

³⁰³ *Supra* note 57, at pp.14 and 25.

³⁰⁴ *Ibid.*, at p.26.

³⁰⁵ William Tallack, “The Penalty of Death”, (1890) 7 *South African Law Journal* 87.

³⁰⁶ C.H. Van Zyl, “The Study of Law”, (1893) 10 *South African Law Journal* 203. See also Bruce Lenman and Geoffrey Parker, *Supra* note 57, at, at p.33.

concurrent system in 1815.³⁰⁷ Later efforts to maintain it were made by white Afrikaner nationalists who succeeded to introduce it in law schools and courts until 1980. Although the true picture of today's South African law is of a mixed legal system whose substance and form originate from Roman Dutch and English legal systems, Roman Dutch law remains the basis of South African criminal law.³⁰⁸ Its influence on the South African criminal policy, including the death penalty can only justify a debate as regards to its form and content as no execution was carried out in Holland since 1860³⁰⁹ and the country abolished the death penalty for murder in 1870.³¹⁰

3.1.1 The death penalty in the Liberian Anglo-American law

Liberia was initiated by the American Colonization Society created in 1817. Its purpose was to settle ex slaves in West Africa.³¹¹ Liberia and the United States of America have close ties. They share institutions and concepts of law. Article 6 of the 1820 Constitution provided for the application of the American common criminal law in Liberia.³¹² The country declared its independence in 1847 eventually as a preventive measure against the European colonial ambitions.³¹³ It never underwent European colonization. Liberia applied a dual system that reflected the origin of its inhabitants until 1964 when the indirect rule policy was abolished.³¹⁴ American settlers were subject to the jurisdiction of modern law while African tribes were governed by their respective local customs. Liberian indigenous law was described as "excellent and eminently adapted to the requirements of the country".³¹⁵ The death penalty by burning was the most severe punishment for witchcraft.

³⁰⁷ Francois du Bois, "Introduction: History, System and Sources", in Cornie G. Van Der Merwe and Jacques E. Du Plessis, ed., *Introduction to the Law of South Africa*, The Hague: Kluwer Law International, 2004, at p.1.

³⁰⁸ Jonathan Burchell, "Criminal Law", in Cornie G. Van Der Mwerwe and Jacques E. Du Plessis, eds., *Introduction to the Law of South Africa*, The Hague: Kluwer Law International, 2004, at pp.447-448.

³⁰⁹ *Supra* note 305.

³¹⁰ *Supra* note 5, at p. 5.

³¹¹ Harrison R.J. Church, *West Africa: A Study of the Environment and of Man's Use of It*, London: Longman, 1963, at pp. 330.

³¹² Gerald H. Zarr, "Liberia", in Alan Milner, ed., *African Penal Systems*, London: Routledge and Kegan Paul, 1969, pp.191-212, at p. 196.

³¹³ Declaration of Independence in Convention of the Commonwealth Republic of Liberia, 26 July 1847, page 5. Available at www.digital.library.cornell.edu (accessed 23August 2009).

³¹⁴ Monday B. Akpan, "Black Imperialism: Americo-Liberian Rule over the African Peoples of Liberia, 1841-1964", (1973) 7 *Canadian Journal of African Studies* 217-236.

³¹⁵ Wallis C. Braithwaite, "Tribal Laws of the Mendi", (1921) 3 *Journal of Comparative Legislation and International Law* 233.

A death sentence for murder was rare. Murder was generally redressed by the heaviest fine possible.³¹⁶

From 1859, English law was gradually introduced and it became an authoritative legal component of Liberian law. In the 1900s Liberia initiated a penal reform intending to substitute retributive punishments for reformatory punishments. In 1914, Liberia codified its criminal law and government officials declared that the primary aim of criminal justice was rehabilitation.³¹⁷ The statutory death penalty was not applied until 1971.

3.1.1.1 The implied *de facto* abolition of the death penalty.

The Liberian Declaration of independence is somehow a remake of the American Declaration of independence. It contains the following paragraph:

We were animated with the hope that here we should be at liberty to train up our children in the way they should go to inspire them with the love of an honourable fame, to kindle with them, the flame of a lofty philanthropy and to form strong within them, the principles of humanity, virtue and religion.³¹⁸

Accordingly, the first section of the Republican Constitution created an unrestricted right to life.³¹⁹ Limitations were set out in section 8 and provided that “[n]o person shall be deprived of life, liberty, property, or privilege, but by judgment of his peers or the law of the land”.³²⁰ The death penalty as a limitation to the right to life could therefore be pronounced as a verdict of the jury or by a court of law.

The penal code further subjected the execution of the death penalty to the presentation of a signed and sealed death warrant from the Head of State.³²¹ It appears that Liberia did not resort to the death penalty until 1971. The only account of the death penalty being exercised was obtained from the personnel letter of a teenager, Salomon S. Page’s, writing

³¹⁶ *Ibid.*

³¹⁷ *Supra* note 312, at p. 210, footnote no 20.

³¹⁸ *Supra* no 313.

³¹⁹ Section 1 of the Liberian Constitution of the 26 July 1847, printed in *The Herald Office*, March 1847.

³²⁰ Section 8 of the Bill of Rights of the Liberian Constitution, printed in *The Herald Office*, March 1847.

³²¹ Section 36 (1) of the Liberian Penal Code of 1973.

to his former father's master in April 1849. After narrating the war with local tribes in which he fought beside his father and uncle, he said

[...] time would fail me to give you a complete history therefore I stop here.-5
murderers were hung [and] one of our own citizens for shooting another at about 7
o'clock P.M., 4 natives of Africa for killing an American on an Island up the St. John
river, commonly called the Factory Island.³²²

No other correspondence corroborates this story. If Solomon's letter is given credit, it would stand as the only recorded case before 1971. Liberia had become famous for not applying the barbaric punishments that were common in neighbouring British colonies.³²³ The death penalty was also and still is regularly executed in the United States of America. The idea of liberty, so vital to former slaves, added to the concern of unifying the country where indigenous tribes remained hostile to the foreign invasion led to cautious decision making. Section 232 of the penal code, which provided for capital punishment by hanging in cases of murder, remained unapplied until 1971. President William Tubman simply refused to sign execution warrants. Death sentences were *de facto* commuted into life imprisonment.³²⁴ From the time when the Declaration of Independence was signed in 1847 to 1971, Liberia *de facto* abolished the death penalty.

In 1965, President William Tubman formally opposed the death penalty by suggesting that the responsibility of signing and sealing a death warrant be given to the Chief Justice. The President was not compelled to perform that duty and there existed a constitutional provision supporting the suggestion. Liberians approved the idea and local newspapers found the recommendation logical. The Chief Justice was already required to follow the legal process of homicide cases. He would therefore be comfortable with the responsibility of signing or not signing a death warrant.³²⁵ No further action was taken however.

In 1969, a call for complete *de jure* abolition was launched to prevent future Heads of State from introducing the practice of hanging.

[...T]here now appears some likelihood that capital punishment may be utilized in the more immediate future. As a result of the widespread public concern over the

³²² Mary F. Goodwin, "A Liberian Packet", (1951) 59 *Virginia Magazine of History and Biography* 77.

³²³ Wilson J. Moses, *Liberian Dreams: Back-to-Africa, Narratives from 1850s*, Pennsylvania: Pennsylvania State University Press, 1998, at p.55.

³²⁴ Gerald H. Zarr, *Supra* note 312, at pp. 207-208.

³²⁵ *Liberian Star*, June 9, 1965 as quoted by Gerald H. Zarr, *Ibid.*, at p. 211, footnote no42.

pronounced increase of crimes of violence, some suggestion has been made in the newspapers and other media that capital punishment be used.³²⁶

It was not long before this prophesy of calamity was fulfilled. As soon as President William Tubman died, his former Vice President (now President) began signing death warrants.

3.1.1.2 The era of brutality

From the beginning (1971), President William Tolbert applied the Biblical saying “An eye for an eye and a tooth for a tooth”. He was in fact an ordained Baptist church pastor. He often declared that if you kill, you will be killed too. The first death warrant he signed was that of Justin Obi, a Nigerian lecturer convicted of having murdered an Episcopalian Bishop.³²⁷ A few weeks later, he signed a death warrant authorizing the hanging of three convicted criminals, one of whom was his cousin.³²⁸ In 1974, he again ordered the hanging of four convicted criminals.³²⁹

The regime became more barbaric when Tolbert started punishing those who perpetrated ritual murders. In 1976, twelve people were arrested and accused of ritual murder. The case was known as ‘the trial of the gang of 12’. Before the end of the trial, two of the accused were released and another two died. On the 9 June 1978, a jury convicted Allen Yancy and others of the murder of a very famous singer and fisherman named Moses Tweh, sentencing them to death by hanging. On appeal, the Supreme Court upheld the conviction and confirmed the lower court’s death sentence.

The gang’s last resort was to apply for a Presidential pardon. Influential persons attempted to obtain a review of the court’s decision but the President simply replied, “I will never permit myself to be influenced in one way or another by sentiments. I will do my duty when it is time to do my duty in the fear of God in keeping with the oath of office of the

³²⁶ *Supra* note 312, at p.208.

³²⁷ Fred P.M. Van Der Kraaj, “The Open Door Policy of Liberia-An Economic History of Modern Liberia”, Brimen, 1983 found at www.liberiapastandpresent.org (accessed 26 August 2009).

³²⁸ *Ibid.*

³²⁹ *Ibid.*

President".³³⁰ Some family members tried to poison their convicted relatives to save their family from the public humiliation of a hanging. All these attempts failed and the President signed the death warrant.

The scene of the 1979 execution was one of macabre horror for the Liberians who gathered to watch. The pitiless heart of their President silenced a crowd of 15,000 persons for half an hour.³³¹ The close ties between Liberia and the United States of America has resulted in the international community turning a blind eye to the abuses of human rights in Liberia. In the 1977 Annual Human Rights Report that was presented by the United States' Department of State to the Congress, no mention of the trial is made. Rather, Liberia is applauded to have one of "the best human rights records in Africa".³³² On the 12 April 1980, Samuel K. Doe overthrew and assassinated William Tolbert. In 1986, article 11 of the new Constitution reconfirmed the provision on the death penalty imposed through a judicial process.³³³

3.1.1.3 The legacy of the death penalty in Liberia

In short, the fact that Liberian indigenous tribes only imposed a fine for murder demonstrates the absence of a retaliation policy in that society. The amount of the fine was set with the purpose of ruining the offender as a deterrent measure.³³⁴

It was the Anglo-American law that introduced the death penalty for murder in Liberia. Its practice is however evidence of the extent to which the death penalty served differently politicians. Death penalty provisions remained dormant within the Constitution and the penal code when society was in need of peace and national unity. The executive found ways of excluding executions for more than a century. The resurgence of executions in the 1970s was simply the consequence of not having *de jure* abolition and further evidence of the fragility of *de facto* abolition. Executions started one year after the death of the abolitionist President, William Tubman. The new regime, whose slogan was the *lex talionis*

³³⁰ "Yancy and others to be noosed", in *The New Liberian*, 1979 and "Gang of seven executed: Thousands thronged the cemetery", in *Express special*, 1979 as quoted by Van Der Kraaj, Fred P.M., *Ibid.*

³³¹ *Ibid.*

³³² See Annual Human Rights Issues submitted to the Congress by the US Department of State, 65 (1976-1977), Liberia at www.heinonline.org/HOL/ViewImageLocal? (accessed 1 September 2009).

³³³ The Constitution of the Republic of Liberia of 6 January 1986, *ICL Doc status*, 6 January 1986.

³³⁴ *Supra* note 315, at p.234.

principle, hanged sixteen people between 1971 and 1978.³³⁵ Liberia's last execution occurred in 2000 and the death penalty was legally repealed in 2005. We shall return to this in our last chapter.

3.1.2 The death penalty under the Roman-Dutch law in South Africa

Roman Dutch law in South Africa has never been a death penalty free law. It inherited concepts and theories of Roman law that according to the Law of XII Tables prescribed the death penalty for a range of crimes including treason (*perduellio*), murder, theft, defamation and perjury. It also contained influences of local Germanic customs, which, in addition, imposed the death penalty for rape, sodomy, bigamy and heresy.³³⁶ Certainly English law influences on South African law had little to do with abolition. It favoured the death penalty as well. Its effects limited on shortening the list of capital crimes, introducing the discretionary death penalty for treason and the mandatory death penalty for murder. The efforts of the British colonizer were not immune to Afrikaner nationalism and its apartheid racial ideology.

3.1.2.1 The death penalty prior to the English law influence

When Dutch settlers landed at the Cape of Good Hope in 1650, one of the laws at their disposal was the 1540 Edict of Emperor Charles which made bankruptcy a capital crime. Van der Linden, a prominent and learned early Roman Dutch lawyer, argued that the Edict never found favour with South African settlers due to its absurdity. Temporary imprisonment became a reasonable alternative.³³⁷ However, the exclusion of the death penalty for its unreasonableness remains doubtful. It is instead thought that Van der Linden was expressing a more modern view. The old Roman Dutch legislation (*Placaat*) of commercial honesty imposed the death penalty for a breach of faith among businessmen³³⁸ and "those at the Cape considered themselves governed by the Roman-Dutch law".³³⁹ There is however no indication in the Cape archives of the death sentence for insolvency.

³³⁵ *Supra* note 326.

³³⁶ Exton M. Burchell and Peter M. A. Hunt, *South African Criminal Law and Procedure*, Cape Town: Juta, 1970, chapter 1, at pp. 2-11.

³³⁷ "Capital Punishment", (1897) 14 *South African Law Journal* 122-123.

³³⁸ *Ibid.*

³³⁹ *Supra* note 336, at p.17.

These archives indicate that until formally prohibited by The Netherlands, notorious cases deserving of the death sentence were often returned in Europe.³⁴⁰ This means that the Roman Dutch penal law was not yet extended to Africans. In reaction to the Cape Governor's letter of 19 February 1701 requesting that in accordance with the judgment of the Court of Justice, sailor Jan de Vos be transferred to Holland to be executed there, on the 2 July 1703 Dutch authorities replied that "[...] such desperate people are no longer to be sent over to us -no criminals whatever -for trials..."³⁴¹

This made it clear that there were to be no more transfers of convicted or suspected criminals to The Netherlands. The prohibition also contained firm instructions on the timeframe of execution, the place of execution and the automatic refusal of pardon in such cases. The aforementioned letter stated that

It is somewhat incongruous that those of Ternate sent all the papers connected with the case of the skipper, condemned to death for murder, to Batavia, as the case was so clear and all punishments, of this nature especially, should be promptly inflicted, without leaving the delinquents so long in uncertainty regarding their fate. Moreover, it is advisable that such sentences should be executed on the spot where the crimes have been committed, in order to impress and deter others, and not in another place. The reasons adduced [...] are, moreover, not so favourable and weighty as to justify the postponement of the execution so long, or a request for pardon. Accordingly such verdicts shall henceforth be carried out without delay where the crime has been committed.³⁴²

These firm instructions opposed the Cape authorities' practice of avoiding the death sentence as best they could. There were different ways of avoiding an offender's execution. The first was the commutation of the death sentence into that of banishment. On the 30 November 1697, the death sentence by shooting of J.C. Overvran, an ex soldier convicted of murder was commuted into banishment to Robben Island. The Governor said he found no reason to execute him.³⁴³ This only happened once. It was then restricted or even

³⁴⁰ "Extract from the Despatch of Seventeen to India, 2 July 1703", as quoted in Hendrik C. V. Leibbrandt, *Precis of the Archives of the Cape of Good Hope: Letters Received 1695-1696 by Governor S Van Der Stel*, Cape Town-London: Cape Times 1900, at p.332.

³⁴¹ *Ibid.*

³⁴² *Ibid.*

³⁴³ *Ibid.*, at p.133

forbidden in application of the 1650 law regulating the death penalty. On the 23 July 1701, Dutch authorities felt obliged to reiterate that

[t]he Governor-General had no power to assume unto himself such a right, which not only does not belong to him, but which he is strictly forbidden to assume, as will be seen from our instructions to you of the year 1650, in which pardon from death (or the remission of capital punishment) has been strictly forbidden to all and everybody, and the Governor-General in particular is forbidden to do so on his own authority [...] This law has always steadily been kept in view as far as we know [...]³⁴⁴

Judicial authorities reacted to the prohibition by reducing death sentences. Convicted persons had to be given the impression that they were being executed without killing them. On 27 August 1696, one Frans Coentsen drew his sword against a sergeant on guard. He was “sentenced to be blindfolded on the place of execution, a bullet to be fired over his head and after that to be put in irons and serve as convict for three years”.³⁴⁵ On the 23rd December 1696, Jerla was convicted of human trafficking for having bought a child with the purpose of selling it afterwards. The court condemned Jerla to “be brought to the place of execution, there to be bound to a pole and rigorously scourged and branded [...]”³⁴⁶

On the 13 October 1699, soldier Jan Abrahams was convicted of stabbing his mother in the loin with a knife. The sentence reads: “The knife to be tied above his head, and after having been severely whipped and branded on the back, he was to be banished for 10 years as a convict”.³⁴⁷ On the 14 October 1699, soldier Jan Stekelman was also convicted of a crime that is not mentioned and sentenced “to stand with the rope around his neck under the gallows; to be severely whipped, branded and sen[t] in chains for 10 years to Robben Island”.³⁴⁸

The third way to avoid the death sentence was to resort to legal technicalities. On 1 September 1699, two Chinese were convicted of sodomy, a capital crime. However, the court was unable to secure a confession from the accused. They were sentenced to

³⁴⁴ *Ibid.*, at pp. 276-277.

³⁴⁵ *Ibid.*, at p.210.

³⁴⁶ *Ibid.*, at p.72.

³⁴⁷ *Ibid.*, at p.216.

³⁴⁸ *Ibid.*

banishment.³⁴⁹ On 27 November 1699, Oeydsoeko was also convicted of sodomy. Although tortured, he refused to confess. The court stated “that the mildness of our laws requires that no one shall be executed or condemned unless he personally confesses to the crime of which he is accused [...T]he prisoner although tortured, would not confess [...T]herefore he should be banished for life [...]”³⁵⁰ On 12 December 1699, Binko was convicted of murder and sentenced to be banished for life after serving six first years in irons.³⁵¹ Confession was a precondition for the imposition of the death sentence according to Philip II’s criminal procedure ordinance of 1570.³⁵²

Nevertheless, the Dutch authorities were sometimes inconsistent in their criminal policy. The Netherlands refused, for example, to uphold an execution when doing so would undermine their position in the colony. In 1703, the colony faced probably what was its first challenging death penalty case. Ninety men planned an expedition into the interior land to steal cattle. They spent almost two months moving from village to village, attacking and killing Hottentots and taking possession of their cattle. More than two thousand cattle were stolen during a war in which many Hottentots lost their lives.

Applying the Resolution and *Placaat* of 11 July 1702 and likely bearing in mind the aforementioned 2 July 1703 letter, the judicial council of the Company³⁵³ started by explaining why the court painfully excluded the death sentence in previous similar cases. First of all, half of the population (550 people at the time) was involved in this kind of dirty business. Second, widows and orphans, already far away from their fatherland, would be exposed to extreme misery if their breadwinner was executed. Third was their fear of creating a general chaos. If some convicted criminals escaped execution, they could flee into the uncontrollable mountains creating a climate of insecurity for the Hottentots and for their fellow Europeans.³⁵⁴ However, based on the circumstances of the case, judges found that only the death sentence was appropriate and made the following ruling:

[...] In order to preserve the peace of the Government and to free the natives for the future from similar violence committed on them so unjustly by fully half the number of inhabitants by the abuse and violation of the free barter, we have

³⁴⁹ *Ibid.*, at p.214.

³⁵⁰ *Ibid.*, at p.233.

³⁵¹ *Ibid.*, at p.234.

³⁵² *Supra* note 336, at p.19.

³⁵³ General Netherlands Chartered East India Company.

³⁵⁴ Hendrik C. V. Leibbrandt, *Precis of the Archives of the Cape of Good Hope: the Defence of Willem Adriaan Van Der Stel*, Cape Town: W.A.Richards & Son, 1897, at p.136.

unanimously decided [...], on pain, that offenders will, according to circumstances be punished corporally or capitally [...]³⁵⁵

Despite the determination of Cape authorities to execute the sentence, they wisely submitted the matter for approval to their hierarchy in The Netherlands. On the 24 July 1704, a reply stated as follow:

[...] in reply to your [letter] of 1st April 1703, [...] regarding the violence committed by some freemen on the Hottentots, whom they had visited in order to barter cattle, from whom they took, and whom they robbed of their cattle, likewise murdering some of them, as fully set forth in your letter; [...] We now say that although those violent men have deserved a rigorous punishment commensurate with such a horrible deed, we share your hesitation because of the great number of people who, according to your evidence, are guilty of this crime [...]³⁵⁶

Until 1862, most of prevalent offences under the Roman Dutch law were capital crimes. It appears however that courts seldom pronounced it. Sometimes, the prosecutor's references to the Imperial statutes lying in the criminal code and to Biblical *lex talionis* verses were unsuccessful.³⁵⁷ Capital crimes were treason, murder, assault with intent to murder, rape, sodomy, bestiality, incest between consanguine, arson, robbery, theft aggravated from former conviction, housebreaking, theft and killing of cattle, coining, falsity and forgery. For the crime of sodomy, a 1730 *Placaat* added that the offender should be hanged in public, his body burnt or thrown in the sea or left to wild animals.³⁵⁸

Nevertheless, interest in executions gradually lessened. In 1731, one person was convicted and sentenced to death for sodomy. In 1831, four people were executed, two for sodomy, one for assault with intent to murder and one for rape and robbery. In 1832, three persons were executed, one for assault, housebreaking, theft and killing of cattle, the second for

³⁵⁵ *Ibid.*, at p.135

³⁵⁶ Hendrik C. V. Leibbrandt, *Supra* note 340, at p.347. Accordingly, the Cape Government passed *Placaat* against trifling barter with natives three times (8 December 1739, 26 April 1770 and 16 June 1774) and recidivism led it to take a resolution on the 19th July 1786 authorizing the Landdrost to make the so called trade of cattle with Kafirs, a trade that often turned into a raid in the Hottentots territories, at most twice a year for bringing good cows for benefit of the entire company. See Hendrik C.V. Leibbrandt, *Precis of the Archives of the Cape of Good Hope, Requesten (Memorials) 1715-1806*, Vol. 2, Cape Town-London: Cape Times, 1905, at p.493.

³⁵⁷ Hendrik C. V. Leibbrandt, *Supra* note 340, at pp.431-342.

³⁵⁸ *Supra* note 337, at p.123. For bestiality and coining see also Clarkson H. Tredgold, *Handbook of Colonial Criminal Law*, Cape Town: Juta, 1904, at pp.74 and 101.

theft, shop-breaking and assault with intent to murder and the third for aggravated theft. In 1835, only two people were executed respectively for arson, incest and rape. In 1836, again two persons were executed, one for arson and the other for housebreaking with intent to steal, theft and assault with intent to murder. The death penalty fell out of vogue until 1844 when one person was executed for rape. In 1862, soldier William Nicholas was convicted of rape and executed as well. In 1891, McKeone and Cooper were executed for high way robbery and assault on a policeman.³⁵⁹

Cape sentences were described as being as barbaric as those formerly in vogue in Europe during the same period. They included breaking on the wheel, hanging, impaling, strangling, burning, drowning, smothering and torture accompanied by a *coup de grace*.³⁶⁰

After the execution of William Nicholas, it was commonly thought that the death penalty would be abandoned for all crimes except murder. The Government seemed to have substituted banishment in its place. The convicted were banished and sent to Robben Island for custody or hard labour.³⁶¹ Surprisingly, three decades later the Transvaal High Court imposed a death sentence for highway robbery and theft.³⁶² The sentence provoked intense legal controversy. In fact, the court was blamed for not following legal developments in England where the death penalty was restricted to treason and murder.

In 1891, one of the writers exclaimed that:

The common law in this country seems to have followed in its growth the legislative development of the English criminal law, and one would have thought that the criminal law of Transvaal would have advanced in a similar way, but [...], the world has been astonished to find that this was not the case.³⁶³

In reaction, the Transvaal Chief Justice Kotzé admitted that the sentence was outdated but stated that he had a feeling it conformed to Roman Dutch law.³⁶⁴

³⁵⁹ "Capital Punishment under the Common Law", (1891) 8 *South African Law Journal* 232.

³⁶⁰ *Supra* note 337. See also Exton M. Burchell and Peter M. A. Hunt, *Supra* note 336, at pp.18-19.

³⁶¹ Hendrik C.V. Leibbrandt, *Precis of the Archive of the Cape of Good Hope, Requesten (Memorials) 1715- 1806*, Vol. 2, Cape Town-London: Cape Times, 1905, at pp. 234, 374, 616 and 632.

³⁶² *Supra* note 359.

³⁶³ *Supra* note 359.

³⁶⁴ *Supra* note 37, at p. 199.

3.1.2.2 The influence of English law on the law of treason

Roman Dutch law regarded treason to be a very serious crime. The offender and his or her descendants were put to death as a warning to potential criminals. Alternatively, they were subjected to extreme persecution, misery and poverty to the extent that death became a relief.³⁶⁵

In Roman Dutch law, high treason is referred to as *perduellio* which always implies hostile intent against the ruler.³⁶⁶ No cases of treason appeared before the courts before the British war.³⁶⁷ The early Roman Dutch law of treason had three sources: the *Grondwet* (as modified and completed by amendments and additions), statutes and resolutions and the works of Van der Linden, Van Leeuwen and Grotius. The latter were applied in cases where the two previous sources were silent.³⁶⁸ Section 31 of the Transvaal *Thirty-three Articles*, which was a complement to the *Grondwet*, stated that cooperating with foreign states or their officials or servants with hostile intent was treason and any attempt to do so was attempted treason, all punishable by a fine of Rix Dollars 500 and banishment from the country.³⁶⁹ In Natal, the 1868 legislation aimed “to assimilate the [existing] law to the law of United Kingdom in relation to treason offences”.³⁷⁰ There is no record of any execution for treason under Roman Dutch law.

In 1816, there were five Boers executed for high treason. They had rebelled against the British rule. These were likely the first executions in the colony for this crime. The

³⁶⁵ Frederick G. Gardiner, “Notes on the Law of Treason”, (1901) 18 *South African Law Journal* 151-152.

³⁶⁶ Treason (*perduellio*) was different from *sedition* that involved a riot. Riot would become treason under certain circumstances and namely when the assembling endangered the State. There was no treason if the hostile intent resulted from personal hatred or revenge although these motives were often ignored when the killing had endangered the State. See Frederic G. Gardiner, *Ibid.* at pp. 147-148.

³⁶⁷ *Ibid.* See also “The Crime of Treason, etc., in the Transvaal”, (1896) 13 *South African Law Journal* 182. The first British occupation in South Africa dated 1795 but left no legal legacy. The second occupation started in 1815 and lasted until the Union of South Africa in 1910. See Eduard Fagan, “Roman Dutch Law in Its South African Historical Context”, in Reinhard Zimmermann and Daniel Visser, eds., *Southern Cross: Civil and Common Law in South Africa*, London: Oxford University Press, 1996, at p.46.

³⁶⁸ “The Crime of Treason, etc., in the Transvaal”, (1896) 13 *South African Law Journal* 182.

³⁶⁹ See the *Law of the Thirty- Three Articles* as interpreted in *The State v Lionel Phillips and Sixty- Three Others*, 1896, reprinted, (1900) 17 *South African Law Journal* 21 and 28. See also “The Crime of Treason, etc., in the Transvaal”, (1896) 13 *South African Law Journal* 183.

³⁷⁰ Law no 3 of 1868 (N) as quoted by Exton M. Burchell and Peter M.A. Hunt, *Supra* note 336, at p.29.

executions created a long lasting bitterness that became one of the contributing factors to the Great Trek. On the ground, people considered those executed to be political martyrs.³⁷¹ Apparently in reaction to the consequences of the 1816 executions, the death penalty became rare for treason. From 1832, English authorities decided to introduce legal reforms. The charter creating the Supreme Court empowered that court to reshape Roman Dutch law along English law lines. Judges were granted full authority and jurisdiction to incorporate into the existing legal arsenal new principles as developed by the Cape Government.³⁷² In 1833, eventually as a result of the reform, chiefs Mampuru and Niebel were sentenced to death for public violence and rebellion among other things. Although veiled, the charge amounted to treason. Mampuru was executed the same year and Niebel's death sentence was commuted to life imprisonment.³⁷³

Roman Dutch lawyers however continued resisting the reintroduction of the death penalty for treason. In the *Lionel Phillips and sixty-three others* case,³⁷⁴ the so-called 'Reform committee' case, the defence argued that capital punishment was repealed for treason under Roman Dutch law in reference to Holland law, Transvaal law and Van der Linden, who limited punishments for treason to corporal punishment, imprisonment and banishment.³⁷⁵ Van der Linden warned that a more severe sentence would make the offender an "unfortunate victim of political dissensions".³⁷⁶

Some judges were reminding that, although disused, the death penalty still existed for treason.³⁷⁷ They would still not revive it however. Many were even reluctant to impose the death penalty for treason under occupied South Africa. Only Reinhold Gregorwski J imposed a death sentence on four men convicted of high treason in the *Reform Committee* case. The judge said that the existing legal anarchy did not help in sentencing. One had "[...]

³⁷¹ Ellison Kahn, "How did we get our Lopsided Law on the Imposition of the Death Penalty for Common Law Crimes? And what should do we do about it?", (1989) 2 *South African Journal of Criminal Justice* 141.

³⁷² Stephen D. Girvin, "The Architects of the Mixed Legal System", in Reinhard Zimmermann and Daniel Visser, eds., *Southern Cross: Civil and Common Law in South Africa*, London: Oxford University Press, 1996, at p.96.

³⁷³ *Supra* note 371.

³⁷⁴ *State v. Lionel Phillips and Sixty-Three Others*, 1896, reprinted, (1900) 17 *South African Law Journal* 15.

³⁷⁵ *Ibid.*, at p.21.

³⁷⁶ Johannes Van der Linden, *The Institutes of the Law of Holland*, Amsterdam, 1806, p. 319 as quoted in *State v. Lionel Phillips and Sixty-Three Others*, 1896, reprinted, (1900) 17 *South African Law Journal* 25.

³⁷⁷ "Cape Treason Trials", (1901) 18 *South African Law Journal* 168.

to select one or other of the laws under which the punishment should be met out”.³⁷⁸ But he immediately added, “[t]he laws ran upon parallel lines with each other and the one had nothing to do with the other”.³⁷⁹ A death sentence was imposed in the belief that it was legal. His judgment became controversial and was strongly criticized to the extent that the Government took the step of commuting the four death sentences into imprisonment.³⁸⁰ The record shows that only Jopie Fourie was executed for high treason in 1914.³⁸¹ Eventually some treason convicts were summarily executed. It is submitted that early after the Anglo-Boer war “over fifty [Boers] were executed for treason” in the Cape Province.³⁸² Records of these cases are still missing and some of their graves did not contain their bodies.³⁸³

Judges concluded that in leaving to courts the power of imposing a discretionary death sentence, the legislator had excluded vindictive sentences.³⁸⁴ Even in England, no person had suffered a death sentence for treason since 1861.³⁸⁵ Murder had become the only capital crime. The *de facto* abolition of the death penalty for treason had therefore met the aspiration of Roman Dutch lawyers beginning with Van der Linden who had “an incipient reprobation of it [the death penalty]”.³⁸⁶

3.1.2.3 The influence of English law on the law of murder

The Roman-Dutch law defines murder (*moord* or *doodslag* -archaically used as *doodslach*-) as the intentional killing of a human being by another sane human being; cases of gross negligence (*lata culpa*) were excluded as they lead to a charge of culpable homicide.³⁸⁷ The legal development of the Roman Dutch law did not mean to abandon the death penalty. “Once a court has decided that an act amounts to murder, there is irrespective of persons,

³⁷⁸ *State v Lionel Phillips and Sixty-Three Others*, 1896, reprinted, (1900) 17 *South African Law Journal* 29.

³⁷⁹ *Ibid.*

³⁸⁰ *Supra* note 372, at p.116.

³⁸¹ Barend Van Niekerk, “Hanged by the Neck Until you Are Dead”, (1969) 86 *South African Law Journal* 459.

³⁸² David Harrison, *The White Tribe of Africa: South Africa in Perspective*, London: Ariel Books, 1985, at p. 4.

³⁸³ *Ibid.*, at p. 45.

³⁸⁴ *Supra* note 377, at p.65.

³⁸⁵ *Supra* note 381, at pp. 461-462.

³⁸⁶ *Ibid.*, at p.461

³⁸⁷ Manfred Nathan, “The Roman Dutch Law of Homicide”, (1902) 19 *South African Law Journal* 117-118.

mode, time or place, but one penalty to inflict [*i.e.* the death penalty]”.³⁸⁸ Manfred Nathan calls this a ‘simplification of crime and of its punishment’. There was no longer any need for the ornate embellishments of torture and degradation for the court to be satisfied with the definitional elements of murder.³⁸⁹ Mercy was an alien concept even in cases where the murderer was intoxicated.³⁹⁰

South African law inherited the broad definition of murder, the mandatory death penalty and the secret process of mercy from English law as a consequence of the British colonisation of the Cape.³⁹¹ Section 135 of the Native Territories Penal Code Act of 1886 introduced a new definition and confused murder with culpable homicide under the heading of homicide. It read as follows:

homicide is culpable when it consists in the killing of any person either by an unlawful act or by a culpable omission to perform or observe any legal duty, or by both combined, or by causing a person by threats or fear of violence or by deception, to do an act which causes that person’s death, or by wilfully frightening a child or sick person.³⁹²

It is submitted that English law differentiated between categories of homicide by determining whether the act was perpetrated in secret, in a calm and coldblooded manner (murder) or because of anger, provocation or insult (manslaughter).³⁹³ This categorization did not much impress Roman Dutch lawyers.³⁹⁴ In homicide cases, courts seldom resorted to the English terminology of murder and manslaughter, both being part of intentional homicide under Roman Dutch law.³⁹⁵ Courts instead referred to deliberate murder and determined murder, both of which were punishable by death.

The mandatory death penalty for murder did not enjoy unanimity either. In the *Bodenstein* case, the judge regretted the absence of judicial discretion in cases of murder before

³⁸⁸ *Ibid.*, at p. 139.

³⁸⁹ *Ibid.*, at p.23.

³⁹⁰ *Ibid.*, at p. 124.

³⁹¹ Robert Turrell, *White Mercy: A Study of the Death Penalty in South Africa*, London: Praeger, 2004, at p.4.

³⁹² Section 135 of the Native Territories Penal Code Act 24 of 1886. For details see Manfred Nathan, *Supra* note 387, at p.116 and Clarkson H. Tredgold, *Supra* note 358, at pp. 119-120.

³⁹³ William Wilson, “Murder and the Structure of Homicide”, in Andrew Ashworth and Barry Mitchell, eds., *Rethinking English Homicide Law*, New York: Oxford University Press, 2000, at pp.20-23, Exton M. Burchel and Peter M. A. Hunt, *Supra* note 336, at p.25.

³⁹⁴ *Supra* note 391, at pp.1 and 27, footnote11.

³⁹⁵ *Supra* note 387, at pp.117-131.

recommending mercy. He stated that “the charge of murder against the prisoner has been fully proved, and [...] he should be convicted. We have no alternative but to inflict the sentence of death. If any mercy has to be extended [...], such mercy lies in higher hands than ours”.³⁹⁶

In Natal and at Rustenburg, judges were more courageous and substituted the mandatory death penalty for temporary imprisonment.³⁹⁷ As the Eastern District Judge President, Kotzé opposed this initiative on the grounds that under Roman Dutch law discretionary sentences should be limited to junior offenders.³⁹⁸ It is submitted that the learned judge was referring to the Tryn Jansz case, where a Leiden court had found it inappropriate to strangle and break the body on the wheel of an eleven year old girl who had used rat poison to murder her master’s family. Tryn Jansz was sentenced to seventy years imprisonment and general forfeiture as a ‘humane punishment’ at the times.³⁹⁹

Judge President of Griqualand Laurence stated that the precedent was outdated in terms of meeting the needs of justice. The judge maintained that the court had the power to withhold the death sentence “in very special circumstances, on very exceptional occasions and for very cogent reasons”.⁴⁰⁰ One of special circumstance that justified discretion and the imposition of an alternative sentence was infanticide.⁴⁰¹ The debate indicates the extent to which the confusing legal situation led judges to forge their own paths, which were sometimes totally new to both Roman Dutch law and English law.

3.1.2.4 The pre-apartheid distaste for the death penalty in South Africa

The absence of legislative guidance on precise punishments for precise crimes created uncertainty. The courts were obliged to dig into old authorities that stemmed from two opposite legal systems. Transvaal was the only exception as it had enacted the Criminal Procedure Code 1 of 1903 which created a statutory death penalty.⁴⁰² Although Van der

³⁹⁶ *Rex v. Bodenstein* (September 30, October 2, 1901), reprinted, (1901) 18 *South African Law Journal* 425-426.

³⁹⁷ *Supra* note 337, at p.123 and Ellison Kahn, *Supra* note 37, at p.199.

³⁹⁸ Ellison Kahn, *Ibid*.

³⁹⁹ *Supra* note 387, at pp. 121-122.

⁴⁰⁰ *Supra* note 37, at p.199.

⁴⁰¹ *Ibid*.

⁴⁰² Chapter 18 of the Criminal Procedure Code (Transvaal) Ordinance1 of 1903.

Linden appeared to be alone in his desire for abolition,⁴⁰³ capital punishment did not have much support among the founders of Roman Dutch law. This led to increasing doubt regarding its mandatory nature for murder. It was remarked that “though these old laws are still on our statute book, the extreme penalty has ceased to be exacted. In practice, death sentences are now passed only in cases of murder. Whether even in those cases, it is a compulsory sentence, is open to question”.⁴⁰⁴

There is no record indicating that Roman Dutch law founders consistently recommended the death penalty. The few pre-union cases of hanging are attributed to foreign influences mainly the development of Dutch customs in The Netherlands and the English law of murder.⁴⁰⁵ The nineteenth century discretionary death penalty was restricted to treason and rape and the mandatory death sentence was only for murder as in England. Property crimes no longer incurred the death penalty.

Furthermore, executions were to be humanely carried out in conformity with the English requirement of “swift execution of the condemned and atomization by surgeons”.⁴⁰⁶ All of the terrors previously attached to the punishment such as breaking the body on the wheel, decapitation, torture accompanied by *a coup de grace*, etc. became outlawed. Hanging became the only acceptable method of execution.

In South Africa, the death penalty became more problematic from 1910 with the unification of the four provinces. In the same year, there were 57 executions. The figure increased to 268 during the first decade of the union.⁴⁰⁷ During the first half of the twentieth century, Louis Botha’s government (1910-1919) executed more people than all the other governments that succeeded him.⁴⁰⁸ It is certain that the reasons that provoked the increase of death sentences are alien to Roman Dutch law. As we shall see it *infra*, the plinth of discriminatory policies that the British colonizer left to Afrikaner nationalists added to the bitterness of the Anglo-Boer war framed the policy behind the resort to capital punishment after the Union of South Africa.

⁴⁰³ *Supra* note 381, at p. 461.

⁴⁰⁴ *Supra* note 337, at p. 123.

⁴⁰⁵ *Supra* note 37, at 198.

⁴⁰⁶ Greg T. Smith, “Violent Crime and the Public Weal in England, 1700-1900”, in Richard McMahon, ed., *Crime, Law and Popular Culture in Europe*, Devon: William Publishing, 2008, at p.193.

⁴⁰⁷ *Supra* note 381, at p.458.

⁴⁰⁸ *Supra* note 391, at p.260.

3.2. Asian legal influences in Africa

Two major Asian legal systems influenced Africa prior to colonization, Islamic law in East, North-East, North and West Africa and Coptic law in Ethiopia.

African Islamic countries came under the influence of Islamic law (*Shari'a* law) with the Muslim invasion. Chapter 2, verse 172 of the Quran clearly proclaims that “There is life for you in retaliation”.⁴⁰⁹ The Islamic death penalty law did not impress African tribes however as they were used to blood money.⁴¹⁰ The friction between Islamic law and customary laws sometimes resulted in clashes, with Africans preferring their customs to the imposed religious norms.⁴¹¹

Ethiopia received the Coptic law from the Coptic church of Alexandria. Ethiopia (former Empire of Abyssinia with Aksum as its capital) became a theocratic Empire with close ties to Israel at the time of King Solomon and during and after the era of Jesus Christ.⁴¹² The biblical modes of punishments including the *lex talionis* were introduced with the codification of the *Fetha Negest* in 1434.⁴¹³

3.2.1 The death penalty in Ethiopian law

Like Liberia, Ethiopia never underwent western colonization. Although Ethiopians claim appertaining to the civil law system,⁴¹⁴ the marvellous picture of their law stems from a well balanced symbiosis of traditional customs, Canon and Islamic laws and western laws (common law and Romano-Germanic law) received in modern time.⁴¹⁵

Ethiopian legal history is usually divided into three periods: the traditional period that ended with the reign of Emperor *Zär'a Ya eqob* (1434), the period from Emperor *Zär'a Ya eqob* (1434-1468) up to the end of the monarchy and the beginning of the Ethiopian

⁴⁰⁹Sayed Hassan Amin, *Islamic Law in the Contemporary World*, Glasgow: Royston Limited, 1985, at p.28.

⁴¹⁰ *Ibid.*, at p.24-28.

⁴¹¹ Sayyid Muhammad Abu Rannat “The Relationship Between Islamic and Customary Law in Sudan”, (1960) 4 *Journal of African Law* 13.

⁴¹² 1Kings 10:1-13, Mathew 12: 42, Acts of Apostles 8: 26-39.

⁴¹³ Genesis 9: 5-6, Exodus 21:14.

⁴¹⁴ *Supra* note 265, at p. 511.

⁴¹⁵ *Supra* note 39, at pp.9-15.

revolution (1974) and the post revolution period (from 1974 up today).⁴¹⁶ Without prejudice to this subdivision, the study of the death penalty under Ethiopian law requires one to consider not the country's important political events but solely the criminal law in force at a given time even if the studied period of time bridges different political periods.

The previous chapter established that the death penalty did not exist before the Coptic law arrived. The period of customary law ended in 1434 when Emperor *Zär'a Ya' eqob* instructed scholars of the Ethiopian Orthodox Church to compile legal norms, later known as *Fewuse Menfessawi* or spiritual remedies. Also during his reign, the Emperor ordered a copy of the law in force in Alexandria and required its translation in Ge'ez, the Semitic language formerly praised as the Latin of Ethiopia. The Code is known as *Fetha Negest* or the Law of the King, partly based on Roman-Byzantine law. This second period ended in 1930 with the first codification of the Ethiopian penal code. The 1930 penal legislation that had retained some aspects of the *Fetha Negest* was repealed by the 1957 penal code, which was inspired by the French Indochina penal code.⁴¹⁷

3.2.1.1 The death penalty under the monarchic law

Although indigenous laws remained a valid component of Ethiopian law until 1930, the codification of *Fetha Negest* limited their scope. The *Fetha Negest* codified a law already in force in Egypt. It was partially based on the Coptic principles of the Orthodox Church of Alexandria, the canon law of the Roman Byzantine Catholic Church, doctrines from the Old and New Testaments, *Shari'a* law, glosses from Nicaea and Antioch, and Roman law.⁴¹⁸ It introduced new criminal sanctions including the death penalty and principles of criminal responsibility. The law that developed from it was called the *Atse ser'at* or the deeds of the sovereign which originates from *afe-negus* (the King's mouth). Justice was carried out in the King's name. The word *Atse ser'at* refers to the procedural law, substantive law and the case law initially formed by local justice bodies and then confirmed by the Supreme Court.

⁴¹⁶ *Ibid.*, at p.3.

⁴¹⁷ *Ibid.*, at pp. 3 and 10.

⁴¹⁸ Steven Lowenstein, "Ethiopia", in Alan Milner, ed., *African Penal Systems*, London: Routledge and Kegan Paul, 1969, at p.35. See also Comité de Législation Etrangère et de Droit International, *Le code pénal de l'Empire d'Ethiopie (du 23 juillet 1957)*, Paris: Centre Français de Droit Comparé, 1959, at pp. 6-7.

The *Fetha Negest* introduced capital punishment without instituting the prosecutor. It did not indicate the executioner either. Accordingly, individuals personally initiated and prosecuted the case. They were even required to execute the sentence except when the offence involved the state (blasphemy, perjury, banditry and treason). States organs, mainly the Emperor and priests prosecuted these public offences. Emperor Tewodros is said to have been pitiless as regards treason. He regularly resorted to capital punishment by crucifixion, burning, beheading, famine or hurling against real or supposed political dissidents. He personally supervised most of the executions. The death penalty could be preceded by accessory punishment of amputation of hands and legs. His rule had no mercy for women whether pregnant or not and children. Beside formal trials, he resorted as well to summary executions as he pleased.⁴¹⁹ It is doubtful whether the Emperor was applying the *Fetha Negest*. Treason might have been a capital crime even under customary law.

However, homicide had always been treated as an interpersonal issue. What Coptic law altered was the punishment in replacing compensation with capital punishment. Nevertheless, the absence of a precise criminal procedure in homicide cases gave a green light to revenge. It was sufficient to prove an intentional homicide for the revenge to take place.⁴²⁰ The law only forbade revenge on culprits of involuntary homicide. The *Fetha Negest* had instituted a sanctuary similar to the *sanga nenay* institution of the Kunama. The Coptic Church that citizens and the government highly respected played the role of sanctuary to offenders involved in involuntary homicides.

The offender entered the churchyard and rung the bell as a sign that he had placed himself under the protection of the church.⁴²¹ The violation of a legitimate sanctuary on the grounds of revenge was a serious crime punishable by exile for life. However, boastful offenders who did not hide until the end of the mourning exposed themselves to revenge without further consequences.⁴²²

This anarchy meant that the victim's family had the latitude of determining the method of execution. Private prosecution of criminal cases and execution of penal sanctions undermined the policy of reconciliation. Indeed, the new law had not formally repealed

⁴¹⁹ Weld H. Blundell, "History of King Theodore", (1906) 21 *Journal of the Royal African Society* 12-42.

⁴²⁰ *Supra* note 267, at p. 742.

⁴²¹ *Ibid.*, at p. 725.

⁴²² *Ibid.*, at p. 726.

compensation as a means of reconciliation. Over the years, the government felt concerned by this private justice and took some measures.

First of all, the Emperor was the sole to decide on capital cases. A decree was issued also prohibiting blood revenge without judicial mediation.⁴²³ It is also argued that principles of individual criminal responsibility, personal punishment, grounds of justifications and mitigating circumstances were observed.⁴²⁴ The second important resolution was the control of methods of execution. At the beginning, the monarch determined the place and the method of execution under government supervision. Still, the victim's family retained the executioner's duty.⁴²⁵ In 1925, Haile Sellasie, then Regent and later Emperor of Ethiopia (1916-1974), introduced a method of swift execution. He established a device in a village near to Addis Ababa where the executioner (from the victim's family) had only to pull a lever which caused a rifle to fire at the condemned person's heart from a fixed position.⁴²⁶

All these measures indicate the uneasiness that the death penalty imposed of the rulers and the citizen. Later the government strongly encouraged the return to the customary law remedy of blood money.

3.2.1.2. The survival of compensation under the *Fetha Negest*

The death penalty was not mandatory for personal injuries or homicide cases. It could be converted into compensation for the sake of reconciliation. The *Fetha Negest* established the amount of blood money for all kinds of offences including homicide. In some areas, judges overlooked the statutory provisions and applied customary methods. This means that even in homicide cases, the *Fetha Negest* never had a full control of the country. It is indeed established that it operated more as an esoteric document that was hardly and likely rarely applied outside imperial courts. Imperial judges who were generally from the Ahmara tribe preferred resorting to their customary law that was indeed death penalty free and encouraged reconciliation.⁴²⁷ The consequence of having introduced the *Fetha Negest* was however that the victim's family would refute reconciliation and become

⁴²³ *Ibid.*, at p. 742.

⁴²⁴ Comité de Législation Etrangère et de Droit International, *Supra* note 418, at p.10.

⁴²⁵ *Supra* note 267, at p. 743.

⁴²⁶ *Ibid.*, at p. 743.

⁴²⁷ *Ibid.*, at p. 712.

intransigent on capital punishment. In such circumstance, the death penalty was upheld and executed.⁴²⁸

Certainly, the most interesting part of Ethiopian law was the fact that almost the entire country invested in the process of reconciliation. It was the function of elders, church officials and judges to negotiate with the winning party of the case that he or she accepts blood money from the adversary.⁴²⁹ In capital cases, the Emperor personally pleaded the victim's family to accept compensation.

During the reign of Menilik II (1889-1913), a man fell off a branch of a tree that he was busy cutting and killed the unfortunate person who was sleeping under the tree. There is no record on whether judges convicted the offender of murder rather than involuntary homicide. However, the deceased's family refused blood money and demanded the death sentence. They appealed to the Emperor for the sentence. The Emperor agreed with the victim's family in terms of the legal principle and said that "to satisfy the requirement exactly, death must be inflicted on the criminal in the same way as that in which he had disposed of his victim". In other words, one of the members of the victim's family was required to go up the tree and fall on the offender. No one dared to do it and they accepted the blood money.⁴³⁰

The judicial process was so transparent that judges did not hesitate to point out the Emperor's responsibility in some cases. Emperor Tewodros (1855-1868) was held once liable for the death of a soldier who had been killed by his colleague due to the Emperor's contradictory instructions. When the matter was brought before the court for adjudication, the court courageously stated that "had the Emperor not been the eyes of the nation, the consequence of giving contradictory instructions might have reverted to him".⁴³¹ The Emperor concurred with this wisdom and accepted responsibility paying 500 birr as blood money.⁴³²

⁴²⁸ *Ibid.*

⁴²⁹ *Ibid.*

⁴³⁰ *Supra* note 39, at p.89.

⁴³¹ *Ibid.*, at p.84.

⁴³² *Ibid.*

3.2.1.3 The legacy of the death penalty in Ethiopia

The introduction of the death penalty in Ethiopia was an important change in the country's legal system, as blood money had always been the most severe punishment for homicides and similar cases. Only the Emperor's wisdom could temper the severity of the *Fetha Negest*, which provided that "whoever kills a person, should, likewise, be killed".⁴³³

However, this *lex talionis* principle clashed with a strong custom of blood money that could not be easily overridden. The death penalty was perceived and mostly practiced as a mechanism for revenge rather than a punishment with the far reaching consequences of indefinite blood feud that tore apart the community. There is no doubt that the death penalty was rarely applied. So far, all attempts to replace compensation for homicide have been unsuccessful.

Even when imprisonment was imposed in recent years, Ethiopians felt that the matter was not yet settled. In consequence, the victim's family revenged on the culprit that the state has released so long the blood money was not paid. This is evidence that Ethiopians have opposed and are still resisting retributive and supposedly deterrent punishments and that "traditional proceedings [are] far more successful than states proceedings in restoring peace to the community as a whole".⁴³⁴

⁴³³ *Ibid.*, at p.89.

⁴³⁴ *Supra* note 265, at p. 522.

3.2.2 The *Shari'a* death penalty law in pre-colonial Africa

A State's criminal policy cannot be dissociated from its political, religious and socio-economic regime. Thus, the study of the death penalty in Islamized Africa cannot be separated from the death penalty in the Muslim world. This justifies a general overview before coming to its implementation in Africa which was dominated by the school of Malek ben Anas.

3.2.2.1 *An outline of the death penalty in Shari'a law*

The law stemming from Quran, the sacred book and from Sunna which refers to the prophet's practices, is known as *Shari'a* law.⁴³⁵ When sentencing on the basis of *Shari'a* law, a Muslim judge can draw on three kinds of punishments depending on the nature of the offence: *hudud* or fixed penalties, *qisas* or retribution and *ta'zir* or discretionary punishments.⁴³⁶

The *hudud* is imposed for seven crimes: adultery, false accusations of fornication, drinking alcohol, high way robbery, apostasy, theft from a secure or private place and insurrection against Islamic leaders.⁴³⁷ Of these, only apostasy, insurrection, sexual offences and theft committed in prison by a convicted criminal serving a life sentence are punished by death.⁴³⁸

There has been some controversy over whether the death sentence was a prescribed punishment for adultery and sodomy. The Quran provides for one hundred lashes in cases of adultery involving a married person⁴³⁹ while there is a *hadith* showing that the prophet was reluctant to stone a woman who came four times to confess her adultery to him.⁴⁴⁰ The Quran does not set out a clear punishment for sodomy only that Chapter 4, verse 20

⁴³⁵ William A. Schabas, "Islam and the Death Penalty", (2000) 9 *William and Mary Bill of Rights Journal* 231.

⁴³⁶ *Supra* note 409, at p.23

⁴³⁷ *Ibid.* See also William A. Schabas, *Supra* note 435.

⁴³⁸ *Supra* note 409, at p.24. See also M. Cherif Bassiouni, "Death as a Penalty in the Shari'a", in Peter Hodgkinson and William A. Schabas, eds., *Capital Punishment: Strategies for Abolition*, Cambridge: Cambridge University Press, 2004, at p.189.

⁴³⁹ Quran 24:2

⁴⁴⁰ M. Cherif Bassiouni, *Supra* note 438, at p.181.

refers to such acts. However it is submitted that “the prescribed punishment for adultery, as well as for homosexual intercourse by a married person is death”.⁴⁴¹ This is an apparently new policy that falls outside a strict interpretation of the Quran. Cases of insurrection and criminal gang activities followed by murders cannot be punished by death either if the offender has repented.⁴⁴²

The *qisas* are retributive punishments prescribed by the Quran. Verse 2:178-179 provides that “O believers! Retaliation for blood shedding is prescribed to you: the free man for the free, and the slave for the slave, and the woman for the woman...”⁴⁴³ Retaliation, or the right to revenge in the sense of the Biblical *lex talionis*,⁴⁴⁴ is therefore applicable to five crimes: “premeditated murder, seemingly premeditated murder, erroneous murder, intended offences other than homicide and unintended offences other than homicides”.⁴⁴⁵ It is unfortunate that the principle of proportionality lying behind the word *qisas* has been misunderstood and interpreted meaning retribution⁴⁴⁶ due to its literal translation of ‘equivalence’.⁴⁴⁷

The victim has a choice between taking revenge, exacting blood money or forgiving. If there is an agreement on blood money or *diyya*⁴⁴⁸ or the offender is forgiven, the death sentence is excluded.⁴⁴⁹ The verse 2: 178-179 states *in fine* that “...but he to whom his brother shall make any remission, is to be dealt with equitably; and to him should he pay a fine with liberality”.⁴⁵⁰ Forgiveness is much favoured by the Quran over the two other alternatives,⁴⁵¹ even though local customs led to a misleading interpretation restricting punishments to the death penalty and compensation only. This misinterpretation also had far reaching consequences in that at the time of codification, some States excluded the *diyya* and

⁴⁴¹ After the 1979 Iranian revolution, two laws were passed and they imposed death sentence for homosexual intercourse and adultery. See Sayed Hassan Amin, *Supra* note 409, at pp.24-25.

⁴⁴² Wafaa H. Wahba, al-Mawardi, trans., *The Ordinances of Government*, London: Garnet Publishing Limited, 1996, at pp.68-70.

⁴⁴³ *Medina Sura II: The Cow 178*, in Abdullah Yusuf Ali, *The Glorious Koran*, London: JM Dent & Sons, 1909, at p.356. *Sura V: The Table 32* and *Sura XVII: The Night Journey 33* also provide for retaliation. See William A. Schabas, *Supra* note 435.

⁴⁴⁴ M. Cherif Bassiouni, *Supra* note 438, at p.182.

⁴⁴⁵ *Supra* note 409, at p.29

⁴⁴⁶ *Supra* note 435, at p. 232.

⁴⁴⁷ M. Cherif Bassiouni, *Supra* note 438, at p.182, footnote 51.

⁴⁴⁸ Sometimes written as *diya* or *diyah*. See Sayed Hassan Amin, *Supra* note 409 at pp. 28-29 and 103.

⁴⁴⁹ *Supra* note 442, at p.251.

⁴⁵⁰ *Medina Sura II: The Cow 178*, in Abdullah Yusuf Ali, *Supra* note 443, at p.356.

⁴⁵¹ *Medina Sura II: The Cow 178*, in Abdullah Yusuf Ali, *Ibid*.

forgiveness and prescribed only the death penalty for intentional homicides. Furthermore, under the penal code these crimes are prosecuted by the State and the victim no longer has the right to express consent as to the punishment imposed by the court.⁴⁵²

Ta'zir (correction) is an optional punishment decided by the judge for offences without prescribed penalties. It is different from *hudud*, *qisas* and *diyya*.⁴⁵³ Professor Cherif Bassiouni opposes this view in stating that “their penalties, according to several of the jurisprudential schools of *Sunni* and *Shi'a* traditions, can be the same penalty as provided for *hudud* and *qesas* crimes”.⁴⁵⁴ The difference is that the death penalty may be discretionarily imposed since it is not expressively prescribed by the Quran.⁴⁵⁵ Although Sayed Hassan Amin excludes the discretional death penalty and ranges *ta'zir* from admonishing the offender to a disapproving look,⁴⁵⁶ it is established that the Prophet used crucifixion as a disciplinary chastisement.⁴⁵⁷ Sometimes, crucifixion is combined with stoning.⁴⁵⁸ This confirms the conclusion that the death penalty is the most severe *Ta'zir* punishment though discretionarily imposed.

In short, Islamic law grants the application of the death penalty for certain crimes. It is only mandatory for murder. It can even be made optional or excluded if the victim's family exacts blood money (*diyya*) and forgives the offender or if the offender repents. Indeed, “the Quran specifically provides that an offender who has committed a crime may repent and, if the repentance is genuine, that person should not be punished”.⁴⁵⁹ The trial will only inquire to as the sincerity of repentance. It follows that resorting to the death penalty in Muslim states is more a matter of policy choice than it is a strict adherence to *Shari'a*. *Hudud*, *qisas* and *ta'zir* offer other possibilities and alternative punishments remain consistent with the *Shari'a*.

When addressing the question of why states did not, at least, keep the spirit of the scriptures and noble characteristics of Islam, Professor Cherif Bassiouni answered “[it] can

⁴⁵² M. Cherif Bassiouni, *Supra* note 438, at p.183.

⁴⁵³ *Supra* note 409, at p.29.

⁴⁵⁴ M. Cherif Bassiouni, *Supra* note 438, at p.183.

⁴⁵⁵ *Ibid.*, at p.183-184 and *Supra* note 435, at p. 232.

⁴⁵⁶ *Supra* note 409, at p.29.

⁴⁵⁷ *Supra* note 442, at p.259.

⁴⁵⁸ Rudolph Peters, “Islamic and Secular Criminal Law in Nineteenth Century Egypt: the Role and Function of the Qadi”, (1997) 4 *Islamic Law and Society* 86.

⁴⁵⁹ M. Cherif Bassiouni, *Supra* note 438, at p.184.

only be explained by reasons extraneous to Islam".⁴⁶⁰ Indeed, although Islamic law keeps claiming its absolute validity, it accommodated local customs and enactments of political rulers from its origin. The failure to reach a real symbiosis of these norms has created an uneasy coexistence that gives room to arbitrary interventions from political leaders.⁴⁶¹ It follows that today, the law and its practice in Islamic World is fundamentally inconsistent.

3.2.2.2 The death penalty in the Malek ben Anas School in Africa

Abou Abd El-Salâm ben Saaïd Et-Tenoukhy, who was known as Sehhnoun, a famous Syrian scholar, introduced the Maliki rite in Africa immediately after his appointment as the *Qâdhy* of Egypt. He nominated disciples of the Maliki School for key political and judicial positions to spread its ideology.⁴⁶² Though Sehhnoun did not succeed in expanding the Maliki rite beyond Egypt until the Muslims gained control of Spain, he did, at least, plant it in the hearts of the Egyptians.⁴⁶³ Northern Africa inherited the glorious and famous Spanish Maliki rite from a devoted Spanish graduate, Abd Allah ben Yacin, who crossed the Mediterranean to catechize the Islamic religion.⁴⁶⁴

Reluctant people were forced by sword to adopt and convert to the Maliki rite. Abd Allah ben Yacin first converted the Djedala people and then used them to compel the Lemtouna, who had rejected him. The Lemtouna tribe later became a powerful resource for his mission. He used his people to convert other neighboring tribes at the end of a sword. By the beginning of the nineteenth century, inhabitants of Northern and North East Africa had embraced the Maliki rite.⁴⁶⁵

According to the principles of this rite, intentional homicide means a murder resulting from hatred or anger. This is different from an assassination committed in the course of robbery or a clandestine assassination. Intentional homicide is punishable by death unless the

⁴⁶⁰ *Ibid.*, at p.185.

⁴⁶¹ Joseph Schacht, "Islamic Law in Contemporary States", (1959) 8 *American Journal of Comparative Law* 133.

⁴⁶² M.B Vincent., *Etudes sur la loi musulmane (Rit de Malek): Législation criminelle*, Paris: Joubert, 1842, at p.25

⁴⁶³ Ivan Hrbek, *Supra* note 165, at p.15.

⁴⁶⁴ M.B. Vincent, *Supra* note 462, at p.29

⁴⁶⁵ *Ibid.*

victim's family accepts the *diyya*.⁴⁶⁶ There is no pardon for the two forms of assassination. It is even submitted that for one victim, many members of the offender's family can be executed.⁴⁶⁷ Attempted assassination is subject to optional sentences determined by the Imam. Punishments include simple death, death on the gallows, amputation, imprisonment and ostracism. The crime is forgiven if the offender repents immediately.⁴⁶⁸

In both intentional and involuntary homicides, victims can forgive the offender. Forgiveness from one member of the family suffices. It excludes the death sentence and opens the door to alternative punishments. Females cannot forgive if there are males in the family. When a family cannot provide boy who was close to the victim; forgiveness must be granted by a male from the wider family. His consent plus one female's consent validate the forgiveness.⁴⁶⁹ A father who voluntarily kills his child is due to pay *diyya*. There is no death sentence. The law does not attempt to establish whether the father intended the killing.⁴⁷⁰ The other unanswered question relates to the person to whom the *diyya* is paid in such circumstances, as the father wears two hats: he is the criminal and the victim. The rule remains that "retaliation is excluded if the guilty party comes to inherit any part of the right of blood against himself ..."⁴⁷¹

A death sentence is also imposed in cases of intentional assault that can result in death or which causes severe suffering (for example castration or a wound that reaches the bone). Involuntary assault is punished by *diyya*.⁴⁷²

A *mohhcin*, a married person who commits an act of fornication, is put to death by stoning. If he or she was not married and thus was not a *mohhcin*, he or she is flogged and exiled to another country. Sexual intercourse with a slave or a servant (the *hhadd* of fornication) incurs correctional punishments.⁴⁷³ The death penalty is also imposed for rape if the offender is an unbeliever.⁴⁷⁴ In cases of homosexuality, the law does not take marital status into account. The two consenting males are put to death by stoning. A man having sexual

⁴⁶⁶ *Ibid.*, at pp.64-65.

⁴⁶⁷ *Ibid.*, at p.92.

⁴⁶⁸ *Ibid.*

⁴⁶⁹ *Ibid.*, at p.74.

⁴⁷⁰ *Ibid.*, at p.75, footnote a.

⁴⁷¹ James N.D. Anderson, "Homicide in Islamic Law", (1951) 13 *Bulletin of Oriental and African Studies* 814.

⁴⁷² *Supra* note 462, at p.82.

⁴⁷³ *Ibid.*, at pp.95-96.

⁴⁷⁴ *Ibid.*, at p.99.

intercourse with a woman per anus amounts to fornication or *hadd*, depending on their marital status. Bestiality incurs correctional punishments. A confession or a deposition of four witnesses is a prerequisite for punishment.⁴⁷⁵

Theft is punished by imprisonment rather than death, even when the thief is a repeat offender.⁴⁷⁶ In cases where the offender has committed many offences, some punishable by death and others by lesser punishments, the death sentence absorbs the other sentences.⁴⁷⁷ It is worth noting that imprisonment for theft is not prescribed by the original 'traditions' of the Prophet. The Maliki rite opposed the Hanbali rite and joined the Hanifi and Shafi'i in finding that the prescribed sentence of fine was unacceptable. Joseph Schacht submits that "there were, it is true, attempts made in the formative period of Islamic law to introduce fines for theft by making the thief responsible for twice the value of the object stolen, attempts which found expression in several 'traditions' attributed to the Prophet".⁴⁷⁸ The disagreement is a further evidence of inconsistencies in Shari'a law.

Broadly speaking *Shari'a* law and the Maliki rite share the structure of punishments (prescribed, retributive and discretionary punishments). However, the Maliki rite punishments are differently dispatched. In the Maliki rite, intentional homicide comprises three categories. The first is murder strictly speaking which means a sudden attack resulting from anger or hatred without premeditation. It justifies a death sentence only if no agreement on blood money is reached. The second category entails premeditation, an ambush or follows or precedes the commission of another crime such as robbery. For this crime, the death sentence is mandatory and there is no alternative to it. The third category is an attempt to commit assassination. The sentence is optional and is imposed by the *Imam* although a death sentence is one of the options.

Furthermore, the Maliki rite differentiates between degrees of assault based on the mental element. In a voluntary assault, simple harm is different from harm that has created long term suffering for the victim. The latter are the only crimes considered to be capital crimes. The death penalty is selectively imposed for sexual offences. Homosexuality is a capital crime regardless of the marital status of the offender and his accomplice's.

⁴⁷⁵ *Ibid.*, at pp.100-101 and 107.

⁴⁷⁶ *Ibid.*, at pp. 107-109.

⁴⁷⁷ *Ibid.*, at p.105.

⁴⁷⁸ *Supra* note 461, at p.140.

It is unique in that it does not consider theft, even habitual theft, to be capital crime. Instead the punishment can be amputation or imprisonment while in *Shari'a* law, the death penalty is an option for an incorrigible thief.

3.2.2.3 The death penalty in the pre-colonial Islamized Africa

Before European colonization, Islam had established itself as the most important religion in a major part of upper Sahara and had supplanted African and Christian religions in different areas.⁴⁷⁹ However, the interaction between *Shari'a* law and the existing law whether indigenous or Christianized indigenous law varied in each country.

The practice of the death penalty in Egypt, the Sudan, Morocco and Nigeria will now be looked at in detail because they received Muslim law in varied ways. We believe that their geographical location, political and cultural backgrounds are important criteria for a balanced and objective conclusion.

3.2.2.3.1 The death penalty in Egypt

The death penalty existed in Egypt prior to foreign legal influences. Its practice continued under the successive monotheist beliefs of Christianity and Islam. Christianity was probably introduced into Alexandria around AD 61 by St Mark himself.⁴⁸⁰ It became stronger with the Coptic Church's doctrine in AD 284.⁴⁸¹ The Coptic doctrine based on the Bible expanded the *lex talionis* law.⁴⁸²

Islam was introduced in Egypt after the country was conquered in AD 639 by an Arab army led by Amr ibn al-As.⁴⁸³ The Sunni legal school was introduced by the Maliki rite under the *Qadi* Abu Tahir al-Dhuhli and lasted until AD 969. In that year, Jawhar's army invaded and took control of Egypt and installed the Fatimid dynasty which gradually introduced the

⁴⁷⁹ Safiya Safwat, "Islamic Law in the Sudan", in Aziz Al-Azmeh, ed., *Islamic Law: Social and Historical Context*, London: Routledge, 1988, at p. 231.

⁴⁸⁰ Griggs C. Wilfred, *Early Egyptian Christianity: from Its Origin to 451 CE*, Leiden: E.J. Brill, 1991, at pp.13-14.

⁴⁸¹ John Iliffe, *Africans, the History of a Continent*, New York: Cambridge University Press, 1995, at pp.37-38.

⁴⁸² Exodus 21:12-26.

⁴⁸³ *Supra* note 481, at p.43. For a discussion of legal schools in Islamized Egypt, see generally Yaacov Lev, *Saladin in Egypt*, Leiden: Brill, 1999.

Fatimid law, a branch of the *Ismaili Shi'a* legal school.⁴⁸⁴ The Fatimid law, though not favoured by the majority of the population,⁴⁸⁵ was tolerant towards Christians and Jews. It took an extremely severe attitude towards disciples of the Sunni school, despite their being quite similar.⁴⁸⁶

There are doubts regarding the use of the death penalty during the reign of the first Fatimid dynasties. For example historians disagree over whether a death sentence was handed down to al'Adid. Some state that he was sentenced to death by the jurists of Saladin and others affirm that he either committed suicide or died naturally.⁴⁸⁷ It was only under *Khalif* Al Hakim (996-1021) that harsh punishments including torture and beheading were instituted for those who had, without necessarily infringing Islamic law, violated numerous prohibitions established by the *Khalif*.⁴⁸⁸ The Ottoman administration that took over after the reign of the Fatimid dynasty exclusively applied the principles of the Hanafi legal school until the nineteenth century. Homicide cases were heard by the *Qadi* and were punished by death.⁴⁸⁹

Gradually the Islamic law was confined to evidence matters, with their penal code (of French inspiration) dealing with the substantive law of homicide. In 1860 a Nubian who had murdered a school girl was discharged by the *Qadi* court because the two witnesses were minors. The trying judge did not take the *post mortem* evidence that incriminated the offender into account. The plea of the deceased's mother for the death penalty in compliance with the penal code was refused even before the court of appeal that imposed three years of forced labour.⁴⁹⁰ This is not a *Shari'a* punishment. It is however an indication of the extent to which the system had become dual in nature.

Indeed only a few capital cases were left to the *Qadi*. These were limited to *maqatil* or causing death by exceeding the fixed numbers of lashes imposed for corporeal punishment,

⁴⁸⁴ Ivan Hrbek, *Supra* note 165, at p.10 For the doctrine of this school, see Michael Brett, "The Mīm, the 'Ayn, and the Making of Ismā'ilism", (1994) 57 *Bulletin of the School of Oriental and African Studies* 25-39.

⁴⁸⁵ Ivan Hrbek, *Supra* note 165, at p.12.

⁴⁸⁶ Yaacov Lev, *Supra* note 483, at pp.117-118.

⁴⁸⁷ *Ibid.*, at pp.82-83.

⁴⁸⁸ Ivan Hrbek, *Supra* note 165, at p.12-13.

⁴⁸⁹ *Supra* note 458, at p.78.

⁴⁹⁰ *Ibid.*, at p.79.

infanticide, rebellion or resisting an official when resistance has provoked death.⁴⁹¹ In cases of intentional homicide, the *Qadi's* court had the duty of inquiring whether victims preferred the death penalty or compensation.

The *Qadi's* court referred the matter to the Council for trial code in three circumstances according to the penal legislation: satisfactory agreement on compensation, pardon granted by the victim and acquittal resulting from the lack of evidence. The penal code provided for a sentence of hard labour in addition to compensation. However, the death penalty (as *qisas* retribution) could not be executed unless confirmed by *al Jam'iyya al-Haqqaniya* or the Viceroy. Since the seventeenth century, the *Qadi* court had not been authorized to impose mutilation or death sentences by stoning or stoning combined with crucifixion (as *hudud* or *ta'zir* penalties).⁴⁹²

The dual system weakened the *Qadi's* court. However, this court also appeared to be inclined towards reconciliation rather than punitive measures for homicide and assault. The aim of justice was not retribution. The victim-offender agreement regarding financial compensation determined the victim's intention to reconcile, though the matter could still be heard by the Council.⁴⁹³

3.2.2.3.2 The death penalty in the Sudan

In the fourth century Common Era, Sudan was divided into three Christian kingdoms: Nobatia with Faras as the Capital, Makuria with Dongola as headquarter and Alwa with Soba (today's Khartoum) as its main city.⁴⁹⁴ It was in about the 16th century that the Funj put an end to the Kingdoms of Alwa and Makuria by unifying them at Sennar.⁴⁹⁵ Although the Funj kingdom opened its doors to Egyptian Islamic scholars or Islamic scholars residing in Egypt, they were not much concerned with law and justice. There was no pure Islamic law, as their *Shari'a* law encompassed other beliefs.⁴⁹⁶ The effective application of *Shari'a* law started with the Ottoman invasion in 1837 and gained significance under the Mahdiya

⁴⁹¹ *Ibid.*, at p.80.

⁴⁹² *Ibid.*, at p.86.

⁴⁹³ *Ibid.*, at p.89.

⁴⁹⁴ *Supra* note 481, at p.41.

⁴⁹⁵ *Supra* note 479.

⁴⁹⁶ *Ibid.*, at pp. 232 and 235.

regime. The Turkish administration in the Sudan is remembered for the cruelty of its justice.⁴⁹⁷

The Turks were pitiless and characterized by corruption and injustice. Their “cruelty was also common in the execution of sentences. Sentences included mutilation, lashings, death and imprisonment for long period”.⁴⁹⁸ In being so harsh, Ottoman authorities departed from the basic rules of Islam. This gave weight to their opponents’ argument that oppression, injustice and excessive taxation were not exclusively signs of bad governance but surely were indications of a bad religion.⁴⁹⁹ A religious revolution to return to the ascetic roots of Islam became the battle cry in the Mahdiya Revolution which was led by Mohammad Ahmad al-Mahdi.⁵⁰⁰

From 1885, the Mahdiya imposed the observation of *Shari’a* law in all areas. Murder, apostasy and adultery were capital crimes. However, the desire to build a purely Islamic state drove the Mahdiya to act outside the law. For example, the illegal cohabitation of two consenting adults became a capital crime.⁵⁰¹ Obviously, under *Shari’a* law a case of illegal cohabitation between unmarried people amounts to fornication. The problem became that *Shari’a* law gave no legal status to the customary marriage that was so common among peasants. The marriage was legal under customary law and a capital crime under *Shari’a* law. The clash between customary law and *Shari’a* law was not only limited to sexual offences. It also arose in homicide cases where indigenous people applied blood money while *Shari’a* law imposed a death sentence.⁵⁰² The Mahdiya were aware of these discrepancies but they retained capital punishment for political reasons.

The death penalty was justified on the grounds of peace. Safiya Safwat points out that “the severity of this legislation should not be dismissed as mere blind conservatism”.⁵⁰³ The country’s social order was strongly shaken after the revolution and the war against Egypt. Within the immense and ever-changing tribal forces upon which the new order depended, it was necessary to maintain discipline. People in need of peace believed the Mahdi’s

⁴⁹⁷ *Ibid.*, at p. 233.

⁴⁹⁸ *Ibid.*

⁴⁹⁹ *Ibid.*, at p. 234.

⁵⁰⁰ Carolyn Fluehr-Lobban “Islamization in Sudan: A Critical Assessment”, (1990) 4 *Middle East Journal* 614.

⁵⁰¹ *Supra* note 479, at p.235.

⁵⁰² *Supra* note 411.

⁵⁰³ *Supra* note 479, at p. 235.

repressive regime was in line with *Shari'a*. "Although the penalties for the infringements of his rules may sound mercilessly harsh ..., they were understood and accepted as the correct application of sharia law by his own people".⁵⁰⁴

Mahdi first goal was to modify local customs as most of them were repugnant to Islamic law. Upon his death in 1885, the Khalifa Abdullahi continued to use the Quran and Sunna as the primary sources of law and organized a centralized Kingdom within which severe punishments were in common use.⁵⁰⁵

This Islamic regime did not however survive the Anglo-Egyptian invasion of 1889. After the seizure of Khartoum, the British and the Egyptians agreed on a common administration of the Sudan under the Condominium rule. Sudan was neither an Egyptian nor a British colony. It was officially agreed that neither English law or any modification of it, nor Egyptian law would apply to Sudan. However, the British Governor General exploited this gap using article 4 of the Condominium rule which gave him supreme legislative power in Sudan. Article 4 conceded that "laws, as also orders and regulations with the full force of law ... may from time to time be made, altered, or abrogated by proclamation of the Governor General..."⁵⁰⁶

It is pointed out that "although the laws provided by them were not purely English, they were either an adoption or an adaptation of the English law".⁵⁰⁷ It is worth recalling that at the end of the nineteenth century, the death penalty was mandatory in English law.

3.2.2.3 The death penalty in Morocco

The application of Islamic law in Morocco⁵⁰⁸ presents some peculiarities that make it a *sui generis* case. The way crimes punishable by *hudud*, *qisas* and *ta'zir* penalties were redressed was far different to the Quran scriptures and the Islamic schools recommendations. Homicide cases were firstly redressed by vengeance. A relative of the

⁵⁰⁴ *Ibid.*

⁵⁰⁵ *Ibid.*

⁵⁰⁶ Michael W. Daly, "The Development of the Governor-Generalship of the Sudan, 1899-1934", (1983) 24 *Journal of African History* 77.

⁵⁰⁷ *Supra* note 479, at p. 237.

⁵⁰⁸ For a concise history of Christianity and Islam in Morocco, see Jean-Louis Miège, *Le Maroc*, Paris: P.U.F., 1994.

deceased must take the offender's life. If he succeeds, justice is deemed to be done. If he fails, then the offender must be exiled from the area for a period of seven years. Upon his return, he may choose to pay blood money or co-organize a feast with his relatives, to which he invites the victim's family. The feast aims to reconcile families and to stop interfamily blood feuds.⁵⁰⁹

This collective nature of conflict resolution is attributed to Islamic law.⁵¹⁰ There is confusion over what was and what was not Islamic, as Islamic law is not built on the idea of collective criminal responsibility.⁵¹¹ The first attempt to apply a pure Islamic law dates back to 1512. At that time Yahyà b. T'afuft made two decrees outlawing tribal customs and enforcing a firm Islamic law. It is submitted that

[...] given mistakes of tribal ancestors, Yahyà b. Ta'fuft decided to apply the Islamic precept of *qisas* to whoever kills a Muslim brother: "soul for soul, eye for eye, nose for nose, ear for ear, tooth for tooth." Then, he prescribed the *diyya* for various offences: ten *uqiyya* [almost ten dinars] for theft, one *uqiyya* for assault with stone or stick, five *uqiyya* for an attempt to rape a woman, a half *uqiyya* for a woman who insults a man.⁵¹²

In compliance with this *lex talionis* rule in Fez and Marrakech, convicted criminals were obliged to walk up and down the streets of the town towards the place of execution naked screaming the grounds of their conviction. Only wealthy criminals were exempted from this. They were executed before the procession and while carrying their bodies to the place of execution, the executioner loudly read the reasoning behind the sentence. Methods of execution consisted of crucifixion, the cutting of the throat, the emptying the stomach with a sword and strangling. The death penalty applied to murder and high treason.⁵¹³

Mutilation did not apply to robbery and theft at Fez and Marrakech. The punishment was flogging, in addition to the offender proclaiming the reason for his conviction in the town's streets.⁵¹⁴

⁵⁰⁹ Fernando Rodriguez Mediano, "Les Pratiques de la Justice aux 16e-19e Siècles: Justice, Crime et Châtiment au Maroc au 16e Siècle", (1996) 3 *Annales, Histoire des Sciences Sociales* 613.

⁵¹⁰ *Ibid.*

⁵¹¹ *Supra* note 471.

⁵¹² *Supra* note 509.

⁵¹³ *Ibid.*, at pp.614-615.

⁵¹⁴ *Ibid.*

It is submitted that this was an initial application of *qisas* and *diyya*.⁵¹⁵ It is unquestionable that these reforms of customary law introduced another legal system which departed from both customary law and Islamic law. The Berber tribes of the Rif region or the Rifians resorted to vengeance in a way that lasted for centuries. Compensation was a foreign concept. For Berbers of the central Moroccan Atlas, the Arab Bedouins, the Semele, the Ait Dawud and the Banu, compensation was the most common punishment and ostracism the heaviest.⁵¹⁶ Therefore, bearing in mind that retaliation and compensation are not innovations of Islamic law, it makes sense that three elements exclude these punishments from the Maliki rite (in force in Morocco and in others parts of North Africa):⁵¹⁷ the offenders' public humiliations, proclamation of the reasons for their conviction and the public degradation or dehumanization of the dead body. These practices were alien to both Islamic law and customary law.

Yahyà b. T'afuft efforts at correcting ancestral mistakes led to a mixed system encompassing elements from Islamic law, customary law, canon law and personal initiatives. Christianity was indeed present on the Moroccan coast between the heights of the Roman Empire and 1578.⁵¹⁸ Islamic law matured with the beginning of the seventeenth century (1606). Death by decapitation was the appropriate sentence for murder, rebellion, robbery, theft and adultery.⁵¹⁹ Again this went far beyond the Maliki School within which the death penalty is an option for homicide cases and nonexistent for property crimes. The embellishments with which the sentence was carried out were introduced by Yahyà b. Tafuft likely as a warning to potential criminals.

⁵¹⁵ *Ibid.*

⁵¹⁶ David M. Hart, "Murder in the Market: Penal Aspects of Berber Customary Law in the Pre-colonial Moroccan Rif", (1996) 3 *Islamic Law and Society* 345. See also Fernando Rodriguez Mediano, *Supra* note 509.

⁵¹⁷ Robert Brunschvig, "Justice Religieuse et Justice Laïque dans la Tunisie des Deys et des Beys: Jusqu'au Milieu du XIXème Siècle", (1965) 23 *Studia Islamica* 28.

⁵¹⁸ Jean Louis Miège, *Le Maroc*, Paris: PUF, 1994, at pp.17-18.

⁵¹⁹ *Supra* note 509, at p. 616.

3.2.2.3.4 The death penalty in Nigeria

There is no consensus on the exact date Islam was introduced into Nigeria. Some point to the ninth century,⁵²⁰ others to the eleventh century or fifteenth century.⁵²¹ It is undisputed however that, from the fifteenth century, *Shari'a* law flourished in Northern Nigeria and that the jihad war extended its legal principles and institutions into the nineteenth century.⁵²² Before British colonization the Northern emirates were fully under *Shari'a* law. Ubah points out that

[T]here is at present no comprehensive study of the legal system of the emirates for the period preceding British occupation. But undoubtedly in its several aspects-organizational structure, substantive law, punishments for offences, and judicial procedure that system was basically Islamic, with variation from place to place according to the degree of Islamization.⁵²³

During the jihad, *Shari'a* courts were spread throughout main urban areas. They were headed by a sultan, 'Amirul Mu'mineen', whose primary duty was to reduce injustice, restrain aggressors and ensure that *Shari'a* law was applied as a mechanism of justice.⁵²⁴ The courts were required to apply the Quran, Sunna and other relevant sources without any restrictions. The absence of restrictions had two major consequences: the application of a dual system and an increase in local Muslim schools.

Criminal law remained under *Shari'a* law, although it was confined to a very limited number of crimes, namely those acknowledged the most serious. These were homicides, assault, theft and economic crimes.⁵²⁵ It became the only law under which the death penalty could be imposed. The creation of different legal schools also resulted in the systematization and sophistication of the law. Despite local efforts, the Maliki rite remained dominant until the imposition of English law.⁵²⁶

⁵²⁰ Yadudu H. Auwalu, "Colonialism and the Transformation of Islamic Law in the Northern States of Nigeria", (1992) 32 *Journal of Legal Pluralism* 111.

⁵²¹ Abdulmumini A. Oba, "Lawyers, Legal Education and *Shari'a* Courts in Nigeria", (2004) 49 *Journal of Legal Pluralism and Unofficial Law* 113-116.

⁵²² *Ibid.*

⁵²³ Chinedu N. Ubah, "Islamic Legal System and the Westernization Process in the Nigerian Emirates", (1982) 20 *Journal of Legal Pluralism and Unofficial Law* 70.

⁵²⁴ *Supra* note 520.

⁵²⁵ *Ibid.*, at p.113.

⁵²⁶ *Supra* note 521, at p. 116.

Under the Maliki rite, the *Qadi* or Alkali for the Hausa area over which a political authority of the Emir presided held the legal administration. The Emir held the function of court of appeal and experts in Islamic law assisted him. The Emir was required to apply the Maliki provisions in all cases including homicides. “The hearing of cases and passing of verdicts, as well as the punishments inflicted for various offences, were consistent with the prescriptions of the Maliki schools to which all Nigerian Muslims belonged” .⁵²⁷

Accordingly, the *diyya* was acceptable in cases of involuntary homicide. Murder was punishable by death. The execution was carried out by beheading the convict with a sword. This practice that complied with the Maliki law persisted as an alternative to hanging.⁵²⁸

It is worth noting that the application of *Shari’a* law in this region was very inconsistent. The *Hausa* of Sierra Leone, still under *Shari’a* law, had substituted the death penalty by stoning for 100 lashes in cases of adultery (*zina*).⁵²⁹ The imposition of lashes indicates the distance between the Sierra Leonean *Shari’a* law and the Nigerian *Shari’a* law, which applied death by stoning for adultery.⁵³⁰ Crimes were so punished if committed by or against a freeman. There was unequal treatment of slaves and freemen and crimes perpetrated against slaves were not seriously punished.⁵³¹

3.2.2.4 Disparity of practices in Islamized countries

The implementation of *Shari’a* law depends much on each country’s social realities and it has been so since its introduction into Africa. The Maliki legal school was the most important component of Islamic law in Africa. Nevertheless, under the Maliki, the Fatimid and the Ottoman, the death penalty was not received with much enthusiasm in Egypt. The Ottoman Empire even decided that any sentence of death should be re-examined before its execution or simply replaced by imprisonment or a fine.⁵³²

⁵²⁷ *Supra* note 523.

⁵²⁸ Alan Milner, “Sentencing Patterns in Nigeria”, in Alan Milner, ed., *African Penal Systems*, London: Routledge and Kegan Paul, 1969, at p.264.

⁵²⁹ Smart H.M. Joko, “Place of Islamic Law within the Framework of the Sierra Leone Legal System”, (1980) 18 *African Law studies* 94.

⁵³⁰ *Supra* note 523.

⁵³¹ *Ibid.*, at p.71.

⁵³² Centre Des Etudes de Sécurité (Arabie Saoudite), “Légalité et Commodité de la Peine de Mort en Droit Musulman”, (1987) 58 *Revue Internationale de Droit Pénal* 431-432.

The situation was quite different in Sudan where Islamic authorities struggled with their subjects to impose the *Shari'a* law. They tried to use it as a tool to crush any local resistance to their power. The clash between local customs and Islamic law also existed in Morocco, where the argument for 'a pure Islamic law' served as an alibi to the ruler who invented a law which was neither Islamic or customary, but was probably a mixed law under which, from the sixteenth century, Fez and Marrakech inhabitants suffered an horrific era of brutality. Sentences alien to the Maliki rite such as the death penalty for theft and adultery, the public humiliation of the convicted and the degradation of the dead body were introduced. Nigeria departed from that school in terms of imposing the death penalty for adultery.

Though all these countries applied *hudud*, *qisas* and *ta'zir* punishments and some went even beyond this, the imposition of the death penalty was excluded when deemed inappropriate. Likely the best example is that of the Egyptian *Qadi* who, instead of imposing the death for homicide as a retributive punishment (*qisas*), imposed imprisonment and a fine as appropriate alternatives. It is deplorable that other Islamized African countries did not resort to that option.

Conclusion

There is a strong relationship between a society's criminal justice policy and its political, social, economic and religious values. Some of those values are enforced by legal norms such as penal laws. The ancient and the modern penal laws are characterized by punishments that indicate that they are built on force.⁵³³ It seems to be true for all mankind that the remaining question concerns the nature of the punishment and the body entitled to impose it. Thus, while the foreign nature of the death penalty has justified repeals in recent years,⁵³⁴ other heirs of the same punishment are vehemently pointing out that it is so enshrined in their history, culture and religion that its abolition would be tantamount to the abolition of their identity.⁵³⁵ The two arguments are not necessarily diametrically opposed as the facts demonstrate that the death penalty was not enthusiastically embraced by one or the other.

⁵³³ *Supra* note 297.

⁵³⁴ *S v. Makwanyane and Another*, *Supra* note 11, at 377D-E per Justice Sachs.

⁵³⁵ See, among others, the position of Morocco, Egypt, Libya, Mauritania and Sudan as regards the death penalty as studied by William A. Schabas, *Supra* note 435, at pp. 226-236.

Under Anglo-American law in Liberia, the death penalty was more a political instrument than a penal sanction. Liberians excluded its application at a time where executions were common worldwide. A whole century passed without executions, in the interests of peace and unity. Capital crimes did not increase during that period, but rather the threat of executing criminals and their effective execution corresponded with an increase of criminality. As customary law only reserved the death penalty for witchcraft, in Liberia the death penalty was the result of foreign influence.

The same applies to South Africa with regards to tribes that did not resort to the death penalty. However, compared to those in The Netherlands, Dutch settlers at the Cape displayed distaste for the death penalty. Despite the Dutch authorities' insistence that the death penalty be mercilessly carried out, the Dutch settlers did not cede to the pressure. Death sentences in the Cape were rare. Fortunately English law became influential only after it had matured enough to limit death sentences to treason and murder. Even there, liberal Roman Dutch judges took profit of the legal anarchy and made it discretionary. From the nineteenth century onwards, no death sentence would go without legal controversy. At that time, South Africa was already on the point of abolition. It had practically abolished the death penalty before the twentieth century. The twentieth century reversed the face of the medal. The English view is that "violence [is an] acceptable means of maintaining discipline in both public and private spheres".⁵³⁶ Those backward steps can be attributed to this view. Roman Dutch lawyers blamed English common law and equity for its "mass of anomalies and antiquated rules often leading to positive injustice".⁵³⁷ English law practically introduced the foundation of the apartheid policy. We shall return to this.

Religious laws have played a major role in the imposition of the death penalty in countries where it did not exist previously or was rarely imposed. The modernization of Ethiopian law in 1434 corresponded with the adoption of biblical retributive principles. A country, which redressed homicide cases by using blood money (*guma*), adopted the death penalty model. This punishment was completely alien to Ethiopians so the Emperors painfully imposed it. Unfortunately, any amendment of the penal code would retain the death penalty.

⁵³⁶ *Supra* note 406, at p.191.

⁵³⁷ "Roman Dutch Law in the Transvaal and Orange River Colony", (1901) 18 *South African Law Journal* 398.

Ethiopians knew that the death penalty was not an inspired punishment just as the Muslims knew that its sacred nature, as attributed in *Shari'a* law, remains a 'popular impression.' "Muslim penal law is characterized by a strong undercurrent of clemency and sympathy for the oppressed. Punishment is ordered to be free of any spirit of vengeance or torture".⁵³⁸ Differences among African Islamized countries concerning how *Shari'a* law is received and practised shows that there is no consistency across the board regarding punishments, including those prescribed by the Quran. *Shari'a* law was generally superposed on a customary law base without or with very exceptional death penalty instances.

Kenneth Roberts-Wray was correct when he concluded, "[...] it is clear that in many parts of Africa, indigenous customary law has been influenced and changed by the adoption of certain basic Islamic principles, and that what is claimed to be Islamic law has been modified by customary practice".⁵³⁹ Based on the discrepancies between *Shari'a* law as applied by the Ottoman *Qadi* in Egypt and by Yahyà b. Ta'fuft in Morocco and the difference between the punishments for adultery in accordance with Nigerian *Shari'a* law and with that of Sierra Leone, one conclude that harmony in Islamized Africa will be achieved by nothing less abolition.

It is certain that none of laws that influenced Africa before colonisation was death penalty free. Some of those laws have upgraded to the level of the sole legal system of the country (Liberia) or constitute the basis of the modern law (South Africa, Ethiopia and most African Muslim countries) or has been juxtaposed to the colonial law to form the current law (Nigeria). Although pre-colonial legal practices were characterized by a varied enthusiasm towards the death penalty, the history of capital punishment in some of these countries has been one of the most atrocious on the continent. This resulted from the fact that colonisation worsened a practice which was already heavily outrageous.

⁵³⁸ *Supra* note 435, at 230.

⁵³⁹ *Supra* note 48, at p.537.

4 THE DEATH PENALTY AS A COLONIAL POLICY IN AFRICA

Introduction

Foreign influences changed indigenous laws in their substance and form. Already, limited pre-colonial influences had affected local perceptions of the death penalty in Liberia, South Africa, Ethiopia and West and North Africa. Countries that were death penalty free started justifying the retention of the death penalty on the grounds of its deterrent value or divine nature.⁵⁴⁰ The policy continued during colonization.

Nearly all colonizers resorted to the death penalty to enforce their system of order. There were seven colonial powers in Africa namely Belgium, France, Germany, Italy, Portugal, Spain and the United Kingdom. It is worth noting, however, that the German era in Africa (Namibia, Tanganyika, Ruanda-Urundi, Cameroon and Togo) was short lived. It almost left no legal legacy, although Africans -mainly Namibians- still remember it with bitterness.

The Spanish legal system in Africa was limited to Equatorial Guinea, a small portion of Eastern Morocco and the coast of Western Sahara and had no widespread implications.⁵⁴¹ Legal historians qualify Western Sahara as the stillborn and Equatorial Guinea as the poor parents' child to indicate that Spain left no substantial legal heritage in these countries.⁵⁴² Italy failed to implement the death penalty law in Somalia and there is no record of whether or not it succeeded in Libya. A few decades before colonization (1867), Portugal had abolished the death penalty. In 1870, it adopted a decree extending the abolition of the death penalty to Portuguese territories in Africa, Asia and Oceania.⁵⁴³ Article 55 of the Portuguese penal code provided for a maximum punishment of 24 years imprisonment, a policy that remains ahead of its time.⁵⁴⁴ Portuguese territories in Africa enjoyed *de jure*

⁵⁴⁰ *Supra* note 2, at p.31.

⁵⁴¹ Tony Hodges, *Sahara occidental: Origines et enjeux d'une guerre du désert*, Paris: L'Harmattan, 1987, at pp.61-78.

⁵⁴² *Supra* note 292, at pp.50-51.

⁵⁴³ *Supra* note 30.

⁵⁴⁴ Le Code Pénal Portugais de 1867, in Marc Ancel and Yvonne Marx, *Les codes pénaux Européens*, Tome III, Paris: Centre Français de Droit Comparé, 1957, at p.1529.

abolitionist status during colonial times.⁵⁴⁵ They introduced the death penalty when they became independent.⁵⁴⁶

Despite there being only slight differences between French law and Belgian law; only Belgium was a *de facto* abolitionist state during colonial times. This chapter focuses on the nature and scope of the death penalty in law and practice in territories under British, French and Belgian rule.

4.1 The death penalty in the English colonial law in Africa

In principle, common law is more flexible than civil law as it evolves and accommodates to local environments. However, common law practice in Africa departed from this theory. The need for control that gave way to injustices superseded flexibility.⁵⁴⁷

Various colonies applied English law as it had been imported from England, except where political and local circumstances dictated a few adjustments.⁵⁴⁸ Legal provisions conferring jurisdiction over offences had never been considered to be outside the competence of the British legislature. Crimes remained under the jurisdiction of British law even if they occurred elsewhere.⁵⁴⁹ This calls for an analysis of the common characteristics of English death penalty law in different colonies to occur prior to any discussion of its actual application in Africa.

4.1.1 Common features of the English colonial death penalty law in Africa

During colonization, indigenous law as Islamic law continued to be applied where appropriate in private law, except in situations that were deemed repugnant to English law. The criminal law remained the Queen's *chasse gardée* for serious offences or in special

⁵⁴⁵ Clarence H. Patrick, "The Status of Capital Punishment: A Worldwide Perspective", (1965) 56 *Journal of Criminal Law, Criminology and Police Science* 408.

⁵⁴⁶ Amnesty International, *Mozambique: Human Rights and the Police*, April 1998, AI Index: AFR41/01/98, Reuters, "South Africa Keeps Hangman Occupied", *The Montreal Gazette*, 4 July 1969, at p. 37, Agencia Angola Press, *Angola Constitution Bans Death Penalty*, 19 May 2010.

⁵⁴⁷ *Supra* note 27.

⁵⁴⁸ *R v. Joykissen Mookerjee* (1862) 1 Moo PC (N.S.) 172 at 190-191.

⁵⁴⁹ The Admiralty Offences (colonial) Act, 1860 (23 & 24 Vict, Cap. 123).

circumstances. Africans, who were subjects rather than citizens, could not claim the jurisdiction of customary criminal law or *Shari'a* law. Pre-colonial laws were dedicated to elimination.⁵⁵⁰

Specific legislation was enacted to ensure that British courts had the last word in criminal matters. Murder or manslaughter perpetrated either in a foreign country or on the high seas came under the jurisdiction of British courts.⁵⁵¹ In 1871, citizens of Sierra Leone, Gold Coast (Ghana), Gambia and Lagos were brought under the umbrella of English law. These people were still free men despite a slight occupation of the coast. Articles 1 and 2 of the West African Offences Act proclaimed the extension of English law to them when they committed an offence within twenty miles of the boundary of their territory against a subject of Her Majesty.⁵⁵² Probably the best description of those provisions is found in the Bond Agreement of 1844 between Britain and Gold Coast chiefs. Its sections 2 and 3 read as follow:

1. [...]
2. Human sacrifices and other barbarous customs, such as panyarring, are an abomination and contrary to law.
3. Murders, robberies, and other crimes and offences, will be tried and inquired of before the Queen's judicial officers and the chiefs of the district, moulding the customs of the country to the general principles of British law.⁵⁵³

Section 1 of the Sierra Leone Offences Act appeared to adopt the same style:

The laws which are now or which shall hereafter be in force in the Colony of Sierra Leone for the punishment of crimes therein committed shall be and the same are hereby extended and declared applicable to all her Majesty's subjects within any Territory adjacent to the said colony, and being with the Limits as aforesaid; and every crime or offence committed [...] shall be cognizable in any such courts, and

⁵⁵⁰ *Supra* note 48, at p.535.

⁵⁵¹ Section 1 of the Murders Abroad Act, 1817 (57 Geo.8, c. 58).

⁵⁵² West Africa Offence Act, 1871 (34 & 35 V. c. 8).

⁵⁵³ Sections 2 and 3 of the Agreement of 6 March 1844 between Great Britain and Gold Coast as reproduced by N.M. Ollenu, "The Influence of English Law on West Africa", (1961) 5 *Journal of African Law* 23.

shall be inquired of, tried and prosecuted, and on conviction punished, in such and the same Manner as if the same had been committed within the said Colony.⁵⁵⁴

In terms of capital punishment, violence, ritual execution and discriminatory and unfair process characterized the British colonial policy. The deterrent and didactic nature of the death penalty as professed by the colonial courts was combined with a dose of dehumanization and discrimination. Both the prosecutor and the defence council, each serving personal interest but all resorting to the same prejudicial procedure, presented to the judge many stereotypes. The process of creating another identity started with the trial and ended with the sentence. According to the prosecutor, Africans were a dangerous race, with uncivilized values and violent behaviours. They were lesser than human, with a 'primitive mentality' and 'impulsive savagery'. The defence counsel reiterated that the court was dealing with irresponsible and mentally retarded people.⁵⁵⁵

Compared to the average Englishman, primitive people could not differentiate between good and evil or identify boundaries between right and wrong.⁵⁵⁶ Where a young Englishman took for granted the triumph of forces of right, they strongly believed in evil spirits and were more responsive to them, as well as to forces of nature.⁵⁵⁷ The death penalty cemented this belief. Public displays of judicial power through firing squad and hanging were just a transplantation of the method of execution in vogue in England until the nineteenth century. The motto 'deterrence, authority and efficiency' aimed to crush any resistance or subversion and change the savage into an obedient citizen.⁵⁵⁸ Indians and mostly Africans were subjected to the death penalty when the victim was a European.

After witnessing the execution of his chief for subversion, a Nigerian elder realized that society had changed, "it was giving place to something new, to new laws, different standards of conduct and to a foreign people".⁵⁵⁹ Prior to the period of emergency laws,

⁵⁵⁴ Section 1 of the Sierra Leone Offences Act, 1861 (24 & 25 V c 31). A similar phrasing appears also in the South African colonial legislation. See South African Offences Act, 1863 (26 & 27 V.c. 35) and sections 20 and 21 of the Fugitive Offenders Act, 1881 (44 and 45 V.c. 69).

⁵⁵⁵ Stacy Hynd, "Killing the Condemned: The Practice and Process of Capital Punishment in British Africa, 1900- 1950S", (2008) 49 *Journal of African History* 405.

⁵⁵⁶ Frank Furedi, *Supra* note 29, at pp.135-136.

⁵⁵⁷ *Ibid.*

⁵⁵⁸ *Ibid.*, Stacy Hynd, *Supra* note 555, at p.404; Michael Crowder, *Colonial West Africa*, London: Frank Cass, 1978, at p.9

⁵⁵⁹ *Supra* note 555, at p. 407.

the discomfort resulting from public executions for the colonial officers, the condemned and African society led London to instruct that executions be carried out *in camera*.⁵⁶⁰

The process of imposing the death penalty was unfair. The British colonizer arbitrarily controlled and limited rights of appeal, restricted rights to mercy and sped up executions. There were doubts about the power of the Judicial Committee of the Privy Council (the Queen in Council or the Committee) to grant a *dernier ressort* appeal in capital cases as it could no longer sit as a court in criminal matters.⁵⁶¹ Speaking on behalf of the Committee in 1941, Lord Simon L.C provided a list of areas where the Committee could interfere. It appeared that “the Committee does not concern itself with [...] the award of particular punishments”⁵⁶² or “the length of sentences”.⁵⁶³

The Committee expressed no compassion for the condemned even when the accused had successfully challenged the ruling of the court. A nineteenth century precedent had compared appeals in capital cases from British colonies with stalling tactics intending to delay the carrying out of the sentence. According to Lord Chancellor, with a successful application “it would be easy for any person in any distant colony to stay execution and, which would be a very serious and grave misfortune, to interpret a long delay between the vindication of justice by a verdict and execution of the sentence...”⁵⁶⁴

The rule remained unaltered even when the offender alleged grievous miscarriage of justice. Based on illegal evidence, the Supreme Court of Nairobi convicted *Karuma* of unlawful possession of ammunition and sentenced him to death. The Committee looked at the merits and demerits of the case in depth and found no applicable precedent in English law. Only in the *Olmstead* case had the American Supreme Court stated that “the common law did not reject relevant evidence on the grounds that it had been obtained by illegal means”.⁵⁶⁵

Unfortunately, that case did not indicate on which common law authority it was based. Scottish and South African cases, which could be relied on mainly dealt with different

⁵⁶⁰ *Ibid.*, at pp. 408-409.

⁵⁶¹ *Supra* note 48, p.433-463.

⁵⁶² *Ibid.*

⁵⁶³ *Hardtmann v. R* (1963) A.C.746 at 758; *Mondihar Singh v. R.I.* (1950) A.C. 345

⁵⁶⁴ *Ex parte Deeming* (1892) AC.422 at 426. See also *Hardtmann v. R* (1963) A.C. 746 at 758.

⁵⁶⁵ *Olmstead v. United States* (1928) 277 U.S. 438.

circumstances.⁵⁶⁶ The Committee was embarrassed but still did not advise mercy. It looked for “an intermediate position between the American and Scottish views...”⁵⁶⁷ without managing to hide that “there were matters of fact in the case which caused [their Lordships] some uneasiness”.⁵⁶⁸ They advised that the condemned person’s application be dismissed. The aforementioned uneasiness led them to open a salutary door by directing that the execution be conditional on the decision of the Secretary of the State.

The case highlights contradictions that existed between legal reasoning and the radical and oppressive position of the colonial policy. The Committee found that grounds for granting the application for mercy existed, but they still could not grant it. One wonders why they delegated their powers to the executive. Surely, a precedent undermining British colonial interests was not welcome.⁵⁶⁹ It was important to terrorize the people, already reduced to subjects, with harsher or excessive punishment so that they fear the ruler. The purpose was to combine the domination of men and territories and to rely on legal violence.⁵⁷⁰

In dealing with death row or what it called ‘delays in capital cases’, the British colonizer issued new instructions. Indeed, applications for appeal or commutation of sentences delayed the execution of capital sentences. The Committee was not aware of the facts or even of the decision and no measures could be taken meanwhile. In London, as well as in various colonies, instructions were given that intended to speed up the execution of the death penalty.⁵⁷¹ After the reception of the petition in London, a speedy hearing was immediately organized. When a leave to appeal was granted, the Judicial Committee was also instructed to promptly deliberate on the matter.

The orders for reducing delays in execution of the death penalty are summarized below:

- a. If the condemned intended to apply for a special leave for appeal or commutation of the sentence, the date of execution was postponed for three weeks. The application contained instructions, documents including the affidavit of means and the certificate of council justifying the rationale of the application and funds to a solicitor in London and to a specified government officer.

⁵⁶⁶ *Kuruma v. R.*(1955) A.C. 197 at 200

⁵⁶⁷ *Ibid.*

⁵⁶⁸ *Ibid.*, at 205.

⁵⁶⁹ *Rex v. Mohamed Shah s/o Lal Shah* (1939) 5 E.A.P.L.R.103 at 104.

⁵⁷⁰ *Supra* note 555, at p. 403.

⁵⁷¹ *Supra* note 48, at p.446.

- b. Upon reception of the file by the Solicitor in London, the Secretary of State could postpone the execution for further three weeks.
- c. No further delay could be accepted if the deadline was not respected.

Dismissals justified new applications, which were expected to go through the same process and take the same amount of time.⁵⁷² Though the Committee felt concerned and disapproved of this abuse of the procedure, it took no initiative to stop its dilatory use. In 1947, the Executive appeared increasingly concerned over delays of execution. It sought the authorization of Parliament to delegate the Committee's power to the Governor. In lieu of the judiciary, if the Governor concluded that "any proceedings taken by the accused persons either in the Colony or by way of petition in England were without real substance, he would not allow those proceedings to cause the postponement of the sentence".⁵⁷³

The British colonizer was not concerned with protecting the process of justice. Speedy executions became common. Stacy Hynd recalls that "early colonial hangings were often improvised affairs, the gallows being created from a nearby tree, or even a door-frame suspended over a river bed..."⁵⁷⁴ Following the new instructions, executions fell in the Governors' discretion. The lodging of a special leave to appeal did not "necessarily affect [the Governor's] position".⁵⁷⁵ This excessive politicization of the judicial process prevailed in all British colonies.⁵⁷⁶

4.1.2 The death penalty in British East Africa and Somalia

In 1877, the Sultan of Zanzibar authorized the British East Africa Company to operate in the sphere formerly offered to Portugal. Later the area from the island of Zanzibar to the Eastern coasts of Somalia, Kenya and Tanganyika became a place of contention between Great Britain and Germany. Treaties with local chiefs, demonstrations of force against coastal Arabs, concessions, sale and leasing contracts among Europeans or between them

⁵⁷² *Supra* note 48, at p.446

⁵⁷³ House of Commons, Debates, vol.441 (written answers), cols 230-233 as quoted by Kenneth Roberts-Wray, *Ibid.*, at p.447.

⁵⁷⁴ *Supra* note 555, at p. 407.

⁵⁷⁵ House of Commons, Debates, vol.441 (written answers), cols 230-233 as quoted by Kenneth Roberts-Wray, *Supra* note 48, at p.447.

⁵⁷⁶ Anthony I. Asiwaju, "Law in African Borderlands: the Lived Experience of the Yoruba Astride the Nigeria-Dahomey Border", in Kristin Mann and Richard Roberts, eds., *Law in Colonial Africa*, Porstmouth: Heinmann, 1991, at p.232.

and local chiefs allowed Europeans to control the area.⁵⁷⁷ The agreement was that Germany would occupy Tanganyika and Great Britain would settle in Kenya and South Somalia, while Zanzibar would remain independent under a British protectorate. Uganda joined the team under a protectorate treaty in 1892. Later, Tanganyika was brought under British trusteeship in application of the Versailles Treaty of 28 June 1919.⁵⁷⁸

There were five Somalias: Italian Somalia, British Somaliland, French Somalia, the Ogaden Province of Ethiopia and the Northern District of Kenya. As regards punishments, compensation (*diyya*) characterized Somali customary criminal law of homicide. Even under the influence of *Shari'a* law, Somalia like Zanzibar did not introduce the death penalty. Capital punishment was very rare under the *Ismaili Shi* School in Zanzibar and on the coast. Even murders that involved mutilation were punished by *diyya* provided the victim consented to receiving it.⁵⁷⁹

With colonization, the British and the Italians introduced the Indian penal code and the Italian penal code respectively, both of which punished murder by hanging. These laws collided with a very strong custom of *diyya*, the repeal of which would result in political chaos for the fragile colonial administration. *Herr* (contracts or treaties), which determined the amount of *diyya* depending on the offence and its gravity, bound Somali clans for centuries. Under *Herr*, 100 camels was the punishment for killing a man and 50 camels for killing a woman.⁵⁸⁰ The punishment was doubled for intentional homicide, mainly when it resulted from hatred.⁵⁸¹

Colonial laws perceived *diyya* in their own concepts and in comparison with principles familiar to them. They failed however to push it out. In British Somaliland, courts upheld the payment of full or partial *diyya* although they were applying the penal code.⁵⁸² Under Italian penal code, courts understood *diyya* to be the parallel with a civil remedy for torts resulting from the offence and the collective payment as the correspondent of the Italian principle of *responsabilità solidale*. This oversimplification resulted in the imposition of two

⁵⁷⁷ *Supra* note 48, at pp.756-758.

⁵⁷⁸ Alan Sharp, *The Versailles Settlement: Peacekeeping after the First World War, 1919-1923*, New York: Palgrave Macmillan, 2008, at pp.173-174.

⁵⁷⁹ James S. Read, *Supra* note 26, at pp. 105-106.

⁵⁸⁰ Paolo Contini, "The Evolution of Blood-Money for Homicide in Somalia", (1971) 15 *Journal of African Law* 78-80.

⁵⁸¹ *Supra* note 42, at p.80.

⁵⁸² *Supra* note 580.

punishments, namely imprisonment and *diyya*.⁵⁸³ Tribesmen perceived the imposition of two sentences as double jeopardy.⁵⁸⁴ However, hanging remained uncommon among the Somali in all cases.

Kenya, Uganda and Tanganyika joined to form a formal cooperation in 1926 through the Governors' conference.⁵⁸⁵ Even prior to this, each country's practices influenced the others without replacing them.⁵⁸⁶ Petty offences, which constituted the majority of criminal cases, were left to indigenous courts that applied indigenous criminal law or what remained of it. The British colonizer had repetitively modified indigenous law and procedure in East Africa to make it more modern. The commission in charge of cataloguing customary crimes stated that "some crimes ... were converted into civil wrongs and vice versa, some district representatives agreed to modify elements in certain offences, ... some offences were eliminated altogether where it was found that they were already covered under some written law".⁵⁸⁷

The westernization of indigenous law through "administrative pressures or directions, training courses conducted by courts advisers, handbooks of persuasive and binding authority and ruling by magistrates and high courts"⁵⁸⁸ led indigenous judges to deliver justice in ways that flattered their masters.⁵⁸⁹ The Native Tribunals Rules of 1911 provided that any sentence imposed by the Council of Elders was to be subjected to the approval of the District Commissioner. In Kenya, indigenous courts specialized in applying statutory criminal provisions and usually imposed punishments that had never existed under their traditional law.⁵⁹⁰

Punishments were selected from the range of penalties with which the colonizer was more familiar.⁵⁹¹ The purpose of this policy was to break down the traditional penalty of compensation and emphasize the death penalty as a deterrent. Compensation became

⁵⁸³ *Ibid.*, at p.81.

⁵⁸⁴ *Ibid.*, at p.82.

⁵⁸⁵ *Supra* note 48, at p.447

⁵⁸⁶ *Rex v. Tromoi and Another* (1919) 8-9 K.L.R. 6.

⁵⁸⁷ "Notes and News, Customary Criminal Law in Kenya", (1963) 7 *Journal of African Law* 2.

⁵⁸⁸ James S. Read, "Criminal Law in the Africa of Today and Tomorrow", (1963) *Journal of African Law* 16.

⁵⁸⁹ *Rex v. Weer S/O Muga* (1911) 5 E.A.P.L.R. 62 at 62- 63.

⁵⁹⁰ *Supra* note 587.

⁵⁹¹ James S. Read, *Supra* note 26, at p.95.

considered inadequate and repugnant.⁵⁹² The phrase ‘repugnant to natural justice, equity and good conscience’ was present in all colonial statutes and essentially referred to anything foreign to English law.⁵⁹³ The death penalty was thus traditionalized.

However, the regularity with which the death penalty became imposed by traditional courts attracted the colonizer’s attention. The Council of Elders ordered a group of eight men to execute a death sentence against one Kachau. During a trial for murder, the accused claimed immunity on the grounds that they were executing the order of a court of law. The East African Court of Appeal was asked whether, in terms of colonial law, the Council of Elders constituted a court of justice to pass a death sentence. Despite concluding to the opposite,⁵⁹⁴ traditional courts continued flattering the District Commissioner. In application of a supposedly traditional punishment, in 1908, a statutory Kikuyu Council (the *Kiama*) tried a suspected witch and imposed a sentence of death by stoning.⁵⁹⁵ In 1913, the same Council imposed a death penalty by burning on two men convicted of witchcraft.⁵⁹⁶ In a similar murder case from the Kamba, a tribal meeting imposed a death sentence on the culprit and ordered his hanging in the village.⁵⁹⁷

Discrepancies between methods of execution are per se an indication that the death penalty did not fit the so called ‘survival of indigenous punishments’.⁵⁹⁸ In the *Karoga wa Kithengi and 53 others* case, the court established that in applying the death penalty by burning, stoning or hanging, native courts “were no longer exercising their old customary jurisdiction, but only such jurisdiction as the Governor’s rules allowed them to exercise...”⁵⁹⁹ The appropriate sentence for witchcraft under traditional Kikuyu law was ostracism.⁶⁰⁰ The death penalty was not a valid punishment for Kikuyu, Kamba, Luo or Pokot of Kenya.⁶⁰¹ Its application was an indication of the foreign laws’ influence on African indigenous laws.

⁵⁹² Section 2 of the Colonial Laws Validity Act, 1865 (28 &29 Vict. C.63).

⁵⁹³ *Supra* note 48, at pp. 396-399, 575-579; J.N. Matson, “The Common Law Abroad: English and Indigenous Laws in the British Commonwealth”, (1993) 42 *International and Comparative Law Quarterly* 761.

⁵⁹⁴ *Kasan wa Muiga and others v. Rex* (1912) 4 E.A.P.L.R 103 at 103-105.

⁵⁹⁵ *Rex v. Kichingeri and others*, (1908) 3E.A.P.L.R.1 at 2-4.

⁵⁹⁶ *Rex v. Karoga wa Kithengi and 53 others*, (1913) 5 E.A.P.L.R.50 at 53.

⁵⁹⁷ *R v. Komen Arap Chelal and 43 others* (1938) 5 E.A.C.A.150.

⁵⁹⁸ *Rex v. Kichingeri and others* (1908) 3E.A.P.L.R.1 at 5 and James S. Read, *Supra* note 26, at p.96.

⁵⁹⁹ *Rex v. Karoga wa Kithengi and 53 others* (1913) 5 E.A.P.L.R. 50 at 53.

⁶⁰⁰ Lewis Tupper, “Customary Law and Other Law in the East Africa Protectorate”, (1907) 8 *Journal of Comparative Legislation* 175-176 and James S. Read, *Supra* note 26, at p.105.

⁶⁰¹ *Supra* note 245.

Before pure English law, East Africa, particularly Zanzibar and the adjacent main land areas was under the influence of the Indian criminal law for decades.⁶⁰² With the Order in Council of 1884, the death penalty, already valid in the Indian penal code of 1860, became applicable in Zanzibar and its adjacent territories as part of the district of Bombay. The Indian penal code remained in force until the Colonial Office Model Code replaced it in 1930.

According to section 53 of the Indian penal code, the death penalty was its most severe punishment.⁶⁰³ It was mandatory for political crimes and murder perpetrated by a prisoner serving a life sentence⁶⁰⁴ and discretionary for other forms of voluntary homicide.⁶⁰⁵ Section 194 *in fine* also punished perjury with death when it had resulted in the judicial execution of an innocent person.⁶⁰⁶

There was distaste towards the death penalty in India. Drafters of the Indian penal code joined “those who condemn the English statute book as sanguinary...”⁶⁰⁷ They sent a brief but strong message to the judiciary to prevent it from making use of the discretionary death penalty for gang robbery, cruel mutilation and rape and outlawed the death penalty for petty offences such as theft, cheating or mischief.⁶⁰⁸ The scope of the death penalty was actually very limited even in practice:⁶⁰⁹

- a. Only two crimes were punished by death and commissioners had called the judiciary not to abuse the use of the death penalty.
- b. The personal jurisdiction of the penal code was restricted to non natives. Indigenous people referred to their respective customary laws in criminal matters.
- c. The death penalty, which was not new to the Europeans, Indians, Arabs and Muslim population of Zanzibar and the coast, at least for treason and murder, had to be executed without ritual torture. It was especially recommended that the convicted person not be broken on the wheel or burnt alive.

⁶⁰² J.N. Matson, *Supra* note 593.

⁶⁰³ This was section 40 in the draft presented to the Governor in 1838. See alternatively Walter Morgan and Arthur G. Macpherson, *The Indian Penal Code Act XLV of 1860 with Notes*, London: G.C. Hay and Co, 1861, at p. 32 and “Notes on the Chapter of Punishments”, in Thomas Macaulay, *Indian Penal Code*, New Jersey: Lawbook Exchange, 2002, at p.5.

⁶⁰⁴ Sections 121, 132 and 303 of the Indian Penal Code Act XLV of 1860.

⁶⁰⁵ Sections 302, 303, 305 and 396 of the Indian Penal Code Act XLV of 1860.

⁶⁰⁶ Walter Morgan and Arthur G. Macpherson, *Supra* note 603, at pp. 33 and 163.

⁶⁰⁷ “Notes on the Chapter of Punishments”, in Thomas Macaulay, *Supra* note 603, at p.70.

⁶⁰⁸ *Ibid.*, at p.69.

⁶⁰⁹ *Ibid.* and J.N. Matson, *Supra* note 593, at pp. 760-761.

The new penal code for East Africa⁶¹⁰ departed from Indian law on the grounds that Indian and African living conditions were the same.⁶¹¹ It was inspired by the Northern Nigerian criminal code of 1904, which in turn was based on the Queensland criminal code Act of 1899. The later derived from the work of R.S. Wright, who, in 1877, drafted a criminal code for Jamaica, a colony settled by Sir James Stephen. The draft never became law in Jamaica.⁶¹² The initial text, mistakenly attributed to James Stephen,⁶¹³ was deemed obsolete for its reference to the unfamiliar terms of intention and cause. It contained however basic principles of English law.⁶¹⁴ It became a reliable reference for different colonies. The Queensland code covered 717 provisions. Undoubtedly, the more detailed a code is, the more inflexible it will be. Its sections 8 and 664 together provided for death sentences to be carried out by hanging by the neck within the walls or enclosed area of the prison unless the sheriff decided otherwise. Capital offences were offences against public order, sedition, piracy and homicides.⁶¹⁵ A reading of the code causes one to think that it simultaneously applied to both Queensland and England.

The rationale behind the change in East Africa was the desire to see pure English law applied. The British Secretary of State disclosed that he was advised not to rely on the reasons behind the importation of the Indian code and to apply a code whose language and principles were familiar in England. In *Mawji and Another v. R.*⁶¹⁶ the clash between Indian law and English legal principles in courtrooms set those in London on edge. Lower judges rejected the English law of conspiracy because it did not exist in the law before them, namely the Indian code. Practical problems such as new terminology, the absence of textbooks and the unavailability of English case law also led local lawyers to boycott the brutal legal change. The State Secretary insisted that the basic problem was that Indian law

⁶¹⁰ Model Penal Code for the East African Dependencies Act, 1929 in *The Gazette of the Colony and Protectorate of Kenya*, no 40, 1 August 1929.

⁶¹¹ Clifton Roberts, "African Natives under the English System of Penal Law", (1933) 15 *Journal of Comparative Legislation* 169.

⁶¹² H.L. Stephen, "A Model Criminal Code for the Colonies", (1899) 1 *Journal of Comparative Legislation* 439.

⁶¹³ *Supra* note 588, at p. 14.

⁶¹⁴ *Supra* note 612.

⁶¹⁵ See sections 37 to 43 for treason, 44 to 53 for sedition, 79 to 82 for piracy, 305 for homicides in the Queensland Criminal Code Act, 1899 (68 Vic no 9, 1899).

⁶¹⁶ *Mawji and another v. R* (1957) J.C. 126 at 130 and 133.

needed to be replaced.⁶¹⁷ The East African Court of Appeal reiterated that codification was the only difference between East African law and English law.⁶¹⁸

Accordingly, English principles and methods of interpretation were incorporated into domestic law.⁶¹⁹ Local legislation provided, for example, that English law would serve as a reference to define treason and piracy.⁶²⁰ Henceforth, the definition of crimes would depend on changes that took place in Britain. This drove some to conclude that “no doubt this Penal Code is excellent where one has to deal with Europeans, but it hardly seems to fit the case when we picture a court scene with native prisoners in the dock”.⁶²¹

The reform represented a step backwards. The death penalty became mandatory for treason, piracy and murder. Retribution was the motive behind most punishments. Magistrates started imposing excessive punishments on a regular basis.⁶²² In 1932, almost an entire village received a death sentence. This was considered the only appropriate punishment for the murder that the sixty offenders had perpetrated.⁶²³ Courts vehemently rejected any complaint as to the severity of punishments. The court of appeal insisted that judges not read in the law punishments other than those written there.

In the *Kichanjele* case, the court of appeal quashed a sentence of five years’ imprisonment and imposed a death sentence for treason because the judge erred in considering that the death penalty was the maximum sentence. The court pointed out that that, unlike in rape cases where life imprisonment was a possible sentence; there was no alternative punishment to death for murder and treason.⁶²⁴ Before this case, the practice of the death penalty in Kenya was such that rape or mere assault with intent to rape of European females justified a mandatory death penalty⁶²⁵ while the rape of an African female could

⁶¹⁷ *Supra* note 588, at p.7. See also sections 2 and 4 of the Model Penal Code for the East African Dependencies Act, 1929 in *The Gazette of the Colony and Protectorate of Kenya*, no 40, 1 August 1929.

⁶¹⁸ *Rex v. Kinanda Bin Mwaisumo* (1939) 6 E.A.C.A.105 at 108.

⁶¹⁹ *Mawji and Another v. R* (1957) J.C. 126 at 133 and *Kimno Arap Kipturji v. Rex* (1934) 1 E.A.C.A.190.

⁶²⁰ Section 40 of the Kenya Penal Code, cap.24, section 53 of the Uganda penal code, cap.22, in Uganda Protectorate, *The penal code, 1950 and the criminal procedure code, 1950*, Entebbe, Government Printer, 1950, at p.17.

⁶²¹ *Supra* note 611, at p.170.

⁶²² *Rex v. Kumwaka wa Mulumbi* (1932) 14 K.L.R. 137.

⁶²³ *Ibid.*

⁶²⁴ *Rex v. Kichanjele s/o Ndamungu* (1941) 8 E.A.C.A.65.

⁶²⁵ Uganda and Tanganyika resisted introducing the death penalty for rape. See James S. Read, *Supra* note 26, at pp.105-106.

easily be reduced to adultery or defilement.⁶²⁶ The sentence for rape of African females whether teenager or adults was imprisonment.⁶²⁷

The colonizer's brutality and racism made the death penalty an instrument of oppression. Racial bias in the handling of capital cases increased as demands for independence increased and with the emergence of the *Mau Mau* movement. Murders perpetrated by Africans against Europeans and Asians became systematically punished by death, regardless of procedural irregularities, while those against fellow Africans were regularly reduced to manslaughter. In the *Kamau* case, the accused was charged of murdering an Indian. Based on a medical report the court found that the accused was probably suffering from epileptic insanity both before and during the action. The court imposed a death sentence despite the doubtful medical report.⁶²⁸

The court adopted a different attitude when the victim was an African. *Kibiegion Arap Bargutwa* violently murdered his father on the allegation that his father attempted to have unlawful connexion with him, accusation that his father denied before dying. The medical report concluded that the attack was so violent that it suggested that the accused was not in his right mind. The court found that "although such incomprehensible facts are not in themselves sufficient to establish insanity in law, it seems to us that ... there is good reason to think that he may at least have been labouring under an insane delusion to the effect that his father has made an indecent assault upon him".⁶²⁹ On the assumption that delusion existed, the court reduced the charge from murder to manslaughter.⁶³⁰

Despite their repeated unwillingness to impose the death penalty on juvenile offenders,⁶³¹ East African courts gained interest in criminal cases and in particular the number of homicide cases steadily increased.

⁶²⁶ *Rex v. Odar Odeyu* (1918) 7 E.A.P.L.R. 108 at 109 and *Rex v. Farasisiko Sheshaho* (1938) 5 E.A.C.A.110.

⁶²⁷ *Rex v. Opiri* (1927) K.L.R. 90 and *Rex v Hassan wa Saleh and Another* (1908) 3 K.L.R.105.

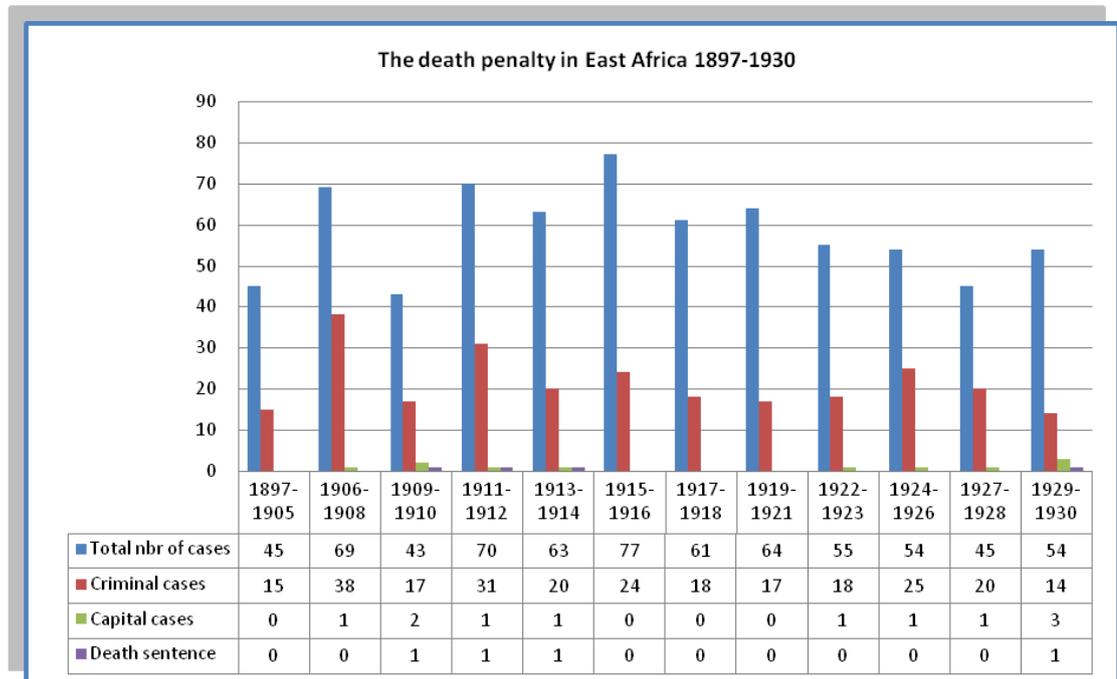
⁶²⁸ *Rex v. Kamau s/o Njeroge* (1939) 6 E.A.C.A.133 at 133-135. See also *Rex v. Gerevazi s/o Lutabingwa* (1941) 9 K.L.R.56 at 56-57.

⁶²⁹ *Rex v. Kibiegion Arap Bargutwa* (1939) 6 E.A.C.A.142 at 143-144. See also *Rex v Mwandamere s/o Sefula* (1931) 8 K.L.R.58 at 58-59.

⁶³⁰ *Supra* note 629. See also *Rex v Mwandamere s/o Sefula* (1931) 8 K.L.R.58 at 58-59.

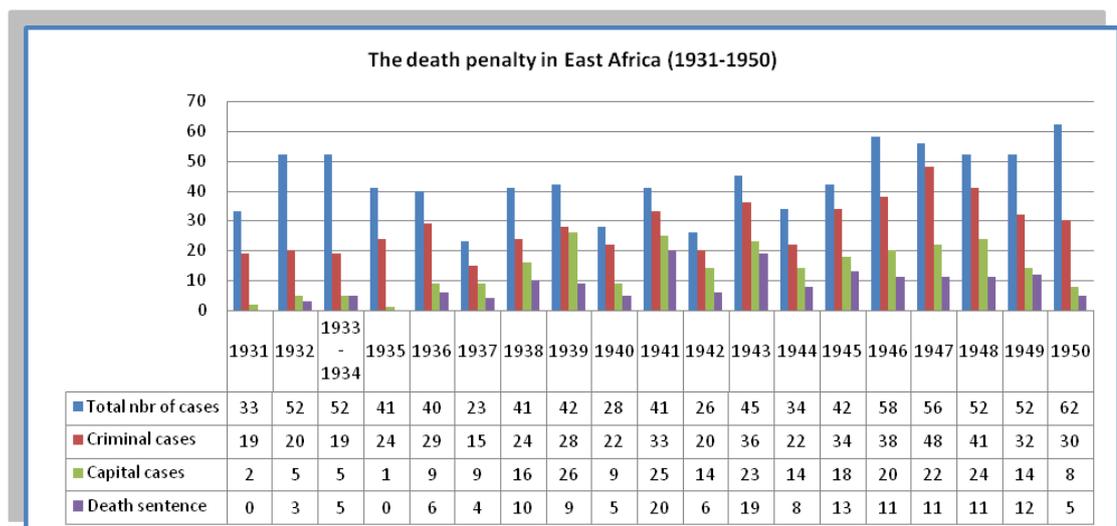
⁶³¹ *Rex v. Mvula s/o Irove* (1944) 11 E.A.C.A.112 at 112-113 and *Rex v. Kulabirawo* (1947) 14 E.A.C.A.116.

Figure 1: Death sentences in East Africa (1897-1930)



Source: East African Law Report (1897-1930)

Figure 2: Death sentences in East Africa (1931-1950)



Source: East African Law Report (1931-1950)

Between 1897 and 1950, 76% of those convicted and hanged for murder were Africans.⁶³² The fate of Africans became of major concern during the *Mau Mau* anti-colonial movement when Kenya had the largest recorded number of hangings. Most offences became capital crimes. Between 1950 and 1963, the rate of executions in Kenya (2,328 executions took place over this period) was almost seven times higher than that of Tanganyika (332 executions).⁶³³ David Anderson states that it was a time of 'Courtroom dramas', where no rule of law or judicial process existed. There was only authority and hanging.⁶³⁴

The 1953 Lari massacre, where more than 200 Kikuyu people (mainly women and children) were murdered, resulted in a call for three priorities: bringing *Mau Mau* culprits speedily to justice, convicting them and executing them.⁶³⁵ Capital offences were increased to meet this goal. Hate speeches and dehumanizing conduct against Kikuyu led to the adoption of draconian measures. "*Mau Mau* adherents did not belong to the human race ...they had to be eliminated".⁶³⁶ Five more offences were added to the list of capital crimes, making it so that anyone in connection with the movement had to be hanged. These offences were administering or taking the *Mau Mau* Oath, being a member of the *Mau Mau*, carrying out acts prejudicing public order, possessing an explosive item, arm or ammunition and consorting with persons carrying arms or ammunition.⁶³⁷

The problem became how to achieve this goal while the lobbying for death penalty repeal was ongoing in London and justice was built on procedures. After considering that the lobbying did not concern Kenya, the leader of British settlers in Kenya advised the colonial office that quick justice required exceptional powers to magistrate in capital cases, complete suppression of appeal and review of sentences without waiting for advisory opinions.⁶³⁸ Suggestions included the restriction of review by the governor and holding execution within 24 hours. These measures aimed to re-establish colonial domination and satisfy the vehement demands of local settlers for the tightest control of the Kikuyu.

⁶³² *Supra* note 555, at p. 406; See also David Anderson, *Histories of the Hanged, Britain's Dirty War in Kenya and the End of Empire*, London: Weidenfeld and Nicolson, 2005, pp.347-348.

⁶³³ David Anderson, *Ibid.*, at pp. 48 and 346-354 and James S. Read, *Supra* note 26, at pp.126-127

⁶³⁴ David Anderson, *Ibid.*, at p.151.

⁶³⁵ *Ibid.*, at p.151; John Lonsdale, "Kenyatta's Trials: Breaking and Making an African Nationalist", in Peter Coss, ed., *The Moral World of the Law*, London: Cambridge University Press, 2000, at p.196.

⁶³⁶ Caroline Elkins, *Imperial Reckoning, the Untold Story of Britain's Gulag in Kenya*, New York: Henry Holt and Company, 2005, at pp.48-49.

⁶³⁷ David Anderson, *Supra* note 632, at p.152.

⁶³⁸ *Supra* note 636, at pp.55-56.

The trial against *Mau Mau* suspects was unprecedented. The longest case barely took a month to try. Poor quality evidence did not prevent judges from imposing the capital penalty. Extrajudicial depositions were approved without prior assessment. Some of the accused were convicted on the basis of a testimony of a child⁶³⁹ or that of a witness who appeared in different hearings, praised in one and judged unreliable and deceitful in another.⁶⁴⁰ Judges interpreted doubts against the accused even when they retracted confessions allegedly obtained by coercion and torture.⁶⁴¹

The magistrates who sat on the Lari trial were inexperienced. Some were brought in due to their conservative tendencies. The idea of wrongful acquittals worried them more than wrongful convictions. The goal was hanging. During this marathon of justice 46 persons were hanged in Githunguri and 25 in Nairobi.⁶⁴² In Githunguri, the process of hanging one convict took nineteen minutes. The body was then taken down so that the gallows could be reset and used for the next convict. In 1953 alone, Kenya officially executed 91 persons.⁶⁴³ Many innocent persons were convicted and hanged alongside guilty criminals. Executions were carried out in a manner designed to reflect the “might of British justice”.⁶⁴⁴ Was there justice? It is generally agreed that “in this woeful process ... the law did not learn from its experience”.⁶⁴⁵

In Tanganyika, there was much debate around the extension of the death penalty to homicide provoked by witchcraft. In 1932, the view had been held that murderers of supposed witches deserved the death penalty. This inferred that the colonial administration did not believe in witchcraft and condemned murder. Yet in 1941, the Governor of Tanganyika expressed a sincere belief in witchcraft, justifying the commutation of the death sentence for the murderer.⁶⁴⁶

Undoubtedly, Tanzanians and Ugandans have been subjected to fewer British judicial injustices than their Kenyan neighbours. In East Africa, the death penalty was introduced first by *Shari'a* law on the Eastern Coast and Zanzibar and secondly by Indian law. It is

⁶³⁹ CC 317/1952 ‘Kamau Ndirangu & Githuka Kagwe’ at Nairobi, 10 April 1953, KNA MLA I/464.

⁶⁴⁰ David Anderson, *Supra* note 632, at p. 151-176.

⁶⁴¹ CC40/1953 “Karaya Njonji & three others’ at Nairobi, 23 April 1953, KNA.

⁶⁴² David Anderson, *Supra* note 632, at p. 175

⁶⁴³ James S. Read, *Supra* note 26, at p.126.

⁶⁴⁴ David Anderson, *Supra* note 632, at p.173.

⁶⁴⁵ *Ibid.*, at p.164.

⁶⁴⁶ James S. Read, *Supra* note 26, at p.127.

doubtful whether Kabaka, the King of Buganda negotiated with Britain to retain and impose the death penalty as an indigenous punishment.⁶⁴⁷

Certainly, British colonizers manipulated it as they wished and extended its use to crimes, which were dealt with in other ways. Still, the use of the death penalty during the period of British colonization appears to have been inconsistent and discriminatory depending on the shape given to a particular territory. Kenya was considered to be the New England and white settlers, mostly farmers, enjoyed greater political influence there than they would have in Uganda and Tanganyika.⁶⁴⁸ This explains the brutality with which the colonizers reacted to the *Mau Mau* anti-colonial movement and the thousands of hangings of Kikuyu after a flawed judicial process.⁶⁴⁹

4.1.3 The death penalty in British Southern Africa

Southern Africa is, geographically speaking, the expanse of land that extends up from the Cape to East Africa and Central Africa. Three colonizers occupied the area, namely Germany in Namibia (before South Africa took over under the League of Nations' mandate), Great Britain in Zambia, Zimbabwe, Malawi, Swaziland, Botswana, Lesotho and South Africa and lastly Portugal in Mozambique and Angola.

Though Great Britain controlled the majority of territories, its legal principles only had a limited scope. The East African Colonial Office Model Penal Code was extended to Northern Rhodesia (Zambia) and Nyasaland (Malawi) and received the same attention there that it did in East Africa.⁶⁵⁰ The sole exception to this was that in 1937 capital crimes and witchcraft were expressly excluded from the jurisdiction of native courts in Northern Rhodesia and Nyasaland.⁶⁵¹

Other British territories in the area remained under the powerful and persistent influence of Roman Dutch law. As early as 1904, Roman Dutch law was the substantive law applied in

⁶⁴⁷ *Ibid.*, at p.97.

⁶⁴⁸ William Burnett Harvey, *Introduction to the Legal System in East Africa*, Kampala: East African Literature Bureau, 1975, at p.361. See also Michael Crowder, *Supra* note 558, at p.126.

⁶⁴⁹ *Supra* note 636, at pp.50 and 57.

⁶⁵⁰ *Supra* note 588, at p.6. See also H.F. Morris, "A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876- 1935", (1974)18 *Journal of African Law*17-20.

⁶⁵¹ Section 11 (1) (a), (b) of the Native Courts Ordinance of 1 October 1937.

Lesotho, Botswana, Swaziland, Zimbabwe, Zambia and Namibia.⁶⁵² The interpretation of statutory laws introduced later were always tested against the standards of Roman Dutch law and adjusted accordingly.⁶⁵³

Lesotho made an exception. The British allowed customary law and Native courts to deal with all suits, actions or proceeding between Africans. The favour was later interpreted as carrying a policy of no interference in African matters. This policy, coupled with the passivity and inertia of the British colonizer, contributed to the maintenance of Basutho indigenous law, which was death penalty free.⁶⁵⁴ Basutho indigenous law passed the test of time, surviving the colonial period and establishing itself as the only valid law of the Kingdom of Lesotho.⁶⁵⁵ It eventually took primacy over the written law and in particular over section 17 of the Cape Proclamation Act 47 of 1871 that had introduced the death penalty.⁶⁵⁶

In Botswana the colonizer took a different approach that of a direct interference in African matters. Under the Order in Council of 10 June 1891, the Resident Commissioner in Botswana (Bechuanaland Protectorate) had a permissive jurisdiction in African cases. He had the right to limited interference in death sentences that native Chiefs imposed. There was a collegial court presided over by the Resident Commissioner and two other officers that was in charge of trying cases of murder.⁶⁵⁷ However, it appeared that their power was very limited. There were only two cases, one in 1893 and one 1897 in which the European court imposed the death penalty.⁶⁵⁸

In 1912, a special court was created to separate the Resident's judicial and administrative functions.⁶⁵⁹ This court dealt strictly with serious offences perpetrated by Europeans until 1928. From then on, its jurisdiction extended over treason committed by Africans.⁶⁶⁰

⁶⁵² A.J. Kerr, "The Reception and Codification of Systems of Law in Southern Africa", (1958) 2 *Journal of African law* 82.

⁶⁵³ For example section 13 of the High court Act, 1891, cap. 8 (Southern Rhodesia), section 1 (1) of the Proclamation no 21 of 1919 (South West Africa), section 2 of the Swaziland Criminal Procedure and Evidence Act, no4 of 1907.

⁶⁵⁴ W.T. McClain, "Lesotho's Criminal Law: South African Common Law or A Lesotho Penal Code", (1985) 1 *Lesotho Law Journal* 239 and 241

⁶⁵⁵ *Ibid*

⁶⁵⁶ J.R. Crawford, "The History and Nature of the Judicial System of Botswana, Lesotho and Swaziland-Introduction and the Superior Courts", (1969) 86 *South African Law journal* 480.

⁶⁵⁷ *Ibid*.

⁶⁵⁸ *Ibid*.

⁶⁵⁹ Section 1 (1) of the Proclamation Act no 40 of 1912.

As regards Swaziland, the Protocol of 5 October 1898 extended the jurisdiction of the Transvaal Landdrost's court over that country. The Protocol was an executive measure of a convention concluded five years earlier between Transvaal and Swaziland that put the latter under the protectorate of the former. The Protocol limited the jurisdiction of native courts in criminal matters and gave the Landdrost's court jurisdiction over serious offences including homicide. In 1904, the Anglo-Boer war had stopped the Landdrost's court from hearing cases in the protectorate. As a result, a special criminal court of Swaziland with a collegial bench appointed by the Governor of Transvaal and empowered with jurisdiction over capital crimes was created. However, the execution of the sentence required the Governor's confirmation.⁶⁶¹

In 1907, the jurisdiction of Swaziland courts in criminal matters was reframed in line with the Bechuanaland judicial organization. The court of the Resident Commissioner had the power to impose capital punishment for Africans. Europeans were tried before the special court unless they consented to the jurisdiction of the Resident Court. The special court, whose bench included an advocate from the Supreme Court of Transvaal and two assistant commissioners, had jurisdiction over treason, murder, culpable homicide and all other serious offences perpetrated by Europeans.⁶⁶²

As in South Africa, the statutory death penalty existed for treason and murder in Botswana and Swaziland and extended to rape in Lesotho.⁶⁶³ The court retained its discretionary power if it was satisfied that there were mitigating circumstances. The clash between customary law and Cape Law often called for the judge to be more flexible in Botswana and Swaziland.⁶⁶⁴ Thus, to create the appearance of a fair and just process, assessors (whose role was actually more advisory than substantial),⁶⁶⁵ were associated with the court in cases involving Africans. Nothing could prevent the magistrate from imposing the death sentence even when there were strong disagreements.⁶⁶⁶ In fact, some tribal laws (such as

⁶⁶⁰ Proclamation Act no 40 of 1912 read together with Proclamation Act no 11 of 1928.

⁶⁶¹ *Supra* note 656, at p. 484.

⁶⁶² *Ibid.*, at p. 485.

⁶⁶³ Robert D. Leslie, "Lesotho, Botswana and Swaziland", in Alan Milner, ed., *African Penal Systems*, London: Routledge and Kegan Paul, 1969, at p.182.

⁶⁶⁴ *Supra* note 656, at p. 478.

⁶⁶⁵ Joseph S. Warioba, "The Role of Assessors in Criminal Trials in Tanganyika", (1966) 1 *Journal of the Denning Law Society* 234-240.

⁶⁶⁶ David Anderson, *Supra* note 632, at p. 176.

the Tswana law) imposed the death penalty for murder, while neighbouring tribes compensated homicide with girls or cattle.⁶⁶⁷

Roman Dutch Criminal law, as it existed in the Cape of Good Hope in 1891, was extended to Zimbabwe,⁶⁶⁸ while Namibia received it as it was on 1 January 1920.⁶⁶⁹ Later, English law influenced the legal philosophy of these countries. They departed from the principles of old Roman Dutch law in a number of criminal matters. Infanticide, homicide resulting from provocation and suicide ceased to be capital crimes. There was no death penalty for juvenile offenders or pregnant women.⁶⁷⁰

Nevertheless, judicial practice indicates that there was no interest in the death penalty. In Southern Rhodesia (Zimbabwe), the judiciary doubted the mandatory nature of the death penalty. In the *Sanka* case, the court stated that “death is a possible but not a necessary sentence”.⁶⁷¹ This simple statement conveys the discretionary nature of the death penalty, a power to which courts resorted on various occasions for excluding the death penalty even in cases of proven murder.⁶⁷² To justify the exclusion of the death sentence, courts have resorted to mitigating circumstances such as intoxication, provocation⁶⁷³ and youth.⁶⁷⁴ Furthermore, the law in Southern Rhodesia was applied to Africans and to Europeans in the same way. This happened often mainly when the offender claimed the benefit of being a European. In the *Biljon* case, the Southern Rhodesia High Court clarified that “...it would indeed be putting back the clock and would be disturbing to the native mind if the impression gained ground that the commission of this crime by a European could be treated with comparative impunity”.⁶⁷⁵

By 1960, the death sentence had likely been imposed in only two 1938 cases, namely *Chikokonya* and *Longone*, in Southern Rhodesia.⁶⁷⁶ There is no record that these sentences were executed. On the contrary, Northern Rhodesia and Nyasaland, which were under the

⁶⁶⁷ *Supra* note 73.

⁶⁶⁸ Article 13 of the High Court Act, 1891, Cap. 8 as quoted in A.J. Kerr, *Supra* note 652.

⁶⁶⁹ Section 1 (1) of the Proclamation no 21 of 1919 as quoted in A.J. Kerr, *Ibid*. This section has been interpreted with approval in *R. v. Goseb* 1956 (2) S.A. 696 (S.W.A.)

⁶⁷⁰ *Supra* note 663, at p.182

⁶⁷¹ *Rex v. Sanka* 1923 R& N 20 (SR)

⁶⁷² *Rex v. Sales* 1936 R& N 55 (SR) at 55-56, *Rex v. Sikonja* 1937 R&N 54 (SR) at 54-56.

⁶⁷³ *Rex v. Mahoko* [1949] R&N 6 (SR) at 6-7.

⁶⁷⁴ *Rex v. Gideon* [1951] R&N 11 (SR) at 11-12.

⁶⁷⁵ *Rex v. Van Biljon* [1938] R&N 180 (SR).

⁶⁷⁶ *Rex v. Chikokonya* [1938] R&N 122 (SR) at 122-125 and *R v. Longone* [1938] R& N 131 (SR).

full influence of English law, often resorted to capital punishment. By 1960, Northern Rhodesia had sentenced 49 people to death and executed 26. Nearly 53% of its death sentences were carried out. Nyasaland had executed 9 persons out of the 25 sentenced to death or an average of 36 %.⁶⁷⁷ This is itself an indicator of the distance between Roman Dutch law and English law in Southern Africa.

4.1.4 The death penalty in British West Africa

There is no clear indication of the date of importation of English law in West Africa. Countries received it on different dates and in different ways.⁶⁷⁸ Sierra Leone was the first British settlement in West Africa. Freetown and the suburbs were repositories of free Africans and West Indians slaves liberated by the British government. English common law was the only law they knew. It superseded the savage and barbaric customs of indigenous people. Therefore, they extended its scope over their territories. The local bar defied several attempts to codify the criminal law. Accordingly, English law, as it existed in the 18th-19th century (credited with more than 200 capital crimes),⁶⁷⁹ was imported to Sierra Leone.⁶⁸⁰

This law was coupled with a certain dose of racial discrimination. The prosecution of non natives for capital crimes ought first to be subjected to the Governor's fiat.⁶⁸¹ Fortunately the first interpretation of this exception in the *Sard* case led the court to conclude that its application would obstruct the course of justice as the "effect would be to give no court jurisdiction in cases in which a non-native is charged with a capital offence in the Protectorate except upon a fiat of the Governor".⁶⁸²

Until 1959 (two years before the independence), Sierra Leone had tried four cases of murder. Two defendants were sentenced to death⁶⁸³ and the other two had their charges

⁶⁷⁷ UN Doc E/67 IV.15, 1968, p.44

⁶⁷⁸ N. M. Ollenu, *Supra* note 553, at p.9.

⁶⁷⁹ *Supra* note 300.

⁶⁸⁰ H.F. Morris, *Supra* note 650, at pp. 10-13. See also Elias T. Olewale, *Ghana and Sierra Leone: the Development of their Laws and Constitution*, London: Stevens and Sons Ltd, 1962, at pp.304-305.

⁶⁸¹ Section 36 of the Protectorate Courts Jurisdiction Ordinance, no 16 of 1932.

⁶⁸² *Rex v. Sard* (1935) A.L.R 395 at 400-401.

⁶⁸³ *Kanu, Seisay and Koroma v. Regina* (1959) A.L.R. 331 at 336.

reduced to manslaughter.⁶⁸⁴ In excluding the charge of murder, the death penalty was automatically excluded. It is evident that the death penalty was not a favoured punishment in Sierra Leone. Like Liberia, Sierra Leone was very attached to the idea of freedom and liberty.

The colony of Ghana was created in 1874 and it was strongly advised that while waiting for the adoption of a criminal code, the English common law be applied.⁶⁸⁵ The Queensland penal code inspired the Ghanaian criminal code of 1892.⁶⁸⁶ It was recommended that all of British West Africa adopt the code, however, only Ghana took action. Its large list of capital crimes and the harshness of its punishments created a high number of opponents to its adoption in Ghana. Morris remarks that the African intelligentsia of the west coast was profoundly suspicious of the code and they bitterly opposed it.⁶⁸⁷ Indeed, the code was suspected of imposing heavy punishments and creating easy opportunity for arbitrary measures.

In practice however, the Ghanaian courts demonstrated little inclination towards death sentences. Capital punishment lay dormant in the statute until the 1950s.

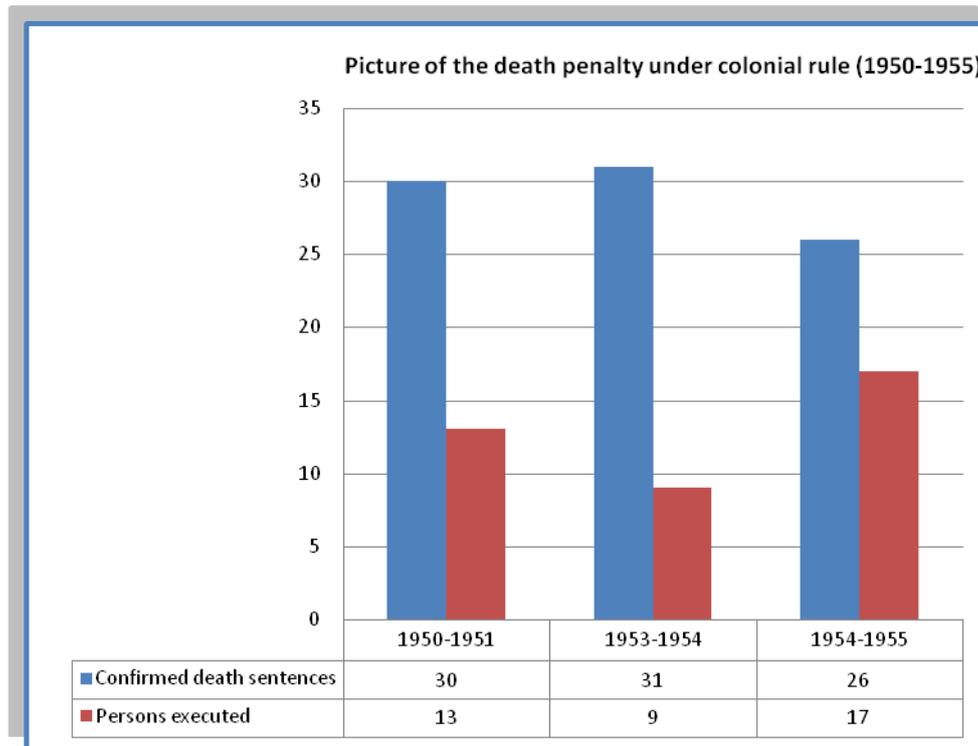
⁶⁸⁴ *Rex v. Sard* (1935) A.L.R. 395 at 400-401 and *Yebema v. Regina* (1959) A.L.R. 235 at 237.

⁶⁸⁵ H.F. Morris, *Supra* note 650, at p 7.

⁶⁸⁶ "Legislation-Ghana", (1961) 5 *Journal of African Law* 157.

⁶⁸⁷ H.F. Morris, *Supra* note 650, at p 6.

Figure 3: The practice of the death penalty in Gold Coast (1950-1955)



Source: Robert B. Seidman and J.D. Abaka Eyison.⁶⁸⁸

Even though justice was still modelled on the British concept of deterrence,⁶⁸⁹ reviews of sentences by the executive and clemency saved almost half of the convicts. From 1950 to 1955 only 30% of those convicted of capital crimes were executed. It is worth noting that before and even after the 1950s, courts frequently used their discretionary power to reduce a charge of murder to manslaughter so as to exclude the possibility of imposing the death sentence.⁶⁹⁰

Until 1950, the courts dealt more with economic crimes, largely the theft of cocoa nuts and the smuggling of mineral stones. Does this imply the absence of murders in Ghana or is it an indication of the colonizer's disinterest in such crimes and their punishments?

Paragraph 3 of the Bond of 1884 had already provided for a dual system of English law alongside customary law in homicide cases. The absence of recorded cases in law reports leads to the conclusion that capital crimes did not interest the colonizers. Native courts

⁶⁸⁸ Robert B. Seidman and J.D. Abaka Eyison, "Ghana", in Alan Milner, ed., *African Penal Systems*, London: Routledge and Kegan Paul, 1969, at p.75.

⁶⁸⁹ *Ibid.*, at p. 66.

⁶⁹⁰ *Rex v. Kwamina Afferi* (1926) G.C.L.R. 197 at 201.

dealt with them. Under British rule, legal problems between Africans fell within the bounds of native law.⁶⁹¹

However, from 1948, criminal law and its punishments (mainly the death penalty) played a huge role in the fight to quell social and political unrest in Ghana.⁶⁹² The sudden rise in death penalty cases corresponded to the use of capital punishment against political agitators to prevent them spreading the ideology of liberation and contaminate the populace.

British barristers holding offices as magistrates in Nigeria applied English common law from 1886 onwards, although that law was confined to foreigners.⁶⁹³ The first principle of Regulation X provided that in “criminal causes to which a foreigner is a party, the general principles of law and procedure shall be, as far as is practicable, similar to those in usage in Great Britain or other European States...”⁶⁹⁴ Section 2 of the regulation extended the application of the death penalty to foreigners. To avoid ‘international complication’, London had to confirm any such punishment before its execution. Those sentenced to death remained on death row until British authorities confirmed the death sentence.⁶⁹⁵ ‘Foreigners’ were citizens from ‘civilized states’ other than those from Britain. British settlers in Lagos were therefore allowed to impose the death penalty on natives. The only safeguard for Africans was that the execution had to be reported by post in London.⁶⁹⁶

In 1900, British authorities reiterated that the common law of England applied in Nigeria.⁶⁹⁷ Consecutive alteration and abrogation of the existing legislation would leave it intact.⁶⁹⁸ Until 1904, there were only two capital crimes: treason and murder. Later, the British proposal to introduce the Ghana penal code in Lagos produced a storm of protest as it

⁶⁹¹ Kodzo A. P. Kludze, *Chieftaincy in Ghana*, Lanham: Austin & Winfield, 2000, at p.433

⁶⁹² Henrietta J.A.N. Mensa-Bonsu, “‘Political Crimes’ in the Political History of Ghana: 1948-1993”, in Faculty of Law, *Ghana Law since Independence: History, Development and Prospects*, Accra: Black Mask, 2007, at p.239.

⁶⁹³ The Charter of the Royal Niger Company of 10 July 1886

⁶⁹⁴ Section D (1) of Regulation X: the General Principles of the Administration of Justice to Foreigners as Reproduced in Henry C. Gollan, “Modes of Legislation in the British Colonies: Northern Nigeria”, (1905) 6 *Journal of Comparative Legislation* 130.

⁶⁹⁵ Section D (2) of Regulation X: the General Principles of the Administration of Justice to Foreigners as reproduced in Henry C. Gollan, *Ibid.*

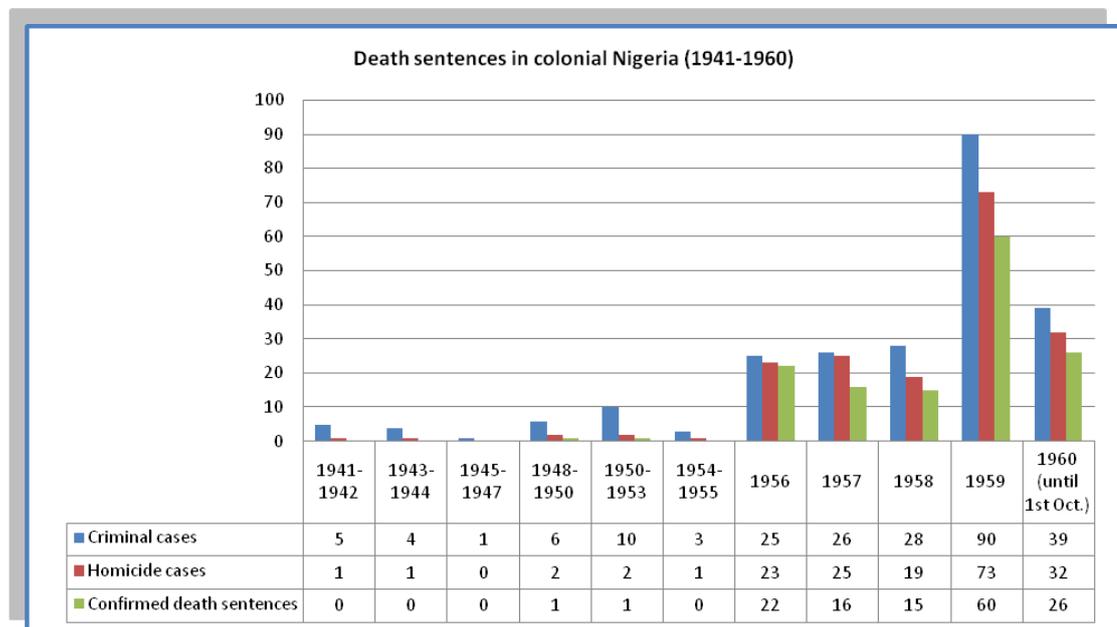
⁶⁹⁶ Section C (3) of Regulation X: the General Principles of the Administration of Justice to Foreigners as Reproduced in Henry C. Gollan, *Ibid.*

⁶⁹⁷ Section 34 of the Protectorate Courts Proclamation of 1900.

⁶⁹⁸ Protectorate Courts Proclamation of 1900 as modified by the Supreme Court Proclamation of 1902, and later repealed by the Provincial Courts Proclamation of 1902.

created new crimes and punishments. The penal code adopted for Northern Nigeria in 1904 resulted from a symbiosis of different codes largely based on the Queensland penal code and textbooks.⁶⁹⁹ Its revised version was extended to the whole country in 1916.⁷⁰⁰ The practice of the death penalty in the colonial Nigeria is however superfluous. The law reports indicate that there was no one single capital case confirmed until 1947. Paradoxically, from 1948 to 1960 death sentences sensibly increased to reach the roof of 90% of homicide cases in some years.

Figure 4: The practice of the death penalty in colonial Nigeria (1941-1960)



Source: Nigerian Law Report (1881-1956) and Supreme Court of Nigeria Law Reports (1956-1960).

The fact that murder was the highest grade of Native and *Shari'a* courts' jurisdiction explains the absence of capital cases before 1947.⁷⁰¹ They were often perceived as being better able to reach the truth than a British Court. They were more familiar with native modes of thought. This also complied with the indirect rule policy.⁷⁰² The death penalty had

⁶⁹⁹ H.F. Morris, *Supra* note 650, at p.9.

⁷⁰⁰ H.F. Morris, "How Nigeria Got its Criminal Code", (1970) 14 *Journal of African Law* 153.

⁷⁰¹ *Regina v. Ibrahim and two others* (1954) 20 N.L.R.137.

⁷⁰² Roberts Clifton, *Tangled Justice: Some Reasons for a Change of Policy in Africa*, London: MacMillan, 1937, at p.136.

always existed under both indigenous law and *Shari'a* law in Nigeria for witchcraft, murder, adultery, profaning gods and habitual theft. Methods of execution included hanging, stoning, killing by identical means or burying alive. Unfortunately, Native courts kept no record of capital cases during the colonial rule.

On occasions however, western judges resorted to legal technicalities such as insufficient evidence, provocation, irregular procedure, etc. to impose more lenient punishments in cases that would otherwise attract capital punishment. This practice was common between 1881 and 1942. The case of *Lamidi Balogun*, a lorry driver who collided with a cyclist illustrates this. The cyclist was heavily injured and unconscious. The driver carried the injured cyclist and his bike to a bush some miles away from the scene of the accident, washed all traces of blood away with petrol and ordered his assistants to keep the secret. During several interrogations, he made no mention of the cyclist. The cyclist was found during a police search and died a few minutes later at the hospital. The prosecutor insisted that the driver's conduct after the accident amounted to malice, itself leading to a charge of murder. However, the court stated that the driver was only suppressing all signs of the accident and injury to the cyclist and was not expecting unconsciousness to result in the cyclist's death.⁷⁰³

In the *Francis Ojifo* case, the accused ran after the soon to be deceased man who fell into a drain. The accused fatally stabbed the victim in the left side under the ribs. In considering whether there was provocation, the court stated that educated and civilized persons should be distinguished from uneducated primitive peasants, whose passion is uncontrollable. The court went on to state that "possibly a more civilized and enlightened person might be able to curb his anger, but in the case of a more primitive and unenlightened person, [any reasonable man] would in all probability act as the accused did".⁷⁰⁴ Accordingly, the accused was convicted of manslaughter.

In 1944, the court convicted *Nwonwu Nshi* of manslaughter. The accused had murdered the police officer who was attempting to arrest him for theft with an irregular arrest warrant. The judge excluded the charge of murder on the grounds that the defective arrest warrant of the deceased excluded any possibility of premeditation in the part of the accused.⁷⁰⁵

⁷⁰³ *Rex v. Lamidi Balogun* (1942)16 N.L.R. 75 at 75-80.

⁷⁰⁴ *Rex v. Francis Ojifo* (1942)16 N.L.R. 63 at 63-66 and *Rex v James Ojifo* (1944) 17 N.L.R. 99 at 102.

⁷⁰⁵ *Rex v. Nwonwu Nshi* (1944)17 N.L.R.103 at 107.

This situation prevailed until 1951 when a group of co-perpetrators who had submitted a suspected wizard to an ordeal test who died afterwards were sentenced to death.⁷⁰⁶ The court had reasons to avoid the above legal technicalities. It was influenced by the ruling of the East African Court of Appeal, which systematically rejected the defence of provocation in cases of murder against witches.⁷⁰⁷ It is also worth noting that in 1951 political unrest had driven the courts to use law to make people obey. Political events in Kenya and Ghana were sufficient to justify supposedly intimidating punishments. From 1954, modern courts and particularly the newly created National Supreme Court of Nigeria started dealing with cases that previously fell within the Native Courts' jurisdiction. Their decision revealed the true picture of modern justice. The highest ever number of death sentences was passed (nearly 92% of all murder cases) in 1956.

There is no explanation for the shift. However, courts discovered that imposing the death penalty was legitimate, timely and justified. In 1957, out of 15 cases of murder, only one was reduced to manslaughter. Fourteen others (93%) were sentenced to death. The 1959 political unrest became the excuse for increasing the number of death sentences against political fanatics. These defendants were often tried and sentenced to death as a group.⁷⁰⁸

The court systematically overruled its previous decisions as regards the death penalty and rejected defenses of provocation, insanity, youth and violation of criminal procedure. It referred consideration of mitigating circumstances to the Privy Council or to the Executive.⁷⁰⁹ On refusing leave for appeal in the *Abdu Kadiri* case, the court added that "we desire to say that, in our view, there are strong extenuating circumstances in this case, the more so if regard be had to the applicant's youth and condition in life. This will, no doubt, be taken into account by the Executive Authority at the appropriate time".⁷¹⁰ In ruling so, the court departed from both its practice and that of the East African Court of Appeal, which had repeatedly excluded the death penalty for juvenile offenders.⁷¹¹

⁷⁰⁶ *Rex v. Uko and Another* (1951) 20 N.L.R.16 at 16.

⁷⁰⁷ See for example the ruling in *Rex v. James Adekanmi* (1946) 17 E.A.C.A.99 at 101

⁷⁰⁸ *Queen v. Amoo* (1959) S.C.N.L.R. 272 at 278.

⁷⁰⁹ *Queen v. Kadiri* (1958) S.C.N.L.R. 25 at 26-27.

⁷¹⁰ *Ibid.*, at 27.

⁷¹¹ *Rex v. Mvula s/o Irove* (1944) 11E.A.C.A.112 & *Rex v. Kulabirawo* (1947) 14 E.A.C.A.116.

4.1.5. The legacy of the English colonial law

In British controlled zone, colonial law remained a means to bend Africans to their master's will. For this reason, the law had to be flexible enough to meet the ever-changing realities on the ground. Any deviation from colonial instructions justified harsh punishments, and if necessary, harsher than the law prescribed. The Southern Africa region that was relatively under the Roman Dutch law emprise escaped the harshness of English colonial administration.

The right to equal treatment before the law was not suited to deal with a childish, primitive and savage race characterized by a passion for crimes. Discrimination and racism were ingredients of English law. Britain only started lessening the appearance of inequality before the law but without outlawing inequality. "The 'lower orders' of society had to believe that the law was, by and large, unbiased".⁷¹² During colonial times, discrimination between aristocrats and commoners, men and women, juniors and elders was in vogue in England as among settlers in colonies. They only shared the common illusion of appertaining to 'a superior race'.⁷¹³ Therefore, English law was not expected to fit the condition of an unsophisticated African. Accordingly, there was no need finding convincing evidences to ensure that the offender was a criminal. For example, Instructions were even issued in East Africa to try "cases according to substantial justice without regard to technicalities of procedure".⁷¹⁴ Avoiding technicalities meant that "proving the offence according to the ordinary rules of evidence should be disregarded" in order to impose a "sharp, swift and effective punishment".⁷¹⁵

Crimes against Europeans and political crimes or supposedly so denoted the savage nature of people who rejected the obvious truth of the superiority of the white race and the goodness entrenched in the civilizing mission of colonization. Society need therefore to be cleaned from any germ of such an opposition and if necessary by the way of capital punishment. The law had therefore to ensure that the African remained subordinate and white interests were protected. In practice, the law set up three dimensions of criminality:

⁷¹² Brett Shadle, "White Settlers and the Law in Early Colonial Kenya", (2010) 4 *Journal of Eastern African Studies* 511.

⁷¹³ Will Jackson, "White Man's Country: Kenya Colony and the Making of a Myth", (2011) 5 *Journal of Eastern African Studies* 344-368.

⁷¹⁴ *Supra* note 712, at p. 514.

⁷¹⁵ *Ibid.*, at pp. 514- 515.

intra-African crimes, intra-whites crimes and anti-whites crimes. In all colonies where the colonizer had the opportunity of extending and effectively applying its rule, an anti-white offence called for a mandatory capital punishment whereas legal technicalities applied to other categories. This justified the increase of capital punishment during anti-colonial revolts in Nyasaland, Kenya and Ghana. In theory, the French colonial policy was not different.

4.2 The death penalty in French colonial Africa

The history of French colonial law and policy in Africa remains the most complex of all the colonizers. Public institutions and the Government were regularly restructured; individual colonies were created, modified, abolished and at times recreated.⁷¹⁶ At the same time, there was too much tergiversation in Paris between the executive and the legislative regarding who should be regulating colonial affairs.⁷¹⁷ However, these problems did not hinder the centralization of legislative power that became their governing principle during the entire colonial period. This meant that the body of laws applicable in French colonies in Africa emanated from the metropolis. Accordingly, French criminal law as it was exported to Africa largely contained nothing adapted to the local environment. It was a projection of what was in vogue in France.

All major French legal principles and methods of interpretation were transplanted to the colonies. This was not necessarily because of lack of imagination but rather for reasons of assimilation.⁷¹⁸ Regardless of the motive behind this centralization, former French colonies and protectorates in Africa have until now failed to wipe out the colonial system.

Therefore, a study of the death penalty in former French colonies cannot fail to acknowledge that legal and criminological developments in France strengthened the distaste for the death penalty in French colonial Africa. Paradoxically, a study of this kind is in essence a study of the French penal system itself as progressively shaped by new thoughts leading to changes in attitudes towards capital punishment until most of African countries achieved their independence in the 1960s.

⁷¹⁶ Jeswald W. Salacuse, "An Introduction to Law in French-Speaking Africa", in Kenneth R. Redden, ed., *The Legal System of Africa Series*, Virginia: The Michie Company, 1969, at p.10.

⁷¹⁷ *Ibid.*, at pp.13-16.

⁷¹⁸ Michel Jeol, *Droit public Africain*, Paris: Berger-Levrault, 1967, at p. 14.

4.2.1 The scope of the death penalty in French colonial law

Senegal was the first to become a French colony in Africa. This is because of its commercial ties with France, which has been in place since 1368. In the 19th century, politics led to West Africa becoming a strategic zone for France. In 1822, France exported its judicial organization to Senegal with the sole exception that two natives sat on the bench of both the tribunal of first instance and the Council, which was at most a court of appeal. These courts had jurisdiction over serious criminal cases.⁷¹⁹ In 1877, France exported its penal code of 1810 (as it had been amended) to Senegal through specific legislation.⁷²⁰

Undoubtedly, the French penal code of 1810 was not the best of the Napoleonic codes. In addition to its structure being awkward because it dealt with punishments before offences, it was substantially based on pre-revolutionary ideologies. This was reflected in the harshness of its punishments for a considerable range of offences.⁷²¹ Before the French Revolution of 1789, there were nearly 100 capital crimes in French penal law. This was reduced to 32 in 1791.⁷²² The adoption of the 1810 penal code was not good news. The code had totally ignored the Parliamentary debate on abolition and it had widened the number of capital crimes from 32 to 36.⁷²³

Article 7 of the 1810 penal code made the death penalty its most severe punishment.⁷²⁴ The method of execution was beheading through a ritual process that elicited more excitement in France than it did in all neighboring countries.⁷²⁵ Article 12 of the code expressly referred to the guillotine. It provided that “[t]out condamné à mort aura la tête

⁷¹⁹ Eugene Hild, *L'organisation judiciaire en Afrique Occidentale Française*, Paris: Emile Larousse, 1912, at pp.65-67.

⁷²⁰ *Bulletin d'Outre-Mer*, 1877, p. 326

⁷²¹ Catherine Elliot, *French Criminal Law*, Devon: William Publishing, 2001, at p.9.

⁷²² Pierre Bouzat, *Traité de droit pénal et de criminologie, Tome I: Droit pénal général*, Paris: Dalloz, 1970, at p.439.

⁷²³ *Ibid.*

⁷²⁴ Article 7 of the code pénal Français (Loi décrétée le 12 Février 1810 et promulguée le 22 Février 1810) in Hyppolyte F. Rivière, *Codes Français et Lois Usuelles*, Paris: A. Maresq Aine, 1970.

⁷²⁵ Jean Imbert, “La Peine de Mort et l’Opinion au XVIIIème Siècle”, (1964) 19 *Revue de Science criminelle et de Droit Pénal Comparé* 509.

tranchée”.⁷²⁶ The Guillotine was the most famous technology developed in the context of judicial killing since 1792 and was praised as “the progress of French civilization”.⁷²⁷

The code reinforced the dehumanizing process that parricide criminals went through. Amputation of the hands preceded the execution. Amputation and the death penalty were among the harsh punishments that survived the revolution.⁷²⁸ The only clothing authorized for parricide criminals was a shirt, they were to be barefoot and their head covered with a black veil as they were walking towards the place of execution.⁷²⁹ In 1832, new amendments introduced compulsory public exposure of the condemned before execution and a public reading of the execution warrant.⁷³⁰ Families intending to bury their relatives were not entitled to record the event.⁷³¹

Furthermore, the code largely remained mute on breastfeeding women and mentally disturbed people. There was only a short reference to pregnant women. Their executions were suspended until delivery, provided the woman had declared her pregnancy.⁷³² She was only given just enough time to deliver. It remained within the state’s discretion to determine the day of execution. Nothing stopped this from being the same day of delivery.

Another concern was the rigidity regarding the execution of mentally disturbed offenders. Article 64 that made *dementia* a criminal defense did not cover people who became mentally disturbed after committing the crime.⁷³³ Their mental disturbance had to be concomitant with the crime. Otherwise, the offender would not escape criminal responsibility.

The code of 1810 was pitiless legislation that aimed to enforce individual obedience. The death penalty was a potential punishment for all kinds of offences: political offences, offences against life, offences against bodily integrity, economic crimes and offences against public welfare. Book III dealt with political offences that were punishable by death.

⁷²⁶ “Every person condemned to death will be beheaded” (our translation). See article 12 of the Code Pénal Français, *Supra* note 724.

⁷²⁷ Robin Bidwell, *Morocco under Colonial Rule: French Administration of Tribal Areas 1912-1956*, London: Frank Cass, 1973, at p.267.

⁷²⁸ *Supra* note 722, at p.438.

⁷²⁹ Article 13 of the Code Pénal Français, *Supra* note 724.

⁷³⁰ Loi du 28 Avril 1832.

⁷³¹ Article 64 of the Code Pénal Français, *Supra* note 724.

⁷³² Article 27 of the Code Pénal Français, *Ibid.*

⁷³³ Article 27 of the Code Pénal Français, *Ibid.*

These were treason, spying, *lèse-majesté*, attempting to overthrow the government, provoking a civil war, mutiny, destroying public properties (vessels, stores, building, etc.) by means of military weapons and commending mutiny groups.⁷³⁴

Voluntary homicide in its various forms, namely aggravated murder, assassination, parricide, poisoning and infanticide constituted the second group of capital crimes.⁷³⁵

Murder was considered to be aggravated when it occurred in conjunction with another offence.⁷³⁶ An example of this would be a robber getting rid of a witness. When the offender resorted to torture or barbaric acts in carrying out the murder, the crime shifted from murder to assassination and was punishable by death.⁷³⁷

As regards economic crimes, counterfeiting, forgery and theft were capital crimes.⁷³⁸

During the same century, special laws extended the death penalty to the mistreatment of children with intention to kill, arson of an inhabited premises, sequestration accompanied with torture, perjury and desertion of a soldier to the enemy. Navy and railways police laws also imposed the death penalty for barratry, piracy and intentionally provoked fatal accidents.⁷³⁹

Contrary to public opinion and the majority views of liberal philosophers who had adopted ideas of Cesaria Beccaria,⁷⁴⁰ attempts were punished as heavily as successfully-executed crimes.⁷⁴¹ Article 82 of the code specifically reiterated that attempt to commit treason and spying were capital crimes.⁷⁴² This applied to both repeat-offenders and accomplices.⁷⁴³

Moreover, efforts to abolish the death penalty in France before and during colonization failed. Conservatism added to political unrest and wars had already convinced many abolitionist pioneers to reintroduce capital punishment.⁷⁴⁴ In 1791, the French Parliament

⁷³⁴ Articles 75-79, 86-86 and 91-97 of the Code Pénal Français, *Ibid.*

⁷³⁵ Article 302 of the Code Pénal Français, *Ibid.*

⁷³⁶ Article 304 of the Code Pénal Français, *Ibid.*

⁷³⁷ Article 303 of the Code Pénal Français, *Ibid.*

⁷³⁸ Article 132 and 381 of the Code Pénal Français, *Ibid.*

⁷³⁹ *Supra* note 722, at pp.439-440.

⁷⁴⁰ *Ibid.*, at p.92 and Jean Imbert, *Supra* note 725.

⁷⁴¹ Article 2 of Dispositions Préliminaires du Code Pénal Français, *Supra* note 724.

⁷⁴² Article 82 of the code pénal Français, *Ibid.*

⁷⁴³ Article 56, para 7 and article 59 of the code pénal Français, *Ibid.*

⁷⁴⁴ *Supra* note 722, at p. 441.

rejected, for false pretexts,⁷⁴⁵ Lepelletier de Saint-Fargeau's first proposal of abolition in peacetime. Certainly, the rejection of the proposal gave deputies sufficient time for abolitionist arguments to mature. Four years later (1795), the Parliament approved the abolition of the death penalty after a proclamation of general peace. Unfortunately, this conditional abolition was not acknowledged by the judiciary, which maintained the *statu quo*.⁷⁴⁶ In 1801, the Parliament ended the regime of ambiguity in adopting a unique article that stated that: "The death penalty will remain of application in cases it is provided for by the law until otherwise decided".⁷⁴⁷

Efforts to abrogate the 1810 penal code repeatedly failed until 1994. Isolated amendments updated it to fit with new social realities and chiefly softened its repressive regime. The 1832 amendment was the first to have a significant impact on the code. It humanized its repressive regime by introducing judicial mitigating circumstances and abolishing capital punishment for economic crimes. To strengthen this reform, article 5 of the 1848 Constitution abolished the death penalty for political crimes as well.⁷⁴⁸ In 1901, the death penalty was abolished for infanticide when perpetrated by the mother. By 1941, infanticide was no longer a capital offence.

Other amendments were made to polish up this softening process but none dared to extend the scope of abolition. This reticence is justified by the fact that crimes perpetrated during war and the post-war delinquency required tough punishments.⁷⁴⁹ In France and in the French colonies, the death penalty remained a valid punishment for the majority of ordinary but 'serious' crimes such as parricide, assassination, poisoning, mistreatment of children with intention to kill, sequestration accompanied by torture, arson of an inhabited building and perjury when it had had the effect of condemning an innocent person to death.⁷⁵⁰ In 1937, the death penalty was extended to punish the kidnapping of children when this was followed by the child's death and to military desertion, piracy, barratry and the provoking of train or boat accidents.⁷⁵¹

⁷⁴⁵ *Supra* note 725.

⁷⁴⁶ *Supra* note 725, at p. 525.

⁷⁴⁷ Loi du 8 Nivose an X (29 décembre 1801) as quoted by Jean Imbert, *Ibid.*

⁷⁴⁸ Marc Ancel and Yvonne Marx, *Supra* note 544, at p.632.

⁷⁴⁹ *Ibid.*

⁷⁵⁰ *Supra* note 722, at p.439.

⁷⁵¹ *Ibid.*, at p.440.

This was how the death penalty existed in French law until 1981 when France repealed the death penalty. Although African colonies received French law differently, its substance remained almost unchanged. However, in practice the *jurés* and the executive played a memorable role in saving the condemned from the guillotine. Some French Presidents, especially Felix Faure, Loubet and Fallieres, systematically pardoned all those condemned to death.⁷⁵²

4.2.2 The expansion of the French penal law in Africa

French Guinea received the Senegalese penal legislation in 1892.⁷⁵³ Dahomey and Ivory Coast received it in 1894.⁷⁵⁴ Introducing colonial law in this way meant that amendments to the penal law in one country could not affect the law in another country. This complex system ended in 1901 when a decree re-extended the Senegalese penal legislation to Dahomey, French Guinea and Ivory Coast.⁷⁵⁵ This meant that a single piece of legislation could amend laws throughout the whole of French West Africa. The 1901 decree was modified in 1902 and 1904 (although this was never enforced) but the substance of the reception provision remained untouched.⁷⁵⁶ The 1902 decree was thus the basic reception statute of the French penal law for the whole West Africa. France did not acquire new territories but formed new colonies within the territorial boundaries of its original four colonies.

This technique was very pragmatic. It bore fruitful results in French Equatorial Africa and in territories entrusted to France by virtue of the League of Nations mandate and United Nations trusteeships. The trading, refuelling and missionary stations created in Gabon had resulted in the control of the whole interior of Central Africa, which was renamed French Congo. It received the Senegalese penal legislation in 1878.⁷⁵⁷ The 1903 law organising the Congo justice system reinforced the Gabonese decree.⁷⁵⁸ In 1910, French Congo became a

⁷⁵² *Ibid.* See also Michel Forst, «The Abolition of the Death Penalty in France», in *The Death Penalty: Abolition in Europe*, Strasbourg: Council of Europe Publishing, 1999, at pp105-116.

⁷⁵³ Article 23 of the Decree of 11 May 1892, *PENANT* (1892).

⁷⁵⁴ See respectively article 23, para 3 of the Decree of 26 July 1894 in *PENANT* 1894 and article 23, para 6 of the Decree of 16 December 1896, *PENANT* III, 17 (1897).

⁷⁵⁵ Article 17, para 10 of the Decree of the 6 August 1901, *PENANT* III, 117 (1901)

⁷⁵⁶ Article 17, para 11 of Decree of the 15 April 1902 *PENANT* III, 122 (1902). See also Jeswald W. Salacuse, *Supra* note 716, at p.24

⁷⁵⁷ Article 14 of the Decree of 1 June 1878, *Bulletin des Lois* (12 Ser), pt. II at 553.

⁷⁵⁸ Article 17 of the Decree of 17 March 1903 *PENANT* III, 118 (1903).

federation of French Equatorial Africa comprising Gabon, Congo, Chad and Central African Republic. Each country applied the Senegalese penal legislation. Cameroon and Togo were not colonies rather territories under United Nations trusteeship. Legislation in force in French Equatorial Africa before 1 January 1924 was extended to Cameroon, while legislation in force in French West Africa before the 22 May 1924 became applicable in Togo.

In Algeria, France directly extended its penal code and *Code d'Instruction Criminelle* in 1830. These laws were applicable to Europeans and Arabs alike. Similar to the British in Kenya, the French managed Algeria as a French province. Any method of maintaining the native's obedience was justifiable. French justice in Algeria was oppressive and repressive.⁷⁵⁹ Algeria applied the colonial penal legislation until 1966.⁷⁶⁰

The French penal code and *Code d'Instruction Criminelle* were introduced in Tunisia in 1913 and 1921 respectively. Independent Tunisia found later no interest of modifying its penal law and kept it intact for decades.⁷⁶¹ The situation in Morocco was different where the scope of French penal law was very limited. France failed to expand its penal legislation on *indigènes* that were used to the *Makhzen*.⁷⁶² Moroccans maintained a mixed law based on *Shari'a*, native customs, individual statutes, individual cases and judicial discretion. The course of the death penalty continued as it had existed before French influence.

4.2.3 The policy of the death penalty in French colonial Africa

Until 1946, the French colonizer resorted to dual penal justice. The personal jurisdiction of criminal courts was limited to French citizens and those assimilated. The majority of *indigènes* were subjected to the authority of administrative authorities. Two distinct institutions, namely the *tribunaux indigènes* and *juridictions pénales spéciales*, were

⁷⁵⁹ Jeswald W. Salacuse, *Supra* note 716, at p.192.

⁷⁶⁰ *Ibid*

⁷⁶¹ *Ibid.*, at p.504.

⁷⁶² The *makhzen* is conceived as a social ideology and particularly a life style or a way of acting that is resorted to when the State cannot fulfil its mission. See Rachida Cherifi, *Le makhzen politique au Maroc: hier et aujourd'hui*, Casablanca: Afrique-Orient, 1988.

successively resorted to for delivering penal justice to these *indigènes* whose inferior status did not allow them to enjoy the justice administered to citizens and those assimilated.⁷⁶³

The code *d'indigénat* is the most criticized French colonial policy in Africa.⁷⁶⁴ The *tribunaux indigènes* had jurisdiction over indigenous offences (anthropophagi, violation of tombs, forced marriage (corresponding to *rapt* in French) and abduction)⁷⁶⁵ and over disciplinary offences (unauthorized meetings, travelling without a pass, disrespect towards Europeans, offensive language, etc.).⁷⁶⁶ Punishments for these offences included imprisonment, sequestration, forced displacement of the offender, forfeiture of property and, the most controversial, a collective fine or banishment.⁷⁶⁷ Administrative authorities were entitled to create offences and punishment or extend the existing punishments to new offences.

The indigenization of law was part of an effort to maintain pre-colonial law, while bringing it closer to European civilization. It was indigenous justice as rethought, organized and supervised by the colonizer who never stopped reframing and altering it. The codification of indigenous law resulted in its transformation and most likely in its suppression.

This French policy attracted strong criticism from scholars and rightly so. The *Code d'indigénat* allowed for a flagrant violation of the principles of legality and individual responsibility, that were dear to French law.⁷⁶⁸ Its only merit was the absence of the death penalty in its provisions. Until their repeal in 1946,⁷⁶⁹ the *tribunaux indigènes* had never had the power to try capital cases. The French *Cour de Cassation* insisted that the death penalty was not part of the power entrusted to administrative authorities under the *Code d'indigénat*. In 1943, a self-appointed *Controlleur Civil* in Tunisia decreed that henceforth economic crimes and vandalism were capital crimes and criminals would be tried as if they were caught in *flagrante delicto* before courts martial. This meant a speedy procedure. Few days later, a Tunisian tribunal in Sousse imposed the death penalty for pillage on four thieves and directed the gendarmes to carry out the sentence immediately. It is certain

⁷⁶³ Jean Châtelain, "Le Régime Disciplinaire et Pénal des Populations Indigènes", (1947) 1 *Revue Juridique et Politique de l'Union Française* 84-85.

⁷⁶⁴ Roger Germain, *La politique indigène du Bugeaud*, Paris: Larose, 1955, at pp. 288-289.

⁷⁶⁵ *Supra* note 763, at p. 86.

⁷⁶⁶ *Supra* note 764, at p. 291.

⁷⁶⁷ *Ibid.*, at p. 292; Jean Châtelain, *Supra* note 763.

⁷⁶⁸ J. Chabas, "La Sanction Pénale des Actes Réglementaires Pris par les Représentants du Gouvernement dans les Départements et les Territoires d'Outre-mer", (1948) 2 *Revue Juridique et Politique de l'Union Française* 29-36.

⁷⁶⁹ Decree of 30 April 1946, *Journal Officiel* du 1er Mai 1946, at p.3680.

that the tribunal had no material jurisdiction over pillage just as it was not competent to decide who should execute the death penalty or when the execution should take place.⁷⁷⁰

The *Cour de Cassation* ruled that the death sentence was illegal as the tribunal had assumed power beyond its jurisdiction. The *Cour de Cassation* was seized for orienting the French jurisprudence.⁷⁷¹ Even when trying indigenous people, French courts were bound to observe French law.⁷⁷² Under French law, neither simple theft nor keeping stolen properties was a capital crime unless accompanied by aggravating circumstances.⁷⁷³

Moreover, Muslim courts in Tunisia and Algeria (the *Cadis*) had completely lost their jurisdiction over capital crimes from 1842.⁷⁷⁴ Such crimes fell within the jurisdiction of French courts regardless of the offender's origin or religion.⁷⁷⁵ The only exception to this was Morocco. According to a 1913 *Dahir*, only the Sultan could impose the death penalty, a punishment that had become rare. Moroccans resisted the introduction of the Guillotine until 1928. In interpreting the 1913 *Dahir*, the French *Cour de Cassation* stated that within the French Empire, French tribunals had jurisdiction over all crimes.⁷⁷⁶

These efforts were in line with the colonizer's policy of assimilation, which was perfected with the abrogation of the *indigénat* system. This created an environment favourable to the expansion of French penal law to all individuals liable for petty or serious offences. The *Cour de Cassation* played a major role in keeping uniformity of the law as applied by different colonial entities. An appeal to the *Cour de Cassation* became recommended in all serious cases and compulsory in all capital cases.⁷⁷⁷ Thus, in ordering the execution of the death penalty within 24 hours, the Tunisian judge deprived the offenders of their rights to appeal and breached the fundamental rules that presided over the functioning of criminal tribunals in French territories.

⁷⁷⁰ Cour de Cassation (Chambre Criminelle) 12 juillet 1946.

⁷⁷¹ *Ibid.*

⁷⁷² Article 39 of the Decree of 26 September 1842.

⁷⁷³ Article 381 of the Code Pénal Français, *Supra* note 724.

⁷⁷⁴ *Supra* note 764, at p. 297-299. Hocine Bouzaher says that the decree became operational from the 17 July 1843. See Hocine Bouzaher, *La Justice répressive dans l'Algérie coloniale 1830-1962*, Algiers: Houma, 2004, at p.49.

⁷⁷⁵ Article 42 of the Décret du 26 septembre 1842 (Tunisia) and article 49 of the Décret du 28 février 1841 (Algeria).

⁷⁷⁶ Cour de Cassation (Chambre Criminelle) 6 octobre 1955.

⁷⁷⁷ Cour de Cassation (Chambre Criminelle) 12 juillet 1946

4.2.4 The example of French justice in Algeria

French colonial justice left behind a bitter legacy in Algeria. Petty offences were severely punished. Algerian tribes were regularly sentenced to long lasting collective fines for arson of forestry or revolt.⁷⁷⁸ The 63 million francs fine imposed on all the Kabyles in 1887 caused lasting suffering. Many were forced to sell their lands and livestock as a result of the punishment. The consequence became a long-term impoverishment.⁷⁷⁹ Capricious governors would even hand down the death penalty for trivial offences. In 1831, the Governor passed a decree punishing public noise with death when the convicted person was serving a sentence of banishment and returned to Algeria.⁷⁸⁰ It is likely that the noise that incurred the punishment was made during the prayer. In 1941, another decree made it a capital crime to walk in the night while armed. All these crimes came under the court martial's jurisdiction.⁷⁸¹

The hardship of these French laws exacerbated with the Algerian Revolution against which France reacted by applying special laws that introduced unprecedented procedures and increased death sentences.⁷⁸² In addition to a plethora of emergency measures and extrajudicial executions,⁷⁸³ the French administration reviewed 50 articles of the penal code, the code of criminal procedure and the code of military justice to contain the revolt. Article 59 of the new penal code specifically extended the death penalty to members of 'criminal associations'.⁷⁸⁴ This provision targeted members of political and social movements. The mere suspicion that a person belonged to such a political movement became sufficient to justify the death penalty.

Mohamed Bouras, the founder of the Algerian Muslim Scouts, was sentenced to death in 1941 for allegedly spying on behalf of Germany.⁷⁸⁵ In 1945, courts martial imposed a death sentence on 99 persons convicted of treason and ordered the immediate execution of 22

⁷⁷⁸ *Supra* note 764, at p.291.

⁷⁷⁹ *Supra* note 28, at pp. 46-47.

⁷⁸⁰ Article 2 of the Decree of 25 June 1831. See also Hocine Bouzaher, *Supra* note 774, p.72

⁷⁸¹ Article 8 para 3 of the *Arreté de Bageaud* of 6 March 1841. See also Hocine Bouzaher, *Ibid.*, at p.77.

⁷⁸² Jeswald W. Salacuse, *Supra* note 716, at p.192.

⁷⁸³ Hocine Bouzaher, *Supra* note 774, at pp.56 and 197.

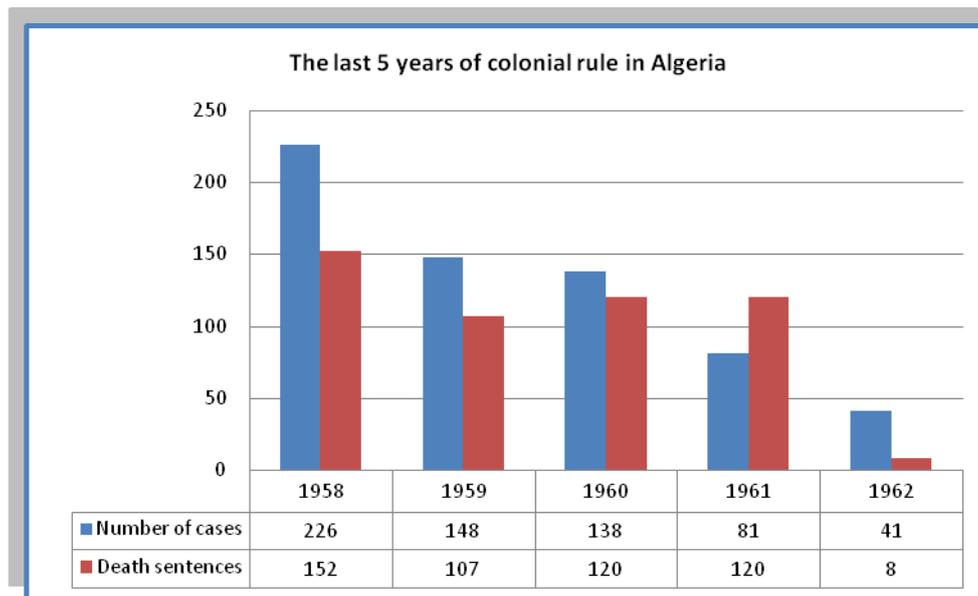
⁷⁸⁴ *Ibid.*, at p.55.

⁷⁸⁵ *Ibid.*, at p.140.

Algerians.⁷⁸⁶ In 1946, the death sentence was imposed on 10 Algerians for the same crime. The executive refused to grant mercy. The sentence was immediately carried out.⁷⁸⁷ In 1955, a peasant was sentenced to death and executed on the mere suspicion that he belonged to a political movement. In 1956, *Boudjema Souidani* was sentenced to death in absentia for having burnt a farm.⁷⁸⁸ The court interpreted arson on a farm belonging to a French settler as being politically motivated.

France failed to acknowledge that the harshness of these punishments increased tensions. Algerians saw those executed as martyrs of liberty. Simultaneously, a mere assault justified a death sentence. In 1957, three people were sentenced to death for assault.⁷⁸⁹ Statistics for the period 1958-1962 indicate the extent to which France realised too late that extending the death penalty only served to weaken the colonial administration.

Figure 5: The death penalty five years before the independence in Algeria



Source: Hocine Bouzahr⁷⁹⁰

People were often sentenced in a group. Only mercy, itself rare in the last few years of colonization, saved the few who escaped hanging. Of the 272 requests for mercy in 1960,

⁷⁸⁶ *Ibid.*, at p.143.

⁷⁸⁷ *Ibid.*, at p.143-144.

⁷⁸⁸ *Ibid.*, at p.148.

⁷⁸⁹ *Ibid.*, at p.148.

⁷⁹⁰ *Ibid.*, at p.224.

200 were upheld. In 1961, out of 271 requests, 162 mercies were accepted and in 1962, out of 63 requests 33 were confirmed.⁷⁹¹ A French Parliamentary Commission reported that the system failed to meet the requirement of justice or efficiency.⁷⁹²

Despite the scarcity of comprehensive statistics in Algeria (as is the case in most French speaking countries), it appears that the French policies in Algeria were not all that different from the British policies in Kenya. Colonial laws were weapons against disrespect. *Le Courier d'Oran* of 24 May 1882 observed that France had no other choice in the face of revolt than to adopt Moses' approach to Medianist Arabs. Moses executed all males and gave the remaining to his soldiers. "The approach may look cruel to the eyes of people with short view, [however], it was rather intelligent".⁷⁹³

This situation prevailed until specific territories achieved their independence. Two general standards were upheld: that betrayal of French principles as contained in the French law (legislation, case law and doctrine) was not tolerated and that the death penalty (even for petty offences) was to be complied with when it served the purpose of colonial domination.

4.2.5. The French contradictory legacy as regards the death penalty

There is no doubt that, as regards the death penalty, France introduced the worse legislation in Africa. It exported anomalies and harsh punishments as they existed in the penal code of 1810. The movement of abolition that had started in France before the adoption of the code however prevented France to marry the practice to the theory in its colonies. The *Cour de Cassation* effectively played its role as the French justice referee in precluding French colonial authorities to abuse the *Code d'Indigénat* that conceded them unlimited powers for petty offences. We should also acknowledge that the French executive often commuted death sentences to the extent that Dahomey, Ivory Coast, and Togo preceded France to become *de facto* abolitionists.⁷⁹⁴

⁷⁹¹ *Ibid.*, at p.60

⁷⁹² *Ibid.*, at p.49.

⁷⁹³ *Ibid.*, at p.19

⁷⁹⁴ UN Doc E/67 IV.15, 1968, p.69, at 252. For France see Michel Forst, *Supra* note 752.

Nevertheless, that remained so as long as the colonial enterprise was not shaken. Revolutionary movements brought the colonizer to his original instinct. Armed with a pitiless penal code and emergency laws that empowered administrative authorities to create offences at their discretion, French colonial authorities in Algeria used capital punishment to eliminate freedom fighters, impose fear and extort obedience.

Therefore, judicial practice in French colonies discloses opposite trends. On the one hand there was a barbarian justice that attempted to secure the Empire at any cost. On the other hand, there was a judicial practice that was influenced by the French abolitionist movement and, accordingly, limited the use of capital punishment. The latter was also the kind of justice practiced by the Belgian coloniser.

4.3 Belgian colonization and the death penalty

Belgium did not tolerate a system inconsistent with its civilizing and humanitarian policy. Therefore, criminal law played a dual role of maintaining order and installing colonial domination. A more human system progressively suppressed and replaced the primitive, savage and inhuman indigenous law. Belgian law was not however of unique origin. France occupied Belgium until 1815. Early attempts to amend the French penal code of 1810 systematically failed until 1867. Although the Belgian penal code was not a remake of classical doctrines present in the French code, subsequent amendments failed to do away with the underlying French criminal policy and were limited to softening the conditions of criminal responsibility and the harshness of punishments.⁷⁹⁵ Congo received the Belgian penal code in 1888.⁷⁹⁶

Henceforth, serious offences and severe punishments such as the death penalty⁷⁹⁷ fell within the jurisdiction of written law. Indigenous law was confined to petty offences. Belgium later extended the laws enforced in Congo to Ruanda-Urundi, which was successively placed under a League of Nations mandate⁷⁹⁸ and United Nations

⁷⁹⁵ Marc Ancel and Yonne Marx, *Supra* note 544, at pp.177-180.

⁷⁹⁶ John Crabb, *The Legal System of Congo-Kinshasa*, Charlottesville: The Michie Company, 1970, at p. 63.

⁷⁹⁷ Article 87 ter of the Code Pénal du Congo-Belge tel que promulgué par le Décret du 26 mai 1888.

⁷⁹⁸ Exécution de l'article 22 du Traité de Versailles du 28 juin 1919 à travers la Décision de la Société des Nations du 31 août 1923 confirmant à S.M. le Roi des Belges le mandat sur le territoire de l'Est Africain, *Bulletin Officiel du Ruanda Urundi (B.O.R.U.)*, 2ème année, no1, p.1.

trusteeship.⁷⁹⁹ Article 3 of the law of 1925 extended all laws and decrees in force at that date in Congo to the newly acquired territory of Ruanda-Urundi.⁸⁰⁰ Ruanda-Urundi simply received the new penal code of 1940 adopted for Congo.⁸⁰¹

4.3.1 The death penalty in Belgian colonial law

The 1867 Belgian penal code provided the death penalty as its most severe punishment. Beheading in public and without record was the method of execution. It was prohibited to execute pregnant women and to carry out an execution on a public holiday. A church minister of choice could assist the offender and the family could demand his body. Capital crimes were political offences, all categories of aggravated murder (assassination, parricide, infanticide, poisoning) and murder facilitating theft, extortion or shielding a criminal.⁸⁰²

In Congo, the exported legislation was tailored to the new territory's needs. In the 1888 Congolese penal code, offences were not classified on the criterion of the severity of the punishment. Even the 1909 reform proposal emphasized the need to introduce new offences, extend judges' power and tighten up the conditions around nominating judges over the need to restructure offences. According to the proposal, "a long term imprisonment and mainly displacement of the offender who leaves the village where he was born [were] sufficient and satisfactory punishments".⁸⁰³

Although the death penalty was a potential punishment, offenders enjoyed automatic appeal in all capital cases and the right to request mercy from the King of Belgium. No execution was carried out unless the King had refused mercy.⁸⁰⁴ Hanging was the method

⁷⁹⁹ Chapters XII and XIII of the Charter of the United Nations Charter, (1945) AJIL Supp.190, (1945) CTS7.

⁸⁰⁰ Loi du 21 aout 1925 portant union du territoire du Ruanda-Urundi et de la colonie du Congo Belge, *B.O.R.U.*, 3ème année, no1, p.10/178.

⁸⁰¹ Code Pénal du 30 janvier 1940 in Leon Strouvens and Pierre Piron, *Codes et Lois du Congo- Belge*, Brussels: Larcier, 1948, at pp.111-146. The Code was extended to Ruanda- Urundi by the Ordonance du Ruanda-Urundi no43/Just du 18 mai 1940, *B.O.R.U.*, 1940, p.86.

⁸⁰² Articles 7-11, 101-103, 113-115, 118, 394-397 and 475 of the Loi du 8 juin 1867, the *Moniteur Belge* du 9 juin 1867.

⁸⁰³ Arsène Detry, *Contribution à la reforme de la législation criminelle du Congo Belge*, Liège: La Meuse, 1909, at p.29.

⁸⁰⁴ Mineur Garçon, *Commentaire du code pénal Congolais*, Bruxelles: Larcier, 1947, at p.35.

of execution for civilians whereas soldiers faced a firing squad.⁸⁰⁵ No specific provision prohibited recording the scene of an execution until 1936.⁸⁰⁶ Later it also became prohibited to carry out the death penalty on pregnant women. Public executions were outlawed as well. The executioner was further required to establish a record of the execution.⁸⁰⁷

The Congolese penal code punished accomplices and the perpetrators differently. An accomplice in a capital crime was sentenced to a maximum of ten years imprisonment.⁸⁰⁸ The attempting and actual commission of an offence were placed on the same pedestal.⁸⁰⁹ There was no clear justification for this severity. In Belgium, attempts (except those related to political offences)⁸¹⁰ carried lesser penalties than perpetrated offences, accomplices were not punished in the same way as perpetrators and there was no death penalty for junior offenders.⁸¹¹ The only other place where this kind of severity existed was in the French penal code of 1810. Prosecuting attempts this way was simply a revival of the famous French classical doctrine.

The legislator's lack of interest in political crimes indicates distaste for the death penalty. Even in Belgium, most death penalty provisions for political crimes were introduced through special amendments during World Wars I and II.⁸¹² The Congolese penal code started with life threatening crimes. Here, only assassination and poisoning were capital crimes.⁸¹³ Assassination was defined as premeditated murder. The Elisabethville (Lubumbashi) Court of Appeal stressed that assassination required premeditation as a personal aggravating circumstance. Premeditation was not automatically extended to co-perpetrators and accomplices.⁸¹⁴ This distinction was very important. The court limited a blind application of the death penalty. Furthermore, *guet-apens* was not one of the defining elements of assassination. This meant that, since *guet-apens* often presupposes

⁸⁰⁵ Articles 5 and 6 (formerly articles 87 and 88 of the 1888 Decree) of code pénal du 30 janvier 1940, *Supra* note 801. To read with the Décret du Gouverneur Général du 9 avril 1898 later modified by Ordonnance no 11/37 du 24 janvier 1948.

⁸⁰⁶ Circulaire du 14 mai 1898 and Décret du 3 août 1936.

⁸⁰⁷ Articles 2 and 3 of the Ordinance of 24 January 1948.

⁸⁰⁸ Article 23, para 3 of the code pénal du 30 janvier 1940, *Supra* note 801.

⁸⁰⁹ Article 4, para 2, of the code pénal du 30 janvier 1940, *Ibid.*

⁸¹⁰ Article 120 of Loi du 8 juin 1867, *Supra* note 802.

⁸¹¹ Articles 52, 69 and 77 of the Loi du 8 juin 1867, *Ibid.*

⁸¹² A comparative interpretation of articles 101-103, 113-115, 118 of Loi du 8 juin 1867, *Ibid.*

⁸¹³ Articles 45 and 49 of the code pénal du 30 janvier 1940, *Supra* note 801.

⁸¹⁴ Elisabethville, 4 February 1943, at p.43.

premeditation in practice,⁸¹⁵ the state's failure to prove premeditation excluded the charge of assassination. In other words, setting an ambush was not literally part of the crime of assassination. In the 1810 French penal code, *guet-apens* was part of the offence.⁸¹⁶ The Congolese code did not create infanticide and parricide as specific voluntary homicides.

Moreover, there was no death penalty for economic crimes. The death penalty remained discretionary for rape or arson. When the victim was dead, the court had the option of imposing death or life imprisonment.⁸¹⁷ Only two political crimes attracted the death penalty, treason and high treason. Article 182 which protected allies, did not create another crime of treason. It borrowed the incrimination in article 181, when an allied state was the victim.⁸¹⁸ There was only one single article in the military penal code that provided for the death penalty. It was provided for cowardice, treason, desertion in wartime and murder perpetrated by a junior soldier on his commander.⁸¹⁹

The Congolese penal code was not as harsh as other colonial legislation in neighbouring countries. In Congo, judicial practices also revealed that courts did not make the death penalty an instrument of oppression.

4.3.2 The practice of the death penalty in Leopoldville (1935-1957)

A study of colonial jurisprudence in Congo and Ruanda-Urundi took place from 1887 to 1953.⁸²⁰ It is unhelpful however, as it provides no records of capital cases. It dealt with natives courts; which had no jurisdiction over capital crimes. This gap was expected to be covered by cases published in the *Revue Juridique du Congo Belge*. However, this source fails to provide a comprehensive picture even for Congo itself.⁸²¹ The only record of the practice of the death penalty during Belgian colonization available is for Leopoldville, which was one of largest cities in colonial Africa. The court of Léopoldville had territorial jurisdiction over the entire southwestern region of Congo, which covered six judicial

⁸¹⁵ Likulia Bolongo, *Droit pénal spécial Zaïrois*, Paris: L.G.D.J., 1985, at p.65.

⁸¹⁶ Article 296 of the code pénal Français, *Supra* note 724.

⁸¹⁷ Articles 44, 85, 108 and 171 of the code pénal du 30 janvier 1940, *Supra* note 801.

⁸¹⁸ Articles 181 and 182 of the code pénal du 30 janvier 1940, *Ibid*.

⁸¹⁹ Article 21 of the Décret du 22 décembre 1888 as amended by the Décrets du 24 novembre 1890, 12 mai 1943 and 29 avril 1944.

⁸²⁰ Jean Sohler, *Répertoire général de la jurisprudence et de la doctrine coutumière du Congo et du Ruanda-Urundi jusqu'au 31 décembre 1953*, Brussels: Larcier, 1957.

⁸²¹ *Revue Juridique du Congo-Belge (1956-1960)*.

circumscriptions (Leopoldville, Cataractes, Bas-Congo, Lac Leopoldville II, Kwango and Kwilu).⁸²² The practice of the death penalty in this court may be indicative of judicial trends towards the death penalty in Belgian territories.

Table 2: Capital crimes in Leopoldville (1935-1957)

	Assassination	Poisoning	Murder for facilitating theft	Arson that provoked death	Rape that provoked death
1935-1937	9	11	8		
1938-1942	13	8	5	3	10
1943-1947	6	2	4	7	12
1948-1952	2	13	5	6	3
1953-1957	0	0	6	3	2

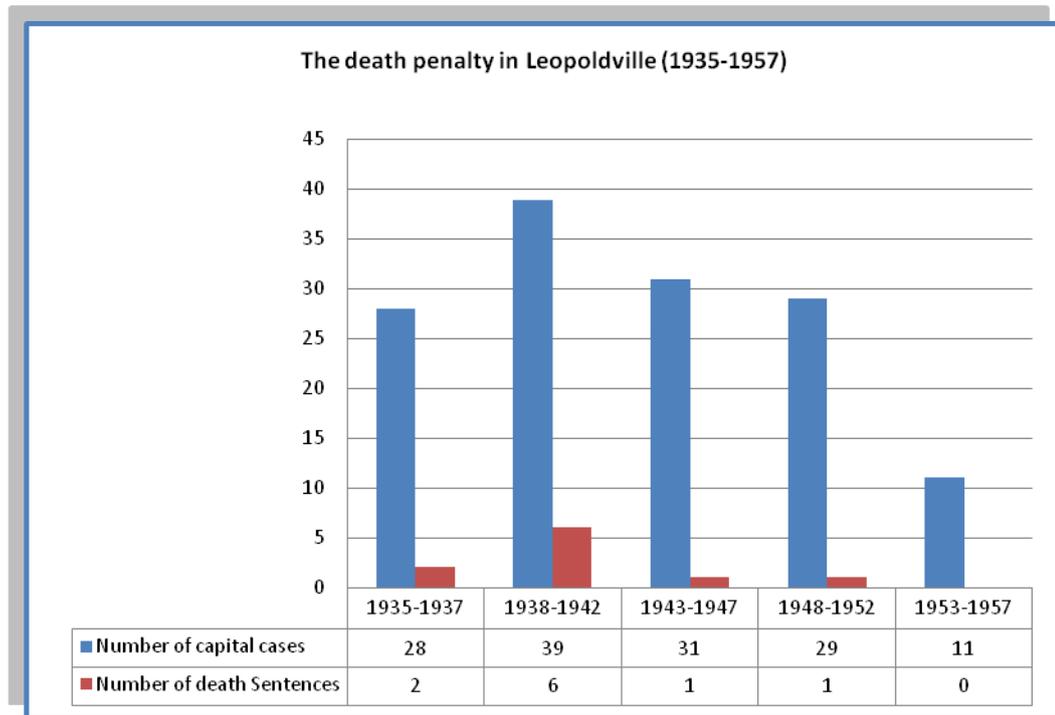
Source: Jean Sohier.⁸²³

The table only lists capital crimes. The death penalty was mandatory for assassination and poisoning. It was discretionary for murder when the crime was accompanied by aggravating circumstances. The code made no distinction between attempted crimes and actual perpetrated crimes. The conclusion here is that the rate of capital crimes was very low. Between 1953 and 1957, no crime occurred that called for the mandatory death penalty, for example. This also implies that death sentences were rare.

⁸²² Jean Sohier, *Essai sur la criminalité dans la province de Léopoldville*, Brussels: Académie Royale des Sciences Coloniales, 1959.

⁸²³ *Ibid.*, at p.34.

Figure 6: The death penalty in Leopoldville (1935-1957)



Source: Jean Sohier.⁸²⁴

The death penalty was rarely imposed during Belgian colonisation. Jean Sohier argues that life imprisonment was the sanction for the majority of assassinations.⁸²⁵ During the Second World War, judges became more and more severe, insensitive to mitigating circumstances and driven by barbaric motives.⁸²⁶ This statement is exaggerated however compared to the practice in British and French colonies. Despite discriminatory language in their judgments within which they referred to Africans as savage, with crude mentalities, Belgian judges detested the death penalty. The bitterness of the war and the revolt for independence did not affect their attitude.⁸²⁷ After the war, the death penalty was almost abandoned. Jean Sohier states that “[s]ince the end of the war, judges are visibly repugnant to impose the death penalty despite the more and more extensive use of the royal right to grant mercy”.⁸²⁸

⁸²⁴ *Ibid.*, at p.38.

⁸²⁵ *Ibid.* at p.37.

⁸²⁶ *Ibid.*

⁸²⁷ *Ibid.*

⁸²⁸ *Ibid.*

A single death sentence was imposed from 1948 to 1957. It is said that the heinous nature of the crime left no option to the judges other than to impose the death penalty. A boy tortured his grandmother to death because he suspected her of witchcraft. The old women tried unsuccessfully to run away. The boy pursued and beat her to death. The two death sentences of 1935-1937 were imposed on thieves who had murdered their victims.⁸²⁹

Courts punished murder with aggravating circumstances more severely than assassinations. Indeed, judges had unilaterally made the death penalty discretionary for assassination. It is important to remember that Belgium had not used the death penalty since the nineteenth century. This fact explains the disgust of the colonial judges who visibly opposed the death penalty. If judges were reluctant to impose the death penalty on perpetrated crimes, it begs the question; would they impose it for attempts? None of the 53 cases of recorded attempted capital crimes between 1935 and 1957 was punished with death. The most severe punishment meted out was life imprisonment, which itself was seldom imposed for attempts.⁸³⁰

Arsène Detry was right when he stated that “[o]ur colony that originated in a genial conscience, unique in its genesis and formation, deserves a unique penal legislation. The latter, so different from examples of other people, as remarkable in its essence as in its application, reminds the doctoral principle of the historian Tite Live “[f]or doing better, turn the back to the crowd”.⁸³¹

Conclusion

European law and judicial practice as regards the death penalty varied depending on the colonizer and the colony. Undoubtedly, the number of capital crimes, the methods of execution, including the ritual execution of parricide criminals and the quasi-absence of safeguards for offenders make the French penal code of 1810 the harshest legislation that African countries received. The severity of the penal code cannot however be paralleled to that of the *Code d'Indigénat*. Although built on arbitrariness, the latter contained no provision on capital punishment.

⁸²⁹ *Ibid.*, at p.36.

⁸³⁰ *Ibid.*, at p.51-53

⁸³¹ *Supra* note 803, at p.14-15.

The last decade of French presence in Africa corresponded with the progressive abandon of the death penalty in France. Out of 95 death sentences between 1950 and 1961, only 21 had been executed in France.⁸³² In French colonies except Algeria, the use of the death penalty was tempered. The developments of moral values in the metropolis had a positive impact in colonies to the extent that the executive systematically granted mercy in Dahomey and Ivory Coast.⁸³³ Reluctance to impose the death penalty also existed in Belgian colonial courts. The Belgian colonial penal code was even more advanced, for it limited the death penalty to few offences. Belgian judges also expressed distaste for the death penalty, even during political and social revolt, which was the excuse other colonial powers used to increase capital offences and exceptional measures and to systematically impose the death penalty.

Nevertheless, the death penalty was a common practice in British colonial courts and its abuse appeared to be legally authorized. Weighing atrocities perpetrated by English courts in Africa requires different scales however. Kenya was a settlement, while other territories were either protectorates or colonies. The reaction of the colonizer depended therefore on the nature of the political administration within one specific territory. A settlement was compared to an overseas British territory, where settlers would do the undoable to stay. The British colonizer introduced biased, inconsistent and arbitrary judicial practices.

In Kenya, Africans were given the death penalty if their victim was European. Raping or attempting to rape white females earned a mandatory death penalty,⁸³⁴ while speculative mitigating circumstances reduced similar crimes to adultery or defilement if the victim was African. Voluntary homicide against Europeans was murder. It became manslaughter when perpetrated against Africans. In the 1950s, *Mau Mau* insurrection lit this powder keg. Justice became a tool used to eliminate the *Mau Mau* movement and eventually its Kikuyu members in face of the failure of politicians, the police force and the army. Everywhere, the colonizer reacted to political demands with the death penalty, which had become a political instrument of repression, oppression and suppression.

⁸³² Roger Merle and André Vitu, *Traité de droit criminel: Problèmes généraux de la conscience criminelle, droit pénal général*, 7th edn, Paris: Cujas, 1997, at p.890.

⁸³³ UN Doc E/67 IV.15, 1968, p.43, at 144.

⁸³⁴ Uganda and Tanganyika resisted introducing the death penalty for rape. See James S. Read, *Supra* note 26, at pp.105-106.

In its essence, colonization was motivated by personal, unilateral and egoist interests.⁸³⁵ To achieve their goals, the colonizers denied Africans common humanity and depicted them as beasts of burden and savages; a mentally retarded and childish race. The death penalty was not imposed on humans but rather on those who were less than human, “to keep ‘bolshie’ Africans in their place”.⁸³⁶ It is unfortunate that these policies of domination have not yet been wiped away in many African countries. The African postcolonial era saw dictatorial regimes resorting to similar techniques for keeping the ‘independent people’ obedient.

⁸³⁵ Albert Sarrat, *Grandeur et servitude coloniales*, Paris: Sagitaire, 1931, at pp.107-108.

⁸³⁶ Paul Nugent, *Africa since Independence: A Comparative History*, New York: Palgrave Macmillan, 2004, at p.11

5 THE DEATH PENALTY AS A POLITICAL INSTRUMENT IN AFRICA

Introduction

The United Nations began to battle against the death penalty in November 1959.⁸³⁷ Excluding Liberia and Ethiopia, only eight African countries were independent at that time.⁸³⁸ By 1960, the year commonly known as the year of African independence,⁸³⁹ another 17 countries had achieved their independence.⁸⁴⁰ This left behind almost 28 countries the last of which to achieve independence were Eritrea and South Sudan. Western Sahara is still struggling to obtain what will now be its second independence.⁸⁴¹ The political independence that these African states eventually achieved was characterized by a strong sense of authoritarianism, which embodied personal, unilateral and egoist interests.⁸⁴²

All independent African countries had the death penalty at the time of their independence. Even former Portuguese colonies that were death penalty free under colonial rule had the death penalty entrenched in their legal systems at independence. Guinea Bissau introduced the death penalty upon achieving independence in 1974.⁸⁴³ Angola and Cape Verde both reserved a death penalty provision in their constitutions in the year of their independence (1975).⁸⁴⁴ Sao Tomé and Príncipe and Mozambique achieved independence in 1975 and then introduced the death penalty in their legal systems in 1979.⁸⁴⁵

⁸³⁷ UN Doc A/RES/1396 (XIV), 1959.

⁸³⁸ Sudan, Libya, Ghana, Egypt, Morocco, Tunisia, Guinea and South Africa.

⁸³⁹ *Supra* note 836, at p.7.

⁸⁴⁰ Cameroon, Togo, Mali, Senegal, Madagascar, the Democratic Republic of Congo, Somalia, Niger, Benin, Burkina Faso, Cote d'Ivoire, Chad, Central Africa Republic, Congo Brazzaville, Gabon, Nigeria and Mauritania.

⁸⁴¹ AHG/RES 92 (XV), 1978 and AHG/RES 102-103 (XVIII), 1981.

⁸⁴² *Supra* note 836, at p.8.

⁸⁴³ Hands off Cain, *Guinea Bissau*, 2011.

⁸⁴⁴ Agencia AngolaPress, *Angola Constitution Bans the Death Penalty*, 19 May 2010 and "La Peine de Mort -Cap Vert", at www.peinedemort.org/National/pays.php?pays=136, (accessed 7 May 2011).

⁸⁴⁵ See respectively "Les pays qui deviennent abolitionnist de droit pour tous les Crimes", at www.peinedemort.org/National/Afrique-abolition.php, (accessed 11 May 2011) and Amnesty International, *Human Rights and the Police*, April 1998, AI Index: AFR 41/01/98.

5.1 The legacy of State killing policy

In each case, the death penalty was applied to the same crimes and executed in the same manner as that practiced by the colonial powers. In the table below, only countries that were independent by 1962 are listed.

Table 3: The death penalty in Africa between 1958 and 1962

No	Countries	Capital crimes	Average number of execution (1958-1962)	Minimum age	Methods of execution
1	Algeria	Treason, murder, torture, kidnapping and aggravated theft	None	Not specified	
2	Benin	Espionage, Treason, Murder	Not available	Not specified	Beheading
3	Burkina Faso	Arson, Espionage, Murder, Treason	None	Not specified	Beheading
4	Burundi	Treason, murder, kidnapping, armed robbery and rape	Not available	18	Hanging/ Civilians Shooting/ Soldiers
5	Cameroon	Arson, Espionage, Murder, Robbery, Treason	5	18	Shooting
6	Central Africa Republic	Espionage, Treason, Murder	None	16	Shooting
7	Chad	Murder	2	18	Shooting
8	Ivory Coast	Arson, Espionage, Murder, Robbery, Treason	None	Not specified	Beheading
9	Democratic Republic of Congo	Espionage, Treason, Assassination	1,4	18	Hanging
10	Egypt	Arson, Espionage, Murder, Treason	23	17	Hanging/Civilians

					Shooting/Soldiers
11	Ethiopia	Arson, Espionage, Treason, Murder	Not available	21	Hanging/Civilians Shooting/Soldiers
12	Gabon	Arson, Espionage, Murder, Rape, Treason	None	21	Shooting
13	Ghana	Murder, Treason,	6	17	Hanging
14	Guinea	Espionage, Murder, Treason	1 (less than)	18	Shooting
15	Liberia	Murder, Treason	None	12	Hanging
16	Libya	Espionage, Murder, Treason	2	18	Hanging/Civilians Shooting/Soldiers
17	Madagascar	Arson, Espionage, Murder, Robbery, Treason, Rape	None	Not specified	Shooting
18	Mali	Arson, Burglary, Espionage, Murder, Robbery, Treason	Not available	18	Hanging/Civilians Shooting/Soldiers
19	Mauritania	Premeditated murder, treason, torture	Not available	Not specified	
20	Morocco	Arson, Espionage, Murder, Treason	5	18	Shooting
21	Niger	Burglary, Espionage, Treason, Murder, Rape	None	18	Shooting
22	Nigeria	Murder, Treason	51	18	Hanging

23	Rwanda	Treason, murder, rape, indecent assault, superstitious practices	None	18	Hanging/ Civilians Shooting/ Soldiers
24	Senegal	Espionage, Treason, Rape, Murder	None	18	Shooting
25	Sierra Leone	Murder, Rape, Treason	Not available	18	Shooting
26	Somalia	Murder, Rape, Treason	2	Not specified	Shooting
27	South Africa	Burglary, Murder, Rape, Robbery, Treason	100	18	Hanging
28	Sudan	Espionage, Murder, Treason	Not available	21	Hanging/Civilians Shooting/Soldiers
29	Tanganyika	Murder, Treason	25,4	18	Hanging
30	Togo	Arson, Burglary, Espionage, Murder, Treason	None	18	Beheading Shooting
31	Tunisia	Espionage, Treason, Murder	2,2	18	Hanging/Civilians Shooting/Soldiers
32	Uganda	Espionage, Murder, Treason	29	18	Hanging

Source: Clarence H. Patrick⁸⁴⁶ except for Algeria,⁸⁴⁷ Burundi,⁸⁴⁸ Mauritania⁸⁴⁹ and Rwanda.⁸⁵⁰

⁸⁴⁶ *Supra* note 545, at pp. 397-411.

⁸⁴⁷ Hands of Cain, *Report on Algeria*, 2010.

⁸⁴⁸ Human Rights Watch, *Background on 2008 Burundi Penal Code*, December 2008, at p.4

⁸⁴⁹ Hans Goran Frank, *The Barbaric Punishment: Abolishing the Death Penalty*, The Hague: Martinus Nijhoff Publishers, 2003, at p.110.

⁸⁵⁰ *Supra* note 93, at pp.54-55.

Conducts that were not crimes or which were not punished with death before colonisation remained capital offences after independence. In addition, some North Africa states extended the list of capital crimes when they adopted radical Islam. For example, the primary capital crimes in Mauritania were premeditated murder, treason and torture. From 1980 onwards, the death penalty under *Shari'a* law was extended to rape, apostasy and homosexuality.⁸⁵¹ In Rwanda and Burundi, the colonial penal code that was enforced until more than two decades after independence extended the death penalty to indecent assault, rape and superstitious practices in Rwanda⁸⁵² and to kidnapping, armed robbery and rape in Burundi.⁸⁵³

The current Rwandan penal code was passed in 1977. Although it was supposed to suppress the colonial ideology, it in fact drew on the classical doctrines of the French penal code of 1810.⁸⁵⁴ Worldwide progress on the issue of the death penalty in the 1970s was completely ignored. The death penalty was extended to non homicide crimes such as political offences, military offences and offences against public faith,⁸⁵⁵ assault with aggravating circumstances, armed robbery, voluntary arson that provoked death, destruction and degradation of objects followed by death, indecent assault that provoked death, witchcraft, rape that provoked death and sequestration followed by acts of torture that provoked death.⁸⁵⁶ The code's underlying Napoleonic ideology was reinforced in subsequent amendments until the death penalty was abolished in 2007.⁸⁵⁷

Moreover, African countries adopted varied tendencies in legislating and applying the death penalty. Former French and Belgian colonies retained the death penalty as a mandatory punishment without alternative punishments, save when the offender had successfully demonstrated mitigating circumstances. This application of the death penalty was the consequence of restrictive interpretation of criminal law within the civil law

⁸⁵¹ *Supra* note 849.

⁸⁵² *Supra* note 93, at pp.54-55

⁸⁵³ *Supra* note 848, at p.4

⁸⁵⁴ Articles 26, 28-33, 151-155, 158, 159, 164, 312-317 and 403 of the of the Décret-loi no21/77 du 18 août 1977 portant Code Pénal Rwandais tel que modifié et complété à ce jour, *Journal Officiel*, no 13 bis, 1978.

⁸⁵⁵ Articles 151-200, 209, 238, 240, 282 and 459-487of the Décret-loi no21/77 du 18 août 1977 portant Code Pénal Rwandais tel que modifié et complété à ce jour, *Journal Officiel*, no 13 bis, 1978.

⁸⁵⁶ Articles 324, 349, 359, 360, 388, 404 ter, 442 and 444 of the Décret-loi no21/77 du 18 août 1977 portant Code Pénal Rwandais tel que modifié et complété à ce jour, *Journal Officiel*, n° 13 bis, 1978.

⁸⁵⁷ Organic Law n° 31/2007 of 25 July 2007 relating to the abolition of the death penalty, *Official Gazette*, n° special of 25 July 2007.

system.⁸⁵⁸ Proving that they had inherited a certified copy of the French penal law, France's former colonies followed the French model of categorizing and punishing crimes dealing first with political crimes.⁸⁵⁹

The death penalty was also mandatory for murder in the former British colonies of Somalia, Gambia, Malawi, the Sudan and South Africa.⁸⁶⁰ Some countries literally imported English law. Uganda drew on legislation from two centuries earlier using the definition of treason found in section 1 of the English Treason Act of 1795. In addition to the broadly described 'levying war', it was a capital crime to imagine, invent, devise or intend any act, matter or theory followed by expressions, uttering or declarations of such compassing, imagining, inventing, devising or intending by any overt act in order by force or arms to overturn the government.⁸⁶¹

Shooting became the commonly preferred method of execution, particularly for military offences. Pre-colonial methods of execution (drowning, strangling, and burning) were deemed primitive, inhuman and barbaric.⁸⁶² Benin and Burkina Faso were alone in applying decapitation. Public execution was prohibited save in Cameroon, the Central African Republic and Liberia. Ethiopia, Guinea, Mali, Malawi⁸⁶³ and Morocco⁸⁶⁴ remained ambivalent. The prohibition of media and public attendance as regards the process and the scene of execution went hand in hand.⁸⁶⁵

In the 1960s, three Anglophone countries executed the largest number of death sentences. South Africa executed 392 out of 592 death sentences. The Sudan followed this with 354 executions out of 547 death sentences. Surprisingly, Somalia was the third, with 8 executions out of 15 death sentences. Each carried out more than 50 % of the death sentences that were pronounced.⁸⁶⁶ It is worth noting that under indigenous law the death penalty did not exist in the Sudan or Somalia. It was first introduced by *Shari'a* law and

⁸⁵⁸ UN Doc E/67 IV.15, 1968, p.14.

⁸⁵⁹ FIDH, *Tchad, la Peine de Mort entre Opportunisme Sécuritaire et Règlement de Compte*, Rapport, Mission Internationale d'Enquête, no 404, septembre 2004, at p.9.

⁸⁶⁰ UN Doc E/67 IV.15, 1968, p.14.

⁸⁶¹ Section 25 (a) and (b) of the Penal Code Amendment Act, 1966. The phrase "levying war" was also inserted in section 39 of the Tanzania Penal Code. See J.J.R. Collingwood, *Criminal Law of East and Central Africa*, London: Sweet & Maxwell, 1967, at pp. 78-81.

⁸⁶² *Supra* note 93, at p.8

⁸⁶³ *Supra* note 545, at pp. 398-404.

⁸⁶⁴ UN Doc E/67 IV.15, 1968, p.26

⁸⁶⁵ UN Doc E/67 IV.15, 1968, pp.26-27.

⁸⁶⁶ UN Doc E/67 IV.15, 1968, p.43

strengthened by colonial regimes. Even under Islamic law, the Somali and Sudanese still redressed murder with *diyya*. Foreign legal influences shaped the law and the mentality of these people. Generally speaking, only Francophone countries developed a consistent custom of commuting death sentences.

Table 4: Countries that executed less than 50% of death sentences (1959-1960)

No	Countries	Death sentences	Sentence quashed on appeal	Convicted escaped	Committed sentences	Mercy	Executions
1	Ivory Coast	16	-	-	16	-	-
2	Dahomey	3	-	2	1	-	-
3	Togo	1	1	-	-	-	-
4	Gambia	2	-	-	2	2	-
5	Ghana	179	14	-	111	-	54
6	Morocco	43	-	-	29	-	14
7	Zanzibar	14	-	-	9	-	5
8	Malawi	25	-	-	16	-	9
9	Nigeria	590	-	-	339	-	251
10	Tanganyika	289	17	-	128	-	144

Source: UN Doc E/67 IV.15, 1968, at p.43

Morocco is the only former French colony that continued the practice of the death penalty and Gambia is the only country within Anglophone Africa that made an exception, pardoning death sentences. Gambia had refrained from executing the death penalty since colonial times. After 30 years had passed without any executions, it became one of the first *de facto* abolitionist countries in Africa.⁸⁶⁷ This is also evidence that colonial rule was perceived differently in Africa. Gambia received the same Colonial Office Model Penal Code as Malawi, Tanganyika and Zanzibar. The latter were credited with executing an average of 33% of death sentences.

In former British colonies, the death penalty was imposed as the ultimate punishment and without accessory embellishments (torture, fine, special or general confiscation). However,

⁸⁶⁷ UN Doc E/67 IV.15, 1968, p.43

African civil law countries imposed the deprivation of civil rights as a subsidiary punishment to the death penalty. Morocco and Benin additionally punished offenders convicted of state crimes with general forfeitures.⁸⁶⁸

In 1975, Guinea Bissau was the only African state on the list of *de jure* abolitionist for ordinary crimes before its withdrawal from the final list because the information relied on was from an unofficial source.⁸⁶⁹ Guinea Bissau eventually abolished the death penalty in 1993. Mozambique was also mistakenly qualified as *de jure* abolitionist since 1867, a date that corresponds to the abolition of the death penalty for ordinary crimes in Portugal.⁸⁷⁰ Former Portuguese colonies simply did not have the death penalty in their colonial statutes. They all introduced capital punishment in their constitutions at the time of or early after their independence.

By 1978, the abolitionist movement had elicited different responses from countries throughout Africa. The majority of African countries remained indifferent. Others progressively decided not to impose the death penalty or, if it was imposed, to commute the sentence. These are countries that felt that “capital punishment is unfortunate but ... [an] unavoidable necessity”.⁸⁷¹ These conditions prevailed until the Seychelles legally abolished the death penalty for murder in 1978.⁸⁷² Three years later, Cape Verde took a stronger stance and abolished the death penalty for all crimes.⁸⁷³

In Africa, abolition has often coincided “with major social changes, a period of national reconciliation, and a desire to break with an oppressive and troubled past”.⁸⁷⁴ In fact, the death penalty is intimately connected to political power. Like the colonial powers, governments have applied it to enforce their policies. This explains its insertion into constitutions of independent countries, which never applied it during colonial times. Dirk Van Zyl Smit states that:

In many African countries, rulers retain the death penalty, even if they do not use it, because they fear that the time will come when using their power to implement the death penalty will be the only way to demonstrate their authority. This

⁸⁶⁸ UN Doc E/67 IV.15, 1968, p.20.

⁸⁶⁹ UN Doc E/5616/, 1975, pp 3-4, Annex I.

⁸⁷⁰ *Supra* note 545.

⁸⁷¹ UN Doc E/5616/,1975, at pp.4-5.

⁸⁷² UN Doc E/1980/9, at para 21.

⁸⁷³ *Supra* note 2, at p.32.

⁸⁷⁴ *Ibid.*

tendency may be most obvious in coup-ridden, politically unstable states. However, it is equally a problem in countries where there is a perception that the state is powerless to act with other means against crime and corruption.⁸⁷⁵

Most African countries punished political crimes with the death sentence. Chad would be an exception where murder was the only capital crime.⁸⁷⁶ However, it is common knowledge that oppressive regimes often punish ordinary crimes with death sentences for political reasons. These are described as politically motivated crimes. Following independence, many illegitimate and tyrannical regimes in Africa used the death penalty in this way.

5.2 The death penalty as an instrument of oppression in Africa: some case studies

Four different legal systems will now be used to illustrate how often the death penalty has been used as an instrument of political oppression in contemporary Africa: the Roman Dutch law (South Africa), the Franco-Belgian law (the Democratic Republic of Congo) and the English law and *Shari'a* law (Nigeria).

The use of the death penalty in these countries has been the most outrageous on the continent. Although South Africa applied sophisticated laws and an organized judicial machinery and the Democratic Republic of Congo (formerly Zaire) and Nigeria adopted untimely military decrees and improvised military courts, they all pursued a similar goal, silencing and mostly eliminating dissident voices. Today, South Africa has distanced itself from these two countries in abolishing the death penalty.

⁸⁷⁵ *Supra* note 13, at 15.

⁸⁷⁶ *Supra* note 545, at p. 398.

5.2.1 The death penalty under apartheid in South Africa

Pre-union Roman Dutch law is sometimes excessively described as primitive, anarchic, barbaric and ferocious.⁸⁷⁷ It is worth bearing in mind that, in principle, it was recommended at the Cape that autochthones be treated humanely and governed politically, civilly and judicially on the same basis as Europeans. Severe measures were sometimes taken against thieves of cattle to redress ill treatments of the Hottentots. Respectable Roman Dutch founders such as Van der Linden had expressed their aversion to the death penalty.⁸⁷⁸ In reality, the injustice and harsher punishments intensified with the Union of South Africa.

5.2.1.1 The state killing policy in South Africa

Until 1917, there was no judicial agreement on the mandatory nature of the death penalty for murder, rape and treason. Common law was itself unclear as to whether the death penalty was mandatory for murder and different courts had inherited different practices. More recent laws also allowed alternative punishments.⁸⁷⁹ Whipping for offenders under sixteen years old and imprisonment with the possibility of release on parole existed in Transvaal and the Free State.⁸⁸⁰

The Criminal Procedure Act of 1917, which was designed to provide the union with a uniform system of law, introduced the mandatory death penalty for murder.⁸⁸¹ It also marked the beginning of the politicization of the death penalty. The policy of brutality and racial inequality between whites and non-whites that had “resulted in tragedy of inordinate

⁸⁷⁷ David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy*, Oxford: Clarendon Press, 1991, at p.33 and George Devenish, “South Africa from Pre-colonial Times to Democracy: A Constitutional and Jurisprudential Odyssey”, (2005) 1 *Journal of South African Law* 551-552.

⁸⁷⁸ Johannes Van der Linden, *The Institutes of the Law of Holland*, Amsterdam, 1806 as quoted in “State v Lionel Phillips and sixty-three others, 1896”, (1900) 17 *South African Law Journal* 25.

⁸⁷⁹ First Offenders (The Cap) Act 10 of 1906, Criminal Procedure Code (Transvaal) Ordinance 1 of 1903 and the Criminal Law Amendment (Transvaal) Act 38 of 1909, Administration of Justice (Orange Free State) Supplementary Ordinance 1 of 1906, Criminal Law Amendment (Natal) Act 10 of 1910.

⁸⁸⁰ Section 259 Criminal Procedure Code (Transvaal) Ordinance 1 of 1903.

⁸⁸¹ Section 338 of the Criminal Procedure Act 31 of 1917.

proportion for all people of colour”⁸⁸² was, however, more present during British colonization⁸⁸³ and became a regular practice with the Union.

At the Cape as in Natal, British settlers ensured that their laws technically contained no discriminatory racial policies. Racial assimilation through Anglicization became one of the settlers’ new policies. Africans were even granted the right to participate in parliamentary voting, although excluded as candidates. This seemed sufficient to flatter them that they enjoyed more rights than they did under Roman Dutch law. The Cape appeared then to be a successful model of colour-blind laws and racial equality to inspire America.⁸⁸⁴ However, “from the inception of the second British occupation ... the very nature [of the Cape] government was inordinately autocratic in nature, and was initially epitomized by haughty character and imperious conduct”⁸⁸⁵

Retrogressive developments ensured white hegemony and thus British supremacy at the Cape and in Natal. Conditions for voting were increased and Africans of Transkei, Zulu and Indians became offside. Any resistance was bloodily quashed. Several thousand Zulu opposing the divide and rule policy were massacred during the Bambatho rebellion.⁸⁸⁶ In daily life, discrimination and segregation supplanted equality. The Governor declared that “The Zulu people were to be territorially separated and thereby segregated politically, economically and socially from whites, so that they could be protected from corruption and exploitation”.⁸⁸⁷ The struggle of the judiciary to maintain racial equality faced resistance from influential politicians. Later the Cape administration was referred to as “at best incompetent, at worst barbaric and corrupt”,⁸⁸⁸ while Natal was called “the wretched colony -the hooligan of the British Empire”.⁸⁸⁹

⁸⁸² George Devenish, *Supra* note 877.

⁸⁸³ Under section 2 (a) of the Immigration Act 47 of 1902, any person who could not successfully write an application to the Minister in any European language was prohibited to enter the Cape and qualified as an undesirable immigrant. Article 3 generally but especially paragraph (g) excluded illiterate Europeans from its scope of application. Other few examples of similar discriminatory legislations were The Sale to Native Act 28 of 1898 which simultaneously prohibited Africans to make traditional beer and to buy and consume Europeans liquors, The Native Dance Act 16 of 1891 whose article 1 provided that “Abakweta and Intonjane dances [were] prohibited upon any land in any district where this Act [was] proclaimed” and The Passes for Natives Act 22 of 1867 that prohibited free circulation of Africans on their lands without signed pass.

⁸⁸⁴ George Devenish, *Supra* note 877, at pp. 553-354.

⁸⁸⁵ *Ibid.*

⁸⁸⁶ George Devenish, *Supra* note 877, at p. 557.

⁸⁸⁷ *Ibid.*

⁸⁸⁸ *Ibid.*

⁸⁸⁹ *Ibid.*

British discriminatory policies were not restricted to Africans. Inhuman military methods such as the concentration camp for Boer and African women and children and exposure to disease and starvation resulted in the death of roughly 30,000 white and 14,152 African inmates during the Anglo-Boer war. These events also shaped the future.⁸⁹⁰ Harrison claims, “it was not war, it was deliberate murder”.⁸⁹¹

The war in which many Asians, Africans and coloured people fought on the British side left a legacy of intense bitterness and hatred that had an impact on South African politics for generations.⁸⁹² Non-Europeans joined the British side because “... the British portrayed themselves as a more accommodating people... But this faith was betrayed after the war, when the British showed little sympathy for the future of non-Europeans throughout Southern Africa”.⁸⁹³ The Union of South Africa inherited a legacy of white supremacy, discriminatory laws and segregationist policies, ultimately apartheid.⁸⁹⁴

White Afrikaners were also victims of frustration and unfair segregation. John Vorster, the then South African Prime Minister and later President under apartheid explained how in 1924 an English speaking girl in his Eastern Cape High School became the reason that the whole school had to study in English:

We had to take our classes, except for Afrikaans, in English because she could not follow Afrikaans. But they never asked us whether we could follow English; they just took it for granted.⁸⁹⁵

Racial segregation was a British policy. Important antecedents of racial segregation were in the British controlled zone, particularly in Natal.⁸⁹⁶ In Natal, the apartheid policy was

characterized by traumatic and tragic policies of progressive disenfranchisement of people of colour and institutionalized racism, enforced within a brutal and rigid system of law that was characterized by the erosion and eclipse of the rule of law

⁸⁹⁰ David Dyzenhaus, *Supra* note 877.

⁸⁹¹ *Supra* note 382, at pp.40-49.

⁸⁹² David Dyzenhaus, *Supra* note 877 and Hulme T. Siwundhla, “White Ideologies and Non European Participation in the Anglo-Boer War 1899-1902”, (1984) 15 *Journal of Black Studies* 223-234. It is worth noting that some burghers fought on the British side. See also Albert Grundlingh, *Boer Collaboration in the South African War of 1899-1902: the Dynamics of Treason*, Pretoria: Protea, 2006, pp.221-230.

⁸⁹³ Hulme T. Siwundhla, *Supra* note 892.

⁸⁹⁴ George Devenish, *Supra* note 877, at pp. 558-563.

⁸⁹⁵ *Supra* note 382, at p.56.

⁸⁹⁶ George Devenish, *Supra* note 877, at p. 564.

effected by increasingly draconian security legislation, for which South Africa became notorious and was regarded as a political outcast.⁸⁹⁷

In 1920, a judge complained about the racist features of English law through the institutionalisation of juries. White-only-juries were used to enforce racial discrimination. He was shocked when a jury found not guilty two whites who had broken the arm of an African and killed his child.

This state of things has been going on for a century, ever since the English jury system was introduced into South Africa. With a people more vindictive than the coloured population of South Africa, justice would have been secured by extra judicial methods.⁸⁹⁸

English law had made the death penalty mandatory for murder. Flaws associated with the concept of malice resulted in extensive and analogical interpretations that drove the majority of Africans, most of whom innocent, to the gallows.⁸⁹⁹ The democratic government's inquiry concluded, "in alarming numbers, most of those executed were later found to have been innocent".⁹⁰⁰ It is contended that 95% of the persons who went to the gallows were Africans. Unjust laws, harsh punishments, unfair dismissals intended to suppress any revolt against inequality.⁹⁰¹ Inmates on death row ended up calling the Pretoria Maximum Prison "The Head Office of Hanging".⁹⁰²

5.2.1.2 The judicial battle against the death penalty

The union inherited the death penalty from both English law and Roman Dutch law. Prior to 1917, courts were reluctant to impose it. In *R v. Blumenthal*,⁹⁰³ it was held that for crimes other than murder, rape and treason, the death penalty had tacitly been abrogated by its disuse. The death penalty had also ceased to be mandatory for murder.

⁸⁹⁷ *Ibid.*

⁸⁹⁸ George Morice, "The Administration of Criminal Law in South Africa", (1920) 37 *South African Law Journal* 137.

⁸⁹⁹ Clarkson H. Tredgold, *Supra* note 358, at p.256 and Robert Turell, *Supra* note 391, at p.5.

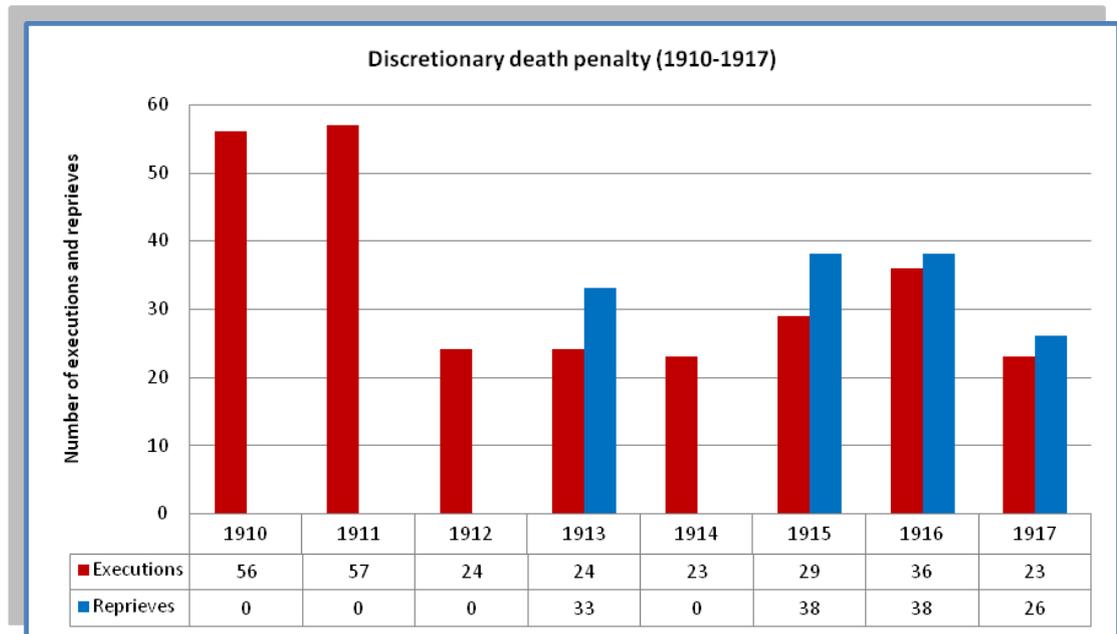
⁹⁰⁰ Department of Justice and Constitutional Development, Address of Minister Jeff Radebe, 22 September 2009 at the 3rd International Meeting of Ministers of Justice, Rome Italy.

⁹⁰¹ *Supra* note 391, at p.7.

⁹⁰² Truth and Reconciliation Special Hearing, *95 Per Cent of Death Sentences Were Black*, Johannesburg: McBride, 22 July 1997.

⁹⁰³ 1915 TPD 420.

Figure 7: Discretionary death penalty in South Africa (1910-1917)



NB: 0 represents data that are not available.

Source: *South African Journal of Criminal Justice*,⁹⁰⁴ Robert Turrell⁹⁰⁵ and Ellison Kahn.⁹⁰⁶

There are no data on reprieves for 1910-1912 and 1914.⁹⁰⁷ However, reprieves were more common than executions over the entire period. The death sentence was not imposed for rape and was rarely imposed for treason between 1910 and 1917. The only case in which the defendant was executed for treason was that of *Jopie Fourie*, who had rebelled against the South African invasion of Namibia in 1914. He was captured on the 16 December 1914 in Rustenburg, was tried by a court martial for high treason and executed on the 20 December 1914.⁹⁰⁸

It is a matter of controversy whether or not there was a decrease in executions after 1917. Professor Ellison Kahn submits that the situation evolved after 1917 and that there were lesser than 25 executions between 1923 and 1934.⁹⁰⁹ The table below opposes this view.

⁹⁰⁴ "Statistics", (1992) 2 *South African Journal of Criminal Justice* 251-254.

⁹⁰⁵ *Supra* note 391, at pp.258-259

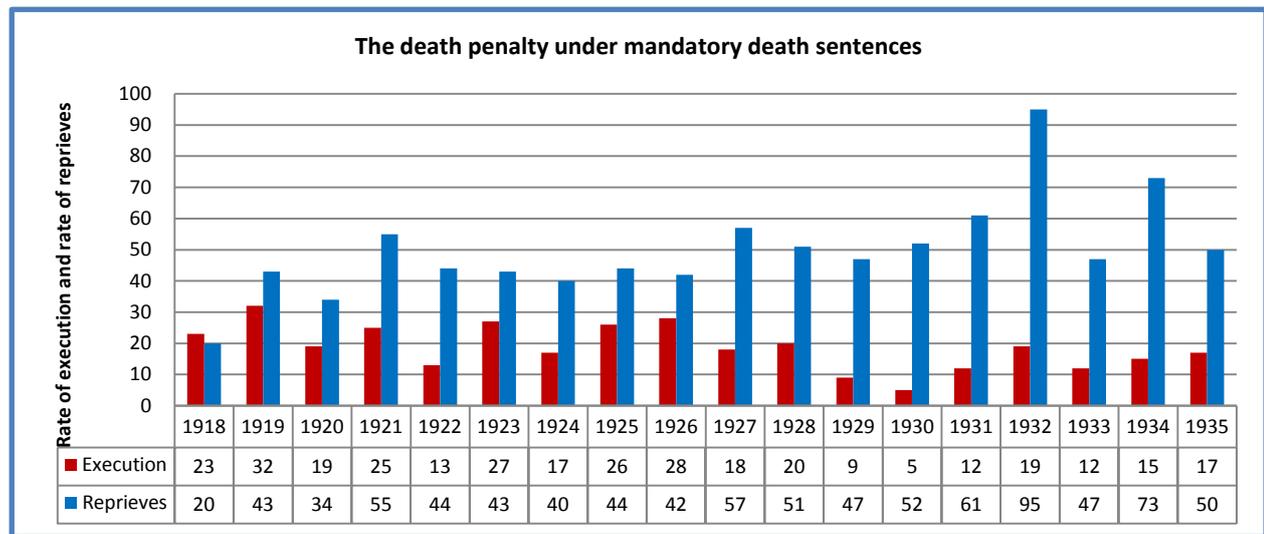
⁹⁰⁶ *Supra* note 37, at pp.198-206.

⁹⁰⁷ *Ibid.*, *Supra* note 904 and Robert Turrell, *Supra* note 391, at pp.258-259

⁹⁰⁸ *Supra* note 381, at p.459.

⁹⁰⁹ *Supra* note 37, at p. 200.

Figure 8: Executions under mandatory death penalty in South Africa (1918-1935)



Source: Ellison Kahn,⁹¹⁰ Robert Turrell,⁹¹¹ Van Niekerk⁹¹² and *South African Journal of Criminal Justice*.⁹¹³

Despite the mandatory death penalty, there are three reasons used to justify the decreased level of executions from 1918 to 1935: public disapproval of the degeneration of criminal law, discretionary power of the juries to convict defendants of culpable homicide and the bureaucratic burden of reporting each capital case.⁹¹⁴ Though some may doubt the exclusion of the death penalty on subjective grounds such as its unpopularity with the public, or the additional reporting duties it imposed on the judicial administration, it is clear that there were fewer executions during this period than for the period 1910-1917. Prior to 1935, courts had no discretion and they were not statutorily entitled to consider mitigating circumstances.⁹¹⁵ However, the executive managed to keep the rate of executions lower than that of reprieves. A judge explained that he also invoked the vague term of circumstantial evidences introduced in 1917 to save people from the death penalty.⁹¹⁶

⁹¹⁰ *Supra* note 37, at p. 200.

⁹¹¹ *Supra* note 391, at pp.258-259

⁹¹² *Supra* note 381, at p. 458.

⁹¹³ "Death Penalty in South Africa, the Statistics", (1989) 2 *South African Journal of Criminal Justice* 252.

⁹¹⁴ *Supra* note 37, at 200.

⁹¹⁵ Section 61 (a) the General Law Amendment Act 46 of 1935. See also *Supra* note 252.

⁹¹⁶ *Supra* note 898, at p. 132.

Mitigating circumstances could exclude the death penalty between 1935 and 1946. Recommendation regarding extenuating circumstances was made as early as 1920. Some questioned whether or not, in addition to the exclusion of the death penalty for women and junior offenders, article 338 of the Criminal Procedure Act 1917 should integrate mitigating circumstances for other classes of criminals.⁹¹⁷ The courts had realized that the death sentence was not serving the purposes of justice at all. George Morice, a judge in Johannesburg, stated, “at present, the passing of the death sentence is often no more than a farce”.⁹¹⁸

African convicts saw courts as a transitional step towards their death. They did not trust judges’ recommendation for mercy. A judge was shocked when a Swazi man for whom he recommended mercy asked for permission to pack his belongings and bid farewell to his relatives. The judge felt obliged to reassure him via an interpreter that he would not be hanged.⁹¹⁹ This drove George Morice to call for a complete abolition of the death penalty:

[Given] the cruelty of which [the death penalty] is enhanced by the special solemnities that sometimes accompany it, such as calling silence in the court and the medieval barbarity of the black cap [,] one feels inclined a blush for civilization when one has to pronounce such a sentence upon an unsophisticated native after explaining to him that it would probably not be carried out.⁹²⁰

However, it seemed premature to suggest abolition. Basing abolition on the poor understanding of an unsophisticated native who questioned the reasoning behind imposing a death sentence that would not be carried out was a weak foundation. George Morice strengthened his position by referring to the harm that the death penalty causes to humanity and asked for the discretionary death penalty to apply for murder so that “there would be less likelihood of these perverse verdicts, which we meet with in cases of so called natural justice”.⁹²¹

In 1933, the judges’ conference requested an amendment in order to allow a discretionary sentence.⁹²² Instead, a new definition of homicide was provided. It split the crime in two.

⁹¹⁷ *Ibid.*, at p. 134.

⁹¹⁸ *Ibid.*

⁹¹⁹ *Ibid.*

⁹²⁰ *Ibid.*

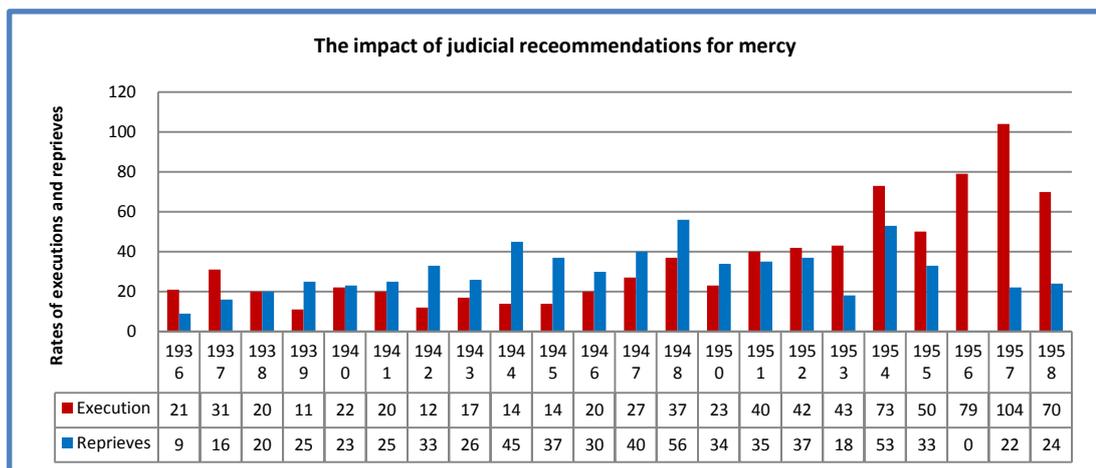
⁹²¹ *Ibid.*, at p. 134-135.

⁹²² *Supra* note 37, at p. 200.

The death penalty remained mandatory for premeditated murder and became discretionary for culpable homicide.⁹²³ This decision was politically motivated although it was a return to Roman Dutch classification of crimes. General Smuts had compared statistics and found that 60% of death sentences were carried out in the United Kingdom, while only 11% of executions of death sentences in South Africa were implemented. He therefore decided to preserve the mandatory death penalty and carried this decision through parliament.⁹²⁴ In dividing the definition of homicide, the law divided justice: Europeans were prosecuted for culpable homicide and non-Europeans for murder.

5.2.1.3 Racial selection of the barbarian to be executed

Figure 9: The impact of judicial recommendations for mercy



Source: Ellison Kahn⁹²⁵ and Robert Turrell.⁹²⁶

Executions substantially decreased leading up to 1950. Mitigating circumstances were found to exist in 997 cases out of 1507 for the decade 1936-1946. At the same time, 297 cases were reprieved. This proves that judges had started taking control of the death penalty and judicial recommendations for mercy were upheld. Executions were carried out in only 213 cases, a figure that represents 14% of all death sentences.⁹²⁷ South Africa

⁹²³ Section 61 (a) of the General Law Amendment Act 46 of 1935. See also Ellison Kahn, *Supra* note 37, at pp.200-201.

⁹²⁴ *Supra* note 371, at pp. 137 and 149.

⁹²⁵ *Supra* note 37, at p. 202.

⁹²⁶ *Supra* note 391, at pp.258-259.

⁹²⁷ *Supra* note 37, at p. 202.

excluded the death penalty in nearly 86% of cases.⁹²⁸ It was the only decade in which South Africa had the highest number of reprieves.

In 1958, the death penalty was extended to property and political crimes, unless perpetrated by juvenile offenders.⁹²⁹ The government justified its return to nineteenth century practices on the grounds of deterrence. In addition to murder, rape and treason, eight statutory offences became capital crimes: robbery with aggravating circumstances, housebreaking with aggravating circumstances, sabotage, undergoing communism training, advocating social change, kidnapping, child stealing and terrorism.⁹³⁰ This extending of the death penalty's scope received great welcome in the white community. The political opposition was enthusiastic about the decision and some judges attempted a retrospective application of the law.⁹³¹ The law was passed in 1958 and in February 1959, the first convict was executed.⁹³²

The period leading up to 1959 is also political relevant. The National Party had won elections in 1948 and there was political unrest brewing out of a desire for full independence from Britain. Every effort was made to move towards building a pure Afrikaner Republic.

⁹²⁸ *Supra* note 391, at pp.258-259.

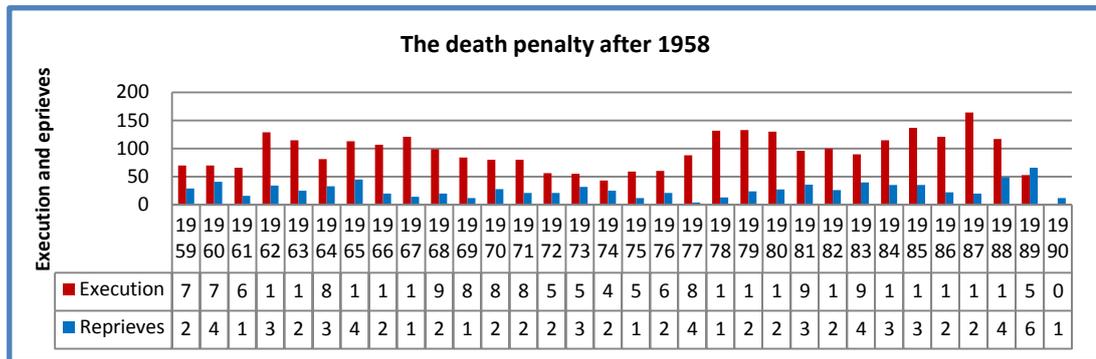
⁹²⁹ Section 25 of the Criminal Law Amendment Act 16 of 1959.

⁹³⁰ See section 11 of the Internal Security Act 44 of 1950 for communism and advocating social change, section 21 of the General Law Amendment Act 76 of 1962 for sabotage, section 2 (1) of Terrorism Act 83 of 1967 for terrorism, section 1(1)(i) read with section 227 of the Criminal Procedure Act 51 of 1977 for robbery and housebreaking with aggravating circumstances and for kidnapping and child stealing. For details see Ellison Kahn, "What Is Happening to the Death Penalty?", (1981) 98 *South African Law Journal* 103.

⁹³¹ *R v. Mazibuko* 1958 (4) SA 353(A.D).

⁹³² *Supra* note 37, at p.204.

Figure 10: The death penalty between 1958 and 1989 in South Africa



Source: Ellison Kahn,⁹³³ Christina Murray,⁹³⁴ Robert Turrell⁹³⁵ and South African Journal on Human Rights.⁹³⁶

Murder was the most common reason for hanging and accounted for 97% of executions between 1970 and 1985,⁹³⁷ a period during which the recorded number of executions reached a peak. Sometimes murder was accompanied with rape or robbery.

In 1882, De Villier, the then Cape Chief Justice had ruled that the death penalty for rape required extreme circumstances of atrocity that left the judge no other option.⁹³⁸ The legislation on the death penalty for Africans who raped European females regardless of the circumstances originated in Natal. The 1887 Natal legislation aiming to protect white females scared of Africans introduced the discretionary death penalty for rape.⁹³⁹ Political propoganda strengthened this racial discrimination. In 1896, a judicial report justified this law by stating that “violating chastity, especially where the offender is a male of an inferior race, is keenly felt among white people as an irreparable wrong to the victim and her relatives and an outrage upon the white race”.⁹⁴⁰

⁹³³ *Supra* note 37, at p. 202.

⁹³⁴ Christina Murray, “Hangings in Southern Africa: the Last Ten Years”, (1986) 2 *South African Journal on Human Rights* 350.

⁹³⁵ *Supra* note 391, at p.259.

⁹³⁶ “Hangings: Last Ten Years”, (1985) 1 *South African Journal on Human Rights* 180.

⁹³⁷ Ellison Kahn, *Supra* note 930.

⁹³⁸ *R v. Nonosi* (1882) 1 Buch AC 154 at 155-6.

⁹³⁹ Section 1 of the law no 27 of 1887 (N).

⁹⁴⁰ *Supra* note 371, at p.141, footnote 28.

Within the Union, rape became one of the most important racial crimes. The recorded figure of 170 executions for rape between 1919 and 1988⁹⁴¹ is a gross understatement. There were 123 executions for rape from 1911-1966.⁹⁴² Nearly 96% of convicted rapists were Africans, coloured and Asians. Out of the 19 executions for rape that took place between 1911 and 1919, there was one coloured person. All the rest were Africans.⁹⁴³ In 1955, the Minister of Justice declared that, since he had taken office, he had systematically refused mercy to natives convicted of raping white women because it was a special horror to be raped by an African man.⁹⁴⁴ The rape of a white woman by an African was renamed “black peril”.⁹⁴⁵

Were whites ever hanged for any of the listed crimes? A complete lack of executions handed down to whites would infer both inequality and a policy of eliminating the African race. Whites committed murder and rape on non-whites four times more often than did non-whites to Europeans.⁹⁴⁶ Professor Ellison Kahn states that it is not ‘entirely accurate’ to state that whites were not executed for inter-whites crimes or for crimes perpetrated against Africans.⁹⁴⁷ However, he found that until 1960, only three of 1,520 persons executed were whites. The first case dated back to 1949. There is no record of a single execution of a white offender before 1949. Compared to the number of Africans executed over the same period, three seems insignificant. This unequal treatment was most apparent in rape cases. Under the Immorality Act,⁹⁴⁸ even consensual sexual intercourse between whites and natives was a criminal offence.

The first case of a European executed for rape was recorded in February 1960. The offender had raped his six year old daughter.⁹⁴⁹ A few whites were executed beginning with the 1960s for two reasons: the need to balance racial figures on execution and the need to escape criticism based on the apparent political nature of executions and the observable trend of eliminating from society inferior white who constituted an insult to white civilization. The concept of degeneration helped eliminate whites who opposed apartheid.

⁹⁴¹ *Ibid*, at p.141.

⁹⁴² *Supra* note 381.

⁹⁴³ *Supra* note 371 and Ellison Kahn, *Supra* note 37, at p. 203.

⁹⁴⁴ *Rand Daily Mail* 16 September 1955 as quoted by Ellison Kahn, *Supra* note 371.

⁹⁴⁵ *Supra* note 23.

⁹⁴⁶ *Supra* note 381, at p.471.

⁹⁴⁷ *Supra* note 37, at p. 204.

⁹⁴⁸ No 5 of 1927.

⁹⁴⁹ *The Star*, 17 February 1960 as quoted by Ellison Kahn, *Supra* note 37, at p. 203.

Several acts were passed to empty degeneracy of its then criminological content. “It took a crucial political meaning. It was mobilized in ideological opposition to mass democracy and socialism. In South Africa, degeneracy was pressed into service in opposition to white working class”.⁹⁵⁰ All South African pre-democracy political regimes referred to the concept ‘degeneracy’ against “whites who posed a threat to the white race”.⁹⁵¹ Even there, the life of a white convict carried more value than that of other racial groups.

Nevertheless, the few cases that resulted in the executions of whites still fell within the racial ideology. Although the purpose of apartheid was white supremacy, it was still necessary to demonstrate to the public and to increasingly demanding abolitionist movement that the death penalty was applied as an instrument of justice rather than a means of crushing the enemy. This judicial hypocrisy led white judges to send a few whites to the gallows as sacrificial lambs.

That should not veil the reality that in many instances white offenders prosecuted for murder were convicted for culpable homicide. Sometimes the charge of murder was reduced to culpable homicide for Africans too when the victim was an African. This policy resulted less from a sense of justice than from a general disdain for the lives of Africans. The non-imposition of the death penalty “did not originate in a belief in the abolition of the death penalty but in a ‘relaxed, casual attitude towards violence if it did not involve the white community’”.⁹⁵² Killing a white would necessarily result in a charge of murder and a death sentence.

The unsophisticated native, the primitive, savage, dangerous barbarian was diminished in his humanity. The political system provided judges with comfortable laws and circumstances that justified the award of the capital punishment on the basis of racial bias. “Judges were able to sentence blacks to death because racism provided them with that essential psychological resource that diminished a black man’s humanity”.⁹⁵³ This is what explains the ascending curb of executions from 1944. The death penalty was undoubtedly a weapon against political antagonists in an attempt to shore up racial segregation. Murder was a political crime until the death penalty was abolished.

⁹⁵⁰ *Supra* note 391, at p.96.

⁹⁵¹ *Ibid.*, at p.97.

⁹⁵² *Ibid.*, at p.8.

⁹⁵³ *Ibid.*, at p.12.

5.2.1.4 Abolition of the death penalty in South Africa

There were four factors that, when combined, always resulted in the death penalty. The person had to be poor, non-European, male and represented by a *pro bono* defence council.⁹⁵⁴ The death penalty for murder was generally imposed on Africans, Indians and Coloured.⁹⁵⁵ In South Africa, racial issues have always been perceived as highly political for both ordinary citizen and learned judges. Van Niekerk calls them the “taboos of our land”.⁹⁵⁶

In the *Makwanyane* case, the court avoided addressing the link between the death penalty and race. It dealt with race together with poverty and other factors of arbitrariness.⁹⁵⁷ The death penalty was outlawed not because it was a political instrument against non-whites but because it irreparably breaches the most fundamental human rights, the rights to life, to dignity and to not to be subjected to cruel, inhuman and degrading punishments.⁹⁵⁸ This legal approach left the taboos mostly intact.

Academics blamed the court for avoiding the practical problems that South African society was facing. It should have analyzed the racial question through the right to equality, which is entrenched in the South African constitution. “In so doing, he [Chief Justice Chaskalson] avoided an assessment of the role the death penalty played in maintaining a system of racial oppression”.⁹⁵⁹

However, the court had clarified that it was not dealing with the desirability of the death penalty by the majority of South Africans. Rare would have been non-Europeans who desired the death penalty. On the contrary, the majority of white judges, lawyers and deputies favoured the death penalty. Parliamentarians stated that “[p]eople fear that the abolition of the death penalty will result in thousands of Non-whites overcome by their instincts, murdering [whites] in [their] beds...”⁹⁶⁰ These subjective considerations were

⁹⁵⁴ *S v. Makwanyane and Another*, *Supra* note 11, at para 48-49 per President Chaskalson.

⁹⁵⁵ *Supra* note 37, at p. 206.

⁹⁵⁶ *Supra* note 381, at p.463.

⁹⁵⁷ *S v. Makwanyane and Another*, *Supra* note 11, at para 49 footnote 78, para 51-54 and 94 per President Chaskalson.

⁹⁵⁸ *Ibid.*, at para 10, 21-24, 26, 57, 67 and 144 per President Chaskalson.

⁹⁵⁹ *Supra* note 391, at pp.13-14.

⁹⁶⁰ Debates in Parliament, cols 2578-9 as quoted by Barend Van Niekerk, *Supra* note 381, at p. 471.

dismissed in one sentence: "...in the matter before us the court had been called upon to decide an issue of constitutionality..."⁹⁶¹

It is unfortunate that today, retentionists are campaigning against the sanctity of the right to life. It is submitted that there cannot be respect for the sanctity of human life unless the murderer's life carries more weight than that of the helpless and innocent victim.⁹⁶²

Worries about the murder rate, which doubled between 1990 and 2000,⁹⁶³ have led some academics to argue that thinking that criminals are deterred by effective prosecution is no less a legal hypocrisy than the belief that they were deterred by the death penalty:

It is ironic that apartheid was characterized by empty phrases which were incompatible with the reality of everyday life and yet, with our new constitutional order, we are running the same risk. The burning question which remains is, whether South Africa has perhaps not again placed ideology over reality.⁹⁶⁴

Whatever the case may be, the State has no right to take the lives of citizens it has the duty to protect. It would be a step backward to reinstate the death penalty in a country, which has experienced its outrages.

⁹⁶¹ *S v. Makwanyane and Another*, *Supra* note 11, at para 303 per Justice Ackermann.

⁹⁶² *Supra* note 233, at p.30 and Stephane S.Terblanche, *Supra* note 26, at p.528.

⁹⁶³ In 2003, the murder rate was about 11 times higher than in Germany and 20 times higher than in the United Kingdom, the two being at the lowest level in Europe. See Carel R. Snyman, *Supra* note 233, at p.29.

⁹⁶⁴ Jolandi Le Roux and Bernard Bekink, "The Abrogation of the Death Penalty in South Africa: Participating in the Ongoing Debate", (2006) 62 *Journal for Contemporary Roman Dutch Law* 201-214.

5.2.2 The death penalty in the Democratic Republic of Congo (formerly Zaire)

The colonial penal code survived in the Congo where there has not been much progress since 1960. A member of the Belgian administration remarked in 1969 that he would be surprised if laws and institutions in the Congo were not “a marked survival of the structure established before independence”.⁹⁶⁵ He was right. Subsequent amendments strengthened the repressive colonial regime. The latest amendment dates to 30 November 2004.⁹⁶⁶

The death penalty is provided for both ordinary and military crimes. Ordinary capital crimes range from homicides and political offences to property crimes. The military penal code contains more than 48 articles providing for capital punishment. The number of ordinary and military capital crimes causes the Congolese penal legislation to resemble colonial emergency laws. Since independence, politicians have resorted to capital punishment to stabilise their insolvent regime at the expense of innocent lives.

5.2.2.1 The death penalty as a draconian punishment in Congo

The death penalty by hanging for civilians and shooting for soldiers is the most severe punishment. The court may however impose life imprisonment if it is satisfied with mitigating circumstances. Civilians are entitled to conditional release after serving a quarter of their sentence. They must serve at least 5 years' imprisonment if they are sentenced to life imprisonment. The regime for soldiers' conditional release is more onerous. The length of imprisonment before conditional release is discretionarily determined by the court.⁹⁶⁷

Although the condemned is entitled to mercy, he or she has no right to introduce a plea for mercy. The prosecutor is required to introduce such a plea to the Head of State for all

⁹⁶⁵ Antoine Rubbens, “The Congo Democratic Republic”, in Alan Milner, ed., *African Penal Systems*, London: Routledge and Kegan Paul, 1969, at pp.23 and 28.

⁹⁶⁶ Décret du 30 janvier 1940 portant code pénal congolais tel que modifié à ce jour (Mis à jour au 30 novembre 2004), *Journal Officiel*, 45^{ème} année, n^o spéciale, 30 novembre 2004.

⁹⁶⁷ Articles 5, 6, 18 and 35 of the Décret du 30 janvier 1940 portant code pénal congolais tel que modifié à ce jour (Mis à jour au 30 novembre 2004), *Journal Officiel*, 45^{ème} année, no Spéciale, 30 novembre 2004, articles 26, 27 and 28 of the Loi No 024/2002 du 18 novembre 2002 portant code pénal militaire, *Journal Officiel*, no Spécial, 20 mars 2003 and article 1 of the Arrêté du Gouverneur General du 9 avril 1898.

death sentences. This is an unfair procedure. The prosecutor is the defendant's adversary at the trial. Furthermore, the head of state's decision is based on the recommendation of the prosecutor, which has often proved to be against mercy. This incoherence led President Mobutu to keep inmates on death row for decades. The death penalty is executed inside the prison unless the Government decides otherwise.⁹⁶⁸

⁹⁶⁸ Article 2 of the Arrêté du Gouverneur Général du 9 avril 1898.

Table 5: A synopsis of ordinary capital crimes in Congo

Ordinary crimes	Circumstances	Legal provisions of the penal code	Punishment
Assassination	Premeditation	Articles 44 and 45	Death
Murder	Simple murder	Articles 44 and 45	Death
Murder	To facilitate theft or obstruct justice	Article 85	Death
Poisoning		Article 49	Death
Creating armed groups	For endangering human beings or their property	Articles 156 to 158	Death is imposed for the mere fact of creating or supporting the association
Superstitious practices	If death, physical incapacity or an incurable disease are the consequences	Article 57, paragraphs 2 and 3	Death
Illegal arrest or arbitrary detention	If accompanied by torture that caused the death	Article 67 paragraph 2	Death sentence is discretionary
Rape	Which resulted in the victim's death	Article 71	Death sentence is discretionary
Indecent assault	Which resulted in the victim's death	Article 71	Death sentence is discretionary
Armed theft		Article 171	Death

Treason	Perpetrated by a Congolese	Articles 181-184	Death
Espionage	Perpetrated by foreigners	Article 185	Death
Attempt to massacre or to commit pillage	With intention to commit massive killings, devastation or pillage	Article 200	Death
Sedition organized by an armed group	Commanders and subalterns bear the same responsibility	Article 204	Death
Using a weapon in an insurrectional movement	Article 207 paragraph 1 does not clearly indicate the nature of the weapon.	Article 207, paragraph 2	Death
Directing or organizing an insurrectional movement	The outcome and circumstances are immaterial	Article 208	Death

Source: Décret du 30 janvier 1940 tel que modifié et complété à ce jour (Mis à jour au 30 novembre 2004).⁹⁶⁹

⁹⁶⁹ *Journal Officiel*, 45^{ème} année, n° spécial, 30 novembre 2004.

The independent legislator has remained in line with the colonial code. Amendments have simply linked offences that presented strong similarities⁹⁷⁰ or have hardened the repressive regime for certain crimes. The Congolese penal legislation does not however make infanticide and parricide separate offences. They are dealt with as murder or assassination. Furthermore, there is no mandatory death penalty for illegal arrest or detention, rape or indecent assault that provoked the victim's death. The court discretionarily evaluates the aggravating circumstances and can impose life imprisonment. It should be noted that the most alarming provisions of the death penalty are found in the military penal code.

⁹⁷⁰ For example articles 44 et 45 relating to murder and assassination were combined in article 1 of Ordonnance-loi n° 68/193 du 3 mai 1968, M.C. n° 14 du 15 juillet 1968, p.1324.

Table 6: A synopsis of military capital crimes in Congo

Military crimes	Circumstances	Legal provision in the military penal code	Punishment
Simple desertion	Deserting with weapons or ammunitions	Article 49, in fine	Death
Desertion to the enemy or desertion in presence of the enemy	Soldier or civilians member of the crew of military navy or aircraft	Articles 50 and 51	Death
Cowardice	Running away in front of the enemy or using irregular methods for avoiding the danger	Article 57	Death
Capitulation or defeatism	Commander ordering to stop the fight or withdrawing before finishing ammunitions at his disposal	Article 58	Death
Abstaining from securing a fellow unit in danger or abstaining to fight the enemy with equal force	You must be the commander	Article 60	Death
Military plot during exceptional circumstances	If committed in war time or exceptional period for the security of the training or affect the decision of the military commander	Article 62	Death
Pillage	In wartime or in period of emergency laws	Article 65	Death
Forgery on the report of the commander or of the chief of staff	With intention to endanger national security or destruction of military materials or military unit	Article 72	Death

Military revolt	In wartime or in front of the enemy	Article 90	Death
Rebellion		Articles 91 and 92	Death
Insubordination	In wartime or in front of the enemy	Article 94	Death
Violence against guards	In wartime, under emergency laws, police operation or in front of the enemy	Article 101	Death
Violence against civilians	In wartime or during exceptional periods	Article 103	Death
Abandoning assigned position	In wartime or under special circumstances	Article 116	Death
Abandoning a military vessel or aircraft or leaving troops behind	You must be a commander or pilot in wartime or in front of the enemy	Article 119 and 120	Death
Abandoning the position	In wartime or in front of the enemy	Article 121	Death
Treason	In wartime, the military code applies to both civilians and soldiers	Article 128 and article 181-184 of the ordinary penal code	Death
Espionage	For foreigners	Article 129 and articles 181-185 of the ordinary penal code	Death
Sabotage	For serving foreign powers or organization	Articles 133	Death
Giving misguiding information	In wartime	Article 134	Death
Attack by a military group		Article 135	Death
Directing or participating in an insurrectional movement		Articles 137-139	Death
Taking commanders in hostage		Article 140	Death

Inciting the army to surrender to the enemy		Article 143	Death
Demoralizing the army	In wartime	Article 146	Death
Jeopardizing national defence	In war time or in special period	Article 148	Death
Terrorism	If it provoked death	Article 158	Death
Genocide and crimes against humanity	When any of them is indivisible of other military or ordinary offences	Articles 161-175	Death
Evading prisoners		Article 179	Death
Enrolling on the enemy's side		Article 190	Death
Exactions against civilian	If accompanied with tortures or any offence	Article 191	Death
Forced labour for civilians, sequestration accompanied by torture, embezzlement, theft and unlawful destruction of military materials		Articles 192, 194 and 202	Death

Source: Loi No 024/2002 du 18 novembre 2002 portant code pénal militaire.⁹⁷¹

⁹⁷¹ *Journal Officiel*, n° spécial du 20 mars 2003

Aggravating circumstances that justify the death penalty are war, public disorder, emergency period, torture and the victim's death. Genocide and crimes against humanity are capital crimes whether perpetrated in peacetime or in wartime. Articles 173-175 of the military penal code do not provide for any punishment against war crimes. There might have been a material mistake in the drafting of the code of 2002. War crimes were capital crimes under the *Code de justice militaire* of 1972.⁹⁷² In ratifying the Rome Statute of the International Criminal Court, the Congo also committed itself to punishing all crimes within the court's jurisdiction.⁹⁷³

There are other unanswered questions however: why are international crimes located in a military penal code, tried before military tribunals and punished with death sentences? The military penal code provides that military tribunals only have jurisdiction over genocide, crimes against humanity and war crimes when they are connected to or indivisible from other crimes.⁹⁷⁴ These are often crimes connected to others such as murder, assassination, poisoning, torture, etc. The consequence of militarizing these crimes is that civilian offenders have appeared before military courts.⁹⁷⁵ To appear before a court whose procedure is limited by disciplinary procedures jeopardizes defenders' rights. Military tribunals are no less than professional courts. Soldiers are prosecuted for having failed to perform their duties.

The wording of the law does not make genocide, crimes against humanity and war crimes military crimes. They are wrongly brought under the jurisdiction of military justice. While desertion is a professional offence, genocide, crimes against humanity and war crimes are the most serious and heinous crimes. They have nothing in common with the military profession.

Therefore, there is only possible justification for this shortcut. The Congo ratified the Rome Statute on 11 April 2002. Meanwhile, amendments of the 1972 military penal code were pending in Parliament. It eventually appeared to be justified to insert international crimes

⁹⁷² Ordonnance-Loi n° 72/60 du 25 septembre 1972 portant code de justice militaire, *Journal Officiel* no 6 of 25 septembre 1972.

⁹⁷³ Article 12 (1) of the Rome Statute of the International Criminal Court of 17 July 1998, UN Doc A/CONF. 183/9, 17 July 1998.

⁹⁷⁴ Article 161 of the Loi n° 024/2002 du 18 novembre 2002 portant code pénal militaire, *Journal Officiel*, n° spécial, 20 mars 2003.

⁹⁷⁵ *Military Prosecutor v. Khawa Panga Mandro*, RMP N0227/PEN/2006, ILDC 524 (CD).

between military crimes rather than amending the ordinary penal code or initiating a separate law.

5.2.2.2 The death penalty at the service of politics

The Congo is one of the most troubled countries on the continent. Coercion, arbitrary arrests and prolonged illegal detention, violence, eliminating political activists, massacres of civilians and students, and more recently intertribal and interethnic killings, have characterized it since its independence.⁹⁷⁶ Unfortunately, “even before 1960, documentation on criminal statistics was difficult to find and since independence it has not usually been readily available”.⁹⁷⁷ Congo is one of the Sub-Saharan countries that has developed a practice of not disclosing data on capital punishment.⁹⁷⁸ It applied the death penalty in such a way as to terrorize and intimidate the population.⁹⁷⁹

Les pendus de la pentecote were the first victims of Mobutu’s regime. Four persons (Evariste Kimba, Emmanuel Bamba, Alexandre Mahamba and Jerome Anany) were hanged six months after Mobutu’s putsch of 24 November 1966. The Minister of information had reported that they would receive a death sentence for high treason and be hanged. He later alleged that he was only speaking in the conditional tense. The court martial, created the day after the 1966 Pentecost,⁹⁸⁰ took 90 minutes for hearings and five minutes for deliberation.⁹⁸¹ The defendants were executed at the current Kasa-Vubu Bridge in Kinshasa. Later Mobutu declared that “...it was necessary to strike by example [...] so that people may not dare again”.⁹⁸²

⁹⁷⁶ Thomas Turner, “Zaire: Flying high Above the Toads: Mobutu and Stalemated Democracy”, in John F. Clark and David E. Gardiner, eds., *Political Reform in Francophone Africa*, Oxford: Westview Press, 1997, at pp. 246-264 at 248.

⁹⁷⁷ *Supra* note 965, at p.26.

⁹⁷⁸ Figures on the number of African countries willing to disclose their data on the death penalty is striking. Out of 46 countries, only seven participated in the 1975 report (UN Doc E/5616), the number increased to nine in 1980 (UN Doc E 1980/9), went to five in 1985 (UN Doc E/1985/43/Corr1) before falling to only two countries namely Mauritius and Cape Verde, in 1990 (UN Doc E/1990/38/Rev.1). In 1996, six countries responded (UN Doc E/CN.15/1996/19) but again the number gradually decreased to five in 2000 (UN Doc E/2000/3), four in 2005 (UN Doc E/2005/3) and two in 2010 (UN Doc E/2010/10).

⁹⁷⁹ *Supra* note 976, at p.248.

⁹⁸⁰ Ordonnance n° 66/338 du 30 mai 1966 portant création du tribunal militaire d’exception.

⁹⁸¹ Conférence Nationale Souveraine, *Période Allant de 1965 à 1971*, Dossier 1, août 1992, at p.6.

⁹⁸² *Ibid.*, at p. 12.

Two years later, Mobutu gave a tenuous amnesty to his former rebel opponent, Pierre Mulele, for the purpose of peace and reconciliation. The latter sailed on a presidential boat from Brazzaville and received a heroic welcome in Kinshasa. In a public meeting at the *Park de la Revolution* on 2 October 1968, Mobutu declared that Pierre Mulele committed crimes against the nation. He was arrested before the end of the speech and tried by a military tribunal at the Kokolo military camp. The court delivered the judgment on the 8 October and on the 10 October 1968, the radio announced that Pierre Mulele had been sentenced to death and executed by shooting.⁹⁸³ A year before, Moïse Tshombé, the then secessionist President of Katanga and prime minister of Congo, had received a death sentence in absentia for high treason during the famous trial of *Les procès Tshipola*. He escaped hanging before he mysteriously disappeared in Algiers, where President Houari Boumedienne had opposed his extradition to Kinshasa.⁹⁸⁴ His co-defendants, the *gendarmes Katangais*, were convicted of treason as well and executed.

The *Coup monté et manqué* trial of 1 September 1975 tried more than thirty persons accused of treason, assassination, creating military gangs, inciting soldiers to insubordination and disclosing military secrets. Four officers and three accomplices were sentenced to death. They spent 20 months on death row before receiving mercy on the 49th birthday of President Mobutu.⁹⁸⁵ The *Conférence Nationale Souveraine* concluded that Mobutu perpetrated crimes against humanity in 1978 when he massacred the entire village of Mulembe in Idiofa. He had accused the villagers of reincarnating Pierre Mulele's ideology. On this basis, fourteen survivors of the massacre were sentenced to death and executed.⁹⁸⁶ After the 1978 *procès du siècle* that brought 90 persons to trial for treason and terrorism, and 13 of those to the gallows the next morning, Mobutu declared that he would no longer accept human rights pretexts for reprieving death sentences.⁹⁸⁷

Summary executions were also a regular practice beside military trials. In retentionist countries, *de facto* and summary executions may exceed the total number of world

⁹⁸³ *Ibid.*, Dossier 3, at p. 35.

⁹⁸⁴ *Ibid.*, Dossier 4, at pp. 38-46.

⁹⁸⁵ Ordonnance n° 79/238 du 13 octobre 1979 portant grâce présidentielle. See also Conférence Nationale Souveraine, *Coup d'Etat Monté et Manqué de 1975: Rapport de Synthèse*, Dossier 5, août 1992, at pp. 59-69.

⁹⁸⁶ Conférence Nationale Souveraine, *Massacre d'Idiofa en Janvier 1978*, Dossier 7, août 1992, at pp. 73-80

⁹⁸⁷ Conférence Nationale Souveraine, *Procès Dits des Terroristes*, Dossier 08 bis, août 1992, at pp. 89-102.

reported judicial executions.⁹⁸⁸ Without naming individual cases, the following were massacred: students of the Kinshasa University in 1969, peasants of Kabare and Idjwi in 1985, Kinshasa protesters in 1988 and 1990, students of the Lubumbashi University in 1990, peasants in Mbuji-Mayi in 1991, Christians in 1992, etc.⁹⁸⁹

The 1992 *Conférence Nationale Souveraine* found that President Mobutu used the death penalty as a threat against his political opponents.⁹⁹⁰ At that time, the conference suggested taking four steps that would lead to a complete abolition of the death penalty: envisaging the abolition of the death penalty within five years from 1992, restricting the imposition of the death penalty to assassination, raising public awareness of abolition and improving penitentiary administration.⁹⁹¹

In the 1990s, Mobutu started commuting death sentences and he envisaged abolition. Political instability, civil war and massive crimes reversed this trend however.⁹⁹² During the 1996 war, both sides applied capital punishment for different purposes: Mobutu to punish treason and Laurent Kabila to discipline soldiers. For example, in January 1997, the Kisangani military tribunal imposed death sentences on 14 governmental soldiers for cowardice and desertion and one civilian for disclosing a military position to the enemy.⁹⁹³ In May 1997, Laurent Kabila resorted to speedy trials and executions as well. Soldier Kanyongo Kisase's trial for murder took only a few hours. He was refused both appeal and mercy and executed on 22 October 1997.⁹⁹⁴ In 1998, the second year in office of Laurent

⁹⁸⁸ UN Doc E/1980/9 at para 84.

⁹⁸⁹ See alternatively *Conférence Nationale Souveraine, Période Allant de 1965 à 1971, Dossier 2, août 1992, at pp. 15-25, Conférence Nationale Souveraine, Massacres Dits de l'Île d'Idjwi (Sud-Kivu) 1985, Dossier 10, août 1992, at pp.110-112, Massacre Dits de Kabare, Dossier 11, août 1992, at pp.113-116, Massacre du Pont Kasa- Vubu, Dimanche 17 Janvier 1988, Dossier 12, août 1992, at pp.117-125, Soulèvement Populaire Protestant Contre la Hausse des Prix-01 Décembre 1990, Dossier 12 bis, août 1992, at pp. 126-132, Massacres (des Chrétiens) des 16 Février et 01 Mars 1992, Dossier 13, août 1992, at pp.133-137, Massacre des Etudiants de l'Université de Lubumbashi dans la Nuit du 11 au 12 Mai 1990, Dossier 14, août 1992, at pp.138-169, Massacre de Mbuji Mayi du 13 au 17 Avril 1991, Dossier 15, août 1992, at pp.170-178.*

⁹⁹⁰ *Supra* note 981, at p.12.

⁹⁹¹ Nyabirungu Mwene Songa, *Traité du droit pénal Congolais*, Kinshasa: Editions Universitaires Africaines, 2007, at p.369.

⁹⁹² Roger Hood, *The Death Penalty: A Worldwide Perspective*, 3rd edn, New York: Oxford University Press, 2002, at p.41.

⁹⁹³ Amnesty International, *Zaire: Killings and Other Human Rights Violations by Security Forces, 1997*, at p.8, AI Index: AFR 62/06/97.

⁹⁹⁴ Amnesty International, *DRC: Deadly Alliances in Congolese Forests, 1997*, at p.31, AFR 62/33/97.

Kabila, the Congo executed 100 persons.⁹⁹⁵ There were 236 executions between 1996 and 2000.⁹⁹⁶ In 2002, President Joseph Kabila declared a moratorium on executions under the Congolese Charter of Human Rights. However, the Special Rapporteur on capital punishment doubted both the decision and the binding character of the charter.⁹⁹⁷

Indeed, Joseph Kabila hanged more people than did his predecessor. In a list of the number of executions per country between 1999 and 2003, the Congo occupied the fifth position.⁹⁹⁸ It had been thirteenth between 1994 and 1998. Statistics indicate that there were 350 executions between 1999 and 2003.⁹⁹⁹ Although some consider that the last execution dates back 2003,¹⁰⁰⁰ death sentences¹⁰⁰¹ and secret executions continued. It was reported that 15 persons were secretly executed on 7 January 2003.¹⁰⁰² The Congo is reported to have executed 215 persons between 2002 and 2006.¹⁰⁰³

5.2.2.3 Towards the abolition of the death penalty in Congo

The law and the courts have played the game of politics in bringing a huge number of soldiers and civilians to the gallows regardless of their age or sex through a process that has ignored all standards of fairness. The promised abolition of military courts only happened after the Constitution of 18 February 2006.¹⁰⁰⁴ The Constitution is also interpreted as containing abolitionist provisions because it proclaims an unrestricted right to life and dignity.¹⁰⁰⁵

⁹⁹⁵ UN Doc E/2005/3 at 46 table 2. Although data are presented for the period 1994-1998, it is indicated that they all count for 1998. See UN Doc E/2000/3 at p.12.

⁹⁹⁶ *Supra* note 992, at p. 92.

⁹⁹⁷ A/57/437 at 36.

⁹⁹⁸ UN Doc E/2005/3 at 46 table 2.

⁹⁹⁹ *Ibid.*

¹⁰⁰⁰ Anjan Sundaram, "Congolese Minors Sit on Death Row", *IPS*, 26 April 2006 at <http://ipsnews.net/news.asp?idnews=33017>, (accessed 8 July 2010).

¹⁰⁰¹ Nadine Kavira, "Kalemie: Affaire Féfé et Consorts, Peine de Mort pour Trois Prévenus", Augustin Kinienzi "Procès Franck Ngyke: Peine Capital pour Tous le Prévenus" *Le Potentiel* of 5 April 2007.

¹⁰⁰² Home Office (United Kingdom), *Democratic Republic of Congo*, 2004, at 5.29.

¹⁰⁰³ *Supra* note 3, at p. 149.

¹⁰⁰⁴ Article 149 para 3 of the Constitution de la République Démocratique du Congo du 18 février 2006 telle que révisée par la loi no11/002 du 02 janvier 2011, *Journal Officiel de la République Démocratique du Congo*, no 3 du 1er février 2011.

¹⁰⁰⁵ Article 16 read together with article 61 the Constitution de la République Démocratique du Congo du 18 février 2006, *Ibid.*

Therefore, death sentences imposed from the 18 February 2006 should be deemed to be unconstitutional.¹⁰⁰⁶ However, according to article 150 of the Constitution, judges impose the penalties available in the penal code. Penal provisions cannot be abrogated tacitly. That lays the blame with the lawmaker who does not enact a penal code consistent with the constitution. Meanwhile, the only remedy for the condemned would be an appeal to the constitutional court. Nevertheless, the condemned has few chances of having the case heard. Article 139 of the Constitution provides for an *a priori* judicial review of constitutionality of laws, initiated by few top political organs. In sum, a penal law that outlaws the death penalty in Congo remains the only efficient abolitionist mechanism.¹⁰⁰⁷

Furthermore, it remains unclear whether States Parties to the Rome Statute of the International Criminal Court such as the Congo may impose severer punishments than the court itself would. This stems from the problem of precedence between article 77 and article 80 of the Rome Statute. It is argued that the rationale of article 80 was a political compromise intending to attract ratifications;¹⁰⁰⁸ or a concession to countries viscerally or culturally attached to death penalty.¹⁰⁰⁹ It follows that article 80 read together with article 17, which makes the International Criminal Court a complementary tribunal to domestic courts, gives power to domestic judges to impose the death penalty.¹⁰¹⁰ Congolese courts have however taken an opposite direction. When trying crimes within the jurisdiction of the Rome Statute, Congolese Military Courts have excluded the death penalty as provided for by the Military Penal Code and referred to article 77 of the Rome Statute.¹⁰¹¹

They confirm the fact that the ambiguous position of Congo during the negotiations of the Rome Statute meant it joined Cuba, Japan, Kenya and Senegal whose silence implied that they have substituted the death penalty for imprisonment.¹⁰¹² It is not clear that Congolese military judges were aware of the negotiation process. They might however have acknowledged the abolitionist signal that the Rome Statute has sent in excluding the death

¹⁰⁰⁶ *Supra* note 991, at p.371.

¹⁰⁰⁷ *Ibid.*, at pp.370-371.

¹⁰⁰⁸ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, New York: Oxford University Press, 2010, at p.921.

¹⁰⁰⁹ *Supra* note 991, at p.369.

¹⁰¹⁰ Nadia Bernaz, *Supra* note 18, at p.268.

¹⁰¹¹ *Military Prosecutor v. Khawa Panga Mandro*, RMP N0227/PEN/2006, ILDC 524 (CD), para 20 and 113 and *Military Prosecutor v. Bongji Massaba*, RP No 018/2006, ILCD 387 (CD2006), para 61, 66-68 and 117.

¹⁰¹² Countries which declared to prefer the death penalty during negotiations of the Rome Statute of the International Criminal Court include Ethiopia, Saudi Arabia, Lebanon, Rwanda and Trinidad and Tobago. See William A, Schabas, *Supra* note 19, 2002, at p.253, footnote 110 and at p.258.

penalty for the most serious crimes. Congolese judges have interpreted their country's ratification of the Rome Statute as a subscription to the principle of article 77 rather than to the exception contained in article 80. This somehow confirms that the window open by article 80 is not an excuse for countries to impose the death penalty.

The worst mistake of our time has been resorting to the death penalty in the belief that its use protects the paramount interests of the state or fundamental rights. The case of the Democratic Republic of Congo demonstrates that this is an illusion. Stability is not achieved by cheapening the lives of citizens. While governments think they are quelling political dissidents by resorting to repressive punishments, their actions create chaos and an infinite circle of violence. Thus, the values protected under articles 16 and 61 of the Congolese Constitution that proclaim the sanctity of life and the ratification of the Rome Statute of the International Criminal Court call on Congo to abolish the death penalty.

5.2.3 The death penalty in Nigeria

The death penalty has a long history in Nigeria. It existed already under indigenous law and *Shari'a* law. With the English law influence, the sentencing policy of these pre-colonial laws progressively fell in line with the new legal order. Indigenous and Muslim judges started applying punishments similar to those of English courts.¹⁰¹³

After independence, the task became easier. A uniform penal code applied all over Nigeria. For the sake of harmony, lessons on criminal law and procedure were initiated in the Northern Province, which was a bastion of *Shari'a* and native courts until independence.¹⁰¹⁴ The survival of pre-colonial courts and the extension of the penal and the criminal procedure codes to the entire country created a jurisprudence that was neither indigenous nor Islamic nor modern.

Indigenous and Islamic judges had however adopted attitudes similar to those of English lawyers.¹⁰¹⁵ Unfortunately, the political turbulence that characterized Nigeria post independence led to the militarization of criminal law. The military junta systematically

¹⁰¹³ *Supra* note 528, at pp. 268-269.

¹⁰¹⁴ *Ibid.*, at p. 266.

¹⁰¹⁵ *Supra* note 528, at p. 287.

overthrew civilian rulers and took the law in hostage. As a component of criminal law, the death penalty became an instrument that silenced opposing voices.¹⁰¹⁶ This exacerbated the latent but existing religious and ethnic antagonism. Nigerian Muslims found refuge in Islamic law and called for an Islamic State with wider application of *Shari'a* law, which itself is not death penalty free.¹⁰¹⁷ With the arrival of democracy and the strengthening of a civil society advocating locally and internationally for the abolition of capital punishment, the federal state of Nigeria was split into abolitionists and retentionists.

5.2.3.1 The death penalty at the service of politics

As did most of the former British colonies, Nigeria introduced fundamental rights into its Constitution at independence. Prior to independence, it was put under the jurisdiction of the European Convention for the Protection of Human Rights and Fundamental Freedoms by a 1959 order in Council.¹⁰¹⁸ In 1963, independent Nigeria reproduced a whole chapter on fundamental rights in its first Constitution inspired by the text of the European Convention. Since then, the rights to life (article 2 of the European Convention), to dignity and to not be subjected to cruel, inhuman and degrading treatment (article 3 of the European Convention) have become part of Nigerian law.¹⁰¹⁹ Articles 18 and 19 of the 1963 Constitution respectively reproduced nearly exactly articles 2 and 3 of the European Convention.¹⁰²⁰

The European Convention's drafting history and the state of international law in 1950s make article 2 of the European Convention one of the most conservative and anachronistic provisions on the death penalty. At the time it was drafted, in 1950, most European states were retentionist and the execution of Nazi criminals was still fresh in the collective

¹⁰¹⁶ Anthony Onyemachi Agwuele, "Military Occupation, the National Question and the Rise of Ethnic Nationalism", in Toyin Falola, ed., *Nigeria in the Twentieth Century*, Durham: Carolina Academy Press, 2002, at pp. 350 and 352.

¹⁰¹⁷ John Hunwick, "An African Case Study of Political Islam: Nigeria", (1992) 524 *Annals of the American Academy of Political and Social Sciences* 143-155.

¹⁰¹⁸ Nigeria (Constitution Amendment no 3) Order in Council, 1959 (S.I. 1959 No 1772, p.3229, s. 69 and Sch) and section 3 of the Nigeria Independence Act, 1960 (8 &9 Eliz, 2 Ch.55).

¹⁰¹⁹ For example sections 30 and 31 of the Constitution of the Federal Republic of Nigeria of 1 October 1979 and sections 33 and 34 of the Constitution of the Federal Republic of Nigeria (Decree no 24 of 1999).

¹⁰²⁰ Articles 2 and 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, Rome 4 November 1950, E.T.S No 5 read with sections 18 and 19 of the Constitution of the Federation of Nigeria Act no 20, 1963.

memory. The European Convention is also unique in that it clearly sets up exceptions other than the death penalty to the right to life in article 2, paragraph 2 and in being silent, amongst other things, on juvenile offenders and pregnant women.¹⁰²¹

In drafting its fundamental rights, Nigeria added three more exceptions:

- a. the word mutiny was added after insurrection,
- b. lethal force may also be used to prevent the commission of a criminal offence and
- c. under article 18 (3) of the Nigerian Constitution, the use of force by the government outside these prescribed cases is as well justified.¹⁰²²

The interpretation of exceptions to fundamental rights has been controversial. The Supreme Court of Nigeria maintains that the death penalty is constitutional since it only acts as an exception which is unmistakably part of the construction of the provision on the right to life.

[The provision...] recognizes deprivation of life so long as it is pursuant to the execution of the sentence of a court in a criminal offence of which the accused has been found guilty in Nigeria.¹⁰²³

It is unfortunate that the Supreme Court does not elaborate further to find that exceptions to the right to life annihilate the whole value of the constitution.

As regards extrajudicial exceptions, Grove argues that they are unacceptable.¹⁰²⁴ The chapter of Fundamental Rights was intended to protect individuals against the actions of the majority dominating Nigerian political life. Since the legislative and the executive cannot pronounce the unconstitutionality of their excess, the duty of protecting individuals in applying and upholding the law, and principally the constitution, is vested in the courts. However, the Supreme Court held that its role was not to speculate on what the law ought to be but to decide whether any exception to fundamental rights was “reasonably justifiable in a democratic society”.¹⁰²⁵ This is said to be an erroneous interpretation. Since the chapter was born out of the European Convention, the test is not reasonableness, but

¹⁰²¹ *Supra* note 19, at p.260-265.

¹⁰²² Section 18 (3) of the Constitution of the Federation of Nigeria Act no 20, 1963.

¹⁰²³ *Onuoha v The State* (1998) 13 N.W.L.R. 531 at 587-588.

¹⁰²⁴ D. L. Grove, “The ‘Sentinels’ of Liberty? The Nigerian Judiciary and Fundamental Rights”, (1963) *7Journal of African Law*170-171.

¹⁰²⁵ *DPP v. Obi* (1961) 1 All N.L.R. 182.

rather necessity. “Restrictions ... are permitted only when they are “necessary” and not “reasonably justifiable”.¹⁰²⁶

The verbatim adoption of the European convention means that “a person is deemed to have been deprived of his life constitutionally only if the force which was applied was ‘no more that is absolutely necessary’”.¹⁰²⁷ Therefore, in retaining the test of ‘reasonably justifiable’ the court impliedly consented to reducing its power to review governmental action.¹⁰²⁸ In other words, the Supreme Court should have noticed that in foreseeing extrajudicial exceptions to the right to life, the Constitution created artificial obstacles against any challenge of the constitutionality of governmental actions. The individual is often part of an unpopular minority mainly when his actions are appreciated through the wording of a Constitution (such as the Nigerian constitution) adopted by parliament rather than referendum. In this respect, the court should bear in mind that it performs its duties more correctly and efficiently when it concentrates more on individual rights and less on exceptions to those rights.

The main capital crimes are treason and culpable homicide, which comprises both murder and negligent homicide.¹⁰²⁹ However, the death penalty may discretionarily be imposed also for brigandage followed by culpable homicide, participating in an ordeal trial that provoked death, false testimony from which an innocent person is executed, attempt to commit culpable homicide by a convict serving a prison sentence and abetment of suicide of a mentally disabled person or a child.¹⁰³⁰ Among the safeguards are the prohibition of death sentences for juvenile offenders, pregnant women and mentally diseased persons.¹⁰³¹ Persons convicted of capital crimes also enjoy the right to appeal which is automatic when the death sentence emanates from a native court. The condemned may also apply for mercy.¹⁰³²

¹⁰²⁶ Alexander S. De Smith, “Fundamental Rights in the New Commonwealth-II”, (1961) 10 *International Comparative Law Quarterly* 222-223.

¹⁰²⁷ *Ibid.*

¹⁰²⁸ *Supra* note 1024, at p. 167.

¹⁰²⁹ Alan Gledhil, *The Penal Codes of Northern Nigeria and Sudan*, London: Sweet and Maxwell, 1963, at p.466.

¹⁰³⁰ *Ibid.*, at p.757.

¹⁰³¹ UN Doc E/67 IV.15, 1968, at para 185-186.

¹⁰³² *Supra* note 1029, at pp.757-758.

The use of capital punishment increased with military regimes. In fact, the 1966 military coup started a cycle of military dictatorship that by 2002 had lasted for 30 out of the 41 years of independent Nigeria.¹⁰³³ The military junta attacked the Constitution by annihilating the chapter on fundamental rights, suspending the Constitution as a whole and by passing military decrees, which had primacy over any other law including the constitution.¹⁰³⁴ For example, the Decree no 1 of 1966 that amended the Constitution provided that "... this Constitution shall not prevail over a Decree and nothing in this Constitution shall render any provision of a decree void to any extent whatsoever".¹⁰³⁵ A more authoritarian phrasing appears in section 3 (1) of the Decree no 17 of 1966:

The Government shall have power to make laws for peace and order of Nigeria with respect to any matter whatsoever. It shall make laws by decrees and no question as to the validity of this or any decree or edict shall be entertained by any court of law in Nigeria.¹⁰³⁶

Subordinating the Constitution to military decrees meant that the legality of those decrees could not be questioned. The certainty of the applicable law to a specific conduct was nullified. This enabled soldiers to penalize conduct that was previously not an offence by adopting retroactive penal laws. Such laws were often adopted in targeting 'the undesirable elements' that opposed the military junta. "In other words, arbitrary, inconsistent and obnoxious laws were promulgated provided they meet the needs of the incumbent dictator".¹⁰³⁷

The federal police became an instrument of oppression focused on political opponents, terrorizing the population and repressing agitators who were demanding the acknowledgment of minimum human rights and the suppression of military tribunals.¹⁰³⁸ Among the military tribunals were the Recovery of Public Property Special Military Tribunal,¹⁰³⁹ the Tribunal created under the Robbery and Firearms Act,¹⁰⁴⁰ Miscellaneous

¹⁰³³ *Supra* note 1016. See also George Klay Kieh and Pita Ogaba Agbese, "From Politics Back to the Barracks in Nigeria: A Theoretical Exploration", (1993) 30 *Journal of Peace Research* 413-414.

¹⁰³⁴ Chika B. Onwekwe, "Militarism versus Democratic Governance", in Toyin Falola, ed., *Nigeria in the Twentieth Century*, Durham: Carolina Academy Press, 2002, at pp. 389-390.

¹⁰³⁵ Decree no 1 of 1966 (Nigeria).

¹⁰³⁶ Section 3 (1) of the Decree no 17 1966

¹⁰³⁷ *Supra* note 1034.

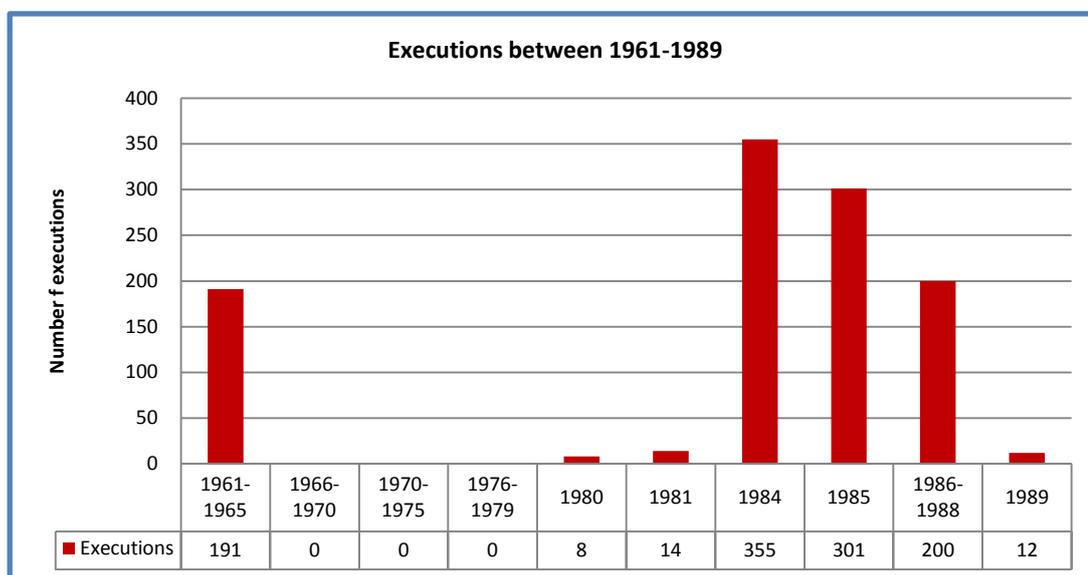
¹⁰³⁸ *Supra* note 1016, at p. 352.

¹⁰³⁹ Recovery of Public Property (Special Military Tribunal) Act of 1990, Cap. 389.

¹⁰⁴⁰ Robbery and Firearms (Special Provision) Act of 1970 as amended by the Robbery and firearms (Special Provision) Act of 1990, Cap.398.

Offenses Tribunal¹⁰⁴¹ and the tribunal created under Exchange Control (Anti-sabotage) Act.¹⁰⁴² The military assisted by policemen with no specialized knowledge in law, tried crimes within the jurisdiction of these tribunals, which were empowered to impose the death penalty. Until human rights activists pushed the military to set up the special appeal tribunal, there was no right to appeal under the Robbery and Firearm Tribunal.¹⁰⁴³ Although the absence of official reports makes it impossible to give the actual rate of executions,¹⁰⁴⁴ it is common knowledge that under the firearms and robbery act, military tribunals made Nigeria one of the world leaders of execution.

Figure 11: Executions of the death penalty in Nigeria (1961-1989)



NB: 0 represents data that are not available.

Source: Olubgeni Fatula¹⁰⁴⁵ and Amnesty International.¹⁰⁴⁶

There were 251 executions between 1959 and 1960.¹⁰⁴⁷ Despite the unavailability of data for 1966-1979, it is known that the majority of executed persons were convicted under the robbery and firearms decree of 1970. Respite only occurred during periods of ephemera

¹⁰⁴¹ Special Tribunal (Miscellaneous Offences) Act of 1990, Cap.410.

¹⁰⁴² Exchange Control (Anti- Sabotage) Act of 1990, Cap. 114.

¹⁰⁴³ Bolanle Awe, "Conflict and Divergence: Government and Society in Nigeria", (1999) 42 *African Studies Review* 12.

¹⁰⁴⁴ UN Doc E/1985/43, p. 10 at 29.

¹⁰⁴⁵ Olugbemi Fatula, "Capital Punishment: To Be or not To Be in Nigeria", (2001-2004) 14 *Lesotho Law Journal* 103.

¹⁰⁴⁶ Amnesty International, *Nigeria: Death Sentences for Murder*, 1991, AI Index: AFR 44/03/91.

¹⁰⁴⁷ UN Doc E/67 IV.15, 1968, at p.43.

civilian rule such as that of 1979-1983. In 1979, the civilian president restored the jurisdiction of the high court over armed robbery and the right to appeal was reinstated. Then “a relatively small number of executions took place”.¹⁰⁴⁸ In 1983, the civilian government was overthrown. In 1984, special military tribunals were re-established and the right to appeal was again suppressed; cases were tried by the military and police officers.¹⁰⁴⁹ That year Nigerians watched at least one execution per day. Article 11 (4) of the Robbery and Firearms Decree (the 1984 version) reads, “[no] appeal shall lie from a decision of a tribunal constituted under this Act or from any confirmation or dismissal of such decision by the Governor”.¹⁰⁵⁰

In August 1985, a new military junta withdrew the death penalty under the Miscellaneous Decree that made drug offences, tempering with electric or telephone cables, tempering with pipelines and arson capital crimes. However, the death penalty was maintained without appeal for armed robbery. In 1986, the Military Governor of the state of Niger stated that “people convicted of armed robbery should be executed by being wounded slowly so that they could die by instalments and thereby their death could take a longer time”.¹⁰⁵¹

It is doubtful whether there were only 12 executions in 1989. The government had decided to carry out executions in secret from 1989.¹⁰⁵² There were at least 2,600 executions between 1970 and 1999, an average of 90 executions per year.¹⁰⁵³ The wave of execution increased again in 1990.

¹⁰⁴⁸ Amnesty International, *Nigeria: Death Sentences and Executions for Armed Robbery*, 1992, AI Index: AFR/44/04/92.

¹⁰⁴⁹ Robbery and Firearms (Special provision) Decree No. 5 of 1984.

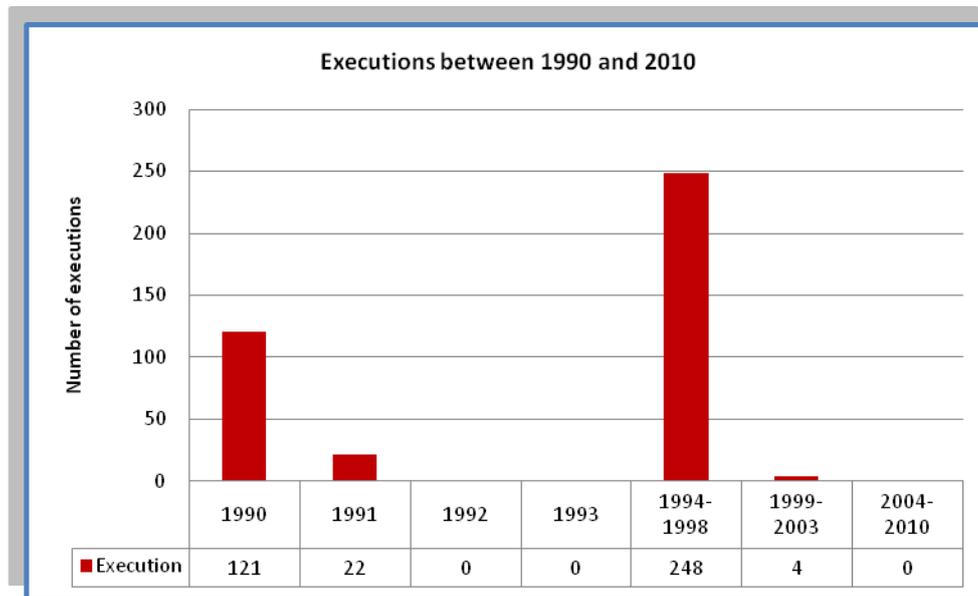
¹⁰⁵⁰ Section 11(4) of the Robbery and Firearms (Special provision) Decree No. 5 of 1984.

¹⁰⁵¹ *Supra* note 1045, at p. 104.

¹⁰⁵² Amnesty International, *Nigeria: Death Sentences for Murder*, 1991, AI Index AFR 44/03/91.

¹⁰⁵³ Amnesty International, *Nigeria: Imo State Death Penalty Puts Victims at Risk*, 7 May 2009.

Figure 112: Executions of the death penalty in Nigeria (1990-2010)



NB: 0 represents data that are unavailable save for 2004-2010.

Source: United Nations¹⁰⁵⁴ and Amnesty International.¹⁰⁵⁵

In 1990, of the 121 persons executed, 69 were convicted of treason for attempting a *coup d'état*.¹⁰⁵⁶ Critics of this practice forced military government to retreat and partially modify the law in 1990.¹⁰⁵⁷ In 1991, the Nigerian Constitutional Rights Project seized the African Commission for Human and Peoples' Rights on provisions, which had not been improved by the 1990 amendment that limited the right to appeal, excluded the appeal against the Governor's decision on mercy and organized a bench where soldiers were chaired by a civilian judge.¹⁰⁵⁸ The Commission confirmed that Nigerian laws and courts have violated "fundamental rights as described in article 7 (1) (a) of the African Charter [of Human and Peoples' Rights]. In this the fundamental rights in question are those to life and liberty provided for in article 4 and 6 of the African Charter".¹⁰⁵⁹

¹⁰⁵⁴ UN Doc E/2000/3, p.13 table 2 and UN Doc E/2010/10, p.22 table 3.

¹⁰⁵⁵ *Supra* note 1048.

¹⁰⁵⁶ Amnesty International, *Nigeria: Death Sentences and Executions for Armed Robbery*, 1992, AI Index: AFR/44/04/92.

¹⁰⁵⁷ Robbery and Firearms (Special Provisions) Act of 1990, Cap. 398.

¹⁰⁵⁸ *Constitutional Rights Project v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 60/91 (1995)

¹⁰⁵⁹ *Ibid.*

In analyzing the fairness of the right to appeal, the Commission stated that “... to foreclose any avenue of appeal to ‘competent organs’ in criminal cases bearing such penalties clearly violates article 7 (1) (A), and increase the risk that severe violations may go undressed”.¹⁰⁶⁰

Accordingly, the government started commuting death sentences. In 1991, death sentences were commuted for 8 persons convicted of treason.¹⁰⁶¹ In 1992, 13 death sentences in River State were all pardoned. However, in 1994, the rate of execution was alarming. 100 persons were executed.¹⁰⁶² This period corresponded with post electoral unrest that opposed General *Sani Abacha* and *Moshood Abiola*, who later supposedly died in detention. The African Commission reacted by calling upon “African military regimes to respect fundamental rights”.¹⁰⁶³ The military regime responded by giving its decrees primacy over the African Charter on Human and People’s Rights, a position that local judges vividly combated.¹⁰⁶⁴ The African Commission condemned gross violations of human rights, the exclusion of the African Charter on Human and Peoples’ Rights and the disregard of ordinary courts by the military junta.¹⁰⁶⁵

The battle with the African Commission worsened as death sentences without possibility of appeal were imposed against *Ken Saro Wiwa* and his eight co-defendants in 1995. The African Commission condemned the continued gross breach of human rights targeting human rights activists and political opponents.¹⁰⁶⁶ The government carried out executions despite the African Union and United Nations protests.¹⁰⁶⁷ Unfair trials led to the arbitrary executions of 248 persons between 1994 and 1998. The last four years of *Sani Abacha’s* regime made Nigeria seventh in the world in a list ranking countries’ number of executed persons.¹⁰⁶⁸

¹⁰⁶⁰ *Ibid.*

¹⁰⁶¹ Amnesty International has given two different figures of executions (15 and 20) for 1991. See alternatively Amnesty International, *Nigeria: Death Sentences for murder*, 18 January 1991, AI Index: AFR 44/03/91 and Amnesty International, *Nigeria: Death Sentences and Executions for Armed Robbery*, 07 May 1992, AI Index: AFR/44/04/92.

¹⁰⁶² Amnesty International, *Nigeria: Death Sentences and Executions for Armed Robbery*, 07 May 1992, AI Index: AFR/44/04/92.

¹⁰⁶³ 16.ACHPR /Res.11(XVI)94: Resolution on Nigeria (1994)

¹⁰⁶⁴ *Abacha v Fuwehinmi* (2000) 6 N.W.L.R. 228.

¹⁰⁶⁵ 16. ACHPR /Res.11(XVI) 94:Resolution on Nigeria (1994).

¹⁰⁶⁶ ACHPR /Res.16 (XVII) 95: Resolution on Nigeria (1995).

¹⁰⁶⁷ A/RES/50/199 of 11 March 1996.

¹⁰⁶⁸ UN Doc E/2000/3, p.13 table 2.

The country's last executions reportedly date back to 2004, when 4 persons were executed.¹⁰⁶⁹ In 2005, Nigeria indicated that it was envisaging abolishing the death penalty.¹⁰⁷⁰ It is doubtful whether Nigeria has in fact applied a moratorium on executions. The strength of the abolitionist movement has sometimes created a hypocritical political stance. Many retentionist countries claim *de facto* abolitionist status while executions continue in secret. In Kano, at least six persons were secretly executed in 2006.¹⁰⁷¹ This number increased to seven in 2007. Prison services have ensured that the condemned are relocated in other states before their execution.¹⁰⁷² Since 1984, executions have been at times carried out simply to decongest prisons.¹⁰⁷³ The extension of the death penalty to new crimes such as kidnapping and homosexuality is also pending. Six states extended the death penalty to kidnapping in 2009.¹⁰⁷⁴ The Governor of the Imo State declared in July 2010 that he would not hesitate to sign death warrants against kidnappers.¹⁰⁷⁵ There are concerns that homosexuality will also be made a capital crime in the South.¹⁰⁷⁶

It is unfortunate that the leadership has not realized that the death penalty has been politically instrumentalized in Nigeria. It is associated with oppression, dictatorship, unjust laws and unfair justice. This is well understood by those continuing its use even under *Shari'a* law.

¹⁰⁶⁹ UN Doc E/2010/10 at para 27, footnote 70.

¹⁰⁷⁰ UN Doc E/2005/3 at 37.

¹⁰⁷¹ Amnesty International, *Nigeria: Amnesty International, Human Rights Watch and Nigerian Civil Society Call on State Governments not to Resume the Execution of Prisoners*, AI Index: AFR 44/010/2010.

¹⁰⁷² Amnesty International, *Nigeria: Government Misleads World about Death Penalty Record*, 25 June 2010, AI Index, PRE 01/004/2007.

¹⁰⁷³ Amnesty International, *When the State Kills ... the Death Penalty v. Human Rights*, London: Amnesty International Publications, 1989, at pp.186-187 and *Supra* note 1071.

¹⁰⁷⁴ Amnesty International, *Death Sentences and Executions 2009*, ACT 50/001/2010, at p.23.

¹⁰⁷⁵ Kareem Ubogodaga, "Death Penalty for Kidnappers", *PM News*, 27 July 2010.

¹⁰⁷⁶ Fran Blandy, "Homosexual Africans Face Prison, Intolerance and the Death Penalty", *The Telegraph*, 11 January 2010. In 2009, the Nigerian Parliament attempted to criminalize the same sex marriage under a civil law. See Human Rights Watch, *Nigeria Rejects "Same Sex" Marriage Ban*, 26 January 2009.

5.2.3.2 *The politicization of Shari'a and the death penalty*

It was under military rule that the diffusion of political energy became a contributing factor to the politicization of religion, or rather, the use of religion as a tool for creating a political constituency.¹⁰⁷⁷ By 1977, drafters of the new Constitution had suggested the creation of a *Shari'a* Federal Court of Appeal. Although Christians opposed the idea on the grounds of equality, Muslim parliamentarians succeeded in having three judges exclusively vested in *Shari'a* related cases. The 1979 Constitution conceded also that states can establish *Shari'a* courts of appeal in personal status matters.¹⁰⁷⁸ Muslims argued that refusal would mean that lay judges would have to try *Shari'a* cases. This was perceived as both discrimination and an attack against Islam.¹⁰⁷⁹ While Christians suspected that Muslims intended to Islamize the whole of Nigeria, Muslims felt that their secular country was nothing more than “a child, albeit bastard, of Christianity... [which] has become a sinister but convenient mechanism to blackmail Muslims and impede the progress of Islam”.¹⁰⁸⁰

The radicalization of Islam worried politicians. This divisive debate on *Shari'a* related provisions resurfaced throughout the constitutional history of Nigeria until the current Constitution of 1999. For the sake of national unity, the 1999 Constitution maintained unaltered *Shari'a* provisions of the 1979 Constitution.¹⁰⁸¹ However, the 1999 restoration of civilian rule in twelve Northern States sought to correct prejudices suffered by Muslims in adopting executive and legislative measures with the view of reversing the *statu quo*. The new Constitution extended the jurisdiction of *Shari'a* courts in criminal law and reintroduced community participation in crimes prevention and detection.¹⁰⁸²

The claim for Islamic heritage was translated into the enactment of a *Shari'a* penal code that broke down the compromise that the 1960 penal code had introduced. In fact, flogging and the death penalty were retained in the North because they were also *Shari'a* punishments. The British outlawed repugnant punishments such as amputation of the hands and cross amputation of hand and foot and introduced new methods of executing

¹⁰⁷⁷ *Supra* note 1017.

¹⁰⁷⁸ Andrew Ubaka Iwobi, “Tiptoeing through a Constitutional Minefield: the Great *Shari'a* Controversy in Nigeria”, (2004) 48 *Journal of African law* 115.

¹⁰⁷⁹ *Supra* note 1017.

¹⁰⁸⁰ Ibrahim, “Politics of religion in Nigeria”, p.77 as quoted by John Hunwick, *Supra* note 1017.

¹⁰⁸¹ *Supra* note 1078, at pp. 116-120.

¹⁰⁸² *Ibid.*, at p.121.

the death penalty so as to get rid of crucifixion, decapitation and stoning. At the same time, the *qisas* punishment of retaliation was abolished.¹⁰⁸³ The Zamfara *Shari'a* Courts Law of 1999¹⁰⁸⁴ inspired the other eleven Northern States.¹⁰⁸⁵ It imposes the death penalty by stoning for adultery, rape, sodomy and incest when committed by married persons¹⁰⁸⁶ and crucifixion for robbery if followed by murder.¹⁰⁸⁷ Homicide cases are dealt with by way of retaliation. The victim is entitled to inflict the same pain on the perpetrator.¹⁰⁸⁸

For Nigerian Muslims, the introduction of *Shari'a* law was a re-affirmation of their religious identity, after decades of religious tensions with Christians. They expected *Shari'a* law to redress moral perversity, corruption, enrooted criminal law injustices and economic problems in the North.¹⁰⁸⁹ Nevertheless, Nigeria has been rebuked for violating its international obligations. The death penalty by stoning violates the rights to life and to dignity¹⁰⁹⁰ and adultery, homosexual intercourse and apostasy are excluded from the range of capital crimes as envisaged under international law.¹⁰⁹¹ Capital crimes should be so serious that they threaten human life or bear "lethal or other extremely grave consequences".¹⁰⁹² The United Nations Human Rights Commission has urged Nigeria to outlaw the death penalty for sodomy and adultery.¹⁰⁹³

Nigerian Islamic states point out that international instruments prohibiting *Shari'a* punishments are part of an international plot against Islam.¹⁰⁹⁴ They find that the Torture Convention "intended to make illegal most aspects of *Shari'a* Hudud as divinely ordained by Allah [thereby] violating the fundamental belief of all true Muslims in Nigeria in

¹⁰⁸³ *Supra* note 1078, at pp. 138-139.

¹⁰⁸⁴ *Shari'a* Courts (Administration of Justice and Certain Consequential Changes) Law, No. 5 of 1999.

¹⁰⁸⁵ By 2002, the following States had adopted *Shari'a* criminal laws: Bauch, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto and Yobe.

¹⁰⁸⁶ Sections 127 (b) for adultery, 129 (b) for rape, 131 (b) for sodomy and 136 (b) for incest of the *Shari'a* Courts (Administration of Justice and Certain Consequential Changes) Law, No. 5 of 1999.

¹⁰⁸⁷ Section 153 (d) of *Shari'a* Courts (Administration of Justice and Certain Consequential Changes) Law, No. 5 of 1999.

¹⁰⁸⁸ Section 200 of *Shari'a* Courts (Administration of Justice and Certain Consequential Changes) Law, No. 5 of 1999.

¹⁰⁸⁹ Human Rights Watch, "Political *Shari'a*?" *Human Rights and Islamic Law in Northern Nigeria*, Vol.16, No 9 (A), 2004, at p.14.

¹⁰⁹⁰ *Supra* note 1078, at pp. 141-145.

¹⁰⁹¹ William A. Schabas, "International Law and the Death Penalty: Reflecting or Promoting Change?", in Peter Hodgkinson and William A. Schabas, eds., *Capital Punishment: Strategies for Abolition*, Cambridge: Cambridge University Press, 2004, at p.48.

¹⁰⁹² *Ibid.*, at p.46.

¹⁰⁹³ A/HRC/8/3/Add.3, para 80.

¹⁰⁹⁴ *Supra* note 1078, at p. 140.

particular and the world in general".¹⁰⁹⁵ Therefore, the abolition of the death penalty is equated with the denial of freedom of worship and an attack against Islam.¹⁰⁹⁶

The first case of effective application of *Shari'a* law appeared in the Katsina state. Sani Yakubu Rodi was accused of a triple murder. He pleaded not guilty and later changed his mind and pleaded guilty. The accused was assisted by his grandfather who refused to appeal on the grounds that it would defy God's justice. The accused was convicted and hanged on 3 January 2002.¹⁰⁹⁷

The practice of *Shari'a* courts attracted much attention when death sentences by stoning were imposed against *Amina Lawal* from Katsina and *Safiya Husseini* from Sokoto.¹⁰⁹⁸ The two divorced women were accused of adultery, convicted and sentenced to death based on their confession and pregnancies, which satisfied the evidentiary requirements of *Shari'a* law. The men involved had denied the charge. *Amina Lawal* had retracted her confession but the court did not allow this under *Shari'a* law. *Safiya Husseini* asked the court to conduct a DNA test on the male culprit, but the court ruled that DNA was not provided for under *Shari'a* law.¹⁰⁹⁹

This distortion of justice encouraged lawyers to appeal both cases. *Amina Lawal's* lawyer argued that the court had violated the constitution. The court replied that it was not bound by the Constitution but by *Shari'a*. A second appeal sustained that the court erred in rejecting the *Shari'a* right of retracting confession. The majority of the appeal Bench considered this second argument, but one dissenting judge remained convinced that the offender should be stoned. In the case of *Safiya Husseini*, the appeal court found that DNA testing was indeed outside the realm of *Shari'a* but also that the lower court had precipitously and retrospectively applied the *Shari'a* penal code.¹¹⁰⁰

The Court of Appeal has so far played an enormous role in saving people that lower *Shari'a* courts have sent to the gallows. It generally quashes death sentences imposed for sexual offences. In one example, the court found that Sarimu Mohammed Baranda, who was

¹⁰⁹⁵ *Ibid.*

¹⁰⁹⁶ *Supra* note 3, at p.80.

¹⁰⁹⁷ *Supra* note 1089, at pp. 32-33.

¹⁰⁹⁸ Human Rights Watch, *Nigeria: Woman Sentenced to Death under Shari'a*, 23 October 2001 and Human Rights Watch, *Nigeria: Court Should Reject Death Penalty*, 26 March 2002.

¹⁰⁹⁹ *Supra* note 1089, at pp. 34-35.

¹¹⁰⁰ *Ibid.*

sentenced to death for rape, was insane at the time of the crime.¹¹⁰¹ Similar legal technicalities also saved Attahiru Umaru and Jibrin Babaji, who were convicted of sodomy, Fatima Usman and Ahmadu Ibrahim, who were convicted of fornication, Umar Tori, who was found guilty of incest and Yunusa Chiyawa, who was convicted of adultery.¹¹⁰²

Shari'a courts are now perceived as instruments of oppression. The enthusiasm with which the northern states championed *Shari'a* law has now caused some to suspect a hidden political agenda. Politicians “championed *Shari'a* simply to boost their popularity. These officials have been willing to sanction serious abuses to enhance their political popularity”.¹¹⁰³ In attempting to redress this perception, the Niger state created a hybrid legal system where provisions from modern law would correct weakness in *Shari'a* law. Other states (Kaduna and Kano) are very cautious in their application of *Shari'a* law in serious cases.¹¹⁰⁴ This has created confusion as to what law is in force in the northern states.

The myth of divine justice is indeed nullified by the harshness of *Shari'a* punishments. The absence of sympathy, the limited skills of judges in *Shari'a* law and the indifference of justice towards human weaknesses added to the judicial flaws have disillusioned those who believed that *Shari'a* law would save society from the moral perversion, corruption and injustices that have characterized Nigerian society since independence.

5.2.3.3 Perspectives on abolition in Nigeria

Secret executions that regularly violate the country's self-imposed moratorium and Nigeria's opposition¹¹⁰⁵ or indifference towards the United Nations' moratorium on the use of the death penalty have led many to conclude that Nigeria is attached to the death penalty.¹¹⁰⁶ There are however reasons to be optimistic. In 2010, Nigeria did not oppose the United Nations moratorium. This change in attitude may lead to a vote and likely to abolition in the near future. Positive initiatives, although isolated, have been observed

¹¹⁰¹ *Ibid.*

¹¹⁰² *Ibid.*

¹¹⁰³ *Ibid.*, at p.2.

¹¹⁰⁴ *Ibid.*, at p.15.

¹¹⁰⁵ A/HRC/8/3/ Add.3, para 80.

¹¹⁰⁶ Amnesty International, *Nigeria: Government Misleads World about Death Penalty Record*, 17 December 2007, AI Index, PRE 01/004/2007.

within the country. Lagos is taking the lead in becoming *de facto* abolitionist. There have been no executions there since 1998.¹¹⁰⁷

Indeed, several reasons peculiar to Nigeria call for abolition either through constitutional amendment or judicial decision:

- a. Section 2 of the 1960 Constitution, which has since been copied in subsequent constitutions, remains a colonial provision that aimed to crush any resistance to colonial rule. The provision is itself built on the European Convention that, among other things, was rooted in Nazi atrocities and subsequent Nuremberg trials.
- b. The practice of the death penalty is evidence that it failed to decrease rates of criminality.
- c. Since the independence, the Nigerian criminal justice system has failed to guarantee a fair process of justice where offenders would be tried by professional judges and represented by trained lawyers before independent and impartial courts. Offenders were denied their rights to appeal, judicial review and pardon. The absence of this process has suffocated justice to the extent that eventually more innocents than culprits were sent to gallows.
- d. Nigerian society has been torn apart by the politicized application of the death penalty by both military courts and *Shari'a* courts.
- e. The discriminatory application of the death penalty based on the offender's state of origin or religion fractures the community more than it unites it. *Shari'a* law does not serve justice when it applies in one area and not in another.

¹¹⁰⁷ Amnesty International, *Death Row Prisoners Freed in Nigeria*, 26 August 2009.

Conclusion

In the 1960s, independent Africa inherited different criminal policies coloured with what had been the colonial practice in each territorial circumscription. To keep the 'independent people' obedient and at times silent, all African countries, including colonial *de facto* abolitionists, resorted to the death penalty. Surprisingly, new leaders of countries where the colonial power did not provide for it, namely Angola, Cape Verde, Mozambique and Guinea Bissau found that the death penalty was an unavoidable necessity. The eagerness with which new countries legislated or simply continued the pre-existing colonial regime on the death penalty law demonstrates that African leaders continued the politicization of the death penalty.

Political context shapes the use of the death penalty, whether imposed for political crimes or for ordinary crimes such as murder. A political context suffices even if the punishment is imposed on ordinary crimes. Illustrations from South Africa eloquently demonstrate how politicians manipulate the death penalty to their benefit and use it as a political weapon. The law of homicide that distinguished between murder and culpable homicide also decided who should visit the gallows. Murder that called for a mandatory death penalty targeted the non-white community; cases in which the criminal was a European or the victim was a non-European often carried the charge of culpable homicide.

A detailed study of the death penalty in the Democratic Republic of Congo and Nigeria concludes that these countries have made and continue to make the death penalty an instrument of political oppression without hiding behind ordinary crimes. The laws and practices related to the death penalty in the Democratic Republic of Congo and Nigeria illustrate the extent to which retentionist countries retain the death penalty for political reasons rather than in the pursuit of justice. Thus, the colonial practice of silencing dissident voices and political opponents has been at the vanguard of the use of the death penalty in these countries.

Unfairness and arbitrariness have been common denominators of the practice of the death penalty both in the DRC and Nigeria. The judiciary served the interest of military junta as they successively replaced one another. Since the abolition of the death penalty in South Africa, unfair procedures and arbitrary laws have made Nigeria the most notorious

executioner on the continent.¹¹⁰⁸ Periods of respite were interrupted by the introduction of religious laws, namely *Shari'a* law, in Northern States. There is no doubt that the reestablishment of *Shari'a* courts complied with the political agenda of the Muslim leaders that have dominated Nigerian politics and the army since independence. Save that the death penalty in *Shari'a* law remains a matter of policy choice,¹¹⁰⁹ inconsistencies between the ruling of Muslim courts within one state and another and inconsistencies between the law of one state and the law applied on the next street in another state within one country are additional arguments that call for the abolition of the death penalty in Nigeria.

¹¹⁰⁸ *Supra* note 3, at p.80

¹¹⁰⁹ M. Cherif Bassiouni, *Supra* note 438, at p.185.

6 CONCLUDING REMARKS ON *DE FACTO* ABOLITION IN AFRICA

Introduction

The most difficult aspect of studies on the death penalty from legal and criminological perspectives remains categorizing countries' practices.¹¹¹⁰ It is easier to identify countries whose laws (constitution, penal laws or common law) do not provide for the death penalty than it is to identify abolitionists in practice. Countries without the death penalty in their legal systems are *de jure* abolitionist. Since criminal justice is built on the legality of offences and punishments, the absence of the death penalty in the legal system prevents the judge from imposing an imaginary punishment whatever the offence's heinous nature or the degree of damage and violence associated with the crime. Acting otherwise would mean that the judge has imposed an arbitrary punishment.

Countries where courts do not impose the statutory or common law death penalty or where the government systematically refrains from carrying out death sentences are known as abolitionists in practice or *de facto* abolitionists. *De facto* abolition status remains problematic. How much time must elapse for a country to be acknowledged as *de facto* abolitionist and who decides that? To which extent are beneficiaries of the criminal justice system in a particular country guaranteed that the death penalty will not be imposed or executions will not be resumed? Finally, is imposing a symbolic death penalty not itself evidence that the death penalty is not deterrent per se?

6.1 The scope of *de facto* abolition in Africa

Until the 1960s, studies had not yet defined *de facto* abolition. The absence of a definition was a good excuse to dismiss the need for analysis.¹¹¹¹ The first attempt at a definition was made in 1960. *De facto* abolition is defined as "a constant and deliberate practice of pardoning condemned persons."¹¹¹² This abolition stems from the malaise that the government has in executing a sentence which it would have repealed should it be

¹¹¹⁰ *Supra* note 545, at p. 405.

¹¹¹¹ *Ibid.*

¹¹¹² UN Doc E/67 IV.15, 1968, p.29, at para 78.

empowered to do so. The legislator is blamed for failing to acknowledge that the context is distanced from the text. For example, in 1965, the Ivorian legislator should have realised that the executive had systematically commuted all death sentences and abolish the death penalty.¹¹¹³ This general *de facto* abolition has often been an incentive process towards the judicial non imposition of the death penalty. Some courts cease to impose death sentences upon realizing that their previous orders had not been executed.¹¹¹⁴

The use of the word deliberate implied an official commitment to not carry out the death penalty. Therefore, the absence of any official commitment is referred to as “suspension” of executions and not *de facto* abolition.¹¹¹⁵ As a consequence, none of the four African countries (Ivory Coast, Dahomey, Gambia and Togo) that had spent at least five years without executing the death penalty was classified *de facto* abolitionist.¹¹¹⁶

In 1965, the fact that courts refrained from imposing the death sentence was upheld as leading to the status of *de facto* abolitionist.¹¹¹⁷ The initiative did not extend the scope of the existing definition; another category of *de facto* abolition was rather introduced. The judge decides to outlaw the death penalty on a case-by-case basis. The government is thus prevented from executing the culprit even if it would wish so. This indicates a true commitment not to resume executions. Countries in this category should be qualified as ‘real *de facto* abolitionist’. Judicial *de facto* abolition is different from the judicial recommendations for mercy that existed in South Africa, Morocco and Zanzibar.¹¹¹⁸ For example, African offenders under apartheid rule in South Africa knew that judicial recommendations for mercy put them in an uncertain position.¹¹¹⁹ Once a sentence is imposed, judges automatically lose the power to control the next step in the process.

In 1975, *de facto* abolition was referred to as ‘abolition by custom’.¹¹²⁰ Although it took time to recognize the importance of the word ‘custom’, its use implied the progressive exclusion of the death penalty under customary international law or, at the very least, regional customary norms. It is submitted that despite the counterargument of human

¹¹¹³ *Ibid.*, p.97, table 1.

¹¹¹⁴ UN Doc E/5616, 1975, p.8 at 19.

¹¹¹⁵ UN Doc E/67 IV.15, 1968, p.69, at 252.

¹¹¹⁶ *Ibid.*, p.43, at 144.

¹¹¹⁷ *Ibid.*, p. 96, at 63.

¹¹¹⁸ *Ibid.*, pp.16-18.

¹¹¹⁹ *Supra* note 898, at p. 134.

¹¹²⁰ UN Doc E/5616, 1975, p. 6 at 19.

rights' cultural relativism; regional efforts that have cemented a custom of abolition should be acknowledged as having achieved normative value in international law.¹¹²¹

Custom refers to constant, consistent and deliberate practices. However, until 1975, the length of time necessary to achieve the status of *de facto* abolitionist was unclear. Researchers had swung between 50, 40, 25, and 20 years or more without providing any justifications.¹¹²² The consequence of this procrastination is that efforts made by some new countries in Africa such as Gambia, Seychelles, Cape Verde, Ivory Coast remained unacknowledged.

Progress was made in 1985 when abolition by custom and *de facto* abolition were differentiated. The first of these categories refers to a forty year period without execution and the second addresses the issue of new states by introducing a new period of ten years without executions. This was the first recognition of efforts that some new nations made to consistently refrain from executing the death sentence.¹¹²³ In 1990, the debate on the scope of *de facto* abolition ended.¹¹²⁴ Countries that have systematically and continuously refrained from either handing down or executing the death penalty for a period of at least ten successive years were categorized *de facto* abolitionist.¹¹²⁵ However, the risk that they might resume executions hangs over the heads of those convicted as the Damocles' sword. It is for this reason that the trend is to consider that *de facto* abolitionists are those countries with a settled policy not to resume executions and those that declared a moratorium on the use of capital punishment.¹¹²⁶ This is undoubtedly a third category of *de facto* abolition.

In 1990, five African countries, namely Ivory Coast, Djibouti, Madagascar, Senegal and Togo were reported to be *de facto* abolitionist.¹¹²⁷ This figure is not significant given that at that point Liberia had resumed executions and Cape Verde, Mozambique, Namibia, Seychelles

¹¹²¹ *Supra* note 1091, at p.43.

¹¹²² UN Doc E/5616, 1975, at para 19 and Annexe I and UN Doc E/1980/9 at Annex, footnote a

¹¹²³ UN Doc E/1985/43 Legend.

¹¹²⁴ UN Doc E/1990/38/Rev., at para 15.

¹¹²⁵ UN Doc E/CN.15/1996/19, at para 6-7; UN Doc E/2000/3, at para 32- 40; UN Doc E/2005/3, at para 3 (c) (i) and UN Doc E/2010/10, at para 3 (c) (i)

¹¹²⁶ UN Doc E/2005/3, at para 3 (c) (i) and UN Doc E/2010/10, para 3 (c) (i) and *Supra* note 3, at p.17.

¹¹²⁷ UN Doc E/1990/38/ Rev.1, Annex, table 3.

and Sao Tomé and Príncipe had become *de jure* abolitionist.¹¹²⁸ The movement evolved so fast that within two decades 22 countries had become *de facto* abolitionist in Africa.¹¹²⁹ Based on the number of years that have gone by without executions in these countries, they are undoubtedly the next *de jure* abolitionists.

6.2 Importance of *de facto* abolition in Africa

In the 1960s African countries knew that the deterrent effect of the death penalty was debatable. They kept the penalty as a threat until the imbalance between the number of death sentences and the number of executions carried out betrayed the malaise that the death penalty imposed on executive and judicial authorities. This disparity ended up creating a culture of non executions, which was followed by complete abolition.

While elsewhere countries have begun by abolishing the death penalty for ordinary crimes or in peacetime,¹¹³⁰ such a progressive approach was rather rare in Africa. South Africa is alone in retaining the death penalty for treason in wartime.¹¹³¹ However, in basing abolition on human rights arguments, the South African Constitutional Court likely intended complete abolition.¹¹³² Sao Tomé and Príncipe, Seychelles, Ivory Coast and Mauritius first hesitated on the retention of the death penalty for mercenaries, political crimes or drug trafficking before making the move towards complete abolition. Current *de jure* abolitionists have spent a considerable length of time not executing the death penalty prior to outlawing it for all crimes.¹¹³³

The general public also learned that their criminal law had “all the necessary legal prerequisites to ensure the all-round protection of the state and its citizens from criminal encroachments”.¹¹³⁴ The absence of an increase in criminality during the period of *de facto* abolition is an indication that the death penalty is no greater deterrent than other punishments. Using the death penalty as the only appropriate punishment would mean that a choice is between the death penalty and impunity. The choice is rather between the

¹¹²⁸ *Supra* note 2, at p.32.

¹¹²⁹ See Appendix I and UN Doc E/2010/10, at p.64, table 4.

¹¹³⁰ UN Doc E/2010/10, at para 13

¹¹³¹ *S v. Makwanyane and Another*, *Supra* note 11, at para 149 per President Chaskalson.

¹¹³² UN Doc E/CN.15/1996/19 para 38 c*

¹¹³³ UN Doc E/CN.15/1996/19 at para 27. See also Appendix II.

¹¹³⁴ UN Doc E/1990/38/Rev.1, para 19.

deterrent effects of different punishments, one of which is the death penalty.¹¹³⁵ The absence of the death penalty does not cause the law to fall into disrepute. Justice becomes ineffective when criminals are not apprehended and brought to trial.¹¹³⁶

One would expect the current 22 *de facto* abolitionists to follow the path of *de jure* abolitionists in abolishing the death penalty for good and for all crimes. However, the reinstatement of executions in former *de facto* abolitionist countries in the 1990s and the continuing secret executions in countries that have declared a moratorium on executions are counter-arguments. In the absence of strong safeguards, *de facto* abolition remains fragile.

6.3 The fragility of *de facto* abolition in Africa

De facto abolition depends on the political will of a particular government or the humanitarian trends of the judiciary during a particular period within a country that is legally retentionist. The non-deterrent effect of the death penalty is time tested while the public is prepared for a legal abolition, the logical next step. There are countries however, in which the course of events reverse the face of the medal. Instead of moving towards legal abolition, they resume executions. Change in political regimes, rising rates of criminality, generalized insecurity, atrocious crimes such as war crimes, crimes against humanity and genocide have all been arguments for resuming executions.

Examples of sudden breaches of *de facto* abolition in Africa are abundant. Guinea was classified *de facto* abolitionist as far back as 1983; however the government warned in 1995 that executions would be resuming as a way of addressing increases in criminality. In 2001, five criminals were executed.¹¹³⁷ In Mauritius, changes in the political regime in 1984 nullified their 24 years of *de facto* abolition by suddenly resuming executions. In Gambia, the first execution post independence happened sixteen years later (1981).¹¹³⁸ In Comoros, an execution in 1996 was the first since the country achieved its independence.¹¹³⁹ After

¹¹³⁵ *S v. Makwanyane and Another*, *Supra* note 11, at para 123 per President Chaskalson.

¹¹³⁶ *Ibid.*, at para123-124per President Chaskalson.

¹¹³⁷ UN Doc E/CN.15/1996/19, at para 29 and UN Doc E/2010/10, p.13, footnote 54.

¹¹³⁸ Amnesty International, *List of Abolitionist and Retentionist Countries*, AI Index: ACT 50/002/2009 at 9.

¹¹³⁹ UN Doc E/2000/3, at para 36 and UN Doc E/2010/10, p.13, footnote 46.

fifteen years of *de facto* abolition, Burundi executed six people in 1997 for killing Tutsi civilians. Burundi's previous execution dated back to 1982.¹¹⁴⁰

The 1989 execution of six criminals in Sierra Leone was the first since 1977. Sierra Leone refrained from executing any more death sentences until 1998 when 24 persons, allegedly members of the Armed Forces Revolutionary Council (AFRC), were executed for treason.¹¹⁴¹ After the first *de facto* moratorium from 1960 to 1974, Benin observed a second *de facto* moratorium between 1974 and 1986 and then resumed executions.¹¹⁴² In 1982, Morocco refrained from executing the death penalty and resumed executions in 1993.¹¹⁴³ Botswana¹¹⁴⁴ executed five persons in 1995 and in 1997 Zambia secretly executed eight persons. Both countries had gone for eight years without executions. Since then, secret executions have continued in Botswana.¹¹⁴⁵ A 1998 execution in Ethiopia was the country's first in seven years. Since then, it has become *de facto* abolitionist again.¹¹⁴⁶ Libya has been *de facto* abolitionist since 1977. It last violated this self-imposed moratorium in 2005 when five foreigners went to the gallows.¹¹⁴⁷

Chad ceased to resort to capital punishment in 1991 with the abolition of courts martial. Afterwards, the government declared a *de facto* moratorium on executions. In June 2003, there was a debate in N'Djamena on *Les Etats Généraux de la Justice* during which the Commission *Justice et Justiciables* recommended legal abolition. Instead, in November 2003, the Government resumed executions, apparently for political reasons. The Supreme Court justified the sentence based on the resurgence of insecurity in the streets of N'Djamena and the state of Chadian prisons, which can be compared to sieves.¹¹⁴⁸ The 2003 executions targeted the nine persons officially convicted of murdering Acheik Ibn Omar Assaid Idriss, a Chadian businessman of Darfur origin and close friend to President Idriss Deby. However, the condemned were also suspected of financing the Zaghawa

¹¹⁴⁰ UN Doc E/CN.15/1996/19, at para 29 and UN Doc E/2000/3, at para 37.

¹¹⁴¹ Amnesty International, *Sierra Leone: Amnesty International Expresses Dismay at 10 Death Sentences for Treason*, AI Index AFR 51/009/2004.

¹¹⁴² *Supra* note 1138.

¹¹⁴³ UN Doc E/CN.15/1996/19, at para36g and para 48.

¹¹⁴⁴ UN Doc E/1985/43/Corr.1, table 2

¹¹⁴⁵ *Supra* note 3, at p.79.

¹¹⁴⁶ *Ibid.*, at p.81.

¹¹⁴⁷ *Ibid.*, at p.68.

¹¹⁴⁸ *Supra* note 859.

rebellion, which is at the centre of recent conflicts in Darfur and has politically distanced N'djamena from Khartoum.¹¹⁴⁹

In Rwanda, suggestions were made in 1995 that the only way of redressing the pain suffered by victims of Tutsi genocide was the execution of the perpetrators or, at least, of those who played a major role in the commission of the crimes.¹¹⁵⁰ Thus, the penalty held symbolic weight in that it was intended to redress the legacy of victims' sufferings and to pacify the hatred that could lead to more atrocities. The then Government of Rwanda was so interested in the death penalty that it voted against the establishment of the International Criminal Tribunal for Rwanda for the reason that, among other things, it was unable to impose the death penalty.¹¹⁵¹

The subsequent organic law no.31/96 of 30 August 1996 provided in its article 14 that punishments of the crime of genocide and crimes against humanity committed between 1 October 1990 and 31 December 1994 were those listed in the Rwandan Penal Code.¹¹⁵² Article 14 of this law included a special provision on capital punishment for mastermind of Tutsi genocide. In 1998, 22 criminals convicted of Tutsi genocide were executed. Rwanda courts continued to impose death sentences but criticism against the previous executions led the government to refrain from executing them. The country took the most important step in 2007 when it legally abolished the death penalty for any and all crimes committed in peacetime and in wartime.¹¹⁵³

Countries that have legally abolished the death penalty usually do not reintroduce it and they should not.¹¹⁵⁴ However, this custom can be defied on the grounds of state sovereignty in criminal matters. This calls for safeguards against the reintroduction of the death penalty in both *de facto* and *de jure* abolitionist countries.

¹¹⁴⁹ *Ibid.*

¹¹⁵⁰ Gérard Prunier, *The Rwanda Crisis 1959-1994: History of a Genocide*, New York: Columbia University Press, 1995, at p.355.

¹¹⁵¹ Mark A. Drumbl, *Atrocity, Punishment and International Law*, New York: Cambridge University Press, 2007, at p.72.

¹¹⁵² *Official Gazette* no 17 of 1September 1996.

¹¹⁵³ Article 2 of the Organic Law no 31/2007 of 25 July 2007 relating to the abolition of the death penalty, *Official Gazette* n° special, 25 July 2007.

¹¹⁵⁴ UN Doc E/2010/10, at para 13

6.4 Safeguards against the reintroduction of the death penalty

It is not appropriate to categorise countries as abolitionist simply because they have gone for a certain period without executions.¹¹⁵⁵ *De facto* abolitionists must have “clearly indicated their intention to remove capital punishment from their legislation and to subscribe to international conventions which ban its reintroduction.”¹¹⁵⁶ Otherwise, they are a subcategory of retentionist states.

A moratorium is the only existing mechanism international law has provided for strengthening *de facto* abolition. A moratorium guarantees that the state representative on the trial commits not to request the death penalty. Few judges would impose a punishment that the prosecutor finds inappropriate. So far, out of the 22 *de facto* abolitionists, six (Algeria, Benin, Tunisia, Cameroon, Kenya and Zambia) have declared a moratorium on executions.¹¹⁵⁷ Burkina Faso, Congo Brazzaville and Madagascar recently joined Algeria and Benin in their support of the United Nations resolution on moratorium on the use of capital punishment.¹¹⁵⁸ Other *de facto* abolitionists abstained from voting.¹¹⁵⁹ The limited number of countries declaring or voting for a moratorium indicates that abstaining countries may resume executions anytime.

Moreover, a moratorium resembles a promise more than an engagement. It can be defied if the judge remains empowered to impose the death sentence. The alleged secret executions in the Democratic Republic of Congo and Nigeria demonstrate that a moratorium is a partial and hypothetical measure that the court can ignore and impose a legal punishment. However, it is important for *de facto* abolitionist category to exist as an inciting measure towards a legal abolition.

In summary, there are no absolutes. Even *de jure* abolitionists can reintroduce the death penalty. There has been no such case in Africa apart from Liberia, where there has been no execution since 2000. Liberia abolished capital punishment in 2005 and reintroduced it for gang rape the same year before substituting it with life imprisonment. Meanwhile Liberia

¹¹⁵⁵ UN Doc E/2000/3, at para 40.

¹¹⁵⁶ *Ibid.*

¹¹⁵⁷ UN Doc E/2010/10, at para 19 and 20.

¹¹⁵⁸ UN Doc E/2010/10, at para 19, footnote29.

¹¹⁵⁹ Cameroon, Central African Republic, Eritrea, Gambia, Ghana, Lesotho, Malawi, Morocco, Niger, Sierra Leone, Swaziland, United Republic of Tanzania and Tanzania. See UN Doc E/2010/10, at para 19, footnote30.

acceded to the Second Optional Protocol to the International Covenant on Civil and Political Rights that prohibits the reintroduction of the death penalty.¹¹⁶⁰ In 2008, Liberia passed another law punishing armed robbery, terrorism and hijacking with the death penalty. The question of whether Liberia is retentionist or abolitionist remains unanswered. It is submitted that despite the 2008 law, Liberia remains *de jure* abolitionist under international law.¹¹⁶¹ The principle extends as well to another eight *de jure* abolitionists that have ratified or acceded to the Second Optional Protocol, namely Cape Verde, Djibouti, Guinea Bissau, Mozambique, Namibia, Rwanda, Seychelles and South Africa.¹¹⁶²

With all due consideration, the first step towards ensuring that the death penalty is not reinstated is making it unconstitutional. If the death penalty had been outlawed in the Liberian Constitution, the new law could not have been passed without a constitutional amendment. Therefore, *de jure* abolition status is reliable when the country has combined international engagement with the prohibition of the death penalty under its constitution. Yet only a few countries choose this option.¹¹⁶³ Countries that have excluded the death penalty in their Constitution “have ... ensured ... that the death penalty cannot be reintroduced”.¹¹⁶⁴ A country that has outlawed the death penalty under its Constitution without joining the Second Optional Protocol qualifies as more solidly *de jure* abolitionist than a country that keeps the death penalty in its Constitution and joins the protocol. In other words, Angola and Sao Tomé and Príncipe, which have made the death penalty unconstitutional without joining the protocol, have more secured their abolitionist status than Liberia.¹¹⁶⁵

It is submitted that Liberia “... is prohibited by its international obligations from imposing the death penalty”.¹¹⁶⁶ Imposing or not imposing the death penalty will necessarily require

¹¹⁶⁰ Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, 15 December 1989, GA Res.44/128, (1990) 29ILM 1464.

¹¹⁶¹ UN Doc E/2010/10, p. 14 at 24.

¹¹⁶² *Ibid.*, pp.30-32.

¹¹⁶³ Article 26 (2) of the Constitution of the Republic of Cape Verde of 1992 as amended in November 1999, article 32 of the Constitution of the Republic of Guinea of 1984 as amended in 1991, *Sabado*, 11 May 1991, article 15 (2) of the Constitution of the Republic of Seychelles of 18 June 1993 as amended by Constitutional Act no14 of 1996, article 40 of the Constitution of the Republic of Mozambique of 16 November 2004, *Mozlegal, Lda* 2004 and section 6 of the Namibian Constitution Second Amendment Act, 2010.

¹¹⁶⁴ *Supra* note 5, at p. 11.

¹¹⁶⁵ Article 30 of the Constitutional Law of the Republic of Angola of 2010 and article 22 of the law no 1/ 2003 establishing the Constitution of the Democratic Republic of Sao Tome and Principe of 2003.

¹¹⁶⁶ UN Doc E/2010/10, at para 24.

a constitutional interpretation of the place of international law in Liberian domestic law. Yet article 2 (2) of the Liberian Constitution provides that “[a]ny laws, treaties, statutes, decrees, customs and regulations found to be inconsistent with [the Constitution] shall, to the extent of inconsistency, be void and of no legal effect”.¹¹⁶⁷ In this light, the Constitution has primacy over international law and it is most likely that Liberian judges will uphold the values protected in their domestic constitution. **In 2010, Liberia indeed imposed capital punishment on the basis of the 2008 law.**¹¹⁶⁸ To avoid ambiguity, the remaining seven *de jure* abolitionists (Burundi, Cote d’Ivoire, Gabon, Mali, Mauritius, Senegal and Togo) and forthcoming abolitionists should simultaneously amend their constitutions and join the Second Optional Protocol to the Covenant.

6.5 Optimistic perspectives on the abolitionist movement in Africa

Despite the concerns outlined thus far, there are further causes for optimism regarding the abolitionist movement in Africa. The resistance to calls to abolish the death penalty in Africa is crumbling. In 1948, when the United Nations General Assembly adopted the Universal Declaration of Human Rights, only Cape Verde would have qualified as a *de facto* abolitionist if it had been independent. In the 1980s nine African countries were either *de jure* or *de facto* abolitionists; in 1997, that number had almost tripled.¹¹⁶⁹

In February 2010 Gabon quietly became the seventeenth African country to abolish the death penalty in law.¹¹⁷⁰ The abolition of the death penalty in Gabon, announced one year later, was interpreted as “an enormous progress regarding human rights” and “an opportunity for even more progress in Africa”.¹¹⁷¹ Thirty-nine countries are now abolitionists, either in law or in practice. There is a strong trend indicating that the death penalty will not be reinstated in abolitionist countries and that *de facto* abolitionists are on the right path towards *de jure* abolition. Of the 22 *de facto* abolitionists, ten (Algeria, Benin,

¹¹⁶⁷ Section 2(2) of the Constitution of the Republic of Liberia of 6 January 1986, *ICL Doc Status*, 6 January 1986.

¹¹⁶⁸ Amnesty International, *Death Sentences and Executions 2010*, London: Amnesty International Publications, 2011, at p. 37.

¹¹⁶⁹ *Supra* note 2, at pp.30-31.

¹¹⁷⁰ Loi no 3/2010 du 15 Février 2010 portant Abolition de la Peine de Mort, *Journal Officiel de la République Gabonaise*, 51^{ème} année, no3, 30 mars 2010. In its 2010 report on capital punishment, Amnesty International mentions 16 countries as it withdrew Liberia from the list of *de jure* abolitionists. See Amnesty International, *Supra* note 1068, at pp. 37 and 44Annex II.

¹¹⁷¹ Richard Fielding, *Gabon Quietly Abolishes the Death Penalty*, World Coalition Against the Death Penalty, 4 March 2011.

Burkina Faso, Central African Republic, Congo Brazzaville, Ghana, Kenya, Mali, Tunisia and Zambia)¹¹⁷² declared in 2010 that they were considering abolishing the death penalty in their criminal law or Constitution and have imposed a *de facto* moratorium on the death penalty. In December 2010 Madagascar and Gambia joined the list in voting for the recent United Nations' moratorium on the use of the death penalty.¹¹⁷³

Nine of the ten remaining countries did not vote against the moratorium but significantly chose to abstain or were absent from the session. These were Cameroon, Eritrea, Lesotho, Malawi, Mauritania, Morocco, Niger, Sierra Leone and Tanzania.¹¹⁷⁴ Among the *de facto* abolitionists, only Swaziland voted against the United Nations moratorium.¹¹⁷⁵ Swaziland's last execution goes back to 1989¹¹⁷⁶ and it is believed that it will keep its status until the death penalty is legally repealed. The country is waiting for the release of the Constitutional Review Commission report that King Muswati III initiated for, among other things, the study of the appropriate mechanism for abolishing the death penalty. Meanwhile, Prime Minister Sibusiso Dlamini stated in April 2011 that Swaziland will remain retentionist.¹¹⁷⁷

Today, only 14 of Africa's 54 countries (less than 26 %) retain the death penalty. These are Botswana, Chad, the Democratic Republic of Congo, Egypt, Equatorial Guinea, Ethiopia, Guinea Conakry, Libya, Nigeria, Somalia, Sudan, South Sudan, Uganda and Zimbabwe. Despite proposals to extend the death penalty to same sex intercourse in Uganda¹¹⁷⁸ and to human trafficking, robbery, rape and drug related crimes in Gambia,¹¹⁷⁹ the overall tendency among retentionist states is also towards abolition. Somalia voted for the December 2010 United Nations' moratorium on the use of the death penalty, the Democratic Republic of Congo and Nigeria abstained; Chad and Equatorial Guinea decided not to attend the session.¹¹⁸⁰

¹¹⁷² UN Doc E/2010/10, at para 19 and 20.

¹¹⁷³ Among *de facto* abolitionist, Algeria, Benin, Burkina Faso and Congo Brazzaville also voted for the United Nations Moratorium. See UN Doc GA 71/ A 65456 dd2 Part II DRI, 21 December 2010.

¹¹⁷⁴ *Ibid.*

¹¹⁷⁵ *Ibid.*

¹¹⁷⁶ UN Doc E/2005/3, at para 33.

¹¹⁷⁷ Bhekhe Matsebula, "Swaziland Stands Firm on Death Penalty", *IOL News*, 11 April 2011.

¹¹⁷⁸ Amnesty International, *Urgent Action: Anti-homosexuality Bill May Be Passed*, UA 134/11 Index: AFR 59/010/2011.

¹¹⁷⁹ African Commission for Human and Peoples' Rights, *Combined Report of Commissioner Zainabu Sylvie Kayitesi*, Banjul, 28 April-12 May 2011, p.5 available at <http://www.achpr.org/English>, (accessed 13 May 2011).

¹¹⁸⁰ UN Doc GA 71/ A 65456 dd2 Part II DRI, 2 December 2010

It is worth noting that the Democratic Republic of Congo and Nigeria previously declared self imposed moratoria. Somalia's positive vote indicates that it has now joined the group of *de facto* abolitionist countries. In Ethiopia, the June 2011 commutation of death sentences for 23 former officials convicted of genocide and crimes against humanity is expected to lay the basis of a continuing positive attitude towards abolition.¹¹⁸¹

Furthermore, six of the fully retentionist countries (Botswana, Chad, the Democratic Republic of Congo, Guinea, Nigeria and Uganda) are party to the Rome Statute of the International Criminal Court. Although audacious, Congolese military judges have put their country on the right move in substituting the death penalty by the penalties listed in article 77 of the Rome Statute. The remaining countries cannot also ignore that, in ratifying the Rome Statute, they joined the community of states that excluded the death penalty for the most dreadful crimes before the world highest court in criminal matters. It is therefore expected that they react positively to Roger Hood and Carolyn Hoyle's question, "if ... the most serious of all crimes [...are] not punishable by death, why should lesser offenses be so punished"?¹¹⁸² There is no doubt that despite the provision of article 80 under which states may apply the death penalty, the Rome Statute has laid the basis of a soon to come worldwide abolition of capital punishment.¹¹⁸³

It is anticipated that the Arab Revolution in Maghreb will increase the chances that Egypt and possibly Libya may take more courageous action towards the abolition of the death penalty. That alone would marginalize the six remaining fully retentionist countries on the continent.¹¹⁸⁴ It is likely that the practice of other countries in their neighborhood will impact on the attitudes of these retentionist countries. The abolitionist movement has had a contaminating effect that states hardly resist.

Abolition in Africa remains a matter of national initiative. So far the African Union has not established a clear roadmap towards the abolition of the death penalty. The Working Group on Capital Punishment, established in 2005, is still striving to reach a common position on strategies for abolition. Raising public awareness is the sole strategy that

¹¹⁸¹ "Ethiopia Commutes Death Sentences for Top Junta Men", AFP 1 June 2011.

¹¹⁸² *Supra* note 5, at p. 22.

¹¹⁸³ *Supra* note 1008, at 925-926.

¹¹⁸⁴ Botswana, Ethiopia, Guinea Conakry, Sudan, South Sudan, Uganda and Zimbabwe.

member states have in common.¹¹⁸⁵ Libya, Egypt, Tunisia and Algeria have rejected the idea of a Second Additional Protocol¹¹⁸⁶ to the African Charter for Human and Peoples' Rights¹¹⁸⁷ and alternative punishments to the death penalty are relegated to general recommendations.¹¹⁸⁸

However, of all the strategies, Peter Hodgkinson argues that a remedy to the expressed fears and concerns of the victims and the public in general and to the dilemmas of the politician as regard alternative sentences to death is of paramount relevance.¹¹⁸⁹

Alternative punishments are those imposed in lieu of the death penalty. There is no consensus on what is an appropriate sentence to replace the death penalty.¹¹⁹⁰ In most countries the death penalty is replaced by a severe deprivation of liberty, which often takes the form of life imprisonment.¹¹⁹¹

The broad expression 'life imprisonment' is understood to be hard labour for life, rigorous life imprisonment or forced labour for life in Burkina Faso.¹¹⁹² The absence of a definition of life imprisonment and guidelines on alternative sentences to death penalty have led countries to initiate alternative sentences whose cruel, degrading and inhuman nature only differs from the death penalty in that they do not take the offender's life immediately.

Indeterminate imprisonment without the possibility of early release is perceived as a violation of human dignity. It nullifies also hopes of rehabilitation and self improvement in the person of the offender.¹¹⁹³ Others have said that it is a death penalty by installments. In bearing in mind the state of African prisons, such a sentence is even literally worse than the death penalty.¹¹⁹⁴ These have been the reason for release after a certain period of

¹¹⁸⁵ "The Kigali Framework: Document on the Abolition of the Death Penalty in Africa", 25 September 2009 (unpublished) and "The Cotonou Framework: Document on the Abolition of the Death Penalty in Africa", 15 April 2010 (unpublished).

¹¹⁸⁶ *Supra* note 23.

¹¹⁸⁷ "The Cotonou Framework: Document on the Abolition of the Death Penalty in Africa", 15 April 2010 (unpublished).

¹¹⁸⁸ *Ibid.*

¹¹⁸⁹ *Supra* note 31, at p.2.

¹¹⁹⁰ UN Doc E/1985/43, at para 67-69, UN Doc E/C.N.15/1996/19, at para 50 and UN Doc E/2010/10, at para 10.

¹¹⁹¹ UN Doc E/67 IV.15, 1968, p.108 at 103

¹¹⁹² *Ibid.*, at 102.

¹¹⁹³ *Supra* note 1008, at p.893.

¹¹⁹⁴ *Supra* note 13, at p. 13.

imprisonment or simply for providing for a term imprisonment.¹¹⁹⁵ However, a temporary detention during which the prisoner is subjected to unnecessary pain is no less cruel, inhuman and degrading.

The replacement of the death penalty by life imprisonment in confinement in Rwanda provoked strong protest within and outside the country on the grounds that the death penalty had simply been substituted with, among other things, another cruel, inhuman and degrading punishment.¹¹⁹⁶ Criticism from the International Criminal Tribunal for Rwanda (which stated that it would not transfer its files to Rwanda until the law was reviewed)¹¹⁹⁷ and human rights activists led the Rwandan Government to reconsider its position. It first satisfied the ICTR's claim regarding detainees' transfer but maintained the punishment for offenders within the country.¹¹⁹⁸ However, criticism continued on the basis of inequality and double standard justice that this established.

In 2008, the Supreme Court was called to decide on the constitutionality of life imprisonment in confinement in the *Tubarimo Aloys* case.¹¹⁹⁹ The court erred in systematically dismissing the defense lawyer's arguments based on inconsistencies between confinement and the constitutional right to not to be subjected to torture, physical abuse or cruel, inhuman or degrading treatment.¹²⁰⁰ In 2010, an Organic law¹²⁰¹ came to interpret life imprisonment in confinement in the line of article 15 of the Rwandan Constitution that prohibits torture. Following this development, the ICTR has decided to refer its cases to Rwanda. The tribunal has noted that as regards punishments, "the ambiguities which existed... have been adequately addressed by Rwanda".¹²⁰²

¹¹⁹⁵ Andrew Coyle, "Replacing the Death Penalty: the Vexed Issue of Alternative Sanctions", in Peter Hodgkinson and William A. Schabas, eds., *Capital Punishment: Strategies for Abolition*, Cambridge: Cambridge University Press, 2004, at p.104.

¹¹⁹⁶ Jamil Dlamulira Mujuzi, "Issues Surrounding Life Imprisonment after the Abolition of the Death Penalty in Rwanda", (2009) 9 *Human Rights Law Review* 335.

¹¹⁹⁷ *Prosecutor v. Yussuf Munyakazi*, ICTR -97-36-R 11bis, para 22- 32.

¹¹⁹⁸ Article 1 of Organic Law n° 66/2008 of 21 November 2008 modifying and completing the Organic Law n° 31/2007 of 25 July 2007 relating to the Abolition of the Death Penalty, *Official Gazette* no 23, 1 December 2008.

¹¹⁹⁹ *Re Tubarimo Aloys* RS/Inconst/Pén.0002/08/CS of 29 August 2008.

¹²⁰⁰ *Re Tubarimo Aloys* RS/Inconst/Pén.0002/08/CS of 29 August 2008, at para 28, 31 and 33.

¹²⁰¹ Organic Law n° 32/2010 of 22 September 2010 relating to Serving Life Imprisonment with Special Provisions, *Official Gazette*, n° Special, 14/10/2010.

¹²⁰² *Prosecutor v. Jean Uwinkindi*, Case No ICTR-2001-75-R11bis at para 51.

Most retentionist countries argue that there is currently no valuable alternative to death penalty. It is thus necessary to present alternatives punishments to countries that may be reluctant to abolish the death penalty in the absence of alternative punishments and to ensure that the abolition of the death penalty does not result in the creation of worse punishments. So far, a reasonable term of imprisonment with the possibility of early release is generally accepted.

Conclusion

The five steps that generally lead to a progressive abolition are: declaration of a moratorium, *de facto* abolition, *de jure* abolition for ordinary crimes, *de jure* abolition for all crimes and joining the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. A moratorium on the use of the death penalty whether self imposed or official, remains an unguaranteed promise that can be broken at a politician's discretion. If the country keeps its commitment then it moves to *de facto* abolitionist status.

Although revoked sometimes, it is believed that *de facto* abolitionist status creates an international obligation under article 6 (2) of the International Covenant on Civil and Political Rights¹²⁰³ to not reinstate the death penalty. Professor William Schabas argues that international law is clear "once a State has abolished the death penalty, it cannot reinstate it".¹²⁰⁴ Article 6 (6) is even more calling *de facto* abolitionist to get rid of capital punishment. States are expected to report on measures that they have undertaken to limit the use or abolish the death penalty. The public embarrassment of reporting has so far been an incited some countries to move from the status of *de facto* abolitionist to that of *de jure* abolitionist.¹²⁰⁵ Abolition in practice can therefore be genuinely considered as a transitional step towards a legal abolition.

Obligations under article 6(2) of the International Covenant on Civil and Political Rights apply a fortiori to *de jure* abolitionists. Their status is confirmed by joining the Second Optional Protocol, which prohibits the reintroduction of the death penalty once it is abolished. However, Liberia's situation indicates that states can still defy international law and create unstable situations. States should thus be reminded or even encouraged to outlaw the death penalty in their respective constitutions before ascending to the international level. Constitutional abolition and accession to international norms prohibiting the death penalty would potentially further reassure Africans that they are not at their politicians' mercy.

¹²⁰³ The International Covenant on Civil and Political Rights (1966) entered into force 23 March 1976, 999 UNTS 171.

¹²⁰⁴ *Supra* note 19, at p. 101.

¹²⁰⁵ *Ibid.*, at pp.138-139.

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APPENDIX I

De facto abolitionists in Africa and the date of last execution.

No	Countries	Last execution
1	Algeria	1993
2	Benin	1987
3	Burkina Faso	1989
4	Cameroon	1997
5	Central African Republic	1981
6	Congo Brazzaville	1982
7	Eritrea	1989
8	Gambia	1981
9	Ghana	1993
10	Kenya	1987
11	Lesotho	1995
12	Madagascar	1958
13	Malawi	1992
14	Mali	1979
15	Mauritania	1989
16	Morocco	1993
17	Niger	1976
18	Sierra Leone	1998
19	Swaziland	1989
20	Tunisia	1981
21	United Republic of Tanzania	1994
22	Zambia	1997

Source: E/2010/10, p. 64 Table 4

APPENDIX II

De jure abolitionist in Africa

No	Country	Last execution	Date of de jure abolition
1	Angola	1987	1992
2	Burundi	1997	2009
3	Cape Verde	1835	1981
4	Cote d'Ivoire	Never since colonial time	2000
5	Djibouti	Never since colonial time	1995
6	Gabon	1989	2010
7	Guinea Bissau	1986	1993
8	Liberia	2000	2005
9	Mauritius	1987	1995
10	Mozambique	1986	1990
11	Namibia	1988	1990
12	Rwanda	1998	2007
13	Sao Tomé and Princes	Never since colonial time	1990
14	Senegal	1967	2004
15	Seychelles	Never since colonial time	1993
16	South Africa	1989	1995
17	Togo	1978	2009

Source: UN DOC E/2010/10, p. 60, Table 2.