THE ROLE OF PUBLIC OPINION IN COURT DECISIONS ON THE LEGALITY OF THE DEATH PENALTY: A LOOK AT UGANDA AND SOUTH AFRICA

A DISSERTATION SUBMITTED TO THE FACULTY OF LAW OF THE UNIVERSITY OF PRETORIA, IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTERS OF LAW (LLM HUMAN RIGHTS AND DEMOCRATISATION IN AFRICA)

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DECLAR ATION

I, **William Tumwine**, hereby declare that this dissertation is original and has never been presented in any other institution. I also declare that any secondary information used has been duly acknowledged in this dissertation.

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DEDICATION

This dissertation is dedicated to my wife, Naomi, for the love, support and encouragement rendered during the program. I also dedicate it to my parents for the inspiration and moulding that has made me succeed in life.

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
AG	The Attorney General
AI	Amnesty International
AU	African Union
Cap	Chapter
CC	Constitutional Court
EHRR	European Court of Human Rights
FHRI	Foundation for Human Rights Initiative
HRC	Human Rights Commission
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
NGO	Non Governmental Organisation
OAU	Organisation of African Unity
SA	South Africa
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations (Organisation)
USA	United States of America

TABLE OF CONTENTS

CHAPTER 3: HOW PUBLIC OPINION HAS INFLUENCED COURT DECISIONS ON THE LEGALITY OF THE DEATH PENALTY

CHAPTER 4: ARGUMENTS FOR AND AGAINST THE ROLE OF PUBLIC OPINION IN COURT DECISIONS

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

CHAPTER ONE

INTRODUCTION

1. 1 Background to the study

One of the momentous tasks that courts, especially constitutional courts, have is balancing public opinion with legal principles. Understanding public opinion and relating it to the work of the courts, is a complex issue. To tell whether, and if so, to what extent public opinion is to be considered when deciding cases is no easy task. Public opinion is sometimes trivialised to the point of absurdity, but it cannot safely be ignored.[1]

'Public opinion' is one of those words which every one understands clearly, and uses freely, until an attempt is made to define or set limits to it. It then sinks into a bog of ambiguities, confusion and imprecision. It is not, therefore, the intention of this study to define public opinion in any final sense. The origin of the expression 'public opinion' is a mystery.[2] Dicey illustrates that we are so accustomed to endow public opinion with a mysterious or almost supernatural power that we neglect to examine what it is and measure the true limits of its authority.[3]

The term 'public opinion' has meant different things to different and it has various definitions thus views regarding the role of public opinion will consequently differ.[4] The varying interpretations usually relate to differences in opinion regarding the particular group of people constituting the 'public,' the degree of agreement necessary, the extent to which the opinions must be formed in a particular way, the subject matter of the opinions and their intensity and stability, as well as their influence. Public opinion is usually affected by public relations, media, the nature of the questions posed, the order and sequence of questioning, and the context within which the survey takes place.[5] This has contributed to the uncertainty of public opinion.

Lippman has defined public opinion as '… the aggregate of individual attitudes or beliefs held by the adult population.'[6] Strouse calls it the latent opinion waiting to be aroused on specific issues.[7] According to Asher, 'public opinion' amounts to an overt and not necessarily candid part

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1 See G Murray 'Out of touch or out of reach?' (2004). Judicial Conference of Australia <http://www.hcourt.gov.au/speeches/cj/cj_02oct04.html> (accessed 16 August 2006).

2 HL Childs *An introduction to public opinion* (1940) 35.

3 B Berelson & M Janowitz (eds) *Reader in public opinion and communication* (1953) 121.

4 Childs (n 2 above) 348–349.

5 R Hood *The death penalty: A world-wide perspective* (2002) 181.

6 W Lippmann 'Public opinion from Wikipedia, the free encyclopedia' <http://www E:\Public opinion.htm> (accessed 18 August 2006).

7 JC Strouse *The mass media: Public opinion and public policy analysis* (1975) 6.

of one's private opinion.[8] Hood states that public opinion is commonly used to denote opinions gathered through polls or other surveys.[9]

There is, therefore, no agreed definition of public opinion, but one can discern the meaning from the different definitions that 'Public opinion' is a prevailing composite opinion formed out of the several individual opinions that are held in the public by all those members of a group who are giving attention to a specific issue. It is a collective product of everybody's view, the natural or general thought or wish. It is neither a unanimous nor a majority opinion. To confine the term to situations where there is no dissent would deprive it of all the value.[10] To find out what was a given state of public opinion one has to collect the opinions of the individuals.[11] The term must then be related to a specific public and to definite opinions about something since there are many kinds of publics.[12] Given the above attempt to define public opinion, one can conclude that the term is subject to various interpretations.

For purposes of this study, therefore, 'public opinion' is defined as the attitudes, feelings or views of the majority of general members of society. These include the Ugandan and South African citizens and the 'opinions' of interest will be their opinions regarding the legality of the death penalty.

Public opinion finds its way into the justice system and finally to the decision making platform of the courts through various channels. These include public opinion polls, legislative debates, writings of jurists, social pressures, political situations and referendum on legal issues.[13]

Regarding the death penalty, the role of public opinion becomes more debatable because as Kakooza explains, there is a difficulty of addressing death penalty issues as values, national aspirations and conditions of social intercourse vary from society to society.[14] The death penalty touches life, which is the most important of all human rights. It, therefore, remains debatable as to whether it is the courts or the people that may decide the legality of criminal sanctions like the death penalty. Protection of judicial independence conflicts with the need for legitimacy given that courts are occupied by un-elected judges.[15] While sticking to legalistic and official positions, courts must keep in touch with the public since they need the latter's approval for decisions to be respected and implemented. It is also not clear whether and if so to what extent courts may rely

8 H Asher *Polling and the public: What every citizen should know* (1991) 20.
9 Hood (n 5 above) 181.
10 See Berelson (n 3 above) 7-13; Childs (n 2 above) 41; Asher (n 8 above) 20; Lippmann (n 6 above).
11 See Childs (n 2 above) 41.
12 As above 34.
13 Murray (n 1 above).
14 J Kakooza opening address at the first international conference on the application of the death penalty in commonwealth Africa *The Uganda Living Law Journal* (2004) 2 (1) 81.
15 See Murray (n 1 above).

upon public opinion in making judicial decisions thus the importance of assessing the role it should play and coming out with a way forward.

1. 2 Statement of the problem

Courts are temples of justice manned by professionals. They make decisions that affect various human rights including the right to life. In making these decisions, courts are guided by various principles inherent in a given legal system. In common law traditions reliance is always on the existing laws and legal precedents where they are clear enough to answer the legal issues under consideration as the normative rules under chapter two provide. However, sometimes courts go on a judicial intuition once the law is not settled enough to directly provide an answer. In these situations, courts are guided by traditions, customs, values, public opinion and the general practice in the community.

Some courts have had recourse to public opinion in arriving at their decisions especially in matters seriously affecting life such as the death penalty. Other courts have clearly rejected this approach. Reasons advanced for each approach differ. For instance, in Uganda, the Constitutional Court has held that the people still desire the death penalty and that the 1995 Constitution, in addition to 'saving' the death penalty, enjoins courts to follow the aspirations, values, norms and wishes of the people when making judicial decisions.[16] The Nigerian Supreme Court has held a similar position to that in Uganda.[17] The Tanzania Court of Appeal has similarly argued that such matters are better left to the people to decide and that the Constitution had provided for the death penalty.[18] However some courts have rejected the utility of public opinion in judicial decisions. For instance, the South African Constitutional Court has reasoned that judicial decisions are based on the law and not public opinion, and therefore, court can neither seek nor rely on public opinion.[19]

There is lack of a common position in the above judicial decisions as to the role of public opinion in court decisions. There is also a prevalent trend where the courts that accept the role of public opinion, usually hold that the death penalty is constitutional while those that reject it, find the

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16 See *Susan Kigula and Others v AG* constitutional petition 6 2003 (Uganda CC) (unreported) (Kigula case) where in a petition challenging the constitutionality of the death penalty, the Constitutional Court held *inter alia* that because the people were in favour of retention and courts are enjoined to decide in accordance with the wishes of the people, the death penalty was not unconstitutional.

17 *Kalu v the State* (1998) 13 NIULR 54 (Kalu case) where the Supreme Court of Nigeria considered whether the death penalty violated, *inter alia*, the right to life and the protection against inhuman or degrading treatment guaranteed by sections 30 and 31 of the Nigerian Constitution. The Court upheld the death penalty arguing that the constitution saved it and the punishment was still popular.

18 *Mbushuu (Alias Dominique Mnyaroje) and Another v Republic of Tanzania* 1995 TLR 97(CA) (Mbushuu case) where the High Court of Tanzania had held that the death penalty was unconstitutional and the respondent cross-appealed against that decision. One of the issues was whether the views of the society were relevant in determining the constitutionality of the death penalty in Tanzania.

19 *State v Makwanyane and Another* 1995 1 LRC 269 (CC) (Makwanyane case) where two death-row inmates challenged the constitutionality of the death penalty. Part of the arguments rested on whether public opinion that was largely believed to be in favour of retention should have been relied upon by the court, respectively.

penalty unconstitutional. Uganda, Tanzania and Nigeria serve as examples of the former position. South Africa represents the latter.[20] From these decisions, it is clear that following and refusal to follow public opinion determines the outcome. This, therefore, makes the question as to the place and role of public opinion in judicial decisions, important.

This study aims to interrogate the question of the utility of public opinion particularly in deciding the legality of the death penalty.

1. 3 Aims and objectives of the study

This study aims to investigate the role of public opinion in court decisions on the legality of the death penalty with a view to determining the utility of public opinion in deciding death penalty cases. The general objectives of the study are:

a) To examine literature on what public opinion is and how it is determined.
b) To find out the role public opinion ought to play in general court decisions and specifically those on the legality of the death penalty.
c) To critically examine court practice regarding the utility of public opinion relating to death penalty cases in the two case studies of Uganda and South Africa.
d) To make recommendations that would be useful not only for Uganda and South Africa, but for other countries in similar situations. This will be geared towards understanding what role public opinion should play in court decisions generally and particularly decisions on the legality of the death penalty.

1. 4 Significance of the study

The issue of whether public opinion has a role to play in court decisions on the legality of the death penalty has generated a lot of debate. Part of the debate relates to who holds the power to decide which punishment is appropriate in a given country. Is it the Courts or the public (society) through its representatives (the legislature)? Granted, the ideal is that the legislature which represents the people makes the law while the courts decide cases basing on the law. This seems to work in general court decisions, but not with those on the death penalty perhaps because of the great effect it has on life and the gravity of capital offences. In this regard, the debate has caused tension among state organs.[21] There have been complaints from politicians and commentators about

[20] See n 16, 17, 18 & 19 above.
[21] P Hodgkinson 'Beyond capital punishment: responding the needs of victims and establishing effective alternatives to the death penalty' in *Death penalty condemned* Commission of Jurists Sept (2000) 24. He states:

courts' to rely on public opinion.[22] The South African Constitutional Court recognised this tension, but stood its ground holding that it could not delegate its duty to parliament.[23]

There is, therefore, need to contribute to the assessment of the way courts and scholars have handled the role of public opinion in court decisions, particularly those on the legality of the death penalty. This will provide an insight on the significance of the utility of public opinion in Uganda, South Africa and beyond. It is also necessary to research on the possibility of a common position on the role of public opinion because the different positions taken are likely to lead to uncertainty of law and consequently lesser effectiveness of court decisions. The ultimate significance of this study is a contribution to the assessment of the effect public opinion should have on court decisions on the legality of the death penalty after examining the role it in fact plays in Uganda and South Africa.

1. 5 Research questions

The broad question that the study addresses is as follows:

- Given the practice in Uganda and South Africa, what should be the role of public opinion in decisions on the legality of the death penalty?

In answering this broad question, the following sub-questions are addressed:

- What is the role of public opinion in court decisions?

- What should be the role of public opinion in court decisions?

- What is the role of public opinion in court decisions on the legality of the death penalty?

- What should be the role of public opinion in court decisions on the legality of the death penalty?

- Is there a need for courts to have recourse to public opinion in deciding the legality of the death penalty and if so, to what extent should public opinion be relied on?

… there was tension between the Constitutional Court and Parliament in South Africa over who should take responsibility for the abolition of the death penalty.

[22] Amnesty International News Release 'Ugandan President incites killings' (1998) AI INDEX: AFR 47/4/98 <http://www.*E:\Ugandan President incites killings.htm*> (Accessed 16 August 2006). It was stated that during a visit to Rwanda on 11 January President Museveni reportedly told students at the National University of Rwanda at Butare that the organisers of the genocide 'must be hanged and the sooner the better.... If you kill six of my children, you should be sure that I will kill you. If the government does not do it, I will do it myself.'

[23] *Makwanyane* case (n 19 above) 188.

1. 6 Literature review

There are several court decisions and academic studies on both the death penalty and public opinion generally, although lesser research has been done on the influence of public opinion on the courts.

The court decisions analysed reflect a variance in the judicial position on the utility of public opinion. Some courts support public opinion while others do not. For example, in Uganda, the Constitutional Court has partly relied upon public opinion to uphold the constitutionality of the death penalty.[24] The Court agreed with the respondent that Ugandans were still in favour of the death penalty.[25] In Tanzania, the Court of Appeal decided that the question of desirability of a form of punishment is for the people to decide and that they had decided for the death penalty as a tool to protect themselves.[26] In South Africa, however, the Constitutional Court disregarded the view that public opinion should be consulted and relied on, holding that it is for the court to interpret the Constitution and safeguard individual rights.[27] Some courts hold the view that while public opinion should not be the determining factor, it cannot be ignored altogether. For instance it was held that 'public acceptance of capital punishment is a relevant, but not controlling factor in assessing whether it is consonant with contemporary standards of decency.'[28] Cases from other jurisdictions discussing the constitutionality of the death penalty were analysed comparatively.[29] These cases do not provide enough answers to the issue under investigation, but serve to show that there is no settled position on the role of public opinion in court decisions generally, but particularly decisions on the legality of the death penalty.

Reports of the Constitutional Commission and Constitutional Review Commission on the legality of the death penalty in Uganda show that the majority of Ugandans still support the death penalty.[30] These reports contain statistics of the respondents to the questionnaire about whether the death penalty should be retained in Uganda. This was part of the constitution-making and review processes of 1993 and 2001 respectively. The reports showed that a majority of the

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24 *Kigula* case (n 16 above).

25 As above (judgment of Okello J).

26 *Mbushuu* case (n 18 above) 118 (Ramadhani JA).

27 *Makwanyane* case (n 19 above) 188 where it was held that 'to allow ourselves to be influenced unduly by public opinion would, in any event, be wrong.'

28 *The People v Anderson* (1972) 493 2d 880 (Wright CJ at 893-4) See also *Mhlakaza and another v S* [1997] 2 All SA 185 (A) 189 g-1 (Mhlakaza case). It was observed that:

> The Court cannot allow itself to be diverted from its duty to act as an independent arbiter by making choices on the basis that they will find favour with the public …. On the other hand the courts must not disregard it. Perhaps the main duty of the court is to lead public opinion.

29 See for example *Kalu* case (n 17 above) 531; *Catholic Commission for Justice and Peace in Zimbabwe v The Attorney General, Sheriff of Zimbabwe and the Director of Prisons* 1993 4 SA 239 where the court held that the views of the society had to be considered.

30 The Report of the Constitutional Review Commission. Findings and Recommendations 10 December 2003, 13-172 (Ssempebwa Commission) and The Report of the Uganda Constitutional Commission: Analysis and Recommendations 1993 154 (Odoki Commission).

respondents supported retention of the death penalty. This was relied on by the respondents in *Kigula* to argue that the death penalty was still popular and thus constitutional in Uganda.

Books on courts and public opinion were reviewed.[31] Several writers agree with the courts on the non-binding role of public opinion.[32] Kanyeihamba, while preferring a middle position whereby courts consider public opinion without necessarily being bound by it, he acknowledges the dilemma in balancing judicial ethics with public opinion.[33] However, his work does not make particular reference to the practice in the case study countries of Uganda and South Africa. Hodgkinson illustrates the controversy caused by the issue of the role of public opinion in court decisions using the tension between the Constitutional Court and Parliament in South Africa over who should take responsibility for the abolition of the death penalty.[34] Clearly Hodgkinson's contribution is not an in depth discussion of the issues raised by this topic. It is also limited to the situation in South Africa and does not cover Uganda. There are also a number of journal and internet articles on the utility if public opinion in court decisions.[35] The views are varied, but they largely show that while courts should not rely upon public opinion, they should not ignore it altogether.[36] This study compares the views for the reliance on public opinion in court decisions and those against. It tries to find possibilities of a common position.

None of the writings above gives the topic an in-depth treatment. As far as this study can ascertain, even where the study has been done, it did not specifically concern this topic. No attention has, as of now, been given to the comparative study of the role of public opinion in court decisions in Uganda and South Africa. This study discusses how the role of public opinion is being handled in Uganda and South Africa. It is an analysis of the extent to which courts have relied on public opinion in their decisions and whether this is the correct position. The study will provide a solution to the lack of a specific study on the role of public opinion in court decisions on the legality of the death penalty.

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31 See G Denevish *The application of the death penalty in South Africa: Its historical and jurisprudential evolution and background and its relationship with constitutional and political reform* (1990); J Megiven *The death penalty: A historical and theological survey* (1997); Hood (n 5 above) and M Seleoane *The death penalty: Let the people decide* (1996).

32 T Cloete 'Sentencing: Public expectations and reaction' in *Note and Comments* (2000) *The South African Law Journal* 618-623 He quotes *R v Karg* 1961 (1) SA 231 at 236 B-C stating that 'it is not wrong that the natural indignation of interested persons and that of the community at large should receive some recognition in the sentences that courts impose.'

33 G Kanyeihamba 'Reflections of a judge on the death penalty in Uganda.' *The Uganda Living Law Journal* (2004) 2 (1) 96 & 99. (Kanyeihamba is a judge of the Supreme Court of Uganda and also the new African Court on Human and Peoples' Rights).

34 Hodgkinson (n 21 above).

35 See for example D Beschle 'Why do people support capital punishment? The death penalty as a community ritual' (2001) 33 *Connect ant Law Review* 765 and W Bowers 'Capital punishment and contemporary values: Peoples misgivings and the court's misperceptions' (1993) 27 *Law and Society Review* 157.

36 See Cloete (n 32 above) 618-623. He quotes *R v Karg* 1961 (1) SA 231 236 B-C stating that 'it is not wrong that the natural indignation of interested persons and that of the community at large should receive some recognition in the sentences that courts impose.'

1. 7 Research methodology

This study involves an examination of literature from primary sources like constitutions and statutes. Secondary sources like case law, books, Constitutional Commission Reports, internet, journals and newspaper articles are also used. The study heavily relies on library and internet sources because the time for the study is too short to enable collection of primary data from the field.

Uganda and South Africa have been selected as case studies. This is to examine the efficacy of public opinion in these two countries. The case studies are selected because they represent the major trends of the approaches courts have taken to the public opinion debate.

The study also uses a comparative analysis approach. It draws lessons from other jurisdictions where this issue has been dealt with. In the final analysis, views in support of the role of public opinion in court decisions are evaluated *visa avis* those against it in order to give an insight to the rules on the subject and provide a forum for cross-fertilisation of experiences and ideas.

1. 8 Scope and limitations of the study

A study of death penalty and public opinion can be approached from various disciplinary angles. In the interest of time and resources, this study takes a legal approach to the subject. More particularly, it examines the relevant practice of courts in Uganda and South Africa regarding the role of public opinion in court decisions.

The study is particularly on the role of public opinion in court decisions on the legality of the death penalty. Only a few decisions exist on this subject matter. Two case studies of Uganda and South Africa are selected. South Africa, because it has recovered from apartheid and suppression and thus represents, perhaps the most liberal approach of a growing democracy. Uganda, on the other hand, has suffered a lot of human rights abuses under prolonged dictatorship and is just starting to democratise. It will, therefore, be interesting to understand how issues of death penalty and public opinion are treated in these two differing situations.

The case of *Kigula* representing the position of Ugandan courts on the role of public opinion in court decisions on the death penalty is pending an appeal at the Supreme Court where the decision analysed in this study may be overturned.

1. 9 Outline of chapters

Chapter one comprises the background of the study, statement of the problem, significance of the study, aims and objectives of the study, literature review, methodology and limitations of the study. Chapter two is a discussion of the role public opinion ought to play in court decisions in general and decisions on the legality of the death penalty in particular. Chapter three is an analysis of the actual influence of public opinion on court decisions on the legality of the death penalty. It also has a comparison of court practice in Uganda and South Africa and includes a critique. Chapter four is a presentation of arguments for and against the role of public opinion in court decisions. Chapter five contains conclusions from the research findings and recommendations on how public opinion should be treated in court decisions generally and court decisions the legality of the death penalty in particular.

CHAPTER TWO

THE ROLE PUBLIC OPINION OUGHT TO PLAY IN COURT DECISIONS

2. 1 Introduction

This chapter is divided into two parts. The first part introduces the international, regional and national normative standards before discussing the role public ought to play in court decisions in general while the second part concentrates on the role public opinion ought to play in court decisions on the legality of the death penalty. According to Welsh, prior to 1968, courts simply assumed the constitutionality of capital punishment because parliamentary supremacy reigned. The powers of courts to review laws, least of all constitutions, were unheard of. Therefore, the role of courts in deciding the legality of capital punishment is a fairly recent development.[37] The question whether courts should rely on public opinion and if so, to what extent, remains unsettled and more so in death penalty decisions given their unique nature. The role public opinion ought to play is discussed in many writings and court holdings. Views regarding this role differ because of differences in philosophical outlook, in social, economic, political, and religious beliefs. Some ascribe a determinative role of public opinion in court decisions on the death penalty,[38] others say that there is a role, but not a determinative one, others suggest that there is a role, but are not sure what it is and the rest think that public opinion should have no role at all in court decisions on the death penalty.[39] The rest offer a critique without taking sides.[40] This chapter analyses these various positions.

2. 2 Normative standards on the role of public opinion in court decisions

No particular international legal instrument has been made on the role of public opinion in court decisions. However, particularly instructive on the matter are various instruments on the independence of the judiciary which also provide that courts shall decide cases without interference and only in accordance with the facts and the law.

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37 S Welsh The death penalty in the nineties: An examination of the modern system of capital punishment (1987) 4.

38 See *Mbushuu* case (n 18 above); *Mhlakaza* case (n 30 above) 189; *Kigula* case (n 16 above); *Catholic Commission* case (n 31 above) 239; Childs (n 2 above) 352; P Lenta 'Democracy, rights disagreements and judicial review' (2004) sajhr 1 11 49-53 <http://www.ceu.hu/legal/legal/Friedman.htm> (accessed 27 July 2006); Kanyeihamba (n 35 above) 93.

39 See *Makwanyane* case (n 19 above) 269; *Hungary Decision No. 23/1990 (x.31) AB of the Constitutional Court on the constitutionality of capital punishment* (Hungary decision) On file with researcher. This was a constitutional petition in Hungary challenging capital punishment. The respondent objected arguing that parliament was the better forum to decide the matter. The Court held that it was neither bound by intent of parliament nor did it hunt for popularity among members of the society; Roland 'The death penalty: A decisive question,' *United Nations Crime Prevention and Justice Newsletter*, 39-42 39 & Hood (n 5 above) 150.

40 W Schabas *The death penalty as cruel treatment and torture: Capital punishment challenged in the world's courts* (1996).

2. 2. 1 The International standard

At the international level we have the Universal Declaration of Human Rights (UDHR) whose article 10 recognises as fundamental, the principle that everyone is entitled to a fair and public hearing before an *independent and impartial tribunal*, in the determination of rights and obligations. The International Covenant on Civil and Political Rights (CCPR) is another instrument which provides that everyone shall be entitled to a fair and public hearing by an *independent and impartial tribunal* established by law.[41] [Emphasis is mine]. Uganda and South Africa ratified the CCPR in 1995 and 1998 respectively.[42]

Another international instrument is the Basic Principles on the Independence of the Judiciary (1985) which, although less binding, is still important.[43] These are to assist member states in their task of securing and promoting the independence of the judiciary and are to be taken into account and respected by governments with in the framework of their national legislation and practice. The principles provide that the independence of the judiciary shall be guaranteed by the state and enshrined in the Constitution or national law. They also create a duty on all governmental and other institutions to respect and observe the independence of the judiciary; provide that the judiciary shall decide impartially and on the *basis of the facts and in accordance with the law, without any restrictions, improper influences, pressures, threats or interferences, direct or indirect from any quarter or person* and confer jurisdiction over all judicial issues to the judiciary meaning that the legality of the death penalty should be for the courts to decide and prohibits inappropriate or unwarranted interference.[44] [Emphasis is mine].

The Bangalore Principles of Judicial Conduct (2002)[45] is another relevant instrument whose preamble captures a summary of the expected relationship between the courts and the public as well as the relevance of judicial independence thus:

> WHEREAS…. a competent, independent and impartial judiciary is likewise essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law; public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society.

The Bangalore principles recognise judicial independence as a pre-requisite to the rule of law and a fundamental guarantee of a fair trial and provide that a judge shall exercise the judicial function independently on the basis of the judge's assessment of the *facts* and in accordance with a

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41 Article 14(1).

42 See C Heyns (ed) *Human rights in Africa* (2004) 48 & 49.

43 Adopted at the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders on 26 August-6 September 1985 at Milan and Endorsed by the UN General Assembly in resolution 40/32 of 29 November 1985 and resolution 40/146 of 13 December 1985.

44 Articles 1, 2, 3 and 4.

45 Adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002.

conscientious understanding of the *law*, *free of any extraneous influences, inducements, pressures, threats or interference*, direct or indirect, from any quarter or for any reason.[46] [Emphasis is mine].

2. 2. 2 Regional standards

At the regional level the first relevant instrument is the African Charter on Human and Peoples' Rights (African Charter)[47] which provides that state parties shall have a duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the Charter.[48]

The second instrument is the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003) which guarantees the independence of the judiciary.[49]

The third instrument is the Dakar Declaration and Recommendations on the Right to a Fair Trial which protects the independence of the judiciary and also expresses recognition by states of the inadequacy of the existing independence protections due to non transparent judicial appointments and lack of security of tenure.[50]

2. 2. 3 National standards

At national level, in Uganda the Constitution provides that the courts shall be independent and not subject to the control or direction of any person or authority. It also emphasises that no person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions.[51] The Uganda Judicial Service Commission Regulations (1989) and the Uganda Judicial Code of Conduct (2003) provide guidance on how judicial work is carried out and prohibit reliance on the public when deciding cases.

The position of the Constitution of the Republic of South Africa (1996)[52] is that the Courts are independent and subject only to the Constitution and the law, and no organ of the State or person

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46 Part 1.1

47 Adopted by the Organisation of the African Unity (OAU in June 1981 and entered into force in October 1986. Uganda ratified it on10 May 1986 while South Africa, on 9 July 1996. (See Compendium of key human rights documents of the African Union 2005 263).

48 Article 26.

49 Adopted by the African Commission on Human and Peoples Rights (African Commission) per its 1999 Resolution on the Right to a Fair Trial and Legal Assistance in Africa. (See Compendium (n 47) above 210). See articles 4 and 5.

50 This is a Resolution on the Right to a Fair Trial and Legal Assistance in Africa adopted by the African Commission in 1999. (See Compendium (n 47 above) 192-199). See also resolution 2.

51 The Constitution of the Republic of Uganda, 1995 (As amended). See article 128(1) & (2), (3) and (4).

52 (Act 108 0f 1996).

may interfere with their functioning. Instead, organs of the State must assist and protect courts to ensure independence and impartiality.

The effect of these rules is to prohibit external pressure and interference on the Courts so that they decide cases basing on the facts and the law without fear or favour. Uganda and South Africa are supposed to be guided by the rules as members of the UN and the African Union (AU).

2. 3 The role public opinion ought to play in court decisions generally

The following is a presentation of an attempt by courts and writers to identify the role public opinion should play in general court decisions. The views are divided into three schools of thought: The 'no' role school; the 'non-determinative' role school; and the 'determinative' role school.

2. 3. 1 The 'no' role school

The 'no' role school of thought advocates that public opinion should not play a role in court decisions. Dismissing the role of public opinion in court decisions, it has been suggested that assessment of popular opinion is essentially a legislative, not a judicial, function. Choper suggests instead, that the judiciary should play a supervisory role and restrains the majority will through judicial review.[53]

Murray agrees with this school of thought and although he concedes that decision-makers are required, above all, to be 'in touch', this, for him does not apply to the courts. He suggests that though judges are expected to be conspicuously responsive to community values, this involves knowing those values; a task that is not always as easy as it sounds. He states:[54]

> Judges have no techniques for or expertise in, assessing public opinion. Judges ordinarily do not seek to influence public opinion. They do not sample community opinion for the purpose of informing their decision-making. And they do not set out to influence wider community values.

Opponents argue that judges would be exposed to improper pressure and interference if they were to be intimidated by popular disapproval. They state that it is one thing for individual judges, and the judiciary as an institution, to show a proper respect for community values and to be conscious of the importance of public confidence, and it is another thing for judicial decisions to bend before the changing winds of popular opinion. Nothing is more likely to undermine public confidence in judicial independence and impartiality than the idea that judges seek popularity or fear unpopularity.[55] This position tends to agree with the normative standards outlined above.[56]

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53 J Choper quoted in V Wyk *Rights and constitutionalism: The new South African legal order (*1994) 9.
54 Murray (n 1 above).
55 As above.

Total reliance on public opinion for decision-making has been particularly discouraged by opponents like Anne. Weiss however, recognises that public opinion represents people's support and states:[57]

> The leaders of democracy ought never to make any decision just because a poll shows that it will be the most popular one. Polls must not become a substitute for debate and discussion.… Polls can promote government by the people in other ways. They can reflect the country's changing needs.

It has also been argued that judges, as opposed to claims by proponents of the role of public opinion, understand the needs of society. Those who want to influence judicial decision-making, and regret their lack of capacity to do so, often find the judiciary frustratingly unresponsive and may regard the independence of judges as evidence of inappropriate isolation from the rest of the community.[58]

Finally, it has been argued that public opinion should not be the determining factor because judges may be called upon to protect the rights of citizens who are in conflict with government and who are despised by most members of the community. This would create a conflict as the people would be judges in their own cases. Unelected public officials are meant to be outside the political process. They are not supposed to compete with politicians for popular support or to seek political legitimacy.

2. 3. 2 The 'non-determinative' role school

Some writers have acknowledged the difficulty of choosing sides and have thus suggested a middle position which entails courts to consider, although not as a determinative factor, public opinion in arriving at decisions. Kanyeihamba writes:[59]

> Whereas it is a principle of the judicial oath that a judge should not be influenced by public hysteria, he or she must take into account the attitudes of the responsible members of the society, in respect of which the law is to be upheld.

This approach sounds attractive as far as it allows both sides to feel accommodated. However, it presents practical difficulties of compliance leading to the 'dilemma' discussed under paragraph (2.4) below.

This school proposes that while courts do not have to reflect public opinion, they must not disregard it and that perhaps the main duty of the court is to lead public opinion. This was

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56 See generally chapter 2 para 2.3 above.

57 AE Weiss 'Polls and surveys, a look at public opinion research' (1979) 61 & 67 <http://www.amazon.com/gp/product/book-citations/0275949893htm> (accessed 5 September 2006).

58 See generally Murray (n 1 above).

59 Kanyeihamba (n 33 above) 94 & 96.

reiterated in *Mhlakaza* and *Makwanyane.*[60] This is a more realistic view than the pure rejectionist one because it acknowledges that courts cannot just decide in total disregard of the circumstances around them.[61]

The view that once the law is out of touch with the moral consensus of the community, whether by being either too far below it or too far above it, the law is brought into contempt supports the role of public opinion in court decisions. Following this, the European Court of Human Rights has held that '... in a democracy, the law cannot afford to ignore the moral consensus of the community.[62] This decision is instructive in as far as it reminds the courts not to take extreme positions of either totally relying upon public opinion or totally ignoring it when making decisions. Without deviating from the African judicial approach, it presents a more accommodative position.

The need to refer to the moral aspects of the society was acknowledged by the court in *Makwanyane* observing that while it was important to appreciate that in the matter before the court, it had been called upon to decide an issue of constitutionality and not to engage in debate on the desirability of abolition or retention, it was equally important to appreciate that the nature of the court's role in constitutional interpretation, and the duty placed on courts would of necessity draw them into the realm of making necessary value choices.[63] This displays the dilemma caused by the judicial oath as illustrated below.

2. 3. 3 The 'determinative role of public opinion'

The position of the 'determinative role of public opinion' school of thought is that public opinion should play a decisive role in The Court in *Mbushuu* was of the view that the matter of the death penalty is to be decided by members of Tanzania society holding that 'But the crucial question is whether or not the death penalty is reasonably necessary to protect the right to life. For this we say it is society which decides."[64]

This school has support under article 126 of the Constitution of Uganda which provides that '… justice shall be exercised in the name of the people and in conformity with law and with the values, norms and aspirations of the people.' This was raised in *Kigula* where the respondent, relying on article 126, among other grounds, argued successfully that the Constitution required courts to take into account public opinion when making judicial decisions. The Court went ahead to hold that if the people wished to retain the death penalty, it should be so.[65]

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60 See *Mhlakaza* and *Makwanyane* cases *(*n 28 & 19 above).
61 *Mhlakaza* case (n 28 above) 189 g-1.
62 *Dudgeon v United Kingdom* (1982) 4 EHRR 149 184.
63 *Makwanyane* case *(*n 19 above) 303.
64 *Mbushuu* case (n 18 above) 117.
65 *Kigula* case (n 16 above) 113-134.

In effect, this school asserts that public opinion should play a determinative role in court decisions. Most of the reasons advanced by this school are similar to those given in support of the role of public opinion in court decisions on the legality of the death penalty under chapter 4 paragraph 4.3.

2. 4 The 'dilemma' courts face in deciding whether to rely upon public opinion

Courts of law are comprised of human beings who grow up, are educated and live in society. They acquire the attitudes of the society before and while at law school. While still living in the society, and capable of public pressure, they are required by judicial ethics and rules, to totally ignore the views of the public and decide all cases in accordance with abstract legal rules. This presents a dilemma that is discussed below.

Murray raises many questions to display the dilemma of relying upon public opinion. He asks for instance:[66]

> How should judges keep in touch? Should they employ experts to undertake regular surveys of public opinion? Who exactly is it that they ought to be in touch with? Whose values should they know and reflect? What kind of opinion should be of concern to them? Any opinion, informed or uninformed? What level of knowledge and understanding of a problem qualifies people to have opinions that ought to influence judicial decision-making?

Other writers have contributed to the dilemma of relying on public opinion. For instance Kanyeihamba questions; 'Should a court take into account the degree of revulsion felt by law-abiding members of the community for the particular crime?'[67] Harwood joins and adds; 'Why should the people, however defined, be consulted? What is justice? Is it to be found in some higher moral order or here and now in the decisions of the majority? On what kinds of questions, if any, is the general public especially competent?'[68]

There are also questions raised by supporters of public opinion. Cleote asks; 'So what rights have the courts not to give the public what it wants and what the elected representatives of the public have enacted?'[69] Hans chips in his; 'but should the human rights ideal need to protect itself from public opinion?'[70]

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66 Murray (n 1 above).
67 Kanyeihamba (n 33 above) 93.
68 Childs (n 2 above) 349.
69 Cloete (n 32 above) 620.
70 G Hans *The barbaric punishment; Abolishing the death penalty* (2003) 4.

There are no definitive answers to the questions, but the views on these and other profound philosophical questions have a very important influence on the role people think public opinion should play in public policy decisions.[71]

2. 5 Conclusion

This chapter has discussed the normative postulation of the role of public opinion in court decisions. The chapter has also presented the dilemma of relying on public opinion. It has analysed the various views about whether, and if so, what role public opinion ought to play in court decisions. The 'determinative role of public opinion' school holds that public opinion should be relied upon in making court decisions wile the 'no role' school advocates that courts should not refer to public opinion when reaching decisions. Proponents of the 'non-determinative role' of public opinion maintain that public opinion should not be considered as a determining factor, because, while it is not totally irrelevant, it lay at the periphery - not core of the judicial process in deciding cases.[72] Their view is that public opinion has not, in general, obtained the status of a sole determining factor in court decisions. Their position is the strongest as it takes into consideration the reality of public opinion while at the same time guarding judicial ethics. It can be deduced from the analysis that public opinion ought to play no role in court decisions although it has some supporters. The next chapter analyses the practice of courts in selected retentionist and abolitionist states regarding the role of public opinion in court decisions on the legality of the death penalty.

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71 Childs *(*n 2 above) 349.

72 *Furman v the state of Georgia (*1992) 408 US 238.

CHAPTER THREE

HOW PUBLIC OPINION HAS INFLUENCED COURT DECISIONS ON THE LEGALITY OF THE DEATH PENALTY

3. 1 Introduction

This chapter looks at how courts in retentionist and abolitionist states represented by Uganda and South Africa have, in practice, assessed the utility of public opinion in deciding cases on the legality of the death penalty. This chapter also presents a critique of the different court practices. The practice in other jurisdictions is alluded to for comparative illustrations. The issue of whether public opinion itself affects what people think is a question of long standing.[73] While some courts like in Uganda,[74] Tanzania[75] and Nigeria[76] have held that public opinion is relevant and should be relied upon in deciding death penalty cases, others like the South African Constitutional Court have rejected it as irrelevant.[77] In addition, there are middle-ground views suggesting that while public opinion should not be the determining factor, courts must never ignore it.[78]

3. 2 The practice in retentionist states

3.2.1 The political context in Uganda

According to the US State Department report (http://www.state.gov), Uganda got independence October 9, 1962 from the British. In 1966, Milton Obote suspended the Constitution. The country has undergone several military *coup detats* and got several presidents as a result. The Idi Amin's 8-year rule produced economic decline, social disintegration, and massive human rights violations. Uganda has been under limited operation of political parties, but is now a multiparty system from 2005. The current constitution was promulgated 1995 provides for an executive president, to be elected every 5 years. Parliament and the judiciary have significant amounts of independence and wield significant power. The current government has largely put an end to the human rights abuses of earlier governments, initiated substantial economic liberalisation and general press freedom. This makes the need for capital punishment persist as the population still wants punishment for past atrocities.

In retentionist states, public opinion is frequently invoked in defence of capital punishment. Politicians and jurists argue that they cannot move far ahead of public opinion thus the survival of

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73 RG Walden *Public opinion polls and survey research: A selected annotated bibliography of U.S. guides and studies from the 1980*s (1990) 44.

74 *Kigula* case (n 16 above).

75 *Mbushuu* case (n 18 above) 115-117.

76 *Kalu* case (n 17 above) 54.

77 *Makwanyane* case (n 19 above).

78 *Mhlakaza* case (n 28 above) 189.

the death penalty on many statute books. According to Hans, retention is said to be both a consequence of democratic rule and a will of the majority. He states:[79]

> Democracy leans toward abolition, but retentionists defend the death penalty in the name of the will of the people…. Yet public opinion is increasingly being invoked by States to justify abolitionist measures.

According to Amnesty International, one reason put forward by officials for retaining the death penalty is that public opinion demands it and it would be undemocratic in the face of such support for the penalty to be abolished.[80] Citing the example of Rwanda which in 1994 opposed the United Nations Security Council resolution creating the International Criminal Tribunal for Rwanda (ICTR), Schabas states that it was argued that the draft statute was not acceptable to the citizens because it excluded the death penalty. He illustrates:[81]

> During debates on the death penalty, it is usually argued by retentionists and frequently conceded by abolitionists, that public opinion favours its use…they frequently invoke public opinion in order to account for their reticence.

Public opinion has been regarded highly in Tanzania where the Court of Appeal has held that the people should decide if the death penalty is desired, and that it could not be abolished when it was still popular. The Court explained:[82]

> The society can only discharge its duty of protecting the right to life by deterring persons from killing others. Tanzania, like many other societies, has decided to do so through the death penalty…. But the crucial question is whether or not the death penalty is reasonably necessary to protect the right to life. For this we say it is society which decides.

The Ugandan Constitutional Court has also accepted that public opinion should be relied on, holding that if the majority of Ugandans desires the death penalty, the Court should uphold it. The Court also agreed with the argument of the respondent that public opinion was a relevant factor for consideration and that there is a legal basis for following public opinion, since the courts are enjoined by article 126 of the Constitution to respect the law, the norms, values and aspirations of the people.[83]

The Speaker of Parliament of Uganda has reiterated support for the role of public opinion in deciding the legality of the death penalty arguing that 'you cannot tell people that you can kill some one and never be touched. It would cause anarchy in our villages.'[84]

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79 Hans (n 70 above) 1, 4 & 5.

80 Amnesty International 'When the state kills…the death penalty: a human rights issue' 22 (On file with the researcher).

81 Schabas (n 40 above) 79.

82 *Mbushuu* case (n 18 above) 115 & 117.

83 *Kigula* case (n 16 above) 113-134 (Twinomujuni J).

84 'Speaker backs death penalty' *Daily Monitor* 27 July 2006 4. <http://www.monitor.co.ug> (accessed 27 July 2006).

It is evident that courts in many jurisdictions seem to acknowledge that the public usually supports retention of the death penalty.[85] This may tend to influence the decision of the constitutionality of the death penalty especially in retentionist states.

3. 3 The practice in abolitionist states

3. 3. 1 The political context in South Africa

According to the US State Department report (http://www.state.gov), South Africa became a republic in 1961 and is multiparty parliamentary democracy with a bicameral National Assembly. There is a president elected to a 5-year term by the National Assembly. Until 1991, South African law divided the population into racial categories. The country's first non-racial elections were held in1994. South Africa's post-apartheid governments have made remarkable progress in consolidating the nation's peaceful transition to democracy and the Truth and Reconciliation Commission (TRC) has helped the healing process. The current constitution entered into force in 1997 and provides for an independent and impartial judiciary, and, in practice, these provisions are respected. The constitution's bill of rights provides extensive guarantees. This history has dictated that respect for human rights is given a priority so as to end the abusive past.

In abolitionist states like South Africa, public opinion has not been embraced in arriving at judicial decisions. In South Africa, where it was argued by the State that the constitutionality of the death penalty should have been decided relying upon public opinion, Chaskalson J held that public clamour did not enjoy the same constitutional guarantee as the rights to life and human dignity.[86]

Abolitionists argue that a court is neither bound by the will of the majority, public sentiments nor the intent of the legislature. That it is parliament that is under public pressure and constitutional courts do not hunt for popularity among members of the society.[87]

Even in abolitionist states, public opinion was a big factor in the delay to abolish the death penalty. For example, in South Africa, there was a long-standing support for the death penalty before *Makwanyane* was decided, as Keith states:[88]

> One of the factors …against the abolition of the capital punishment in this country is public support for its retention. The only official investigation into capital punishment in South Africa, the Lowdown Commission of 1947 (Report of the Penal and Prison Reform Commission U6, 47 of 1947) argued that public opinion was such that the abolition of the death penalty was not to be tolerated.

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85 Hans (n 70 above) 4 & 5. He refers to *Mbushuu* case (n 18 above) 351.
86 *Makwanyane* case (n 19 above) 78.
87 See *Hungary Decision* (n 39 above).
88 I Keith 'The penalty of death: public attitudes in South Africa' SACJ (1989) 2 SAS 256.

Similarly, in the US, public opinion played a role in abolition. Joan states that for more than a quarter-century, the Supreme Court upheld the death penalty relying on attitudes both in the states and foreign countries. Accordingly, the Court had decided that it would consider public consensus when deciding when the death penalty is inappropriate.[89]

It appears, therefore, that public opinion is a factor in determining which side a court takes on this matter. Consequently, public opinion is frequently cited as the reason for retaining, abolishing or reinstatement of the death penalty.[90]

3. 4 Critique of the approaches taken by courts in the selected States

The first parts of this chapter have presented the practice of courts in retentionist and abolitionist states. Different reasons are given for the positions taken by these Courts. A critique of the different approaches in particular cases will now be embarked on beginning with the retentionists.

Keith states that although a substantial number of people support the death penalty, they mostly do not know much about its effects and circumstances.[91] In spite of the acknowledgment of the lack of adequate information by the public by the Appeal Court in *Mbushuu,* the final holding was that the people should decide.[92] This displays the Court's readiness to accept and rely upon public opinion even if it may not be formed after an appraisal of relevant facts.[93] No wonder, some courts have dismissed the relevance of public opinion because it is not properly informed.[94] Lloyd explains that the main reason for the rejection of public opinion is that South Africans are uneducated about the death penalty and are not versed with what it means and how inhumane it is. He maintains that people seem to think that there are only two options; the death penalty or the release back into society of dangerous killers.[95]

Concerning the approach that the society should decide the appropriateness of the death penalty, this misses the point. The constitutionality of the penalty is clearly not a matter within the power of the people who usually pass on the same to the Court through the Constitution. It can be argued that were this to indeed be a matter for the society, the court should always decline jurisdiction and refer it back for a referendum.[96] For example in *Mbushuu*, the Court reasoned that

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89 J Biskupic 'Door open to death-penalty limits' (2002) <http://www.ceu.hu/legal/legal/Friedman.htm> (accessed 12 August 2006).

90 Hood (n 5 above) 148.

91 Keith (n 88 above) 259.

92 *Mbushuu* case (n 18 above) 116. The Court of Appeal quoted the trial judge as holding that 'there may be a majority of Tanzanians who support the death penalty blindly, and these are not enlightened and not initiated or aware of the ugly aspects of the death penalty ….'

93 P Hodgkinson & W Schabas (eds) *Capital punishment: Strategies for abolition* (1996) 239.

94 Hans (n 70 above) 4 & 5.

95 S Graeme & V Lloyd 'The death penalty in South Africa' <http://www.E:\The Death Penalty in South Africa - Simpson & Vogelman.htm> (accessed 16 August 2006).

96 A call for a similar referendum in Uganda 'Hold poll on the death sentence' *The New Vision* 7 February 2005 11.

the people may have a duty to protect their members through punishments, but this is done through the elected legislators and the courts which are mandated by the same people through the Constitution.

Popularity of the death penalty is not an ingredient for court to rely upon in deciding its constitutionality. This violates the normative rules set out above as it allows undue influence and deciding the matter not based on the law but on popularity. In essence, this would mean that whatever is popular, including mob justice, should be legalised, an idea that has no legal backing.

Another criticism is that whereas public opinion is hard to prove, courts in retentionist states tended to overlook this. For instance, the required evidence of public opinion was regarded inadequate in South Africa where the Court held that appropriate source material is limited and any conclusions that individual members of the Court might have wished to offer would inevitably have to be tentative rather than definitive. It was decided that the Court would have required much fuller research and argument than was the case.[97] In *Mbushuu,* the Court seemed to presume that the majority of Tanzanians supported the death penalty. While it might have been true that the death penalty was still popular, this was not proved in court.[98] In *Kigula*,[99] the statistics court relied on were neither updated nor a result of a specific referendum on the death penalty.[100] The sampling was not representative enough and the percentage of the supporters of the death penalty was not high enough to lead to a conclusion that they were the majority of Ugandans.

Need for education has been cited by the retentionists too as reason for the delay to abolish the death penalty. They argue that the legal consciousness of the population is still very low.[101] For instance in Uganda, the response of the public to the questionnaire by the Odoki and Ssempebwa Constitutional Commissions[102] on the death penalty was poor because of inadequate sensitisation of the masses on the topic. Apart from a few letters in the newspapers, Uganda failed to embark on adequate debate on the issue. The statistics showed that the general public in Resistance Councils[103] 1 and 2, who were mainly illiterate and not exposed to sensitisation about the death penalty, preferred to retain it. However, all the other groupings that were better sensitised about the death penalty advocated for its abolition.[104] The Court in *Kigula,* however, did not take this into account.[105]

97 *Makwanyane* case (n 19 above) 78 372.
98 *Mbushuu* case (n 18 above) No opinion poll was particularly conducted for this.
99 *Kigula* case (n 16 above).
100 Statistics as per Odoki and Ssempebwa Commission Reports (n 30 above).
101 P Hodgkinson & A Rutherford (eds) *Capital punishment global issues and prospects* (1996) 58.
102 Odoki and Ssempebwa Commission Reports (n 30 above).
103 Resistance Councils are the lowest local government units where the illiteracy level is high.
104 Unpublished: R Ruhweza 'A review of the application of the death penalty in Uganda' unpublished LLB thesis, Makerere University, 2000 59-60 (quoting J Waliggo 'How the Constitution process dealt with the death sentence' UHCR, Monthly Magazine (1999)).
105 *Kigula* case (n 16 above).

Concerning the approach in *Kigula,* total reliance on public opinion is not an acceptable practice for the courts. This is partly because public opinion changes and thus popular support for the death penalty tends to vary over time; from community to community and in response to particular events and eventualities. A marked increase in violent crime, for example, may help to heighten public support for capital punishment.[106] This makes it hard to determine public opinion thus requiring frequent polls to determine the prevailing trends. Given this argument, the fact that at the time of deciding the case no particular public opinion was sought, raises more questions about the approach the Court took. To illustrate that public opinion is not static and thus hard to rely upon; people still express opposition to the *Makwanyane* decision:[107]

> Many adults in South Africa believe capital punishment should be implemented again, according to a poll by Research Surveys. 72 per cent of respondents believe the government should bring back the death penalty.

The approach of the abolitionists represented by South Africa, has received its share of criticism. Some contradiction was made when the court in the case of *Makwanyane* concluded that 'yet, were public opinion on the question clear it could not be entirely ignored.'[108] This suggests that one of the reasons for rejection of public opinion was that it was not clear. Earlier though, the Court stated that even if public opinion on the issue existed; it would not be considered and relied on. This has attracted criticism from Seleoane who maintains that stating on the one hand that public opinion is not relevant and thus should not be followed and on the other hand that if it were clear, it would not be ignored, creates a contradiction and does not clearly show the position of the court.[109] It can be argued, however, that this is not contradictory because if public opinion was clear, it would be considered, even though not as a determinative factor. However, as public opinion was not clear in this case, it was not considered at all.

While it is true that a constitution is to be interpreted more broadly than a statute, it is hard to maintain that this allows courts to base their decisions on what the public wants in deciding legal matters. This is why they are not 'courts of public opinion', but 'courts of law'.

3. 5 Conclusion

This chapter has shown that the practice in the studied states is not the same. The retentionists more than the abolitionists, tend to rely upon public opinion in making court decisions on the death penalty. The Courts hardly demand legal proof of public opinion and neglect the defects thereof. This is perhaps because public opinion is usually in favour of retention. The lack of uniformity in the

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106 Graeme (n 95 above).

107 A Reid 'South Africans support death penalty' (2006) <http://www.E:\South Africans Support Death Penalty Angus Reid Consultants.htm> (accessed 12 August 2006). Quoting *Makwanyane* case (n 19 above).

108 *Makwanyane* case (n 19 above) 78 171 (Kentridge J).

109 Seleoane (n 31 above) 41-42.

way courts have approached the influence of public opinion on court decisions has to be addressed as suggested in chapter five. In general, courts respect public opinion in spite of its defaults. Irrespective of the court decision reached, public opinion plays some role even in abolitionist states. However, it is clear that other factors too determine which way the court decides. Clearly, public attention is an important factor in policy making and implementation.[110] There are boundaries of policy action set forth by public opinion and leaders not only have a sense of what these boundaries are, but also are very wary of overstepping such limits.[111] Having analysed the different approaches adopted by the Courts, in the next chapter I examine arguments for and against the role of public opinion in court decisions generally and particularly court decisions on the legality of the death penalty.

110 Strouse (n 7 above) 30.
111 Strouse (n 7 above) 17.

CHAPTER FOUR

ARGUMENTS FOR AND AGAINST THE ROLE OF PUBLIC OPINION IN COURT DECISIONS

4. 1 Introduction

In chapter two, I discussed the role public opinion ought to play in court decisions. In chapter three, I carried the discussion further by analysing how courts have handled this role in practice. Given this normative postulation and an examination of the practice, in this chapter, I seek to examine arguments for and against the role of public opinion in court decisions.

4. 2 Arguments in support of the role of public opinion in court decisions

One of the arguments advanced in favour of the role of public opinion is that some constitutions make it a duty for courts to decide cases in accordance with views and aspirations of the people. The argument goes further postulates that these views and aspirations can only be obtained through public opinion polls. This was raised in *Kigula*[112] where the respondent, relying on article 126 of the Ugandan Constitution, among other grounds, argued successfully that the Constitution required courts to take into account public opinion when making judicial decisions. Article 126 of the Ugandan Constitution provides in part that '… justice shall be exercised in the name of the people and in conformity with law and with the values, norms and aspirations of the people.' The respondents interpreted this article as guaranteeing consideration and reliance upon public opinion by courts. The Constitutional Court agreed with the respondent on the constitutional basis for following public opinion, with Twinomujuni J holding:[113]

> I agree that the norms and aspirations of the people must be taken into consideration when interpreting this Constitution. The courts are also enjoined by article 126 of the Constitution to respect the law, the norms, values and aspirations of the people. I do not agree that public opinion is an irrelevant factor.

It has additionally been argued that constitutional principles need to be interpreted in light of the prevailing views of the people which views may keep changing.[114] The need to consider public opinion in constitutional interpretation was reiterated in *Weems v United States*[115] where the Supreme Court held that a constitution was 'not fastened to the obsolete', but might 'acquire meaning as public opinion becomes enlightened by human justice.' This implies that constitutional principles need to be interpreted in light of the prevailing views of the people which may keep changing. Court decisions, especially from the constitutional courts, usually relate to issues of

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112 *Kigula* case (n 16 above).

113 As above 113-134.

114 See *Tuffuo v Attorney-General* [1980] GLR 637 where the Supreme Court of Ghana in expounding on rules of constitutional interpretation, held at 647-648 that a constitution embodies the will of the people, contains their aspirations and hopes, and mirrors their history. This implies the necessity of considering public opinion.

115 217 US 349, 378 (1910).

interpretation. The legality of the death penalty is one of such issues and accordingly, it is argued, public opinion input is essential to court decisions.

Proponents of public opinion base their support on the preposition that law is a product of the society and that it is meant to operate in society. As custodians of the law, courts are expected to consider public opinion. Following this, the European Court of Human Rights has held that '... in a democracy the law cannot afford to ignore the moral consensus of the community.'[116]

A related reason advanced to support the role of public opinion is that it would be strange if courts were immune to social forces. This stems from the fact that courts are made of people, deal with people and operate in society. It has been further argued that if the judicial system were highly autonomous, it would produce many wrong results which go against what major social, economic and political forces see as their interests. It is asserted that people with wealth and power would challenge the work of a judicial system if it refused to do as they wished.[117] Given the fact that the people express themselves through public opinion, this builds a case for its consideration in court decisions.

It is also argued that making court decisions without public support would undermine the confidence in the law and perhaps lead to private vengeance as it is undemocratic to ignore strong public sentiment. This argument goes on to contend that the state must express the will of the people and the extent to which a government will base their penal policy on the attitudes expressed by the general population depends on sources from which they believe the authority of the law should emanate.[118] In Uganda, the Constitution stipulates that all power belongs to the people.[119] The judiciary as a branch of the state should, therefore, consider public opinion when making decisions.

Obtaining compliance with judicial orders provides additional incentive for courts to be cognizant of public opinion. Courts do not have their own enforcement mechanisms and yet they do not want to give orders in vain and therefore, public support is necessary for court orders like affirmative decrees and money damage awards in particular, to be enforced.[120] This reasoning is related to acceptance of judicial interpretations and rulings which do not necessarily carry specific orders. Declarations, for example, need public acceptance, to be effective.

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116 *Dudgeon v United Kingdom* (1982) 4 EHRR 149 184.

117 See generally B Friedman & B. Burbank (eds) *Judicial independence at crossroads: An interdisciplinary approach* (2002).

118 Hood (n 5 above) 148 & 150.

119 Under article of 1(1) the Constitution, all power belongs to the *people*; (2) all authority in the State emanates from the *people,* while under clause (3) the Constitution derives its authority from the *people*. [Emphasis is mine].

120 Lenta (n 38 above) 49-53 (quoting Jefferson).

Adjudication of cases does not take place in a vacuum. Supporters of public opinion reason that the societal factor in judicial decision-making cannot be ignored because society entertains high expectations of the judiciary and the trial of cases. The pressure exerted by these expectations from the general public confronts judges with the 'old dilemma of responsivity' on the one hand versus 'independence, objectivity and distance' on the other.[121] To put it differently, courts are made to choose whether to consider public opinion or strictly adhere to judicial ethics and thus interpret the law as it is.

Public opinion has been described as 'the prime mover' of democracy and opinion polls and as 'the pulse of democracy.' Therefore, it has been argued that any public representative who fails to gauge the mood of the public correctly must realise that he or she does so at the cost of being relieved of his or her duties.[122] While it may be argued that judicial officers are not public representatives, democracy is necessary for the courts to function. Participation by all, and rule by the majority are cardinal principles of democracy. These demand that public opinion be considered in court decisions. To fortify this argument, Cleote proposes that since 'The courts categorise themselves as the mouth piece of society, it would also be popular to give the public what it wants.'[123] Cleote's argument seems to be better fitted for political decisions than judicial ones since it is the politicians that depend on popularity and therefore require public support.

The other reason for supporting public opinion is that the majority should decide. For instance the Court in *Mbushuu* held that it is society that has a constitutional duty to ensure that its law abiding members are not deprived of their rights.[124] This implies a right on the part of the society to decide punishments. Lenta describes the right of participation as the 'right of rights.' He argues that democracy entitles people to govern themselves in accordance with their own judgements, so that if people elect to place decisions about principles in the hands of the judiciary, this amounts to a refusal of self-government.[125]

Supporters of public opinion argue that views of the public should be considered and relied upon when deciding penal sanctions. For instance, in *Mbushuu,* the Court held that in answering whether or not the death penalty is necessary, society should decide.[126] This view was supported in S v *Mhlakaza,* observing that while courts may not rely upon public opinion in reaching judicial decisions, they must not disregard it. The Court further observed that perhaps the main duty of the court is to lead public opinion.[127]

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121 M Malsch 'The citizen and the criminal justice system' 8 <http:// www.nscr.nl/themas/burger_projE.htm> (accessed 16 August 2006).
122 Seleoane (n 31 above) 136.
123 Cloete (n 32 above) 620.
124 *Mbushuu* case (n 18 above) 115 & 117.
125 Lenta (n 38 above).
126 *Mbushuu* case (n 18 above) 116 & 117.
127 [1997] 2 All SA 185 (A) 189 g-1.

It is proposed that courts should not ignore public opinion because it forms part of real life and should prevail. The temptation to erect a rigid wall between law and politics, especially in constitutional adjudication, is discouraged, because a moment's reflection will show that constitutional adjudication asks more of the court than to simply adopt a guardian role when it comes to the Bill of Rights as Max observes:[128]

> But equally so, I believe that the Court is under an obligation to engage with and inform the public whose opinion it has refused to follow. To allow the court to exercise power in favour of the few, with little more than a dismissive nod to the many, is to live in a constitutional utopia where judges espouse constitutional 'truths' at the expense of the public becoming restless.

It has also been suggested that the people, through the elected representatives, are the ultimate judges of the court system they have created. It is due to this that judges are subject to discipline and even to removal under certain circumstances, and are not beyond criticism of their performance.[129] The end result of this is that public opinion must be consulted.

In further support of the view that the people should make decisions that affect society, Jefferson voiced his condemnation of the idea that the courts, and not the people had taken over this role. For example in a letter to Monsieur Coray in 1823, he stated:[130]

> At the establishment of our constitutions, the judiciary bodies were supposed to be the most helpless and harmless members of the government. Experience, however, soon showed that these decisions, nevertheless, become law by precedent, sapping, by little and little, the foundations of the constitution, and working its change by construction, before any one has perceived that that invisible and helpless worm has been busily employed in consuming its substance. In truth, man is not made to be trusted for life, if secured against all liability to account.

Absolute judicial power to decide matters of public concern, it is argued, suffers from a deficit of democratic legitimacy and this has important practical consequences for judicial practice. For example, such judicial power might appear to some South Africans to reproduce at least one feature of the apartheid system because it allows important decisions to be made by a small minority. However, this arrangement is now clothed in legitimacy because the Constitution provided safeguards.[131] This is a clear factor for the support of public opinion.

It has been stated that the public is competent, probably more competent than any other group – elitist, expert or otherwise – to determine the basic ends of public policy, choose top policy makers, appraise the results of public policy, and to say what, in the final analysis, is fair, just and

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128 P Max 'Between apology and utopia: The Constitutional Court and public opinion' (2002) SAJHR 1.

129 'The Virginia Bar Association Judiciary Committee Model speech on independence of the judiciary' *(edited)* <http://www.vba.org/section/judicial/projects.htm> (accessed 12 August 2006).

130 Lenta (n 38 above).

131 As above.

moral.[132] However, it is not suggested that public opinion is all-wise or that the public interest is always what public opinion says it is on all kinds of questions.[133] There are also arguments against the role of public opinion in court decisions as illustrated in the following paragraphs.

4. 3 Arguments against the role of public opinion in court decisions

It has been argued that the legal position with regard to the role of public opinion in court decisions was that public opinion is irrelevant. That the duty of courts is to decide in accordance with the Constitution and other laws, and courts should not be reduced to the status of election returning officers. The argument goes on that it would set a very dangerous precedent if every time a court had to make a decision, it had to seek public opinion so that it decides in accordance with it, since this would make the role of courts meaningless.[134] Proponents of this school argue that public opinion has not obtained the status of a sole determining factor in court decisions. For instance in *Kigula*, the petitioners insisted that even if a majority of the 20 million citizens had been in favour of the death penalty, this would not make the death penalty constitutional as the courts have not given pre-eminence to the role of public opinion on such issues.[135] This argument brings out the legal position on judicial independence and emphasises judicial ethics. While the legislature and executive may be required to consult their constituencies in making political decisions, courts are not allowed to be influenced by any factor or person as this would have negative effects on the effective and fair dispensation of justice.

Opponents of public opinion argue that courts should not relegate their judicial functions to the masses. For instance the petitioners in *Kigula* argued that whereas article 126(1) of the Constitution of Uganda enjoined courts to exercise judicial power in conformity with law and aspirations of the people and therefore public opinion might have some relevance, it was, in itself, no substitute for the duty vested in courts to interpret the Constitution and to uphold its provisions without fear or favour.[136] This implies that courts could consider public opinion without necessarily being bound by it. This argument that courts cannot allow themselves to be diverted from their duty to act as independent arbiters of constitutions by making choices on the basis that they will find favour with the public was reiterated in *Makwanyane* where the Constitutional Court held that courts do not represent the people because they are 'courts of law' not 'of public opinion'. It was further observed that the determining factor is the law under consideration. Public opinion, even if expressed in Acts of parliament, could not be decisive.[137]

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132 Childs (n 2 above) 350.
133 As above 354.
134 *Kigula* case (n 16 above) 113-134.
135 As above.
136 As above.
137 *Makwanyane* case *(*n 16 above) 89.

Another argument against the role of public opinion is that courts cannot follow it since majoritarianism is not wholly applicable in constitutional adjudication. Majoritarianism was thus rejected in *Makwanyane*, holding that the Constitutional Court was not a politically responsible institution to be seized by majoritarian opinion.[138] Max supports the view that a court cannot afford to be swayed by the majoritarian preferences of the citizenry, for if it were to abdicate its responsibility under the Constitution in favour of public opinion, the court would become little more than an apology for majoritarian politics. He states that a court has a legitimate power, by dint of its institutional position, to reject public opinion in the course of its work.[139]

Fear of parliamentary sovereignty is another ground for rejecting public opinion. It is feared that since the people speak through legislators as their representatives, allowing their views to hold sway without review by courts, is to invite parliamentary sovereignty. Under parliamentary sovereignty, courts cannot challenge or overrule any legal provision enacted by parliament. This fear was expressed in *Makwanyane* thus:[140]

> The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution.

This approach would not offer enough protection of human rights because the legislators as representatives of the society that is wronged by the capital offenders cannot be impartial.

A further argument by the opponents to the role of public opinion in court decisions is that human rights issues like the legality of the death penalty as affecting the right to life are not a decision of the general public. They are left for the courts to determine judiciously. The argument goes further that there should be a distinction when it comes to human rights adjudication because if public opinion was to be canvassed each time individual rights were in jeopardy, there could be little doubt that human rights guarantees would usually come out the loser.[141] This was illustrated in *Makwanyane* thus:[142]

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life … and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

It is the view of the opponents to the role of public opinion in court decisions that consulting public opinion is not a function of courts as it promotes policies that are not to be found in the law itself. This is said to allow courts to prescribe what they believe to be the current public attitudes or standards in regard to these policies. This view was supported by the court in *Bongopi v Council of*

138 As above 370.
139 Max (n 131 above) 1.
140 *Makwanyane* case (n 16 above) 88.
141 Schabas (n 40 above) 80.
142 *Makwanyane* case (n 16 above) 111.

the State, Ciskei[143] holding that courts are not the makers of the law and will enforce the law as they find it.

The lack of reliability of sources of public opinion forms part of the grounds for its rejection. This stems from the usual evidence requirement in judicial matters. The difficulty is partly because people's views change depending on the circumstances and the prevalence of crime. For instance it has been stressed in *Makwanyane* that enduring values are not the same as fluctuating public opinion. The Court concluded that the sources of public opinion that included newspaper articles, letters to newspapers, debates in the media and representations to the authorities, could hardly be regarded as scientific.[144] The various methods employed to gather public opinion have proved faulty thus the Court's observation that 'needless to say, there was no similar evidence before us. Public opinion has not expressed itself in a referendum, nor in any recent legislation.'[145] Opponents rely on this problem of lack of reliability of results of opinion polls to argue that since public opinion is determined *inter alia* through opinion polls, the common defects in the process make the results unattractive. Murray has related faulty opinion polls to inadequate education of the respondents arguing that the two form a ground for the rejection of public opinion. He explains:[146]

> Opinion polls are obviously defective in methodology. The public are not well-informed about the level of sentences that courts in fact impose. The more information people are given about what sentencing judges are doing, and why they are doing it, the less likely they are to believe that there is a gulf between their expectations of the criminal justice system and the reality.

One of the greatest weaknesses of public opinion is that it is hardly formed after evaluation of relevant information. For instance the South African Constitutional Court rejected public opinion because values intended to be promoted by the Constitution were not to be founded on what might well be uninformed or indeed prejudiced public opinion.[147] This criticism is fortified by the general illiteracy of the members of the public and the technical nature of death penalty issues.

4. 4 Arguments in support of the role of public opinion in court decisions on the legality of the death penalty

Support for public opinion in court decision on the death penalty has been expressed by the Ugandan Constitutional Court basing on the fact that society should decide. For instance the respondents in *Kigula* successfully argued that the answer to the issue of the constitutionality of the death penalty was to be found from the public which had expressed support for the penalty as per statistics from the Odoki and Ssempebwa Constitutional Commissions reports.[148] The

143 *1992 (3) SA 250 (CK) at 265 H - I,* as per Pickard CJ.
144 *Makwanyane* case *(*n 16 above) 259.
145 As above 201.
146 Murray (n 1 above).
147 *Makwanyane* case (n 19 above) 259.
148 See Odoki and Ssempebwa Commission Reports (n 32 above).

Constitutional Court agreed with the respondents that the majority of Ugandans still favoured retention of the death penalty and that consequently, the death penalty was not yet viewed as a cruel, inhuman and degrading punishment in Uganda. According to Twinomujuni J (agreeing with the majority) 'if the majority of Ugandans want violent crimes to be punished by death without any excuse so be it ….The majority of Ugandans approve of it.'[149]

It follows, therefore, that in order to decide whether the death penalty is justifiable under the provisions of a given constitution, public perceptions have to be considered. This has received judicial support in Zimbabwe where, discussing the constitutionality of the death penalty, it was held in *Catholic Commission* that:[150]

> … whether a form of ... punishment ... is inhuman or degrading is dependent upon the exercise of a value judgment ...; one must not only take account of the emerging consensus of values in the civilised international community (of which this country is a part) ..., but of contemporary norms operative in Zimbabwe and the sensitivities of its people.

Proponents argue further that public opinion ought to have a say in the determination of serious criminal sanctions like the death penalty. They reason that such sanctions are meant to protect members of the society who should then have a say in the determination of how they are protected. This was reiterated in the US in *Furman v the State of Georgia* where the Court observed that one of the principles inherent in the constitutional prohibition of cruel and unusual punishments was that 'a severe punishment must not be unacceptable to contemporary society.'[151] This is supported by the reasoning that public attitudes should be referred to because an effective punishment aims, *inter alia*, at both deterrence and retribution.[152]

It has also been argued that public opinion has a role to play particularly in areas of criminal law. They argue that the law cannot be divorced from the views of the public and in the reality of the social process, an important end of the criminal law is to reinforce and uphold the moral sentiments of the community. As Kanyeihamba states, 'Criminal law must represent a remarkably high average of the population's views with regard to the penalties.'[153] This view may not reflect a perfect position of the effectiveness of criminal sanctions because applying it means that a society dominated by rapists would proscribe no penalty for rape. It seems to follow from this view, that for courts to decide whether the death penalty is appropriate, public opinion should be sought.

Reliance on public opinion is also based on the view that effectiveness of any legal punishment like the death penalty depends to a large extent, on the perspective in which a given society sees it.

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149 *Kigula* case (n 16 above) 134.
150 *Catholic Commission* case (n 29 above) 248 B-C Gubbay CJ.
151 408 US 238 (1972) 277 Brennan J.
152 Schabas (n 40 above) 80.
153 Kanyeihamba (n 33 above) 93-94.

According to Kakooza, society's view of the manner of executing the punishment would itself be governed by how society conceives the effect of the offence to its well-being.[154] Public opinion has been said to be one of the factors that might be considered by courts in deciding whether the death penalty violates 'evolving standards of decency.'[155] These 'standards of decency' depend so much on public perceptions and therefore, it is suggested that the Courts needs to consult public opinion when deciding such cases.

It can be discerned from the above discussion that in spite of some weaknesses, public opinion is not wholly irrelevant in issues of punishment. Its supporters argue that it must inevitably contribute to an assessment of a punishment that is appropriate and effective.[156]

4. 5 Arguments against the role of public opinion in court decisions on the legality of the death penalty

To some scholars, no role at all should be played by public opinion in judicial decisions like the legality of the death penalty. To them, judges must make decisions based on the law, and judicial officers who are influenced by public opinion in making decisions violate the solemn oath to apply the law impartially.[157]

It has been argued that public support is not a prerequisite for abolition of the death penalty. This goes against the supporting argument that the majority of the people support the death penalty. For instance, it is illustrated that in France, Germany, The United Kingdom (UK) and Canada, abolition took place even though a majority of the population was opposed to it.[158] No wonder, it has been observed that the public has never welcomed the abolition of the death penalty.[159] It is further suggested that support from the public may not be as inevitable as has been portrayed by some proponents. This is because there is no uniform route to abolition as Schabas illustrates:[160]

> In Ireland, it was by referendum. In South Africa, Albania, and Ukraine it has been by Constitutional Court judgment. In Russia, it was by executive fiat. In Turkey, it was by legislation. But in all of these recent cases of abolition of the death penalty, probably the most significant single impetus has been the dynamism of international human rights law.

154 Kakooza (n 14 above) 83 & 84.
155 H Sarah *Capital punishment in the United States* (1982) 60 quoted in Hood (n 5 above) 151.
156 Schabas (n 44 above) 80.
157 See 'What role should public opinion play in the decisions a judge makes' <http:// www.cherylforjudge.com/press.php (accessed 16 August 2006).
158 Hood (n 5 above) 150.
159 *Makwanyane* case (n 19 above).
160 Schabas (n 44 above).

The opponents to the role of public opinion in court decisions further argue that the public usually supports the death penalty due to the erroneous belief that it is deterrent. The Court in *Makwanyane* observed that these erroneous beliefs deserved no homage. [161]

It has been suggested that courts do not need to seek public opinion. That court decisions are a product of judicial deliberations and not public debates and opinions. Referring to the arguments by the state that the decision should have awaited a referendum, Madala J observed: [162]

> I do not agree with this submission, if it implies that this Court or any other court must function according to public opinion. In order to arrive at an answer as to the constitutionality or otherwise of the death penalty or any enactment, we do not have to canvass the opinions and attitudes of the public.

This argument was reiterated in *Mhlakaza,* with the Court observing that courts are independent organs and do not rely on popularity for their functioning. The Court held: [163]

> The object of sentencing is not to satisfy public opinion but to serve the public interest …. Sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. The Court cannot allow itself to be diverted from its duty to act as an independent arbiter by making choices on the basis that it will find favour with the public.

Rejection of the need to consult public opinion was further held in *Hungary Decision* a case challenging the death penalty that courts are neither bound by the will of the majority nor by public sentiments and that constitutional courts do not hunt for popularity among members of the society. This followed an argument that the appropriate forum to make the decision on the death penalty was parliament and not the Court. [164]

Much of the criticism of public opinion has been directed to the methods of data collection and the fact that the respondents do not possess the necessary informed opinion. This applies to Uganda, South Africa and Tanzania. Keith states that although a substantial number of people support the death penalty, they mostly do not know much about its effects and circumstances. [165] The support is usually borne out of sentiments of anger against capital offenders.

The nature of questions posed in opinion polls too has been criticised for not requiring people to think, but to just react spontaneously. [166] Hodgkinson agrees that the opinion of the public sought and found is a very crude indicator, as it invariably requires little more than a 'yes' or 'no' response. [167] It is observed that the scientific aspects of many of these questions loom so large that

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161 *Mhlakaza* case (n 28 above) 111.
162 *Makwanyane* case (n 19 above) 255 256.
163 *Mhlakaza* case (n 28 above) 189 g-1.
164 See (n 39 above) 4, 12 & 32.
165 Keith (n 88 above) 259.
166 Hodgkinson (n 99 above) 239.
167 As above 21.

sometimes the non-scientific aspects well within the competence of the lay man, and not the expert are lost sight of.[168]

It has been argued in *Makwanyane* that the issue of the constitutionality of the death penalty is a constitutional one for the Courts to decide and not a political one where public opinion has a say. Ruling on its capacity to decide the issue, the court observed:[169]

> The issue is also, however, a constitutional one. It has been put before us squarely and properly. We cannot delegate to Parliament the duty that we bear to determine it, or evade that duty otherwise, but must perform it ourselves.

Opponents to the role of public opinion insist that the difficulty in determining public opinion makes it unattractive and that clear and reliable evidence to prove public opinion is difficult to find. This was the position in *Kigula*[170] where the petitioners argued that no accurate figures as to what percentage of the people of Uganda supported the death penalty were presented. They argued that there was no reliable poll that had been taken on the matter and that the report of the Constitutional Review Commission was not determinative of the matter because the sample size was small. The data from the report showed that about 23,656 people (less than 0.12% of Ugandans) addressed the Commission on the question of whether the death penalty should be abolished or retained. From this number, 13,610 supported the retention of the death penalty, while 10,046 advocated abolition. Therefore, it was clear that even among the few people who presented their views to the Commission, 57.5% favoured retention and 42.5% advocated abolition – not an overwhelming majority even of the number who responded, as was claimed by the respondent.[171] This shows that opinion on retention of the death penalty was divided. Therefore, public opinion polls as evidence of support for retention have shortcomings and should not be relied on. Japan is an example where officials cited public opinion, but the polls were criticised by the Japanese Bar Association as imprecise and not fairly interpreted.[172]

A related view was held in *Makwanyane* that there was no evidence of a general social acceptance of the death penalty for murderers such as might conceivably have influenced court conclusions. That the official executive moratorium on the death penalty of 1992, while not evidence of general opinion, did cast serious doubt on the acceptability of capital punishment in South Africa. The Court held further that since 1989, there had been no judicial execution in South Africa.[173]

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168 Childs (n 2 above) 352.
169 *Makwanyane* case (n 19 above).
170 *Kigula* case (n 16 above).
171 See the Ssempebwa Commission Report (n 32 above) 172.
172 Amnesty International (n 22 above).
173 *Makwanyane* case (n 19 above) 201.

The role of public opinion is further diminished by the difficulty in determining what it is. Asher illustrates this stating that while public opinion is not synonymous with the results of public opinion polls, the two are often treated as though they are identical.[174] For instance, Austria affords a good example where all the political parties were united opposition to the death penalty even though a considerable segment of the population somewhat favoured it.[175] One wonders which, of the two positions, public opinion was. Was it the position of the political parties or the general population?

4. 6 Conclusion

In this chapter I have analysed arguments for and against the role of public opinion in court decisions. It has been illustrated that different courts and writers hold different view about the role of public opinion in court decisions. From a legal perspective, public opinion does not have a technical role to play in court decisions. Neither the law nor judicial ethics generally permit court reliance on public opinion. In practice, however, courts take into account what society expects without being bound by it and sometimes without explicitly acknowledging that they do. Consulting public opinion may not be the best way to arrive at judicial decisions as explained in the immediate following paragraphs. The following chapter presents concluding remarks on the study and makes recommendations on how best the utility of public opinion in court decisions on the legality of the death penalty should be handled.

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174 Asher (n 8 above) 20.
175 Roland (n 39 above) 39-42 39 & Hood (n 5 above) 150.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This chapter presents a summary of the preceding chapters. It also provides an overall conclusion of the study and makes recommendations on how best the utility of public opinion in court decisions on the legality of the death penalty should be handled. The next paragraph contains a summary of the chapters.

5. 2 Summary of chapters

In chapter two I have presented the international, regional and national normative postulation of the role of public opinion in court decisions. I have also done an analysis of the various views about whether, and if so, what role public opinion ought to play in court decisions generally and in particular, those on the legality of the death penalty. The dilemma courts face in deciding whether to rely upon public opinion in arriving at judicial decisions was presented. Under chapter three I examined the practice of the Courts in selected retentionist and abolitionist states in determining the utility of public opinion in court decisions on the legality of the death penalty. Other jurisdictions with similar practice were, for comparative illustrations, alluded to. I also presented a critique of the practice. Chapter four entails an analysis of arguments for and against the role of public opinion in court decisions generally and particularly court decisions on the legality of the death penalty.

5. 3 Conclusions

Given the questions set out at the start.[176] The following conclusions can then be drawn:

Public opinion is difficult to define given the attempt in chapter one. Part of the public opinion finds its way into the judicial system and finally the court decision circles. This then causes the debate as to whether courts should consider public opinion when deciding cases.

According to the existing standards on judicial independence as illustrated in chapter two, courts should not decide according to public perceptions. The practice in Uganda and South Africa shows a difference in the interpretation and application of the standards. The Constitutional Court of South Africa employs a more strict approach than the Ugandan one, when it rejects public opinion and decides on the law and facts in *Makwanyane.* This difference in approach can be explained from the history and transitional contexts in the respective countries.

[176] See chapter one para (1.4).

There are various schools of thought on the role of pubic opinion. A person's view of the role of public opinion will be profoundly affected by whether the public he or she is thinking of is the totality of the electorate, those paying attention to the issue or some other group.[177] Some categorically disapprove of any effective role of public opinion. While some argue that it should play a role in court decisions on the death penalty, others say that there is a role, but not a determinative one reasoning that judicial ethics and rules do not allow consulting the masses, but courts do not decide the law in the vacuum and so society influences are inevitable. Other schools of thought suggest that there is a role, but are not sure what it is and the rest think that public opinion should have no role at all in court decisions on the legality of the death penalty. The rest offer a critique without choosing sides. This enhances the debate and it can be discerned from the above views that determining the role of public opinion in court decisions is no easy task. It is even harder when dealing with death penalty cases because they affect the right to life. What emerges as the strongest school of thought is that public opinion has no effective role to play in court decisions as it takes into consideration the reality of public opinion while at the same time promoting judicial ethics.

The opponents to the role of public opinion in court decisions support their views on the fact that opinion polls are rarely preceded by adequate mass sensitisation, among other reasons. It can be concluded that the public does not usually have enough information to decide on. Most members of the public know little about the circumstances in which murder takes place, the characteristics of murderers and all aspects of capital punishment.[178] Related to inadequate information is lack of education of the public. It appears that most people do not know much about capital punishment, although a substantial number of them support the death penalty.[179] Concerning the death penalty in particular, this study reveals that the public is quite misinformed and generally ignorant of even the basic facts about capital punishment in their own jurisdiction.[180] One cannot assume that the masses have information when they do not, that they have the opportunity to weigh intelligently different points of view when they do not.[181] This is a crucial factor when considering public opinion which displays that there is need for caution and perhaps that the opinions of the public should not be considered in the dispensation of justice.

This study has revealed that there is a dilemma in deciding the role public opinion should play in court decisions. Part of the reasons is that public opinion is not static. Research shows that attitudes towards death penalty can change with more knowledge of facts.[182] There appears to be

177 Childs (n 2 above) 349.
178 Hood (n 5 above) 153.
179 Keith (n 88 above) 256 259.
180 Hodgkinson (n 101 above 58.
181 Childs (n 2 above) 135.
182 Amnesty International (n 22 above).

no formula to follow in the abolition as each country finds its own path to a civilised and humane system of criminal law.[183]

Many court decisions involving national moral issues have the potential to incense or disappoint members of the public. This cannot be avoided because judges cannot resolve what appear to be irresolvable ethical debates about issues that grip the hearts of the people without making a declaration of preference for one side's views over another. The courts are expected to be independent, not only from the government whose legislation and conduct they must scrutinise, but also from the public who may have an opinion on the matters that come before the Court. Courts have a legal defence for their decisions that conflict with public opinion. It follows that since they are charged with the protection of rights courts have the function of protecting the rights of the minority against the 'vicissitudes of public opinion'.[184]

There continues to be a wide spread view that public opinion ought not to have any direct impact on the judicial decision-making process. From the literature discussed in this study, it is concluded that public opinion should have no role to play in court decisions generally and court decisions on the legality of the death penalty in particular.

5. 4 Recommendations:

The study has raised questions and provided answers. Conclusions have also been drawn. From all this, it is found that more needs to be done in order to make clearer the role of public opinion in court decisions. The following are suggested for action by various stakeholders.

5. 4.1 To the Courts

Courts should take every opportunity to explain the system of judicial review and the independence of the judiciary. This has been recommended at international level.[185] There ought to be a concerted effort to persuade the public about the importance of judicial independence and impartiality. This is because the public does not to sufficiently understand what courts do in the first place. People doubt court abilities to take their interests into account as they think judicial officers are a detached class.[186] It is in the interests of the courts to adopt a role which openly engages with citizens in those cases where they reject public opinion. They should justify their rejection by drawing on some sections of the respective constitutions which demands protection of fundamental rights irrespective of the stand of public opinion. Therefore, the Courts should avoid the temptation

183 Schabas (n 40 above).
184 Max (n 131 above) 1.
185 The report of the First Meeting of the Judicial Group on Strengthening Judicial Integrity Vienna, April 2000. Recommendation (k) states the need to improve the explanation to the public of the work of the judiciary and its importance.
186 Murray (n 1 above).

to seek refuge behind their 'official position'[187] given their judicial power and concomitant ability to upset the public. This is because it is an inappropriate method of dealing with the people who feel bitter at having their courts tell them that they are wrong. In any event, it has been concluded that many people, perhaps a large majority, do not understand the institutional role of a constitutional court in modern society.

5. 4. 2 To the Governments

More education is encouraged because the well-informed people will hold better quality opinions.[188] Governments must ensure that citizens base their views regarding the death penalty on a rational and properly informed assessment.[189] Governments should lead, not follow or hide behind public opinion.[190] This is because the leaders of democracy ought never to make any decision just because a poll shows that it will be the most popular one. Polls must not become a substitute for debate and discussion.[191]

There is need for free flow of information on the death penalty. Communication channels should be improved because it is clear that the quality of public opinion depends to a large extent on the availability and flexibility of the agencies of public communication, such as the press, radio, and public meetings.[192] Secrecy prevents informed public debate about capital punishment within the relevant society. Countries that have maintained the death penalty have an obligation to disclose the details of how they apply the penalty.[193] There is a responsibility to mould and guide public opinion.[194] There is, therefore, need to raise public awareness of the death penalty issues.[195]

5. 4. 3 To abolitionists

Abolitionists should first undertake to educate the masses that outlawing the death penalty will not constitute a license for the population to take the law into their own hands and execute suspects. It has been suggested that before joining the bandwagon of abolitionists, there is need to understand and appreciate the idea of crime and punishment and why it is necessary sometimes to impose

187 'Official position' refers to the legal or ethical position.
188 C Hardly *Gauging public opinion* (1994) 211& 219.
189 *Mbushuu* case (n 18 above) 116.
190 Hodgkinson (n 21 above) 29.
191 AE Weiss *Polls and surveys, a look at public opinion research* (1979) 61& 67
192 Berelson (n 3 above) 50.
193 The Foundation for Human Rights Initiative (FHRI) Alternative report to the UN Special Rapporteur on Extra judicial, Summary or Arbitrary executions 2005 22 available at http://www.fidh.org/IMG/pdf/ug425a.pdf (accessed on 20 September 2006).
194 Childs (n 2 above) 142.
195 Hodgkinson (n 21 above) 248.

maximum punishments upon offenders.[196] Other than sit back and complain that abolition is prevented by strong public opinion, it is important to change public opinion in favour of abolition.[197]

NUMBER OF WORDS: 17982

196 Kanyeihamba (n 33 above) 93 99.
197 Hodgkinson (n 93 above) 27.

BIBLIOGRAPHY

Books

Asher, H (1995) *Polling and the public. What every citizen should know,* a Division of Congressional Quarterly Inc. Washington, DC 21.

Berelson, B & Janowitz, M (eds) (1977) *Reader in public opinion and communication* London: The free Press, New York Collier-Macmillan Limited 50.

Denevish, G (1990) *The application of the death penalty in South Africa: Its historical and jurisprudential evolution and background and its relationship with constitutional and political reform* Pietemaritzburg: University Of Natal Press.

DeSario, J & Langton, S *Citizen participation in public decision making* New York: Greenwood Press West port 161.

Friedman, B & Burbank, B (eds) (2002) *Judicial independence at crossroads: An interdisciplinary approach* New York: Sage Pubns.

Hardly, C (1994) *Gauging public opinion* Princeton University Press London: Oxford University Press 211 & 219.

Hans, G (2003) *The barbaric punishment; Abolishing the death penalty* Martinus Nijhoff Publishers.

Hodgkinson, P & Rutherford, A (eds) (1996) *Capital punishment global issues and prospects* Waterside Press.

Hodgkinson, P & Schabas, W (eds) *Capital punishment: Strategies for abolition* Cambridge University Press 248.

Hood, R (2002) *The death penalty: A world-wide perspective* third edition Oxford: Clarendon Press.

Megiven, J (1997) *The death penalty: A historical and theological survey* New Jersey: Paulist Press.

Schabas, W (1996) *The death penalty as cruel treatment and torture; Capital punishment challenged in the world's courts* Boston North Eastern: University Press.

Seleoane, M (1996) *The death penalty: Let the people decide* Florida: Vivla Publishers and Booksellers.

Strouse, JC (1975) *The mass media, public opinion, and public policy analysis* Linkage explorations Charlea E. Merril Publishing Company A Bell & Howell Company Columbus, Ohio 6.

Walden, GR *(*1990) *Public opinion polls and survey research*: *A selected annotated bibliography of U.S. guides and studies from the 1980*s New York & London: Garland Publishing Inc.

Weiss, A (1979) *Poll and surveys: A look at public opinion research* Franklin Watts.

Welsh, S (1987) *The death penalty in the nineties. An examination of the modern system of capital punishment* Ann Arbor: The University of Michigan Press 9.

Chapters in Books

Choper, J quoted in *Rights and Constitutionalism: The New South African Legal Order*; Van Wyk D. et al, Juta, 1994 9.

Hodgkinson, P 'Beyond capital punishment: Responding to the needs of victims and establishing effective alternatives to the death penalty.' in *Death penalty condemned* Commission of jurists (2000).

Journals

Beschle, D 'Why do people support capital punishment? The death penalty as a community ritual' (2001) 33 *Connect ant Law Review* 765.

Bowers, W 'Capital punishment and contemporary values: Peoples misgivings and the Court's misperceptions' (1993) 27 *Law and Society Review* 157.

Cloete, T 'Sentencing: Public expectations and reaction note and comments' (2000) *The South African Law Journal* 618-623.

Fox, JA; M.L and Bonsteel, J.L 'Death penalty opinion in the Post Furman years' (1990-91) *NYU Review of law and society change* XV111:499.

Kakooza, J 'Opening address at the first international conference on the application of the death penalty in Commonwealth Africa' (2004) *The Uganda Living Law Journal* 2 (1) 81.

Kanyeihamba, G 'Reflections of a judge on the death penalty in Uganda' (2004) *The Uganda Living Law Journal* 2 (1) 93.

Keith, S 'The penalty of death: public attitudes in South Africa' *SACJ* (1989) 2 SAS 256.

Max, D 'Between apology and utopia - The Constitutional Court and public opinion' 2002 SAJHR 1.

Makubuya, A 'The constitutionality of the death penalty in Uganda: A Critical Inquiry' (2000) 6 (2) *East Africa J. Peace Human Rights* 222 22.

Reports

Hood, R (1989) 'The death penalty: A world-wide perspective' A Report to the United Nations Committee on Crime Prevention and Control Oxford: Clarendon Press.

The Foundation for Human Rights Initiative (FHRI) Alternative report to the UN Special Rapporteur on Extra judicial, Summary or Arbitrary executions 2005 22 available at http://www.fidh.org/IMG/pdf/ug425a.pdf (accessed on 20 September 2006).

The Report of the Constitutional Review Commission (Ssempebwa Commission): Findings and Recommendations 10 December (2003) 13-172.

The Report of the Uganda Constitutional Commission (Odoki Commission): Analysis and Recommendations (1993) 154.

Constitutions and Statutes

The Constitution of the Federal Republic of Nigeria, 1999.

The Constitution of the Republic of South Africa, 1996 (Act No 108 of 1996).

The Constitution of the Republic of South Africa, 1993 (Act No 200 of 1993).

The Constitution of the United Republic of Tanzania, 1977.

The Constitution of the Republic of Uganda, 1995 (as amended).

The Criminal Procedure Act No. 51 of 1977 (Laws of South Africa).

The Penal Code Act (Cap 120 of Laws of Uganda).

The Trial on Indictments Act (Cap 23 of Laws of Uganda).

International and regional instruments

African Charter on Human and Peoples' Rights, 1981.

International Covenant on Civil and Political Rights, 1966.

The Bangalore Principles of Judicial Conduct (2002).

The Basic Principles on the Independence of the Judiciary (1985).

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003).

The Resolution on the Right to a Fair Trial and Legal Assistance in Africa (1999) (The Dakar Declaration).

Universal Declaration on Human Rights, 1948.

International Cases

Kindler v Canada (Communication no.470/1990), views adopted on 30 July 1993, Official Records of the Human Rights Committee 1992/93, Volume II (New York: United Nations, 1997), 559-72.

Soering v United Kingdom Judgement of 7 July 1989, Publications of the European Court of Human Rights, Series A, no.161.

National Cases (South Africa)

Mbushuu (Alias Dominique Mnyaroje) and Another v Republic of Tanzania 1995 TLR 97(CA).

Mhlakaza and another v S [1997]2 All SA 185 (A) 189.

State v Makwanyane and Another 1995 1 LRC 269 (CC).

National Cases (Uganda)

Attorney General v Paul K. Ssemogerere and Zachary Olum, Constitutional Appeal No.3 of 2004 (Un reported).

Simon Kyamanywa v U Constitutional Reference 10 2000 (Uganda). (Un reported).

Susan Kigula and Others v AG constitutional petition 6 2003 (CC). (Unreported).

National Cases (General)

Bongopi v Council of the State, Ciskei 1992 (3) SA 250 (CK).
Catholic Commission for Justice and Peace in Zimbabwe v The Attorney General, Sheriff of Zimbabwe and the Director of Prisons 1993 (4) SA 239.

Ex Parte Medley 134 US 160 (1890).

Fisher v Minister of Public of Safety and Immigration and Others Privy Council Appeal No.53 of 1997, December 1997, (unreported).

*Furman v the state of Georgia (*1992) 408 US 238.

Gregg v Georgia (1976) 428 US 153.

Kalu v the State (1998) 13 NIULR 54.

Pratt v Attorney General for Jamaica (1994) 2 AC 1.

The People v Anderson (1972) 493 P 2d 880.

Weems v United States 217 US 349, 378 (1910).

Internet articles

Biskupic, J 'Door open to death-penalty limits' (2002) Available at <http://www.E:\Death penalty - Comunità di Sant'Egidio.htm> (accessed 16 August 2006)

Dalton & Russell, J 'Citizen politics: Public opinion and political parties in advanced industrial democracies' (1996) 2d ed. Available at <http://www. cherylforjudge.com/press.php> (accessed 16 August 2006)

Graeme, S & Lloyd, V 'The death penalty in South Africa' Available at <http://www.E:\The Death Penalty in South Africa - Simpson & Vogelman.htm> (accessed 16 August 2006)

Joan Biskupic 'Door open to death-penalty limits' June 21, 2002. Available at <http://www.ceu.hu/legal/legal/Friedman.htm> (accessed 12 August 2006)

'Judicial selection: Who's to judge' Available at <http:// www.ceu.hu/legal/legal/Friedman.htm> (accessed 27 July 2006)

John, J 'Attitude to the death penalty in south africa -- with some international comparisons' *the journal of social psychology*, 1982, 116, 287-288. *University of new south wales, Australia.* Available at <http://www.e:\attitude to the death penalty in south africa.htm> (accessed 16 August 2006)

Lippman, W 'Public opinion from Wikipedia, the free encyclopaedia *public opinion*.' Available at <http://www.E:\Public opinion.htm> (accessed 16 August 2006).

Malsch, M 'The citizen and the criminal justice system project overview 8 Available at <http://www.nscr.nl/themas/burger_projE.htm > (accessed 16 August 2006)

Mongezi, M 'Life After the death penalty: Different penal options to be considered in the light of the abolition of capital punishment.' Seminar No. 4 1995. Available at <http://www.E:\Life After the Death Penalty Different penal options to be considered in the light of the abolition of capital punishment.htm> (accessed 16 August 2006).

Murray, G 'Out of touch or out of reach?' Judicial conference of Australia colloquium - Adelaide 2 (2004) Available at <http://www.hcourt.gov.au/speeches/cj/cj_02oct04.html> (accessed 16 August 2006).

The Virginia Bar Association Judiciary Committee Model Speech on Independence of the Judiciary *(edited)* Available at <http://www.vba.org/section/judicial/projects.htm> (accessed 12 August 2006).

'South Africans support death penalty' May 14, 2006. Available at <http://www.E:\South Africans Support Death Penalty Angus Reid Consultants.htm> (accessed 16 August 2006).

'Ugandan President incites killings' Amnesty International News Release AI INDEX: AFR 47/4/98, Available at <http://www.E:\Ugandan President incites killings.htm> (accessed 16 August 2006)

Newspapers

'Kibaki bans death penalty' *The New Vision* 12 March 2004 3. Available at <http://www.newvision.co.ug> (accessed 12 March 2006)

'Speaker backs death penalty' *Daily Monitor* 27 July 2006 4. Available at <http://www.monitor.co.ug> (accessed 27 July 2006).

Papers presented

Singh, K 'Death penalty: Legal and constitutional issues' (Paper Presented at 12th Common Wealth Law Conference, Kuala Lumpur, Malaysia, September 1999) 22

Dissertations

L. Chenwi 'Towards the abolition of the death penalty in Africa: A human rights perspective' unpublished LLD thesis, University of Pretoria, 2005.

R A Ruhweza 'Review of the Application of the death penalty in Uganda' LLB Dissertation, Makerere University, 2000.