DEATH PENALTY AND THE RIGHT TO LIFE: A CRITICAL ANALYSIS

BY

CEASER TAMBUA
LLD/31044/102/DU

A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF DIPLOMA IN LAW OF KAMPALA INTERNATIONAL UNIVERSITY, KAMPALA

DECEMBER, 2011

DECLARATION

I **CEASER TAMBUA** do hereby declare that to the best of my knowledge and belief, this is my original piece of work and that it has never been submitted for the award of any credentials in any university or college or published as a whole or part.

I further declare that all materials cited in this dissertation which are not my own have been fully acknowledge.

Signed.....

Date ...../...2011

APPROVAL

This dissertation is submitted with the approval of my supervisor

Signed.....

MS. CAROLINE MUCHUMA

DATE...../..../2011

DEDICATION

This work is dedicated to my beloved parents and grand parents Mr. Gabriel Ndefu Karasi and Mrs Elizabeth Tete, Bande Mangu, Mr John Mangu Bande and Mrs Sitta Santina Ndefu, my uncle Dominic Gabriel Ndefu, aunt Louisia Mangu Bande for showing me the light of the day, Mr Simon Bonis, Mr John Bii and Mrs Mariam John Bii and lastly Mr Ibrahim Abigaba, Hon/ Paul Tambua, Emmanuel Beko.

May God bless you all.

ACKNOWLEDGEMENT

This research work has taken a lot of my time and other resources to come to this final stage which was still inadequate and it has also involved some other people who have helped me to reach in this final stage.

I have made a substantial proportion of references from sources and literature both old and contemporary. I am therefore greatly indebted to the learned authors of those writings. I am similarly, grateful to my supervisor Madam Caroline Muchuma.

She perused through this work in its entirety, advised and guide me accordingly. Her considered comments and critiques were very helpful. I am thankful once again.

A very special word of thanks is offered to Mr Livingstone Ssewanyana, Director of Foundation for Human Right Initiative (FHRI), who allowed me to access FHRI's library for research purposes.

I would like to express special thanks to my lecturers for their encouragement and being so friendly to me right from my first semester.

I am also indebted to fellow students and friends who shared with me some materials for this research. Most especially Brian Twinemugisha, Tumushabe Judith, Rabison, Darius Bitanako, Mary Saanyu and Stuart.

I am also grateful to my sisters and brothers Vesta Nako, Anna Aninyasi Dominic, Dominic Dadu, Rhoda Rudolf Ndefu, Joseph Kumbonyaki Mangu Bande, Benjamin Mangu Bande, Saba Paul Tambua, and Charles Paul Tambua, for their material support and spiritual encouragement and prayers for me.

Last but not least, I deeply thank my dedicated parents Mr. John Mangu Bande and Mrs. Sitta Santina Gabriel Ndefu and grand parents late Gabriel Ndefu Karasi and late Elizabeth Tete, Mangu Bande who sacrificed whatever they had, to see me become successful in my studies and whose constant prayers and loving support were the greatest human factor in enabling this work to be written.

Above all I give thanks and praise to God Almighty who has endowed me with wisdom and whose strength and guidance alone have enable me complete this work.

TABLE OF CONTENTS

DECLARATION i
APPROVAL ii
DEDICATION iii
ACKNOWLEDGEMENT iv
TABLE OF CONTENT v
LIST OF INTERNATIONAL INSTRUMENTS vii
LIST OF CASES viii

CHAPTER ONE 1
1.0INTRODUCTION..... 1
1.1.BACKGROUND OF DEATH PENALTY. 3
1.2.STATEMENT OF THE PROBLEM 4
1.3.OBJECTIVES OF THE STUDY 5
1.4.HYPOTHESIS,..... 5
1.5.SCOPE OF THE STUDY 5
1.6.IMPORTANCE OF THE STUDY. 5
1.7.METHODOLOGY:..... 6

CHAPTER TWO 7
LITERATURE REVIEW 7
2.0. Death penalty in Uganda 7
2.2 International views on the death penalty. 17

CHAPTER THREE 19
3.0 ARGUMENT FOR AND AGAINST THE DEATH PENALTY 19
3.1 REASON AGAINST ABOLITION DEATH PENALTY IN UGANDA 19
3.1.1 The deterrence theory. 19
3.1.2 The death penalty is a harsh punishment, but it is not harsh on crime. 21
3.1.3 The retribution justice theory 23
3.1.4. The Prevention theory. 25
3.1.5. The Populist theory. 26
3.1.6 Democracy 27
3.1.7 Threat of International Terrorism 28
3.2. Reasons for abolition of the death penalty 28
3.2.1 Justice system is not fallible 29
3.2.2 Death penalty is Barbaric 31
3.2.3 Violation of Human Rights 34
3.2.4 A tool of repression: 35
3.2.5. It is Unconstitutional. 36
3.2.6 Inequality 37

CHAPTER FOUR 39
4.0. IMPORTANT LAWS ON DEATH PENALTY 39
4.1. International law 39
4.1.1 Constitutional law: 45
4.1.2 Criminal law; 47
4.1.3 Martial law 48
4.1.4 Sharia law 49
4.1.5 The Death Penalty and the Right to life 49

4.1.6 The Prohibition against torture, cruel, degrading and inhuman form of punishment. 52

CHAPTER FIVE 59
5.0 RECOMMENDATIONS AND CONCLUSION 59
5.1. RECOMMENDATIONS 59
5.2 The challenges 59
5.3 Education 60
5.3.1 Moratorium and partial abolition 60
5.3.2 Reduction of capital offences 61
5.3.3 Mandatory death penalty: 62
5.3.4 Constitutional litigation 64
5.3.5 A need for practical right of appeal. 65
5.3.6 Addressing the socio-economic factors. 66
5.3.7 Alternative of life imprisonment. 66

5.4. CONCLUSION. 67

BIBLIOGRAPHY 69

LIST OF INTERNATIONAL INSTRUMENTS

African Charter on Human and Peoples' Rights adopted on June 27 1981 OAU DOC CAB/LEG/673re.5,21ILM58(1982) entered into force Oct 21st 1986[excepts]

American Convention on Human Rights 1969, Convention against Torture and other Inhuman or Degrading Treatment or Punishment 1984 American Declaration of the Rights and Duties of Man

European Convention for Protection of Human Rights and Fundamental Freedom 1950

International Convention on Civil and Political Rights adopted by United Nations General Assembly on Dec 16th 1966.

Universal Declaration of Human Rights 1948

Second Optional Protocol to the ICCPR (UNGA res 44/128, Dec, 1989)

National Instruments

Penal Code Act Cap 120 Laws of Uganda 2000

The Constitution of the Republic of Uganda (1995)

The National Resistance Army Code of Conduct.

The Uganda Peoples Defence Forces Act. Cap 307 Laws of Uganda 1992

Trial on Indictment Act Cap 23 Laws of Uganda

LIST OF CASES

Bachan Sigh Vs state of Punjab(1980) SCC 684

Bwenge Patrick Vs Uganda

Camargo Vs Columbia, Human Rights Committee, Communication No.45/ 1979.

District Attorney for the Suffolk District Vs Watson and others (1980)381 Mass 648.

Earl Pratt Vs A-G for Jamaica (1993)2 LRC39 Privy Council App. No 10/ 1993

Enfrancis Kafantayeni and others Vs Attorney General

Furman Vs Georgia (1972) 408

Gregg Vs Georgia 428 US 153

Harry Wilson Vs the Queen

Kindler Vs Canada(No. 470/1991) UNDOC:A/ 48/ 40 VOL.11p. 138, 14HRLT307

Mithu Vs State of Punjab

NG Vs Canada. Comm.No 469/1991.5.Nov.1995

Rajendra Prasada Vs State (1979) SC 916.

R Vs Home Secretary, Experte Bugdaylay (1987) AC514.

R Vs Robert (1957)4 S.A 265 (AD)R Vs Majafe,2. S.A118 (1958)

Reyes Vs the Queen

S Vs Mtilongo (1994) 10sacr 584

Soering Vs UK & Germany(1991)85 AJIL 128

CHAPTER ONE

1.0 INTRODUCTION

The death penalty is a controversial form of punishment. It has been condemned and abolished in many countries for being a violation of the right to life a considerable number of countries, including Uganda have retained the death penalty prompting.. There has so been a considerable debate level of discussion on the subject. In Uganda, the discussion arrived at its point during the constitutional drafting process that ended in 1995 and during the hearing of 2003 constitutional petition filed by Susan kigula and 416 others.[1] The Supreme Court upheld the Constitutional Court's judgement that is, a call for expedient executions. Far from the truth, the claim is based on the notion of the death row syndrome which is ably articulated in ***Catholic*** commission ***for Justice and Peace in Zimbabwe Vs Attorney General and others[2].*** The death row syndrome is indicated by the uncertainty as to the precise moment, death, which has been judicially decreed, will occur. When "a prisoner sentenced by Court to death is confined in the penitentiary awaiting execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty as to the precise time when his execution will take place[3]".

Vital opposition originate from Non-Government organisation such as the Foundation for Human Rights initiative (FHRI) which lobbied the constituent Assembly to exclude capital punishment in the 1995 Constitution. On the other hand, the Constitutional draft Commission, which was headed by Justice Benjamin Odoki, appreciated the strong opposition against the death penalty but nevertheless did not recommend its abolition[4]. The death penalty is also endorsed by **Article 22 Clause (1)** of the 1995 Constitution of the Republic of Uganda which provides that "No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a Court of competent jurisdiction in respect of criminal offence under the law of Uganda and the conviction and sentence have been confirmed by the highest appellate court[5]"

---

[1] Constitutional petition No 6 of 2003
[2] (1993)2 LRC 279
[3] OP Cit at page 290
[4] Report of the Uganda Constitutional Commission (1992)
[5] Uganda Constitution(1995)

In the Penal code Act, the death penalty is provided as the maximum punishment for several offences, including murder, treason, armed robbery, aggravated defilement, rape. The death penalty is also the maximum punishment for other offences like kidnap, [6]terrorism[7].

In addition to the above, death penalty is legally recognised, current information on death penalty in Uganda shows that the death penalty is actively used as a form of punishment[8]. The bulk of these are held on charges of rape and defilement[9]. There are two occurrences that may contribute to people's changes in opinion on the death penalty. Firstly, shocking events such as the hanging of 28 people which was done ion APRIL 29th 1999[10] at a go may change the public views in support of the death penalty may influence the public's opinion[11].

Secondly, the retention and active use of the death penalty in Uganda raises a number of issues which are addressed in this study. These include among others the violation of the right to life. The study also analyses the historical background of death penalty, the arguments for and against it and it examines the law and Constitutionality of death penalty in Uganda.

DEFINITION OF DEATH PENALTY.

"The death penalty is a legal imposition of death as a punishment for failure to abide by the criminal law." It involves inflicting severe trauma and injury on a human body to the peak where life is extinguished[12] .

[6] Section7(a) of the Anti-terrorism Act 2002
[7] Murder(S. 189), Armed Robbery(S.286), Smuggling(S.319(2), Treason(S.23)(d), Kidnapping(S.243), Rape(123), Defilement(S.129)(1)
[8] Amnesty International, when the state kills ...the death penalty
[9] E.A Journal of peace and Human Rights Vol:6,No.2 2000 P.224
[10] New vision on 29th April 1999
[11] New vision on 29th April 2008
[12] Amnesty International Report 1999 P5

1.1.BACKGROUND OF DEATH PENALTY.

The law and philosophy underlying the use of the death penalty in Uganda can be traced from the development of criminal law in England. Like other laws, criminal law in Uganda is largely a colonial legacy introduced in Uganda under the reception clause of 1902[13]. However, the earliest historical records containing evidence on capital punishment can be trace from the code of HAMMURABI OF 1750b.c, which prescribed a revengeful punishment popularly referred to as "an eye for an eye", a tooth for a tooth[14]". Besides that, the Bible prescribed death as the punishment for more than thirty different crimes, ranging from murder[15] to fornication[16].

According to Robert Seidman, the law on penal punishment in England developed five stages.

The first stage was the primitive stage. In this stage, all crimes were punished with extremely harsh sanctions, the commonest penalty for felony being death. Given the general absence of private property, the majority of offences were personal offences such as rape and murder, which were punished with death. The second stage witnessed the coming of the concept of retribution where punishment was designed to fit the crime[17]. The emergence of this theory coincided with the articulation of the natural law and rights theory that emphasized the derived right and power, which no human being could upset.

Retribution as a basis of punishment gave way to the theory of deterrence that was explained by 18th and 19th Centuries rationalists like Jeremy Bentham. This marked the third stage in the development of penology and the principle of punishment. Philosophers advocated for a utilitarian approach to the law and sought to principle of punishment from human nature, holding that the basis of objectives of criminal law were to deter potential criminals by example.

This reasoning is founded the doctrines of "a classical theory of criminal law".

---

[13] G.S.K. Ibingra, the Political Constitutional Evolution of Uganda from Colonial Rule to I independence (1894-1962,1973)
[14] Biblical Maxim
[15] Exodus 21:12
[16] Deuteronomy 22:12
[17] Robert B. Seidman, A source book of the Criminal Law of Africa(1966)

The fourth and fifth stages in the development of this school of penology came to cater for categories of criminals who by themselves lacked capacity to be deterred by punishment. These include young and insane people. The arguments were that the criminal mind was not entirely independent, it was determined to a certain extent by the environment and personal history. If the criminal and the crime are products of social and economic forces, then the criminal cannot be deterred by the threat of punishment. To these categories of criminals, therefore, the goal of punishment was seen as reformation and rehabilitation.

The above theories on criminal punishment have continued to be applied and influence sentencing in Courts of law today as basis of punishments. In Africa, it appears that the deterrence theory is a dominant basis of judicial sentencing[18]. In Uganda, government policy on the death penalty tends to lie on this theory. According to Abu Mayanja, a former Deputy Prime Minister/ Minister of Justice and Attorney General of Uganda, "death penalty is a strong deterrent to crime in a socially deprived society[19]".

The death penalty in Uganda was inherited from the British[20] and upheld by the constituent Assembly while debating the 1995 Constitution[21]. It is not surprising that today this form of punishment is applied in Uganda Penal system as a mandatory punishment[22]. Following, the Susan Kigulla Constitutional appeal[23] which was conclude in 2009, underscored the principle that the mandatory death penalty was unconstitutional and infact led to the abolition of mandatory sentence.

1.2. STATEMENT OF THE PROBLEM

In spite of the fact that Uganda has adopted various international and regional human rights instruments and has recognised the right to life in her Constitution, death penalty is still a popular type of punishment.

International legal instruments like the Universal Declaration of Human Rights (UDHR), the International Convention on Civil and Political Rights (ICCPRs) protect

[18] Rv .Majafe, 2S.A 118(1958)
[19] The New vision 10 march 1992
[20] Capital Punishment was introduced by the British in Uganda under the reception Clause of 1902
[21] Supra note.7
[22] The Penal Code Act Cap 120 Vol.6
[23] Constitutional Petition No.3 of 2009.

the right to life. Thus, this dissertation examines the extent to which retaining the death penalty in Uganda is a violation of international and regional human rights provisions as well as the Constitution of Uganda.

1.3. OBJECTIVES OF THE STUDY

The broad objective of this study is to find out whether the existing laws on death penalty in Uganda have outlived their usefulness and violate the right to life.

The specific objectives of the study are:

a) To examine whether death penalty contravenes the provisions of the Constitution of Uganda and international and regional human rights provisions.
b) To assess whether death penalty in actual fact achieves its main objectives of retribution and deterrence. In other words, whether it bears any relevance in the context of Uganda today.
c) To establish a case for the abolition of death penalty.

1.4. HYPOTHESIS,

It is usual for the offender to be punished and to feel the propensity of the punishment. However death penalty does not allow this, and therefore fails to achieve the objectives of punishment.

Death penalty as a capital punishment violates the right to life, which extends to violation of all rights since life is the concrete foundation of all human rights.

1.5.SCOPE OF THE STUDY

This dissertation focuses on death penalty and right to life in Uganda. However, it makes mention of the operation of death penalty in other jurisdictions. It discusses principles laid out in international and regional human rights instrument as well as the Constitution of the Republic of Uganda.

1.6.IMPORTANCE OF THE STUDY.

The discussion on the Constitutionality of the death penalty in Uganda indicates the complex cultural and religious beliefs the international community has had to deal with in an attempt to find a lasting solution to capital punishment. Susan Kigula

Constitutional petition reiterated issues raised by the constituent Assembly Delegates during the Constitution review process some of these issues remain unsolved. The submissions made during Kigula case affirmed the human rights obligations that bind Uganda. On the other hand, crime control considerations can not be ignored. This dissertation discusses the death penalty in light of these competing interests.

1.7. METHODOLOGY:

For this study, the research engaged in desk research as the purported source of data. The researcher used the following libraries: Law Development Centre (LDC), Foundation for Human Rights Initiative (FHRI), Nkumba University, Uganda Human Rights Commission,

Kampala international University (KIU).Books, academic articles, newspaper articles and web based resources were used.

CHAPTER TWO
LITERATURE REVIEW

2.0. Death penalty in Uganda.

The present study is more focused on Uganda and highlights contemporary views on the death penalty. This chapter analyses literature that justifies the death penalty as well as literature criticising the death penalty.

Justice George Kanyeihamba[24], in his article: Uganda still needs the death sentence, while justifying the role of Court in upholding the death penalty expressed his point of view saying that, "retribution means not only the convicted person should receive punishment that is proportional to his or her guilty, but the punishment should also be proportional to the harm done. In the later sense, punishment is totally amounting to retaliation. The Judge seeks justice by inflicting the sentence the offender deserves. This argument seems to stress the fact that such decisions are unjust like the crime itself. This literature opposes the abolition of death penalty. Proportioning the heaviness of punishment to the gravity of crime requires the primitive rule of life for life. It is not necessary that the punishment is equivalent to the offence because it could require, for instance, punishing the rapist by raping him or putting out the eyes of those who have blinded others. This form of retribution is unacceptable and gives credence to the argument that the death penalty should be abolished.

Karaoke C.K advancing ***the case for partial abolition quotes Prof***[25]. GAO Mingxuan who arguing in defence of death penalty expressed the opinion that "if we abolish the death penalty now, no other punishment could be sufficient to express the notion of monstrous crime the goal of reinforcing the law abiding attitude by way of punishment will then be unattainable".

This work does not advance the cause for the abolition of the death penalty in Uganda. It emphasises more on retaining the death penalty as the only alternative of expressing the notion of monstrous crime. This dissertation argues that life imprisonment can adequately serve this purpose hence justifying the abolition of death penalty in Uganda.

---

[24] Professor George Kanyeihamba; Uganda still need death penalty. The Uganda Human Right Magazines June-July, 1999 at 24

[25] Karaoke C.K; The case for Partial Abolition' Uganda Human Rights monthly Magazine Vol.6 .No.1 May 2003 at 6

According to Patrick Marshall,[26] death penalty seems to have played the role of attaining justice amongst the subjects of the state. To him, justice can only be attained when the criminal is subjected to the same treatment in which he put the victim. In his article titled, ***why are countries abolishing the death penalty?*** He asserts:

"The argument of retribution suggest that the offender should be killed in order to prevent crime but also to do justice, in this matter, the nature of killing by the state is the appeasement of society and the compensation of relatives of the victims through which the state fails to be a fair retribution of pain.' I do not agree with the argument raised here, because the state killing the offender, it could mean another murder. Then what could be justice for the relative of the offender? I think justice, it could not be attained in this situation through other means of punishment that will balance both families of the victim and offender."

In accordance with the article, ***The Constitutionality of death penalty in Uganda***[27]: a critical inquiry by Apollo Makubuya argues that 'the retentionists of death penalty link punishment to the deterrence theory.' The argue that if the death penalty is abolished there will not be any punishment adequate to deter those criminals who are already serving a long term sentence in prison or those who commit murder while incarcerated and even those who have not yet been caught but are potential criminals.

The other groups of the people that the receptionists would like the death sentence to be imposed upon them are: terrorists, revolutionaries and spies. The retention's bases their argument on the fact that taking the offenders life is the most severe than any other forms of punishment; it therefore has better deterrent effect to potential offenders. My view is that this argument is not full proof. This is because there has been a rise in crime rates of which there is no proof that takes the offender's life as to deter the rates of crime in Uganda. It is therefore contended that death penalty serves no useful reason and hence should be abolished in Uganda.

---

[26] Why are more Countries Abolishing the death penalty, Uganda' Human Right monthly Magazines june-july 1999 at 28

[27] East Africa journal of Peace and Human Rights Vol.16, No 2 of 2000at 227

Charles Smith[28] puts forward argument for deterrent effect of the death penalty. In his book ***'Outrageous atrocity or Moral imperative'*** He argued that, "if executing a convicted murder is barbaric is it not all more barbaric to make sacrifice of additional lives in order to save the life of the murderer."

If, for the sake of argument capital punishment is implemented under the mistaken notion that it deters, the lives of convicted murderers are lost. On the other hand, if death penalty is abolished due to the mistaken belief that it does not deter, then innocent lives are lost. Social justice would then suggest all things equal, that death penalty for premeditated murderers, should be retained[29].

Titus Raids[30], in ***'crime and criminology'*** said that " retribution is the only doctrine supporting punishment in general and in proponent, it has attribute the doctrine of death penalty, to him according to this doctrine, there is no need to consider the effectiveness of the punishment and as such, its goal is not doing justice but rather preventing crime".

Amnesty International report[31], ***on Uganda: the death penalty, a barrier to improving human rights?,*** notes that the death penalty appears to be generally so widely supported by the public in the belief that it presents an effective deterrence against crimes. The argument is therefore that the death penalty acts as a safeguard for violation of human rights. So, it further notes, that it is true to the extent that military officials justify their preparedness to execute soldiers as an indication of their commitment to human rights and the rule of law. The report further advances that the Uganda government has at times defended the death penalty on the ground that the public accepts retribution. The government also argues that if the capital punishment is abolished, the people will lose confidence in it and as result, they will take the law in their own hands.

---

[28] Charles ; (1997), 'Outrageous Atrocity' at 34 copy right © 1990-2010 IMDB.com.Inc in An Amazons. Company

[29] The Human Right Activists

[30] Titus Remid (1997) 'Crime and Criminology' at pg 519

[31] The death penalty; A barrier to improving our rights 'Amnesty International Report may 1993 AI Index; AFR

The government bases this argument on the possibility of eminent danger of people being subjected to mob justice for serious crimes that they might have committed such as rape and murder. According to the report, the government seeks to show the civilian population that the authorities will punish those who commits serious crimes against another person.

This argument has nothing to do with the abolition of capital punishment in Uganda, because the government of Uganda tries to indicate its responsibility over serious crimes by allowing the death penalty. But this can presently be achieved through life imprisonment. This would show the government's commitment to serious crimes and at the same time preserving human rights of murderers.

The death penalty, on the other hand denies both human rights and punishment of murderer. In addition, their argument is that, in an orderely society citizens should rely on legal process rather than self help to vindicate the wrongs.

According to Karpal Singh[32], the death penalty cannot be justified because the state has no right to take a citizens life for the simple reason it did not, in the first place, give life to the condemned.

God did and therefore, it is only He who can take it. This argument is important in abolishing capital punishment in Uganda. It helps to show that the life is irreplaceable and the sentence of death is irreversible, so that is the impression it gives about abolition of the death penalty.

Civil Society Coalition on the Abolition of Death Penalty (**CADP**)[33] was formed to foster joint advocacy on the abolition of capital punishment in Uganda. Civil Society Coalition on the Abolition of Death Penalty's member are: the Foundation for Human Rights Initiatives (**FHRI**), Amnesty International, Friends of Hope for condemned Prisoners Uganda, Human Rights Network (Uganda), the Uganda Association of Women Lawyers and the Christian joint council, Public Defenders Association of Uganda. According to **CADP** the sanctity of human life can not be upheld by a state that easily panders to stir emotion of revolution and retribution. Hence, the sincere requirement for the respect of human life has to include the abolition of the death

[32] Karpal Singh (1999); Legal and Constitutional issues Paper presented at the 12th Common Wealth Law Conference at Kuala Lumpur in September 1999 at p.1

[33] CADP 2005

penalty. The Article 22 of the 1995 Constitution of Uganda offers the opinion that, the challenges that comes to the legislature is not impose death as remedy to those in the society, but rather in statute books that provides for a death penalty in Uganda.

Christopher P. Marshall[34] in his book, ***'Beyond retribution'*** expresses his disagreement with the argument that death penalty offers retribution to the families of the victims hence ensuring that justice is done. He however, acknowledges the society's needs for retribution but still expresses distaste for execution.

He therefore argues that in the aftermath of murder, the desire for retribution against the offender and to see the murderer suffer what he /she inflicted on the innocent victim is understandable. According to him, retribution as a whole provides no adequate moral justification for the taking of another human life, since in this circumstances killing of the murderer will neither restore the life of the victim of the murder, nor will it in itself create a just balance. He also acknowledges that justice certainly should be done as it can be in circumstances, because justice requires that the offender be held accountable for his or her action and that the offender accepted responsibility for the pain caused. The victim's beloved ones should have their anguish and loss acknowledged, their anger affirmed for those are the important conditions for dealing with what has happened. However, the bottom line in his argument is that retribution in form of execution only doubles the number of the bereaved and as such, it is only a bitter, hateful revenge that has no therapeutic value in the treatment of the grief of the bereaved victim's family.

This review implies that death penalty is an effective punishment for the delivery of justice to the people since killing of the murderer will not restore the life of the victim of the murder but will instead add to the number of the bereaved.

Further more, Christopher Marshall, in "***Beyond retribution***",[35] is of the view that, "protection of innocence is a fundamental moral duty of the society", but execution is not the only way to achieve it. It should be noted, that the likelihood of an accused facing death may even discourage juries from convicting a guilty person, perhaps

[34] Christopher P. Marshall (1998) Beyond Retribution.
[35] Christopher P. Marshall(supra) rigid at 11

heightening the risk of re-offending. Certainly there are some people who are so dangerous that they need to be removed indefinitely from the society. However, the vast majority of convicted murderers never kills a second time and poses no greater threat to the innocent than do other members of the community".

This work brings the knowledge that there is a need to protect the innocent people. One of the ways to achieve that is sometimes removal of the murderers indefinitely from the society.

Marshall's work helps us to understand that such protection of the innocent is not necessarily achieved by execution of the convict. This implies that there are other forms of punishment that can be given to the murderers who are so dangerous other than the death penalty

Thus, it is important to me researcher who examines that whether the death penalty in Uganda should be abolished.

Amnesty International report[36], emphasises that society should not condemn the premeditated killing of defenceless people, whatever they might have done.

The report further says that all these methods of execution are cruel some and can go wrong.

Many of such executions have resulted in prolonged death; the condemned has to suffer the terror of waiting for pre-ordained moment of death. In addition, the methods of killing are not always the clinical painless process claimed by the proponents of death penalty. This work is relevant on the issues of arguments against the death penalty, especially the fact that the execution methods are not efficient as proponents claim. This is because they can go wrong and they do not kill a person immediately, which will make the condemned suffered until he/she dies in painful process. The contribution of this Amnesty International's report is the argument that in light of this, the death penalty should not be used on defenceless people under such situations.

Apollo Kakaire[37], in his article '***The death penalty, the case for Total Abolition'*** he observes that, people who murder are normally irrational at the time the commit they

[36] The death penalty; an Affront to our Humanity; Amnesty International Report 1999 at pg 4
[37] Apollo Kakaire (2003). The death sentence; a case for total Abolition at pg 5

crime. Therefore, the threat of future death does not enter the minds of the killer acting under the influence of drugs or alcohol, in the grip of fear or rage, panicking while committing another crime or simply lacking an understanding of what he is doing. The deterrence theory is therefore, based on speculation and any tested evidence. He therefore concluded in his words that, "while many people support the death penalty in Uganda and there may be in some situations the risk of mob justice justifying capital punishment on the ground that people will take the law into their hands, are simply a failure to take responsibility for law .and, it is also a way of violating the responsibility of introduction of effective measures to protect human rights'. This work is important to the topic in view of the fact that it challenges the claim that the death penalty serves a deterrence effect. It so contributes to the arguments in favour of abolishing the capital punishment.

Fr Tarcisio Augustine[38], in his book, ***'May the state kill'*** maintains that capital punishment has led to killing of innocent people though this seems to be a difficult thing to happen. In addition, he asserts that there are number of factors contributing to this innocent killing. For instance, he attributes these on rampant corruption in the system which cuts across the different stakeholders in the administration of justice, law and order. That is, it is present within the police, prosecution and the lawyers themselves. To him this is enough to conclude that innocent people have over the years been convicted and executed.

Another factor that he attributes to the killing is the indifference of the officials in the Court, Police investigating authorities and the Director of public prosecutions, this practice has been drawn from the plea bargain, where the condemned enter bargain, through payment of money and subsequently bringing false testimonies that the innocent are convicted, condemned and executed for the crime that were committed by the rich. This helps us to understand that the death penalty has been used inconsistently, especially where the poor could be executed when they are in fact innocent. So, this work contributes to arguments against the death penalty in Uganda.

[38] Fr.Tarcisio Agotoni (2004) may state kill at pg. 17

He further contents that punishment should not violate human rights. According to him, the extent of punishment should carefully evaluate upon and should not go to the extreme of executing the offenders. He however gave the situation when the capital punishment may be exceptionally used as in cases of absolute necessity that would be in situation where the rights of the citizen of the states could not have been protected other than by the execution of the offender.

According to him punishment should not be purposely aimed at harassment and execution of offender but rather to the re-education of the offender[39]. The theme of this work indicates that the death penalty, if used will violate human rights and its use is opposed except in exceptional circumstances. Hence, this review lends support that the abolition of death penalty as it violates human rights.

According to Crises and Joseph Boyle[40], capital punishment is immoral because it involves the premeditated killing of an individual, which is a kin to murder. The researcher concurs with this submission as the death penalty is another form of execution and is considered the greatest offence of which in most cases, punishment cannot be reduced.

Ernest Candern Haag[41], states that, "Every thing that can be said about possible capriciousness in applying capital punishment can be said about imprisonment as well". This means that, as much as capital punishment is inhuman, degrading and cruel especially death penalty, imprisonment is also of the same effect. The researcher does not concur with this assertion, because imprisonment and death penalty are very different. For this reason imprisonment needs to replace death penalty as it can preserve human dignity.

According to James A, Joyce[42] the legalized taking away of human life by the state in the name of social defence has nowadays become politics of the first instance and an issue of world wide proportions.

---

[39] Ibid pg.32
[40] Life and death, Liberty and Justice "London, Notre Dane press 1979 PP450
[41] Ernest Candern Haag (1997), Punishing Criminals New York Basic Books inc. P. 228
[42] James A. Joyce (1983), 'The Right to Life London Victor Gollarez ltd pg 210.

Capital punishment is used for political offences like treason to oppress the opposition and retain the status quo. This is undemocratic since people are entitled to have their different opinion and views. James's work illustrates how the death penalty is used unfairly as it targets to oppress political opponents and suppress political oppositions the guise of political offences, and the only way to overcome this is by the abolition of the death penalty.

J.S Mbiti states that before colonialism, each community has its own form of restitution and punishment for various offences, like fines and flogging[43].
Death was reserved for serious crimes, for instance practicing sorcery or witchcraft. In some countries, capital punishment, mainly death has been retained for offences of high treason in times of war.

This literature helps us to understand that death penalty fits serious crimes that could not otherwise be punished by other forms of punishment. Nevertheless, the weakness under this review is the fact that serious offences are not well defined by the author.
Therefore, this helps readers to understand that in some countries, capital punishment, mainly death penalty has been reserved for offences of high treason and for members of the armed forces in the times of war. For example in England, there was execution of two men convicted for murder on 19th Aug 1964[44].

H, Ralp[45], offers an important insight in to the discussion on capital punishment, especially with the views of retentionists today serves no purpose than satisfying the desires of political leaders.

I concur with the view because most political leaders tend to impose capital punishment in order to silence those who oppose their governments. However, this calls for the total abolition of the death penalty in Uganda, because revolutionists may turn out to be liberations.

[43] J.S Mbiti (1985) ,Africa philosopher &Religion London Heiman ,PP.211
[44] Amnesty International, 'When the state kills 'USA,A.I publication 1989PP.226.
[45] C.H Ralph (1979) ,'Common sense About crime 'London .Victor Gillanez ltd pp.450

Kakaire[46] asserts that capital punishment has never been indicated to deter crime more effectively than other punishment. Its use, it is claimed, diverts attention from the need to improve law enforcement systems and to address the underlying causes of crime.

This is virtually true because if for instance an offender is given a fine or imprisonment in lieu of the crime, he will be able to change and the law enforcement bodies are able to observe such criminals. The death penalty can come as a last resort or otherwise be done a way with.

According to Abu Mayanja[47], former Deputy Prime Minister of Justice and Attorney General of Uganda, 'capital punishment is a strong deterrent to crime in socially deprived society'. This view seems not to hold the truth in Uganda where most crimes are committed every day of which the death penalty is imposed. This is inline with Amnesty International's argument that the continuing frequent occurrence in Uganda of crimes for which the penalty is death strongly suggests that it has no deterrent effect whatsoever. So, death penalty serves no useful purpose if it cannot deter the most serious crimes, it should therefore be abolished in Uganda.

According to M.S Stephanie Hoey[48] of ***Foundation for Human Rights Initiative,*** capital punishment does not stamp out crimes. It is a pseudo solution, which diverts attention from the measures needed to prevent crimes; by creating the false impression that, decisive measures are being taken. Such punishment like death penalty does not protect society, but rather distracts attention from the urgent need for methods of effective protection, which at the same time uphold and enhance respect for human rights and life, indeed, whether or not there exists capital punishment in our law books, the crime rate has never gone down, but it is rather increasing.

Therefore, capital punishment is not the best punishment for offenders and alternative sentence should be sought. This view is applicable to the topic of research that calls for abolition of death penalty, for the reason that it has no effect on the rampant crimes in Uganda; the alternative to the punishment could be life imprisonment.

---

[46]Death Penalty in Uganda on the Exchange of views, Meeting on death penalty organised by FHRI, at fair way Hotel, in Kampala 28th Feb 2000

[47] The New vision 10 march 1992

[48] Amnesty International Report.

Hugo Bedan[49], in case against capital punishment states, "All punishment is reductive. Therefore, whatever legitimacy is to be found in punishment as just reduction can, in principle, be satisfied without recourse to execution", he further argues that the death penalty can be defended on narrowly retribution grounds only for the crime of murder, and not for any of other crimes that have frequently been made subject to this mode of punishments are unjust unless they are like the crime itself, the principle is unacceptable since it would require us to rape rapists, torture, and inflict other horrible and degrading punishment on offenders.

This review contributes to the argument against the death penalty. It is applicable in Uganda where the death penalty is not restricted to the offence of murder, but to other offence as well such as rape and defilement.

2.2 International views on the death penalty.

According to the Amnesty International report, the death penalty is a barrier to improving human rights[50], CADP. The report notes that "in Uganda, therefore, the death penalty is not only a denial of the ultimate human right to life but a barrier to official action to ensure that there are other kinds of human rights violations do not take place[51]". The helps readers to understand that due to a misconception that the death penalty is an effective deterrent, it prevents the authorities from seeing the need to introduce practical safeguards which would actually deter or prevent human rights violations. This implies that the death penalty is more of a problem than a solution.

The Amnesty International report further quotes Justice Cuba of South Africa, when he spoke about the "government's reasons for abolishing death penalty[52]". He stated that: " considering that is no empirical proof that the death penalty is a more effective deterrent than a long prison sentence; Mozambique has adopted an abolitionist position (because it) believes that life is an immeasurable good to be preserved in the names of all civilizations and the highest values of a society and other means can be used to achieved that which capital punishment has shown, in practice, that it cannot it achieve; peace, harmony, respect for human life and stability".

47 Death penalty; Total or Partial Abolition UHRC Monthly magazine Vol.4 No.1 may 2003
[50] Hugo Bedau (1997), case Against death sentence available
[51] CADP reports
[52] The death penalty, A barrier to improving Human Rights, Amnesty International (1993)

The argument is strongly applicable under the Ugandan situation, and this shows that it is time for Uganda to abolish the death penalty.

According to the ***Journal of the Burkinabe Movement for human and people's Rights***: "the death penalty not only denies the judicial system an opportunity to correct mistakes but also denies the offender all possibility of rehabilitation[53]". This statement is true in that the innocent are convicted, and so long as the death penalty is in place, judicial system will not be able to resolve such errors. This calls for abolition of the death penalty in order to avoid such mistakes and give chance the convicted to reform.

Amnesty International's[54], 'A violation of a fundamental Human Rights in liberty' states: "The death penalty is ultimately cruel, inhuman and degrading form of punishment and seeks its worldwide abolition. Everywhere experience indicates that executions have a brutalizing effect on those involved in the process. Nowhere has it been shown that the death penalty has any special power to reduce crime or political violence. In countries after countries, it is used disproportionately against the poor or against racial or ethnic minorities. It is often imposed and inflicted arbitrarily. It is an irreversible punishment, resulting inevitably in the execution of people innocent of any crime. It is a violation of fundamental human rights".

The researcher concurs with the above argument since the same situation applies in Uganda. This is a call for Uganda to join the trend towards abolishing the death penalty

.

[53] Ibid at pg 8
[54] The death penalty, a violation of a fundamental Human Rights in Liberty (October 1990)

CHAPTER THREE

This chapter in general shall discuss the argument against and for the death penalty in Uganda and the World as a whole

3.0 ARGUMENTS FOR AND AGAINST THE DEATH PENALTY

3.1 REASON AGAINST ABOLITION DEATH PENALTY IN UGANDA

This section engages with arguments in support of death sentence.

We as individuals value our lives, and those of our families and friends. We know that a life once taken cannot be revived. We fear becoming the victims of crime. We want to know that there is punishment in place that might, we hope, have a deterring effect on those who would commit crime; there is need to punish the perpetrators of crime. The arguments commonly advanced in favour of the death penalty are explained below.

3.1.1 The deterrence theory.

Retentionists of death penalty argue that it deters potential criminals from committing serious crimes[55]. They insist that because of taking an offender's life is a more severe punishment than any prison term, it must be a better deterrent.[56] They also contend that without death sentence there will be no adequate deterrence for those already serving a life term, who commits murder while incarcerated, or for those who would be liable to life imprisonment if arrested, as well as for revolutionaries, terrorists, traitors and spies[57].

This theory is commonly placed in all kinds of literature, including Courts decisions. In the South African case of **R Vs *Robert***[58], in which the Trial Court had sentenced the accused to death in spite of extenuating circumstances having been found by the

[55] Towards Abolition of the death sentence, 'Amnesty International Report (may 1991) An Index: AFR 01/01/91
[56] Report of the Uganda Constitutional Review Commission of Inquiry (Nov. 2003)
[57] The monitor 30th June 2003
[58] The monitor 14th Feb 2003

Jury, on appeal W.YKJ Said, "My duty is to protect the public against the accused and other would be killers. The accused belongs to the class of persons whose conscience is gravely impaired. They are deterred; I believe that the fear of the death sentence is still the strongest single deterring factor with this type of person. I have a strong feeling that if the accused were set free again, this desire to rape and do violence to women under the influence of liquor, may well manifest itself again, will be risking somebody else's life. The accused committed a horrible murder, a typical sex murder and may strike again if given opportunity".

It is the insistence on this purpose of deterrence that in some cases, it leads to miscarriage of justice in failing to consider the attendant mitigating factors as it may well have the case here.

Deterrence is an argument often cited to justify the death penalty. On the surface, the argument makes sense. Rational people understand links between cause and effect and crime, and punishment. A fear or the possibility of death also affects behaviour of most reasonable people.

This argument is particularly persuasive in Uganda, given the large increase in crime rate in recent years. However, there have been no compelling studies indicating that the death penalty is more deterrent than life sentence. Moreover, crime has not dramatically risen in countries after the abolition of death penalty, but in some cases, has in fact fallen[59].

For instance, when the death penalty was abolished in Canada in 1976, homicides in Canada in 2001(554) were 23% lower than the number of homicides rates in 1975(721), the year before the death penalty was abolished. More still, homicides rates in Canada are generally three times lower than homicide rates in the United States which retains the death penalty[60].

The British Home office released statistics, which indicate that the murder rate in the United Kingdom is more than three times that of many European countries that have abolished the death penalty.[61]

---

[59] Susan Kigula and 416 others Vs Attorney General, Supra note 14 Judgement of Twinomujuni
[60] Amnesty International: Towards Abolition of the Death Penalty: may 1991 pg.8
[61] Karpal Singh (1999); death penalty: Legal &Constitutional Issue Pg1

Deterrence as a basis of punishment for criminal offences and the death has so remained largely subject to criticism.

For example, severe punishment has never reduced criminality to any marked degree. There exists no scientific proof of the notion.[62]

That is to say, scientific studies have consistently failed to find convincing evidence that the death deters crime more effectively than other punishments. Research findings on the relationship between the death penalty and homicide rates conducted the United Nations in 1988 and updated in 1996, concluded; "the research has failed to provide scientific proof that executions have greater deterrent effect than life sentence. Such proof is unlikely to be forth coming.

The evidence as a whole still gives no positive support to the deterrent hypothesis[63]".

It is incorrect to assume that people who commit such serious crimes as murder do so after rationally calculating the results. Often murders are committed in moments when emotion overcomes reason or under the influence of drugs or alcohol. Some people who commit violent crimes are highly unable or mentally ill. The execution of Larry Robison, tested as suffering from paranoid schizosphrenias, in the USA on 21st January, 2000 is just one such example. In none of these cases, can the fear of the likelihood of detection, arrest and conviction to deter the commission of the crime.[64]

The fact that no clear evidence exists to indicate that the death penalty has a unique deterrent effect points to the futility and danger of relying on the deterrence hypothesis as a basis for the death penalty.

3.1.2 The death penalty is a harsh punishment, but it is not harsh on crime.

Not disputing death penalty, by permanently ' incapacitating' a prisoner would indeed have repeat the same crime if allowed to live, nor is there any need to violate prisoner's right to life for the purpose of incapacitation, dangers can be kept away

[62] 14 AIR (1980) SC 898

[63] Eric Bussey, Canada (2003) in his article "Death penalty in Uganda to the of its Abolition Pg. 9

[64] Tracy Garner, in his article, "The Death penalty- an Abuse of Human Rights, Vol.7 No.2 , 2002 Pg 23

from public without resorting to execution' as indicating the experience of many abolitionist by countries by introducing life imprisonment[65].

There is no evidence that the death penalty will prevent politically motivated crimes or acts of terror. These crime may be prevalent in Sudan: both North and South , a fact largely attributable to political instability in Northern Uganda

The overwhelming majority of serious studies on death penalty have concluded that it has no significant deterrent effect Professor A.A Adeyemi of the University of Lagos in Nigeria compared the statistics on the annual number of murder and executions in his country between 1967 and 1985 and noted that; "murder incidents had consistently increased for the most of this time", even though murder had always been widely known to be punishable by death. Moreover incidents of armed robbery had increased since it became a capital offence throughout Nigeria in 1970[66].

An African scholar has noted that; "in some parts of Africa, when thieves were being tied on trees for public shooting, other thieves were busy stealing tyres and head lamps from cars[67],,.

It should be rightly asked whether the death penalty has a uniquely deterrent effect in Uganda.

This can be answered to greater extent that, there is absolutely no evidence to support such a claim from Uganda or any other country in the World. Indeed, the continuing frequent occurrence in Uganda of crimes punishable by death strongly suggests that it has no deterrent effect whatsoever[68].

The above assertions evidently show that the death penalty is out fashioned and should be abolished.

---

[65] Interviews with Condemned Prisoners, Luzira Upper & lower Prisons , Kampala 13th Dec 2004 Ibid

[66] Ibid

[67] State Vs Makwanyane & Anor (1995)MILRC 269 AT 299

[68] Dominic Mnyarose Mbushuu & Kalai Sanaa Vs R (1994)lrc335, Tan High Court & (1995)1 IRC216 Tan C.A

3.1.3 The retribution justice theory

This theory holds that criminals should pay for their sins. This argument is also based on Biblical perspective that "whosoever sheds blood, by man shall his blood be shed[69]". This has usually been interpreted as a divine warrant for putting the murderer to death. Retribution has been in form of "an eye for an eye," many feel that when someone has killed, they themselves should be killed by the state.

However, the South African judgment on the death penalty shows the fallacy of this argument.

According to Justice P. Chaskalson, "punishment must to some extent be commensurate with the offence, but there is no requirement that it be equivalent or identical to it. The state does not put eyes of a person who has blinded another in a vicious assault, nor does it punish a rapist, by castrating him and submitting him to the utmost humiliation in jail. The state does not put engage in the cold and calculate killing of murderers in order to express moral outrage at their conduct. A very long prison sentence is also a way of expressing outrage and visiting retribution upon the criminal".[70]

The literal application of heinous offences "an eye for an eye and a tooth for tooth" seems to have long outgrowth.

However, critics of the death penalty have argued that one can accept a retributive theory that stress that; "there is no convincing argument that society cannot find other ways other than killing to express its condemnation of crime. Indeed, the publicity surrounding an execution may divert the attention from the crime to the person who committed it. Far from being condemned for his or her deeds, the criminal may actually become a focus of sympathy".[71]

Likewise in the case of ***Salvatori Abuki Vs A-G[72], J.P.M Tabaro said***, "How are we to punish offenders through convictions or retribution? Speaking for myself, I think retribution is base and sordid and is only euphemism for a primitive instinct in man to revenge whenever wronged. However, revenge in form of most cruel punishments

[69] New vision 23rd Jan 2005
[70] State vs Makwanyane {1980}HCB
[71] Ibid
[72] New vision 19th Nov. 2004

imaginable such as quartering and burning at the stake has never deterred crimes to any demonstrable level. An anecdote is often told of scenes of public hangings of thieves where at some people went a head to picket others in attendance to witness executions. Thus what is the utilitarian value of brutal, harsh punishment? In a civilised society the jurisprudence of tooth for a tooth and an eye for an eye' has no place".
And like the old adage says an eye for an eye, leaves the World blind.

It is still the argued that, the fact that today's penal system do not sanction the burning of an arsonist's home, the rape of a rapist or the torture of a torturer is not because they tolerate the crimes. Instead, it is because societies understand that they must be building on a different set of values from those they condemn.[73]

An execution cannot be used to condemn killing, such an act by the state is the mirror image of the criminal's willingness to use physical violence against a victim.
In Uganda, government officials sometimes defend the death penalty on the bases that public accepts retribution. The government argues that if the death penalty is abolished, the people would lose confidence in government and they would take the law into their hands.[74]
There is a danger that those thought to have committed serious offences such as murder and rape might be subjected mob justice. The government clearly and appropriately considers vital the civilians, who commit serious crimes against the person. There is, however, no good reason for punishment to be equated with execution.[75]

For the government to seek to justify the death penalty because the majority of the population supports it, and that therefore if the government does not execute the people will themselves act, is simply a failure to accept responsibility for law and order. It is also a way of avoiding responsibility for introducing effective measures to protect human rights. There is no evidence to suggest that abolishing death penalty would lead to a political collapse in the country or that by using more human

[73] Supra
[74] Ibid
[75] Ibid

punishments the government would lose credibility. In the end, the government accepts public opinion on death penalty because it agrees with it.[76]

However, in the case of Rajendra ***Prasad Vs state,***[77] the Supreme Court of South Africa, stated that; "special reasons necessary for imposing death penalty must relate, not to the crime as such but to the criminal. The crime may be shocking and yet the criminal may not deserve death penalty. The crime may be less shocking than other offences and yet the criminal callous ".

So, the justification of death penalty on the ground of retribution seem to be outdated in the civilised society like Uganda because, proportioning severity of punishment to the heaviness of crime does not require the primitive rule of a life for life.

3.1.4. The Prevention theory.

This theory attributes to the fact that the death penalty removes "dangerous" persons to create a "safer society". It is argued that the death penalty ensures that the dangerous criminal never commit crime again.[78]

The matter to be raised under this theory include; who is a dangerous person and what is the degree of dangerousness required to remove some one for good?

It is argued that the policy of removal, requires for its success that those who have a disposition to commit crimes be identified. Also, " we argue that by removing one dangerous person, you do not remove crime or criminals generally". Moreover, there are other ways and means of prevention such as life imprisonment.[79]

The death for prevention theory addresses the symptoms and not the root cause of crime. It is wrongly proposed that the commission of any capital offence renders one, "dangerous" to society, including offences such as cowardice in combat situations. These assumptions are doubted and highly questionable.

---

[76] New vision 1st Oct.2001

[77] When the state kills...Amnesty International, 1989 pg8

[78] Amnesty International: Towards Abolition of the death penalty,1991 pg.8

[79] Ex-officers-in charge of Luzira Upper Prison New vision 22nd June.

Also the prevention theory is seen in another perspective, where by some government officials have argued that those convicted of serious crimes should be executed as otherwise they might escape or bribe their way to liberty.[80]

This suggestion is callous and immoral evasion of responsibility; the government should take serious steps to improve security and conditions in prisons and not deny prisoners their right to life for administrative convenience.

3.1.5. The Populist theory.

Retentionists argue that the death sentence is a popular form of punishment for serious crimes such as murder.[81]

The position is reflected in the phenomenon of "***mob justice***", where society takes it upon itself to punish criminals in mob leading to their death.[82] The most usual is that such punishments are made out for crimes and their intention is not always to kill the criminal.

Besides, a mob "***dispensing justice***" should not be as a representation of public opinion attitude and values are by no means uniform or constant.

More still, as a guide to policy making, the source of such "public opinion" as well as their reliability have to be considered. It is argued that on issues where popular attitude differ from government policy, for instance over health issues; government is always prepared to campaign to change those attitudes.[83]

But one wonders, why should the death penalty be an exception?

The issue is not what the majority of Ugandans think that the death penalty is a proper punishment for murder. Rather, it is whether the death sentence conforms to the concept of human rights under its Constitutional order and binding treaty law.

Moreover, questions of interpretation of the Constitution are vested in the Courts. The Courts cannot afford to allow themselves to be diverted from their duty as independent arbiters of the Constitution by making choices on the grounds that they will find favour with the public.[84]

---

[80] Supra note 14
[81] Ibid
[82] Amnesty International: The death penalty,2000
[83] Uganda Constitution 1995
[84] Ibid

Therefore, if public opinion were to be decisive, there would be no need for constitutional adjudication.

Justice Jackson has in the case of ***West Virginia state board of education Vs Barnett***, commented that "one's right to life, liberty, property, free press, free speech, freedom of worship assembly and other fundament rights may not be submitted to vote: they depend on the outcome of no elections.[85]

The reasons for a seemingly strong public support for the death penalty can be complex and lacking in factual foundation. If the public were fully informed of the reality of death penalty and how it is applied, many people might be more willing to accept abolition.[86]

A similar view that public support is based on ignorance is seen by justice Marshall of the Supreme Court of the U.S.A in the case of ***Furman Vs Georgia***[87] who argued that; " if the public knew the truth about the death penalty they wouldn't support it". This statement, commonly referred to as the "Marshall hypothesis", suggests that ignorance from the lack of an informed citizenry'.

Uganda has been basing its decision to retain the death on public support. For instance, the government submitted that the death penalty was incorporated justifiably in the constitution through the constituent assembly, which was the vote of 26 million Ugandans who approved it as a legitimate and appropriate punishment[88].

The researcher is of the view that the public's support for the death penalty is misconceived. For example, a large number of Ugandans are illiterate and have not been educated on important arguments, so, the government would not be justified in torturing prisons or prosecuting an unpopular ethnic minority simply because the majority of the public demanded it. When the death sentence is abolished, there is usually no great public outcry and it usually remains abolished.[89]

3.1.6 Democracy

Support for the death penalty implies being more democratic. Professor Steiker of Harvard Law School asserts that:

---

[85] Ibid
[86] When the state kills 1989.
[87] Ibid pg.59
[88] Supra 23 at pg.8
[89] Ibid

"in light of the fact that large numbers of people support death penalty in Europe as well as United States, some people claim that they are simply more democratic in giving effect to these preferences. There is nothing to that, although it is also true Americans seem to have a greater intensity in their preference for death penalty than Europeans do[90]", it is the researcher's view that the same ideas needs to be used in Africa. Uganda in particular.

3.1.7 Threat of International Terrorism

Technological development is facilitating greater mobility of people and communications. With the anti-social conduct multiplying and intensifying the dangers to life and property, the demand for the severest punishment becomes more pronounced the entire World over. Hence the support of the death penalty for terrorism- related offences.[91]

In the case of Uganda, this argument seems to be farfetched. Therefore the argument advanced above in favour of the death penalty, are un-convincing. That is the reason they are subjected to a lot of criticism. Hence, no need of retaining the death penalty under such argument.

3.2. Reasons for abolition of the death penalty

The argument for the abolition of the death penalty outnumber and outweigh the simple and outdated notions put forward by those who resist evaluating this old-fashioned punishment. It is evident in Uganda that people from different walks of like have come up with different views opposing the use of the death penalty as a form of punishment. For example, at the play "the Gallows" at the national theatre in 2006, Mr. Joseph Etima, the Commissioner of prisons spoke against the death penalty. He argued that because the justice system is not infallible, many innocent people would be killed if the death penalty were retained. He asserts that the objective of the prison system was to rehabilitate prisoners, which is obviously negated by the death penalty. Uganda prisons services also testified to the Constitutional review commission that it was opposed to the death penalty.[92]

---

[90] Ibid
[91] Ibid
[92] Supra note 22 at pg 2

In the case filed by Susan Kigula's and other inmates on the death row,[93] Twinomwunjuni J. A. disagreed with the petitioner's claim that public opinion is irrelevant in judicial Constitutional interpretation as argued by the Foundation for Human Rights Initiative on behalf of the 417 living inmates convicted and sentenced to death. The petitioners argued that the death penalty violates **Article 44(a)** (freedom from torture, cruel, inhuman, and degrading treatment or punishment), **Article 22** (the right to life), 21 (the right to a fair, speedy, and public hearing before an independent and impartial Court or tribunal of the Ugandan Constitution.

3.2.1 Justice system is not fallible

This is the most compelling reason for abolition. It is seen that many innocent people are convicted and sentenced to death as long as death penalty is in place.

The very fact that death is an irreversible punishment makes it inherently unfair-errors cannot be rectified. The judicial procedures in many countries are seriously defective, but even where the death penalty is confined to the most serious crimes and all procedural safeguards are observed, there remains a danger that innocent people may be executed.[94] Therefore, there is no way to correct these errors as in the case of punishment of imprisonment.

According to Karpel Singh, "no criminal justice system is perfect, being evolved by humans". It is perhaps for this season that the French philosopher Voltaire said in his work 'Zidig'that"it is better to risk saving a guilty man than to condemn an innocent one". After all judges are human and liable to fall into error. A Sentence of death is irreversible. What would be the remedy in such situation? We have not advanced to that level where a lost soul could be resurrected. Not at least after that soul has shed what has turned into dust".[95]

Similarly, in the case of ***Bachman Singh Vs state of Punjab***,[96] Bhagwati J dissenting observed, the chief arguments of the abolitionists, which have been substantially adopted by the learned council for the petitioners, are hereunder. The death penalty is

---

[93] Ibid
[94] The monitor 27th march 2002 at pg 1-2
[95] Amnesty International, Uganda: soldiers' executions must not set trend, AFR 59/002/2002
[96] The New vision 3rd April at 19

irreversible decided upon according to fallible processes of law by fallible human beings"

For this matter, thousands have been put to death under one government only to be recognised as innocent victims when another set of authorities comes to power.
There have been several notable cases in which people sentenced to death have been found innocent, including that of George Kelly, who was executed 53 years back in U.K, but exonerated recently.[97]

In Uganda, Eddy Mpagi spent 19 years as a condemned prisoner in Luzira upper prison charges of murder before being released in 2000 when the man he was supposed to have killed was found to be alive.

Another examples is of Elias **Wanyama and Godfred Muganyi**, both were imprisoned and had been sentenced to death, having been wrongly accused of crimes they did not commit.[98] This problem is rampant in Uganda, because of the corruption and lack of resources within the justice system. Many of condemned prisoners in Uganda are poor, have inadequate access to counsel, are poorly represented, and often cannot understand the Court proceedings as majority of them do not speak English and are provided with no translations.

Many of the condemned prisoners reported that they only met with Lawyerson State briefs who represented them on that day of the hearing and that their lawyers did not have a full understanding of their cases.[99]
Some reported that they were told by their lawyers to plead guilty even though they were innocent. Many said that their lawyers did not adequately review the evidence and some did not allow them to call witness. Prisoners also reported judges and lawyers had often been compromised[100]
These factors increase the likelihood of wrongful convictions that calls for the abolition of death penalty in Uganda, to ensure that such convictions will never occur.

---

[97] Ibid pg.7
[98] New vision 15th Dec 2004
[99] Ibid
[100] Supra note 44 at pg 7

It is therefore vital to note that Chaskalson P's conclusion in South African context which also hold true in Uganda that "the unpalatable truth is that most capital cases involves poor people who can not afford and do not receive as good defence as those who have the means. In this process, the poor and ignorant have proven to be the most vulnerable, and are the persons most likely to be sentenced to death.[101]

3.2.2 Death penalty is Barbaric

This is another argument for abolishing the death penalty, as conditions, both mental and physical in which condemned prisoners are forced to live, constitute cruel, inhuman and degrading punishment. Hanging that is method of execution in Uganda as in many African countries has been held to be barbaric.[102]

There have been witnesses to hangings where the executioner had to kill the prisoner by using hammers or other weapons. This is case in Uganda, where Anthony Okwonga, a former Commissioner of prisons, discussed that in cases where the prisoners are not certifiably dead; they are killed by hitting them at the back of their heads with a hammer or a crowbar.[103]

Condemned prisoners in Luzira Upper prison live in extremely overcrowded conditions although this may have improved slightly as over 100 prisoners have moved recently to Kirinya prison in Jinja.

The overcrowding was so bad in November 2004 that prisoners are forced to sleep curled upon blanket on the floor.

Many experience joint pain as a result of which are exacerbated by lack of exercise. This is true that, at least 250 condemned prisoners share cell space originally designed to house only 60 prisoners[104]. ***Foundation for Human Rights Initiative*** (FHRI) documents that neither beds nor beddings are provided by Uganda prisons.[105]

---

[101] The New vision 19th Nov. 2004
[102] Supra note 27 at pg 12
[103] Supra note 46
[104] Amnesty International, Supra Note 27
[105] Joseph M.N Kakooza, the 1st International Conference on the application of death penalty in Common Wealth Africa Countries.

However, perhaps more significant is the mental torture on death row for 10-20 years as their cases pending appeal. Prisoners live each day never knowing whether it is going to be their last, and in perpetual dread that they, or their fellow inmates may be executed.[106]

Many also reported feelings of hopelessness as they watched fellow inmates exhaust the appeal process. Several prisoners have had friends and family members abandon them after they were sentenced to death. Others worry about children who they cannot support. These anxieties have led many to suffer from conditions such as high blood pressure, depression and mental disturbances.[107]

Prisons warders who guard condemned prisoners are also often traumatised by having to look after the prisoners only to escort them to their deaths. This is one of the reasons cited by the prison service in its opposition to the death penalty.[108]

In addition, what worries the researcher is that, if someone can be traumatised to slaughter chicken and see it dying, what about a human being? This is simply because the physical pain caused by the action of killing a human being cannot be qualified. Nor can the psychological suffering caused by foreknowledge of death at the hands of the hands of the state.[109]

A former prisoner in Pretoria central prison, South Africa, wrote: "only after I had lived at Pretoria central prison did I come to realise, fully, the utter worst of capital punishment, what it involves and the responsibility it imposes on a man. I do not think that any man can be asked to exercise that devastating responsibility. I do not think that any man can carry out the demands of the system or live with the system without him at once becoming degraded, corrupt and brutal".[110]

This holds true in Uganda, Okwonga,[111] states that he witnessed all the executions and found them to be cruel, inhuman and degrading to all people involved. A part from the prisoners on the death row prison warders, the executioners, the prison medical

[106] Chaskalson supra note 12
[107] Ibid
[108] Supra note 23 at pg. 11
[109] Ibid
[110] Ibid
[111] Amnesty International, Supra note 27

doctor and various religious leaders witness the hanging. Once the execution is given a go-ahead, the execution officer ensures that everything is in order and gallows are clean. He restricts the prisoners' movements and ensures that the coffins are made.[112] He further says that, some prison warders suffer psychological problems and illness, leading many of them to resign from the service. Some seek treatment from witch doctors and increase their alcohol consumption to deal with their mental disorientation.

It is noteworthy that **Article 44** of the Constitution states that, "not withstanding anything in this Constitution, there shall be derogation from enjoyment of the following rights and freedom from torture; cruel, inhuman degrading treatment or punishment.[113] And Article 24 of the Constitution states that; "no person shall be subjected to any form of torture, cruel, inhuman and degrading treatment or punishment.[114]

It is can be argued that, in as far as, the death penalty or state killing is a torture and humiliation of a human being; it offends against the spirit of the Constitution especially the provisions as stated above, that is **Article 24 and 44** of the Constitution.[115] These was deliberated upon by the Constitutional Court of Uganda. For example, in the case of ***Uganda Vs Hakibar Godi the former MP Arua municipality, which was based on Article 22 {1} of the Constitution.***

Amnesty International,[116] commented upon it, which despite modern methods of execution, that prisoners suffering is likely to be prolonged if the executioner makes an error or anything goes wrong. It reports that even where unconsciousness has occurred before; the heart may continue beating for some minutes.
In the same publication, the human rights activists also argued that, that kind of killing, by even shooting is a form of torture and cruelty. They are quoted in their

[112] Amnesty International, Supra note at pg. 10-14
[113] Ibid pg.10
[114] (1957,4 S.A 265(AD)
[115] Supra note 6 at pg.10
[116] Ibid

publication that, "shooting by firing squad does not necessarily result in immediate death".[117]

It is argued that the cruelty of death sentence is felt by family of a condemned person, not only before the execution but also for the rest of their lives.[118]

It is the researcher's considered view that in order to fill the gaps and suffering of the prisoners in Uganda; offenders need to be put in to firing squad other than hanging. In addition, the prisoner is made to hang from a rope tied around the neck exerted against the body as the body falls. Unconsciousness and death are brought about by damage to the spinal cord or if that is insufficient, by asphyxiation due to constriction of trachea.[119] There is definitely a need for abolishing this barbaric kind of punishment.

3.2.3 Violation of Human Rights

The use of death sentence violates the spirit and the letter of international human rights laws which Uganda is party to.[120]

Various international and regional human rights instruments reiterate the right to life. Chapter four of this research discusses the various provision in detail. Terminating the life of an accused person denies them the opportunity to appeal or to their potential. It denies the living victims the opportunity to forgive.[121]

When a state convicts prisoners without affording a fair trial, it denies the right to life to due process and equality before the law. The irrevocable punishment of death removes not only the victim's right to seek legal redress for wrongful conviction, but also the judicial system's capacity to correct its error.[122]

Like killing that take place outside the law, the death sentence denies the values of human life. By violating the right to life, it removes the foundation for the realisation of rights espoused in the Universal Declaration of Human Rights.[123]

---

[117] United Nations Report in 1988
[118] Ibid
[119] New vision New York Times, 11th May 2002
[120] Barnes & Tecers, New Horizons in Criminology 33(1951)
[121] Tibanianya Mwene Mushenga; the death penalty and its alternatives, a paper presented at the Conference on the death penalty in Africa at Ibendans Nigeria (1977)
[122] Amnesty International: Supra note
[123] Ibid

This is squarely the case in Uganda, if the death penalty is not abolished, the rights enshrined in UDHR and those provided for under the Constitution of Uganda will be denied. For example, in the Kotido executions Corporal James Omiedo and private Abdullah Mohammed were publicly executed on 25th March after a trial less than three hours before a field Court Martial, which found them guilty of the triple murder.[124] In this regard, Amnesty International observed that; "the speed of the executions of these two men cast along shadow of doubt on the manner in which military Courts are conducted and the method by which their decision are reached. It was reported that the Courts Martial lasted only for two hours and 36 minutes. This only compounds the fact that there could not have been an effective investigation to determine the guilty or otherwise of these two men. The timing of the arrest of the men and their execution brings into question the due process of process of law. Any Court Martial should be conducted under stringent conditions of transparency, fail trial and impartiality to the failure of this case to be investigated fully before any trial was conducted leads us to believe that these men were not given opportunity fully before engaging in the process, so denying them a chance for a fair trial and independent trial.[125]

In addition, Gawaya Tegulle says;

"in the Kotido case, the investigation, trial and execution took place less than 72 hours after the crime, haste which is questionable internationally. Controversy was heightened by the bizarre pronouncement that the accused would be executed before the Court begun hearing the case".[126]

It should be noted that; the right to fair trial (and its various guarantees) is provided for under Article 28 of the Constitution of Uganda, 1995.This is stipulated in Article 28 clause(1), which provides that; " in determination of civil rights and obligations or any criminal charge, a person shall be entitled to fair, speedy and public hearing before impartial Court or tribunal established by law".

3.2.4 A tool of repression:

[124] Ibid
[125] Amnesty International, Supra note 22 at pg 5
[126] Ibid

Death penalty continues to be as tool of political repression. Rulers have executed their political rivals, or have tried threats of death to silence their opponents. The death sentence has been used to consolidate power after coups and coup attempts, and members of opposition political groups have been eliminated as a matter of political expediency.[127]

In many cases, the death sentence has been directed at prominent individual political opponents.

Margaret Sekagya, former chairperson Uganda Human Rights Commission believes that death sentence is used disproportionately, against the poor and minority groups as a tool of political repression.[128]

It is the irrevocable nature of punishment that makes it as tempting as a tool of repression.

Thousands have been put to death under one government only to be recognised as innocent victims when a new government comes to power.[129] This is a true example in Uganda of Abdullah Nassur who was recently pardoned in Museveni's regime.[130]

3.2.5. It is Unconstitutional.

This is a debatable issue. The Constitution providing for right to life also provide for a limitation on the enjoyment of that right. In some cases, the Constitutions recognise the death sentence which is discretionary.[131]

Article 20 of the Constitution of Uganda recognises that fundamental rights and freedoms of the individual are inherent and not granted by the state.

The Article provides that; "the rights and freedoms of the individual and groups enshrined in this chapter shall be respected, upheld, and promoted by all organs and agencies of government and persons.[132]

---

[127] Tibanianya Mwene Mushenga, the death penalty and its alternatives, a paper presented at the Conference on the death penalty in Africa at Ibendans Nigeria (1977)
[128] Amnesty International: the death penalty; A barrier to improving Human Rights, 1993 at pg.2
[129] Genesis 9:6
[130] Makwanyane Supra Note 12 at pg. 90
[131] Amnesty International Supra note 22 at pg.18
[132] Ibid

Article 22(1) provides that; "No person shall be deprived of life intentionally except in an execution of sentence passed in a trial by a Court of competent jurisdiction in respect of criminal offence under the law of Uganda and the conviction and sentence have been confirmed by highest appellate Courts

It is argued that, the death penalty is by definition cruel and degrading punishment.[133] However, the reading of **Article 24 and 44** of the Constitution respectively prohibit torture, cruel, inhuman, or degrading punishment, of which the death sentence falls under this.[134]

3.2.6 Inequality

Studies have indicated that most of those sentenced to death come from the poorest levels of society. Poverty breeds crime and the poor cannot afford to appoint their own legal counsel. The use of the death sentence gives the impression that the authorities are dealing severely with crime when in fact they are unable or unwilling to resolve the social and opening address problems which gives rise to crime.

A case in point is Alpheus Sekoboane was executed on 13th November 1990 in South Africa. Because he could not afford to pay legal costs, he had lodged a petition for clemency before he was served with notice of execution.[135] They were therefore unable to challenge the prosecution on points of law or to challenge the admissibility of evidence before the Courts.[136]

In addition, experience demonstrates that whenever the death sentence is used some people will be killed while others who have committed similar or even worse crimes may be spared. The prisoners executed are not necessarily only those who committed the worse crimes, but also those who were too poor to hire lawyers to defend them or those who faced harsher prosecutions or judges.[137]

---

[133] Constitutional petition No. 2/97 at pg.12
[134] Amnesty International, Supra note 22 at pg.7
[135] Ibid
[136] Amnesty International, Supra note 78 at pg. 3
[137] Ibid pg.4

As Chaskalson P said "that, the poor and the ignorant have been proven to be the most vulnerable, and are the persons to be sentenced to death.

This should be noted that the above argument holds true in Uganda that until the death penalty is abolished, most of the convicts who are poor will remain to be sometimes subjected to wrongful convictions since they will not be able to access legal counsel who seem to be expensive in Uganda. These so calls for a need to abolish such punishment.

CHAPTER FOUR

4.0. IMPORTANT LAWS ON DEATH PENALTY

This chapter examines the position of death sentence in light of international, domestic and regional legal provisions.

4.1. International law

The focus of international human rights law and international criminal law is presently propelling towards the worldwide abolition of death sentence. For example, the 1998 Rome statute of international Criminal Court[138] provides that, "the Court may only impose a maximum sentence of imprisonment up to thirty years. In the same token, both the International Criminal Tribunal for Rwanda[139] and for former Yugoslavia provide for a maximum sentence of life imprisonment

This focus towards abolition is manifested in the various international human rights instruments, treaties, and conventions that have been adopted by the United Nations. The Universal Declaration of Human Rights, (UDHR), in response to the staggering extent of state brutality and terror witnessed during World War II, recognises each person's right to life and categorically states that "every one has the right to life."[140] In addition, it stipulates that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". In Amnesty International's view, the death penalty violates these rights.[141]

Article 3 of UDHR is indeed abolitionist in outlook.[142] By its silence on the matter of the death penalty, it envisages the abolition of death penalty.

A report from the secretariat of the United Nations has described the right to life provision in the UDHR as being neutral on the question of the death penalty.[143]

---

[138] Ibid
[139] Ibid
[140] (1979)SC 916
[141] Amnesty International, Supra note 22 at pg. 14
[142] Apollo N. Makubuya (2000): the Constitutionality of the death penalty in Uganda, a critical Inquiry. Pg.228
[143] Ibid at pg. 229

Clearly, the General Assembly has considered that Article 3 of the declaration and the abolition of death sentence are in dissociable.[144]

Therefore, it no exaggeration to state that **Article 3** of UDHR was aimed at eventual abolition of the death penalty, a role which it has admirably fulfilled.

The International Covenant on civil and political rights (ICCPRs) states that "every human being has the inherent right to life".[145] It further provides that; "any one sentenced to death shall have right to seek for pardon or commutation of sentence. Although the ICCPR does not obligate states to abolish the death penalty subsection 6 clearly indicates that this does not in any way a bar to the abolition of death penalty. It further limits the death penalty as a punishment for the most serious offences.[146]

Second optional Protocol to the ICCPR is yet another instrument, aimed at the abolition of the death penalty but allows state parties to retain the death penalty in time of war if they make a reservation to that effect at the time of ratifying or acceding to the protocol.[147]

In this individual dissenting opinion in ***Kinder Vs Canada***,[148] Human rights committee member Bertil Wennergen states that:

"By guaranteeing to every human being, 'the inborn right to life, Article 6 makes it clear that, its object as a whole is the protection of human life." According to him, the other provisions of Article 6 concern a secondary and subordinate object namely to allow states parties that have not abolished capital punishment to resort to it until such time they feel ready to abolish it".

Wennergen explained:

"the principal difference between my and the committee's views on this case lies in the vital, I attach to the fundamental rule in par (1) of **Article 6**, and my belief

[144] Amnesty International, Supra note 78 at pg.4
[145] Ibid
[146] Amnesty International Supra note at pg. 22
[147] Amnesty International, Uganda: The failure to safeguard of Human Rights (1992)pg.58
[148] UNDOC AI Conf.183/9

that what is said in paragraph (2) about the death penalty has a limited objective that cannot by any reckoning override the main principle in paragraph (1)".[149]

Concerning an issue whether there are exceptions to this 'inherent right to life' Wennergen, in his individual dissenting opinion, recognised only two; the death sentence as 'a necessary evil' and the rule of necessity, which is implicit. He said that only if absolute necessity so requires will it be justifiable to deprive an individual of life, in order to prevent the individual from killing one another or in order to avert fabricated disasters. 'From some reason, it being killed,' he concluded, on one form or other, the rule of necessity is inherent in all legal systems; the legal of the covenant is so exceptional.[150]

The Convention Against Torture and other inhuman or degrading treatment or punishment calls for the protection of all persons from being subjected to torture or any form of cruel, inhuman, degrading treatment.[151]
The convention further calls for an effective struggle torture, inhuman, degrading treatment.

Several jurists have explained that the action of executing a person by whatever means amounts to an act of cruelty, and is not only degrading but also inhuman.[152] During the presentation of the Republic of Korea's periodic report, the united nations committees country reporters noted that; "all were agreed that the death penalty was a cruel, inhuman and degrading punishment" he requested Korea to abolish it.[153]

More still, the United Nations General Assembly has passed a number of resolutions relating to the death penalty notable of which are resolution 2857(XXVI) of 20th December 1971 and resolution 2857(XXVI) calls for a progressive restriction of the number of offices for which capital punishment may be imposed. This call is aimed at abolishing this punishment in all countries.

---

[149] Art 76 (1) and (2) Uganda's Constitution 1995
[150] Security Council Resolution 955, (1994), UNDOC S/RES/955(1994)
[151] Security Council Resolution,827,25 may 1993
[152] UDHR Article. 3
[153] UDHR Article.3

Resolution 1984/ 50 adopts safeguards guaranteeing the protection of the right of those facing the death penalty, on the understanding that these safeguards should not be invoked to delay or prevent the abolition of capital punishment should be imposed for serious crimes only.

However, the problem with this is the definition of "a serious crime". Each state has its own definition of what amounts to a serious crime, drug trafficking in Thailand attracts the death penalty.

The safeguard further includes the right of appeal, the right to benefit from lighter penalties under certain conditions, the right to seek pardon and exemptions from capital punishment for persons below eighteen years (18) of age, pregnant women, new mothers, and persons of unsound mind.[154] These exemptions, however, puts a question on those persons for instance, it may be difficult to establish the age in countries like Uganda, where a percentage of the population is illiterate and ignorant of when they were born. In addition, it may be difficult to detect a woman who is one day pregnant. So, such safeguards in Uganda are most likely to be inapplicable, since few people have access to proper medical care and examinations.

At the regional level, a number of conventions has been drafted against the death sentence. For instance, the council of Europe passed the European Convention for protection of Human Rights and Fundamental freedoms.[155]The Convention provides, among others that: "No one shall be deprived of his or her life intentionally except in the execution of a sentence of a Court following his or her conviction of a crime for which this penalty is provided by law".[156] It further provides that: "No person shall be subjected to torture or inhuman or degrading treatment prohibited in Article 3.[157]

However, as observed, these provisions are inherently contradictory because the death penalty implicitly allowed in Article 2 results to torture or inhuman or degrading treatment prohibited in Article 3.

---

[154] Amnesty International; The death penalty; Questions and Answers April 2000
[155] William A. Schabas; The Abolition of the death penalty in . Law 3RD ED. Pg .42
[156] Ibid 43
[157] Ibid

This holds true in Uganda under the Constitution of Uganda of 1995, that provides for the death penalty under **Article 22** and contradicts **Article 44** of the same Constitution, which absolutely prohibits cruel, inhuman and degrading treatment

It can be seen from the above, that in light of the mention of the death penalty in **Article 2** of the Convention, the European Courts of human right was not prepared to consider that the death penalty perse constitutes inhuman treatment.[158] As the scholar Francis Jacobs stated presciently, many years before the Soering judgement punishment could be contrary to **Article 3** of the Convention, 'only if it involved the ultimate penalty'.[159]

In ***Soering Vs UK & Germany***,[160] the Court declared that the decision whether these marked changes have the effect of bring the death penalty perse within the prohibition of ill treatment under **Article 3** must be determined on the principles governing the interpretation of the Convention, The Convention is to be read as a whole and **Article 3** should therefore be construe in harmony with the provisions of **Article 2**. On this basis **of Article 3** evidently cannot have been intended by the drafters of Convention to include a General prohibition of the death penalty, since that would nullify the clear working **Article 2.**

Subsequent practice in national penal policy, in the form of a generalised abolition of death sentence, could be taken as establishing the agreement of the contracting states to abrogate the exception provided for under Article 2(1) and hence remove a textual limit on the scope for evolution interpretation of Article, "in these conditions, notwithstanding the special characters of the Convention, Article 3, cannot interpreted as general prohibiting the death penalty".[161]

In the researcher's opinion, the holding of the Court in the instant case seem to hold true in Uganda. This is because the legislature could not have intended that the death penalty would be prohibited under Article 44 of the 1995 Constitution, because this

[158] ICCPR, Article 6 (2)
[159] Ibid, Art 6 (4)
[160] Article 6 (2)
[161] Second Optional Protocol to the ICCPR, Aiming at the Abolition of death penalty(UNGA res.44/128,Dec, 1989)

would nullify the clear working of Article 22 (1) of the same Constitution. Indeed the learned judges adopted this view in the Susan Kigula's case.[162]

Protocol no 6 to the European Convention for protection of Human Rights and Fundamental Freedoms, "European Convention on Human Rights" concerning the abolition of death penalty, adopted by the council of Europe in 1982, provides for the abolition of death penalty in peacetime.[163] States parties may retain the death penalty for rimes, "in times of war or of imminent threat of war".[164]

The organisation of America States (O. A. S) has over the years created human rights societies and invariably to death penalty. A number of Conventions and Declarations have been passed but are not limited to the 1948 American Declaration of the Rights and Duties of Man (ADRDM) and the American Convention on Human Rights (ACHR).

The ADHRDM provides that, "Every human being has the right to life, liberty and the security of his or her person."[165]

The ACHR explains that; "everyone has the right to have his or her life respected and it shall not be arbitrary taken away."[166] Further it provides that; those countries that have not abolished the death penalty should impose it only for the most serious crimes". It provides too, that the death penalty shall not be re-established in states that have abolished it[167], and in no case shall death sentence be inflicted for political offences or related common crimes.[168]

The ACHR also explains that no one shall be subjected to torture or cruel, inhuman or degrading treatment.[169]

---

[162] (No.470/1991)UNOC:A/48/40 Vol.11 pg. 138, 14 HRLT307
[163] Ibid
[164] Ibid
[165] Convention Against Torture &other Inhuman or degrading punishment (UNGA res;39/46 Dec 10th 1984)
[166] Ibid; at preamble
[167] Chaskalson, in the Makwanyane case No. CCT/3/94 at pg.43
[168] Supra note 8 at pg.193
[169] Resolution 1984/50 of may 1984

The Protocol to the American Convention on Human Rights to Abolish the Death Penalty, calls for total abolition of the death penalty in all member states.[170]
However, member states are given the option to reserve the right to apply the death penalty in wartime according to the International Law for extremely serious war crimes.[171]

In Africa, the African Charter on Human and People's Rights (ACHPR), states that no one may be arbitrary deprived of the right to life.[172] This implies that, the African Charter approves of the death penalty within the jurisdictions of states that have it as a form of punishment, provided that it is not imposed in an arbitrary fashion.

This is according to one scholar, Etienne Richard Mbaya, who states that Article 4 of the African Charter permits the death penalty, which is widespread in Africa, providing it be imposed in accordance with the law.[173]

From the foregoing, it is clear those international and regional human rights instruments affirm the right to life but recognise the death penalty. However it has to be noted that these instruments call upon states to abolish the death sentence, a clear contradiction is seen between the recognition of death penalty and the prohibition against inhuman, degrading treatment as discussed below, these arguments light the provisions in Uganda Constitution and the Penal code Act.

THE DEATH PENALTY IN DOMESTIC LEGISLATION

4.1.1 Constitutional law:

There are a number of countries that have taken very bold steps and abolished the death penalty in their Constitutions. Some of these are; ***Mozambique, Namibia, Rwanda, South Africa, Sao tome and Cape Verde.*** However, many countries like Uganda have retained it in their Constitutions.
Justice Chaskalson of South Africa summed up the reasons why his country decided to abolish the Death Penalty:

---

[170] Nov.4, 1950 European Convention
[171] Ibid, Article 2
[172] Id;Article 3
[173] Supra note 8 at pg.271

"The right to life and dignity are the most essential of all human rights, and the source of all other personal right'. "By committing ourselves to a society founded on the recognition of human rights, we are required to value these two rights above all others". And this must be so demonstrated by the state in every thing it does, including the way, it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to mothers in the expectation that they might possibly be deterred thereby."[174]

Article 22 (1) of the Constitution of Uganda provides that "No person shall be deprived of life intentionally except in an execution of a sentence passed in a fair trial by a Court with competent jurisdiction in respect of criminal offence under the law of Uganda and the conviction and sentence have been confirmed by the highest appellant Court"[175] It is the researcher's opinion that the Constitutionof Uganda values human life as seen in Article 22(1) of the Constitution. On the other hand, the death penalty is recognised under the same Constitution.

This is in line with the Indian Constitution where, **Article 21** of Indian Constitution provides that; "No person shall be deprived of the right to life or personal except in accordance to the procedures established by law".

In the case of ***Bachan Singh Vs State of Punjab***[176], the Supreme Court help that section 302 of the Indian Penal Code, which authorises the imposition of the death penalty. It was therefore clear that death penalty was specifically contemplated and suctioned by the framers of the Indian Constitution when they adopted it in November 1949

This so holds true in Uganda, that the legislature contemplated the death sentence in Article 22 (1) of the Uganda's Constitution. However, the Article 24, of the Constitution of Uganda provides that: "No person shall be subjected to any form of torture, cruel, inhuman and degrading or treatment or punishment".[177]

This provision is fortified by Article 44 of Constitution, which provides that: "Notwithstanding anything in this Constitution, there shall be no degradation from the

[174] Id; pg.272
[175] [1991]85AJIL128
[176] Id;
[177] Suzan Kigulla and 416 others Vs Attorney General Constitutionals petition2003

enjoyment of the following rights and freedoms; freedom from torture, cruel, inhuman or degrading treatment or punishment".[178] The death penalty is constituted of cruel, inhuman or degrading treatment or punishment. This fact is clearly stated by Wright J in the case of the ***people Vs Anderson***: " Death penalty is to be impressible and cruel because it degrades and dehumanises all who participate in its processes. It is unnecessary to any legitimate goal of the state and incompatible with the dignity of human kind and judicial process."[179]

4.1.2 Criminal law;

In Uganda, the criminal justice system is governed by a number of Act and statutes including the Penal Code Act.[180] The trial on indictment Act[181] and the Criminal Procedure Code Act.[182] In the Penal Code Act, a number of offences are created that carry the death penalty as the maximum sentence..

These include; kidnap with intent to murder,[183] murder, armed robbery,[184] defilement,[185] rape.[186]

In Uganda today, a person can be sentenced to death if he or she commits a crime that falls within the confines of the Penal Code Act and is found guilty by a competent Court.[187] However, the accused person has the right of appeal to the supreme Court of Uganda.

The offences of defilement and rape stated under chapter fourteen of the Penal Code Act (offences against morality) has only recently attracted the death sentence. And it is crystal clear that, the factors which influence the National Resistance Council (NRC)[188] to lobby for these amendments was to curb the spread of HIV/Aids which has plagued Uganda for over decade.

---

[178] Article 1
[179] Article 2
[180] ADRDM, Article 4
[181] ACHR;Article 4(1)
[182] Id; Article 4(2)
[183] Id; Article 4 (3)
[184] Id; Article 4(4)
[185] Id; Article 4
[186] Id; Article 4 (5)
[187] Id; Article 5(2)
[188] Article 1

4.1.3 Martial law

Uganda has two separate systems of criminal justice. That is to say that all Ugandan citizens are citizens subjected to the Penal Code Act, while soldiers are in addition subjected to a separate military criminal regime under the Nation Resistance statute Disciplinary code of conduct.

The National Resistance Movement (NRM), 1986 took up bold steps to incorporate in to Uganda law two codes of conduct for soldiers, which prescribed the death penalty for a wide range of offences. The National Resistance Army(NRA) code of conduct(operational situation), which is applicable in non-operational situation, and it prescribes mandatory death sentence for treason, murder, rape and disobedience of lawful orders, carrying a maximum punishment of death. These two codes of conduct were streamlined and submitted within the Uganda People's Defence Force Act.(UPDFA).Therefore, the army is governed by the UPDF Act ,2005,hence not using the National Resistance Army Code of conduct, it was only incorporated to form the Uganda Peoples Defence Force Act {UPDF}.

In the army, military disciplinary measures are taken via a system of Court ranging from unit Court Martial, Martial division Court, General Court, to Court Martial appeal Court.

Soldiers on operations are tried by a field Court Martial and executed if found guilty. It is so observed that, this system leaves a lot of room for injustice as the field Courts are often dhow and the accused rarely represented by legal counsel of whatever nature. There is also no appeal produced. However, soldiers have the right to legal representation by a lawyer from the army.

It is essential to note that; since 1987 at least 40 soldiers have been executed by firing squads.

In mid December 1990 two NRA officers were executed *in Lira for cowardice and Mishandling of an operation in Kitgum district,* which result in the death of several soldiers.

The Uganda People' s Defence Forces Act provides for a Court Martial referred to it from decision of General Court Martial.

This procedure is subject to criticism in that it is the army lawyers who act as defence counsel for the accused, army officers who sit in these Courts, and the army becomes the army that prefers charges against the accused soldiers. So, the institution of the case against the army becomes the accuser, the prosecutor, and the judge. And like the Uganda saying that goes, "A monkey cannot judge the forest". This saying implies that defence in favour of the Court Martial officers.

Therefore, it is true that the situation in the court Martial contradicts the principles of natural justice and can occasion to the miscarriage of justice.

Also, it is observed that, **Article 22(1)** of the Constitution requires that death penalty is passed by the Courts Martial are subject to the Court of Appeal and final appeal is to the Supreme Court. The challenge only arises where it is a field Court Martial when it may be impossible to access civilian Courts for purposes of appeals.

4.1.4 Sharia law

Under this law, the death penalty is prescribed for a range of offices including rape, murder and in some cases theft. The gravity of this law is mostly felt in Muslim states such as Sudan and Egypt. However, in Uganda, Sharia law does not operate as an independent legal system.

4.1.5 The Death Penalty and the Right to life

The right to life is the supreme right of the human being,[189] and the bedrock of the concept of human rights that is universally recognised as an inalienable and inherent right to life.

This right is provided for and protected differently in the domestic legislations. For instance in some jurisdictions such as South Africa, the right to life is unqualified.

[189] Id; Article 2

This is clear in Article 9 of the South Africa Constitution that provides that: "Everyone has the right to life".

Chaskalson P. emphasised that the right to life was the most fundamental of all rights and was unqualified in the South Africa Constitution. He stated: "The unqualified right to life vested in every person by Article 9 of our Constitution is another factor crucially relevant to the question whether the death penalty is cruel, inhuman or degrading punishment within the meaning of Article 11 of our Constitution.[190] The carrying out of the death penalty destroys life, which is without reservation under Article 9 of our Constitution.[191]

However, in the English case of ***R Vs Home Secretary***,[192] Lord Bridge asserted that: "capital punishment imposed a limitation on the essential content of the fundamental right to life and human dignity, eliminating them irretrievable". As such, it was Unconstitutional.

This statement was confirmed by Justice Chaskalson where he stated that; the right to life and dignity "are the essential content of all the rights...take them a way, and all other rights cease".[193]

In Uganda,[194] the right to life is qualified to the extent that it may be taken away in execution of sentence passed in a fair trial by Court of competent jurisdiction.
The jurisprudence in the ***Makwanyane*** case and the ***R Vs Home secretary***, ***Expert budday*** case discussed above provides basis to challenge the Constitutionality of the death penalty in Uganda.

The opinion that the death penalty is a violation of the "right to life" finds its way into the provisions of Article 20 of the 1995 Constitution which recognises that the fundamental rights and freedom of the individuals are inherent and not granted by the state. The Article provides that; "The rights and freedoms of the individual and groups

[190] Article, 4
[191] Supra note 8 at pg 355
[192] Chaskalson in the Makwanyane case at pg.101
[193] 1995 Constitution
[194] Cap 120;Law of Uganda,2000

enshrined in this chapter shall be respected, upheld, and promoted by all organs and agencies of government and by all persons".

Article 20 underlines the fact that the right to life is not a privilege granted to an individual by the state but an inalienable and integral part of person by virtue of being human. It imposes a duty upon all organs of the state to respect, uphold and promote this inalienable right.

It can further be emphasised that, in the case of ***Joseph Kindler Vs Canada*** **decision,**[195] the Court was of the view that an individual's right to it is important and inherent, such a right cannot be compatible with the death penalty. It is true that the value of life is immeasurable for any human being and that the right to life cannot be qualified in anyway

Therefore, as was held in ***S Vs Mtilongo***; the death penalty is the ultimate and the most incomparably extreme form of punishment and it is the last, the devastating and most irreversible recourse of the criminal law, involve as it necessary does the planned and calculated termination of life itself, the destruction to the greatest and most precious gift which is bestowed on all human kind.[196]

In the Makwanyane case, the South African Constitutional Court found that; "the right to life is one antecedent to all the other rights in rights in the Constitution. With life in the sense of existence, it would not be possible to exercise rights or to be bearer of them. But the right to life was included in the Constitution not simply to enshrine, the right to existence. It is not life as an organic matter that the Constitution cherishes, but the right to human life, the right to live as a human being, life that is at the centre of the experience of human life that is at the centre of our Constitutional values. The community is recognised and treasured the right to life is central to such a society".[197]

It can be seen from the above that, all human beings are entitled to the protection of the law and those entitled to claim this protection even include social outcasts or

[195] Cap 23, Laws of Uganda 2000
[196]Cap 116, Laws of Uganda 2000
[197] Id; s.243(1)

criminals. Thus, if at all the law seeks to protect the lives of people, then it would be superfluous for the law to uphold right to life on the one hand, then it would be regard to the special nature of this right, and then seek to take it a way on the other.

There is now evidence from the considered cases cited above that, **Article 22 (1)** of the Constitution of Uganda is inconsistent with the fundamental rights to life and human dignity and can be with due respect challenged on those grounds. And this automatically calls for abolishing the death penalty in Uganda.

Sentencing in capital offences proceeds on the basis of a presumption in favour of the accuser's right to life and therefore, the death penalty should be imposed in very rare case.

A case in point **Harry Wilson Vs The Queen**[198]after a review of several sentencing cases from the Caribbean countries, Rawling J.A pointed out that, "the foregoing cases established that the first principle by which a sentencing Judge is to be guide in these cases is that there is a presumption in favour of an unqualified right to life. The second consideration is that the death penalty should be imposed only in most exceptional and extreme cases of murder.

In India, life imprisonment is considered to be the appropriate penalty for murder and death only in some case where the accused is a habitual criminal of which the alternative of life imprisonment is inadequate due to the gravity combined with the fact that there is no possibility that convict will reform.

4.1.6 The Prohibition against torture, cruel, degrading and inhuman form of punishment.

In the case of the ***People Vs Anderson***, Justice Wright held capital punishment to be impressible and cruel because it degrades dehumanises all who participate in its process. It is unnecessary to any legitimate goal of the state and is incompatible with the dignity of human kind and judicial process .[199]

[198] Civil Application 30 of 2004 Court of Appeal. On the principles of sentence,, I have greatly relies on Fitzgerald and starmer;
[199] Id; s.189

The United Nations committee on Human Rights has held that the death sentence by definition is cruel and degrading punishment just as the Supreme Court and the Constitutional Courts of Canada and Hungary have held respectively.[200]

In Uganda, **Article 24** of the Constitution provides that; "No person shall be subjected to any form of torture, cruel, inhuman or degrading treatment". This is as unequivocal as it is unqualified. It is fortified by **Article 44** of the Constitution, which provides that; "Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms; freedom from torture, and to cruel, inhuman or degrading treatment and a right to fair hearing".

The issue above rises a legal question whether in the context of the law applicable in Uganda, the death penalty amounts to torture and to cruel, inhuman and degrading punishment. Regarding the decision of the Courts in Canada, Hungary, South Africa and California explains the above, this question can only be answered in affirmative. So, it is provided that **Article 22** of the Uganda Constitution is inconsistent with **Article 24** thereof. It is observed by basing on the considered authorities that, the death penalty under **Article 22** not only offends the inherent rights to life, but also amounts to torture and a cruel, degrading punishment. It is therefore Unconstitutional and should be pronounced as such by Uganda Courts.

So, by declaring the death penalty as a cruel and an Unconstitutional form of punishment the Ugandan Courts would be following in the footsteps of other Courts that have addressed this point.

This issue further still is addressed by other different authorities. For example, a provision of the Zimbabwean Constitution that banned. Inhuman or degrading punishment was considered by that country's Supreme Court to be; one that embodies broad an idealistic notions of dignity, humanity, and decency. It guarantees that punishment, of the exercised within evolving standards of the nurturing society, or which involves the infliction of unnecessary suffering is repulsive. What might not

[200] Id;s.286

have been regarded as inhuman decades ago may be resolving to the new sensitivities, which emerges as civilisation advance?[201]

In the American context, in the case of ***Furman Vs the state of Georgia***,[202] the death penalty was considered as; "Unique in its absolute revocation of all that is embodied in our concept of humanity. In that case, Justice Bremen reiterated that; death is truly an awesome punishment. The calculated killing of a human being by the state involves by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident, a prisoner remains member of the human family in comparison to all other punishments, the deliberate extinguishment of all human life by the state is unique degrading to human dignity.[203]

In the same case Justice Bremen emphasised the distinctive features of the death penalty that highlighted the elements of torture and cruelty it entails when he said; "Death is today an unusually severe punishment, unusual in its pain, in its finality and its enormity. No other existing punishment is comparable to death in terms of physical pain".
We know that mental pain is an inseparable part of our practice of exacts a frightful toll-during the inevitable long wait between the imposition of sentence and the actual infliction of the death. The usual severity of it is manifested most clearly in it finality and enormity. Death is in these respects in a class by itself.[204]

It is seen in the case of ***California case of the people Vs Anderson,*** where it was held that; he cruelty of death penalty lies not only in the execution itself and pain incidental thereto, but also in the dehumanising effects of the lengthy imprisonment before the execution during which are carried out. Penologists and medical experts agree that, the process of carrying out a verdict of death is often so degrading and brutalising to human spirit as to constitute psychological torture[205]

---

[201] Id; s.129 (1)
[202] Id; s.124
[203] Article 22 (1) of the 1995 Constitution of the Republic of Uganda
[204] Id; Article 44 of the 1995 Constitution
[205] Amnesty International; The death penalty; a barrier to improving Human Right 1993 pg.7

Similarly, in ***Earl Pratt Vs Jamaica***,[206] the important question was whether the execution of a man following long delay after his sentence to death can amount to inhuman punishment. The privy council held that such delay is capable of having that effect. This is because; "There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to these instinctive evulsions? The answer can only be our humanity; We regard it as an inhuman act to keep a man facing the agony of execution over a long period of time, which renders his sequent execution unlawful.

This view was however, emphasised by Justice Liacos in the case of ***District Attorney for the Suffolk District Vs Watson*** and other when he said; "The ordeal of the condemned are inherent and inevitable in any system that informs the condemned person of his or her sentence and execution. Whatever one believes about the cruelty of the death penalty itself, and the violence done to the prisoner's mind must afflict the conscience of enlightened government and give the civilised no rest, the condemned must confront this primal terror directly, and in the most demeaning circumstances. A condemned man knows, subject to the possibility of successful appeal or commutation, the time and manner of his death. His thoughts about death must necessary be focused more precisely than other people's. He must wait for specific death, not merely expect death in abstract. Apart from cases of suicide or terminal illness, this certainty is unique to those who are sentenced to death".

The state puts the question of death to the condemned person, and he must grapple with it without consolation that he will die naturally or with his humanity intact. A condemned person experiences an extreme debasement, the death sentence itself is a declaration that society deems the prisoner a nullity, less than human, and unworthy to live. But that negative understanding of his personality carries through the entire period between sentence and execution.[207]

A similar view was expressed by Supreme Court of Zimbabwe that "from the moment he enters the condemned cell, the prisoner is treated in a dehumanising surrounding of near hopelessness. He is in place where the sole subject is "the living dead". He is

[206] The NRA Code of Conduct (Non Operation Situations)
[207] UPDF/A Cap307

kept only with other death sentence, prisoners with those appear to have been dismissed and who await death or reprieve; or those whose appearances are pending judgement. While the right to appeal may raise the prospect of being allowed to live, the intensity of the trauma is much increased by the knowledge of its dismissal. The hope of a reprieve is all that is left.

Through out all this time, the condemned prisoner constantly broads over his fate. The horrifying spectre of being hanged by the neck and the apprehension of being made to suffer a painful death is never far from mind".[208]

The controversial issue on the death penalty was successfully handed recently in the leading case of ***the state Vs Makwanyane and Mchunu***, where twelve of the most senior judges of South Africa concurred entirely with the finding of the President of the Constitutional Court of South Africa that; "death is cruel penalty and the legal processes which necessarily involve waiting in uncertainty for sentence to be a side or carried out add to the cruelty. It is also inhuman punishment, for it involves by its very nature to a denial of the executed person's humanity, and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state.[209]

The United State Supreme Court has accepted that human dignity is at the cornerstone of prohibition of cruel and unusual punishment by the eighth and fourteenth amendments.

One American dissenting judge referred to the death penalty as a fatal Constitutional infirmity; and stated as follows.

The fatal Constitutional infirmity in the punishment of death is and treats members of the human race as objects to be toyed with and discarded. It is so inconsistent with the fundamental promise of the clause that even the vilest criminal remains a human being possessed of common dignity.

In Germany, the federal Constitutional Court also stressed this aspect of punishment. "Respect for human dignity especially requires the prohibition of cruel, inhuman and degrading punishments. The state cannot turn the offender into object of crime

[208] Id; s. 78
[209] Id; s. 80

prevention to the detriment of his Constitutionally protected right to social worth and respect".[210]

That the death penalty constitutes a serious impairment of human dignity has also been recognised by judgement of the Canadian Supreme Court. In ***Kindler Vs Canada,***[211] three of the judges who heard the case expressed the view that "the death penalty was cruel and unusual; it is the supreme indignity the individual, the ultimate corporal punishment, the final and complete lobotomy and the absolute and irrevocable castration. It is the ultimate desecration of human dignity".

The three others added; "There is strong ground for believing regard to the limited extent to which the death penalty advances any valid apagogical objectives and the serious invasion of human dignity it engenders that the death penalty cannot, except in exceptional circumstances be justified in this country.

The Human Right Committee of the United Nations in ***Ng Vs Canada,***[212] expressed the opinion that: "the committee is awaiting that by definition, every execution of sentence of death may be considered to constitute cruel and inhuman treatment within it's meaning of Article of the covenant.

It can now be asserted from the foregoing authorities, the fact that death penalty is an Unconstitutional form of punishment as it amounts torture and is cruel, degrading and inhuman contrary the provision of Article 24 of Uganda's Constitution and binding international treaties.

The above analysis has also illustrated that **Article 22(1)** allowing for death penalty infringes upon the right to life. And of **Article 24 and 44** of the Constitution indicates that any form of cruel, inhuman, and degrading punishment and treatment is prohibited by the Constitution.[213] The opening line of **Article 44** directly implies its supremacy over anything else written in the Constitution. It clearly manifests that the right of an individual not to be subjected to any form of torture, cruel, degrading or

[210] Id; s.81
[211] Id; s. 84
[212] Id; s. 78
[213] Amnesty International; Report at pg. 59

inhuman punishment is paramount and cannot under estimate any circumstances be comprised, any other provision to the contrary notwithstanding.

This implies that although the death penalty is arguably provided for under **Article 22(1)** of the Constitution, it cannot in law be imposed by any Court of law since such imposition would amount to derogation from the freedom not to be subjected to torture, cruel, inhuman and degrading punishment.

It is clear from the arguments stated in the above discussion that, the death penalty by a law or the imposition in that sentence by Court according to the law cannot be successfully challenged as Unconstitutional, on the basis of **Article 22**. However, it may be possible to challenge the death penalty using other provisions of the Constitution. One challenge here is the above discussed circumstances, on the provisions prohibiting torture, cruel, inhuman or degrading treatment or punishment as in **Article 24** of the Constitution, it was provided for in the case of ***Susan Kigula Vs Attorney General.***

So, it is evident from the authorities cited in the foregone discussion, that the death penalty in Uganda should be declared as an Unconstitutional form of punishment. In addition, these arguments are in line with the petition filed by Ssempebwa and co. advocates working together with Foundation for Human Right Initiative who petitioned Court on behalf of the 417 condemned prisoners seeking to abolish the death sentence arguing that, the punishment was cruel, inhuman and degrading.

Although this was the holding of the Constitutional Court, the argument that death penalty is cruel and inhuman is valid and should inform legislators in deciding whether to abolish the death penalty.

CHAPTER FIVE

This research has outlined and discussed the theme of the arguments for retention of death penalty on the one hand, and for its abolition on the other hand. It has analysed the legal basis for the death penalty in Uganda in light of the right to life and the freedom from cruel, inhuman and degrading punishment

5.0 RECOMMENDATIONS AND CONCLUSION.

5.1. RECOMMENDATIONS

In light of the discussions against the death penalty that have been discussed in this dissertation, its abolition in Uganda is recommended.

The researcher submits that although, the government of Uganda still considers the death penalty as popular mechanism of punishment to offenders, and would be reluctant to abolish it, some recommendations are made below which may stimulate public debates on the abolition of the death penalty. These would gradually build public support for the abolition of the death penalty.

5.2 The challenges

It should be noted that a lot of industry must go into the sentencing process. Off the cuff please for leniency will not do. Comparisons are not consoling. The study of jurisprudence reveals that relevant evidence include:

- Social inquiry reports
- Probation reports
- Psychiatric reports
- Testimony from village mates, or workmates
- Testimony from religious leaders

5.2.1 Bearing in mind that in Uganda, it is mostly the peasantry and poor working class that is involved in capital offences, a challenge of resources to support the mitigating process arises. since there is a right to legal representation in capital offences, the state is expected to support the process.[214]

[214] Sentencing in capital offences:Ssempebwa E.F, Case on sentencing in capital (16th June 2010)

5.2.2 There is then the public perception about a person pronounce guilty of murder, robbery, aggravated rape. Such person does no longer deserve to live. With such perception, it will be hard to find workmates or village mates willing to put in a good word for the convicts.

5.3 Education

This recommendation should be geared towards changing the public opinion about the death penalty. This is so because, when the opinion is changed, the government will have no excuse that the majority of the population favours it. So open debates and wide spread education about crime and death penalty would encourage people to develop an informed opinion.

It is recommended that the government first undertake to educate the public to appreciate that the carrying out of Constitutional and legal execution of wrong doers is barbaric and wrong. In absence of such education and sensitisation, the knowledge that those who murder, rape, ravage and carry aggravated robbery, will no longer be liable to death sentence, will constitute a license for the population to take the law into its own hands and execute suspects including innocent ones before they are fairly tried by the Courts of law.

It is only through education that public confidence in the administration of criminal justice can be promoted and the death penalty can be abolished.

5.3.1 Moratorium and partial abolition

While in transition, Uganda should retain the death penalty on its books as a scarecrow, but should not enforce it (abolitionist defacto). The government should abstain from signing death warrants. This has been practicable in some countries like Botswana which carried out its last execution eight years ago in 1995, and Zimbabwe resume executions in 1995 after seven years, Morocco did not carry execution for the 11 years before 1993.

South Africa imposed a moratorium on execution from 1990 before the death penalty was abolished for ordinary crimes in 1995. Moreover, in Malawi, moratorium was placed on execution in 1993.

It is recommended that the government of Uganda should also undertake to follow the trend of those countries, because if it refrains from killing, it will affirm the fundamental obligation to protect human life.

5.3.2 Reduction of capital offences

Reduction of the scope of crimes punished by death is extremely necessary so that, the death sentence is restricted only to the most serious crimes. As discussed, Uganda military laws provides for over 20 offences that attract the death penalty. In addition, Uganda's Penal code carries many offences whose maximum penalty is death including aggravated defilement, treason, murder and aggravated robbery.

Recent decision relating to these offence such as rape and defilement has revealed that judges are usually ready to give a maximum penalty of about 18 years imprisonment. This is shown by evidence of many offences in Uganda's law books that unnecessarily carry death sentence. There is a need therefore to review the number and gravity of the offences to which the death penalty should be applied.

It is the researcher's view that, the death penalty in respect of political and subjective offences such as treason should be scraped from the law books. Also the reduction of the scope should cover the following among others, military deserters during war.

Thus, it is recommended that Uganda should follow those countries that have abolished the death sentence for an ordinary crime. For example, India retains the death penalty only for offences of an exceptionally deprived and heinous character and a source of great danger to the society at large such as criminal conspiracy and wait or attempting to wage war against state. Japan retains it only for executing those who commit extremely heinous offence for example murder. In Africa, Egypt reserves the death penalty for cases with certain aggravating circumstances, such as where murder is premeditated or planned, say as in poisoning. This indicates a good

ground for Uganda to reduce the scope of the many offences that carry death sentence.

5.3.3 Mandatory death penalty:

In Susan Kigula's case the Court concluded that mandatory death sentences were; "an intrusion by the legislature into the realm of judiciary" and that; "parliament has no power to enact a law which is arbitrary, unfair, unjust, fanciful or oppressive yet the mandatory provisions do just that". It also concluded that; "there is no justifiable reason for denying a convict whose sentence is fixed by law to appeal against sentence only. This is repugnant to the principle of equality before the law and fair trial.

However in the view of Susan Kigula's case is important to this dissertation in that it outlaw the mandatory death penalty. Susan Kigula follows the foot path of many jurisdictions which have recognised that crimes such as murder carry differential degrees of criminal culpability. Ritual murder of children or murders resulting from terrorist activities can not be placed on the same plane as mercy killings of an ailing beloved one. As observed by the Privy Council in **Reyes Vs the Queen**, "there is probably no offence in criminal calendar that varies so widely both in character and degree of moral guilt as that which falls within the legal definition of murder.[215]

Statutes such as the Penal Code which imposed mandatory death penalty have been now held to be Unconstitutional due to the following three reasons.

In the first place they contravene Article 24 and 44 (a) of the Constitution which prohibit cruel, inhuman, and degrading punishment. This is so because a mandatory death penalty does not deal with the problem of varying culpability. It has ergo been recognised in many jurisdiction (now including Uganda) that imposing the same mandatory death penalty for every capital offence without giving the offender an opportunity to be heard on whether the sentence is disproportionate to his or her criminal culpability amount to imposing a cruel, inhuman, and degrading punishment. As per Lord Bingham in **Reyes Vs the Queen**.[216] " to deny the offender the

[215] Privy Council per Lord Bingham quoting from the house of LORDS committee's Report on murder and life imprisonment-Paper 78-1

[216] Op Cit per Lord Bingham

opportunity, before sentence is passed to seek to persuade the Court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and this to deny his humanity".

Secondly, mandatory sentence provisions contravene Article 22(1), 28, and 44 which guaranty a non-derogable right to a fair trial and require that sentences of death be confirmed by the highest Court before they can be implemented. In particular according to Article 22 (1) "No person shall be deprived of life except under sentence.

a) Passed after a fair trial; and
b) **"the conviction and sentence have been confirmed by Highest appellate Court".**

When the penalty of death was mandatory, it was illusory to talk about its confirmation by appellate Court. The Courts hands were tied. In **Mithu Vs State of Punjab**[217] one of the most celebrated cases in this area Chandrchud C.J. observed " a provision of law which deprives the Court of the use its wise and beneficent discretion in a matter of a matter of life and death, without regard to the circumstances in which the offence was committed and therefore, without regard to the gravity of offence, cannot but be regarded as harsh, unjust and unfair".

Thirdly, mandatory death provisions derogated from the principle of separation of powers. Sentencing is part of a trial and fair hearing and a Judicial function. Legislative provisions that remove the function from the hands of Judiciary are Unconstitutional because, as stated by the same Judge in Mithu; "the legislature cannot make relevant circumstance irrelevant, deprive Courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in proper cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death."

Further more, mandatory death penalty have of recent been struck down in Malawi in **ENFRANCIS KAFANTAYENI AND OTHERS Vs ATTORNEY GENERAL**[218] which was decided in 2007. They are under challenge in Kenya and Tanzania, Uganda is now in the company of many other jurisdictions that have struck out

[217] (1983)2 S.C.R583
[218] Constitutional case 12 of 2005. see also Mabvuto Alumeta. The Republic Supreme Court of Malawi civil Application 31 0f 2008

mandatory death penalty. This is the reason why the Supreme Court of Uganda in Kigula orders that:-

"for that respondent whose sentence arose from the mandatory penalty provisions and are still pending before an appellate Court, their cases shall be remitted to the High Court for them to be heard only on mitigation of penalty and High Court may pass sentence as it may deem fit under the law.

It should be noted that, all mitigating and aggravating factors should be considered and the due regard to the personal circumstances of the accused as he or she committed the crime made to determine an appropriate penalty.

This research has indicated that convicts of capital offences that do not carry a mandatory penalty have rarely been sentenced to death in the recent past years. This could therefore be first step towards the abolition of the death penalty. Such proposed reform in the law serves a double purpose; it satisfies the receptionists who feel that the death penalty is available, and the abolitionists who consider permitting judicial discretion as good as actual abolition of the death penalty.

Thus, the decision could clear way towards abolition of the death penalty. I argue that the government of Uganda should follow that trend. Since this discretion would be exercised by judges can be argued that would not be utilised arbitrarily.

5.3.4 Constitution litigation

In Susan Kigulla's case, by a 3 to 2 majority, the Court held the mandatory death penalty violated **Article 21, 22(1), 24,44(a) and 44(b)** of the Uganda's Constitution. This was a landmark decision and illustrates how Constitutional petitions can be utilised to change provisions that violate Constitutional provisions.

Article 50 of Uganda's Constitution provides that;

1) Any person or organisation who claims that the fundamental rights or freedom guaranteed under this Constitution has been infringed or threatened is entitled to apply to a Court for redress.
2) Any person or organisation may take an action against the violation of any person's right.

3) Any person aggrieved by any decision of the Court may apply to the appropriate Court in the event of violation or threat of violation of human rights.
4) Any person sentenced to death or any other person on his or her behalf can appeal to have the sentence quashed as being Unconstitutional.

And **Article 137 (3)** provides that; "Any person who alleges that;(a) An Act of parliament or any other law or any thing in or done under the or authority or any law is inconsistent with or in contravention of any provision of this Constitution may petition the Constitutional Court for a declaration to effect and for redress where appropriate". For instance, the Constitutional petition No. 6 of 2003 which was filed by Susan Kigula and 416 other convicts, awaiting execution, proceeded against the Attorney General of Uganda in the Constitutional Court. This case was filed before the case of ***Bwenge Patrick Vs Uganda***[219] could exhaust the right to appeal.

This is further constitutionally safe guard by **Article 132 (3)** of the Constitution, which provides that; any party aggrieved by a decision made by Court of appeal sitting as a Constitutional Court, is entitled to appeal to the Supreme Court against the discretion.

The firm of Katende Ssempebwa and co. advocates together with Foundation for Human Rights Initiative (FHRI) petitioned the Constitutional Court to declare the death sentence as contravening **Article 24 and 44** of Uganda's Constitution. This petition led to a declaration that mandatory death sentences are Unconstitutional. The Constitutional Court did not however find the death sentence to be a contravention of Article 24 and 44 of the Constitution. Be that as it may, the Court remains a viable forum.

5.3.5 A need for practical right of appeal.

Article 22 (1) of 1995 Constitution of the Republic of Uganda provides that; Nobody shall be deprived of the right to life except with execution of a sentence

[219] Criminal Appeal No. 28 of 2003.

passed by a Court of competent jurisdiction and unless that sentence is confirmed by the highest appellate Court of Uganda. This implies that there is a right of appeal against any sentence. There is a doubt that an appellate Court can set aside the sentence that has been passed, where it is mandatory provision of the law to reverse the discretion of the lower Court.

It is vital to explain that, an accused that is sentenced to death can be considered for the Presidential clemency as explained in **Article 121(4)** of the 1995 Constitution of the Republic of Uganda.

In Uganda, there is a practice of handling state briefs to advocate representing death penalty appellants for a minimal fee. It is feared that because the fees are not attractive such work is hardly taken seriously. It is clear that; there are limits to the available financial and human resources, limits when are likely to exist in the foreseeable future, and which will continue to place the poor accused at a significant disadvantage in defending themselves in capital cases. This set up reduces the process to no more than, "a sophisticated judicial lottery" where the odds on a poor accused surviving the hang man are significantly reduced.

5.3.6 Addressing the socio-economic factors.

The theme of this argument for the retention of the death sentence is that, it deters crime rate. However, the discussion of this dissertation is not necessary the case, but socio-economic factors play big role in promoting crime. There is therefore an urgent need to address the important socio-economic factors such as poverty, inequality, access to justice, and unemployment; strengthening social standards on and attitudes towards crime prevention, detection and arrest of offenders; programmes to address the needs of victims, including compensation for damages sustained; and whenever possible, programmes for the rehabilitation of offenders which will enable them to lead productive social lives. Addressing the above, will help in the reduction of crime rates most of which are punishable by death sentence.

5.3.7 Alternative of life imprisonment.

Life imprisonment seems to be an adequate and human alternative to death sentence. Life imprisonment should mean imprisonment for life of the offenders, not subject to release. There is no rational reason to limit life imprisonment to twenty years.

On the other hand, the mandatory death sentence should be substituted with life imprisonment. This will automatically be one way of totally abolishing the barbaric form of punishment in Uganda. And this will allow a convicted person to die naturally. Life imprisonment will so help an offender to reform and also allow him be forgiven and forgive. In the case of **Harry Wilson Vs the Queen**[220] it was of the view that several sentencing cases from Caribbean countries have initiated an alternative death penalty. In India, life imprisonment is considered to the appropriate sentence for murder and death only in the "rarest of rare case" where the alternative of life imprisonment is inadequate.

5.4. CONCLUSION.

According to Albert Camus, "There will be no lasting peace either in the hearts of individuals or in social customs until death is outlawed".

This research has outlined and discussed the theme of the arguments as supporting the retention of death sentence and arguments for its abolition. It has analysed the legal grounds for death sentence in Uganda with respect to the right to life. In general, this research holds that; the death sentence offends the concept and the law on human rights and that it is inconsistent with the contemporary way of international criminal law. It is further manifested that death sentence is cruel, inhuman and degrading punishment that, is unaccepted under any circumstances whatsoever under both international and domestic legislation in Uganda. The death sentence should therefore be abolished.

In the intervening period before the abolition of death penalty, it is recommended that, the legislature should put into effect the holding in Susan Kigula's case declare mandatory sentence Unconstitutional.. In tandem with this, no more capital offences should be created. If public opinion continues to favour the death sentence, it should limit to very grave and atrocious offences like treason, murder, war crimes, and crimes against humanity and genocide. However, this dissertation maintains that life imprisonment suffices, as an alternative, to the death penalty. The extension of capital

[220] Civil Application 30 of 2004 Court of Appeal. On the principles of sentence.Fitzgerald and starmer: A guide to sentencing in capital offences .

punishment for rape and defilement may have good motives but it seems unlikely to have any effect on incident of these crimes, which seems to be on the increase.

Hopefully, many arguments discussed above will find a receptive audience and help to change the public's understanding of the death sentence in Uganda and this will pave way for it to be abolished totally.

Karpal Singh (1999); legal and Constitutional Issues Presented at the 12th common Wealth Law Conference at Kuala Humpur.

Tibamanya Mwene Mushanga (1977); The death Penalty and A paper read at the Conference on the Death Penalty in Africa at Ibadan, Nigeria, 3-8 october 2000

Hon. Lady Justice Anna Magezi (1996) Uganda Vs Bwenge Patrick in the High Court of Uganda Holden at Kampala.

Ssempebwa E.F, (2010) Sentencing in capital offences

NEWS PAPERS

The New Vision 31st February 2003,Death penalty in Uganda.

The Monitor

New York Times.