

THE ANALYSIS OF DEATH PENALTY IN UGANDA.

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DECLARATION

I Mazima Timothy 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 collage or published as a whole or part.

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

Signed



MAZIMA TIMOTHY

Date 31/01/2019

APPROVAL

This proposal is submitted with the approval of my supervisor.

Signed



Mrs. RUTABINGWA DIANAH

Date 31.01.2019.

DEDICATION

“I am sincerely indebted to all those who in one way or another contribute to the success of this dissertation. First and foremost my gratitude goes to my supervisor Mrs. Rutabingwa Dianah for her guidance and supervision provided valuable enrichment to this work.

I pay special tribute to my brothers, His worship Rukundo Isaac and Mr. Birungi Samuel, my sisters Kiconco Grace, Kobusogyne Annet and Kesande Esther, for all the financial support they gave to me, my friends, Ahirirwe Javan and Muhumuza Immam for the encouragement and guidance though out Bachelors in Law at KIU.

Finally, I will thank and uphold the Almighty Lord whose divine plan purpose that I would walk this path.

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ABSTRACT

The researcher's major emphasis is on death penalty in Uganda. Thus this research gives an over view of the death penalty and its international and domestic instruments, literature review, arguments for and against abolition of the death penalty.

CHAPTER ONE

THE ANALYSIS OF DEATH PENALTY IN UGANDA

1.1 INTRODUCTION

Death penalty is described by Black Law Dictionary 6th edition as capital punishment for murder, aggravated robbery, rape, defilement, among others.

In legal terms it is the legal termination of one's life by court. It involves an intentional infliction of death on the offender by the state as punishment. This can be carried out through hanging, shooting or lethal injection among others.

Art.22 of the 1995 constitution as amended provides for the protection of right to life except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the Laws of Uganda and the conviction and sentence have been confirmed by the highest appellant courts.

Article 121 of the constitution provides for the prerogative to the president which means that he is the final authority to pardon or confirm the death penalty.

Uganda last hanged a death row inmate in 1999 and while execution under military Law was last carried out in 2002. According to the prison services spokes man Frank Baine, over 250 converts are on the death row in Uganda.

The death penalty has been there for as long as man existed. In the period before Christ (BC), God himself would give the death penalty to those who seriously offended him.

During Noah's time God passed death penalty to all mankind in Sodom and Gomorah except Noah and his family.

The death penalty in Uganda was inherited from the British and upheld by the constituent assembly while discussing the 1995 constitution. it is not

surprising that today this form of punishment is applied in Uganda penal system as a mandatory punishment.

In 2005, the constitutional court declared the death sentence unconstitutional in the Land Mark Judgment delivered in the 2005 of Susan Kigula case. However, in 2009, the supreme court left the issuance of the death sentence to the discretion of the Judge.

1.2 Statement of the problem:

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

Uganda has been a party to international legal instruments like the International Covenant on Civil and Political Rights (ICCPR) since 1995, and has ratified the first optional protocol to the ICCPR allowing for the right of individual petition to the UN Human Rights Committee. It has not signed nor ratified the second optional protocol to the ICCPR aiming at the abolition of the death penalty. Uganda ratified the African Charter on Human and People's Rights in 1986 and the Protocol to the African Charter on the establishment of the African Court on human and people's Rights in 2001.

In 2003, the World Coalition Against the Death Penalty (WCADP) established the world day against death penalty. Partners around the world united on October 10th to promote awareness of the movement against the death penalty. Since the 1980s, there has been a global trend towards the abolition to this day.

According to Amnesty International, 16 countries had abolished the death penalty in Law for all crimes in 1977, such a move by countries to wards abolition of death penalty was supported by the courts holding in the case of AG Vs Susan Kigula and 417 others and established socio economic

profiles of those living on death row at the time the Supreme Court decides the case.

Foundation of Human Rights Initiative strongly believes that the death penalty is a cruel, inhuman and a degrading form of punishment as well as a violation of the right to life.

1.3 Objectives of the study:

The general objective of the study is to examine how the death penalty violates the right to life.

The specific objectives of the Research study include;

- To examine whether death penalty is a violation of human rights.
- To establish a case for the abolition of the death penalty in Uganda.
- To identify and justify alternatives to death penalty.

1.4 Hypothesis:

In Uganda it is imperative for the offender to be punished for the offence committed however death penalty does not allow this and therefore fails to achieve the objectives of punishment

In respect to Ugandan Constitution Article 28 death sentence violates the right to life which covers all other rights since life is the cornerstone of all human rights

This hypothesis is thus illustrated in famous Koffi Annan's quote "Forfeiture of life is too absolute too irreversible for one human being to inflict it on another even when backed by legal process. Life itself is a very fundamental and superior right from where every other human right emanates and under no circumstances should it be taken away."

1.5 Scope of the study

This dissertation focuses on the death penalty in Uganda. However, it makes mention of the operation of the death penalty in other jurisdictions. It

discusses principles laid out in international and regional human rights instrument as well as the Constitution of Uganda.

1.6 Significance of the study:

The debate on the constitutionality of the death penalty in Uganda mirrors the complex cultural and religious beliefs, the death within attempting to find a lasting solution to capital punishment. The Susan Kigula constitutional petition receipts rated issues raised by the Constituent Assembly Delegates during the constitution review process. These issues remain unsolved. The submissions made during the Susan Kigula case affirmed the human rights obligation that bind Uganda. On the other hand, crime control considerations cannot be ignored. This dissertation discusses the death penalty in light of these competing interests.

1.7 Methodology:

The research analyses secondary data in this field. Data was obtained from government documents, archives, newspapers, NGO publications text books, reports from Libraries collateral material and web based resources.

CHAPTER TWO

2.0 LITERATURE REVIEW.

2.1 INTRODUCTION.

The literature review has some text books and writers who have written about death penalty as a cruel, inhuman, degrading and a violation of right to life. Some are in support of the death penalty and others are against it.

2.2 OVERVIEW OF THE DEATH PENALTY AND BRUTALITY.

I have used **Apollo Makubuya's journal of 2000¹**, the constitutionality and the death penalty in Uganda. **A critical inquiry East Africa -j. Peace Human Rights 222**. He discusses the constitutionality of the death penalty vis-a-vis the right to life and prohibition against torture, cruel inhuman and degrading treatment. It criticizes the main argument of supporting capital punishment. The journal contemplates and offers reforms leading to abolition of death penalty in Uganda but certainly is not limited to the death penalty through court.

Jenifer. C. Honeyman and James R.P. Goff² Argument for life death Canadian journal of behavior science volume 28. This document raised questions regarding the effectiveness of arguments for or against the death penalty in charging people attitudes about the death penalty. It contends that vengeance plays a very big role on most of the people who support the death penalty.

Human rights v Death penalty, Abolition and restriction in law and practice³. This text talks about the death penalty as a human rights violation. It highlights the restriction to the death penalty through international standards international abolitionist treaties and gives an elaborate account of the path to abolition⁴.

¹ The constitutionality and the death penalty in Uganda by Apollo Makubuya.

² (January 1996) capital punishment.

³ Amnesty international by Eric Prokosch.

⁴ <http://www.squidoo.com/abolishthedeathpenalty>.21.02.2011.

The case against the death penalty⁵. The book gives nine reasons why the death penalty should be abolished and concluded that capital punishment does not deter crime and it's uncivilized in theory and unfair and inequitable in practice.

Charles .E. Rice (June 22 1987): Retribution is an obligation⁶. The document highlights the purpose of criminal punishment as deterrence and retribution. It points out that the common good requires that punishment fit crime. It concludes by saying that the death penalty should be supported and imposed only with scrupulous procedural safeguards.

The idea "**May the state kill**" emerged from concerted effort which started in 1999 by a coalition of institutions engaged in public awareness and lobbying for the abolition of death penalty in Uganda⁷ . **Uganda Human Rights Commission (UHRC), Uganda Joint Christian Council (UJCC) Prison Fellowship and Amnesty (AI)** international.

In case law, The Constitution Court of South Africa 1995 February 15th /17th June case No. CCT 3/94 Criminal procedure sentence death sentence; States that Although Article 6(2and 5)⁸ of the ICCPR specifically allow the imposition of death penalty. The Human Rights Committee of the United Nations regards it as a cruel and inhuman punishment.

"I will never sign the death sentence for a fellow human being. I would like to reaffirm this commitment life, is sacred, I believe a person can reform. I believe that forgiveness makes all of us better persons. In the course of truth and justice invite all heads of state in Africa, our common home to abolish the death sentence to work for the removal of violence among our people and so to prepare a better future for our children." This was stated by **Dr. Bakill Muluzi** in his

⁵ Capital punishment project America civil liberties By Hugo Badau.

⁶ The new American. Com;accused on 7th /02/2005.

⁷ Farther Toscio Agostone for 2nd Edition.

⁸ Case law of South Africa

speech to the **Eighth general assembly of the world council of churches in Havana** in December 1998.

The death penalty⁹ is no more effective and deterrent than life imprisonment... while police and enforcement officers are the strongest advocates of capital punishment; the evidence is overwhelming that police are no safer in communities that retain the sanction than those that have abolished it.

Respect for human dignity especially requires the prohibition of cruel, inhuman and degrading punishments. The state cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect (1977), **45 Bvert GE 228**) That it is therefore necessary for us to note that justice based on the rule of law is the pillar on which civilized society rest. We should see to improve its equality, humane efficient, criminal Justice system as an instrument of equity and every right of the individual should enjoy the protection of law. Mr. Etima commissioner general of prisoners. During penal reforms conference¹⁰.

To repay brutality with brutality in my opinion does not serve any useful purpose¹¹. The important point is that every person can improve himself and should be given the opportunity to do so, however serious his mistakes have been. The reason for this is that deep down inside each human being there exists the pretenciality to develop towards the highest good. A death penalty would totally destroy that potentiality such punishment is not a correction. It can only be an act of revenge.

In the U.S case. **Justice Stewart as he then was in a case of Furman vs. Georgia** described death penalty as cruel and unusual in the same way that being struck by lightning is cruel and unusual. For all the people convicted of rape and murder in 1967 and 1968 many just as reprehensible as these,

⁹ Death penalty (Supreme Court Justice, Thurgood Marshall, USAPg13).

¹⁰ Penal Reforms.

¹¹ President Sir Daudi Javana, Gambia.

the petitioners among a capriciously selected random handful upon whom the sentence of death has in fact been imposed¹²

In **Black stones statute international human rights document** ¹³ . Described the punishment as inhuman and degrading treatment.

Also **Peter Hodgkinsan** and **Andrew Rutherford** (waterside press) in the book titled capital punishment global issues and prospects¹⁴, described the punishment as a violent, inhuman and degrading treatment.

In book filed punishment and death penalty by Robert M. Baird and Stuart E. Rosen Baur¹⁵, punishment of innocent by Micheal L. Redelect, Hugo Adams Bedan and Constance E. Purman (a case of Adam on May 10 1984)¹⁷ was executed due to miscarriage of Justice in Florida. Adam was not guilty.

Van den Haag, said, Justice requires punishing the guilty as many of the guilty as possible even if only some can be punished and sparing the innocent as many of the innocent as possible even if not all are spared, it would surely be wrong to react everybody with equal injustice in preference to meeting¹⁶.

The Australian coalition against Death penalty (ACADP) (2004)¹⁷, in one of their articles, 'The death penalty- the facts, the truth and the reality' is of the expression that many world governments often justify their use of the death penalty saying that; public opinion favors it, or that religion demands it. However, they advise that, civilized governments should not engage in emotions of vengeance. According to this article, the sanctity and safety of human life cannot be upheld by a state that easily panders to stir emotions

¹² <http://www.opposingviews.com/comments/the-death-penalty-not-a-h...20/02/2011>.

¹³ Black stone Statute international Human Rights document 4th Edition by Ghandhi pg 79 - 110

¹⁴ Capital punishment global issues and prospects by Peter Hodgkinsan and Andrew Rutherford.

¹⁵ Pg 95-102.

¹⁶ Capital punishment global issues and prospects pg 163.

¹⁷ <http://www.acadp.com.20/02/2011>.

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⁹ Death penalty (Supreme Court Justice, Thurgood Marshall, USAPg13).

¹⁰ Penal Reforms.

¹¹ President Sir Daudi Javana, Gambia.

of revulsion and retribution. Hence the sincere requirement for the respect of human life has to include the abolition of the penalty. The article offers of the opinion that, the challenges that comes to the legislature is not to impose death as a remedy to those in the society, but rather to introduce a genuine social and legal reform. This review thus calls for a reform in statute books that provide for a death penalty in Uganda.

This literature review requires a lot of work. You have just dumped quotations from people and done a narrative of literature that is one sided. Where is your analysis?

I raised this in your previous draft and it does not seem you have done much work on it.

Death penalty is unconstitutional given various provisions of the Ugandan constitution that paint its negative image. This is enshrined under article 28 of the Ugandan constitution which criticizes main arguments supporting this penalty, contemplates and offers reforms leading to abolition of death penalty in Uganda.

Ugandan constitution 1995, as well stipulates that notwithstanding anything in this constitution there shall be no delegation from enjoyment of freedom from torture, cruel and inhumane or degrading punishment.¹⁸ This reflects the dark side of this penalty.

This was illustrated in the case of: People Vs. Anderson¹⁹ it was stated inter alia that capital punishment is impermissible as it degrades and dehumanizes all who participate in its processes.

Given the cruel nature of death sentence its incumbent on the state to establish legitimate goals that are compatible with the dignity of human kind and the judicial process.

¹⁸ 1995 Ugandan Constitution, article 44

¹⁹ Californian case, 1972:6 cal 3. 628.

It's worth noting that death penalty should for one reason or the other be called for in circumstances that deem fit for it. This is enshrined in the Bible where it is stressed that "an eye for an eye and tooth for tooth"²⁰ this throws light on the virtue that there ought to be no violence either physical or moral that should go unpunished.

²⁰ Mathew 5:28-31

CHAPTER THREE

3.0 THE CASE OF SUZAN KIGULA AND 147 OTHERS VS ATTORNEY GENERAL

A: FACTS AND RULING OF THE CASE

The respondent / cross appellants filed their petition²¹ in Constitutional Court under article 237(3) of the constitution challenging the Constitutionality of the death penalty under the constitution of Uganda²². The respondents were all persons who at different times had been convicted of diverse capital offences under the Penal Code Act²³ and had been sentenced to death as provided for under the laws of Uganda. At the time of filing the petition on 3rd September 2003, all petitioners were incarcerated in condemned section of upper prison Luzira, the women prison in the same place and at Jinja main prison, Kirinya. They contended that the imposition on them of the death sentence was inconsistent with Articles 24 and 44 of the constitution. To the respondents, the various provisions of the Laws of Uganda which prescribe the death sentence were inconsistent with articles 24 and 44. The respondent also further petitioned in the alternative as follows:

First, that the various provisions of the law of Uganda which provides for a mandatory death sentence are unconstitutional because they are inconsistent with Articles 20, 21, 22, 24 and 44(a) of the constitution. They contended that the provisions contravene the constitution because they deny the convicted person

²¹ Constitutional Petition 6 Of 2003 Suzan Kigula Vs Ag.

²² Constitution of Uganda 1995.

²³ Penal Code Act Cap 20.

the right to appeal against sentence, thereby denying them the Right of equality before the Law and the Right to fair hearing as provided for in the constitution.

Second that the long delay between the pronouncement by court of the death sentence and execution, allows for the death row syndrome to set in. therefore carrying out of the death sentenced after such a long delay constitutes cruel, inhuman and degrading treatment contrary to Article 24 and 44(a) of the Constitution.

Third, that section 99(1) of the Trial on Indictments Act²⁴ which provides for hanging as the legal mode of carrying out the death sentence is cruel, inhuman and degrading contrary to Articles 24 and 44 of the constitution

Accordingly, they sought various reliefs, orders and declarations. The Attorney General opposed the petition in its entirety, contending that the death penalty was provided for in the Constitution of Uganda and its imposition, whether as a mandatory sentence or as a maximum sentence was constitutional. Both parties filed affidavits in support of their respective cases.

The Constitutional Court heard the petition and decided as follow: -

- 1) The imposition of the death sentence does not constitute cruel, inhuman or degrading punishment in terms of Article 24 and 44 of Uganda prescribing the death sentence are not inconsistent with or in contravention of article 24, and 44 or any provisions of the constitution.
- 2) The various provisions of the laws of Uganda which prescribe a mandatory death sentence are inconsistent with article 21, 22(1), 24, 28, 44(c) of the constitution and, therefore, are unconstitutional.
- 3) Implementing or carrying out of the death sentence by hanging is constitutional as it operationizes article 22(1) of the constitution. Therefore, section 99(1) of the trial on Indictments Act is not

²⁴ T.I.A Cap 23.

unconstitutional or inconsistent with article 24 and 44(a) of the constitution.

- 4) A delay beyond three years after a death sentenced has been confirmed by the highest Appellate Court is an inordinate delay. Therefore, for those condemned prisoners who have been on death row for three years and above after their sentences had been confirmed by the highest Appellate Court, it would be unconstitutional to carry out the death sentence as it would be inconsistent with article 24 and 44(a) of the constitution.

Consequently, the court made the following orders:

- 1) For those petitioners whose appeal process is completed and their sentence of death has been confirmed by the Supreme Court, their redress will be put on halt for two years to enable the executive to exercise its discretion under article 121 of the constitution. They may return to court for redress after expiration of that period.
- 2) For the petitioners whose appeals are still pending before an appellate court: (a) shall be afforded a hearing in mitigation on sentence, (b) the court shall exercise its discretion whether or not to confirm the sentence, (c) therefore in respect of those whose sentence of death will be confirmed, the discretion under Article 121 should be exercised within three years.

The Attorney General was not wholly satisfied with the above decision and orders, hence this appeal. The respondents were also dissatisfied with parts of the decision of the constitutional court, hence the cross appeal.

In this court the Attorney General filed, 8 grounds of appeal as follows:-

- 1) The learned justice of the constitutional court erred in law in holding that the various provisions of the law that prescribe mandatory death sentences are inconsistent with article 21, 22(1), 24, 28, 44(a) and 44(c) of the constitution.

- 2) The learned justices of the constitutional court erred in law in holding that section 123 of the Trial on Indictments Act (cap 23) is inconsistent with article 21,22(1),24,28,44(a) and 44(c) of the constitution.
- 3) The learned justices of the constitutional court erred in law and fact in holding that delay carrying out the death sentence after it has been confirmed by the highest appellate court is inconsistent with articles 24 and 44(a) of the constitution.
- 4) The learned justices of constitutional court erred in law and in fact in holding that a delay in carrying out a death sentence beyond 3 years after the highest court has confirmed the death sentenced is inordinate.
- 5) The learned justices of the constitutional court erred in law and in fact in ordering that the petitioners whose death sentence has been confirmed by the Supreme Court shall have their redress put on halt for two years to enable the executive to exercise its discretion under article 121 of the constitution.
- 6) The learned justices of the Constitutional court erred in law in fact in ordering that the petitioners whose appeals are still pending before an appellate court shall be heard in mitigation on sentence.
- 7) The learned justices of the constitutional court erred in law in ordering that the appellate courts shall exercise discretion whether or not to confirm the death sentence.
- 8) The learned justices of the constitutional court erred in law and in fact in ordering that where death sentence has been confirmed the discretion under article 121 of the constitution should be exercised within three years.

The summary of the grounds upon which the judgement of constitutional court was to be overruled are analysed below:-

1. Constitutional provisions as regards any form of torture or inhumane and degrading treatment were not bound to apply to Article 22(1) of the Ugandan Constitution.
2. That death penalty was not in line with constitution however hanging was allowed as a form of punishment.
3. That this penalty's nature manner and the process calls for cruel inhumane and degrading treatment thus cannot be upheld in Uganda.
4. That this penalty is a violation of right to life protected under various Ugandan laws such as penal code, section 25(1). Anti-terrorism Act Section 7(1)(a).

Both parties filed summary submissions but also made oral submissions in support of their respective cases.

After hearing the petition, Supreme Court subsequently made the following pronouncements:-

- 1) That the imposition of the death penalty does not infringe on the constitution.
- 2) For those respondents whose sentences were already confirmed by the highest court, their petitions for mercy under 121 of the constitution must be processed and determined within three years from the date of confirmation of sentence. Where after three years no decision has been made by, the executive, the death sentence shall be deemed to be commuted to imprisonment for life without remission.
- 3) For those respondents whose sentences arose from the mandatory death sentence provisions and still pending before an appellate court, their cases shall be remitted to the High Court for them to be heard only on mitigation of sentence and High Court may pass such sentence as it deems fit under the law. This decree was passed by Supreme Court and its attached and marked annex "A" in this thesis.

ISSUES RAISED BY THE BENCH

On the first order I wish to refer to the memorandum from Hon. JC LUGAIZI, the Head Criminal Division, High Court to Hon. JC OGOLA, the principle judge in which he opined as follow:-

“the final decision in the Kigula case has also brought about a few other complications (a) where the High Court revisits a case it decided with a view to giving a convict opportunity to exercise his or her right to mitigate the death sentence, the decision in Kigula case would have retrospective effect, (b) in such a case it would also be difficult to see how the High Court would deal with the matter without breaching the “functus officio rule”, (c) where a convict exhausted the whole of the Appeal process, but the death sentence was not executed that process it is not clear whether the life sentence is self-executing or not, (d) in view of section 84 and 85 of the prisons act 2006 it is doubtful whether our courts have power to interfere with remission of sentences, which is purely administrative.

On the third order it is relevant to refer to an article in New vision Newspaper from the Registrar High Court, Adonyo Henry.

“Mitigation is a legal terminology which refers to lessening of a sentence especially death. It is a new process altogether in Uganda’s judicial system with 57 files of death row convicts now sent back to the High Court for mitigation hearings that can lead to reducing the inmate’s sentence. There is already one beneficiary of this process. Patrick Bwengye who had his sentence reduced to two years imprisonment. Bwengye was convicted of murdering his wife on May 5, 1995. When Bwengye’s file was sent to High Court for mitigation, Justice Anna Magezi reduced the original death sentence to a custody sentence of two years. The judge noted that Bwengye had been drunk and that there was no evidence of premeditation to murder his wife. The judge further established that clinical assessment had observed that Bwengye suffered from alcohol dependency before and that if this plea of intoxication had been properly considered, it could have perhaps lead to a conviction of manslaughter rather than murder. The judge also

noted that although Bwengye had been incarcerated for over 17yrs, he had remained in contact with his family. Thus she contended that this contact would help court to determine if a non-custodial sentence or short prison term would be appropriate in the circumstances”.

ANALYSIS

This case raises pertinent questions that need clarification and direction

- 1) The functus officio rule may not be applicable because what Supreme Court is ordering is a retrial of the issues of sentence and once a retrial is ordered the issue is re-opened for trial by the high court without infringing on the functus officio rule.
- 2) The management of a sentence after it has been passed and confirmed by the Highest Court is an executive function to be performed by the Commissioner General of Prisons and the Kigula judgment enters into this realm.
- 3) The order infringes on the Prison Commissioners duty to remit sentences which are beyond one month’s imprisonment as shown in section 47(5) of the Prison Act which is attached and marked annex “B” in this thesis.
- 4) There is need to define what life imprisonment is. Is it possible for court to impose a sentence that will ensure imprisonment of a convict for the rest of his life?

The second order concerns those cases “which shall be remitted to the High Court for them to be heard only on mitigation of sentence, and the court may pass such sentence as it deems fit under the law”.

A number of cases have already been remitted by the Supreme Court Registrar and I am aware some have been disposed off, but the exercise so far reveals many challenged.

Rights ushered in Susan Kigula’s Case

Considering the above case, death penalty violates various human rights as analysed below:

Terminating the life of an accused denies them a right to appeal or an opportunity to reform and be good beings.²⁵

When the state convicts prisoners without according them a fair trial it denies them a right to due process and equality before the law. The irrevocable death penalty does not only deny the victim a right to seek a legal redress for wrongful conviction. But also incapacitates the judiciary in correcting its errors.²⁶

Imposition of death penalty is a violation of the right to life protected under Article 22(1) of the Ugandan Constitution.

As stipulated under 1995 Ugandan Constitution carrying out death sentence by hanging is cruel, inhumane and degrading²⁷

CHALLENGES AND DILEMMA

- 1) The view by some judges that they are functus officio has already been alluded to. To counter this view is the argument that the process of sentencing was not completed if the convict did not submit in mitigation which means that the judge is not functus officio as far as the 'repeating' of the sentencing process is a retrial and my concern is whether since it has been ordered by superior court it poses no legal problem or irregularity? The case of Uganda vs. Bwengye Patrick²⁸ illustrates the difficulty of retrying a sentence only. In this case the antecedents of the accused include his having maintained family contacts and support while in prison and his good relationship with other prisoners, but how about the relatives of the deceased that he may have orphaned or widowed? In this case a prison

²⁵ New Vision 29th Jan. 2005, 14

²⁶ Ibid 15.

²⁷ 1995 Ugandan constitution, article 20

²⁸ Crsc Ug Vs Patrick Bwengye 190 of 1996.

sentence of two years was passed. It he last year of which shall be suspend and under the supervision of a probation officer of the nearest court of his residence, after probation assessment has been produced. By the nature of the fact that this sentencing experience is a new development in our jurisdiction, there is need for every stakeholder to assist in its implementation. If records were kept, the record of their prisoner would indicate that he was convicted of murder and sentenced to two years imprisonment. The judge rightly took into account the seventeen years the convict had spent on the death row but this writer opines that the Judgment should have indicate the period. The other scenario is where the trial judge sentenced the convict to life imprisonment without remission. The sentence did not indicate as to when the sentence was to commence. Section 96(5) of the prisons rules.^{1 304-4}²⁹ provides that “whenever a capital sentence is commuted to a sentence of life imprisonment or to a sentence of imprisonment for a term of years, the sentence shall for the purpose of remission be deemed to have commenced at the date sentence of death was passed”. But this is not commutation of sentence and there is no remission. What is the commissioner of prisons supposed to do because the prisoner would have been committed to prison on the date shown on the warrant of committal?

- 2) There is difficulty posed by the cases tried by the judges now out of Jurisdiction through retirement or death.

B: THE WAY THE EXECUTION OF DEATH PENALTY IS PERFORMED IN UGANDA

To hear that someone has been sentenced to death is disturbing, so naturally one wonders what goes on in the mind of the person who actually executes the death sentence.

²⁹ Prison Rules S.1 304-4

To answer this question, I set out to find the hangman. After weeks of making contact through a go between, I finally convinced him to see me.

He does not want his identity disclosed, so we shall call him Michael.

Tall, dark-skinned and bearded, Michael's physique is imposing, but as you interact with him, he strikes you as a regular gentleman who would never kill anyone.

This is probably why most people who know him have no idea what he does for a living.

"People may have a negative attitude if they get to know what I do. Nobody wants to be friends with a hangman," he says.

But in the gallows, the 55-year-old executes his duties with almost precision.

With over 100 executions in his career, the 55-year-old says he has mastered the art of killing without causing pain.

"A person I hang never kicks around while dying. He dies immediately with almost no discomfort. The art lies in how you tie the knot that crushes the neck.

Not everybody can do that," he explains.

He confesses that ending someone's life is not a laughing matter. His most traumatizing execution was when he hanged two brothers who were convicted of murder.

"It takes exceptional courage to walk an inmate to the death chambers. Once, an aggressive inmate hit me hard. If it were not for the cuffs placed on his hands and legs, he would have killed me," he recalls.

When it is time

Often, the executioner will know about the task to be performed a month in advance. Before explaining the procedure, Michael warned me that what I was about to hear might be disturbing, but I insisted on hearing it all the same.

He began by explain that normally, the death row inmate will know about his fate when he is handcuffed and taken out of his cell with full escort to meet the officer in charge (OC).

The family will have been invited to meet him and pray with him for the last time. This meeting takes place in the OC's office.

The convict is given an opportunity to choose his last meal, which is then prepared and served to him before execution.

The execution team then heads to the death chambers. They spend some time getting the facilities ready because there is no room for error.

According to Michael, the hanging is carried out when all parties that include the OC of the condemned section, the clergy and the prisons director of medical services are contented with the inmate's health on the appointed day.

He says prior to execution, the prisoner's neck and body measurements are taken because the ropes need to be of the right strength and the drop needs to be worked out in relation to the individual's weight and height.

In the death chamber, the prisoner may stand or be seated on a death chair depending on whether he is cooperative or aggressive.

The legs and hands are tied and a black hood placed over the head so that the prisoner does not see the execution team.

"A noose is then placed around his neck, after which, upon a prisons warder's command, the hangman presses a button and a machine pulls the ropes to squeeze the prisoner's neck."

“The alternative is to release the prisoner through a hole so that his own weight pulls the rope and squeezes the neck.

Either way, death is either brought about by damage to the spinal cord or by suffocation caused by constriction of the trachea,” he explains.

He adds that after the prisoner’s body drops, the officers, priests and medical personnel proceed to the bottom of the gallows to certify the death.

When there are mistakes Michael says in the event the prisoner is not dead, they are hit hard at the back of the head with a hammer or a crow-bar.

The body is then quickly placed in a coffin, sprayed with acid and buried in an unmarked grave within the prison cemetery.

What is the point of this story? Where is the legal analysis? This is not your interview. I have read it somewhere else.

Commissioner General’s stand on the death penalty

Dr. Johnson Byabashija, the Commissioner General of Prisons, has frequently expressed his stand against the death sentence because he is of the view that it is cruel, inhuman and degrading.

“Death is something which every one of us will meet so by executing a person, you will have not punished them,”

Byabashaija argues.

He adds that the main objective of Uganda Prison Service is to correct offenders, yet execution does not correct lawbreakers.

“And it has not been proved that the death penalty deters people from continuing to commit those crimes,” he says.

He, however, says since the law still provides for the death penalty, and judges have continued to sentence people to death.

The prisons authorities would have no choice but to hang a prisoner if an order comes through.

The hanging facilities are still in good working condition. The executioner and his two assistants are still on the pay roll.

“We perform the duty as directed by our superiors,” Byabashaija says.

Recalling Saddam Hussein, Byabashaija says some inmate on death row at Luzira spent up to three days without eating when they watched the former Iraqi leader’s execution on television.

Asked about the criteria followed while recruiting hangmen, Byabashaija says Uganda Prison Services advertises for the posts.

The last recruitment was in the late 1980s.

Warder’s experience

Awarder who was once in charge of the condemned section, says he watched one prisoner being executed in Luzira and could not sleep for two days.

He says over 20 years, he still gets nightmares.

“The images of that execution haunt me to date and I am now convinced that they shall haunt me.

Innocent

The warder says he felt bad every time an inmate was executed. Yet, some prisoners are sentenced to death for no crime.

A case in point is Edward Mpagi, 60 who was declared guilty of murder and sentenced to death in 1982, then the person he supposedly killed reappeared years later.

He spent 18 years on death row before he was released, by which time his property had been snatched by his enemies.

During time, the prisoners would say “I am going. I am going to meet my Lord.”

Then some of their remaining colleagues would sob. After being walked out of the ward, some of the prisoners would sing religious songs as they were being led to the gallows.

The death chamber was above the ward, so the remaining prisoner would hear the sound of their colleagues’ bodies with a thud during execution.

Finally, they then would hear the sound of nails being knocked into coffins.

They would then go through days of grief, not knowing who among them would be next.

In mate on death row speak out

Amos Olweny has been in the condemned section of Luzira’s Maximum Security prison for 28 years.

“The condemn section is an extremely intimidating structure.

The walls are high and all around us. They are painted a dull, harsh white colour.

The living conditions are extremely depressing. The lights in the cells are left on throughout the night, making it difficult for us to sleep properly.

With the overcrowded cells, there is barely enough room to move around,” he says.

“As death row inmates, we do not know when they are coming for us.

The practice of being left in suspense adds to our constant fear, mental anguish and torture.

For that reason the prisoner is kept in a dehumanizing environment from the moment he enters the cells,” Olweny explains.

Susan Kigula's remarkable story

On July 9, 2009, Susan Kigula was arrested and remanded to Luzira Prison for killing her husband David Sseremba.

In September 2002, court found her guilty of the offence and sentenced her to death by hanging.

A young woman, who had a whole life ahead of her, dreams unaccomplished, promises waiting to be fulfilled was set to die.

"Hanging a person is not a deterrent since everyone deserves a second chance to live. That is why I petitioned against the death penalty," says Kigula.

This move made Susan the leading figure in the landmark case, Susan Kigula and 417 death row inmates' vs. attorney General, in an attempt to have capital punishment declared unconstitutional and abolished in Uganda.

On January 21, 2009, this Supreme Court of Uganda reached a decision, Susan and the others lost: the court saw no basis to outlaw the death penalty.

In addition, it ruled that no sufficient evidence was brought to show that being hanged caused more pain and suffering to the person being executed than any other manner of execution.

What could be more disappointing and troubling for anyone? Although Susan's petition was refused, with it sprung several court rulings which would eventually become precedents in the criminal laws of Uganda.

First, the court ruled that the death sentence should no longer be mandatory because it would only tie the hands of the court and prevent it from taking into consideration the specific circumstance of each case.

It also ruled that the state cannot torture condemned prisoners by keeping them on death row for years; therefore, where a death penalty cannot be executed within three years, it must be commuted to life imprisonment.

Thus, Kigula, who had spent nine years in prison, escaped the hangman's noose and started a new life.

In November 2011, in a remarkable High Court session, Susan Kigula's sentence was reduced to 20 years.

Today, Kigula holds a diploma in legal studies, which she did through the prisons education system. She now runs a legal clinic for other inmates.

Since these court rulings in 2009, a number of prisoners have been released and approximately 180 death sentences have been converted to life sentences.

What is the purpose of the above chapter. There is no legal analysis. It is stories that have been copied and pasted. You need to recast the whole chapter

CHAPTER FOUR

This chapter in general shall explain the argument for and against the death penalty in Uganda and the world as a whole.

4.1 ARGUMENTS FOR AND AGAINST ABOLITION OF THE DEATH PENALTY.

4.1.0 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.

Currently Uganda has 160 death row inmates that include six women. The last executions happened in 1999 and 2005 for the civilian and military systems, respectively. It is evident in Uganda that people from different walks of life have come up with different views opposing the use of the death penalty as a form of punishment.

Public support for the death penalty in Uganda has tremendously reduced, with 64% reportedly backing abolition. Doctor Johnson Byabashaija the Commissioner General of Prisons, has frequently expressed his stand against the death sentence because he is of the view that it is cruel, inhuman and degrading. "Death is something which every one of us will meet so by executing a person you will have punished them," said Byabashaija. Francis Suubi the executive director of Wells of Hope ministries also said the death sentence should be abolished because many children have ended up on the streets after the breadwinner is sentenced to death.

Martha Ngabirano, a teacher says the death penalty should be removed. Even if the murderers acted against the law, no one has a right to terminate another person's life. Vengeance should not be ours.

Death row inmates should be given a second chance in life because people are taken to prison to reform. How then will an executed person reform if all you want to do is kill them? What is the point of prison being a correctional institution?

European Envoy to Uganda Mr. Attilio Pacifici speaking at the International Day against the death penalty at the Foundation for Human Rights Initiative in Nsambya, Kampala on 11th, Oct. 2017, urged Uganda to abolish the death penalty because it is “the global trend.” “It’s not a strong correlation between the poverty and capital punishment, there is such a strong link; people living in poverty are at a greater risk of suffering the death sentence because they have no access to credible defence”. The envoy said the death penalty is in human and degrading form of punishment that does not deter crime and he stressed the importance of giving people a second chance.

The envoy decried several flaws in the criminal justice system:

“Judges are human beings, like police officers, they make mistakes. Good legal aid is not available to the vast majority of defendants”, he said. “They (suspects) cannot afford it, some case files go missing, and miscarriage of justice is inevitable in every justice system and is irreversible. How then can someone in an error-prone and imperfect system pass an irreversible sentence?”

He cited the cases of Mr. Edmary Mpagi and Mr. Patrick Zzizinga who were sentenced to death for murders’ they never committed.

Mr. Mpagi and his cousin, Mr. Fred Masembe (who died in prison) were sentenced to death in 1982 for murdering George William Wandyaka, their neighbour in Masaka District.

However, Mr. Wandyaka was found alive even after Mr. Mpagi’s release after 18 yrs on death row. Mr. Zzizinga on his part, was convicted and sentenced to death for killing his wife with whom was still live.

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 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 executed³⁰. Therefore, there is no way to correct these errors as in the case of punishment of imprisonment.

According to **Karpal Singh**, "no criminal justice system is perfect, being evolved by humans". It is perhaps for this reason that the French philosopher Voltaire said in his work '**Zidig**' "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 a 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"³¹.

Similarly, in the case of **Bachman Singh Vs State of Punjab**³², **Bhagwati J** dissenting observed, the chief arguments of the abolitionists, which have been substantially, adopted the learned counsel for the petitioners, are as under. The death penalty is irreversible decides 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 recognized as innocent victims when another set of authorities comes to power.

³⁰ Amnesty International: Towards Abolition of the Death Penalty: May 1991 P.8

³¹ Karpal Singh (1999); Death Penalty : Legal & Constitutional Issue Pg.1

³² 14 AIR (1980) SC 898.

There have been several notable cases in which people sentenced to death have been found to be innocent, including that of **George Kelly**, who was executed 53 years ago in the U.K, but exonerated recently³³.

Another example is of **Elias Wanyama and Godfrey Mugaanyi**, both were imprisoned and had been sentenced to death, having been wrongly accused of crimes they did not commit³⁴. This problem is rampant in Uganda, because of the corruption and lack of resources within the system of justice. 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 the state attorneys who represented them on that day of the hearing and that their lawyers did not have a full understanding of their cases³⁵.

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 witnesses. Prisoners also reported that judges and lawyers had often been bribed and that witnesses had often been coached³⁶.

These factors increase the likely hood of wrongful conviction that calls for the abolition of the death penalty in Uganda, to ensure that such convictions will never occur.

It is therefore important to note that **Chaskalson P's** conclusion in South Africa context which also hold true in Uganda that "the unpalatable truth is that most capital cases involve poor people who cannot afford and do not receive as good defense as those who have the means. In this process, the poor and ignorant have

³³ Erica Bussey, Canada (2003) in his article "Death Penalty in Uganda – the Road to Its Abolition Pg.9

³⁴ Tracy Garner, in his article. "The Death Penalty-an Abuse of Human Rights, Vol. 7 No. 2, 2002 Pg23.

³⁵ Interviews with Condemned Prisoners, Luzira Upper & Lower Prisons, Kampala 13th Dec. 2004

³⁶ Ibid

proven to be the most vulnerable, and are the persons most likely to be sentenced to death³⁷,

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 seen to be barbaric³⁸.

There have been witnesses to hangings where the executioner had to kill the prisoner by using hammers or other weapons. This case is clear in Uganda, where **Anthony Okwonga**, a former senior Assistant Commissioner of prisons, disclosed that in case where the prisoners are not certifiably dead; they are killed by hitting them at the back of their heads with a hammer or a crowbar³⁹ However, perhaps more significant is the mental torture on death row for 10-20 years as their cases are appealed. 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 executed⁴⁰.

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 disturbance⁴¹.

Prison warders who guard condemned prisoners are also often traumatized by having to look after the prisoners only to escort them to their deaths.

³⁷ State Vs Makwanyene & Anor (1995) MILRC 269 at 299

³⁸ Dominic Mnyarose Mbushuu & Kalai Sanaa Vs Republic (1994)2 LRC 335, Tan High Court & (1995) 1 IRC 216 Tan C.A

³⁹ New Vision 23rd Jan 2005

⁴⁰ Supra

⁴¹ Ibid

This is one of the reasons cited by the prison service in its opposition to the death penalty⁴².

In addition, what worries a researcher is that, if someone can be traumatized to slaughter a chicken and see it die, what about a human being? This is simply because the physical pain caused by the action of killing a human being cannot be quantified. Nor can the psychological suffering caused by foreknowledge of death at the hands of the state⁴³.

A former prisoner in Pretoria central prison, South Africa, wrote: "only after I had lived at Pretoria central prison did come to realize, fully, the utter horror of capital punishment, what it involves and the responsibility it imposes on 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"⁴⁴.

This holds true in Uganda. Okwonga⁴⁵, states that he witnessed all the executions and found them to be cruel, inhuman and degrading to all the people involved. A part from the prisoners on the execution roll, prison warders, the executioner, the prison medical 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 the gallows are clean. He restricts the prisoners' movements and ensures that the coffins are made⁴⁶. He further says that, some prison warders suffer psychological problems illness, leading many of them to resign from the service. Some seek treatment from with doctors and increase their alcohol consumption to deal with the family mental disorientation.

He says that, he never recovered from what he describes as the horrifying experience of witnessing executions⁴⁷. There can never be any justification for

⁴² Ibid

⁴³ New Vision

⁴⁴ When the State Kills ...Amnesty International, 1989 pg.8

⁴⁵ Amnesty International: Towards Abolition of the Death Penalty, 1991 Pg8

⁴⁶ Ex-officer-in-Charge of Luzira Upper Prison New Vision 22nd June.

⁴⁷ Supra Note 14

torture or for cruel treatment. Like torture; an execution constitutes an extreme physical and mental assault on an individual⁴⁸.

It is noteworthy that Article 44 of the constitution states that notwithstanding anything in this constitution, there shall be derogation from enjoyment of the following rights and freedom from torture; cruel, inhuman degrading treatment or punishment⁴⁹. And Article 24 of the constitution states, "No person shall be subjected to any form of torture, cruel, inhuman and degrading treatment or punishment"⁵⁰.

It can be argued that, in as far as, the death sentence or 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 constitution⁵¹.

Amnesty International⁵², commented upon it, which despite modern methods execution, that prisoner is 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 argue that, that kind of killing, by even shooting is a form of torture and cruelty. They are quoted in their publication that "shooting by firing squad does not necessarily result in immediate death"⁵³.

It is argued that the cruelty of the death penalty is felt by the family of a condemned person, not only before the execution but also for the rest of their lives⁵⁴.

⁴⁸ ibid

⁴⁹ Amnesty International: The Death Penalty, 2000

⁵⁰ Uganda Constitution 1995

⁵¹ ibid

⁵² ibid

⁵³ When the State Kills 1989.

⁵⁴ Ibid P.59

It is the researcher's considered view that in order to heal the wounds 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 the trachea⁵⁵. There is definitely a need for abolishing this barbaric form of punishment.

Violation of Human Rights

The use of the death penalty violates the spirit and the letter of the international human rights laws which Uganda is a party to⁵⁶.

Various international and regional human rights instruments reiterate the right to life. Chapter four of this dissertation discusses the various provisions in detail. Terminating the life of an accused denies them the opportunity to appeal or to their potential. It denies the living victims the opportunity to forgive⁵⁷.

When a state convicts prisoners without affording a fair trial, it denies the right 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 errors⁵⁸.

Like killings that take place outside the law, the death penalty denies the value of human life. By violating the right to life, it removes the foundation for the realization of all rights enshrined in the Universal Declaration of Human Rights⁵⁹.

This is squarely the case in Uganda, in that 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 instance, in the Kotido executions corporal James

⁵⁵ Supra 23 at Pg.8

⁵⁶ New Vision 29 Jan 2005

⁵⁷ ibid

⁵⁸ Ibid

⁵⁹ Supra Note 22 at 2

Omeido and private Abdullah Mohammed were publicly executed after a trial less than three hours before a field court -martial, which found them guilty of the triple murder⁶⁰. 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 way their decisions are reached. It was reported that the court 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 guilt 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, fair trail and impartiality ...the failure of this case to be investigated fully before any trial was conducted leads us to believe that these men were not given the opportunity to fully before engage in the process, thus denying them a chance for a fair and independent trial”⁶¹

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

A Tool of Repression:

Capital punishment continues to be as a tool of political repression. Rulers have executed their political rivals, or have tried threats of death to silence their opponents. The death penalty 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 expediency⁶².

⁶⁰ Ibid

⁶¹ The Monitor 27th March 2002 at 1-2

⁶² The New Vision 3 April, at 19

In many cases, the death penalty has been directed at prominent individual political opponents. Margaret Sekagya, former Chairperson Uganda Human Rights Commission believes that death penalty is used disproportionately, against the poor and minority groups as a tool of political repression⁶³.

It is the irrevocable nature of the penalty that makes it as tempting as a tool of repression. Thousands have been put to death under one government only to be recognized as innocent victims when a new government comes to power⁶⁴. This is a true example in Uganda of Abdullah Nassur who was recently pardoned in Museveni's regime⁶⁵.

As long as the death penalty is accepted as a legitimate form of punishment, the possibility of political misuse will remain. Only abolition can ensure that such political abuse of the death penalty will never occur⁶⁶.

It is Unconstitutional.

This is a debatable issue. The Constitution providing for a right to life also provide for a limitation on the enjoyment of that right. In some cases, the Constitutions recognize the death penalty which is both mandatory in some cases and discretionary in others⁶⁷.

Article 20 of the Constitution of Uganda recognizes that the fundamental rights and freedoms of 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 by all persons"⁶⁸.

⁶³ Ibid p.7

⁶⁴ New Vision 15 Dec. 2004

⁶⁵ Ibid

⁶⁶ Supra Note 44 at 7

⁶⁷ The New Vision 19 Nov. 2004

⁶⁸ Supra Note 27 at 12

Article 22(1) provides that; “No person shall be deprived of life intentionally except in execution of a sentence passed in a trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate courts.

It should be noted in this context that the death penalty is by definition cruel and degrading punishment⁶⁹.

However, the reading of Article 24 and 44 of the constitution respectively prohibit torture, cruel, inhuman, or degrading punishment, of which the death penalty falls under this⁷⁰.

Inequality.

Studies have shown 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 penalty 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 crime⁷¹.

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 execution⁷². They were therefore unable to challenge the prosecution on points of law or to challenge the admissibility of evidence before the courts⁷³.

In addition, experience demonstrates that whenever the death penalty 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

⁶⁹ Supra Note 46

⁷⁰ Amnesty International, Supra Note 27

⁷¹ Joseph M.N Kakooza, the 1st International Conference on the Application of the Death Penalty in Common Wealth Africa Countries.

⁷² Uganda Constitution 1995 Article 20(1)

⁷³ Chaskalson Supra Note 12

committed the worst crimes, but also those who were too poor to hire lawyers to defend them or those who faced harsher prosecutors or judges⁷⁴.

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

This 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. This thus calls for a need to abolish such punishment.

4.2 REASONS AGAINST ABOLITION OF THE DEATH PENALTY.

This section engages with arguments in support of the death penalty. Samuel Musimenta, a child rights activist says, the death penalty should be retained because it will deter the would be perpetrators of crimes related to murder. Let it be an eye for an eye; for example, why should a person who admits to killing a child for ritual sacrifice live.

Babra Nassimbwa a pediatric surgeon. The death penalty should be retained so that serial killers can face justice. Given the nature of the crime, they do not deserve to live. In fact, tax payers, money should not be wasted on feeding prisoners, especially those sentenced to death because they do not add any value to our economy.

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

⁷⁴ Ibid

The deterrence theory.

With the recent crime rate in Uganda like the killing of girls on Entebbe road, kidnapping of children and girls with intent to murder, the murder of seven sheiks, Felix Kaweesa (former Assistant Inspector of police), Joan Kagezi (prosecutor) major Kiggundu, Abiringa Ibrahim (member of parliament for Arua) and July 2010 Kampala attacks where 74 people were confirmed dead and 71 critically injured is a clear manifestation that death penalty should be reinstated so that those people who are found guilty of murder by court can also be killed in order to deter others from engaging in such criminal Acts.

Retentionists of the death penalty argue that it deters potential criminals from committing heinous crimes⁷⁵. They insist that because taking an offender's life is a more severe punishment than any prison term, it must be a better deterrent⁷⁶. They also contend that without capital punishment there is no adequate deterrent for those already serving a life term who commit murder while incarcerated, or for those who would be liable to a life term if arrested, as well as for revolutionaries, terrorists, traitors and spies⁷⁷.

This theory is common- place in all types of literature, including court decisions. In the South African case of **R Vs Robert**⁷⁸, in which the trial court had sentenced the accused to death in spite of the extenuating circumstances having been found by the jury, on appeal WYK.J said,

"My duty is to protect the public against the accused and others would be killers. The accused belongs to a class of persons whose conscience is gravely impaired. They are deterred; I believe that the fear of 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

⁷⁵ Supra Note 23 at p.11

⁷⁶ Ibid

⁷⁷ Ibid

⁷⁸ Amnesty International, Supra Note 27

again. As I see it, anybody who should give the accused his liberty 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 deterrent that some case, leads to miscarriage of justice in failing to consider the attendant mitigating factors as it may well have been 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 the behavior of most reasonable people.

This argument is particularly persuasive in Uganda, given the large amount of crime in recent years. However, there have been no compelling studies indicating that the death penalty is more of a deterrent than life imprisonment⁷⁹ Moreover, the crime has not dramatically risen in countries after the abolition of the death penalty, but in some cases, has in fact fallen⁸⁰.

For example, when the death penalty was abolished in Canada in 1976, homicides in Canada in 2001 (554) were 23% lower than the number of homicides in 1975 (721), the year before the death penalty was abolished. Moreover, homicides rates in Canada are generally three times lower than homicides rate in the United States which retains the death penalty⁸¹

The British Home Office released statistics, which indicates that the murder rate in the United Kingdom is more than three times than that of many European countries that have abolished the death penalty⁸²

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

⁷⁹ Amnesty International, Supra Note at 10-14

⁸⁰ Ibidp.10

⁸¹ (1957 4 S.A 265 (AD)

⁸² SUPRA Note 6 at 10

For instance, severe punishment has never reduced criminality to any marked degree. There exists no scientific proof of the notion⁸³.

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 relation between the death penalty and homicide rates conducted for the United Nations in 1988 and updated in 1996, concluded; "...research has failed to provide scientific proof that executions have greater deterrent effect than life imprisonment. Such proof is unlikely to be forth coming. The evidence as a whole still gives no positive support to the deterrent hypothesis⁸⁴.

It is incorrect to assume that people who commit such serious crimes as murder do so after rationally calculating the consequences. 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, diagnosed as suffering from paranoid schizophrenia, 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 conviction⁸⁵

President Yoweri Kaguta Museveni while attending the annual Judges Conference on January 18th 2018, he was quoted to have said, "I saw some NGOs opposing the death sentence. In a pre-industrial society like ours, removing death sentence is a recipe for chaos. We believe in the law of Moses, eye for an eye."

Also in January 2018, during the passing out of prison wardens, in Kampala, the president said, "Criminals think they have a right to kill people and keep their heads up. I am going to revise a bit and hang a few".

⁸³ ibid

⁸⁴ United Nations report in 1988

⁸⁵ ibid

While responding to the president's speech, Amnesty international said the president's threat to resume executions was "misguided since there is no credible evidence that the death penalty is a deterrent to crime."

The rights watch dog said president should instead lead Uganda to fully abolish the death penalty like nineteen other African countries have done

The fact that no clear evidence exists to show 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.

The Death Penalty is a Harsh Punishment, but it is not Harsh on Crime.

Undeniably the 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, dangerous can be kept away from public without resorting to execution, as showing by the experience of many abolitionist countries by introducing life imprisonment⁸⁶

Nor is there evidence that the threat of the death penalty will prevent politically motivated crimes or acts of terror. This is true in Uganda to the fact that the political instability in northern Uganda has-not responded to the deterrence theory, because it has been in place a decade.

The overwhelming majority of serious studies on the 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 murders and executions in his country between 1967 and 1985 and that; "murders incidents have consistently increased for most of this time" even though murder had always been widely known to be punishable by death. Moreover, incidents of armed

⁸⁶ New Vision New York Times, 11 May 2002

robbery had increased since it became a capital offence throughout Nigeria in 1970⁸⁷.

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 cars⁸⁸. It should be rightly asked whether the death penalty has a uniquely deterrent effect in Uganda. This can be answered to a 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 whatsoever⁸⁹.

The above assertions imply that the death penalty is out fashioned and thus it is time to abolish it from Uganda.

The Retributive 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”⁹⁰. This has usually been interpreted as a divines 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 indicates 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

⁸⁷ Barnes & Tecers, *New Horizons in Criminology* 33 (1951)

⁸⁸ Tibaniana Mwene Mushenga; *the Death Penalty and its alternatives*, a paper presented at the Conference on the Death penalty in Africa at Ibadan Nigeria (1977)

⁸⁹ Amnesty International; *Supra Note*27

⁹⁰ *Ibid*

humiliation in jail. The state does not have to engage in the cold and calculated 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.”⁹¹

The literal application of heinous offences “an eye for an eye and a tooth for a tooth” seems to have long outgrown.

However, critics of the death penalty have argued that one can accept a retributive theory 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”⁹².

Likewise in the case of **Salvatore Abuki Vs A-G**⁹³ , J.P.M Tabaro said,

“How are we to punish offenders through rehabilitation 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 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 ahead to picket others in attendance to witness the executions. So what is the utilitarian value of brutal, harsh punishment? In a civilized society the jurisprudence of a 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.

⁹¹ ibid

⁹² Amnesty International, Supra Note 22 at 5

⁹³ ibid

It is still argued that, the fact that today's penal system does not sanction the burning of an arsonist's home, the rape of a rapist or the torture, is not because they tolerate the crimes.

Instead, it is because societies understand that they must be built on a different set of values from those they condemn⁹⁴.

An execution cannot be used to condemn killing; it is 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 grounds that public accepts retribution. The government argued that if the death penalty is abolished, the people would lose confidence in government and they would take the law into their own hands⁹⁵.

There is a danger that those thought to have committed serious crimes such as murder and rape might be subjected to mob justice. The government clearly and appropriately considers it important that the civilian population should see that the authorities would punish those, both soldiers and civilians, who commit serious crimes against the person. There is, however, no good reason for punishment to be equated with execution⁹⁶.

For the government to seek to justify the death penalty because the population favours it, and that therefore if the government does not execute the people will themselves acts, 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 the use death would lead to a political collapse in the country, or that by using more human

⁹⁴ Tibaniana Mwene Mushenga; the Death Penalty and its alternatives, a paper presented at the Conference on the Death penalty in Africa at Ibadan Nigeria (1977)

⁹⁵ Amnesty International: The Death Penalty; A barrier to Improving Human Rights, 1993 P.2

⁹⁶ Genesis 9:6

punishments the government would lose credibility. In the end, the government accepts public opinion on the death penalty because it agrees with it⁹⁷.

However, in the case of **Rajendra Prasad Vs state**⁹⁸, the Supreme Court stated “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 criminal may not deserve death penalty. The crime may be less shocking than other murders and yet the callous criminal.”

Thus the justification of the death penalty on the ground of retribution seem to be outmode led in the civilized society like Uganda because, proportioning the severity of punishment to the gravity of crime does not require the primitive rule of a life for a life.

The Prevention Theory.

This theory attributes to the fact that the death penalty removes “dangerous” persons to create a “safer” society. It is argued here that the death penalty ensures that the dangerous criminal never commits the crime again⁹⁹.

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

The French Ambassador to Uganda Ms. Stephanic Rivol. During the International Day Against the Death Penalty on 11th Oct. 2017, said that the death penalty is not prevention not reparation, it is just revenge and added that abolition is a sign of respect for human life “it is a moral choice- Apolitical choice and here in Uganda, it’s your choice

It is argued that the policy of removal - for- requires for its success that those who have a disposition to commit crimes be identified. Also, “we argue that by removing

⁹⁷ Makwanyene Supra Note 12 at 90

⁹⁸ Amnesty International Supra Note 22 at 18

⁹⁹ Ibid

one dangerous person you do not remove crime or criminals generally.” Moreover, there are other ways and of prevention such as life imprisonment¹⁰⁰.

The death for prevention theory addresses the symptoms and not the root causes of crime. It wrongly presupposes 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.

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 liberty¹⁰¹.

This suggestion is a callous and immoral evasion of responsibility; the government should take steps to improve security and conditions in prisons and not deny prisoners the right to life for administrative convenience¹⁰².

Thus, the application of prevention theory requires scrutiny in Uganda, because the rate of crime in Uganda clearly shows that the death penalty cannot serve any prevention purposes.

The Populist Theory.

Retentionists argue that the death penalty is a popular form of punishment for serious crimes such as murder¹⁰³.

The position is reflected in the phenomenon of “**mob justice**”, where society takes it upon itself to punish criminals in mobs leading to their deaths¹⁰⁴. The most obvious that such punishments are mated out for all crimes and their intention is not always to kill the criminal.

¹⁰⁰ Constitutional Petition No. 2/97 at 12

¹⁰¹ Amnesty International, Supra Note 22 at 7

¹⁰² Ibid

¹⁰³ Amnesty International, Supra Note 78 at 3

¹⁰⁴ Ibid p.4

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

Furthermore, 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 attitudes differ from government policy, for example over health issues, government is always prepared to campaign to change those attitudes¹⁰⁵.

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

The issue is not what the majority of Ugandans believe the death penalty to be a proper sentence for murder. Rather, it is whether the death penalty 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 basis that they will find favour with the public¹⁰⁶. Therefore, if public opinion were to be decisive, there would be no need for constitutional adjudication.

Justice Jackson has in **West Virginia state board of education Vs Barnett**, commented that “one’s right to life, liberty, property, free speech, free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote: they depend on the outcome of no elections”¹⁰⁷.

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 the death penalty and how it is applied, many people might be more willing to accept abolition¹⁰⁸.

¹⁰⁵ Ibid

¹⁰⁶ Ibid

¹⁰⁷ (1979) SC 916

¹⁰⁸ Amnesty International, Supra Note 22 at 14

A similar view that public support is based on ignorance is seen by Justice Marshall of the Supreme Court in the case of **Furman Vs Georgia**¹⁰⁹ 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 support results from the lack of an informed citizenry.’

Uganda has been basing its decision to retain the death penalty 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 punishment¹¹⁰.

The researcher is of the view that the public’s support for the death penalty. For instance a large number of Ugandans are illiterate and have not been educated on relevant arguments, thus, the government would not be justified in torturing prisoners or prosecuting an unpopular ethnic minority simply because the majority of the public demanded it¹¹¹. When the death penalty is abolished, there is usually no great public outcry and it usually remains abolished¹¹².

The 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 offences¹¹³.

In the case of Uganda, this argument seems to be farfetched. Therefore, the arguments advanced above in favour of the death penalty, are un- convincing.

¹⁰⁹ Apollo N.Makubuya (2000): the Constitutionality of the Death Penalty in Uganda, a Critical Inquiry. P.228

¹¹⁰ Ibid at 229

¹¹¹ Amnesty International, Supra Note 78 at 4

¹¹² Ibid

¹¹³ Amnesty International, Uganda: The Failure to Safeguard of Human Rights (1992) P.58

That is the reason they are subjected to a lot of criticism. Hence, no need of retaining the death penalty under such argument.

CHAPTER FIVE

5.0 RELEVANT LAW ON THE DEATH PENALTY

This chapter examines the position of the death penalty in light of domestic and domestic legal provisions.

5.1 The 1995 constitution of the Republic of Uganda

There are currently 19 African 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:

“The right to life and dignity are the most important of all human rights, and the source of all other personal rights’. “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 everything 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 there by”¹¹⁴.

Article 22(1) of the Uganda Constitution provides that “No person shall be deprived of life internationally except in execution of a sentence passed in a fair trial by a court with competent jurisdiction in respect of criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellant court”¹¹⁵. It is the researcher’s opinion that the Uganda constitution

¹¹⁴ Chaskalson in the Makwanyane case at 101

¹¹⁵ 1995 Constitution

values human life as seen in Article 22(1) of the constitution, On the other hand the death penalty is recognized under the same constitution.

This is in line with the Indian constitution where, Article 2.1 of the Indian constitution provide that; "No person shall be deprived of life or personal liberty except according to procedure established by law".

In the case *Bachan Singh Vs State of Punjab*,¹¹⁶ the Supreme Court held that section 302 of the Indian penal code, which authorizes the imposition of the death sentence for murder, was not unconstitutional because there was a law, which made provision for the death penalty. It was therefore clear that capital punishment was specifically contemplated and suctioned by the framers of the Indian constitution when they adopted it in November 1949.

This thus holds true in Uganda, that the legislators contemplated the death sentence in Article 22(1) of the Uganda's Constitution. However, Article 24 of the Constitution of Uganda provides that; "No person shall be subjected to any form of torture, cruel, inhuman or degrading or treatment or punishment"¹¹⁷.

This provision is fortified by Article 44 of the constitution, which provides that "Notwithstanding anything in this Act, there shall be no degradation from the enjoining of the following rights and freedoms; freedom from torture, cruel, inhuman or degrading treatment or punishment"¹¹⁸.The death penalty is t constitutes, cruel inhuman or degrading treatment or punishment. This fact is clearly stated by Wright J in the case of the **people Vs Anderson:**

"Capital punishment is to be impressible and cruel because it degrades and dehumanizes all who participate in its processes. It is unnecessary to any legitimated goal of the state and is incompatible with the dignity of human kind and judicial process"¹¹⁹

¹¹⁶ SCC 684 (1980)

¹¹⁷ 1995 Constitution

¹¹⁸ Ibid

¹¹⁹ (1972) 493 p.2 d 880, 886

The Penal Code Act (cap 120)

The Penal Code Act (P.C.A) provides for a number of laws for the protection of and promotion of the right to life in Uganda. It likewise contains provisions that violate the same right as estimated under the 1995 constitution. The provision of the law which protects and promotes the right to life under the Penal Code Act includes;

Under section 187 of the Penal Code Act, every person who of malice aforethought causes death of another person by an unlawful act of omission commits murder. In this case regard the section duties, persons from unlawfully taking away the lives off often persons this being an offence of murder, the law prescribes a punishment of death sentence to the person charged and convicted under Section 189 of the Penal Code Act.

Under section 187 of the Penal Code Act, any person who by an unlawful act or omission causes the death of another person commits the offence of manslaughter under Section 187(2) defines an unlawful omission as an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health whether such omission is or is not accompanied by an intention to cause death or bodily harm. Section 190 of the Penal Code Act prescribes a punishment of imprisonment for life to anyone who commits the felony of manslaughter.

The protection of the Penal Code Act is also extended to unborn children with section 197 therein providing for the time when a child is deemed a person. Under that section, a child becomes a person capable of being killed when it ides completely proceeded in the living state from the body of the mother, whether it has breathed or not and whether it has an independent circulation or not and whether the naval string is severed or not.

The law under Section 190 of the Penal Code Act likewise condemns suicide pacts Section 198 therein provides for the limitation of time in connection of the person's act and the cause of death.

There are likewise offenses connected with murder and suicide and Section 204 of the Penal Code Act providing for the attempt to murder, section 210 providing for attempting to commit suicide, section 207 providing for the offence of written threats to murder and section 208 providing for the offence of conspiracy to murder. Basing on these provisions of the law, the commitment of the offence of murder and any other acts that are likewise in contravention of the right to life are prohibited under the Penal Code Act and forbidden therein.

Section 211 of the Penal Code Act forbids the concealment of the birth of a child with section 212 therein establishing the offence of killing unborn child as well as section 213 establishing the offence of infanticide. Basing on the provisions set out above, it's evident that the Penal Code Act grants protection to the people and not only the living people but even to those who are yet to be born.

The Children Act. [C.A] Cap 59

The Children Act cap 59 laws of Uganda also provides for the protection of the right to life amongst the children by providing for the things that are rendered relevant for the protection of the right to life among the children. Whereas section 2 of the Children Act provides for the definition of a child as a person below the age of eighteen years, section 3 therein requires that the welfare principles of the child and the child's rights set out in the first schedule to the Children Act are guiding principles in making any decision concerning the child.

Under section 5 of the Children Act, it's the duty of the parent or guardian or any person having custody of a child to maintain that child, and that duty gives the child the right to immunization, adequate diet, and medical attention, among others which are considerably vital for the protection of the child's right to life. With regard to the above provisions of the law, it's evident that the international and national laws grant protection to all groups of people and as such, they are available to safeguard the rights that are quite offended at the stake of violation.

Martial law

Uganda has two separate systems of criminal justice. That is to say that all Ugandan citizens are subject to the Uganda Penal Code Act, while soldiers are in addition subject to a separate military criminal regime under the National Resistance Statute Disciplinary code of conduct¹²⁰.

The National Resistance Movement (NRM), 1986 took up bold steps to incorporate into Ugandan 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 situations), which is applicable in non-operational situations, and it prescribes mandatory death sentence for treason, murder, rape, and disobedience of a lawful order leading loss of life.

Further still, the operational code of conduct defines a further series of offences, including desertion and disobedience of lawful orders, carrying a maximum penalty of death. These two codes of conduct were streamlined and submitted within the Uganda People's Defense Force Act¹²¹,

In the army, military disciplinary measures are taken through a system of courts ranging from unit court martial¹²², martial division court¹²³, General court¹²⁴, to court martial appeal court¹²⁵. Soldiers on operations are tried by a field court martial and executed if found guilty¹²⁶. It is thus observed that, this system leaves a lot of room for injustice as the field courts are often adhoc and the accused rarely represented by any legal counsel of whatever nature. There is also no appeal produce. However, soldiers have the right to legal representation by a lawyer from the army.

¹²⁰ The NRA Code of Conduct (Non Operation Situations)

¹²¹ Uppp/A Cap 307

¹²² *Id*; s.78

¹²³ *Id*; s.80

¹²⁴ *Id*; s.81

¹²⁵ *Id*;s.84

¹²⁶ *Ibid*.s.78

It is important to note that; since 1987 at least 40 soldiers have been executed by firing squads¹²⁷. In mid December 1990, two NRA officers were executed in Lira for cowardice and Mishandling of an operation in Kitgum district, which resulted in the death of several soldiers¹²⁸

The Uganda People's Defense Forces Act¹²⁹ provides, for a court martial appeal which has the jurisdiction to hear and determine all appeals all referred to it from decisions of the General court martial.

This procedure is subject to criticism in that it is the army lawyers who act as defense counsel for the accused, army officers who sit in these courts, and the army becomes the army that proffers charges against the accused soldiers. Thus, the institution of 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 defense counsel will defend 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 constitution¹³⁰ requires a problem lies the fact that a death sentence passed by the court martial and the field martial would not be confirmed by the highest appellate court as. In this way, executions made under this law would be unconstitutional. And as such, the committee on the prerogative of mercy is precluded by the constitution to consider cases decided by the field court martial.

Sharia law.

Under this law, the death penalty is prescribed for a range of offences including rape, murder and in some cases theft. The gravity of this law is mostly felt in

¹²⁷ Amnesty International;...at 59

¹²⁸ Id; at 60

¹²⁹ Supra note 62

¹³⁰ 1995 Constitution

Muslim states such as Sudan and Egypt.

The Death Penalty and the Right to Life.

The right to life is the supreme right of the human being¹³¹, and the bedrock of the concept of human rights that is universally recognized as an inalienable and inherent right to all.

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. This is clear in Article 9 of the South African constitution that provides that “Everyone has the right to life”.

Chaskalson P. emphasized that the right to life was the most fundamental of all rights and unqualified in the South African constitution. He stated:

“The unqualified right to life vested in every person by section 9 of our Constitution is another factor crucially relevant to the question whether the death sentence is cruel, inhuman or degrading punishment within the meaning of section 11(2) of our constitution¹³². The carrying out of the death sentence destroys life, which is without reservation under section 9 of our Constitution¹³³.

However, in the English case of *R Vs Home secretaiy*¹³⁴, Lord Bridge asserted that “capita] punishment imposed a limitation on the essential content of the fundamental rights to life and human dignity, eliminating them irretrievably”. As such, it was unconstitutional.

This statement was confirmed by Justice Chaskaslon where he stated that; the right to life and dignity “are the essential content of all rights take them away, and all other rights cease”¹³⁵.

¹³¹ Caniargo, Human Rights Committee, Communication No.45/1979

¹³² State V.T Makwanyane & M. Chunu case No.CCfl/3/94

¹³³ Ibid

¹³⁴ (1987)AC 514 at 531

¹³⁵ Chaskalson Supra note 73 at 59

In Uganda¹³⁶, the right to life is qualified to the extent that it may be taken away in execution of a sentence passed in a fair trial by a court of competent jurisdiction.

The jurisprudence in the Makwanyane case and the **R v Home secretary, Expert bugday** case discussed above provides a 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**” find its momentum in the provisions of Article 20 of the 1995 constitution which recognizes 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 enshrined in this chapter shall be respected, upheld, and promoted by all organs and agencies of government and by all persons”¹³⁷.

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

This is a very clear that neither a court of a law, which is an organ of the state nor the legislature is capable of condemning a person to death.

It can further be emphasized that, in the **Joseph Kindler V Canada** decision, the court was of the view that an individual’s right to life has been described as the most fundamental of all human rights, and that it is paramount and inherent, such a right cannot be compatible with the death penalty¹³⁸. 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.

¹³⁶ Uganda Constitution 1995, Art 22(1)

¹³⁷ Id Art 20 (2)

¹³⁸ Joseph Kindler V Canada, United Nations Committee of inhuman Rights; Communication No. 470/1991 at 23

Therefore, as was held in **S Vs Mtilongo**; the death penalty is the ultimate and the most incomparably extreme form of punishment. It is the last, the most 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 kind¹³⁹.

In the **Makwanyane case**, the South African constitutional court found that;

“The right to life is one antecedent to all the other 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, to be a part of a broader community, to share in the experience of human life that is at the centre of the experience of human life that is at the centre of our constitutional values. The community is recognized and treasured the right to life is central to such a society”¹⁴⁰.

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 criminals. So if at all the law seeks to protect the lives of people, then it would be superfluous for the law to uphold the 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 away on the other.

There is now evidence from the considered cases cite 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.

¹³⁹ (1994) 10 SACR 584, at 587

¹⁴⁰ Chaskason in Makwanyane case, Supra note 73

The Prohibition against Torture, Cruel, Degrading and Inhuman Forms of Punishment.

The death penalty is seen as a violation of 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 impermissible and cruel because it degrades and dehumanizes all who participate in its process. It unnecessary to any legitimate goal of the state and is incompatible with the dignity of human kind and judicial process¹⁴¹.

The United Nations Committee on Human Rights has held that the death sentence by definition is a cruel and degrading punishment just as the Supreme Court and the constitutional courts of Canada and Hungary have held respectively¹⁴².

In Uganda, Article 24 of the constitution provides that, "No person shall be subjected to any form of torture, cruel, inhuman or degrading treatment punishment". 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 enjoinder of the following rights and freedoms; freedom from torture and to cruel, inhuman or degrading treatment or punishment and a right to a 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 decisions of the courts in Canada, Hungary, South Africa and California stipulated above, this question can only be answered in the affirmative. Thus it is provided that Article 22 of the Ugandan 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

¹⁴¹ (1972) 493 p.2d 880, 886

¹⁴² Chaskalson in Makwanyane case Supra note 73 at 63

rights to life, but also amounts to torture and a cruel, degrading punishment. It is therefore unconstitutional and should be pronounced as such by the Uganda courts.

Thus, 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 instance, 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 and 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 have been regarded as inhuman, degrading or may be resolving to the new sensitivities, which emerges as civilization advances?¹⁴³

In the American, case of *Furman Vs the State of Georgia*¹⁴⁴, the death penalty was considered as; "Unique... in its absolute revocation of all that is embodied in our concept of humanity¹⁴⁵. 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 a 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 dignity¹⁴⁶.

In the same case, Justice Bremen emphasized the distinctive features of the penalty that highlighted the elements of torture and the cruelty it entails when he said; "Death is today an unusually severe punishment, unusual in its pain, in its

¹⁴³ Justice Gubbay in catholic Commission for Justice & peace in Zimbabwe V.A.G & Ors.

¹⁴⁴ (1972) 408 Us 238

¹⁴⁵ Per Justice Steward in *Id*; at 306

¹⁴⁶ *Id*; at 290-91

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 punishing criminals by death, for the prospect of pending execution 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 its finality and enormity. Death is in these respects in a class by itself¹⁴⁷.

It is seen in the **Californian case of the People Vs Anderson**, where it was held that; the cruelty of capital punishment lies not only in the execution itself and the pain incidental there to, but also in the dehumanizing effects of the lengthy imprisonment prior to the execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture¹⁴⁸.

Similarly, in *Earl Pratt Vs Jamaica*¹⁴⁹, the essential 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 time²³⁷, which renders his sequent execution unlawful.

This view was however, emphasized by Justice Liacos in the case of **District Attorney for the Suffolk District vs. Watson and other** when he said;

¹⁴⁷ Id; at 287-88

¹⁴⁸ Per chief Justice Wright, Supra note 82 at 894

¹⁴⁹ (1993) 2 LRC 39 Privy Council APP. No.10/1993

"The ordeals of the condemned are inherent and inevitable in any system that informs the condemned person of his 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 civilized no rest the condemned must confront this primal tenor 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 a specific death, not merely expect death in the 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 negation of his personality carries through the entire period between sentence and execution,"¹⁵⁰

A similar view was expressed by the supreme court of Zimbabwe that "from the moment he enters the condemned cell, the prisoner is enmeshed in a dehumanizing environment of near hopelessness. This is in a place where the sole object is "the living dead." He is kept only with other death sentence, prisoners with those appeals have been dismissed and who await death or reprieve; or those whose appeals are pending judgment. While the right to an 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, throughout all this time the condemned prisoner constantly broods over his fate. The horrifying specter of being hanged by the neck and the apprehension of being made to suffer a painful death is never far from mind."¹⁵¹

¹⁵⁰ (1980) 381 Mass 648, at 678-683

¹⁵¹ Catholic Commission for Justice & peace in Zimbabwe V.A.G & Ors, Supra note 84 at 268

The controversial issue on the death penalty was successfully handed recently in the land mark case of the **State V. T. Makwanyane and. Mehunnu**, where twelve of the most senior judges South Africa concurred entirely with the finding of the president of the constitutional court of South Africa that; death is a cruel penalty and the legal processes which necessarily involve waiting in uncertainty for the sentence to be a side or carried out add to the cruelty. It is also inhuman punishment, for it involves by its very nature 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 state¹⁵².

The United States Supreme Court has accepted that human dignity is at the core of the 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 thus inconsistent with the fundamental promise of the clause that even the vilest criminal remains a human being possessed of common dignity¹⁵³. 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 an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect¹⁵⁴."

That the death penalty constitutes a serious impairment of human dignity has also been recognized by judgments of the Canadian supreme court. In **Kindler Vs Canada**¹⁵⁵, three of the judges who heard the case expressed the view that "the death penalty was cruel and unusual; it is the supreme indignity to the individual,

¹⁵² Supra note 73 at 18-19

¹⁵³ Gregg V. Georgia. 428 US 153.230.

¹⁵⁴ 45 Bverf GE 228 (1992)

¹⁵⁵ CRR (2d)193 (1992)

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 other 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 Rights Committee of the United Nations in **Ng Vs Canada**¹⁵⁶ expressed the opinion:

“The committee is awaiting that by definition, every execution of sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article of the covenant.

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

The above analysis has also illustrated that Article 22(1) allowing for a death penalty infringes upon the right to life. And of article 24 and 44 of the constitution shows that any form of cruel, inhuman, and degrading punishment and treatment is prohibited by the constitution. 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 inhuman punishment is paramount and cannot under any circumstances be comprised, any other provision to the contrary notwithstanding.

¹⁵⁶ Comm. No 469/1991.5 Nov. 1995

This implies that although the death penalty is arguably envisaged by 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 any form of torture, cruel, inhuman and degrading punishment.

It is clear from the arguments stipulated in the foregoing discussion that, the death sentence by a law or the imposition in that sentence by court in accordance with 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 is the forgoing discussed above, on the provisions prohibiting torture, cruel, inhuman or degrading treatment or punishment as in Article 24 of the constitution.

Thus, it is evident from the authorities cited above, 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 Rights Initiative who petitioned court on behalf of the 417 condemned prisoners seeking to abolish the death penalty arguing that, the punishment was cruel, inhuman and degrading¹⁵⁷.

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

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

¹⁵⁷ The New Vision 29th Jan

5.2 RECOMMENDATIONS

In light of the arguments 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 a popular mechanism of punishment to offenders, and would be reluctant to abolish it, some recommendations made below may stimulate public debates on the abolition of the death penalty. These would gradually build public support for the abolition of the death penalty.

Education/ Raising Awareness

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 favors it. Thus open debate and wide spread education about crime and the death penalty would encourage people to develop an informed opinion. For instance at Makerere University in Uganda an experiment conducted in 1972 illustrated the importance of education. The report indicated that

A group of under graduates were asked to write down on a piece of paper what they thought should be done with murderers and armed robbers. Almost 90 percent of the responses were in favour of capital punishment for these crimes. After one academic year of studying criminology and sociology of deviance and crime, the same students were asked to write down what they thought should be done with such offenders; almost 90 percent stated that they strongly disapproved of the death penalty,”

The public must be educated or informed about the process of abolishing the death penalty¹⁵⁸.

It is recommended that the government first undertake to educate the masses to appreciate that the carrying out of constitutional and legal execution of wrong doers is barbaric and wrong. In the absence of such education and sensitization, the knowledge that those who murder, rape, ravage and carrying out aggravated robbery, will no longer be liable to be sentenced to death 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 by courts of competent jurisdiction.

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

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 first execution in eight years in 1995, and Zimbabwe resumed executions in 1995 after seven years, morocco did not carry executions for the 11 years before 1993.

South Africa imposed a moratorium on executions from 1990 before the death penalty was abolished for ordinary crimes in 1995. Moreover, in Malawi, moratorium was placed on execution in 1993¹⁵⁹.

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.

¹⁵⁸ The death penalty and its Alternatives, Tisbamanya Mwerw Mushanga, A paper read at the Conference on the Death Penalty in Africa at Ibadan, Nigeria, 3-8 October 1977

¹⁵⁹ Apollo Kakaire, (2003), death penalty; Total or partial abolitions, case for total

The main import of this recommendation is that; death penalty should be retained for exceptional offences. Death penalty has a deterrent effect, the threat of death, even if it is not enforced, still it has that deterrence, and responds to majority public opinion that favors the death penalty. Thus, this focuses on partial abolition first, because this will pave a way for total abolition.

Reduction of capital offences

Reduction of the scope of crimes punished by death is extremely necessary so that the death penalty is restricted only to the most serious crimes. As discussed Uganda military laws provide for over 20 offences that attract the death penalty¹⁶⁰. In addition, Uganda's penal code carries many offences whose maximum sentence is death including defilement, treason, murder and aggravated robbery¹⁶¹.

Recent decisions relating to these offences such as rape and defilement has revealed that judges are usually ready to give a maximum penalty of about 18 years imprisonment. This is evident that there are far too many offences in

Uganda's law books that unnecessarily carry the death penalty. There is a need therefore to review the number and gravity of 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 scrapped 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 penalty 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 waging or attempting to wage war against state. Japan retains it only for

¹⁶⁰ The Uganda people's Defence Force Act Cap 307 Law of Uganda 2000

¹⁶¹ Penal Code Act Cap 120, Laws of Uganda 2000

executing those who commit extremely heinous offences for example murder. In Africa Egypt reserves the death penalty for cases with certain aggravating circumstances, such as where the murder is premeditated or planned, say as in poisoning¹⁶². This shows a good ground for Uganda to reduce the scope of the many offences that carry the death penalty.

Mandatory death penalty sentence

In Susan Kigula's case the court concluded that mandatory death sentences were an "intrusion by the legislature into the realm of the judiciary" and that "parliament has no power to enact which is arbitrary, unfair, unjust, fanciful or oppressive yet the mandatory provisions do just that"¹⁶³. 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 principles of equality before the law and fair trial".

In Uganda, certain laws are framed in such a way that presiding judges have no option to the punishments to be meted out to the convicts. That is to say, they are mandatory. The recommendation is that, the presiding judge must be given the option either to impose the death penalty or another punishment depending on the circumstances in which the offence was committed.

The mandatory death penalty sentence imposed by such as the penal code Act¹⁶⁴ with respect to offences such as murder, treason and robbery with a deadly weapon¹⁶⁵, should be removed.

This dissertation argues that, the death penalty should only be retained as an option to the used in "extreme" cases where there is no reasonable prospect of reformation and the objects of punishment would not otherwise be achieved by other sentence. Such phrases in Uganda's statutes as "shall suffer death" should

¹⁶² C.K Karusoke (2003), The case for Partial Abolition the URC Monthly Magazine P.11

¹⁶³ Ibid. Judgment of Twinomujuni IA, PP.46-49

¹⁶⁴ Penal Code Act Id at 5

¹⁶⁵ Id, SS. 243(1), S.23(d), S 286(2) respectively

be replaced with the more flexible expression such as “shall be liable to suffer death.” As is presently the case for offences such as rape, defilement, kidnap with intent to murder. The maximum penalty for these offences is death, but the judge has permitted discretion. The same discretion followed in these offences should be applied in other situations when dealing with cases that carry death as a sentence.

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

This research has shown that convicts of capital offences that do not carry a mandatory sentence have rarely been sentenced to death in the recent past. This could therefore be a 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 abt0 of the penalty.

Thus, the discretion could pave the way towards abolition of the death penalty. I argue the Government of Uganda to follow that trend. Since this direction would be exercised by judge sit can be argued that it would not be utilized arbitrarily. -

Constitution litigation

In Susan’s Kigulla’s case, by a 3 to 2 majority, the court held the mandatory death penalty violated Article 21, 22(1), 24, 28, 44(a), and 44(c) of the constitution. This was a landmark decision and illustrates how constitutional petitions can be utilized to change provisions that violate constitutional provisions.

Article 50 of the Uganda’s Constitution provides that; -

1) Any person or organization who claims that his fundamental rights or freedom guaranteed under this constitution has been infringed or threatened is entitled to apply to court for redress.

2) Any person or organization may an action against the violation of any person's right.

3) Any person aggrieved by any decision of the court may appeal to the appropriate court. This Article in essence creates the right to a higher court a constitutional court in the event of violation or the 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) provide that; Any person who alleges that; (a) An act of parliament or any other law or an thing in or done under the 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”.

This is further constitutionally safe guarded by Article 132(3) of the constitution, which provides that; any party aggrieved by a decision of the court appeal sitting as a constitutional, court is entitled to appeal to the supreme court against the decision.

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

A need for a practical right of appeal.

Article 22(1) of the constitution provides that: Nobody can be executed in enforcement of court sentence unless that sentence is confirmed by the highest

appellate court of Uganda¹⁶⁶. This implies that there is a right of appeal against a sentence. There is a doubt that an appellate court can quash or set aside the sentence that has been passed, where it is mandatory provision of the law to reverse the decision of the lower court.

It is important to note that an accused that is sentenced to death can be considered for presidential clemency as stipulated in Article 121 (4) of the constitution.

This is exercised by the president, and in any event only upon the recommendation of the Advisory committee on the prerogative of mercy. It should be remembered that the Advisory Committee discusses the case only from the court record and the trial judge's report¹⁶⁷. The accused is never actually heard again even if he or she raises a defense to the sentence.

The researcher recommends that,

There is also need for proper appeals within the military courts, as the death penalty is greatly used for the military most of the death penalty used in the military. Most of the death sentences are passed by the field court martial without any provision for counsel, opportunity for appeal, or essential guarantees of fair trial.

Although the Uganda People's Defense Force Act¹⁶⁸ statute attempts to provide for appeals, it does not go far enough. Under this statute, the appeal procedures are available in theory but in practice they are hardly ever followed. That is why it is recommended to provide for a practice right of appeal in order to avoid convicting the innocent in Uganda, and this will propel the abolition of the death penalty.

¹⁶⁶ 1995 Constitution

¹⁶⁷ Article 121(5)

¹⁶⁸ UPDF ACT CAP

Protection of the disadvantaged convicts.

A every important reform needed in the criminal procedure system is provision off the supplementary opportunity and facilities to the accused to prepare his or her defense considering the severity of the sentence he or she is liable to suffer upon conviction. This requirement is in line with the constitution, which imposes a duty on the state to provide legal representation to the accused in offense that carries the death penalty¹⁶⁹. However, the provision of the article alone is insufficient.

In Uganda, there is a practice of handing 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 which 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 reduced¹⁷⁰.

Thus the researcher recommends that, considering the fact that the majority of capital offenders are economically disadvantaged people, it is necessary to ensure greater protection for them. In this regard, it might be desirable to increase the number of legal counsel commissioned to handle such defense. Such counsel should have sufficient recourses made available to them by the state and should be advocates with experience in criminal law practice.

Addressing the Socio-Economic Factors

The main argument for the retention of the death penalty is that it deters crime rate. However as discussed in the dissertation, this is not necessarily the case. Socio-economic factors play a big role in promoting crime. There is therefore an urgent need to address the relevant socioeconomic factors such as poverty, inequality, access to justice, and unemployment; strengthening social standards

¹⁶⁹ Uganda Constitution, Supra note 11

¹⁷⁰ Makaany are case, Supra note at 38

on and attitudes towards crime prevention, detection and arrest of offenders; programmes to address the needs of victim, 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 the death penalty.

Alternative of a Life Imprisonment

Life imprisonment seems to be an adequate and human alternative to the death penalty. Life imprisonment should mean imprisonment for life of the offenders, not subject to release. There is no rational reason to limit life of imprisonment to twenty years. In other words, the mandatory death penalty 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 thus help an offender to reform and also allow him to be forgiven and forgive.

5.3 CONCLUSION

In the words of Albert Camus, "There will be no lasting peace either in the hearts of individuals or in social customs until death is outlawed."¹⁷¹

This research has outlined and critiqued the main arguments supporting the retention of the death penalty and arguments for its abolition. It has analyzed the legal basis for the death penalty in Uganda with respect to the right to life. Generally, this research holds that, the death penalty offends the concept and the law on human rights and that it is inconsistent with the contemporary trend of international criminal law. It is further manifested that death penalty is cruel, inhuman and degrading treatment that is unacceptable under 'my circumstances whatsoever' under both international law and the domestic legislation in Uganda.

¹⁷¹ Apollo Kakaire, *Supra* note 3 at 8

The death penalty should therefore be abolished. In the words of Albert Camus, 'There will be no lasting peace either in the hearts of individuals or in social customs until death is outlawed¹⁷².'

In the intervening period before the abolition of the death penalty, it is recommended that the relevant laws should be amended to outlaw mandatory death sentences. In tandem with this, no more capital offences should be created. If public opinion continues to favour the death sentence, it should be limited 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. Otherwise life imprisonment seems to be adequate.

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

However, it is acknowledged that the process of abolishing the death penalty in Uganda is still a complex one. The struggle for its abolition must however go on; human rights lawyers and all other stakeholders must continue to advocate for the abolition of the death penalty by law if not by the constitution or to challenge its execution using human rights standards. In addition, the process of abolition should involve all stakeholders including judiciary, the lawyers, legislators, and concerned NGO in order to generate the necessary support.

Therefore, while there are encouraging signs in Uganda indicating that the death penalty should be abolished, public opinion needs to change before there is wide spread acceptance that it is no longer an acceptable punishment. In Susan Kigula's case, the petitioners advised the court to focus solely on the constitutionality of the death penalty and urged the judges to disregard public opinion, public policy and even their own personal views on the death penalty. The petitioner merely aimed to challenge the constitutionality of their death sentences and replace them with "alternative, severe but lawful" forms of

¹⁷² Apollo Kakaire, *Supra* note 3 at 8

punishment such as life imprisonment. They were not contesting their clients' convictions, and wanted to pre-emptively dispel any media allegations that they were attempting to set capital convicts free. The effort currently made to abolish the death penalty will at the very least help to stimulate public debate about the abolition of the death penalty in Uganda. In this conclusive remarks, reform and forgiveness as cardinal principles of a religious life should be considered.

Hopefully, many arguments canvassed above will find a receptive audience and help to change the public's perceptions of the death penalty in Uganda and this will be a road to its total abolition.

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