

**DEATH PENALTY AND HUMAN RIGHTS IN UGANDA**

**A CASE STUDY IN UGANDA**

**BY**

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## **A LIST OF ABBREVIATIONS**

- 1.LDC –Law Development Centre
- 2.UDHR-Universal Declaration Of Human Rights
- 3.ICCPR – International covenant on civil and political rights
- 4.ECHR - European Convention Of Human Rights
- 5.ACHPR – African Charter Of People And Human Rights
- 6.FHRI – Foundation For Human Rights Initiative
- 7.CAP – Chapter
- 8.SEC- Section
- 9.BC – Before Christ

## DECLARATION

I Shehe Gladys Pendo of registration no. **LLB/7208/52/DF** hereby declare, this special study paper is my own original work and not a duplication of similarly publish work of any scholar for academic purpose a partial requirement of any university or otherwise .It has therefore never been submitted to any other institution of higher learning for award of my degree of bachelor of laws. I further declare that all materials cited in this paper which are not my own, have been duly acknowledged.

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## **DEDICATION**

This paper is dedicated to my beloved parents: Mr. Andrew Shehe Chai and Mrs Isabellah Harusi Shehe not forgetting my beloved brothers Isaac Lucky Shehe, Daniel Gift Shehe, Paul Chai Shehe My In law Josephine Shehe, Michelle Shehe my niece, My Friends Eddie Ndahura, Linda Nyamwata, my classmates and my entire well wishers who had been supportive and encouraging in the achievement of my goal.

My lecturers and my supervisor Mr. Godfrey Himbaza despite of the tough schedule he had.

May God bless them abundantly.

I also thank God for the protection he gave me.

The information has made me succeed in my degree course.

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**Abstract**

The researcher carried out the study on death penalty and human rights in Uganda a case study in Kampala.

The researcher discussed the following topic in chapter one. An overview, death penalty and international and domestic instruments, effects of death penalty and conclusion and recommendations.

## CHAPTER ONE

### 1. 0 An overview

This study dealt with the question of the death penalty and human rights in Uganda which is an infringement of human rights under the **1995 constitution of Uganda article 22** of which provide for the right to life and that no one should violate it.<sup>1</sup>

Thus the study was intended primarily to critically analyze legal framework rationale for this right other incidental rights.

The study further substantial and analytical uncurthed they weakness and strengths underpinning the rights to life under articles of the Ugandan constitution.

Also the way purpose of the present study is to examine the extent to which prisoners are not enjoying **article 22 of the 1995 constitution of Uganda**.

Another purpose of the study is to examine the extent to which prisoners whose rights are being enshrined in provision of that statute against the counter agreement that's such rights might be another of the constitutional .Theoretically by government of promising human rights to the people sat the same spear heading the violation of human rights.

Finally the main gist of the study is to see whether death penalty in Uganda should abolished or retain and if so what could be the reason for that.

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<sup>1</sup> Article 22 of the 1995 constitution of Uganda

### **1.1 Introduction /background to the study**

Death penalty means imposition of a sentence of death by a court of competent jurisdiction upon an offender found guilty and convicted of criminal offence punishable by death in a fair trial and after due process of law.

In addition to this under **article 22(1) of Ugandan 1995 constitution** provides that "one's life may be taken in the execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of criminal offence". Under the law of Uganda offences punishable with death include murder, kidnap with intent to murder, aggravated robbery, terrorism, treason, rape and defilement.

However **human right** was defined by **Thomas Aquinas natural law** as rights given by God that could not be taken away from man and human beings should live in peace and harmony with each other for example right to life under the **1995 constitution**.<sup>2</sup>

### **1.2 The genesis of the law on death penalty.**

Historically the law and philosophy underlying the use of death penalty in Uganda can be traced to the development of criminal law in England just like other laws criminal law in Uganda is largely a colonial legacy introduced in Uganda under a reception clause of 1902 Uganda Order in Council.

Also the earliest historical records containing evidence on capital punishment can be traced in the code of Hammurabi of **1750BC** which prescribed death penalty for more than 30 different crimes ranging from murder for instance in **Exodus 21:14** to adultery.

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<sup>2</sup> Social foundation of law page 67



The draconian code of ancient law went further imposing capital punishment for every offence.

End 15<sup>th</sup> century English law recognized seven capital crimes for instance treason, murder, larceny, burglary, rape, robbery with violence and hence 200 capital crimes were recognized and per year like 1,000 people were sentenced to death.

However criminal law in England developed simultaneously with English society per **Robert Seidman** the law on penal punishment in England developed in five stages.

First stage was primitive stage in this period crimes were punished with harsh sanctions the commonest penalty for felonies being death.

Second stage witnessed the emergence of the concept of retribution where punishment was designed to fit the crime.

The emergence of this concept coincides with the circulation of natural law and right theory that emphasized the right and power which a human being could upset.

Third stage was retribution of the basis of punishment that was articulated by 18<sup>th</sup> and 19<sup>th</sup> century rationalist like **Jeremy Bentham** philosopher is under this stage advocated a utilitarian approach to the law and sought to derive principle of punishment from human nature holding that the basic objective of criminal law was to deter potential criminals.<sup>3</sup>

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<sup>3</sup> Sydney Smith editor of Edinburgh review 1830

Fourth and fifth stage in developing of this school of penology emerged to cater for categories of criminals who by themselves lacked the capacity to be declared by the punishment .It was determined to a certain extent by the environment and personal history for instance when the criminal and the crime products of social economic .

To these categories of criminals therefore the goal of punishment was seen as reformation and rehabilitation.

In addition to this in pre-colonial era in Uganda it is generally accepted the use of death penalty in Uganda during the pre-colonial period is restricted to anthropological studies. Nevertheless on the basis of available studies the most scholars maintain that capital punishment was in principle employed by several tribes in pre-colonial Uganda for crimes such as murder, witchcraft, treason and incest.<sup>4</sup>

Although there are no records or statistics on the overall number of executions carried out during the pre-colonial period same commentators maintained in the traditional Uganda societies execution were uncommon as the emphasis of criminal sanctions was more on reconciliation and restitution than on punitive measures.<sup>5</sup>

For instance although the **Baganda** would occasionally impose the death sentence in the most cases the sanctions imposed upon a murder would be the payment of blood money comprising seven head of cattle to the next of kin of the deceased .Thus the death penalty was predominantly impose in cases of intra family homicide where it was considered in

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<sup>4</sup> Towards abolition of the death penalty in Uganda page 1para 2

<sup>5</sup> Emmanuel kasimbazi ,death penalty in Uganda presented on commonwealth Africa 10-11 may 2004

It did so as an exception not as a law and it was not institutionalized as it is at present it is almost undeniable that the death penalty did exist in pre-colonial Uganda. Nonetheless it would be enormously to assume that the executions were prevalent uniforms practiced or in any way was culturally entrenched among the diverse communities that from the territory of modern day in Uganda.<sup>9</sup>

### **1.3 The 1962, 1966 interim and 1967 constitutions**

The short-lived 1962 independence constitution's primary concern was "to accommodate pre-colonial political structure within the new Uganda, by granting federal status and other privileges to Buganda and its monarchy."<sup>10</sup> Nonetheless, this document also enshrined a number of fundamental rights modeled on the Universal Declaration of Human Rights in Articles 17 to 33. The right to life provision in **Article 18(1)** provided that: "No person shall be deprived of his life internationally save in execution of the sentence of a court in respect of a criminal offence under the law of Uganda of which he has been convicted", thereby providing for a qualified right to life, which permitted the imposition of the death penalty pursuant to a criminal conviction.

**Article 21 of the 1962 constitution** codified the right not to be subjected to "torture or to inhuman and degrading treatment", but limited its exercise by virtue of a "saving-clause" found in **Article 21(2)** which, in a language very similar to equivalent clause found in **Article 21(2)** Independence Constitutions of several Commonwealth Caribbean states, barred the invalidation of any punishment prescribed by a law

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<sup>9</sup> Lilian Mankwa Chenwi towards abolition of death penalty chapter 2 and 3, <http://upetd.up.ac/thesis/etd-10062005-151306>

<sup>10</sup> Francis Ssekandi and Cos Gotta, 'Protection of fundamental human rights in the Uganda constitution', 26 Columbia Human Rights Law Review 191 (1994)

that was in force in Uganda immediately before the coming into force of the Constitution.

The 1962 constitution was subsequently replaced by the 1966 interim and the 1967 constitutions following Milton Obote's rise to power. The 1962 constitution framework work considerably weakened the protection of fundamental rights and freedoms in many and significant ways. Although the 1967 constitution contained the bill of rights in chapter III these rights were expressly subordinate to overriding states interest which empowered the government to impose states of emergency without limitation and exercise extremely broad of search seizure and arrest without trial.<sup>11</sup>

The language of the right to life found in **Article 8 of the 1967** constitution mirrored that of its counterpart it provide for a qualified right to life that could be limited pursuant to a criminal conviction in a court of competent jurisdiction. Similarly the prohibition against torture inhuman and degrading treatment and punishment found in **Article 12** was like in the 1962 constitution subject to limitation through a 'saving clause.'

#### **1.4 (a) Offences that warrant death sentence**

##### **Mandatory sentences**

##### **(i)Aggravated robbery**

Under **section 286(2) of the penal code Act Cap 120** laws of Uganda imposes the mandatory death penalty upon conviction for aggravated robbery.<sup>12</sup>The subsection defines aggravated robbery as situation where at the time of or immediately or immediately after the time of the robbery an offender uses or

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<sup>11</sup> Ssekndi and Gitta ,protection of fundamental human rights in the Uganda constitution ,”26 columbia human rights law reviw 191 (1994)

<sup>12</sup> Section 286 (1) of penal code act chapter 120

threatens to use a deadly weapon or causes death or grievous bodily harm to any person. It is arguable that the imposition of the death penalty for the robbery particularly given its mandatory nature violates Ugandans obligation under international law not to impose the death penalty "but for the most serious crimes" and contravenes the well international census of the international communities surrounding the imposition of the death penalty for non fatal offences <sup>13</sup>

In addition to this the constitutional of death penalty for robbery has been successfully challenged in a number of retentions jurisdiction .For instance in the united states in **1982** ruling in **Enmun v Florida**<sup>14</sup>it was stated that although robbery is a serious crime that deserves a severe punishment robbery is not a crime that is so grievous an affront to humanity that the only adequate response may be the penalty of the death and that robbery was clearly distinguishable from murder in the sense that a murder victim loses their life forever whereas robbery victim loses some tangible object that is right fully theirs .

## **(ii) Treason**

The imposition of capital punishment for treason or treasonous offences has been known for its staying power even amongst states that have abolished the death penalty for ordinarily crimes.<sup>15</sup>

Treason is a violation of **section 23 of the penal code No.25(1) and 2 in penal code cap 120 laws of Uganda and section 2** of the same Act. It is also another offence carrying the mandatory death penalty in Uganda .Additional **sec 23(3)** dealing with incitement to commit mutinous or treacherous acts provide for maximum discretionary sentence of death.

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<sup>13</sup> The question of death penalty ,61<sup>st</sup> session 2005

<sup>14</sup> 458 us 782 1982

<sup>15</sup> Commentary and critique of abolitionist strategies,"26 ohio northern university law review 625,640(2000)

It is worth noting that the aforementioned constitutional review commission's final report "omitted" treason from the list of crimes that should attract mandatory death sentence, which tacitly indicates the commission's opposition to the imposition of capital punishment.

Although the government has reportedly arrested and charged unprecedented numbers of the people with this crime since 1986 these detentions have done little to increase the size of Uganda's death row population as individuals arrested and charged with it are rarely prosecuted and seldom convicted or executed.

Treason although a capital crime in Uganda appears to have more of a practical nexus with human rights violations such as arbitrary detention, torture and government infringement on the rights to freedom of association and political participation than it does with any fundamental rights issues arising in relation to the death penalty where its role appears to be limited to that of a coercive tool.

#### **(iv) Kidnapping with intent to murder**

Kidnapping with intent to murder is found in section **243 of the penal code act cap 120 laws of Uganda**. It provides for a discretionary sentence of death upon conviction but evidence indicates that capital punishment is not regularly handed out for the crime as the only 2 individuals were on death row for kidnapping as of July 2005.<sup>16</sup>

#### **(v) Rape and defilement**

Under **section 124 of the penal code Act laws of Uganda** prescribes a maximum discretionary sentence for the crime of rape and **section 129 (3)** which also prescribes a maximum sentence of death for this crime that any person who performs a sexual act with another person who has unlawful carnal knowledge of a woman or girl without her consent, if the consent is

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<sup>16</sup> Page 22 para 2 towards the abolition of death penalty in Uganda

obtained by force or by threats or intimidation of any kind or by fear or bodily harm or by means of false representations as to the nature of the acts or in the case of married woman by impersonating her husband commits a felony termed as rape.

#### **(vi) Terrorism**

On 7<sup>th</sup> June the anti terrorism act came into force in Uganda. In enacting this legislation Uganda joined the ranks of countries that have adopted anti-terrorist legislative measures in the aftermath of the 9/11 attacks. The Ugandan government's initial justification for this legislation was the wave of terrorism in the capital Kampala from late 1997 to 1999. In which 160 people were injured and more than fifty died.<sup>17</sup>

Under **section 7 of anti terrorism act** it provides for a mandatory death sentence if the terrorist offence in question result in the death of any person and discretionary in any other case. The possibility of receiving a death sentence upon conviction under the terrorism act is of a particular concern given that allegedly the statute appears to cover a wide range of activities and overlaps significantly with other existing common law or statutory crimes which could be misused to prosecute peaceful protestors and dissenters.<sup>18</sup>

**Section 7 of the act** adopts a broad definition of terrorism, which it clarifies as "any act which involves serious violence against a person or serious damage to property, endangers act), creates a serious risk to the health or safety of the public"

Additionally, terrorist Act s must be "designed to influence the Government or to intimidate the public or a secretion of the public", and to further the

<sup>17</sup> Human rights watch, state of pain : torture in Uganda ,'' march 2004, <http://hrw.org/reports/2004/Uganda> 0404/index.htm

<sup>18</sup> The anti corruption act ,2002(Uganda),'' march 2004 ,no.33 vol.xcv, june 2002, printed by uppc ,entebe ,by order of the Governments



advancement of a political, religious, social or economic aim". Although no death sentence has been handed out under the **ATA 2002** to date, there is ongoing concern among civil society about its potential misuse against those in the media and public life who have divergent views".<sup>19</sup>

#### **(vii) Murder**

Under **section 189 of the penal code Act**, the mandatory sentence for the crime of murder is death<sup>20</sup> under the provision of the **penal code cap 120 laws of Uganda** it provides that "any person convicted of murder shall be sentenced to death". This means that upon a conviction of murder, high court judges are precluded from exercising their discretion and have no choice but to send the accused to the gallows. Further, the defendants convicted of murder at first instances may only appeals against the conviction but not sentence.

### **1.5 Statement of the problem**

The right to life is one of the fundamental rights and entitlements of the prisoner and here comes people are executed to death. For instance under the provision of the constitution of Uganda **article 22** which provides for right to life that is inherent to all and no one should violate it so it our right to fight for the peoples rights which are violated like the right to life.

The human rights activists should preach against the violation of human rights and also the aggrieved party should work hand in hand to advocate for their rights.

### **1.6 Hypothesis/Research questions**

- i. That the absence of a well coordinated mechanism of experiencing human rights has contributed to the gross violation of the rights of the imposed to play a critical role in the protection of right to prisoners.

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<sup>19</sup> Human rights watch ,state of pain :torture in uganda," march 2004

<sup>20</sup> The penal code Act ,chapter 120 of the laws of Uganda ,sec 189: "any person convicted of murder shall be sentenced to death"



- ii. That the existing legislation and government policy requires modification and qualification to comply with the states obligation under international human rights.
- iii. That the criminal justice system plays or is imposed to play a critical role in the protection of right of prisoners.
- iv. That the state should play a role and discuss critically the reasons as to why death penalty should be abolished and retained.

### **1.7 Objective of the study**

The study was premised on the following objectives:-

The main objective of the study is to postulate the nature and the scope of the right to life aid and to critically discuss the reason of sustaining abolishing death penalty.

**The specific objectives as here under:**

- i. To examine the origin and essence of of the right to life accruing to prisoners.
- ii. To explain the and role the criminal justice in the protection of the prisoners rights
- iii. To ascertain the obstacles to realization of prisoners right and purpose appropriate recommendations
- viii. To critically discuss the reason for abolition and retaining death penalty

### **1.8 Methodology.**

My research employed both qualitative and quantitative methods focused groups' discussion and interviews.

However due to the fact that the some ground data was necessary to back up the theory with the practice in Uganda.

It was researchers considered view that a combination of the quantitative and qualitative methods would produce the desired goals.

### **1.9 Library research**

The methods of research that I employed included the library research, human rights library, makerere university library, Uganda human rights commission rights and Kampala international university library.

### **1.10 Interviews**

Interviews were conducted with persons knowledgeable about the right to life and other incidental rights of prisoners those working with advocacy organization such as legal aid project of Uganda law society, legal aid clinical at law development centre(LDC) other relevant sources of information such as internet.

### **1.11 Scope of the study**

The study covers how far the right of prisoners whom their right to life for instance penalty under 1995 constitution have been realized.

The study is carried out and within Kampala with a specific interest in the period of **2000-2009**.

### **1.12 Literature review**

Death penalty and human right for instance right to life as provided under **article 22 of 1995 constitution** has been the subject of a great deal of research.

However this study has essentially given due treatment to what has been written on this subject of the right to life and outside jurisdiction as the latter

aspects will aid a lot in bringing the research paper in the advanced stage of a comparative analysis.

Therefore this paper assesses and reviews the existing literature the research paper will supplement the existing knowledge and integrate all the crucial issues behind the rights of prisoners who are executed to death sentence.

According to **article 22 of the 1995 constitution** it provides that no one shall be deprived of the intentionally except in the 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 appellate court but however accordingly there is a violation of human rights despite the provision of the constitution.

Due to the mode of execution, for example hanging, electrocution, lethal injection and firing squad, death phenomena like sent to death spend several years without execution. Hitting the head of the prisoner to death that's cruel and brutal as a form of torture and violation of human rights under the constitution of **Uganda article 22**.

**Sydney Smith of Edinburgh in his book** "the editor of the Edinburgh review 1830" wrote that when a man has been proved to have committed a crime it's expedient that a society should make use of that man for the duration of crime he belongs to them for the purpose, but I believe that no one should take the law into their hands but the society is supposed to take the appropriate procedure of handling a criminal instead of stoning the criminal or sentencing that criminal to death.

**Per Robert B. Seidman** in his book *A Sourcebook of the Criminal Law of Africa* 1966 page 548 .11<sup>th</sup> continually English law recognizes seven capital crimes

that were treason, larceny, burglary, rape, and arson and result more than 1000 people would be sentenced to death.

In my view the capital offenders should be given harsh punishment that when they do it they feel that they should never do it again because of the pain they will encounter but not be sentenced to death. once someone is sentence to death just a minute to die he/she wont feel guilty or she wont suffer and at last he will die without suffering and hence the some members of the community will commit the same crime .so the stat e should impose a harsh punishment to capital offenders instead of death penalty.

The decision of **judge Hiemisha** also in the case of **R.v.majafe<sup>21</sup>** is very important. He noted that "there are various factors that influence punishment .one of them is the deterrent effect which punishment has on others ....that aspect is in this and other cases more important than it is in the genera run of cases" in **Uganda government per Abu Mayanja a former deputy prime minister of justice and attorney general of Uganda** "the death penalty is a strong deterrent to crime in a socially deprived society. In my view it is not due to the fact that the offender dies and the crimes are still be committed .For instance those capital offenders then instead they become coward of the punishment they end up commit more capital crimes and the number of prisoners to be executed to death are still high and they increase daily so death penalty is not a strong deterrent to crime in a society deprived society but instead it just violate the right too life as provided under the **Article 22 of the 1995 constitution laws of Uganda**.

Also in his article :*Reflections of a judge n the death penalty in Uganda Ltving Law Journals .vol.2.no.1 of June ,page 96,Prof.G.W Kanyeihamba,JSC* observed that a lawful punishment can not be said to be torture ,cruel

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<sup>21</sup> (1958) 2 SA 118

,inhuman and degrading punishment to the one who is be in punished and his family ,relatives and friends. He further stated that an example of a sole winner with a family and wives who is imprisoned even for just one year, there will be no food at home and the children will do out of school.

Many inmates experience their time in prison as torture,cruel,inhuman or degrading and many people loose their dreams in future of things like homes, cars and fortunes also they experience this as torture.

He also argue that death penalty is a torture and inhuman as a violation of human rights under **article 22 of the 1995 constitution**. The suffering is the necessary consequence of justice and retribution. He who has caused other people pain will have to count on taking part of the pain also it's the price to pay for the heinous crimes that he has committed against his fellow men, but not death penialty atleast another type of punishment that will not inflict much pain in someone body because life is precious and inherent to all people in our society.

According to **Roger Hoods** words in his book of **the death penalty :a world wide perspective,2<sup>nd</sup> edition 1966,oxford:crarendon press,p.6,para.23** his issue was whether death penalty deters people but whether when all circumstances surrounding the use of capital punishment are taken into account .He further argued that death penalty is frequently raised by governments to support their retentionist position .also in my view I argue that death sentence is just <sup>Thera</sup>~~their~~ in practice but in real sense it doesn't help anything but violating the life of a prisoner in our society and I think it is just practiced so as to support the retentionist as **Roger Hoods said**.

## CHAPTER TWO

### 2.0 Death penalty and international and domestic instruments

The examples of international instruments are: **Declaration of Human Rights, African Charter of People and Human Rights, International Covenant on Civil and Political Rights system** and the **1995 Constitution Republic of Uganda**.

#### 2.1 Universal Declaration of Human Rights

The adoption in **1948 of the universal Declaration of human rights (UDHR)** which has been described as the cornerstone of temporary human rights law<sup>22</sup> marked the first of a number of patterns of international debate on the death penalty. The main provisions in the declaration relevant to capital punishment are **Article 3** which provide for right to life and **Article 5** which provide freedom from torture, cruelty, inhuman and degrading punishment through **Article 5** which wasn't linked to the penalty in the beginning.

In addition to this **Article 3** omits an explicit references to capital punishment but its apparent neutrality has been interpreted as a compromise between accepting it as necessary evil and granting recognition of its inescapable implication of human rights issues.

Finally it has been argued that **Article 3** indicates a common aspiration towards eventual abolition

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<sup>22</sup> William A Schabas Cambridge University third Edition 2002 pg 23

## **2.2 The International Covenant on Civil and Political Rights (ICCPR)**

The coming of international covenant on civil and political rights in 1966 and it's coming into force in 1976 didn't abolish the death penalty. In some countries attempted adherence to abolition as a goal.

**Article 6 of the ICCPR** restricts the imposition of the death penalty to the most serious crimes commission and pursuant to final judgment rendered by a competent court.

Moreover the provision recognizes the light to seek pardon or commutation of sentence and both the imposition of death sentence on pregnant women and people who were under if when they committed the crime.<sup>23</sup> In addition to this during the process of **Article 6 ICCPR** no decorations attempted to defend the death penalty the death parse.

Commentators have argued that the preparatory works of **Article 6** any reveal rare and equal equivocating limits of support for the death penalty.

## **2.3 The Inter American System**

The system has attempted to restrict and abolish capital punishment in its member states by adopting different instrument. **Article 4 of American Convention of Human Rights** permits the imposition of capital punishments subject to the same restriction found in the **ICCPR**, and **ECHR**. The **ECHR** however includes additional limitations on the death precut that the people under if years and over to committed of political offences can't be sentence to death and once a country has introduce it. It can't be reintroduced.<sup>24</sup> Nonetheless a small number of funs diction retain death penalty such as give tamale a where the last exaction responds took place in June 2000.

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<sup>23</sup> Article 6(4) ICCPR

<sup>24</sup> ACHPR PAC and Son Jose

## 2.4 The African Human Right Systems

**Article 4 and 5 of African Charter on Human and Peoples** right through not expressing reframing the death penalty period sanitary deprivation of the right to life as well as degrading treatment and explosion including torture cruel and inhuman treatment. Some commentators have interpreted these provisions as approving of the death penalty as provided it isn't imposed arbitrarily<sup>25</sup>.

The **ACHPR** in it's reports challenge to the death penalty stated in **Bosch V Botswana**<sup>26</sup> it was communicated that death penalty, didn't locate the right to life under the African charter of Human and people's Right.

It's also indirectly considered capital punishment in reaction to the right to a fair trial in **Article 7 of ACHPR** in an individual communication concerning **ken sora- wiwa** .Similarly in **Amnesty International and Others V Sudan**<sup>27</sup> the commission found that the execution of prisoners after summary and arbitrary trails contravened **Article 4 of the charter**.

**2.5 FHRI** to outlaw this historical punishment the right to life provision was ultimately Included in article **22 (1) in chapter 4 of the ACHPR**. It was formulated in very similar wording to the constitutional commissions draft clause but it additionally enshrined a right of appeal to the highest appellate court on both conviction and sentence in capital cases.

## 2.6 Death penalty in the 1995 Constitution of Republic Of Uganda.

The instance of a significant debate on the possibility of abolishing capital punishment in Uganda came during the process culminating in the enactment of the 1995 constitution. The constitution draft commission headed by the current **chief Justice Benjamin Odoki** was tasked with producing a draft constitution for latter consideration by a constituent assembly.

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<sup>25</sup> Emmanuel Kasimbazi "Death penalty in Uganda 2004

<sup>26</sup> December 2002 Case

<sup>27</sup> 1902 Case



The commission considered the issue of whether the death penalty ought or be abolished amongst several other subjects which given their controversial nature subjected to public consultation in mid 1992<sup>28</sup>.

The public's new on the death penalty were statistically analyzed along with a series of contentious human rights issue.

The results of the survey indicated that a large majority of these interviewed around 75% were opposed to the idea of abolition<sup>29</sup>.

Death penalty was one of the most divisive human lights issues that the constitutional draft commission had to tackle during its deliberations in the after math of the public consultation exercise.

A large numbers of commissioners supported the retention of capital punishment in the proposed constitution just like those members in the public who participated in the survey did. Nevertheless there in the abolitionist minority predominantly human rights activists presented strong arguments in support of their dissent. In addition to this, death penalty debates in the constituent assembly charged with debating the commission's draft and ultimately adopting the constitution by large followed those in the commission and led to the retention of the death penalty in spite of request made by civil society organizations like foundation for human rights initiative.

In spite of the failure of **1995 constitution** to outlaw the death penalty, it is worth nothing that **Article 24** which enshrines the right to free from torture, cruelty, inhuman or degrading treatment and punishments isn't limited by the existence of laying Clause like its predecessors<sup>30</sup>.

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<sup>28</sup>John Mary Waligo constitutional Reform processes in eastern Africa October 1999

<sup>29</sup> Benjamin – search for national Consensus. The making of Uganda constitution fountain publishers 2005 P 186

<sup>30</sup> Article 24 of 1995 Constitution of Republic of Uganda

The magnitude of the prohibition against torture, cruelty, inhuman and degrading treatment. In the 1995 constitution is further emphasized by Article 44 which grants it the status of an absolute non-derogable right<sup>31</sup>.

**Article 274(1) of the constitution** further establishes that “although laws existing when the constitution came into force shall not be affected by the coming into force of the constitution such laws shall be constructed with such modifications, adaptations, qualifications and expectations to bring them into conformity with the constitution”.

**Article 274** read in conjunction with **Article 2(2)** established the constitution as the supreme law of Uganda and that when any law or custom is inconsistent with the constitution, the constitution shall prevail and the other law or custom shall be void to the extent of inconsistency.

However Uganda isn't only country in the world in general. Africa in particular which has legalized the death penalty. The penalty isn't prohibited by public international law. International law still recognizes death penalty by Public international law international treaties and customary international law still recognizes the death penalty. The treaties which recognize the death penalty include the international covenant on civil political rights, some others which I have discussed them above.

Also the provision of **Article 22(1) of the constitution** aren't unique to Uganda only. A number of other countries have formulations providing for deprivation of life similar to that of Article 22(1) of the 1995 constitution. These include:

**a) Article 13(1) of the constitution of the Republic of Ghana 1992**

**b) Article 30 (1) of the constitution of the Republic of Bangladesh 1972**

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<sup>31</sup> Article 44 of 1995 Constitution of Republic of Uganda

In Africa only nine countries out of 53 have abolished the death penalty namely Namibia, Mozambique, Angola, Africa, Cape Verde, Djibouti, Guinea Bissau, Mauritius and Ivory Coast the immediate neighbors Kenya, Tanzania, Rwanda and Sudan still have death penalty.

This shows that majority of the countries in the world general and Africa in particular still have death penalty in their statutes books.

Therefore Uganda retaining death penalty is still well within the values of the civilized international community of which the values of the civilized international community of which Uganda is part of it.

Therefore the theory that the death penalty offends the concept and the law on human rights and it' inconsistent with the counterparty trend of international criminal law is unfounded and not correct.

Under the penal code **sec 189** it provides that any person convicted of murder shall be sentenced to death and under **Article 22 (1) of the constitution of Uganda** it provides that no person shall be deprived of life internationally expect of a sentence passed in a far that by a court of competent jurisdiction in respect of a criminal offence the laws of Uganda.

So there is a confusion of the law since the constitution of Uganda is the supreme law and here comes people are being executed to death contrary to the constitution that makes it to be unconstitutional.

Examples of people who were executed to death in Uganda in kotido executions corporal **James omeido** and private **Abdullah Mohamed** were publicly

executed on 35<sup>th</sup> March after a trial less than 3 hours before field court martial which found them guilty of the triple murder<sup>32</sup>.

**Elias wanyama** and **Godfrey Mugaanyi** both were imposed and living under the sentence of death having been wrongly accused of crimes they didn't commit<sup>33</sup>.

Also in South Africa **Alphesus Sekaboanze** was extenuated on cost he hadn't lodged to petition for clemency before he was served with notice of execution.

By December 2004 there were 417 prisoners on death row in Uganda the official statistics from Uganda prisons Headquarters is indicated in the tables below.

**Table A: number of prisoners on Death Row by offence as at 31: 12: 2000 – 2009 new vision 31<sup>st</sup> December 2009 page 23**

OFFENCE	MALES	FEMALES	TOTAL
Murder	228	12	240
Robbery	105	0	105
Treason	7	0	7
Kidnap	2	0	2
Total	3	0	354

**Table B: static on the Death penalty in Uganda as 24th may 2000**

Years	Clemency cases/ Pardon	Number of Execution
1962 -1971		0

<sup>32</sup> Daily monitor 27<sup>th</sup> march 2002 p 1 and 2

<sup>33</sup> Tracy Garner "Death penalty" un abuse of Human Right Volume 1, 7 No. 2002 P 23

by legislation<sup>34</sup>. A number of statutes in Ugandan legal system deal with death penalty most significantly the Ugandan **penal code Act Cap 120** the Ugandan peoples Defense Forces Act which cumulatively prescribe the death penalty is provided and to ensure that its not imposed except for the serious crimes <sup>35</sup>.

Sentence of death are carried out by hanging as provided under see **99** of the **Trial on Indictments Act**<sup>36</sup>. In military context the sentence is by firing squad. This part of the chapter analyses the prisons mandatory authorizing the imposition of capital punishment in Ugandan laws.

Finally January 2004 and December 2005. Seven more sates abolished the death penalty<sup>37</sup>. The increasing number of states ratifying or acceding to growing impetus of the evolutionist movements.

As of May 2006 there were 57 state parties to the second optional protocol to the ICCPR (16 more their 2001)<sup>38</sup>

But whist this trend is promising 64 states imposed 7395 death sentences and 25 states executed at least 3797 in makes during the last year<sup>39</sup>.

Currently 75 states retain the death penalty. Many of them tenaciously oppose the idea of abrogating or even restricting the death penalty. These countries pose the biggest challenged for civil society efforts.

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<sup>34</sup> G.P Tumwine Mukkubwa

<sup>35</sup> ICCPR/ CO/801 UGA 2004

<sup>36</sup> Trial Indictment Act Cap 23 Laws of Uganda

<sup>37</sup> Bhutam Greece, Senegal and Turkey, Liberia and Mexico. Death Penalty World wide Developments 2005 [Http// web](http://web)

<sup>38</sup> Commission of Human Rights 59 Session "status of Ratification of the principles of Hunan Rights Treaties

<sup>39</sup> Amnesty International Annual Report 2004

## CHAPTER THREE

### 3.0 EFFECTS OF DEATH PENALTY

The argument for the removal of the death penalty out number and out weigh the simple and outdated nations put forward by those who resist evaluating this old fashioned punishment. It's evident in Uganda that people from different walk of life have come up with different news opposing the use of the death penalty as a form of punishment. For instance **Mr. Etima Joseph Commissioner** of prisons spoke against death penalty. He argued that because justice system is not infallible many innocent people will be killed if the death penalty is retained. He also asserted that the objective of the prison system was to rehabilitate a prisoner which is obviously by the death penalty<sup>40</sup>.

Uganda prisoners also testified to the constitutional review commission that it was opposed to the death penalty.<sup>41</sup>

#### (a) Death penalty is barbaric

This is an argument derived from the case of **Dominic Mnyarose Mbushuu & Kalai Sanaa v Republic**<sup>42</sup> for abolishing the death penalty as the conditions both mental and physical in which condemned prisoners are forced to live, constitute and inhuman and degrading punishment.

Hanging which is the method of execution in Uganda as in many African countries has been held to be barbaric<sup>43</sup>.

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<sup>40</sup> The Daily Monitor 30<sup>th</sup> June 2003 by Joseph Etima former commissioner of prisons service limited and hivos

<sup>41</sup> The daily Monitor 14<sup>TH</sup> Feb 2003 supra note 40

<sup>42</sup> (1994 ) 2 LRC 335, TAN HIGH COURT & (1995) 1 LRC

<sup>43</sup> Supra note 42

There have been witnesses to watched hangings where the executor had to kill the prisoner to using home or other weapons.

This case is dealt in Uganda, where Attorney Okwonga a former Senior Assistant commissioner of prisons disclosed that incase the prisoners are not certifiably had they are killed by hitting them at the back of their heads with a metal bar, hammer or a crowbar.

In **Campbell V Wood, the US Supreme court**<sup>44</sup> held that hanging is a savage and barbaric method of terminating human life and its cruel unusual. In Layman's terms and in the constitutional sense.

However perhaps more significantly is the mental torture on death now for 10-20 years as their cases are appeared. Prisoners live each day never knowing whether it's going to be their last and in perpetual dread that they or their fellow inmates may be executed.

Many of them reported feelings of hopelessness as they watch fellow inmates exhaust the appeal process. Several prisoners have had friends and family members abandon them after they were sentenced to death. Other worry about children who they can not support. These anxieties have led many to suffer from conditions such as high blood pressure, stress, depression, stomach ulcers and mental disturbances<sup>45</sup>.

Sometime one can think when he slaughters chicken and see it dying he feel bad as if it's brutal what about a human being like me. This is because (the physical pain caused by the action of killing human being

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<sup>44</sup> 18F 3a 662 1994 Us Supreme Court case No. 28 Vol.3

<sup>45</sup> Ibid

can not be quantified nor can the psychological suffering caused by fore knowledge of death at hand of the state<sup>46</sup>.

For instance a former prisoner in Pretoria Central prison South Africa wrote: "only after I had lived at Pretoria General prison did I come to realize fully the utter horror of capital punishment what it involves and the responsibility imposes on man I do not think that any man can be asked to exercise that devastating responsibility. I do not think that man can carry demands of the system or live with the system without himself at once becoming degraded corrupt and brutal."<sup>47</sup>.

This is true in Uganda where **Okwonga A formers senior assistant commissioner of prisons** states that "the witnessed all the executions and found them to be cruel, inhuman and degrading to all the people invoked"<sup>48</sup>.

It is however not worthy that **Article 44 of 1995 constitution of the Republic of Uganda** states that "no person shall be subjected to any form of torture, cruel, inhuman and degrading punishment"<sup>49</sup>."

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 1995 constitution**<sup>50</sup>.

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<sup>46</sup> Amnesty international 1989 p.2

<sup>47</sup> Amnesty international towards abolition of death penalty

<sup>48</sup> Ex officer in charge Luzira upper prison

<sup>49</sup> Article 44 of 1995 constitution of republic of Uganda

<sup>50</sup> Supra note 49



It was commented upon by Amnesty International<sup>51</sup> that despite modern methods execution the prisoners suffering is likely to be prolonged if the execution makes an error of anything goes wrong.

It reports that even where unconsciousness has occurred therefore the heart may continue beating for some minutes.

In the same way of publication, the Human rights activists also argue that any kind of killing even by shooting portrays torture, cruelty and barbaric. They are quoted in their publication that shooting by firing squad does not necessarily result in immediate death<sup>52</sup>

I add that cruelty of death penalty is felt by the family of a condemned person not only before the execution but for the rest of their lives.

In **Mbushuu and Anor V Republic, the Uganda Supreme Court**<sup>53</sup> emphasized that death penalty amounts to torture, cruelty and dehumanizes or is degrading punishment.

#### **(b)Justice system is not fallible**

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

The very fact is that death penalty is irreversible punishment makes it inherently unfair errors can not be rectified. The judicial procedures in many countries are seriously defective but even where the death penalty

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<sup>51</sup> Supra note 49

<sup>52</sup> Ibid

<sup>53</sup> 1, CHLR 5 30 January 1995

is confined to the most serious crimes and all procedural safeguards are observed, there remains a danger that innocent people may be executed<sup>54</sup>. So there is no way to correct such a mistake in case of punishment of imprisonment.

According to **Karpel Singl (1999): death penalty: legal & constitutional issues pg 1** he says that "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 "**zidio**" its better to risk saving a guilty man than to condemn an innocent one" after all judges are human and liable to fail into error. Sentence of death is irreversible: what would be the remedy in such a situation? They have not advanced to that level where a lost soul could be resurrected, not at least after that though has she what has turned into dust"<sup>55</sup>.

Similarly in the case of **Bachan Singh V State of Punjab**<sup>56</sup> **Bhagwati J dissenting** observed, the Chief governments of the abolitionist which have been substantive adopted by the learned counsel for the petitioners are under the death penalty is irreversible decided upon according to fallible process of law by fallible human beings.

There have been very many notable cases in which people sentenced to death have been found innocent including **George Kely** who was executed 53 years ago in the United Kingdom but executed recently<sup>57</sup>.

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<sup>54</sup> Amnesty international towards abolition of death penalty 1991 p.8

<sup>55</sup> Karpel singh 1999, death penalty legal and constitutional issues p.1

<sup>56</sup> 14 AIR 1980 SC 898

<sup>57</sup> Erlisa Bussey Canada 2003 in his Article death penalty in Uganda road to abolition p.9

This has been clearly seen in Uganda **Mpangi** Spent 19 years as condemned prisoner in Luzira upper prison on charges of murder before being released in 2000 when the man he was supposed to have killed was found to be alive<sup>58</sup>.

Another scenario is of **Elias Wanyama and Godfrey Mugaanyi** both were imprisoned and living under the sentence of death having been made wrongly executed of crimes they did not commit<sup>59</sup>. This problem is rampant in Uganda because of the corruption and lack of resources within the system of Justice.

Many of the condemned prisoners reported that they only met with the State Attorneys who represented them on the day of the hearing and then their Lawyers did not have a full understanding of their cases.

Some reported that they were hold 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 all witness. Prisoners also reported that judges and lawyers had often been bribed and that witness had often been coached.

So these factors increase the likelihood of wrongful convictions which cause for the abolition of the death penalty in Uganda to ensure that such convictions will never occur.

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<sup>58</sup> The New Vision 21<sup>st</sup> Aug 2001

<sup>59</sup> Tracy Garner in his Article the death penalty or abuse of human rights.vol 7 No .2 2002 p.23

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

In this process the poor and the ignorant have power to be the most vulnerable and are the persons likely to be sentenced to death. This principle was laid in the case of **State V Makwanyane & Anor**<sup>60</sup>.

**(c) It's a violation of Human Right laws.** The use of death penalty violates the spirit if not the latter of the international Human Right Laws that Uganda is a party to the right to life is one that is specified in and considered the basis of almost every human rights document in existence around the globe.

The enactment of such Human rights began in **1948** when the United Nations adopted the **Universal Declaration of Human Rights (UDHR)**. This cornerstone document has been described as the basic interviews with condemned prisoners, **Luzira upper & lower prisoners Kampala** international pronouncement of rights that can not be taken away from all members of the Human family.

Members of the United Nations are simply expected to adhere to it and respect it. The third paragraph of this declaration begins that "everyone has a right to life".

Execution is the irreversible end to life yet it can be applied unjustly to the wrongly caused or unfairly tried. Just as well all have irrevocable law,

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<sup>60</sup> 1995 1 LRC 269 at p.299

equal Human rights written in International Law as sensitive, intelligent beings we also have less definable Human capacities to repent reform and forgive.

Like killing which takes place outside the law, 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 **Kondo executions corporal James Omeido and Private Abdullal Mohamed** were publically executed on 25<sup>th</sup> March after a trial less than three hours before a field court Martial which found them guilty of the triple murder.<sup>61</sup>

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.<sup>62</sup>

**(d) Unconstitutional** This is a debatable issue. The constitution providing for a right to life also provide for invitation of the enjoyment of their right. Under the constitutions themselves. In some cases the death penalty and either mandatory while in other it's discretionary<sup>63</sup>.

In Uganda context **Article 20 of the 1995 constitution** recognizes that the fundamental rights and freedoms of the Individuals are inherent and not granted by the state.

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<sup>61</sup> The daily monitor 27<sup>th</sup> march 2002 at 1-2

<sup>62</sup> Amnesty international Uganda soldiers' execution must not set trend ,AFR 59/002/2002

<sup>63</sup> Joseph kakooza. The 1<sup>st</sup> international conference on the application of the death penalty in common wealth Africa.

The Article provides that “the right and freedom of the individual and groups enshrined in this chapter shall be respected upheld and promoted by all means and agencies of government and by all persons”.<sup>64</sup>

**Article 22 (1)** provides that “no person shall be deprived of life internationally except in execution of a sentence passed in a fair trial by 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 punishment<sup>65</sup>.

Also the reading of **Article 24 and 44 of the constitution** prohibit torture, cruel, inhuman or degrading punishment of which the death penalty law under this<sup>66</sup>.

**Article 22(1)** of the constitution of Uganda is inconsistent with the fundamental right to life and human dignity since it provides for the death penalty that is prohibited under **Article 24 of the constitution** and it is therefore unconstitutional. And as such it serves no purpose in conformity with the other provisions of the constitution so the death sentence should be abolished under such circumstances.

For instance in 1999, 2001 and 2002 there are petitioners who challenged death penalty to be unconstitutional. For instance I the case

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<sup>64</sup> Uganda constitution 1995 article 20(1)

<sup>65</sup> Article 20 (1) of 1995 constitution of uganda

<sup>66</sup> Ibid

of **Attorney General Vs Salvatori Abuki and Anor**<sup>67</sup>, **Paul Kawanga Semogerere and others V Attorney General**<sup>68</sup> and **Zachary Olum V Attorney General**<sup>69</sup>. The petitioners argued the constitutional as the guardian of fundamental rights and freedoms enshrined in the constitution to safeguard these rights and give them a broad and purposeful interpretation and ensure the guilt benefit of the right in issue to the individual to whom the right pertains<sup>70</sup>.

They also argued the court to consider the wording of Article 2 of the constitution which establishes that human rights are inherent and not granted by the state. The petitioner also argued that the court to employ “evolving standards of human dignity” to constitutional interpretation and to consider both purpose and effect when assessing the death penalty constitutionality.

They also remind the court of its limitless competence to interpret the constitution including that of resolving provisional conflicts and the importance to interpret the constitution including that of resolving provisional conflicts and the importance of foreign constitutional cases and international court and tribunal ruling as demonstrated by prior supreme court and constitutional court ruling.

**(e) A tool of repression** Capital punishment continues to be used as a tool of political repression. Rulers have executed their political rivals or have tried to use threats of death to silence their opponents. The death penalty has been used to consolidate power after coups and coup

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<sup>67</sup> 1 LRC 68 2001

<sup>68</sup> Supreme court of appeal No. 1 .2002

<sup>69</sup> Constitutional petition No.6 . 1999

<sup>70</sup> Petitioners submission Ibid 7

attempts and members of opposition political groups have been eliminated as a matter of political expending<sup>71</sup>.

Even when execution have not taken place the threat has been present through laws providing for the death penalty for non violent political acts such as forming or being involved in political parties or groups opposed to the established regime. In many cases the death penalty has been directed as prominent individual political opponents. This holds true in Uganda considering the fact that **Abdullah Nasser** was pardoned by **President Museveni** moreover **Hajji Musa Sebirumbi** and **18 others** were not pardoned<sup>72</sup>.

This argument seems to be weak in that a guerilla today is a liberator tomorrow.

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

For this matter therefore **Margaret Sekagya** Chair person **Foundation of Human Rights initiative** believes that death penalty is used disproportionately against the poor and minority groups as a tool of political repression.<sup>73</sup>

Its irrevocable nature of the death penalty that makes "so tempting as a tool of repression. Thousands have been ...to death under one government only to be recognized as innocent victims when a new government comes to power."

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<sup>71</sup> Appollo kakaire 3 April 2002 p.19

<sup>72</sup> New vision 19<sup>th</sup> Nov 2004

<sup>73</sup> The new vision 19 Nov.2004 PG 9-10 death penalty and human rights in Uganda



In Uganda **Abdullah Nasser** who was recently pardoned in Museveni's regime<sup>74</sup>.

As long as death penalty is accepted as 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 occur<sup>75</sup>.

**(f) Inequality** Studies have shown that most of those sentenced to death come from the poorest levels of society. Poverty breeds crime and the poor can not 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 give rise to crime. It can rightly be seen that **Alpheas Sevubane** was executed on **13<sup>th</sup> November 1990 in South Africa** because he could not afford to pay legal costs he had no lodged a petition for clemency before he was served with notice of execution<sup>76</sup>.

For instance in **Rwanda** virtually none of the hundreds of prisoners sentenced to death in recent years has had any legal representation.

They were therefore unable to challenge the persecution on point of law or to challenge the admissibility of evidence before courts<sup>77</sup>.

In addition to this 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.

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<sup>74</sup> Supra note 73

<sup>75</sup> Amnesty international Supra Note 14

<sup>76</sup> Ibid

<sup>77</sup> Ibid

The prisoners executed ...necessary only those who committed the worse crimes but also those who were too poor to hire skilled lawyers to defend them out those who faced harsher prosecutors or judges<sup>78</sup>.

As **Chaskalson P** said that. "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 government holds true in Uganda that until that 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 regal counsel who seem to be expensive in Uganda. This thus calls for a need to abolish such punishment.

**(f) Death penalty amounts to torture, cruel and inhuman form of punishment** In the case of the **people V Anderson**<sup>79</sup>, **Justice Wright** held capital punishment to be impermissible and cruel because it degrades and dehumanizes all who participate in its processes. It's a necessary to any legitimate goal of the state and is incompatible with then dignity of human kind and judicial process.

The United Committees 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 respectively.

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<sup>78</sup> Amnesty international Supra

<sup>79</sup> 1972 493 p.2 d 880- 886

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

However this issue of death penalty has been duly discussed and in fact in different countries to be abolished. For instance in Zimbabwe. In the case **Catholic Commission for Justice and Peace in Zimbabwe V Attorney General & Ors**<sup>80</sup>. According to Justice, he discussed that it's inhuman and amounted to torture. One that embodies broad and idealistic notions of dignity, humanity and decency. It guarantees that punishment of the individuals be exercised within evolving standards.

Any punishment.....incompatible with the ideal standards of decency the mark progress of the nurturing society or which involves the infliction of unnecessary suffering is repulsive. What might not have been regarded as inhuman decades ago may be involving to the new sensitivities which emerge as civilization advances.

Penologists and medical experts argue that the process of carrying out a verdict of death is often so degrading and initializing to the human spirit as to constitute psychological torture.

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<sup>80</sup> 6 CRR 2d 193 1992

Moreover the controversial issue on the death penalty was successfully handled recently in the land mark case of **State V Makwanyare and M Mchunu** where 12 of the most senior judges of south Africa concurred entirely with the finding of the President of the constitutional court of South Africa that death is a cruel penalty and the legal processes which necessarily involve waiting in uncertainty for the sentence to be set aside or carried out add to the cruelty.

(g) It's also **inhuman and it's degrading** because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state.

Having death penalty constitutes a serious impairment of human dignity has also been recognized by judgments of the Canadian Supreme court. In **Kindler V Canada**<sup>81</sup> it was held that death penalty was cruel, brutal and amounted to torture which was unusual per Canadian Constitution.

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<sup>81</sup> 6 CRR 2d 193 1992

## CHAPTER FOUR

### 4.0 CONCLUSION AND RECOMMENDATION

#### 4.1 CONCLUSION

I conclude that death penalty is seen as a violation of the prohibition against torture, cruel, degrading and inhuman punishment as held in the case of the **people v. Anderson**<sup>82</sup>, justice Wright held that capital punishment to be impermissible and cruel because it degrades and dehumanizes all who participate in its process. It is necessary to any legitimate goal of the state and is compatible with the dignity of human kind and judicial process.

Also the imposition and carrying out of the death sentence creates undue physical and mental anguish for prisoners and even on the executioners. The value of punishment should be repentance but the death penalty only serves the purpose of dehumanizing and tormenting those affected by it.

The system of death sentence is injustice due to the fact that it contravenes with **the article of the 1995 constitution article 22(1)** which provides for right to life “no one shall be deprived of life intentionally except in the execution of a sentence passed in a fair trial by court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the convictions and sentence should have been confirmed by the highest appellate court.”

I also emphasize that the death sentence is unconstitutional due to the fact that many people are dying which is contrarily to the provision of the

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<sup>82</sup> (1972 )493 p.2d 880,886

constitution and the penal code provide the punishment to the capital offenders.

**Article 274** read in conjunction with article **2(2)**, establishes the constitution as the supreme law of Uganda and that when any law or custom is inconsistent with the constitution, the constitution shall prevail and the law or custom shall be void to the extent of the inconsistency.

I further conclude that not only does death penalty violate the right to life it's also amount to torture, cruel, inhuman and degrading treatment or punishment as provided for under article **24 of the 1995** constitution of Uganda.

In **Edward v Bahamas**<sup>83</sup> .the petitioners were arguing in decision making of the mandatory death sentence that they were not arbitrary, unfair and misappropriate and therefore violate the right to a fair trial and the right to life but were also "contrary to the proscription on cruel and inhuman forms of treatment and punishment.

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<sup>83</sup> 4 APR 2001,REPORT NO.48/01

## 4.2 RECOMMENDATIONS

I recommend that the state should impose another punishment apart from death penalty which will violate the right to life and that one which is not constitutional due to the fact that even the number of capital offenders is increasing and inmate's rate also is high.

The value of punishment should be repentance but the death penalty only serves the purpose of dehumanizing.

The judiciary should amend the existing laws which are in conflicts with **article 2(2) of the 1995 constitution of Uganda** which establishes the constitution as the supreme law of Uganda and that when any law or custom is inconsistent with the constitution the constitution shall prevail and the law or custom shall be void the extent of the inconsistency.

The human rights activists should advocate for the violation of human rights as provided.

The United Nations committees Evolving commitment should highly and globally advocate for abolishing the death penalty.

If at all death penalty will still be there those who will be executed should not be kept for unreasonable delay due to the fact that it will make them suffer from death row syndrome which will be a constitutional violation.

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