

**SHOULD THE DEATH PENALTY BE ABOLISHED  
IN UGANDA**

**BY**

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**DISSERTATION SUBMITTED TO THE FACULTY  
OF LAW IN FULFILLMENT OF THE AWARD OF  
DIPLOMA IN LAW OF KAMPALA INTERNATIONAL  
UNIVERSITY**

**2010**

## DECLARATION

I declare that this research paper is my original work, except where otherwise stated. It has not been presented at any other university or higher institution for an award of diploma in law or its equivalent.

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## **APPROVAL**

This dissertation entitled "should the death penalty be abolished in Uganda,"  
Was carried out under my supervision and approved.

**Signature**

  
.....

**M/s Parton Twikirize**

**Supervisor**

**Date**

  
.....

## **DEDICATION**

I dedicate this work to my husband, Mr. Zeddy Ouma, My parents Mr. and Mrs. Sitienei Rutto who finance this course from the beginning to the end.

I also dedicate this work to my mother in – law Mrs. Margrete Mwaga without her support, advice and guidance this work would have remained a day dream.

I will not forget to dedicate to my sons Omosh and Okoth for their patience; may the almighty God always bless them.

## **ACKNOWLEDGEMENT**

The task of completing this research does not go without support and guidance from almighty God. I would like to express my gratefulness to the following individuals whose moral and material support was instrumental to the completion of this research paper.

I extend my gratitude's to my supervisor M/s Parton Twikirize for her advise and guidance through out the conduct, preparation and completion of this special task.

I would also thank in general the members of the faculty of law of Kampala International University and the lecturers of diploma in law whose materials and challenges invigorated the research process adding value to this dissertation.

Lastly to all participants for their support in all cases concerning the completion of this research.

## **ACRONYMS**

UDHR- Universal Declaration of Human Rights

ICTY- International Criminal Tribunal for Yugoslavia

ICCPR- International Covenant on Civil and Political Rights

ACHR- American convention on Human Rights

ACHS – African Human Rights System

UPDF- Uganda Peoples Deface Force

TIA- Trial on Indictments

PCA- Penal Code Act.

ICTR- International Criminal Tribunal For Rwanda

UN- United Nations

AG- Attorney General

ATA- Anti-Terrorism Act

## LIST OF INSTRUMENTS

### International instruments

- Universal declaration of human rights (adopted 10 December 1948) UNGA Res 217 A (111) (UDHR).
- International convention on civil and political rights (adopted 16 December 1966 entered into force 23 ,march 1976) 999 UNTS 171(ICCPR)
- African Human Rights' System (adopted 27 June 1981) OAU .DOC CAB. LEG/67/3 (AHRs)
- International Criminal Tribunal for Yugoslavia and Rwanda (Adopted by SC. RES 827, UN SCOR 48 Sess.3217 at 6, UN DOC, S/RES /1827 (1993) (ICTY) (ICTY).
- American Convention on Human Rights (adopted June 1990) (ACHR)

### Domestic instruments

The constitution of Uganda 1995

*The penal code act* cap 120(Uganda)

*Ugandan peoples defense force act* cap 3071992 (Uganda)

*Trial on indictment act* cap 23(Uganda)

*Ant- terrorism act* 14 of 2002(Uganda)

## **LIST OF CASES**

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*The State Vs Makwanyane and Mchunu. (1995) 1LRC 269.*

*Rwanyarare Vs Attorney General constitutional petition No.1 of 1998.*

*Morris Vs Cohen. (1994)LRC 344*



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# CHAPTER ONE

## 1.0 INTRODUCTION.

The right to life can be defined as that fundamental basic value without which a person ceases to exist as a human being. It entails a freedom and duty on man "to live and let live respectively. This means that while every one is entitle to life no one shall be allowed to by law to tamper or deny another this fundamental and basic right.

The right to life is sacred and God given and this makes it inherent to every individual. For being sacred and God given the bible provides for it's protection in Exodus 20: 13 "thou shall not kill," a commandment by God himself to protect human life. State laws also compliment in a quest to protect human life. The constitution of Uganda (1995) Article 22(2) states that no person shall deprive of the right of life intentionally except in execution of a sentence passed in a fair trial by a competent jurisdiction in respect of criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest court of appeal. This article is strongly protected by international documents on human rights like the European convention on human rights (1950), the [1968] and the American convention on human rights (1969).

Though protected by various documents, the right to life is threatened by the very law that protects it, for example social crimes and accidents are condemned by law while in some instances they are acquitted for being legal like the death penalty. In law the death penalty comes as contradiction to the essence of law itself and in some states this kind of punishment has been abolished.

In Uganda the death penalty is mandatory for crimes like murder, aggravated robbery, treason, aggravated defilement among others. Human rights activities are against the death penalty as it constitutes a violation of the right to life.

It leaves the state with an option of imposing this sentence in particular circumstances. The death penalty being the infliction of death as punishment to a criminal offence, involves inflicting severe trauma and injury to the human body to the point where its life is extinguished.

While faced with serious opposition in Uganda, the death penalty has been retained for serious crimes like murder because of the following reasons first, because of long periods of unrest in the country there are many criminals who only fear death. If this kind of punishment is abolished such persons are likely to commit wanton murder without fear.

Secondly, history shows that with each change of regime of government prisoners sentenced to life imprisonment have in the ensuing confusion escape from prison and terrorized the populace.

The death penalty is a clear indication to all that life is sacred and thus whoever takes the life of another must be deprived of life too among many others.

### **1.1 DEFINITIONS OF DEATH PENALTY.**

The death penalty carried out in the name of nation's entire population involves every one. Every one should be a ware of what the death penalty is, how it is used, how it affects them and how it violates fundamental rights.

The death penalty is the premeditated and cold – blooded killing of a human being by the state.<sup>1</sup> The state can exercise no greater power over a person than that of deliberately depriving him/her of life.

Death penalty also means a legal punishment usually for serious crime such as murder.<sup>2</sup> Killing people legally is called capital punishment. It involved inflicting severe trauma and injury to the human body to the point where its life is extinguished.

Death penalty is provided under article 22, 28(e), 80(2)(e) of the Constitution of Uganda 1995 and imposed by the Penal Code Act Cap120, laws of Uganda.

## **1.2 BACKGROUND OF THE STUDY**

The earliest historical records containing evidence on capital punishment can be traced in the code of king Hammurabi of Babylon which codified the death penalty for 25 different crimes.

The death penalty prescribes revengeful punishment popularly known as “an eye for an eye,” a” tooth for a tooth”. Besides that the bible prescribes death penalty as penalty for more than 30 different crimes ranging from murder<sup>3</sup> to fornication.<sup>4</sup>

Information relating to the use of the death penalty in Uganda during the pre-colonial period is restricted to anthropological studies on the basis of available studies; most scholars maintain that capital punishment was in principal employed by several tribes in pre- colonial Uganda for crimes such as murder, witchcraft, treason and incest. Although there are no records on the overall number of executions carried out during the pre – colonial period some

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<sup>1</sup> Amnesty International , *When the state kills* , The death penalty v human rights , 1 October 2004 at Pg1 paragraph

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<sup>2</sup> Macmillan English Dictionary for Advanced learners, international student edition.

<sup>3</sup> Exodus 21: 12

<sup>4</sup> Deuteronomy 22:13

commentators maintain that in traditional Ugandan societies executions were uncommon, as emphasis of criminal sections was more on reconciliation and restitution than punitive measures.<sup>5</sup>

As in most other common wealth African states, the history of the death penalty in Uganda was heavily influence by the country "colonial experience." The law and philosophy underlying the use of death penalty in Uganda can be traced to the development of criminal law in England like other laws, criminal law in Uganda is largely a colonial legacy introduced in Uganda under the reception clause of 1902.<sup>6</sup>

The death penalty as it is presently known in Uganda is regarded as "a colonial legacy". Although a number of agreements, such as Buganda agreement of 1900, provided traditional leaders with a limited measure of independent governmental authority the judicial system remained largely in the hands of the colonial authorities. Until the advent of independence in 1962 all death sentences were subject to the approval of the Queens representative in Uganda, although this fact in itself did not reduce the application of the death penalty in the country.<sup>7</sup>

Thus the death penalty in Uganda was inherited from the British in 1962, and upheld by the constituent assembly while discussing the 1995 constitution.<sup>8</sup> According to Abu Mayanja a former deputy prime minister of justice and attorney General of Uganda, the death penalty is a strong deterrent to crime in socially deprived society.<sup>9</sup> Uganda government policy on the death penalty tends to lie on this theory.

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<sup>5</sup> Emmanuel kasimbazi, *the death penalty in Uganda, presented at the first international conference on the application of the death penalty in commonwealth Africa, 10-11 may 2004, Entebbe Uganda* available at <http://www.biiil.org>. Index asp.

<sup>6</sup> G.S.K ibingira ,*the political and constitutional evolution of Uganda*.

<sup>7</sup> See Buganda agreement of 1900

<sup>8</sup> The justice update. F.HRI pg 2,

<sup>9</sup> *The new vision* 10 march 1992

It is therefore not surprising that today this form of punishment is still applied in Uganda penal system as a mandatory punishment.<sup>10</sup> Uganda's penal code provide 15 capital offences nine under a collective hearing, "treason" and offences against the state, rape, aggravated defilement, murder, aggravated robbery and aggravated kidnapping. Death is mandatory punishment for six of the treasonous offences and discretionary sentences for the remaining felonies at the same go.

### **1.3 STATEMENT OF THE PROBLEM**

The fact that Uganda has adopted and acceded to various human rights and recognized the right to life under it's constitution it has not abolished the death penalty in its laws.

The international legal instruments like the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights (ICCPR) protect the human life and reserve the death penalty for serious offences. Thus the problem of this study is to examine the adequacy and practicability of special constitution provisions in relation to abolition of the death penalty. The problem of death penalty in Uganda like in many other countries has affected human right and right to life.

### **1.4 OBJECTIVES OF THE STUDY**

The main objective of this study is to find out whether the existing laws and legislations on the death penalty in Uganda has outlived it's usefulness in terms of guaranteeing maximum protection of the right to life.

The specific objectives of the study are;

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<sup>10</sup> The penal codes Act cap 120 laws of Uganda.



- i) To examine whether the death penalty is still valid in light of national and international human rights laws.
- ii) To assess whether the death penalty can be abolished as achieving its objectives like retribution and deterrence.
- iii) To offer proposal for the reform of the death penalty law necessary to replace it with life imprisonment.

### **1.5 SIGNIFICANCE OF THE STUDY**

Studies on death penalty have not sufficiently shed light on the problems emanating from it especially at constitutional and human right level.

It is through this research that such crucial areas will be covered by considering arguments for and against death penalty.

This study is also geared to rise the awareness of policy makers to help them come up with appropriate strategies for purpose of reviews and reform of the law on the subject.

It is also intended to meet the requirements of the dissertation paper necessary for the award of the diploma in laws.

The researcher anticipates that this study will serve as an information source book and further literature for the use by other researchers.

### **1.6 METHODOLOGY**

Library desk research may be the main source of this study.

The libraries to be used shall include Kampala International University Library, Law Development Centre Library and Foundation of Human Rights Initiative Centre Library.

The literature to be conducted includes text books, academic articles, news papers publications, internet among others.

In addition, interviews may be conducted for the purpose of information right from the public these shall include prisoners, prison warders, practicing advocates, NGO's activists for the abolition of the death penalty, officials from Human Rights commission among others.

A sample shall be two to three people from each section.

## CHAPTER TWO

### 2.0 LITERATURE REVIEW.

The death penalty is associated with two fundamental human rights, the right to life and the protection against cruel, inhuman and degrading punishment. Although the punishment of death is as old as man, it still remains the most shocking and most controversial punishment for mankind.

A lot of literature exists on the subject of the death penalty. The literature in place however is wanting in many aspects most of it is in favor of the death penalty.

The present study shall be focused on Uganda and brings out contemporary knowledge on the subject being examined. It will therefore enable its readers to appreciate the extent human right to life has been violated in Uganda, considering literature both for the justification of death penalty and its critics as reviewed by different authors on this subject here under;

Justice George Kanyeimba (1999)<sup>11</sup>, in his article '*Uganda still needs the death sentence*' while justifying the role of the courts in upholding the death penalty expressed his point of view saying that retribution means not only the convicted person should receive punishment that is proportional to his or her moral guilty but the punishment must also be proportional to the harm done.

In this sense, punishment tantamount to a retaliation. The judge seeks justice by imposing the sentence the criminal deserves. This argument seems to stress the fact that punishments are unjust unless they are like the crime itself. This is unacceptable concerning the abolition of death because it would require punishing a rapist by raping him or putting out the eyes of those who have blinded others.

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<sup>11</sup> Kanyeimbamba; *Uganda still need death penalty. the Uganda human right magazine* of June 1999 at pg22

This literature does not justify the abolition of death penalty because proportioning the severing of punishment to the gravity of the crime requires the primitive rule of life for a life. More over, a retributive form of punishment can be accepted without necessarily resorting to death penalty.

Titus Reid (1997)<sup>12</sup> in *Crime and Criminology*; said that retribution is the only doctrine supporting punishment in general and proponents have attributed the death penalty to this doctrine. To him according to this doctrine, there is no need to consider the effectiveness of the punishment and as such it's goal is not doing justice but rather preventing crimes. He goes further to identify another justification of the punishment that, it plays an important function of legitimization of punishment. In that; the society desires to see the criminal has pursued his self interest by means non criminals have restrained themselves from using for preference of the law and fear of punishment. Therefore, there is need to punish the offenders acts to justify the self restraint demonstrated by non- criminals.

Apollo Kaka ire [2003],<sup>13</sup> in this article, "*The Death Penalty*; the case for total abolition observes that; people who murder are normally irrational the time they commit the crimes. Therefore the threat of future death does not enter the minds of a killer acting under the influence of drugs of alcohol; in the grip of fear or rage panicking while committing another crime or simply lacking an understanding of what he is doing. The deterrence theory is therefore based on speculation and not any tested evidence. He therefore concludes in his words that". While many people support the death penalty in Uganda and there may be in some situations the risks of mob justice justifying capital punishment on the grounds that people will take the law into their hands is simply a failure to

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<sup>12</sup> Titus Reid, *crime and criminology*, (1997) at 519.

<sup>13</sup> Apollo kaka ire, *the death penalty* (2003) at pg 5.

take responsibility for the law and order. It is also a way of avoiding the responsibility of introducing effective measures to protect human rights”.

This work is relevant to the topic due to the fact that, death penalty does not serve a deterrent effect since the people who murder don't put into consideration the fear of death penalty especially those under the influence of alcohol. This is true, when considering the issue of abolishing the death penalty, that it serves no deterrent purpose to those who commit serious crimes.

Fr. Taricisio Agostonia (2003)<sup>14</sup>, in his book *“May the State Kill;”* maintains that capital punishment has led to the killing of innocent people through this seems to be a difficult thing to happen. And asserts that there are a number of factors that contribute to this innocent killings he attributes these on rampant corruption in the system. That this act of corruption cuts across the different stakeholders in the administration of justice, law and order. That is it's present within the police, prosecution and the lawyers themselves. To him this is enough to conclude that innocent people have over the years been convicted and executed.

Another factor that he attributes to the killings is the indifference of the officials in the court, police investigating authorities and the DPPs. He draws this practice from the plea bargain, a practice where the rich or relatives of the condemned enter bargain through payment of money and subsequently bringing false testimonies in exchange for a lesser punishment.

It is through these testimonies that the innocent are convicted, condemned and executed for the crimes that were committed by the rich who used money to get a way with it.

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<sup>14</sup> Fr. Tarcisio Agostoni, *may the state Kill* (2004)

This helps us to understand that the death penalty has been used inconsistency especially where the poor could be executed when they are in fact innocent. Thus this work contributes to arguments against the death penalty in Uganda.

He further contends that punishment should not violate any human rights. According to him the extent of punishment should be carefully evaluated upon and should not go to the extreme of executing the offender. He however gave the situation when capital punishment may be exceptionally used in cases of absolute necessity that would be in a situation where the rights of citizens of the states could not have been protected otherwise than by execution of the offender. According to him punishment should not be purposely aimed at harassment and execution of the offender but rather to the re- education of the criminal.<sup>15</sup>

The gist of this work shows that death penalty if used will violate human right and its use is opposed except in exceptional circumstances. Hence, this review indicates the abolition of such punishment as it violates human rights.

J.S Mbiti (1985),<sup>16</sup> states that before colonialism each community had its own way of restitution and punishment for various offences like fines and flogging. Death was reserved for very serious offences for example practicing sorcery or witchcraft. In some countries, capital punishment mainly death has been retained for offences of high treason in times of war.

This literature helps us understand that death penalty fits serious offences which could not otherwise be punished by other forms of punishment. But the weakness under this review is the fact that serious offences are not well defined

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<sup>15</sup> Ibid.

<sup>16</sup> J.S Mbiti, *African philosopher and religion* London Heiman (1983) pg 211.

by the author. However, this helps readers to understand that in some countries, capital punishment especially death has been retained for offences of high treason and for members of the armed forces in times of war, for example in England there was execution of two men convicted for murder on 19<sup>th</sup> august 1964.<sup>17</sup>

According to Abu Mayanja (1992)<sup>18</sup>, a former deputy prime minister of justice and Attorney General of Uganda "capital punishment is a strong deterrent to crime in a socially deprived society", the view seem not to hold true in Uganda where most crimes are committed every day of which the death penalty is imposed. This is in line with amnesty international that; that continuing frequent occurrences in Uganda of crime for which the death strongly suggests that it have no deterrent effect whatever. Thus death penalty serves no useful purpose if it cannot deter the most serious crimes. And this calls for it's abolition in Uganda.

Amnesty international (1991)<sup>19</sup> Towards Abolition of the Death penalty; believes that, the death penalty is the ultimate cruel, inhuman and degrading form of punishment and seeks its world wide abolition.

Every where experience shows that executions have a brutalizing effect on those involved in the process. No where has it been shown that the death penalty has any special power to reduce crime or political violence. In country after country it is used proportionality against the poor or against racial of ethical minorities. It is often imposed and inflicted arbitrary. It is an irrevocable punishment resulting inevitably in the executions of people innocent of any crime. It is a violation of fundamental human rights". I do concur with the

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<sup>17</sup> Ibid note 1 at pg 2

<sup>18</sup> *New vision* 10 march 1992

<sup>19</sup> Towards abolition of the death penalty, Amnesty international Report- (1991)

above argument since the same situation applies in Uganda. And this is a call for Uganda to join the trend towards abolishing the death penalty.

According to the Uganda constitutional review commission of inquiry(2003)<sup>20</sup>, it stated that "killing of human beings by way of revenge was resorted to only if the effects at compensation failed," the arguments stated is right and could help Uganda to do away with death penalty. For example in Acholi society, the argument stated was applicable, whereby it was stated that "our son killed your son, we give you this girl so that she may produce a son to replace the one who was killed by ourselves."<sup>21</sup>

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<sup>20</sup> Report of the Uganda constitutional review commission of inquiry (November 2003)

<sup>21</sup> Joseph kakooza. *The first international conference on the application of Death penalty in common wealth African*



## **CHAPTER THREE**

### **ARGUMENTS FOR AND AGAINST THE ABOLITION OF THE DEATH PENALTY.**

#### **3.0 Introduction.**

Support for and opposition to the death penalty is based to a large extent on considerations of just deserts. Even if there were irrefutable evidence that the death penalty does or does not deter crimes, the ultimate decision about its use would be based on values concerning the sanctity of human life and the requirements of justice.

#### **3.1 Arguments In Favor of Death Penalty**

Support for the death penalty remains high, although there is some reluctance to carry out executions once sentence of death has been pronounced. It is noted in the report on the constitution making process, that the debate on the need to abolish the death penalty did not receive substantial submissions. Nevertheless, the majority views submitted supported the retention of capital punishment for a conviction of murder among other serious crimes because of the following reasons:-

##### **3.1. 1. The Deterrence Theory**

1. The belief that the death penalty will prevent crime by deterring future murders is a common argument in support of capital punishment. The retentionists of capital punishment linked the punishment to the deterrence theory through the argument they advance that if death penalty is abolished there will not be any punishment adequate enough to deter those criminals who are already serving long term sentence in prison or those who commit

murder while incarcerated and even those who have not yet been caught but are potential criminals<sup>22</sup>.

Other groups of the people that the retentionists would like the death sentence to be applied to are the terrorists, revolutionists and spies. The retentionists based on the arguments that the taking of the offenders' life is the most severe than any form of punishment. It is therefore a better deterrent to potential offenders.

Another aspect this argument suggest that because of long periods of unrest In Uganda there are many criminals who fear death and if capital punishment is removed such person are likely to commit wanton murders without fear.

### **3.1. 2. Retribution theory.**

Retribution is taking action to get even with the offender in the same way he/she harmed the victim. The retributions argument is perhaps the oldest of all justifications for punishment. Although modern Israel establish In 1948 quickly abandoned the mosaic law of "life for life" except in cases of wartime treason or Nazi collaboration, many people continue to apply this notion of retribution in support of the death penalty.

Retribution continues to be an important philosophy. It has been an important philosophy views punishment as a positive moral duty. It regards crime as a violation or disturbance of the divine or moral order. The moral order can be restored or the violation atoned by inflicting evil (generally pain) upon the one guilty<sup>23</sup>.

In addition Paul's declaration to the Romans that, **"let every soul be in subjection to the superior authorities, for there is no authority except in**

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<sup>22</sup> East African journal of peace and human rights Vol. 16 No. of 2000 at 227.

<sup>23</sup> -*Morris V Cohen*, morns aspect of criminal law

**a God, the existing authorities stand placed in their relative position by God therefore he who opposes the authority has taken stand against the arrangement of God.”<sup>24</sup>**

Some believed that Paul’s statement meant that if the state permitted capital punishment it must be God’s will because government exists only by God’s will. This line of reasoning continues to be employed today by those who defend the death penalty on the basis of biblical interpretation.

Moreover, it has been argued that in recent years the Supreme Court justices have given more support to the doctrine of retribution as a justification for capital punishment because they realize the evidence on deterrence is not strong and the public has become disillusioned with doctrine of rehabilitation<sup>25</sup>.

Hence retribution is the only doctrine supporting death penalty in particular in which there need be no question of effectiveness. Effectiveness is not the issue. The arguments supporting is that people are punished in a specific way because that is the punishment they deserve. Retribution is not utilization. Because it’s goal of “doing justice” rather than preventing crimes it makes no instrumental claims and that is its principal merit<sup>26</sup>.

### **3.1. 3. Errors in executing innocent persons are rare.**

Errors in executing innocent persons are rare. These who favor capital punishment claim that recent development in the procedural rights of the defendant have greatly reduced the chance of such errors. The process from the local courts to the high courts, to the court of appeal, to the pardon authorities may take years. Such a long process is truly a very important in the

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<sup>24</sup> Romans 13:1-2.

<sup>25</sup> Ibid

<sup>26</sup> Jack, Gibbs, *the death penalty retribution and penal policy journals of criminal Law and criminology*. Pg. 69

present judiciary system. In fact the Supreme Court may release some prisoners or send back the case to be verified and reconsidered by the lower courts. Thus errors in executing innocent persons are rare<sup>27</sup>.

### **3.1. 4. Death penalty is economical.**

Some retentionists claim that carrying out the death penalty is more economical than housing an offender in prison for life. They argue that Uganda is a poor country and it cannot afford to spend money on “criminals including robbers” And that is why the budget for prisons including staff and prisons upkeep is the last to be considered, hence death penalty is the remedy.

### **3.1. 5. Populist theory.**

There is a public opinion which sees death penalty as a popular form of punishment for crimes such as murder. Capital punishment for crimes seems to play a role in attaining justice among the subjects of the state.<sup>28</sup> Justice can only be attained when the criminal is subjected to the same treatment in which he put the victim. This is because many murders committed Uganda are not by people with psychological problems but rather by normal people who intentionally kill in order to settle scores with enemies or to eliminate business, political and other rivals or who are hired to eliminate other people's enemies.

In this matter, the nature of the killing by the state is the appeasement of the society and compensation of relatives of the victim through what the state feels to be fair retribution of pain.<sup>29</sup>

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<sup>27</sup> Marcia cycle, “*innocent dead man walking*” the National law journal

<sup>28</sup> Abolishing the death penalty Uganda Human rights monthly magazine June – July 1996 at pg 28

<sup>29</sup> Ibid.

### **3.2 Arguments in abolition of death penalty.**

By 2004, 118 countries have abolished death penalty in law or practice. An average of three countries abolished death penalty every year. The worldwide trend towards abolition of the death penalty is reflected in the African Union had abolished the death penalty in law or practice by 1 October (2004).

Here are reasons for total abolition of this degrading and in human punishment.

#### **3.2. 1. Death penalty violates the right to life.**

The universal declaration of human rights (UDHR) recognized each person's right to life. Article 4 of the African charter on human and people's rights (ACHPR) states that "human beings are inviolable every human being shall be entitled to respect for his life and the physical and moral integrity of this person. This view is reinforced by the existence of international and regional treaties providing for the abolition of the death penalty notably the second optional protocol of the international covenant on civil and political rights adopted by the general assembly of the United Nations in 1989.<sup>30</sup>

#### **3.2. 2. The death penalty is Barbaric.**

The UDHR categorically states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" All forms of executions are inhuman. No government can guarantee a dignified and painless death to condemned prisoners, who also suffer psychological pain the period between their sentence and execution.<sup>31</sup>

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<sup>30</sup> Amnesty international, world wide sites, 1 October 2004

<sup>31</sup> Above no .13. 19

### **3.2. 3. Discriminatory in its application.**

Throughout the world, the death penalty is inappropriately used against the disadvantage people. Some condemned prisoners from a most impoverished social class would not have been sentenced to death if they were from wealthier sectors of society. In these cases either the accused are less able to find their way through the maze of the judicial system because of lack of knowledge, confidence or financial means or the system reflects generally negative attitude of society and the powerful towards them. It has also been proved that certain criminals run a greater risk of being condemned to death if their victims come from higher social classes.<sup>32</sup>

### **3.2. 4. The death penalty has no dissuasive effect.**

No scientific study has proved that the death penalty has a more dissuasive effect on crime than other punishment. The most recent investigations into the links of cause and effects between capital punishment and murder rate was +following conclusions “.....it is not prudent to accept the hypothesis that capital punishment deter murder to a marginality greater extent than does the threat and application of the supposedly lesser punishment of life imprisonment.<sup>33</sup>

### **3.2. 5. Execution is irreversible.**

The death penalty denies the capacity people to mend their ways and become a better person. Defenders of the death penalty consider that anyone sentenced to death is unable to mend their ways and could re – offend at any time if they are released. However there are many examples of offenders who have been integrated and who have not re – offend. Execution definitely destroys any

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<sup>32</sup> Fr. Tarcisio Agoston, *May the state kill*, (2004) at pg 13

<sup>33</sup> -Ibid.

chance of later development both at human level (forgiveness and repentance) and political level (pardon legal modification)<sup>34</sup>

### **3.2. 6. The Death Penalty is used for Political Repression.**

It cannot be denied that in the countries concerned, application of the death penalty previously exceeded or is still exceeding the strictly penal field to encroach upon and serve political interests. Opponents of the ruling party are often sentenced. Whether the penal code directly or indirectly [via another offence] sanctions crimes of a political nature by capital punishment or not, political opponents are they declared or potential have paid or are still paying the price of this abuse of power. Uganda is particularly renowned for this as regards the crime of treason where if there are aggravating circumstances a judge must pass the death penalty.

In Burundi, following the inter ethnic crisis in 1993, Tutsi judges systematically sentenced to death those they considered the supporters of the Hutu rebellion and or involved in the 1993 massacres on the basis of the section of the penal code on endangering national security.<sup>35</sup>

### **3.2. 7. The death penalty goes against the humanist value and religion.**

The Roman Catholic Church has traditionally accepted the right of the state to execute people convicted of serious crimes but in recent years the death penalty has been redefined as inconsistent with catholic theology because execution lacks utility and dignity, fails to contribute to the common good and discriminates against the poor and minorities. In asking for clemency for people under death sentence, Pope John ii in 1933 criticized capital

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<sup>34</sup> Frank Gorchs –Chacou and Caroline sculiaer, *the death penalty in the great lakes region of Africa* at pg 18.

Pg.18

<sup>35</sup> Ibid.

punishment the first pope to do so. Catholic bishops in the United States have also voiced their opposition to the death penalty.

Protestants leaders have opposed capital punishment since 1957, denying that the state has the right to execute offenders and seeing capital punishment as a "Contradiction of both value of our Christian traditions and the principles of humane government".<sup>36</sup>

### **3.2. 8. Death penalty demeans the state.**

The death penalty is premeditated murder which demeans the state and makes the society more violent. Opponents of the death penalty claim that even if certain offenders deserve to die, a civilized society should not execute them. They argue that it is immoral for the state to take a human life as a form of punishment and that doing so "cheapens the value of human and might even encourage others to kill"<sup>37</sup>

### **3.2. 9. The Justice System is Fallible.**

The risk of executing innocent people remains indissolubly linked to the use of the death penalty. Since 1973, 166 people condemned to death in the United States have been released after proof of their innocent has been established. Some of them have only just escape execution after having passed years on death row. These repeated judicial errors have been especially due to irregularities committed by the prosecution and police officers who are often under great deals of public pressure to solve violent crimes and may overzealous in arresting and prosecuting suspects. Also recourse to doubtful evidence, materials information or confessions and incompetence of defense lawyers contribute to errors in judicial system.

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<sup>36</sup> Franklin 198: *Criminology* 6<sup>th</sup> edition at pg509

<sup>37</sup> The death penalty, the religious community calls for abolition of death penalty.



In addition, false confessions and faulty eye witness identifications are responsible for two of every seven wrongful convictions.<sup>38</sup>

### **3.2. 10. Death Penalty is a Collective Punishment.**

This punishment affects all the family, friends and those sympathizing with the condemned person. The close relatives of an executed prisoner, who generally do not have anything to do with the crime, could feel, as a result of the death penalty the dreadful scene of loss as the victim's parents felt at the death of their loved one.<sup>39</sup>

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<sup>38</sup> Hugo Adam Bedau & Michael Radalet, *miscarriages of justice in potential capital cases*.

<sup>39</sup> Amnesty international (above).30, 17.

## CHAPTER FOUR

### THE LAW ON DEATH PENALTY

#### 4.0 Introduction

The legal basis of the death penalty can be found in the current position in both international and domestic laws on the death penalty. This can be examined here below.

#### 4.1 International laws

The movement to abolish the death penalty is increasingly an international one. Whenever a country faces the controversial decision of whether or not to abolish the death penalty the arguments (both in favor of and against abolition) are almost invariably extrapolated from recent international development. Uganda is no different. For instance in *Susan Kigula and others vs. Attorney General constitutional petition case NO.6 of 2003*, it is clear that virtually all the issues that the constitutional court addressed were extracted from judicial decisions elsewhere.

##### 4.1. 1. The Universal Declaration of Human Rights. (UDHR)

The adoption in 1948 of the Universal Declaration of Human Rights (UDHR), which has been described as the “cornerstone of contemporary human rights law,”<sup>40</sup> marked the first of a number of patterns of international debate on the death penalty.<sup>41</sup> The main provisions in the declaration relevant to capital punishment are Articles 3 (the right to life) and article 5 (freedom from torture,

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<sup>40</sup> William Shaba's, *the abolition of the death penalty in international law*, Cambridge university press ( 2003)pg 23

<sup>41</sup> Joan Fitzpatrick and Alice Miller, *international standards on death penalty shifting discourse* 19 *Brooklyn Journal of international law* 273 (1993) p.277.

cruel, inhuman or degrading treatment or punishment) although article 5 was not linked to the death penalty in the beginning.<sup>42</sup> Articles 3 omit any explicit references to capital punishment, but its apparent neutrality<sup>43</sup>, has been interpreted as a compromise between accepting it as “a necessary evil”, and granting “early recognition of it’s inescapable implication of human rights issues.”

Furthermore, it has been argued that the preparatory works of articles 3 indicate “common aspirations”.<sup>44</sup>

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

While the signing of the international (ICCPR) in the 1966 and it’s coming into force in 1976 did not abolish the death penalty, the limitation of its application,<sup>45</sup> showed evidence of “ a tentative adherence to abolition as a goal”<sup>46</sup>. Some countries attempted to introduce a draft provision calling for its immediate abolition, but it ultimately included in the text of article 6 “as a carefully worded exception to the right to life protecting the individual against its arbitrary imposition.”<sup>47</sup>

Article 6 of the ICCPR restricts the imposition of the death penalty to the most serious crimes in accordance with applicable law at the time of the crime’s commission and pursuant to a final judgment rendered by a competent court.<sup>48</sup> Moreover, the provision recognized the right to seek pardon or commutation of

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<sup>42</sup> John F. Partridge and Alice Miller *international standard on death penalty*.

<sup>43</sup> A 1980 report from the UN secretariat

<sup>44</sup> Ibid.

<sup>45</sup> Paul Thruskelt, “*the death penalty international law and Human Rights*”

<sup>46</sup> The draft on “*every Human being has inherent right to life*” pg. 64.

<sup>47</sup> William A. Shaba’s “*international laws on abolition of death penalty(1998)*”

<sup>48</sup> ICCPR at Article 6(2)

sentence,<sup>49</sup> and bars the imposition of death sentences on pregnant woman and people who were under 18 years when they committed the crime.<sup>50</sup>

Additionally, article 6 (6) establishes nothing in articles 6 “ shall be invoke to delay or to prevent the abolition of capital punishment” , by any state party indicating a strong presumption in favor of abolition reflective of the widespread consensus that capital punishment should be abolished sooner or later.<sup>51</sup>

#### **4.1. 3. American Convention on Human Rights (ACHR).**

The inter-American system has also attempted to restrict and abolished capital punishment in its member states by adopting different instruments. Article 4 of the American convention on human rights (ACHR) permit the imposition of capital punishment subject to the same transactions found in the ICPPR and ECHR. The ACHR however includes additional limitations on death penalty; People under 18 over 70years, or convicted of political offences cannot be sentenced to death penalty it cannot reintroduced it.<sup>52</sup> In 1990 the OAS adopted the protocol to the American convention on human rights to abolish the death penalty,<sup>53</sup> which forbids states parties from imposing capital punishment except in wartimes.

The OAS's efforts to limit and abolish the death penalty in the America have been known to “back fire” with English - speaking Caribbean nations. For example Trinidad and Tobago withdraw from American convention in 1998,

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<sup>49</sup> Ibid Article 6(4)

<sup>50</sup> Ibid Article 6(5)

<sup>51</sup> Fits Patrick and Miller supra note2 at pg 2888-

<sup>52</sup> American convention on human Rights “pact of sanfase Costa Rice [http://www.as.org/jurido/English/Treaties.](http://www.as.org/jurido/English/Treaties/)”

<sup>53</sup> Protocol on the ACHR to abolish the death penalty OAs treaty series No. 73 (1990) adopted 8<sup>th</sup> June

following a judgment from the inter- American court limiting it's ability to impose death penalty.<sup>54</sup>

#### **4.1. 4. The African Human Rights System**

Article 4 and 5 of the African charter on Human and people's rights<sup>55</sup> though not expressly referencing the death penalty forbids arbitrary deprivation of the right to life as well as degrading and exploitation, including torture, cruel inhuman and degrading treatment, some commentators has interpreted these provisions as a approving of the death penalty, provided it is not imposed arbitrarily. Some have argued that the ACPHR can be interpreted under the UDHR, ICPHR and ECHR among others because article 60 provide that the charter shall draw inspiration" on human and people's rights from international law including international law including international instruments.<sup>56</sup>

Scholars have argued that the death penalty remains an enormous barrier to fair and equal justice in Africa.<sup>57</sup> However development indicates a remarkable transformation towards the "abolition position," evincing that total abolition in Africa is not unattainable aspiration.<sup>58</sup>

These Community of West African states (ECOWAS) where 9 members have either enacted abolitionist legislation or refrained from carry out executions for instance, Senegal passed abolitionist legislation in December 2004. Nigeria permits death penalty under its statutes and constitution, former president Olesgun Obasanjo opposed capital punishment. There have been no

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<sup>54</sup> David sell wood and hounds fenlands", *the death penalty in the commonwealth cabbean, recent trends and Road to abolition.*

<sup>55</sup> African (Banju) charter on Human and people's Rights adoption 27June, 1981 OAU.

<sup>56</sup> Emmanuel Kazimbazi "the Death penalty in Uganda paper presented at 1<sup>st</sup> international conference on the application of the death penalty in commonwealth "

<sup>57</sup> Margret Burnman;" *The Death Penalty. In East Africa, law Politics & Transactional Advocacy in Makau wa Mutua* edition. Human Rights NGOs in East Africa.

<sup>58</sup> Ibid

executions in Kenya since 1987 and in Tanzania there has been no execution since 1995 and Malawi has not carried out execution since 1992.

#### **4.1. 5. The International Criminal Tribunals for Yugoslavia and Rwanda.**

The international criminal tribunal for the former Yugoslavia (ICTY)<sup>59</sup> and the International Criminal Tribunal for Rwanda (ICTR)<sup>60</sup> excise capital punishment from its status which provokes debates particularly in the Rwandan context where the ICTR's influence on the death penalty is fraught with paradox.<sup>61</sup>

The Rwandan government itself initially requested UN to establish an international criminal tribunal to adjudicate the perpetrators of the 1995 genocide but it ultimately votes against UN Security Council Resolution 955 which establishes the ICTR. One of the main reasons for Rwanda's dissent was that the ICTR, like ICTY, allowed for life imprisonment as the tribunal's maximum punishment and argued that capital punishment would be conducive to national reconciliation.<sup>62</sup> The Rwandan penal code to date retains capital punishment.<sup>63</sup>

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<sup>59</sup> Statute of international Tribunal for adopted by Res 827 UNSCOR.

<sup>60</sup> Statute of international Tribunal for adopted by SCRCS955 UN

<sup>61</sup> Dirk Van Zyismit supra< note 76.

<sup>62</sup> See William A Shaba's, *sentencing by international tribunal a Human Right approach*.

<sup>63</sup> Article 26 and 312 of the Rwanda Penal Code Provide for imposition the death penalty.

## 4.2 The Domestic Legislation

### 4.2. 1. The constitution of Uganda 1995

The constitution is the supreme law of Uganda designed to protect the rights of all citizens .It is the superior to all laws, statutes, regulations, court decisions and customary laws.

The constitution of Uganda (1995) article 22(2) states that *no person shall be deprive of the right to life intentionally except in execution of a sentence passed in a fair trial by the court of competent jurisdiction in respect of criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest court of appeal*. This article is strongly protected by international documents on human rights like the European Convention on Human Rights (1950), the African Charter on Human and People's Rights (1968) and the American Convention on Human Rights (1969).

Though protected by various documents, the right to life is threatened by the very law that protects it, for instance social crimes and accidents are condemned by law, while in some instances they are acquitted for being legal like the death penalty. In law the death penalty comes as a contradiction to the essence of law itself and in some states this kind of punishment has first instance of a significant on the possibility of abolishing capital punishment in Uganda come during the process culminating in the enactment of the 1995 constitution.<sup>64</sup>

The constitutional draft commission headed by chief justice Benjamin. Odoki was tasked with producing a draft constitution for later consideration by a constituent assembly. The commission considered the issue of whether the death penalty was statistically analyzed along with a series of contentious

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<sup>64</sup> Constitution of Uganda available at <http://www.Parliament.Go.Uganda>

human rights issues.<sup>65</sup> The results of the survey indicated that “a large majority of those interviewed around 75% were opposed to the ideal of abolition.”<sup>66</sup>

Article 22(1) of the constitution provides for the right of life as not absolute as it's subjected to being taken away in execution of sentence of death penalty. Hence article 22(1) does not constitutional the death penalty but rather recognizes its existence and authorizes its imposition by legislation<sup>67</sup>.

However, the president of the South African constitutional court “Chalkalson” held that the state does not have to engage in the cold and calculated killing of murders in order to express moral outrage and their conduct. A very long prison sentence is also a way of expressing outrage and revising retribution upon criminals.

#### **4.2. 2. Criminal law.**

A number of statutes in the Ugandan legal system deal with the death penalty most significantly the Uganda Penal Code Act and Uganda People's Defense Forces Act (UPDF) which cumulatively prescribed the death penalty for 27 crimes (although the later statute is only applicable to members of the Ugandan military the UPDF). It is worth nothing that in 2004, the UN Human Rights Committee in it's consideration of Uganda's first periodic report specifically urged the government of Uganda to “limit the number of offences for which the death penalty is provided and to ensure that it's not imposed except for the most serious crimes.”<sup>68</sup>

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<sup>65</sup> These issues included the need for the establishment of a permanent national institution to safeguard Human rights, the necessary to abrogate detention without trial

<sup>66</sup> Benjamin. Odoki, the section for a National consensus; the making of the 1995 Uganda constitution, fountain publishers (2005)P.186

<sup>67</sup> GPTumwine Mukubwa supra notes. P.20

<sup>68</sup> Concluding observations of the human rights committee Uganda UN Doc.



Sentences of death are carried out by hanging as provided for by section 99 of the Trial on Indictments Act.<sup>69</sup> In the military context death is by firing squads.

Under section 189 of the Penal Code Act, the mandatory sentence for the crime of murder is death<sup>70</sup>. Section 286(2) of the Penal Code Act imposes the mandatory death penalty upon conviction for aggravated robbery,<sup>71</sup> Treason in violation of sections 23 of the Penal Code No. 25(1) and (2) in PCA is another offence carrying the mandatory death penalty in Uganda. Kidnapping with intent to murder is found in section 243 of the Penal Code Act. It provides for a discretionary sentence of death upon conviction section 124 of the penal code act prescribes a maximum discretionary sentence for the crime of rape and defilement is described in section 179 which also prescribes a maximum sentence of death for this crime.<sup>72</sup> In their inception rape and defilement were punishable by imprisonment it was only after the coming into force of statute No. 4 of 1990 that these offences became capital crimes. On June 2002, the Anti- Terrorism Act 2002 (ATA) came into force in Uganda.<sup>73</sup> In enacting this legislation, Uganda joined the ranks of countries that have adopted anti-terrorists legislative measures in the aftermath of the 9(1) attack. Under section 7 of the ATA, terrorism provides for a mandatory death sentence if the "terrorist offence" in question results in the death of any person and discretionary in any other case.

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<sup>69</sup> Trial on indictments Act, cap 23, laws of Uganda sec. 99, sentence on death shall be carried out by hanging in accordance with the provision of the Prisons Act.

<sup>70</sup> The penal code Act, chapter 120 of the laws of Uganda section 189 "Any person convicted of murder shall be sentenced to death".

<sup>71</sup> Robbery without aggravated is punishable by a maximum of 10 years

<sup>72</sup> Section 129(3), of the penal code Act Cap 120 laws of Uganda.

<sup>73</sup> The Anti-Terrorism Act 14 of 2002.

### **4.2. 3. Military law**

In addition to the Penal Code Act, members of the Ugandan people's defense Force (UPDF) Act.<sup>74</sup>UPDF soldiers who commit treason, murder, rape or disobedience of a lawful order, are punishable by a mandatory death sentence. Additionally the UPDF Act prescribes maximum discretionally death sentences for a wide array of offences. In particular mutiny section 18 of the UPDF Act, disobeying lawful orders (section19) failure to execute one's duties (section20) cowardice in action (section 29) offences by persons in command when in action (section 30) offence relating to security (section 37)among other sections in the Act.

### **4.2. 4. 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 most states such as Sudan and Egypt.

## **4.3 The Constitutionality of the Death Penalty.**

Discourse on the death penalty in Uganda has evolved considerably particularly over the last 15 years. The public views appear to be gradually shifting in favor of abolition, but according to opinion polls a majority of Ugandans, still favor of retention

Uganda has executed some 377people including one woman, according to records of Uganda prisons department. President Yoweri Museveni's Government has put 51 people to death since it took over power in 1986.

Since 1970s, the first hangings following high court condemnation took place on 15<sup>th</sup> march, 1989, when Kassim Obura, Lukoda Mugaga and Thomas Nangana were executed in Luzira prison. There were no further executions

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<sup>74</sup> Uganda people's defense force Act cap 307, laws of Uganda (1992)

under the Uganda penal code until 29<sup>th</sup> June, 1991, when nine prisoners convicted of aggravated robbery and murder were hanged in Luzira prison. Among them were three UNLA soldiers namely; William Otasono, Milton Ongom and Nicholas Okello who had been convicted of robbery and murder in July, 1984<sup>75</sup>.

An overview of execution figures in Uganda since 1991 indicates that they frequent but not abundant. Between 1991 and 1998, executions took place on average of every two years and involve the hanging of nine people on two occasions. A year with an exceptionally high figure was 1991, with 28 executions provoking criticism from civil society organization.<sup>76</sup> No more civilians were executed after 1999<sup>77</sup>. Currently, 555 prisoners, 27 of whom are women sit on Uganda's death row, according to prison department.

On the surface there appears to be a wide range of offences which can result in the death penalty under the laws of Uganda. However statistics indicates that judges are not prepared to send the accused to the gallows for treason or any of the discretionary capital crimes which suggest the judiciary's opposition to the death penalty. Though not occurring yearly executions are nonetheless frequent enough to alert national and international human rights organizations and have even led to a judicial challenge to the constitutionality of the death penalty.

The criminal process from arrest to execution is ridden with flaws and injustices casting serious doubt on the fairness of many death sentences. Internationally and nationally recognized due process rights are often neglected

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<sup>75</sup> FIDH, supra Note 74, P.16

<sup>76</sup> Amnesty international, *executions to resume with hangings of 28 people*, AI INDEX; AFR 59/13/99, <http://web.amnesty.org/library/index/ENGAAFR 59013/999>

<sup>77</sup> Amnesty international Uganda, soldier "*execution must not set trend*". AI INDEX AFR 59/002/2002, <http://web.amnesty.org/library/index/ENGAAFR 5900 22002? Open 8 of = ENG-UGA>.

or ignored altogether. Especially egregious are the military courts which ignored fair trial guarantees particularly in operational and hoe court martial proceedings and rarely publics' hearings.

The action taken by the Ugandan Foundation for Human Rights initiative (FHR I) led to historic decision by the constitutional court. In the case of *Susan Kigula and 417 others*, the petitioners argued that the death penalty violates article 44(a)(freedom from torture, cruel, in human and degrading treatment or punishment), 22(the right to life),21(the right to equality and freedom from discrimination) and 28(the right to fair, speedy and public hearing before an independent impartial court or tribunal) of the Ugandan constitution. Hence, the petitioners aimed to challenge the constitutionality of their death sentences and replace them with "alternative, severe but lawful" forms of punishment such as life imprisonment<sup>78</sup>.

African countries had already witnessed attempts to question the constitutional legality of capital punishment but what made the Ugandan example different was that a FHRI managed to convince all the detainees on death penalty raw to launch the appeal together.

Although the decision was passed by a small majority (three judges out of five), and the court did not question if the constitutionality of the death penalty itself, the result was still historic and important stage in the struggle towards abolition.<sup>79</sup>

However ,in the case of *Rwanyarare VAG*,<sup>80</sup> the constitutional court determined that one cannot challenge the provisions of the constitutions as being

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<sup>78</sup> Constitutional petition No.6 of 2003

<sup>79</sup> *ibid*

<sup>80</sup> Constitutional petition 1/97

“unconstitutional,” constitutionally article 22 cannot therefore be challenged , it can only be revised by the review commission for amendment.

However, president of South African constitutional court “Chaskalson” held that; punishment must to some extent be commensurate with the offence but there is not requirement that is should be equivalent or identical to it. The state does not put out the eyes of the person who has made the other blind nor does it punish a rapist by castrating him.

#### **4.3.1. The Death Penalty and the Right to Life.**

The universal declaration is a pledge among nations to promote fundamental rights as the fundamental of freedom justice and peace. The rights it proclaims are inherent in every human being. They are not privileges that may be granted by government for good behavior and they may not be withdrawn for bad behavior. Fundamental human rights limit what the state may do to a man, woman and child.

Worldwide’ the legitimacy of the death penalty is being questioned from a human rights perspective. Even in Uganda there are voices from within civil it’s abolition.

However, the 1995 constitution of Uganda retained what was contained in 1969 constitution. Article 22(1) provides thus; the right to life and dignity are the important of all human rights and the source of all other personal rights and if taken away all other tight cease.

#### **4.3.2. Prohibition against torture, cruel, degrading and inhuman form of punishment.**

The death penalty degrades and dehumanizes the “offender” under article 24, of the constitution, No person shall be subjected to any form of torture, inhuman and degrading treatment or punishment. Article 44 of the constitution provides that notwithstanding anything in this constitution, there shall be no derogation from the enjoyment of the following rights and freedoms;

- (a) Freedom from torture, cruel inhuman or degrading treatment or punishment.

Since the above right is unqualified, once it is agreed that the death penalty dehumanizes the offender then it should be declared unconstitutional.

Universal declaration recognizes each person’s right to life and categorically that right to life is not absolute as it’s subjected to being taken always in execution of sentence of death penalty, which has been confirmed by the highest appellate court.

No matter what reason a government gives for executing prisoners and what method of execution is used, used, the death penalty cannot be separated from the issue of human rights. The legitimacy of the death penalty is increasingly under question. It is considered by human rights activities as degrading, inhuman treatment. The death penalty no longer passes the test of international standards of human basic dignity. Consequently, there is a world wide trend towards its abolition.

*In the case of the State Vs Makwanyane and Mchunu*<sup>81</sup>, in his judgment justice Chalkalson summed up reasons why his country decided to abolish the death penalty. He states further that “No one shall be subjected to torture or to cruel,

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<sup>81</sup> (1995)1LRC269.

inhuman or degrading treatment or punishment. In amnesty international's view the death penalty violates these rights.<sup>82</sup>

Self defense may be held to justifying in some cases, the taking of life by state official for example when a country is locked in warfare (international of civil) or when law – enforcement official must act immediately to save their own lives or those of others. The death penalty however is not an act of self defense against an immediate threat of life. It is the premeditated killing of a prisoner who could be dealt with equally well by less harsh means.

There can never be a justification for torture or for cruel, inhuman or degrading treatment or punishment. The cruelty of the death penalty is evident. Like torture an execution constitutes an extreme physical and mental assaults on a person already rendered helpless by government authorities.

If hanging a woman by her arms until she experiences excruciating pain is rightly condemned as torture how does one describe hanging her by neck until she is dead? If a pistol held to the head is clearly an instrument of torturer how should it be identified when used to kill by shooting.

The physical pain caused by the action of killing a human being cannot be quantified nor can the psychological sufferings caused by foreknowledge of death at the hands of the state. Whether the death penalty is carried out six weeks after a mass that of 16 years after lengthily legal proceedings the person executed is subjected to uniquely cruel, inhuman and degrading treatment and punishment.<sup>83</sup>

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<sup>82</sup> Amnesty international document library of 1<sup>st</sup> October, 2004

<sup>83</sup> Ibid.

## **CHAPTER FIVE**

### **5.0 RECOMMENDATION AND CONCLUSION**

#### **5.1 RECOMMENDATION**

##### **5.1. 1. Protection of the Disadvantage**

Although free legal representation is guaranteed by the constitution in both capital cases and cases where the maximum penalty is life imprisonment, serious doubts have been raised about the quality of representation provided by state briefs. There are a number of institutions in offering free legal representation in Uganda, who are doing very meritorious association, the legal Aid project of the Ugandan law society and the legal Aid clinic of the law development by state briefs and private lawyers required to provide pro-bono services. The enumerations offered to such advocates are very low hence most of the lawyers do not take the case seriously.

Capital defendants especially the disadvantage convicts who cannot afford to have private lawyers to represent them are often provided with less vigorous defense by the state briefs who meet them at the time of trial, thus the state should provide adequate funds of death penalty cases in order to aid the disadvantage convicts.

##### **5.1. 2. Alternative to life imprisonment.**

A life imprisonment is better different to crime than the death penalty.

An execution provides only a single different example where as "the penalty of a life time of servitude for a single crime supplies frequent and lasting examples to others.



There are several important reasons why the death penalty has not been shown to be a different effect. First, those who commit murder totally set out to do so rather most homicide occur as unplanned act during the commission of a robbery of other felony, thus death penalty is not considered as possible outcome because murder was not an anticipated part of the crime. Second, offenders rarely believed that they will be caught. Third, when criminal homicide occurs they are usually committed during a moment of intense anger or emotion in which reason is distorted. All of these circumstances work against the exercise of rational behavior which is pivotal to the nation difference hence life imprisonment should be the alternative.

Some claim that carrying death penalty is more economical than housing a prisoner. It is true but death penalty is not a remedy. I would suggest that prisoners condemned to death penalty can encourage in same kind of production. For instance, they can be sending out of prison to work while guarded. They can producers furniture or agricultural products in form to sell hence avoid being passive consumers, but productive to the government.

### **5.1.3. A need for a practical right to appeal.**

Article 22 of the constitution of Uganda 1995, enshrines the right of all capital convicts to appeal to the court of appeal and then to the Supreme Court. However, in practice this right is hindered by one of the biggest shortcomings in the legislative frame work of the death penalty, in Uganda the impossibility of appealing against the severity of the sentence according to section 5(3) of the judicature Act Cap 13 laws of Uganda (1996). This provision not only hinders the right of an accused person to a fair trial, but arguably constitutes an infringement upon the principle of separation of powers and an impediment to the exercise of judicial discretion which may not hear mitigating

circumstances with regard to the sentence. Hence there is a need for a practical right appeal.

#### **5.1.4. Addressing the social economic factors.**

Without doubt there is much to be done to prevent people becoming victims of crimes including crimes of violence. As discussed in the United Nations, the measures needed to tackle crime include;

Addressing the relevant social economic factors such as poverty inequality and unemployment, strengthening social standards on and standards towards crime, education through mass media on what the public can do protect itself and reduce the opportunities for crime detection and arrest of the offenders; helping to improve crime detection and arrest of the offenders programs for the rehabilitation of offenders enabling them to lead productive social lives; programs to address the needs of victims of crime, including compensation for damages sustained and research into pattern of crime and better ways of preventing and detecting it.

#### **5.1.5. Amendment of the constitution**

In Uganda the death penalty is not imposed by the constitution but by the penal code which according to some reliable sources should be revised.

However, articles 22, 28(e), 80 (e), of the constitution, consider the possibility of the death penalty” **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 sentence have been confirmed by the highest appellate court”**

In spite of the above provisions, the death penalty is not in line with the spirit of the constitution because of article 44, which provides that notwithstanding

anything in this constitution there shall be non derogation from enjoyment of the following rights and freedoms ;

(a) Freedom from torture, cruel, inhuman or degrading treatment or punishment.

Article 24 provides that No person shall be subjected to any form of torture, cruel, inhuman and degrading treatment or punishment.

As seen above, to be on “death row” years is torture and cruelty, the execution itself is a second torture, cruelty often inhuman degrading. This calls for the amendment of the constitution.

#### **5.1.6. The guest of mercy killing should be raised**

Abolishing the death penalty is no remedy for the injustice of the sentencing a person. It is inhuman and degrading to imprison a person. But i think it is obviously worse for him/ her to be killed than to be in prison thinking it is better off to be dead or to be alive it is up to him/ her to determine and not the judges thus the guest of mercy killing should be raised.

### **5.2 CONCLUSIONS**

The death penalty does not stamp out crime; it is a pseudo solution which diverts the attention from the false measures from the false measures needed to prevent crimes by creating the false impression that decisive measures are being taken. The death does not protect the society but rather distracts attention from the urgent methods of effective protection when at the same time uphold and enhance respect for human rights and life.

Like torture, the death penalty is cruel inhuman and degrading

It destroys human's lives and violates human's heights. The alternative to the death penalty like the alternative to torture is abolition.

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