THE DEATH PENALTY IN UGANDA: HUMAN RIGHTS VIOLATIONS VERSUS CRIME CONTROL CONCERNS

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DECLARATION

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

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

Signed.....

BAKOLE MANSHURU SHABAN

DATE...17/08/2010

APPROVAL

This dissertation is submitted with the approval of my supervisor

Signed .....

DR. SARAH KINYANJUI

DATE..17/8/2010.....

DEDICATION

This work is dedicated to my beloved parents and grant parents Mr. Thabit Matata Ondoga and Mrs. Agoli Kadara and Mr. Abdullah Ondoga and Mrs. Dabiya Uyu for showing me the light of the day, Yobu Ayisa and lastly Hon/Hajjat Oleru Huda and Professor Uluru for their tireless support to me.

May Allah bless you all?

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LIST OF INSTRUMENTS

International instruments

African Charter on Human and Peoples' Rights ADOPTED ON JUNE 27 1981 OAU Doc CAB/LEG/67/3re.5, 21ILM58 (1982) entered in to force Oct 21st 1986[excepts]

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

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950

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

Universal Declaration of Human Rights 1948

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

National instruments

Penal Code Act Cap 120 Laws of Uganda 2000

The Constitution of the Republic of Uganda (1995)

The National Resistance Army Code of Conduct

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

Trial on Indictment Act Cap 23 Laws of Uganda 2000

LIST OF CASES

Bachan Sigh Vs State of Punjab (1980) SCC684

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

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

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Gregg Vs Georgia 428 US 153.

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

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

Rajendra Prasad Vs State (1979) SC 916.

R Vs Home Secretary, Experte Bugdaylay (1987) AC 514.

R Vs Robert (1957) 4 S.A 265 (AD)

R Vs Majafe, 2.S.A 118(1958)

S Vs Mtilongo (1994) 10sacr 584.

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CHAPTER ONE

1.0 INTRODUCTION:

The death penalty is a controversial form of punishment. It has been condemned and abolished in many States for being a violation of the right to life A considerable number of countries, including Uganda, have retained it. There has thus been a significant level of discussion on the subject. In Uganda, the debate reached its peak during the constitution making process that ended in 1995 when the majority of Constituent Assembly Delegates voted to retain the penalty amidst strong opposition from different circles. The death penalty also got considerable attention during the hearing of the 2003 Constitutional Petition filed by Susan Kigulla and 416 others.[1]

Significant opposition emanated from Non-Governmental Organizations such as the Foundation for Human Rights initiative (FHRI) which lobbied the Constituent Assembly to exclude capital punishment in the 1995 Constitution. On the other hand the Constitutional Draft Commission, which was headed by Justice Benjamin Odoki, appreciated the strong opposition against the death penalty but nevertheless did not recommend its abolition[2].

The death penalty is also endorsed by Article 22(1) of the constitution which provides that

> "No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court competent jurisdiction in respect of a criminal offence under the law of Uganda and the conviction and sentence have been confirmed by the highest appellate court"[3]

In the Penal Code Act, the death penalty is provided as the mandatory punishment for several offences, including murder, treason, armed robbery and smuggling. The death penalty is also a maximum punishment for other offences such as kidnap, rape and defilement[4], Terrorism[5].

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[1] Constitutional Petition No. 6 of 2003.
[2] *Report* of the Uganda Constitutional Commission (1992).
[3] Uganda Constitution (1995)
3 Murder (S.189), Armed Robbery(S.286),Smuggling[(S.319(2)],Treason[(S.23)(d)],Kidnapping(S.243),Rape(S.124), Defilement[(S.129(1)].
[5] Section 7(a) of the Anti- Terrorism Act 2002.

In addition to the legal recognition of the death penalty, current data on the death penalty in Uganda indicates that the death penalty is actively used as a form of punishment[6]. The bulk of these are held on charges of rape and defilement[7].

There are two occurrences that may contribute to people's change in opinion on the death penalty. Firstly, shocking events such as the hanging of 28 people which was done ion April 29th 1999[8] at a go may change the public's view in support of the death penalty. Secondly effective civic education on the pros and cons of the death penalty may influence the public's opinion. [9]

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

DEFINITION OF DEATH PENALTY.

"The death penalty refers to the legal infliction of death as a penalty for violating criminal law". It involves inflicting severe trauma and injury on a human body to the point where life is extinguished[10].

1.1 BACKGROUND OF DEATH PENALTY.

The law and philosophy underlying the use of the death penalty in Uganda can be traced to the development of criminal law in English. Like other laws, criminal law in Uganda is largely a colonial legacy introduced in Uganda under the reception clause of 1902[11].

However, the earliest historical records containing evidence on capital punishment can be traced from the code of Hammurabi of 1750 B.C, which prescribed a revengeful punishment popularly

[6] Amnesty International, when the state kills...the death penalty
[7] E.A Journal of peace and Human Rights Vol:6, No,2 2000 P.224
[8] New vision on 29th april 1999
[9] New Vision 29 April 2008
[10] Amnesty International Report 1999 P.5
[11] G.S.K.Ibingra, the Political Constitutional Evolution of Uganda from Colonial Rule to Independence,1894-1962, (1973)

referred to as "an eye for an eye", a tooth for a tooth"[12]. Besides that, the Bible prescribed death as the penalty for more than thirty different crimes, ranging from murder[13] and fornication[14].

According to Robert Seidman, the law on penal punishment in England developed five stages. The first one was the primitive stage. In this period, all crimes were punished with extremely harsh suctions, the commonest penalty for felonies being death. Given the general absence of private property, the majority of offences were personal offences such as rape and murder, which were punished with death. The second stage[15] witnessed the emergence of the concept of retribution where punishment was designed to fit the crime. The emergence of this concept coincided with the articulation of the natural law and rights theory that emphasized the derived right and power, which no human being could upset.
Retribution as the basis of punishment gave way to the concept of deterrence that was articulated by 18th and 19th Centuries rationalists like Jeremy Bentham. This marked the third stage in the development of penology and principle of punishment. Philosophers advocated a utilitarian approach to the law and sought to derive principle of punishments from human nature, holding that the basis objectives of criminal law were to deter potential criminals by examples. This reasoning founded the doctrines of " a classical theory of criminal law".

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

The above theories on criminal punishments have continued to be applied and to influence sentencing in courts of law today as a basis of punishments. In Africa, it appears that the

[12] The Biblical Maxim
[13] Exodus 21:12
[14] Deuteronomy 22:13
[15] Robert B. Seidman, A Source Book of the Criminal Law of Africa (1966).

deterrence theory is a dominant basis of judicial sentencing[16].In Uganda, government policy on the death penalty tends to lie on this theory. According to Abu Mayaja, a former Deputy Prime Minister/ Minister of Justice and Attorney General of Uganda, "the death penalty is a strong deterrent to crime in a socially deprived society"[17]

The death penalty in Uganda was inherited from the British[18]and upheld by the constituent assembly while discussing the 1995 constitution[19]. It is not surprising that today this form of punishment is applied in Uganda penal system as a mandatory punishment[20].However, the Susan Kigulla Constutional Petition[21] which was concluded in 2005, underscored the principle that the mandatory death penalty was unconstitutional.

1.2STATEMENT OF THE PROBLEM.

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

International legal instruments like the Universal Declaration of Human Rights (UDHR), the International Convention on Civil and Political Rights (ICCPR) protect the right to life. Thus, this dissertation examines the extent to which retaining the death penalty in Uganda is a violation of international and regional human rights provisions as well as the Constitution of Uganda.

1.3OBJECTIVES OF THE STUDY.

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

The specific objectives of the study are:

a) To examine whether the death penalty contravenes the provisions of the Constitution of Uganda and international and regional human rights provisions.

[16] RV.Majafe, 2S.A 118(1958)
[17] The New Vision 10 march 1992
[18] Capital Punishment was introduced by the British in Uganda under the Reception Clause of 1902.
[19] Supra note. 7
[20] The Penal Code Act Cap 120 Vol.6
[21] Constitutional Petition No. 6 of 2003.

b) To assess whether the death penalty in actual fact achieves its purported objectives of retribution and deterrence. In other words, whether it bears any relevance in the context of Uganda today.

c) To establish a case for the abolition of the death penalty.

1.4 HYPOTHESIS.

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

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

1.5 SCOPE OF THE STUDY.

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

1.6 SIGNIFICANCE OF THE STUDY.

The debate on the constitutionality of the death penalty in Uganda mirrors the complex cultural and religious beliefs the international community has had to deal with in attempting to find a lasting solution to capital punishment The Susan Kigulla Constitutional Petition reiterated issues raised by the Constituent Assembly Delegates during the Constitution review process. These issues remain unsolved. The submissions made during the Susan Kigulla case affirmed the human rights obligations that bind Uganda. On the other hand, crime control considerations cannot be ignored. This dissertation discusses the death penalty in light of these competing interests.

METHODOLOGY:

For this study, the researcher engaged in desk research as the main source of information. The researcher used the following libraries: Law Development Centre, Uganda Christian University, Uganda Human Rights Commission, and Foundation for Human Rights Initiative, The British Council and Human Rights Peace Centre at Makerere University.

Books, academic articles, newspaper articles and web-based resources were used.

CHAPTER TWO.

2.0LITERATURE REVIEW

2.1 Death penalty in Ugandan view.

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

Justice George Kanyeihamba[22], in his article *Uganda Still Needs the Death Sentence*, while justifying the role of court in upholding the death penalty expressed his point of view saying that, 'retribution means not only the convicted person should receive punishment that is proportional to his or her guilty but the punishment should also be proportional to the harm done'. In this later sense punishment is tantamount to retaliation. The judge seeks justice by imposing the sentence the criminal deserves. This argument seems to stress the fact that such decisions are unjust like the crime itself. This literature opposes the abolition of death penalty. Proportioning the severity of punishment to the gravity of the crime requires the primitive rule of the life for life. It is not necessary that the punishment is equivalent to the offence because it could require, for instance, punishing the rapist by raping him or putting out the eyes of those who have blinded others. This form of retribution is unacceptable and gives credence to the argument that the death penalty should be abolished.

Karaoke *C.K* advancing *the Case for Partial Abolition*[23]quotes Prof. GAO Mingxuan who arguing in defense of the death penalty expressed the opinion that 'if we abolish the death penalty now, no other punishment could be sufficient to express the negation of monstrous the goal of reinforcing the law abiding attitude by way of punishment will then be unattainable'. This work does not advance the cause for the abolition of the death penalty in Uganda. It emphasizes more on retaining the death penalty as the only alternative of expressing the negation

[22] Kanyeihamba; Uganda still needs the Death Penalty. The Uganda Human Right Magazines June –July, 1999at 24
[23] Karusoke C.K; the case for Partial Abolition' Uganda Human Rights monthly Magazine Vol.6 No.1 May 2003 at 6

of monstrous crime. This dissertation argues that life imprisonment can adequately serve this purpose hence justifying the abolition of the death penalty in Uganda

According to Patrick Marshall,[24] capital punishment seems to have played the role of attaining justice amongst the subject of the state. To him, justice can only be attained when the criminal is subjected to the same treatment in which he put the victim. In his article entitled *Why are Countries Abolishing the Death Penalty*? He asserts:

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

In an article, *The Constitutionality of the Death Penalty in Uganda: a Critical Inquiry*[25] Apollo Makubuya argues that 'the receptionists of capital punishment link the punishment to the deterrence theory'. They argue that if the death penalty is abolished there will not be any punishment adequate enough to deter those criminals who are already serving a long term sentence in prison or those who commit murder while incarcerated and even those who have not yet been caught but are potential criminals.

The other groups of the people that the receptionists would like the death sentence to be imposed upon are: terrorists, revolutionaries and spies. The retentionist bases their argument on the fact that taking the offenders life is the most severe than any other forms of punishment; it therefore has better deterrent effect to potential offenders. The researcher's view is that this argument is not fool proof. This is because there has been a rise in crime rates of which there is no proof that taking the offender's life has deterred the rates of crime in Uganda. It is therefore

[24] Why are more Countries Abolishing the Death Penalty Uganda' Uganda Human Rights Monthly Magazines June July 1999 at 28

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

contended here that the death penalty serves no useful purpose and hence should be abolished in Uganda.

Charles Smith [26] puts forward an argument for the deterrent effect of the death penalty. In his book *Outrageous Atrocity or Moral Imperative*? He argues that, "if executing a convicted murderer is barbaric is it not all more barbaric to make sacrifice of additional lives in order to save the life of the murderer"?

If, for the sake of the argument capital punishment is implemented under the mistaken notion that it deters, the lives of the convicted murderers are lost. On the other hand, capital punishment is abolished due to the mistaken belief that it does not deter, then innocent lives are lost. Social justice would then suggest all the things equal, that death penalty for premeditated murderers, should be retained[27].

Titus Raids[28], in *Crime and Criminology* said that "retribution is the only doctrine supporting punishment in general and in proponent it has attributed the doctrine of death penalty, to him according to this doctrine, there is no need to consider the effectiveness of the punishment and as such, its goal is not doing justice but rather preventing crime".

Amnesty International report[29], on *Uganda: the Death Penalty, a Barrier to Improving Human Rights?*, notes that the death penalty appears to be generally so widely supported by the public in the belief that it presents an effective deterrence against crimes. The argument is therefore that the death penalty acts as a safeguard for violation of human rights. Thus, it further notes, that it is true to the extent that military officials justify their preparedness to execute soldiers as an indication of their commitment of the human rights and the rule of law. The report further advances that the Ugandan government has at times defended the death penalty on the ground that the Ugandan public expects retribution. The government also argues that if forever the death

[26] Charles; (1997), 'Outrageous Atrocity' at 34.copy right © 1990-2010 IMDb.com .Inc in An amazons. Company
[27] The Human Rights Activists.
[28] Titus Rimed (1997) 'Crime and Criminology' at pg 519.
[29] The Death Penalty; A barrier to improving our rights 'Amnesty International Report may 1993 AI Index; AFR 59/03/93

penalty is abolished, the people will lose confidence in it and as a result, they will take the law in their own hands.

The government bases this argument on the possibility of eminent danger of people being subjected to mob justice for serious crimes that they might have committed such as rape and murder. According to the report, the government seeks to show the civilian population that the authorities will punish those who committed serious crime against another person.
This argument has nothing to do with the abolition of the death penalty in Uganda, because the government of Uganda tries to show its responsibility over serious crimes by allowing the death penalty. But this can presently be achieved through life imprisonment of those who committed serious crimes as murder. The meting out of the life imprisonment would show the government's commitment to serious crimes and at the same time preserving of human rights of a murderer. The death penalty on the other hand denies both human rights and punishment of the murderer. In addition, the argument wants is that, in an ordered society citizens should rely on the legal process rather than self help to vindicate the wrongs.

According to Karpal Singh[30], the death penalty cannot be justified because the state has no right to take a citizens life for a simple reason it did not, in the first place, give life to the condemned. God did and, therefore, it is only He who can take it. This argument is relevant in abolishing the death penalty in Uganda. It helps to show that the life is irreplaceable and the sentence of death is irreversible so the impression it gives abolition of the death penalty.

Civil Society Coalition on the Abolition of Death Penalty (CADP) [31] was formed to foster joint advocacy on the abolition of death penalty in Uganda. CADP's members are: the Foundation for Human Rights Initiatives, Amnesty International, Friends of Hope for Condemned Prisoners Uganda, Human Rights Network (Uganda), Public Defenders Association of Uganda, the Uganda Association of Women Lawyers and the Christian Joint Council. According to CADP the sanctity of human life cannot be upheld by a state that easily panders to stir emotion of revolution and retribution. Hence, the sincere requirement for the respect of human life has to

[30] Karpal Singh (1999); Legal and Constitutional Issues Paper Presented at the 12th Common Wealth Law Conference at Kuala Lumpur in September 1999 at p.1
[31] CADP 2005

include the abolition of the death penalty. The article offers the opinion that, the challenges that comes to the legislature is not impose death as a remedy to those in the society, but rather in statute books that provide for a death penalty in Uganda.

Christopher P. Marshall[32] in his book *'Beyond Retribution'* expresses his disagreement with the argument that death penalty offers retribution to the family of the victim hence insuring that justice is done. He however, acknowledges the society's needs for retribution but still expresses distaste for execution.

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

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

Further still, Christopher Marshall[33], in *"Beyond Retribution"* is of the view that,

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[32] Christopher P. Marshall (1998) Beyond Retribution.
[33] Christopher P. Marshall (supra) rigid at 11

"Protection of the innocent is a fundamental moral duty of the society" but execution is not the only way to achieve it. In fact, the likelihood of a defendant facing death may even discourage juries from convicting a guilty person, perhaps heightening the risk of re- offending. Certainly there are some people who are so dangerous that they need to be removed indefinitely from the society, but however, the vast majority of convicted murderers never kills a second time and poses no greater threat to the innocent than do other members of the community"

This work brings the knowledge that there is a need to protect the innocent people. One of the ways to achieve that is sometimes removal of the murderers indefinitely from the society. Marshall's work helps us to understand that such protection of the innocent is not necessarily achieved by executing the convicted person. This implies that there are other forms of punishment that can be given to the murderers who are so dangerous other than the death penalty. Thus, it is relevant to this research which examines whether the death penalty in Uganda should be abolished.

Amnesty International Report[34], emphasizes society should not condemn the premeditated killing of defenseless people, whatever they might have done.

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

Apollo Kakaire[35], in his article *'The death penalty, the Case for Total Abolition'* observes that, people who murder are normally irrational at the time they commit the crime. Therefore, the

[34] The Death Penalty; an Affront to our Humanity, Amnesty International Report 1999 at P.4
[35] Apollo Kakaire (2003). The Death Penalty; a case for Total Abolition at Pg 5

threat of future death does not enter the minds of the killer acting under the influence of drugs or alcohol, in the grip of fear or rage, panicking while committing another crime or simply lacking an understanding of what he is doing. The deterrence theory is therefore, based on speculation and any tested evidence. He therefore concludes in his words that,

> "While many people support the death penalty in Uganda and there may be in some situations the risk of mob justice justifying capital punishment on the grounds that people will take the law into their hands, are simply a failure to take responsibility for the law and order. It is also a way of a violating the responsibility of introducing effective measures to protect human rights,"

This work is relevant to the topic in view of the fact that it challenges the claim that the death penalty serves a deterrent effect. It thus contributes to the arguments in favour of abolishing the death penalty.

Fr Tarcisio Augustine[36], in this book '*May the State Kill*' maintains that capital punishment has led to the killing of innocent people though this seems to be a difficult thing to happen. In addition, he asserts that there are number of factors contributing to this innocent killing. For instance, he attributes these on rampant corruption in the system which cuts across the different stakeholders in the administration of justice, law and order. That is, it is present within the police, prosecution and the lawyers themselves. To him this is enough to conclude that innocent people have over the years been convicted and executed.

Another factor that he attributes to the killings is the indifference of the officials in the court, police investigating authorities and the director of public prosecutions, this practice has been drawn from the plea bargain, where the condemned enter bargain, through payment of money and subsequently bringing false testimonies that the innocent are convicted, condemned and executed for the crimes that were committed by the rich. This helps us to understand that the death penalty has been used inconsistently, especially where the poor could be executed when

[36] Fr. Tarcisio Agotoni (2004) May Sate Kill at P.17

they are in fact innocent. Thus, this work contributes to arguments against the death penalty in Uganda.

He further contents that punishment should not violate human rights. According to him, the extent of punishment should carefully evaluate upon and should not go to the extreme of executing the offenders. He however gave the situation when the capital punishment may be exceptionally used in cases of absolute necessity that would be in a situation where the rights of the citizens of the states could not have been protected other than the 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 offender[37].
The gist of this work shows that the death penalty if used will violate human rights and its use is opposed except in exceptional circumstances. Hence, this review indicates that the abolition of such punishments as it violates human rights.

According to Crises and Joseph Boyle[38], capital punishment is immoral because it involves the premeditated killing of an individual, which is a kin to murder. The researcher concurs with this submission as the death penalty is another form of execution and is considered the greatest offence of which in most cases, punishment cannot be reduced.

Ernest Candern Haag[39], states that, "Every thing that can be said about possible capriciousness in applying capital punishment can be said about imprisonment as well." This means that, as much capital punishment is inhuman, degrading and cruel especially death penalty, imprisonment is also of the same effect. The researcher does not concur with this assertion, because imprisonment and death penalty are very different. For this reason imprisonment needs to replace death penalty as it can preserve human dignity.

[37] Ibid p.32
[38] Life and Death, Liberty and Justice "London, Notredane press 1979 PP 450
[39] Ernest Candern Haag (1979), Punishing Criminals New York Basic Books inc.P.228

According to James A, Joyce[40] the legalized taking away of human life by the state in the name of social defense has now days become the politics of the first instance and an issue of world wide proportions.

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

J.S Mbiti[41] states that before colonialism, each community has its own form 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 to understand that death penalty fits serious offences that could not otherwise be punished by other forms of punishment. Nevertheless, the weakness under this review is the fact that serious offences are not well defined by the author.

Therefore, this helps readers to understand that in some countries, capital punishment, mainly death penalty has been retained for offences of high treason and for members of the armed forces in the times of war. For example in England, there was execution of two men convicted for murder on 19th Aug 1964[42].

H, Ralph [43], offers an essential insight in to the debate on capital punishment, especially with the views of receptionists and abolitionists of capital punishment in general. It is submitted that capital punishment today serves no purpose than satisfying the desires of political leaders.

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[40] James A. Joyce (1983), 'The Right to Life London
Victor Gollarez ltd pp 210

[41] J.S Mbiti, (1985), African Philosophers & Religion London Heiman, PP.211

[42] Amnesty International, 'When the State Kills' USA, A. I Publications 1989 pp.226.

[43] C. H Ralph (1979), 'Common Sense About Crime' London, Victor Gillanez ltd pp.450

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

Kakaire[44] asserts that capital punishment has never been shown to deter crime more effectively than other punishment. Its use, it is claimed, diverts attention from the need to improve law enforcement systems and to address the underlying causes of crime.
This is virtually true because if for instance an offender is given a fine or imprisonment as a fine, he will be able to change and the law enforcement bodies are able to observe such criminals. Hence, the death penalty can come as a last resort or otherwise be done away with.

According to Abu Mayanja,[45] 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.' This view seems not to hold the truth in Uganda where most crimes are committed every day of which the death penalty is imposed. This is in line with Amnesty International's argument that the continuing frequent occurrence in Uganda of crimes for which the penalty is death strongly suggests that it has no deterrent effect whatsoever[46]. Thus, death penalty serves no useful purpose if it cannot deter the most serious crimes, it should therefore be abolished in Uganda.

According to M.S Stephanie Hoey *of Foundation of Human Rights Initiatives*[47], capital punishment does not stamp out crimes. It is a pseudo solution, which diverts attention from the measures needed to prevent crime; by creating the false impression that, decisive measures are being taken. Such punishment like death penalty does not protect society, but rather distracts attention from the urgent need for methods of effective protection, which at the same time uphold and enhance respect for human rights and life. Indeed, whether or not there exists capital punishment in our law books, the crime rate has never gone down, but it is rather increasing. Therefore capital punishment it not the best punishment for offenders and alternatives should be sought. This view is applicable to the topic of research that calls for abolition of the death

[44] Death Penalty; Total or Partial Abolition UHRC Monthly Magazine Vol. No. 1 May 2003
[45] The New Vision 10 March 1992
[46] Amnesty International Report.
[47] Death Penalty in Uganda on the Exchange of views, Meeting on Death Penalty Organized by FHRI, at fair, way Hotel, Kampala 28th Feb 2000

penalty, for the reason that it has effect on the rampant crimes in Uganda; the alternative to this punishment could be life imprisonment.

Hugo Bedan[48], in *Case against Capital Punishment* states, "All punishment is reductive. Therefore, whatever legitimacy is to be found in punishment as just reduction can, in principle, be satisfied without recourse to executions". He further argues that the death penalty can be defended on narrowly retributive grounds only for the crime of murder, and not for any of other crimes that have frequently been made subject to this mode of punishment. According to him if making the punishment fit the crime means that punishments are unjust unless they are like the crime itself, the principle is unacceptable since it would require us to rape rapists, torturers, and inflict other horrible and degrading punishment on offenders.

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

2.2 International views on the Death Penalty.

According to the Amnesty International Report, the death penalty is a barrier to improving human rights,[49] CADP. The report notes that "in Uganda, therefore, the death penalty is not only a denial of the ultimate human right to life but a barrier to official action to ensure that other kinds of human rights violations do not take place". This helps readers to understand that due to a misconception that the death penalty is an effective deterrent, it prevents the authorities to see the need to introduce practical safeguards which would actually deter or prevent human rights violations. This implies that the death penalty is more of a problem than a solution.

The Amnesty International report *further* quotes Justice Cuba, when he spoke about the "government's reasons for abolishing the death penalty. He stated that:

> "considering that there is no empirical proof that the death penalty is a more effective deterrent than a long prison sentence; Mozambique has adopted an abolitionist position

[48] Hugo Bedau (1997), case Against Capital Punishment Available.
[49] The Death Penalty, A barrier to Improving Human Rights, Amnesty International (1993)

> ... (because it) believes that life is an immeasurable good to be preserved in the name of all civilizations and the highest values of a society and that other means can be used to achieve that which capital punishment showed, in practice, that it cannot it achieve; peace, harmony, respect for human life and stability"[50].

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

According to *the Journal of the Burkinabe Movement for Human and People's Rights*[51]: "the death penalty not only denies the judicial system an opportunity to correct mistakes but also denies the offender all possibility of rehabilitation". This statement is true in that the innocent are convicted, and so long as the death penalty is in place judicial system will not be able to reserve such errors. This calls for abolition of the death penalty in order to avoid such mistakes and give chance the convicted to reform.

Amnesty International's[52], *'Towards Abolition of the Death Penalty'* states:

> "The death penalty is the ultimate cruel, inhuman and degrading form of punishment and seeks its worldwide abolition. Everywhere experience shows that executions have a brutalizing effect on those involved in the process. Nowhere has been shown that the death penalty has any special power to reduce crime or political violence. In country after country, it is used disproportionately against the poor or against radical or ethnic minorities. It is often imposed and inflicted arbitrarily. It is an irrevocable punishment, resulting inevitably in the executions of people innocent of any crime. It is a violation of fundamental human rights".

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

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[50] Ibid at p.8
[51] The Death Penalty, a Violation of a Fundamental Human Rights in Liberty (October 1990)
[52] Towards Abolition of the Death Penalty, 'Amnesty International Report (May 1991) An Index;AFR01/01/91

According to the Uganda Constitutional Review Commission of Inquiry[53]," the killing of human beings by way of revenge has been resorted to only when an effort for compensation has failed'.

[53] Report of the Uganda Constitutional Review Commission of Inquiry (Nov. 2003)

CHAPTER THREE.

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

3.0 ARGUMENTS FOR AND AGAINST ABOLITION OF THE DEATH PENALTY.

3.1 REASONS FOR ABOLITION OF THE DEATH PENALTY.

The argument for the abolition of the death penalty out number and outweigh the simple and outdated notions put forward by those who resist evaluating this old-fashioned punishment. It is evident in Uganda that people from different walks of life have come up with different views opposing the use of the death penalty as a form of punishment. For instance, at the play "the Gallows" at the national theatre, Mr. Joseph Etima, the Commissioner of Prisons spoke against the death penalty. He argued that because the justice system is not infallible, many innocent people would be killed if the death penalty were retained. He also asserted that the objective of the prison system was to rehabilitate prisoners, which is obviously negated by the death penalty.[54]Uganda prisons service also testified to the constitutional review commission that it was opposed to the death penalty[55]

.In the case filed by Susan Kigula's[56] where the court's analysis granted some importance to public opinion. Twinomunjuni J.A. disagreed with the petitioner's claim that public opinion is irrelevant in judicial constitutional interpretation. The Foundation for Human Rights Initiative on behalf of the 417 living inmates convicted and sentenced to death. The petitioners argued that the death penalty violates Article 44(a) (freedom from torture, cruel, inhuman, and degrading treatment or punishment), 22 (the right to life), 21 (the right to a fair, speedy, and public hearing before an independent and impartial court or tribunal of the Ugandan constitution.

[54] The Monitor 30th June 2003.
[55] The Monitor 14th feb.2003
[56] Susan Kigula and 416 Others Vs the Attorney General, Supra Note 14. Judgment of Twinomujuni, JA P.23.

3.1.1 Justice system is not fallible.

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

The very fact that death is an irreversible punishment makes it inherently unfair –errors cannot be rectified. The judicial procedures in many countries are seriously defective, but even where the death penalty is confined to the most serious crimes and all procedural safeguards are observed, there remains a danger that innocent people may be executed[57]. Therefore, there is no way to correct these errors as in the se of punishment of imprisonment.

According to **Karpel Singh**, "no criminal justice system is perfect, being evolved by humans". It is perhaps for this season that the French philosopher Voltaire said in his work ***'Zidig'*** "it is better to risk saving a guilty man than to condemn an innocent one". After all judges are human and liable to fall into error. A sentence of death is irreversible. What would be the remedy in such a situation? We have not advanced to that level where a lost soul could be resurrected. Not at least after that soul has shed what has turned into dust"[58]

Similarly, in the case of ***Bachman Singh Vs State of Punjab***[59], ***Bhagwati J*** dissenting observed, the chief arguments of the abolitionists, which have been substantially adopted by the learned council for the petitioners, are as under. The death penalty is irreversible decided upon according to fallible processes of law by fallible human beings..."

For this matter, thousands have been put to death under one government only to be recognized as innocent victims when another set of authorities cones to power.

There have been several notable cases in which people sentenced to death have been found to be innocent, including that of **George Kelly**, who was executed 53 years ago in the U.K, but exonerated recently[60].

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[57] Amnesty International: Towards Abolition of the Death Penalty: May 1991 P.8

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

[59] 14 AIR (1980) SC 898.

[60] Erica Bussey, Canada (2003) in his article "Death Penalty in Uganda- the Road to Its Abolition Pg.9

In Uganda, **Mpagi** spent 19 years as a 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

Another example is of **Elias Wanyama and Godfrey Mugaanyi**, both were imprisoned and had been sentenced to death, having been wrongly accused of crimes they did not commit[61].This problem is rampant in Uganda, because of the corruption and lack of resources within the system of justice. Many of condemned prisoners in Uganda are poor, have inadequate access to counsel, are poorly represented, and often cannot understand the court proceedings as majority of them do not speak English and are provided with no translations.

Many of the condemned prisoners reported that they only met with the state attorneys who represented them on that day of the hearing and that their lawyers did not have a full understanding of their cases[62].

Some reported that they were told by their lawyers to plead guilty even though they were innocent. Many said that their lawyers did not adequately review the evidence and some did not allow them to call witnesses. Prisoners also reported that judges and lawyers had often been bribed and that witnesses had often been coached[63].

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

It is therefore important to note that **Chaskalson P's** conclusion in South African context which also hold true in Uganda that ''the unpalatable truth is that most capital cases involve poor people who cannot afford and do not receive as good defense as those who have the means .In this process, the poor and ignorant have proven to be the most vulnerable, and are the persons most likely to be sentenced to death[64],

[61] Tracy Garner, in his article. "The Death Penalty-an Abuse of Human Rights, Vol.7 No. 2, 2002 Pg23.
[62] Interviews with Condemned Prisoners, Luzira Upper &Lower Prisons, Kampala 13th Dec.2004
[63] Ibid
[64] State Vs Makwanyane & Anor (1995)MILRC 269 at 299

3.1.2Death penalty is Barbaric

This is another argument for abolishing the death penalty, as conditions, both mental and physical in which condemned prisoners are forced to live, constitute cruel, inhuman and degrading punishment .Hanging that is method of execution in Uganda as in many African countries has been to be barbaric[65].

There have been witnesses to hangings where the executioner had to kill the prisoner by using hammers or other weapons. This case is clear in Uganda, where **Anthony Okwonga,** a former senior Assistant Commissioner of prisons, disclosed that in cases where the prisoners are not certifiably dead; they are killed by hitting them at the back of their heads with a hammer or a crowbar[66].

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

The overcrowding was so bad in November 2004 that prisoners are forced to sleep curled up on blankets on the floor. Many experience joint pain consequently which are exacerbated by lack of exercise. This is true in that, at least 250 condemn prisoners share cell space originally designed to house only 60 prisoners[67].*Foundation for Human Rights Initiative (FHRI)* documents that neither beds nor beddings are provided by Uganda prisons[68].

Prisoners also reported that they received insufficient food, where they had one meal a day served at 4.00 pm and porridge 11:00 am and this was in-between hard work in the plantations. They also reported that were served soup with only four beans or less and the soup was very cold. Moreover, that the medical facilities were inadequate. They reported that they were treated

[65] Dominic Mnyarose Mbushuu & Kalai Sanaa Vs Republic (1994)2 LRC 335,Tan High Court & (1995) 1 IRC 216 Tan C.A
[66] New Vision 23rd Jan 2005
[67] Supra Note 9
[68] Ibid

worse than other prisoners were, in a sorrowful condition with even no lighting in their cells from 6:00am to 6:00am[69].

However, perhaps more significant is the mental torture on death row for 10-20 years as their cases are appealed. Prisoners live each day never knowing whether it is going to be their last, and in perpetual dread that they, or their fellow inmates may be executed[70].
Many also reported feelings of hopelessness as they watched fellow inmates exhaust the appeal process. Several prisoners have had friends and family members abandon them after they were sentenced to death. Others worry about children who they cannot support. These anxieties have led many to suffer from conditions such as high blood pressure, depression and mental disturbance[71].

Prison warders who guard condemned prisoners are also often traumatized by having to look after the prisoners only to escort them to their deaths.
This is one of the reasons cited by the prison service in its opposition to the death penalty[72].

In addition, what worries a researcher is that, if someone can be traumatized to slaughter a chicken and see it die, what about a human being? This is simply because the physical pain caused by the action of killing a human being cannot be quantified. Nor can the psychological suffering caused by foreknowledge of death at the hands of the state[73].

A former prisoner in Pretoria central prison, South Africa, wrote: "only after I had lived at Pretoria central prison did come to realize, fully, the utter horror of capital punishment, what it involves and the responsibility it imposes on man. I do not think that any man can be asked to exercise that devastating responsibility. I do not think that any man can carry out the demands of the system or live with the system without him at once becoming degraded, corrupt and brutal"[74].

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[69] New Vision 19th Nov. 2004
[70] Supra
[71] Ibid
[72] Ibid
[73] New Vision 1st Oct. 2001
[74] When the State Kills...Amnesty International, 1989 pg.8

This holds true in Uganda, Okwonga[75], states that he witnessed all the executions and found them to be cruel, inhuman and degrading to all the people involved. A part from the prisoners on the execution roll, prison warders, the executioner, the prison medical doctor and various religious leaders witness the hanging. Once the execution is given a go-ahead, the execution officer ensures that everything is in order and the gallows are clean. He restricts the prisoners' movements and ensures that the coffins are made[76]. He further says that, some prison warders suffer psychological problems illness, leading many of them to resign from the service. Some seek treatment from wit doctors and increase their alcohol consumption to deal with the family mental disorientation.

He says that, he never recovered from what he describes as the horrifying experience of witnessing executions[77]. There can never be any justification for torture or for cruel treatment .Like torture; an execution constitutes an extreme physical and mental assault on an individual[78].

It is noteworthy that Article 44 of the constitution states that not withstanding anything in this constitution, there shall be derogation from enjoyment of the following rights and freedom from torture; cruel, inhuman degrading treatment or punishment[79].And Article 24 of the constitution states, "No person shall be subjected to any form of torture, cruel, inhuman and degrading treatment or punishment"[80].

It can be argued that, in as far as, the death sentence or killing is a torture and humiliation of a human being; it offends against the spirit of the constitution especially the provisions as stated above, that is Article 24 and 44 of the constitution[81].

Amnesty International[82], commented upon it, which despite modern methods execution, that prisoner is suffering is likely to be prolonged if the executioner makes an error or anything goes

[75] Amnesty International: Towards Abolition of the Death Penalty, 1991 Pg8
[76] Ex-officer-in-Charge of Luzira Upper Prison New Vision 22nd June.
[77] Supra Note 14
[78] Ibid
[79] Amnesty International: The Death Penalty,2000
[80] Uganda Constitution 1995
[81] Ibid
[82] Ibid

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

In the same publication, the human rights activists also argue that, that kind of killing, by even shooting is a form of torture and cruelty. They are quoted in their publication that ''shooting by firing squad does not necessarily result in immediate death".[83]

It is argued that the cruelty of the death penalty is felt by the family of a condemned person, not only before the execution but also for the rest of their lives[84].

It is the researcher's considered view that in order to heal the wounds and suffering of the prisoners in Uganda; offenders need to be put in to firing squad other than hanging. In addition, the prisoner is made to hang from a rope tied around the neck exerted against the body as the body falls. Unconsciousness and death are brought about by damage to the spinal cord or if that is insufficient, by asphyxiation due to constriction of the trachea[85]. There is definitely a need for abolishing this barbaric form of punishment.

3.1.3 Violation of Human Rights

The use of the death penalty violates the spirit and the letter of the international human rights laws which Uganda is a party to[86].

Various international and regional human rights instruments reiterate the right to life. Chapter four of this dissertation discusses the various provisions in detail. Terminating the life of an accused denies them the opportunity to appeal or to their potential. It denies the living victims the opportunity to forgive[87].

When a state convicts prisoners without affording a fair trial, it denies the right to due process and equality before the law. The irrevocable punishment of death removes not only the victim's

[83] When the State Kills 1989.
[84] Ibid P.59
[85] Supra 23 at Pg.8
[86] New Vision 29 Jan 2005
[87] Ibid

right to seek legal redress for wrongful conviction, but also the judicial system's capacity to correct its errors[88].

Like killings that take place outside the law, the death penalty denies the value of human life. By violating the right to life, it removes the foundation for the realization of all rights enshrined in the Universal Declaration of Human Rights[89].

This is squarely the case in Uganda, in that if the death penalty is not abolished, the rights enshrined in UDHR and those provided for under the Constitution of Uganda will be denied. For instance in the Kotido executions corporal James Omeido and private Abdullah Mohammed were publicly executed on 25th march after a trial less than three hours before a field court – martial, which found them guilty of the triple murder[90].In this regard, Amnesty international observed that; "the speed of the executions of these two men cast along shadow of doubt on the manner in which military courts are conducted and the way their decisions are reached. It was reported that the court martial lasted only for two hours and 36 minutes. This only compounds the fact that there could not have been an effective investigation to determine the guilt or otherwise of these two men. The timing of the arrest of the men and their execution brings into question the due process of process of law. Any court martial should be conducted under stringent conditions of transparency, fair trail and impartiality ...the failure of this case to be investigated fully before any trial was conducted leads us to believe that these men were not given the opportunity to fully before engage in the process, thus denying them a chance for a fair and independent trial"[91]

In addition, Gawaya Tegulle says

> "...in the Kotido case, the investigation, trial and execution took place less than 72 hours after the crime, haste which is questionable internationally. Controversy was heightened

[88] Ibid
[89] Supra Note 22 at 2
[90] Ibid
[91] The Monitor 27th March 2002 at 1-2

by the bizarre pronouncement that the accused would be executed before the court begun hearing the case"[92].

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

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3.1.4 A Tool of Repression:

Capital punishment continues to be as a tool of political repression. Rulers have executed their political rivals, or have tried threats of death to silence their opponents. The death penalty has been used to consolidate power after coups and coup attempts, and members of opposition political groups have been eliminated as a matter of political expediency[93].

In many cases, the death penalty has been directed at prominent individual political opponents. Margaret Sekagya, former Chairperson Uganda Human Rights Commission believes that death penalty is used disproportionately, against the poor and minority groups as a tool of political repression[94].

It is the irrevocable nature of the penalty that makes it as tempting as a tool of repression. Thousands have been put to death under one government only to be recognized as innocent victims when a new government comes to power[95]. This is a true example in Uganda of Abdullah Nassur who was recently pardoned in Museveni's regime[96].

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[92] Amnesty International, Uganda: Soldiers' Executions must not set trend, AFR 59/002/2002
[93] The New Vision 3 April, at 19
[94] Ibid p.7
[95] New Vision 15 dec.2004
[96] Ibid

As long as the death penalty is accepted as a legitimate form of punishment, the possibility of political misuse will remain. Only abolition can ensure that such political abuse of the death penalty will never occur[97].

[97] Supra Note 44 at 7

3.1.5 It is Unconstitutional.

This is a debatable issue. The Constitutions providing for a right to life also provide for a limitation on the enjoyment of that right. In some cases, the Constitutions recognize the death penalty which is both mandatory in some cases and discretionary in others[98].
Article 20 of the Constitution of Uganda recognizes that the fundamental rights and freedoms of the individual are inherent and not granted by the state.

The Article provides that; "the rights and freedoms of the individual and groups enshrined in this chapter shall be respected, upheld, and promoted by all organs and agencies of government and by all persons"[99].

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

It should be noted in this context that the death penalty is by definition cruel and degrading punishment[100].
However, the reading of Article 24 and 44 of the constitution respectively prohibit torture, cruel, inhuman, or degrading punishment, of which the death penalty falls under this[101].

3.1.6 Inequality.

Studies have shown that most of those sentenced to death come from the poorest levels of society. Poverty breeds crime and the poor cannot afford to appoint their own legal counsel. The use of the death penalty gives the impression that the authorities are dealing severely with crime

[98] The New Vision 19 Nov.2004
[99] Supra Note 27 at 12
[100] Supra Note 46
[101] Amnesty International, Supra Note 27

when in fact they are unable or unwilling to resolve the social and opening address problems which gives rise to crime[102].

A case in point is Alpheus Sekoboane was executed on 13th November 1990 in South Africa. Because he could not afford to pay legal costs, he had lodged a petition for clemency before he was served with notice of execution[103]. They were therefore unable to challenge the prosecution on points of law or to challenge the admissibility of evidence before the courts[104].

In addition, experience demonstrates that whenever the death penalty is used some people will be killed while others who have committed similar or even worse crimes may be spared. The prisoners executed are not necessarily only those committed the worst crimes, but also those who were too poor to hire lawyers to defend them or those who faced harsher prosecutors or judges[105].

As Chaskalson P said "...the poor and the ignorant have been proven to be the most vulnerable, and are the persons most likely to be sentenced to death".
This argument holds true in Uganda that, until the death penalty is abolished, most of the convicts who are poor will remain to be sometimes subjected to wrongful convictions since they will not be able to access legal counsel who seem to be expensive in Uganda. This thus calls for a need to abolish such punishment.

3.2.0 REASONS AGAINST ABOLITION OF THE DEATH PENALTY.

This section engages with arguments in support of the death penalty.
We as individuals value our lives, and those of our families and friends. We know that a life once taken cannot be returned. We fear becoming the victims of crime. We want to know that there are punishments in place that might, we hope, have a deterring effect on those who would

[102] Joseph M.N Kakooza, the 1st International Conference on the Application of the Death Penalty in Common Wealth Africa Countries.
[103] Uganda Constitution 1995 Article 20(1)
[104] Chaskalson Supra Note 12
[105] Ibid

commit crime. Certainly, there is a need to punish the perpetrators of crime. The arguments commonly advanced in favour of the death penalty are stipulated below;

3.2.1 The deterrence theory.

Retentionists of the death penalty argue that it deters potential criminals from committing heinous crimes[106]. They insist that because taking an offender' life is a more severe punishment than any prison term, it must be a better deterrent[107] .They also contend that without capital punishment there is no adequate deterrent for those already serving a life term who commit murder while incarcerated, or for those who would be liable to a life term if arrested, as well as for revolutionaries, terrorists, traitors and spies[108].

This theory is common- place in all types of literature, including court decisions. In the South African case of ***R Vs Robert***[109], in which the trial court had sentenced the accused to death in spite of the extenuating circumstances having been found by the jury, On appeal WYK.J said,

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

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

Deterrence is an argument often cited to justify the death penalty. On the surface, the argument makes sense. Rational people understand links between cause and effect and crime and

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[106] Supra Note 23 at p.11
[107] Ibid
[108] Ibid
[109] Amnesty International, Supra Note 27

punishment. A fear or the possibility of death also affects the behavior of most reasonable people.

This argument is particularly persuasive in Uganda, given the large amount of crime in recent years. However, there have been no compelling studies indicating that the death penalty is more of a deterrent than life imprisonment[110]. Moreover, the crime has not dramatically risen in countries after the abolition of the death penalty, but in some cases, has in fact fallen[111].

For example, when the death penalty was abolished in Canada in 1976, homicides in Canada in 2001 (554) were 23% lower than the number of homicides in 1975 (721), the year before the death penalty was abolished. Moreover, homicides rates in Canada are generally three times lower than homicides rate in the United States which retains the death penalty[112].

The British Home Office released statistics, which indicates that the murder rate in the United Kingdom is more than three times than that of many European countries that have abolished the death penalty[113].

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

For instance, severe punishment has never reduced criminality to any marked degree. There exists no scientific proof of the notion[114].

That is to say, scientific studies have consistently failed to find convincing evidence that the death deters crime more effectively than other punishments. Research findings on the relation between the death penalty and homicide rates conducted for the United Nations in 1988 and updated in 1996, concluded; "...research has failed to provide scientific proof that executions have greater deterrent effect than life imprisonment. Such proof is unlikely to be forth coming. The evidence as a whole still gives no positive support to the deterrent hypothesis[115]."

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[110] Amnesty International, Supra Note at 10-14
[111] Ibidp.10
[112] (1957 4 S.A 265 (AD)
[113] Supra Note 6 at 10
[114] Ibid
[115] United Nations report in 1988

It is incorrect to assume that people who commit such serious crimes as murder do so after rationally calculating the consequences. Often murders are committed in moments when emotion overcomes reason or under the influence of drugs or alcohol. Some people who commit violent crimes are highly unable or mentally ill. The execution of Larry Robison, diagnosed as suffering from paranoid schizophrenia, in the USA on 21st January, 2000 is just one such example. In none of these cases, can the fear of the likelihood of detection, arrest and conviction[116].

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

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

Undeniably the death penalty, by permanently 'incapacitating' a prisoner would indeed have repeat the same crime if allowed to live, nor is there any need to violate prisoner's right to life for the purpose of incapacitation, dangerous can be kept away from public without resorting to execution, as showing by the experience of many abolitionist countries by introducing life imprisonment [117].

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

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

[116] Ibid
[117] New Vision New York Times, 11 May 2002

incidents of armed robbery had increased since it became a capital offence throughout Nigeria in 1970[118].

An African scholar has noted that; "in some parts of Africa, when thieves were being tied on trees for public shooting, other thieves were busy stealing tyres and head lamps from cars"[119]
It should be rightly asked whether the death penalty has a uniquely deterrent effect in Uganda. This can be answered to a greater extent that, there is absolutely no evidence to support such acclaim from Uganda or any other country in the world. Indeed, the continuing frequent occurrence in Uganda of crimes punishable by death strongly suggests that it has no deterrent effect whatsoever[120].

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

3.2.2 The Retributive Justice Theory

This theory holds that criminals should pay for their sins. This argument is also based on biblical perspective that "whosoever sheds, blood, by man shall his blood be shed"[121]. This has usually been interpreted as a divines warrant for putting the murderer to death. Retribution has been in form of "an eye for an eye," Many feel that when someone has killed, they themselves should be killed by the state.

However, the South African judgment on the death penalty indicates the fallacy of this argument. According to Justice P.Chaskalson

> "Punishment must to some extent be commensurate with the offence, but there is no requirement that it be equivalent or identical to it. The state does not put eyes of a person who has blinded another in a vicious assault, nor does it punish a rapist, by castrating him and submitting him to the utmost humiliation in jail. The state does not have to engage in

[118] Barnes & Tecers, New Horizons in Criminology 33 (1951)
[119] Tibanianya Mwene Mushenga; the Death Penalty and its alternatives, a paper presented at the Conference on the Death penalty in Africa at Ibendans Nigeria (1977)
[120] Amnesty International; Supra Note 27
[121] Ibid

the cold and calculated killing of murderers in order to express moral outrage at their conduct. A very long prison sentence is also a way of expressing outrage and visiting retribution upon the criminal."[122]

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

However, critics of the death penalty have argued that one can accept a retributive theory stress that;

"There is no convincing argument that society cannot find other ways other than killing to express its condemnation of crime. Indeed, the publicity surrounding an execution may divert the attention from the crime to the person who committed it. Far from being condemned for his or her deeds, the criminal may actually become a focus of sympathy"[123].

Likewise in the case of ***Salvatore Abuki Vs A-G***[124], J.P.M Tabaro said,

"How are we to punish offenders through rehabilitation or retribution? Speaking for myself, I think retribution is base and sordid and is only euphemism for a primitive instinct in man to revenge whenever wronged. However, revenge in form of most cruel punishments imaginable such as quartering and burning at the stake has never deterred crimes to any demonstrable level. An anecdote is often told of scenes of public hangings of thieves where at some people went ahead to picket others in attendance to witness the executions. So what is the utilitarian value of brutal, harsh punishment? In a civilized society the jurisprudence of a tooth for a tooth and an eye for an eye' has no place."

And like the old adage says an eye for an eye, leaves the world blind.

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

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[122] Ibid
[123] Amnesty International, Supra Note 22 at 5
[124] Ibid

Instead, it is because societies understand that they must be built on a different set of values from those they condemn[125].

An execution cannot be used to condemn killing; it is killing. Such an act by the state is the mirror image of the criminal's willingness to use physical violence against a victim.
In Uganda, government officials sometimes defend the death penalty on the grounds that public accepts retribution. The government argued that if the death penalty is abolished, the people would lose confidence in government and they would take the law into their own hands[126].

There is a danger that those thought to have committed serious crimes such as murder and rape might be subjected to mob justice. The government clearly and appropriately considers it important that the civilian population should see that the authorities would punish those, both soldiers and civilians, who commit serious crimes against the person. There is, however, no good reason for punishment to be equated with execution[127].

For the government to seek to justify the death penalty because the population favours it, and that therefore if the government does not execute the people will themselves acts, is simply a failure to accept responsibility for law and order. It is also a way of avoiding responsibility for introducing effective measures to protect human rights. There is no evidence to suggest that abolishing the use death would lead to a political collapse in the country, or that by using more human punishments the government would lose credibility. In the end, the government accepts public opinion on the death penalty because it agrees with it[128].

However, in the case of ***Rajendra Prasad Vs state***[129], the Supreme Court stated "special reasons necessary for imposing death penalty must relate, not to the crime as such but to the criminal. The crime may be shocking and yet criminal may not deserve death penalty. The crime may be less shocking than other murders and yet the callous criminal."

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[125] Tibaniaanya Mwene Mushenga, the Death Penalty and its alternatives, a paper presented at the Conference on the Death Penalty in Africa at Ibendans Nigeria (1977)
[126] Amnesty International: the Death Penalty; A barrier to Improving Human Rights, 1993 P.2
[127] Genesis 9:6
[128] Makwanyane Supra Note 12 at 90
[129] Amnesty International Supra Note 22 at 18

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

3.2.3 The Prevention Theory.

This theory attributes to the fact that the death penalty removes "dangerous" persons to create a "safer" society. It is argued here that the death penalty ensures that the dangerous criminal never commits the crime again[130].

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

It is argued that the policy of removal – for- requires for its success that those who have a disposition to commit crimes be identified. Also, "we argue that by removing one dangerous person you do not remove crime or criminals generally." Moreover, there are other ways and means of prevention such as life imprisonment[131].

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

Also the prevention theory is seen in another perspective, where by some government officials have argued that those convicted of serious crimes should be executed as otherwise they might escape or bribe their way to liberty[132].

This suggestion is a callous and immoral evasion of responsibility; the government should take steps to improve security and conditions in prisons and not deny prisoners the right to life for administrative convenience[133].

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[130] Ibid
[131] Constitutional Petition No. 2/97 at 12
[132] Amnesty International, Supra Note 22 at 7
[133] Ibid

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

3.2.4 The Populist Theory.

Retentionists argue that the death penalty is a popular form of punishment for serious crimes such as murder[134].

The position is reflected in the phenomenon of ***"mob justice",*** where society takes it upon itself to punish criminals in mobs leading to their deaths[135]. The most obvious that such punishments are mated out for all crimes and their intention is not always to kill the criminal.

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

Further more, as a guide to policy making, the source of such 'public opinion" as well as their reliability have to be considered. It is argued that on issues where popular attitudes differ from government policy, for example over health issues, government is always prepared to campaign to change those attitudes[136].

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

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

Moreover, questions of interpretation of the construction are vested in the courts. The courts cannot afford to allow themselves to be diverted from their duty as independent arbiters of the constitution by making choices on the basis that they will find favour with the public[137].

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

Justice Jackson has in ***West Virginia state board of education Vs Barnett,*** commented that " one's right to life, liberty, property, free speech, free press, freedom of worship and assembly

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[134] Amnesty International, Supra Note 78at 3
[135] Ibid p.4
[136] Ibid
[137] Ibid

and other fundamental rights may not be submitted to vote: they depend on the outcome of no elections"[138].

The reasons for a seemingly strong public support for the death penalty can be complex and lacking in factual foundation. If the public were fully informed of the reality of the death penalty and how it is applied, many people might be more willing to accept abolition[139].

A similar view that public support is based on ignorance is seen by Justice Marshall of the Supreme Court in the case of ***Furman Vs Georgia***[140] who argued that; "if the public knew the truth about the death penalty they wouldn't support it". This statement, commonly referred to as the "Marshall hypothesis", suggests that support results from the lack of an informed citizenry.'

Uganda has been basing its decision to retain the death penalty on public support. For instance, the government submitted that the death penalty was incorporated justifiably in the constitution through the constituent assembly, which was the vote of 26 million Ugandans who approved it as a legitimate and appropriate punishment[141].

The researcher is of the view that the public's support for the death penalty. For instance a large number of Ugandans are illiterate and have not been educated on relevant arguments, thus, the government would not be justified in torturing prisoners or prosecuting an unpopular ethnic minority simply because the majority of the public demanded it[142]. When the death penalty is abolished, there is usually no great public outcry and it usually remains abolished[143].

3.2.5 Democracy

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

> 'in light of the fact that large numbers of people support the death penalty in Europe as well as united states, some people claim that they are simply more democratic in giving

[138] (1979) SC 916
[139] Amnesty International, Supra Note 22at14
[140] Apollo N.Makubuya (2000): the Constitutionality of the Death Penalty in Uganda, a Critical Inquiry. P.228
[141] Ibid at 229
[142] Amnesty International, Supra Note 78 at 4
[143] Ibid

effect to these preferences. There is nothing to that, although it is also true Americans seem to have a greater intensity in their preference for the death penalty than Europeans do"[144].in the researchers view the same ideas needs to be used in Africa, Uganda in particular.

3.2.6 The Threat of International Terrorism

Technological development is facilitating greater mobility of -people and communications. With the anti-social conduct multiplying and intensifying the dangers to life and property, the demand for the severest punishment becomes more pronounced the entire world over, Hence the support of the death penalty for terrorism-related offences[145].

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

[144] Amnesty International Supra Note at 22
[145] Amnesty International, Uganda: The Failure to Safeguard of Human Rights (1992) P.58

CHAPTER FOUR

RELEVANT LAW ON THE DEATH PENALTY

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

4.1. International law

The focus of international human rights law and international criminal law is at present propelling towards the worldwide abolition of the death penalty. For instance, the 1998 Rome Statute of the International Criminal Court[146] provides that "the court may only impose a maximum sentence of imprisonment up to thirty years.[147]In the same token, both the International Criminal Tribunal for Rwanda[148] and for the former Yugoslavia[149] provide for a maximum sentence of life imprisonment.

This focus towards abolition is manifested in the various international human rights instruments, treaties, and conventions that have been adopt by the United Nations. The Universal Declaration of Human Rights, *(UDHR),* in response to the staggering extent of state brutality and terror witnessed during World War II, recognizes each person's right to life and categorically states that "Every one has the right to life[150]." In addition, it stipulates that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"[151]. In Amnesty International's view, the death penalty violates these rights[152].

Article 3 of UDHR is indeed abolitionist in outlook[153]. By its silence on the matter of the death penalty, it envisages the abolition of death penalty

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[146] UNDOC AI Conf 183/9

[147] Art 76 (1) and (2)
[148] Security Council Resolution 955,(1994),UNDOC S/RES/955(1994)
[149] Security Council Resolution, 827,25 May 1993
[150] UDHR Art.3
[151] UDHR Art.
[152] Amnesty International; The Death Penalty; Questions and Answers April 2000
[153] William A. Schabas; The Abolition of the Death Penalty in. Law 3RD Ed. Pg.42

A report from the secretariat of the United Nations has described the right to life provision in the UDHR as being neutral on the question of the death penalty[154]. Clearly, the General Assembly has considered that Article 3 of the declaration and the abolition of the death penalty are in dissociable[155].

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

The International Covenant on Civil and Political Rights (ICCPR) states that, "every human being has the inherent right to life[156]." It further provides that "any one sentenced to death shall have the right to seek pardon or commutation of the sentence.[157]" Although the ICCPR does not obligate States to abolish the death penalty subsection 6 clearly indicates that this does not in any way a bar to the abolition of the death penalty. It further limits the death penalty as a punishment for the most serious offences.[158]

Second Optional Protocol to the ICCPR is yet another instrument, aiming at the abolition of the death penalty. It provides for the total abolition of the death penalty but allows states parties to retain the death penalty in time of war if they make a reservation to that effect at the time of ratifying or acceding to the protocol[159].

In his individual dissenting opinion in ***Kindler Vs Canada***[160], Human Rights Committee member Bertil Wennergen stated that:

> "By guaranteeing to every human being 'the inherent right to life, Art 6 makes clear that its object as a whole is the protection of human life. According to him, the other provisions of Article 6 concern a secondary and subordinate object, namely to allow

[154] Ibid....43
[155] Ibid
[156] ICCR,ARTICLES (6),(2)
[157] Ibid, Art 6(4)
[158] Article 6(2).
[159] Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty (UNGA res.44/128,Dec, 1989)
[160] (No. 470/1991)UNOC: A/48/40 VOL.11 P.138, 14 HRLT 307.

states parties that have not abolished capital punishment to resort to it until such time they feel ready abolished it".

Wennergen explained:

> "the principal difference between my and the committee's views on this case lies in the importance I attach to the fundamental rule in par (1) of Article 6, and my belief that what is said in par (2) about the death penalty has a limited objective that cannot by any reckoning override the cardinal principle in par(1)"[161].

Concerning an issue whether there are exceptions to this 'inherent right life' Wennergen, in his individual dissenting opinion, recognized only two; the death penalty as 'a necessary evil' and the rule of necessity, which is implicit. He said that only if absolute necessity so requires will it be justifiable to deprive an individual of life, in order prevents the individual from killing others or in order to avert fabricated disasters. 'For the same reason, it being killed,' he concluded, in one form or other, the rule of necessity is inherent in all legal systems; the legal of the covenant is so exception[162].

The Convention against Torture and other Inhuman or Degrading Treatment or Punishment[163]calls for the protection of all persons from being subjected to torture or any form of cruel, inhuman, degrading treatment[164]
The Convention further calls for an effective struggle against torture, cruel, inhuman or degrading treatment.

Several jurists have argued that the action of executing a person by whatever means amounts to an act of cruelty, and is not only degrading but also inhuman[165].During the presentation of the Republic of Korea's periodic report, the united nations committees country rapporteur noted that

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[161] Ibid;
[162] Ibid;
[163] Convention Against Torture & other Inhuman or Degrading Treatment or Punishment (UNGA res.39/46 Dec 10,1984)
[164] Ibid; at Preamble
[165] Chaskalson, in the Makwanyane Case No. CCT/3/94 at 43

"all were agreed that the death penalty was a cruel, inhuman and degrading punishment" he requested Korea to abolish it[166].

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

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

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

The safeguard further includes the right of appeal, the right to benefit from lighter penalties under certain conditions, the right to seek pardon and exemptions from capital punishment for persons below eighteen (18) years of age, pregnant women, new mothers, and persons of unsound mind[167]. These exemptions, however, pose yet further problems for instance, it may be difficult to establish the age in countries like Uganda, where a percentage of the population is illiterate and ignorant of when they born. In addition, it may be difficult to detect a woman who is one-day pregnant. Thus, such safeguards in Uganda are most likely to be inapplicable, since few people have access to proper medical care and examinations.

[166] Supra Note 8 at 193.
[167] Resolution 1984/50 of 25 May 1984

At the regional level, a number of conventions against the death penalty have been adopted. For example, the council of Europe passed the European Convention for the Protection of Human Rights and Fundamental Freedoms[168].The convention provides, inter alia, that: "No one shall be deprived of his life intentionally except in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law"[169]. It further provides that: "no one shall be subjected to torture or inhuman or degrading treatment or punishment"[170].

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

This holds true in Uganda under the constitution of Uganda, 1995 that opposes the death penalty under Article 22 and contradicts Article 44 of the same Constitution.

It can be said from the above, that in light of the mention of the death penalty in Article 2 of the Convention, the European court of human rights was not prepared to consider that the death penalty perse constitutes inhuman treatment[171]. As the scholar Francis Jacobs stated presciently, many years before the *Soering* judgment punishment could be contrary to Article 3 of the convention 'only if it involves the ultimate penalty'[172].

In **Soering Vs UK & Germany**[173], the court declared that the decision whether these marked changes have the effect of bringing the death penalty perse within the prohibition of ill treatment under Article 3 must be determined on the principles governing the interpretation of the convention. The convention is to be read as a whole and Article 3 should therefore be construed in harmony with the provisions of Article 2. On this basis Article 3 evidently cannot have been intended by the drafters of the convention to include a general prohibition of the death penalty, since that would nullify the clear working of Article 2.

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[168] Nov.4, 1950 European Convention
[169] Ibid. Article 2
[170] Id; Art 3
[171] Supra Note 8 at 271
[172] Id; pg 272
[173] [1991] 85AJIL 128

Subsequent practice in national penal policy, in the form of a generalized abolition of capital punishment, could be taken as establishing the agreement of the contracting states to abrogate the exception provided for under Article 2(1) and hence to remove a textual limit on the scope for evolution interpretation of article "...in these conditions, not withstanding the special characters of the convention, Article 3, cannot be interpreted as generally prohibiting the death penalty"[174].

In the researcher's opinion, the holding of the court in the instant case seem to hold true in Uganda. This is because legislators could not have intended that the death penalty would be prohibited under Article 44 of the 1995 constitution, because this would nullify the clear working of Article 22(1) of the same constitution. Indeed the learned judges adopted this view in the *Susan Kigulla* case[175].

Protocol No 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ["European Convention on Human Rights"] concerning the abolition of the death penalty, adopted by the Council of Europe in 1982, provides for the abolition of the death penalty in peacetime[176]. States parties may retain the death penalty for rimes "in time of war or of imminent threat of war"[177].

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

The ADRDM provides that, "Every human being has the right to life, liberty and the security of his person."[178]

The ACHR stipulates that; "everyone has the right to have his life respected and it shall not be arbitrary taken away"[179]. Further it provides that; those countries that have not abolished the

[174] Id;
[175] Suzan kigula and 416 others Vs Attorney General constitutional petition 2002
[176] Art 1
[177] Art 2
[178] ADRDM,Article 4
[179] ACHR; Article 4(1)

death penalty should impose it only for the most serious crimes"[180]. It provides too, that the death penalty shall not be re-established in states that have abolished it,[181]and in no case shall capital punishment be inflicted for political offences or related common crimes.[182]

The ADRDM limits the age a person should have attained upon which the death penalty can be imposed. For a person to be amenable to the death penalty they must have attained the age of 18 but not above 70 years[183]. It also provides that; pregnant women are exempted[184].

The ACHR also stipulates that no shall be subjected to torture or cruel, inhuman or degrading punishment or treatment[185].

The Protocol to the American Convention on Human Rights to Abolish the Death Penalty, calls for the total abolition of the death penalty in all member states[186].
However, member states are given the option to reserve the right to apply the death penalty in wartime in accordance with international law for extremely serious war crimes[187].

In Africa, the Africa Charter on Human and People's Rights (ACHPR), states that no one may be arbitrarily deprived of the rights to life[188]. This implies that, the African Charter approves of the death penalty within the jurisdictions of states that have it as a form of punishment, provided that it is not imposed in an arbitrary fashion.

This is in accordance with one scholar, Etienne Richard Mbaya, who states that Article 4 of the African Charter permits the death penalty, which is widespread in Africa, providing it be imposed in accordance with the law[189].

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[180] Id; Art 4(2)
[181] Id ;Art 4(3)
[182] Id ;Art 4(4)
[183] Id ;Art 4
[184] Id; Art 4(5)
[185] Id; Art 5(2)
[186] Article 1
[187] Id; Art 2
[188] Art,4
[189] Supra Note 8 at 355

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

THE DEATH PENALTY IN DOMESTIC LEGISLATION

4.2.1 Constitutional law:

There are a number of countries that have taken very bold steps and abolished the death penalty in their constitutions. Some of these are; *Mozambique, Namibia, Rwanda, South Africa Sao Tome and Cape Verde*. However, many countries like Uganda have retained it in their constitutions

Justice Chaskalson of South Africa summed up the reasons why his country decided to abolish the Death Penalty:

> "The right to life and dignity are the most important of all human rights, and the source of all other personal rights'. "By committing ourselves to a society founded on the recognition of human rights, we are required to value these two rights above all others." And this must be so demonstrated by the state in every thing it does, including the way, it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to mothers in the expectation that they might possibly be deterred there by"[190].

Article 22(1) of the Uganda Constitution provides that "No person shall be deprived of life internationally except in execution of a sentence passed in a fair trial by a court with competent jurisdiction in respect of criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellant court"[191] It is the researcher's opinion that the Uganda constitution values human life as seen in Article 22(1) of the constitution. On the other hand the death penalty is recognized under the same constitution.

[190] Chaskalson in the Makwanyane case at 101
[191] 1995 Constitution

This is in line with the Indian constitution where, Article 21 of the Indian constitution provides that; "No person shall be deprived of life or personal liberty except according to procedure established by law".

In the case ***Bachan Sigh Vs State of Punjab***,[192] the Supreme Court held that section 302 of the Indian penal code, which authorizes the imposition of the death sentence for murder, was not unconstitutional because there was a law, which made provision for the death penalty. It was therefore clear that capital punishment was specifically contemplated and suctioned by the framers of the Indian constitution when they adopted it in November 1949.

This thus holds true in Uganda, that the legislators contemplated the death sentence in Article 22(1) of the Uganda's Constitution. However, Article 24 of the Constitution of Uganda provides that; "No person shall be subjected to any form of torture, cruel, inhuman or degrading or treatment or punishment"[193].

This provision is fortified by Article 44 of the constitution, which provides that "Notwithstanding anything in this Act, there shall be no degradation from the enjoining of the following rights and freedoms; freedom from torture, cruel, inhuman or degrading treatment or punishment"[194].The death penalty is t constitutes, cruel inhuman or degrading treatment or punishment. This fact is clearly stated by *Wright J* in the case of ***the people Vs Anderson:***

> "Capital punishment is to be impressible and cruel because it degrades and dehumanizes all who participate in its processes. It is unnecessary to any legitimated goal of the state and is incompatible with the dignity of human kind and judicial process"[195].

4.2.2 Criminal law;

In Uganda, the criminal justice system is governed by a number of Acts and statutes including the Penal Code Act.[196] The Trial on Indictment Act[197] and the Criminal Procedure Code Act[198].

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[192] SCC 684 (1980)
[193] 1995 Constitution.
[194] Ibid
[195] [1972] 493 p.2 d 880,886

In the Penal Code Act, a number of offences are created that carry the death penalty.
These include; kidnap with intent to murder[199], murder,[200]armed robbery[201], defilement,[202] rape,[203]
In Uganda today, a person can be sentenced to death if he or she commits a crime that falls within the confines of the penal code and is found guilty by a competent court[204].However, the accused person has the right of appeal to the supreme court of Uganda[205].

The offences of defilement and rape stipulated under chapter fourteen of the Penal Code Act (offences against morality) have only recently attracted the death penalty. And it is crystal clear that, the factor which influenced the National Resistance Council (NRC)[206] to lobby for these amendments was to curb the spread of HIV/AIDs which has plagued Uganda for over a decade.

4.2.3 Martial law

Uganda has two separate systems of criminal justice. That is to say that all Ugandan citizen are citizens are subject to the Uganda Penal Code Act, while soldiers are in addition subject to a separate military criminal regime under the National Resistance Statute Disciplinary code of conduct[207].

The National Resistance Movement (NRM), 1986 took up bold steps to incorporate in to Ugandan law two codes of conduct for soldiers, which prescribed the death penalty for a wide range of offences. The National Resistance Army (NRA) code of conduct (operational

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[196] Cap 120; Law of Uganda, 2000
[197] Cap 23,Laws of Uganda 2000
[198] Cap 116, of Uganda, 2000
[199] Id; s. 243(1)
[200] Id; s. 189
[201] Id; s. 286 (2)
[202] Id; s. 129 (1)
[203] Id; s. 124
[204] Article 22(1) of the 1995 Constitution
[205] Id; article
[206] Amnesty International; The death Penalty; a barrier to Improving Human Right 1993 pg.7
[207] The NRA Code of Conduct (Non Operation Situations)

situations), which is applicable in non-operational situations, and it prescribes mandatory death sentence for treason, murder, rape, and disobedience of a lawful order leading loss of life.

Further still, the operational code of conduct defines a further series of offences, including desertion and disobedience of lawful orders, carrying a maximum penalty of death. These two codes of conduct were streamlined and submitted within the Uganda People's Defense Force Act[208].

In the army, military disciplinary measures are taken through a system of courts ranging from unit court martial[209], martial division court[210], General court[211], to court martial appeal court[212]. Soldiers on operations are tried by a field court martial and executed if found guilty[213]. It is thus observed that, this system leaves a lot of room for injustice as the field courts are often adhoc and the accused rarely represented by any legal counsel of whatever nature. There is also no appeal produce. However, soldiers have the right to legal representation by a lawyer from the army.

It is important to note that; since 1987 at least 40 soldiers have been executed by firing squads[214]. In mid December 1990, two NRA officers were executed in *lira for cowardice and Mishandling* of an operation in Kitgum district, which resulted in the death of several soldiers[215].

The Uganda People's Defense Forces Act[216] provides for a court martial appeal which has the jurisdiction to hear and determine all appeals all referred to it from decisions of the General court martial.

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[208] UPDF/A Cap 307
[209] Id; s.78
[210] Id; s.80
[211] Id; s.81
[212] Id; s. 84
[213] Ibid s. 78
[214] Amnesty International;...at 59
[215] Id; at 60
[216] Supra note 62

This procedure is subject to criticism in that it is the army lawyers who act as defense counsel for the accused, army officers who sit in these courts, and the army becomes the army that proffers charges against the accused soldiers. Thus, the institution of the army becomes the accuser, the prosecutor, and the judge. And like the Uganda saying that goes, "A monkey cannot judge the forest". This saying implies that defense counsel will defend in favour of the court martial officers.

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

Also, it is observed that, Article 22(1) of the constitution[217] requires a problem lies the fact that a death sentence passed be the court martial and the field martial would not be confirmed by the highest appellant court as. In this way, executions made under this law would be unconstitutional. And as such, the committee on the prerogative of mercy is precluded by the constitution to consider cases decided by the field court martial.

4.2.4 Sharia law.

Under this law, the death penalty is prescribed for a range of offices including rape, murder and in some cases theft. The gravity of this law is mostly felt in Muslim states such as Sudan and Egypt.

4.3.1 The Death Penalty and the Right to Life.

The right to life is the supreme right of the human being,[218] and the bedrock of the concept of human rights that is universally recognized as an inalienable and inherent right to all.

This right is provided for and protected differently in the domestic legislations. For instance in some jurisdictions such as South Africa, the right to life is unqualified. This is clear in Article 9 of the South African constitution that provides that "Everyone has the right to life".

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[217] 1995 Constitution

[218] Camargo V. Columbia, Human Rights Committee, Communication No.45/1979

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

> "The unqualified right to life vested in every person by section 9 of our Constitution is another factor crucially relevant to the question whether the death sentence is cruel, inhuman or degrading punishment within the meaning of section 11(2) of our constitution[219]...The carrying out of the death sentence destroys life, which is without reservation under section 9 of our Constitution..."[220]

However, in the English case of ***R Vs Home secretary,***[221] Lord Bridge asserted that "capital punishment imposed a limitation on the essential content of the fundamental rights to life and human dignity, eliminating them irretrievably". As such, it was unconstitutional.

This statement was confirmed by Justice *Chaskaslon* where he stated that; the right to life and dignity "are the essential content of all rights...take them a way, and all other rights cease"[222].

In Uganda[223], the right to life is qualified to the extent that it may be taken away in execution of a sentence passed in a fair trial by a court of competent jurisdiction.
The jurisprudence in the *Makwanyane* case and the ***R v Home secretary, Expert bugday*** case discussed above provides a basis to challenge the constitutionality of the death penalty in Uganda.

The opinion that the death penalty is a violation of the ***"right to life"*** find its momentum in the provisions of Article 20 of the 1995 constitution which recognizes that the fundamental rights and freedom of the individuals are inherent and not granted by the state. The Article provides that;

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[219] State V.T Makwanyane & M.Chunu case No.CCTT/3/94
[220] Ibid
[221] [1987]AC 514 at 531
[222] Chaskalson Supra note 73 at 59.
[223] Uganda Constitution 1995, Art 22(1)

"The rights and freedoms of the individual and groups enshrined in this chapter shall be respected, upheld, and promoted by all organs and agencies of government and by all persons"[224].

Article 20 underlines the fact that the life is not a privilege granted to an individual by the state but an inalienable and integral part of a person by virtue of being human. It imposes a duty upon all organs of the state to respect, uphold and promote this inalienable right.
This is a very clear that neither a court of a law, which is an organ of the state nor the legislature is capable of condemning a person to death.

It can further be emphasized that, in the **Joseph Kindler V Canada** decision, the court was of the view that an individual's right to life has been described as the most fundamental of all human rights, and that it is paramount and inherent, such a right cannot be compatible with the death penalty[225].It is true that the value of life is immeasurable for any human being and that the right to life cannot be qualified in anyway.

Therefore, as was held in ***S Vs Mtilongo;*** the death penalty is the ultimate and the most incomparably extreme form of punishment ...it is the last, the most devastating and most irreversible recourse of the criminal law, involve as it necessary does the planned and calculated termination of life itself, the destruction to the greatest and most precious gift which is bestowed on all human kind[226].

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

> "The right to life is one antecedent to all the other rights in the constitution. With life in the sense of existence, it would not be possible to exercise rights or to be bearer of them. But the right to life was included in the constitution not simply to enshrine, the right to existence. It is not life as an organic matter that the constitution cherishes, but the right to human life, the right to live as a human being, to be a part of a broader community, to

[224] Id... Art 20 (2)
[225] Joseph Kindler V Canada, United Nations Committee of Human Rights; Communication No. 470/1991 at 23
[226] [1994] 10 SACR 584,at 587

share in the experience of human life that is at the centre of the experience of human life that is at the centre of our constitutional values. The community is recognized and treasured the right to life is central to such a society"[227].

It can be seen from the above that, all human beings are entitled to the protection of the law and those entitled to claim this protection even include social outcasts or criminals. So if at all the law seeks to protect the lives of people, then it would be superfluous for the law to uphold the right to life on the one hand, then it would be regard to the special nature of this right, and then seek to take it a way on the other.

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

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

The death penalty is seen as a violation of the prohibition against torture, cruel, degrading and inhuman form of punishment.

In the case of ***The People Vs Anderson,*** Justice Wright held capital punishment to be impermissible and cruel because it degrades and dehumanizes all who participate in its process. It unnecessary to any legitimate goal of the state and is incompatible with the dignity of human kind and judicial process[228].

The United Nations Committee on Human Rights has held that the death sentence by definition is a cruel and degrading punishment just as the Supreme Court and the constitutional courts of Canada and Hungary have held respectively[229].

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[227] Chaskalson in Makwanyane case, Supra note 73
[228] [1972] 493 p.2d 880,886.
[229] Chaskalson in Makwanyane case Supra note 73 at 63.

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 is as unequivocal as it is unqualified. It is fortified by Article 44 of the constitution, which provides that;
"Notwithstanding anything in this constitution, there shall be no derogation from the enjoinment of the following rights and freedoms; freedom from torture, and to cruel, inhuman or degrading treatment or punishment and...a right to a fair hearing".

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

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

This issue further still is addressed by other different authorities. For instance, a provision of the Zimbabwean constitution that banned. Inhuman or degrading punishment was considered by that country's Supreme Court to be; one that embodies broad and idealistic notions of dignity, humanity, and decency. It guarantees that punishment ...of the exercised within evolving standards of the nurturing society, or which involves the infliction of unnecessary suffering is repulsive. What might not have been regarded as inhuman decades ago may be resolving to the new sensitivities, which emerges as civilization advances?[230]

[230] Justice Gubbay in catholic Commission for Justice &peace in Zimbabwe V.A.G& Ors.

In the American, case of ***Furman Vs the State of Georgia***[231], the death penalty was considered as; "Unique...in its absolute revocation of all that is embodied in our concept of humanity.[232] In that case, justice Bremen reiterated that; death is truly an awesome punishment. The calculated killing of a human being by the state involves by its very nature a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident...a prisoner remains a member of the human family...in comparison to all other punishments...the deliberate extinguishment of all human life by the state is unique degrading to human dignity.[233]

In the same case, Justice Bremen emphasized the distinctive features of the penalty that highlighted the elements of torture and the cruelty it entails when he said; "Death is today an unusually severe punishment, unusual in its pain, in its finality and its enormity. No other existing punishment is comparable to death in terms of physical pain".
We know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll-during the inevitable long wait between the imposition of sentence and the actual infliction of the death. The usual severity of it is manifested most clearly in its finality and enormity. Death is in these respects in a class by itself.[234]

It is seen in the ***Californian case of the People Vs Anderson,*** where it was held that; the cruelty of capital punishment lies not only in the execution itself and the pain incidental there to, but also in the dehumanizing effects of the lengthy imprisonment prior to the execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit ass to constitute psychological torture.[235]

Similarly, in ***Earl Pratt Vs Jamaica,***[236] the essential question was whether the execution of a man following long delay after his sentence to death can amount to inhuman punishment. The

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[231] [1972] 408 US 238
[232] Per Justice Stew ard in Id; at 306
[233] Id; at 290-91
[234] Id; at 287-88
[235] Per chief Justice Wright, Supra note 82 at 894
[236] [1993] 2LRC 39 privy Council APP. No.10/1993

Privy Council held that such delay is capable of having that effect. This is because; "There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to these instinctive evulsions? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over along period of time,[237] which renders his sequent execution unlawful.

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

The state puts the question of death to the condemned person, and he must grapple with it without consolation that he will die naturally or with his humanity intact. A condemned person experiences an extreme debasement ...the death sentence itself is a declaration that society deems the prisoner a nullity, less than human, and unworthy to live. But that negation of his personality carries through the entire period between sentence and execution."[238]

A similar view was expressed by the supreme court of Zimbabwe that "from the moment he enters the condemned cell, the prisoner is enmeshed in a dehumanizing environment of near hopelessness. He is in a place where the sole object is "the living dead." He is kept only with other death sentence, prisoners with those appeals have been dismissed and who await death or reprieve; or those whose appeals are pending judgment. While the right to an appeal may raise

[237] Ibid [1994] 2 A.C 129
[238] [1980] 381 Mass 648, at 678-&683

the prospect of being allowed to live, the intensity of the trauma is much increased by the knowledge of its dismissal. The hope of a reprieve is all that is left. Through out all this time the condemned prisoner constantly broads over his fate. The horrifying specter of being hanged by the neck and the apprehension of being made to suffer a painful...death is never far from mind."[239]

The controversial issue on the death penalty was successfully handed recently in the land mark case of ***the State V .T. Makwanyane and. Mchunu***, where twelve of the most senior judges South Africa concurred entirely with the finding of the president of the constitutional court of South Africa that; death is a cruel penalty and the legal processes which necessarily involve waiting in uncertainty for the sentence to be a side or carried out add to the cruelty. It is also inhuman punishment, for it involves by its very nature a denial of the executed person's humanity, and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state.[240]

The United States Supreme Court has accepted that human dignity is at the core of the prohibition of cruel and unusual punishment by the eighth and fourteenth amendments.
One American dissenting judge referred to the death penalty as a fatal constitutional infirmity; and stated as follows.

The fatal constitutional infirmity in the punishment of death is and treats members of the human race as objects to be toyed with and discarded. It is thus inconsistent with the fundamental promise of the clause that even the vilest criminal remains a human being possessed of common dignity.[241] In Germany, the federal constitutional court also stressed this aspect of punishment.
"Respect for human dignity especially requires the prohibition of cruel, inhuman and degrading punishments. The state cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect."[242]

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[239] Catholic Commission for Justice &peace in Zimbabwe V.A.G & Ors, Supra note 84 at 268
[240] Supra Note 73 at 18-19
[241] Gregg V. Georgia. 428 US 153.230.
[242] 45 Bverf GE 228 (1977)

That the death penalty constitutes a serious impairment of human dignity has also been recognized by judgments of the Canadian supreme court. In ***Kindler Vs Canada,***[243] three of the judges who heard the case expressed the view that "the death penalty was cruel and unusual; it is the supreme indignity to the individual, the ultimate corporal punishment, the final and complete lobotomy and the absolute and irrevocable castration. It is the ultimate desecration of human dignity."

The three other added:

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

The Human Rights Committee of the United Nations in ***Ng Vs Canada***[244] expressed the opinion:

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

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

The above analysis has also illustrated that Article 22(1) allowing for a death penalty infringes upon the right to life. And of article 24 and 44 of the constitution shows that any form of cruel, inhuman, and degrading punishment and treatment is prohibited by the constitution. The opening line of Article 44 directly implies its supremacy over anything else written in the constitution. It clearly manifests that the right of an individual not to be subjected to any form of torture, cruel, degrading or inhuman punishment is paramount and cannot under any circumstances be comprised, any other provision to the contrary notwithstanding.

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[243] 6 CRR (2d)193 (1992)

[244] Comm. No 469/1991. 5 Nov.1995.

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

It is clear from the arguments stipulated in the foregoing discussion that, the death sentence by a law or the imposition in that sentence by court in accordance with the law cannot be successfully challenged as unconstitutional, on the basis of article 22. However, it may be possible to challenge the death penalty using other provisions of the constitution. One challenge is the forgoing discussed above, on the provisions prohibiting torture, cruel, inhuman or degrading treatment or punishment as in Article 24 of the constitution.

Thus, it is evident from the authorities cited above, that the death penalty in Uganda should be declared as an unconstitutional form of punishment. In addition, these arguments are in line with the petition filed by Ssempebwa and co. advocates working together with Foundation for Human Rights Initiative who petitioned court on behalf of the 417 condemned prisoners seeking to abolish the death penalty arguing that, the punishment was cruel, inhuman and degrading.[245]

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

[245] The New Vision 29th Jan

CHAPTER FIVE

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

5.0RECOMMENDATIONS AND CONCLUSION.

5.1RECOMMENDATIONS

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

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

Education

This recommendation should be geared towards changing the public opinion about the death penalty. This is so because, when the opinion is changed, the government will have no excuse that the majority of the population favours it. Thus open debate and wide spread education about crime and the death penalty would encourage people to develop an informed opinion. For instance at Makerere University in Uganda an experiment conducted in 1972 illustrated the importance of education. The report indicated that

> A group of under graduates were asked to write down on a piece of paper what they thought should be done with murderers and armed robbers. Almost 90 percent of the responses were in favour of capital punishment for these crimes. After one academic year

of studying criminology and sociology of deviance and crime, the same students were asked to write down what they thought should be done with such offenders; almost 90 percent stated that they strongly disapproved of the death penalty,"

The public must be educated or informed about the process of abolishing the death penalty.[246]

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

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

5.1.1Moratorium and partial abolition

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

South Africa imposed a moratorium on executions from 1990 before the death penalty was abolished for ordinary crimes in 1995. Moreover, in Malawi, moratorium was placed on execution in 1993.[247]

[246] The death penalty and its Alternatives, Tibamanya Mwere Mushanga, A paper read at the Conference on the Death Penalty in Africa at Ibadan, Nigeria, 3-8 October 1977

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

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

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

5.1.2 Reduction of capital offences

Reduction of the scope of crimes punished by death is extremely necessary so that the death penalty is restricted only to the most serious crimes. As discussed, Uganda military laws provide for over 20 offences that attract the death penalty.[248] In addition, Uganda's penal code carries many offences whose maximum sentence is death including defilement, treason, murder and aggravated robbery.[249]

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

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

Thus, it is recommended that Uganda should follow those countries that have abolished the death penalty for an ordinary crime. For example, India retains the death penalty only for offences of

[248] The Uganda people's Defense Force Act Cap 307 Laws of Uganda 2000
[249] Penal Code Act Cap 120, Laws of Uganda 2000

an exceptionally deprived and heinous character and a source of great danger to the society at large such as criminal conspiracy and waging or attempting to wage war against state. Japan retains it only for executing those who commit extremely heinous offences for example murder. In Africa Egypt reserves the death penalty for cases with certain aggravating circumstances, such as where the murder is premeditated or planned, say as in poisoning.[250] This shows a good ground for Uganda to reduce the scope of the many offences that carry the death penalty.

5.1.3 Mandatory death penalty sentence

In Susan Kigula's case the court concluded that mandatory death sentences were an "intrusion by the legislature into the realm of the judiciary" and that "parliament has no power to enact a law which is arbitrary, unfair, unjust, fanciful or oppressive yet the mandatory provisions do just that"[251]. It also concluded that "there is no justifiable reason for denying a convict whose sentence is fixed by law to appeal against sentence only...this...is repugnant to the principles of equality before the law and fair trail".

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

The mandatory death penalty sentence imposed by such as the penal code Act,[252] with respect to offences such as murder, treason and robbery with a deadly weapon,[253] should be removed.

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

[250] C.K Karusoke(2003), The case for Partial Abolition the URC Monthly Magazine P.11
[251] Ibid, Judgment of Twinomujuni JA, pp. 46-49.
[252] Penal Code Act Id at 5
[253] Id, SS. 243(1), S.23(d), S 286(2) respectively

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

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

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

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

5.1.4 Constitution litigation

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

Article 50 of the Uganda's Constitution provides that;

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

3) Any person aggrieved by any decision of the court may appeal to the appropriate court. This Article in essence creates the right to a higher court a constitutional court in the event of violation or the threat of violation of human rights.
4) Any person sentenced to death or any other person on his or her behalf can appeal to have the sentence quashed as being unconstitutional.

And Article 137 (3) provides that; "Any person who alleges that; (a) An act of parliament or any other law or an thing in or done under the authority or any law...is inconsistent with or in contravention of any provision of this constitution may petition the constitutional court for a declaration to effect and for redress where appropriate".
This is further constitutionally safe guarded by Article 132(3) of the constitution, which provides that; any party aggrieved by a decision of the court appeal sitting as a constitutional, court is entitled to appeal to the supreme court against the decision.

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

5.1.5 A need for a practical right of appeal.

Article 22(1) of the constitution provides that: Nobody can be executed in enforcement of court sentence unless that sentence is confirmed by the highest appellate court of Uganda.[254] This implies that there is a right of appeal against a sentence. There is a doubt that an appellate court can quash or set aside the sentence that has been passed, where it is mandatory provision of the law to reverse the decision of the lower court.
It is important to note that an accused that is sentenced to death can be considered for presidential clemency as stipulated in Article 121(4) of the constitution.

[254] 1995 Constitution

This is exercised by the president, and in any event only upon the recommendation of the Advisory committee on the prerogative of mercy. It should be remembered that the Advisory Committee discusses the case only from the court record and the trial judge's report.[255] The accused is never actually heard again even if he or she raises a defense to the sentence.

The researcher recommends that,

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

Although the Uganda People's Defense Force Act[256] statute attempts to provide for appeals, it does not go far enough. Under this statute, the appeal procedures are available in theory but in practice, they are hardly ever followed. That is why it is recommended to provide for a practice right of appeal in order to avoid convicting the innocent in Uganda, and this will propel the abolition of the death penalty.

5.1.6 Protection of the disadvantaged convicts.

A very important reform needed in the criminal procedure system is provision off the supplementary opportunity and facilities to the accused to prepare his or her defense considering the severity of the sentence he or she is liable to suffer upon conviction. This requirement is in line with the constitution, which imposes a duty on the state to provide legal representation to the accused in offense that carries the death penalty.[257] However, the provision of the article alone is insufficient.

[255] Article 121(5)
[256] UPDF ACT CAP
[257] Uganda Constitution, Supra note 11

In Uganda, there is a practice of handing state briefs to advocate representing death penalty appellants for a minimal fee. It is feared that because the fees are not attractive such work is hardly taken seriously. It is clear that; there are limits to the available financial and human resources, limits which are likely to exist in the foreseeable future, and which will continue to place the poor accused at a significant disadvantage in defending themselves in capital cases. This set up reduces the process to no more than a "sophisticated judicial lottery" where the odds on a poor accused surviving the hang man are significantly reduced.[258]

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

5.1.7 Addressing the Socio-Economic Factors

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

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[258] Makaany are case, Supra note at 38

5.1.8 Alternative of a Life Imprisonment

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

In other words, the mandatory death penalty should be substituted with life imprisonment. This will automatically be one way of totally abolishing the barbaric form of punishment in Uganda. And this will allow a convicted person to die naturally. Life imprisonment will thus help an offender to reform and also allow him to be forgiven and forgive. .

5.2 CONCLUSION

In the words of Albert Camus, "There will be no lasting peace either in the hearts of individuals or in social customs until death is outlawed."[259]

This research has outlined and critiqued the main arguments supporting the retention of the death penalty and arguments for its abolition. It has analyzed the legal basis for the death penalty in Uganda with respect to the right to life. Generally, this research holds that; the death penalty offends the concept and the law on human rights and that it is inconsistent with the contemporary trend of international criminal law. It is further manifested that death penalty is cruel, inhuman and degrading treatment that is unaccepted under any circumstances whatsoever under both international law and the domestic legislation in Uganda. The death penalty should therefore be abolished. In the words of Albert Camus, "There will be no lasting peace either in the hearts of individuals or in social customs until death is outlawed."[260]

In the intervening period before the abolition of the death penalty, it is recommended that the relevant laws should be amended to outlaw mandatory death sentences. In tandem with this, no more capital offences should be created. If public opinion continues to favour the death sentence, it should limited to very grave and atrocious offences like treason, murder, war crimes, and crimes against humanity and genocide. However, this dissertation maintains that life imprisonment suffices. Other wise life imprisonment seems to be adequate.

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[259] Apollo Kakaire, Supra note 3 at 8
[260] Apollo Kakaire, Supra note 3 at 8

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

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

Therefore, while there are encouraging signs in Uganda indicating that the death penalty should be abolished, public opinion needs to change before there is wide spread acceptance that it is no longer an acceptable punishment. In Susan Kigula's case, they petitioners advised the court to focus solely on the constitutionality of the death penalty and urged the judges to disregard public opinion, public policy and even their own personal views on the death penalty. The petitioner merely aimed to challenge the constitutionality of their death sentences and replace them with "alternative, severe but lawful" forms of punishment such as life imprisonment. They were not contesting their clients' convictions, and wanted to pre-emptively dispel any media allegations that they were attempting to set capital convicts free. The effort currently made to abolish the death penalty will at the very least help to stimulate public debate about the abolition of the death penalty in Uganda. In this conclusive remarks, reform and forgiveness as cardinal principles of a religious life should be considered.

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

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