

**DEATH PENALTY AND THE LAW IN UGANDA: HUMAN RIGHTS  
PERSPECTIVE.**

**BY**

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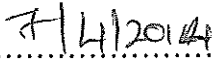
**NOV, 2013**

## DECLARATION

I **Kayesu Phiona** declare that this research project is my original work and has not been submitted for any Bachelors or Masters or PHD or Diploma in any University.

Signed .....  .....

**Kayesu Phiona**

Date .....  .....

## DEDICATION


I dedicate this work **to my** dad and mum for **their moral** support.

Lastly to my brother **Kagina, Uncle Robert** and **Pastor Kanjunakyi.**

May the lord protect you and reward for your support.

## APPROVAL

I hereby certify that this work contained in this research dissertation entitled '**Death Penalty and the law in Uganda: Human Rights Perspective.**' has been under my supervision and I have approved it for submission to the school of Law Kampala International University.

Signature.....

**Twikirize Parton**

Date.....*7/4/2014*

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May God bless us all and give more happy years as we celebrate this academic milestone.

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## **ABSTRACT**

This research project examines the challenges confronted by a developing country such as Uganda in continuing with legal provisions that gives death penalty a chance to exist. Despite facing acute and intractable problems of poverty, Uganda has moved a step to adopt some of the provisions of International Covenant on Civil and Political Rights of 1966, the Convention on the Rights of the Child 1989, United Nations General Assembly and African Charter on Human Rights and People's Rights of 1981. These International instruments are lacking a clear position on the death penalty.

Chapter One involves the introduction of the study, objectives, purpose, problem statement, and significant of the study, related literature and methodology.

Chapter Two includes international laws on death penalty for example the 1998 Rome Statute, the Universal Declaration of Human Rights, 1948 and others. The researcher goes on to give a critical analysis on those instruments; following it up with Regional Instruments such as the African Charter on Human and People, Rights 1981. The chapter finally ends with a discussion of the domestic legislations on the death penalty.

Chapter Three includes the Research findings obtained from respondents in the field study and interpretation of data obtained from the field.

Chapter Four is the conclusion of the study and wraps up all the main findings relating them to the hypothesis. Recommendations of the researcher over the study are also included in the last chapter.



## CHAPTER ONE

### 1.0 Introduction

The death penalty is a controversial form of punishment through out the world. While it has been condemned and abolished in many states as a violation of the right to life. A considerable number of countries including Uganda still retain it as a form of punishment. 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 amidst strong opposition from different circles. These included Non Government Organizations such as the Foundation for Human Rights Initiative (FHRI) which lobbied the Constituent Assembly to exclude capital punishment in the 1995 Constitution; another was the Hon Justice **Benjamin Odoki** report of the Uganda Constitutional Commission (1992).

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, if a sentence passed in a fair trial h 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 they highest appellate court”<sup>1</sup>

The death penalty is currently the mandatory punishment for several offences including Murder, Treason, Aggravated robbery and Smuggling and is one of a number of possible punishments for several other offences including Kidnap, Rape and Aggravated Defilement<sup>2</sup>.

It is also a punishment for terrorist under **Section 2** the Anti-Terrorism Act.<sup>3</sup>

In addition to lawful Executions under the above law, Uganda has been widely known for Extra- Judicial executions. In relation to this, Amnesty International

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<sup>1</sup> Article 26

<sup>2</sup> Penal code Act Cap 120

<sup>3</sup> Sect 7(1)

has stated that “killing by soldiers of unarmed civilians and prisoners have happened every year since the National Resistance Movement took power in 1986. In areas facing insurgencies”.<sup>4</sup>

Current data on death penalty in Uganda indicated that the death penalty is actively used as a form of punishment.<sup>5</sup>

In May 2000, the number of prisoners on remand facing capital charges in Luzira Maximum Upper Prison alone was over 1900. The bulk of these are held on charges of Rape and Defilement.<sup>6</sup> The last executions in Uganda were in 1999 where 25 prisoners were executed on the 28<sup>th</sup> and 29<sup>th</sup> of April.<sup>7</sup>

The retention and active use of the death penalty in Uganda raises a number of issues, the more fundamental of which are addressed in this study. These include among others the violation of the right of life.

The study also analyses the historical background of the death penalty, arguments for and against it and it examines the law and constitutionality of the same in Uganda. It also makes recommendations on, the future of the death penalty in Uganda.

### **1.1 Definition of Death Penalty**

Death Penalty as a form of capital punishment is 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.<sup>8</sup>

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<sup>4</sup> Amnesty International Uganda; the failure to safeguard human rights 19-3 (1992).

<sup>5</sup> Amnesty International, when the state kills

<sup>6</sup> E.A Journal of peace and Human Rights Vol: 6, No. 2 2000 p.224

<sup>7</sup> The Justice update: Foundations for Human Rights Initiative (FHRI) p.9 Amnesty International Report 1999 p.5.

<sup>8</sup> Amnesty international report 1999 pg.5

## 1.2 Background

The law and philosophy underlying the use of the death penalty in Uganda can be traced to the development of criminal law in England. Like other laws, criminal law in Uganda is largely a colonial legacy introduced in Uganda under the Reception Clause of 1902.<sup>9</sup>

However, the earliest historical records containing evidence on capital can be traced in the **Code of Hammurabi of 1750 B.C** which prescribed revengeful punishments popularly referred to as “an eye for an eye, a tooth for a tooth.” Besides that, the Bible prescribed death as the penalty for more than thirty different crimes, ranging from Murder and Fornication.<sup>10</sup>

According to **Robert Sideman**, the law on penal punishment in England developed in five stages.<sup>11</sup> The first was the primitive stage. In this period all, crimes were punished with extremely harsh sanctions, 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 stages 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 divine right and power which no human being could upset. This meant that if you took one's limb, you simply paid with your own.

Retribution as the basis of punishment gave way to the concept of deterrence that was articulated by 18<sup>th</sup> and 19<sup>th</sup> centuries rationalists like **Jeremy Bentham**. This marked the third stage in the development of penology and principles of punishment. Philosophers advocated a utilitarian approach to the law and sought to derive principles of punishment from human nature, holding

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<sup>9</sup> G.S.K Ibingira, the political and constitutional evolution of Uganda from colonial rule to independence

<sup>10</sup> Deuteronomy 22:13

<sup>11</sup> Robert B. Seidman, A source book of the criminal law of Africa (1966)

that the basic objective of criminal law is to deter potential criminals by example. This reasoning founded the doctrine of “deterrence” as 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 argument was that the criminal mind was not entirely independent, it determined to a certain extent by the environment and personal history. If the criminal and the crime are products of social and economic forces, then the criminal cannot be deterred by the threat of punishment. To these categories of criminals, therefore, the goal of punishment was seen as reformation and rehabilitation.

The above theories on criminal punishment have continued to be applied and to influence sentencing in courts of law today as a basis of punishment. In Africa. It appears that the deterrence theory is a dominant basis of judicial sentencing.<sup>12</sup>

In Uganda Government policy on the death penalty tends to lie on this theory.

According **Abu Mayanja**, a former deputy prime Minister/ Minister of justice and Attorney General (A.G) of Uganda. “The death penalty is a strong deterrent to crime in a socially deprived society<sup>13</sup>

Thus, the death penalty in Uganda was inherited from the British in 1962 and upheld by the Constituent Assembly while discussing the 1995 Constitution. It’s therefore not surprising that today this form of punishment applied in Uganda’s penal systems, as mandatory punishment.<sup>14</sup>

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<sup>12</sup> RV.Majafe.2s.a118(1958)

<sup>13</sup> The new Vision 10 March 1992

<sup>14</sup> The Penal Code Act Cap 120 Vol.6

Execution of criminals and political opponents has been used by nearly all societies both to punish crime and to suppress political dissent. In most places that practice capital punishment it is reserved for Murder, Espionage, Treason, or as part of military justice. In some countries sexual crimes, such as Rape, Adultery and Incent carry the death penalty as do religious crimes such as apostasy in Islamic nations (the formal renunciation of the state religion).

In many countries that use the death penalty, drug trafficking is also a capital offense. In **China**, human trafficking and serious cases of corruption are punished by the death penalty. In militaries around the world Courts – Martial have imposed death penalties for offences such as cowardice, desertion, insubordination and mutiny.<sup>15</sup>

**Kealeboga**<sup>16</sup> states that the death penalty is by no means of modern origin. It has been suggested that death penalty is the oldest of all punishments and has its genesis in the dawn of history. According to **Schabas**<sup>17</sup> the 20<sup>th</sup> century was one of the bloodiest of the human history massive killing occurred as the resolution of war between nation states. A large part of execution was summary execution of enemy combatants. Also modern military organizations employed capital punishment as a means of maintaining military discipline. The Soviets, for example, executed 158,000 soldiers for desertion during World War II. In the past. Cowardice, absence without leave assertion, insubordination, looting, shirking under enemy fire and disobeying orders were often crimes punishable by death.

One method of execution used in Uganda since firearms came into common use has almost invariably been firing squad. Moreover, various authoritarian

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<sup>15</sup> <http://www.shQtatdawn.org.uk>

<sup>16</sup> Kealeboga, N. 8. (2004). The death penalty phenomenon and prohibition against torture and cruel, inhuman or degrading treatment African Human Rights Journal.

<sup>17</sup> Schabas W (2002) 'The Right to Life of the Dead' Penalty in International law

states, for example these with fascist or communist governments employed the death penalty as a potent means of political oppression. Partly as a response to such excessive punishment, a civil organization has started to place increasing emphasis on the concept of human rights and abolition of the death penalty.

### **Definition of the Death Penalty**

The death penalty thus, is the execution of a person by judicial process as a punishment for an offence. Crimes that can result in a death penalty are capital crimes or capital offences. The term capital originates from Latin **capitalis**, literally regarding the head (**Latin caput**).

Hence, a capital crime was originally one punished by the severing of the head  
**Erica**<sup>18</sup>

Capital punishment has in the past been practiced in virtually every society although currently only 58 nation's actively practice it, with 95 countries abolishing it (the remainder having not used it for 10 years or allowing it only in exceptional circumstances such as war<sup>19</sup>. It is a matter of active controversy in various countries and states and positions can vary within a single political ideology or cultural region. In the European Union member states, **Article 2**<sup>20</sup> of the Charter of fundamental Rights of European Union prohibits the use of punishment.

Today most countries are considered by Amnesty International as abolitionists, which allowed a vote on a nonbinding resolution to the United Nation to promote the abolition of the death penalty (moratorium on the death penalty). But more than 60% of the worldwide population lives in countries where executions take place insofar as the four most populous countries in the world (the People's Republic of China India United States and Indonesia) apply the death penalty and are unlikely to abolish it in the near future.

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<sup>18</sup> Erica (2003) Death penalty in Uganda; the road to its abolition

<sup>19</sup> (www.amnesty.org/death\_penalty)

<sup>20</sup> Charter of Fundamental Rights of the European Union Article 2

In Ugandan's criminal justice system, the adoption of the death penalty as a fundamental departure was made in 1902 with the adoption of Indian penal Code of pronounced rights. From this the death penalty was accepted into the penal Code Act and later incorporated into the National Resistance Movement statute and the 1995 Constitution under **Article 22(1)**<sup>21</sup> after, majority of interviewees by the **Odoki** Commission advocated for its retention.

### **1.3 Statement of the Problem**

Life is life and not replaceable, this implies that an individual has a right to life as it is per **Article 20** of the 1995 Constitution of Uganda which recognizes that fundamental rights and freedom of the individuals are inherent and not granted by the state<sup>22</sup>. However this is not so realistic as the state still the uphold the death penalty which is also against the international legal instruments like the Universal Declaration of Human Rights and the International Convention of civil and Political Rights (**ICCPR**). Some individuals believe that its politics driving the whole issue. For instance James<sup>23</sup> asserts that legalized taking away of human life by the state in the name of social defense has now days become politics of the, first instance and an issue of earth wide proportions. It's as a result of the diverse ie. That the researcher seeks to understand the effect of the law and death penalty as regards ones right to life in Uganda.

### **1.4 Purpose**

The purpose of this study is to establish the effect of the law on death penalty from a human rights perspective. That is, how the how the punishment of death penalty is dangerous to one's life and to observe it's applicability due to the laws of Uganda mainly the 1995 Constitution. It will then establish

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<sup>21</sup> Article 22 of the 1995 Constitution of Uganda

<sup>22</sup> Article 20 of the 1995 Copnstitution of Uganda

<sup>23</sup> Constitutional Petition 10/2002

arguments for and against death penalty through examining different personnel whose professional impacts on its application.

## **1.5 Objectives**

### **1. General objectives**

### **2. Specific objectives**

The specific objectives of study will be;

- i. To assess the effect of the law on death penalty in Uganda.
- ii. To examine the law vis-a-vis human rights on death penalty in Uganda.
- iii. To examine the law vis-à-vis human right on death penalty internationally

## **1.6 Hypotheses**

- i. The law has a great impact on death penalty in Uganda
- ii. Every body has a right to life and should not be subjected to death by the state

## **1.7 Significance**

It is geared to raise awareness to policy makers to help them come up with appropriate strategies on reforms on law on death penalty. It will also help future researchers by adding on the related literature and finally give insight on why some people advocate for uphold the [subject] while others wish for its abolition.

## **1.8 Literature Review**

### **The Law on Death Penalty in Uganda**

The debate on the death penalty is complicated by the fact that some state consider this form of punishment to be a purely municipal domestic issue which is best dealt with under the criminal regime. For such states it is like other form of punishment provided for in the relevant national legislation.



**Ramcharan**<sup>24</sup> states that states upholding the death penalty Uganda not being exceptional believe that this form of punishment is the only means of dealing with incorrigible individuals and general deterrent. From crime and the only way of just retribution for particular serious crimes such as murder. From the **Odoki** commission, the majority of opinions gathered from people in the country wanted the death penalty for certain offences.

The Laws in Uganda provide for the death penalty for example the 1995 Constitution of Uganda; **Penal Code Act Cap 120** and the Terrorists Act 2002. The 1995 Constitution of Uganda which provides for the death penalty when passed by a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and conviction and sentence have been confirmed by the highest appellant court is the parent law under which it provided for. In the case of **Kyamanywa Vs Uganda**<sup>25</sup>, Constitutional Court made **obiter dictum** that it seems to admit the constitutionality of the death penalty in underlining the non-absolute character of the right to life. Also in the Penal Code for instance **Section 286 (2)**<sup>26</sup> provides that where at the time of or immediately before or immediately after the time of robbery, an offender uses or threatens to use a deadly weapon or cause death or grievous harm to any person, such offender and any other person jointly concerned in committing robbery shall or conviction by the High Court be sentenced to death. This is a mandatory death penalty and the courts are bound to honor it.

The Uganda practice of death penalty is the deterrent theory which states that the death penalty should be retained for curtailed crimes so as to deter any potential offender committing such crimes. The question is; has this stopped people from committing crimes such as murder; aggravated robbery etc.

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<sup>24</sup> Ramcharan, B.G. (1985). The Right to life in international Law

<sup>25</sup> Constitutional Petition 10/2002

<sup>26</sup> Section 286 (2)

Reacting to such a question. **Kakaire**<sup>27</sup> laments that death penalty has never been shown to deter more effectively than other punishments. This is in support with what **Etim**<sup>28</sup> who stated objective of the prison system is to rehabilitate a prisoner which is obviously negated by the death penalty.

**Kanyaihamba (1999)**<sup>29</sup> in his article “Why Uganda still needs the death sentence” argues that the convicted person should not only receive punishment that is proportional to his or her moral guilty but the punishment must be proportional to the harm done. This means justice imposed to the sentence the criminal deserves, **Patrick**<sup>30</sup> argues that retribution suggests that offenders must be killed to prevent crime but to do justice. In this matter, the nature of killing by the state is the appeasement of the society and a compensation of the relatives of the victim through what the state feel to be a fair retribution of pain.

John McAdams - Marquette University/Department of Political Science, on deterrence was quoted as saying; *“If we execute murderers and there is in fact no deterrent effect. We have killed a bunch of murderers. If we fail to execute murders and doing so would in fact have deterred other murders? We have allowed the killing of a bunch of innocent victims. I would rather risk the former”*.

From what has been read, observed and studied, the death penalty is not the best option, this is because from time in memorial people have been killing up to today however much they know they re going to be hanged. In fact today in Uganda some people who are guilty of the offences have been acquitted and the innocent ones hanged. It’s high time we tried other alternatives like community service or life imprisonment.

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<sup>27</sup> Kakaire A(2003). The death penalty a case for total abolition

<sup>28</sup> The Monitor 30<sup>th</sup> June 2003

<sup>29</sup> Kanyaihamba; The Uganda Human Rights magazine June – July ( 1999)pg 24

<sup>30</sup> Patrick : The Uganda Human magazine June-July (1999) pg 28

## **1.9 Methodology**

This section entails the description of how the study will be conducted. It brings out population, data collection methods instruments, and data analysis used.

### **Desk research**

The purpose of data collection is to obtain information to keep on record, to make decisions about important issues, and to pass information on to others. Therefore data will be obtained from libraries like Human Rights Library at Nsambya Research Centers, and Internet sites.

### **Interviews**

Different categories of people will be involved. They include prisoners on the death row, ex-convicts, prison wardens, human rights activists and some other people with in the community. A total of 300 respondents are expected to be interviewed. This will be done from Luzira prison, Human Right Organizations and in the society at large.

### **Data collecting**

There will be two data collection tools that is self administered questionnaires (SAQs) and an interview guide. In this study, questionnaire survey will be used because it gathers data at a particular time with the intention of describing the nature of existing conditions (**Cohen anti Manion, 1995**) Interview guide will help the researcher keep on track that is in line with the objectives of the study.

## **1.10 Data Analysis**

It involves editing, and paraphrasing of the collected data processed through the said stage which will be linked to primary data. The data collected will be processed for analysis and later actually analyzed. The collected data will be edited, categorized or coded and co using the Statistical Package for Social Sciences (SPSS) for generation of summary frequency tables and graphics.

On the question of the death penalty<sup>31</sup>.

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<sup>31</sup> The Death Penalty; barrier to imp[roving human rights. Amnesty International (1993)

## CHAPTER TWO

### 2.0 International Laws and Domestic Legislations on Death Penalty

The death penalty phenomenon has occupied the highest judicial echelons of many countries and International Tribunals like the **Universal Declaration of Human Rights (UDHR)**. This Chapter will endeavor to provide a global perspective of the jurisprudence of the death penalty phenomenon. The aim is to examine the divergent laws, Treaties and Conventions on death penalty at the International, African Regional and domestic level in relation to human rights.

### 2.1 International Laws

The focus of international human rights law and international criminal law is at present propelling towards the world wide abolition of the death penalty. For instance the **1998 Rome Statute** of the International Criminal Court, it provides that the court may only impose maximum sentence of imprisonment up to thirty years<sup>32</sup> while both the International Criminal Tribunal for Rwanda and for the former Yugoslavia<sup>33</sup> provide for a maximum sentence of life imprisonment.

This focus towards abolition is clearly manifested in the various international Rights Instruments, Treaties and Conventions that have been adopted by the United Nations.

The **Universal Declaration of Human Rights (UDHR), 1948** in response to the staggering extent of state brutality and terror witnessed during the World War II, recognizes each person's right to life and states that" *Every one has the right to life. And that no one shall be subjected to torture or inhuman degrading treatment or punishment*<sup>34</sup>.

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<sup>32</sup> Art 76(1) and (2)

<sup>33</sup> Security council resolution 955 (1994) UNDOC S/RES/955(1994)

<sup>34</sup> UDHR Art 3

**Article 3 of UDHR** is indeed abolitionist in outlook.<sup>35</sup> By its silence of the matter of the death penalty it envisages the abolition of death penalty and at the same time admits its existence as a necessary evil.

A report from the secretariat of the United Nations has described the right to life provision in the Universal Declaration being neutral on the question of the death penalty<sup>36</sup>.

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

The **International Covenant on Civil and Political Rights of 1966**<sup>37</sup> provides in very clear terms that every human being has the inherent right to life and that this right shall be protected by law and no one shall arbitrarily be deprived of his right to life. In **Kindler Vs Canada**<sup>38</sup> Human rights committee member **Bertil Wennergen** stated that; by guaranteeing to every human being 'the inherent right to life. **Article 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 state parties that have not abolished capital punishment to resort to it until such time they are ready to abolish it.

**Wennergen** wrote; the principal difference between the Researcher's and the committee's views on this case lies in the importance attached to the fundamental rule of **Article 6** the researcher belief is that what is said about death penalty has a limited objective that cannot by any reckoning override the cardinal principle.

Concerning the issue whether there are exceptions to this inherent right life? **Wennergen**, in his individual dissenting opinion, recognizes only two; the death penalty as a necessary evil and the rule of necessity, which is implicit.

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<sup>35</sup> William A. Schabas; the abolitions of the death penalty in Int. law 3ed pg. 42

<sup>36</sup> The death penalty; barrier to improving human rights. Amnesty International (1993)

<sup>37</sup> Article 6 of the international covenant on civil and political rights of 1966

<sup>38</sup> 6CPR(2<sup>nd</sup>) 193 (1977)

He stated that only if absolute necessity so requires will it be justifiable to deprive an individual of life, in order to prevent the individual from killing others or in order to avert man-made disasters, 'For the same reason, it is justifiable to send citizens into war and there by expose them to the area risk of their being killed; He concluded; that in one form or another, the rule of necessity is inherent in all legal systems, the legal system of the covenant is no exception.

The **Convention on the Rights of the Child (1989)**<sup>39</sup> prohibits the use of the death penalty for person under 18 at the time of the crime. In addition, a number of other articles are concerned with ensuring the right of survival through the provision of essential food, water, health, care etc necessary for life itself.

The **United Nations General Assemble (UNGA)** passed the Convention against Torture and Other Human or Degrading Treatment or Punishment on December 10, 1984.

This convention calls for the protection of all persons from being subjected to torture or any form of cruel, in human, degrading treatment<sup>40</sup>

The Convention further calls for an effective struggle against torture, cruel, inhuman, or degrading treatment.

However, 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<sup>41</sup>

However, it should be noted that; during presentation of the **Republic of Korea's Periodic Report**, the United Nations committees country reporter said

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<sup>39</sup> Article 37

<sup>40</sup> Convention against torture and other in human or degrading treatment or punishment (UNGA res. 39/46 dec 10.1984)

<sup>41</sup> 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”* and be requested Korea to abolish it.

Further still, the UNGA has passed a number of resolution relating to the death penalty notable of which at resolution **2857 (XXV1) of 20 Dec 1971 and resolution 2857 (XXV1)** calls for a progressive restriction of the number of **offences** 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, but on the understanding that these safeguards should not be invoked to delay or prevent the abolition of capital punishment. The safeguards include the provision that capital punishment should be imposed for serious crimes only.

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

The safeguard further includes the right to 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<sup>42</sup>.

There are exemptions, however these pose yet further problems. For instance, it may be difficult to establish the age in countries like Uganda, where majority of the population is illiterate and ignorant of when they were born. And also 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 care and examinations. At the regional level, a number of Conventions against the death penalty have been adopted. For

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<sup>42</sup> Resolution 1984/50 of 25 may 1984

example, the Council of Europe passed the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>43</sup>

The Convention provides, inter alia, that: every one has the right to life and the lives can only be taken in execution of a sentence of a court. It further provides that, no one shall be subjected to torture or inhuman or degrading treatment or punishment.

This holds true in Uganda under the Constitution of Uganda, 1995 which allows the death penalty under **Article 22** but at the same time 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 that Convention, the European Court of Human Rights was not prepared to consider that the death penalty constitutes inhuman treatment. As the **scholar Francis Jacobs** secretariat of European commission stated presciently, many years before the judgment in Soering, punishment could be contrary to **Article 3 of the Convention** only if it did not involve the ultimate penalty as in

**Soering V. UK and Germany (1989) 11 EA RR439** the court declared: whether these marked changes have the effect of bringing the death penalty within the prohibition of ill treatment under **Article 3**, determined on the principles governing the interpretation of the Convention.

The Convention should be read as a whole and **Article 3** should therefore be constructed to the 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**.

Subsequent practice in national penal policy, in the form of generalized abolition of capital punishment could be taken as establishing the agreement of

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<sup>43</sup> Nov.4.1950 European convention



the contracting states to abrogate the exception provided for under **Article 2 (1)** and hence to remove a textual limit on the scope for evaluative interpretation **Article 3**. In these conditions, notwithstanding the special characters of the convention. **Article 3** can be interpreted as generally prohibiting the death penalty.

According to the researcher, the holding of the court in the instant case seem to hold true in Uganda. This is due in the fact that legislators could not have intended that the death penalty would be prohibited under **Articles 44** of the 1995 constitution, because this would nullify the clear working of **Article 22 (1)** of the same constitution.

**Protocol No. 6 of the European Convection** of the Protection of human rights anti Fundamental Freedom (European Convection 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 peace time states parties may retain the death penalty for crimes “*in time of war or of imminent threat of war*”.

In America, the **Organization of American States (O.A.S)** has over the years created in human rights organs and invariably the death penalty. A number of Conventions and Declarations has been passed which include 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 then right to life, liberty and the security of his person. The ACIIR stipulates that; everyone as the right to have his life respected it shall not be arbitrarily taken away. Further it provides that: “those countries that have oat abolished the death penalty shall not he re-establish in states that have abolished it, and in case shall capital punishment be inflicted for political offences or related common crimes”.*

The convection limits the age a person should have attained upon which the death penalty can he imposed to a minimum of 18 and a maximum of 70 years. It also provides that, pregnant women are exempt.

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

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.

However, member states are given the option to reserve the right to apply the death penalty in war time in accordance with international law for extremely serious war crimes.

According to the researcher, it can be asserted from the foregoing authorities that death penalty is an unconstitutional form of punishment as it amounts to torture and is cruel, degrading and inhuman contrary to the provisions of binding International treaties: Therefore is supreme indignity to the individual, the ultimate corporal punishment, the final and complete lobotomy and irrevocable castration. It is the ultimate desecration of human dignity.

## **2.2 REGIONAL INSTRUMENTS (AFRICA)**

In Africa, the **Africa Charter on Human and People's Rights (ACHPR)**. States that no one may be arbitrarily deprived of the right to life<sup>44</sup> this implies that, the Africa 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, **Etieme Richard Maya**, who has written that **Article, 4** of the African charter permits, the death penalty, which is widespread in Africa, providing it is imposed in accordance with the law.

Another instrument is the **African Charter on Human Rights and People's Rights of 1981**<sup>45</sup> on the right to life; the Chapter says Human beings are inviolable. Every human being shall be entitled to respect for life and integrity

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<sup>44</sup> Art 4

<sup>45</sup> African Charter On Human And People's Rights (1981) Nairobi Kenya

of his person. No one may be arbitrarily deprived of this right.<sup>46</sup> Though not so clearly put, right of life under the African Charter is not absolute. It may still be deprived under certain circumstances which do not amount to arbitrariness.

Therefore there is need to clearly put what the Charter stands for than shielding in something that can not be clearly taken. There should be a section either for pure abolition or retention but not on a neutral stand. This should be done by African court of Human Right in order to give justice a chance to prevail without any inconveniences.

**Article 14** of the Constitution of the Republic of Tanzania<sup>47</sup> declares the inherent and universal right and its protection by the society but then subjects both the right and its protection to law. In the case of **Republic Vs Mimu and Another LRC (1994) 343**<sup>48</sup> which was decided by the High Court of Tanzania and went on appeal of the Court of appeal of Tanzania. In the case, **Mwalusanya, J.** held thus; death penalty offends the right to dignity of persons, in the way the sentence is executed and therefore it offends **Article 13(6) (d)**<sup>49</sup>

**Justice Chaskalson** of South Africa summed up the reasons why his country decided to abolish the death penalty. That 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 were required to value these two rights above all others<sup>50</sup>.

One of the first constitutional issues that the South African Constitutional Court had to grapple with was the death penalty in the case of **S Vs Makwanyana and Another**<sup>51</sup>. In that case, the accused persons had been convicted among other things, on four counts of murder. Their appeal to the

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<sup>46</sup> Article 4 of ibid

<sup>47</sup> Article 4 Of ibid

<sup>48</sup> Article 14 Of The Constitution Of The Republic Of Tanzania

<sup>49</sup> 1994 TLR 146

<sup>50</sup> 13(6) (d) of the constitution of the Republic Of Tanzania

<sup>51</sup> 1995,3 SA 39 (36)

Appellate Division was dismissed. However, as a result of the issue of the validity of the death penalty, the case was referred to the Constitutional Court. The Constitutional Court held that the death penalty perse constituted cruel, inhuman or degrading punishment within the meaning of **Section 11 (2)** of the interim Constitution.

Thus if one is to consider international law on the abolition of the death penalty, one has observe that the law approves the right to life but still in one way or another provides for except, to such inherent right, of which one is the death penalty.

It is my considered view that the contradictions of these provisions under the international law have greatly influenced the drafting of different laws in Uganda. This implies that Uganda may still have along way to do a way with such barbaric punishment if such international laws are not altered to ht the present civilized society.

## **2.3 Domestic Laws**

### **Constitution Law;**

There are a number of countries that have taken very bold steps and, abolished the death penalty in their constitutional jurisdiction.. Some of these are Mozambique, Namibia, Sao Tome and Capeverde. However, many countries Like Uganda have maintained it in their Constitution This is evident **in Article 22 (1)** which provides that no person shall he deprived of life internationally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellant court<sup>52</sup> contrary to this, it is seen that other countries such as South Africa have totally abolished the death penalty.

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<sup>52</sup> 1995 Constitution

It is my considered opinion that the Uganda constitution values human life as seen in **Article 22 (1)** of the constitution. But also acknowledge the death penalty under the same 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.”*

And for this matter, it can be seen in the case of **Bachan Singh V. State of Punjab (1982) 3 SCC 24.**<sup>53</sup> 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 specifically contemplated and sanctioned by the framers of the **Indian Constitution** when it was adopted by them 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, still in Uganda **Article 24** of the Constitution provides that *“No person shall be subjected to any form torture cruel inhuman or degrading treatment or punishment”*<sup>54</sup>

These provisions imply that the death penalty is limited as a form of punishment since it constitutes cruel, inhuman or degrading treatment or punishment. This fact is clearly stated by **Wright J**; in the case of the **People V. Anderson (1972) 493 cal3 d**, that capital punishment is to be inhumane 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<sup>55</sup>.

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<sup>53</sup> Justice chaskalson of south Africa in makwanyana’s case. Why my country decided to abolish the death penalty

<sup>54</sup> 1995, 3 SA 39 (36)

<sup>55</sup> 1995 constitution

Capital punishment as practiced in some states especially as regards Uganda's criminal justice system and the adoption of the death penalty a fundamental departure was made in 1902 with the adoption of **Indian Penal Code** of pronounced rights. This was the Period when the death penalty was accepted.

The offences of defilement and rape stipulated under Chapter fourteen of the Penal Code attracted the death penalty and it is clear that the factor which influenced the National Resistance Council to amend the sentence section to include death penalty was to a bid curb the spread of HIV/AIDS which has plagued Uganda for decades. This argument seems to be weak considering the fact whether people who rape or defile necessarily have HIV/AIDS and how many victims of rape and defilement have contracted it if the death penalty has to be justified.

According to the researcher, In Uganda the law is there to protect people but has become an oppressive structure. It is plausible to contend that in society which is dominated by fear, motivated by hatred and patterned with violation and destruction of life, the use of the death penalty as a punishment to curb crime is completely inhuman degrading and violation of the sanctity of life.

Uganda has got two separate systems of criminal justice that is all Ugandan citizens are subject to the Uganda Penal Code Act Cap 307 while soldiers are in addition subject to a separate Military Criminal Regime under the National Resistance Statutory Disciplinary Code of Conduct. In the army, military disciplinary measures are taken through a system of courts ranging from unit court martial, martial division court, general court to martial court of appeal. Soldiers on operation are tried, by a field court martial and executed if found guilty in **Section 78**<sup>56</sup>.

It is thus observed that this system leaves a lot of room for injustice as the field courts are often adhoc and accused rarely represented by any legal counsel of whatever nature. The Uganda Peoples Defense Forces Act provides for a court

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<sup>56</sup> 1995 constitution

martial appeal which has the jurisdiction to hear and determine all appeals referred to it from decisions of the general court martial.

This procedure is subject to criticism in that it is the army lawyers who act as defense counsel for the accused, army officers who sit in these courts, and that offers charges against the accused soldiers. Thus the institution of the army becomes the accuser, the prosecutor and the judge and like an African saying that goes “a monkey cannot judge the forest” **Opio (2007)**.<sup>57</sup> This implies that the defense counsel wills defend in favour of the court martial officers. Therefore the death sentence passed by the court martial and the field court martial would not be confirmed by the highest appellant court as is required by **Article 22(1)** of the Constitution<sup>58</sup> Thus the situation in the court marital contradicts the principle of natural justice and can occasion to miscarriage of justice.

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<sup>57</sup> Judicature act cap 13

<sup>58</sup> Constitutional pet 10/2002

## CHAPTER THREE

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

#### 3.1 Reasons for the abolition of the death penalty;

This chapter presents result obtained from the field on whether the death penalty should be abolished or not and its impact on human rights. As individuals, we value the lives of families and friends. It knows that life once taken can not be returned. Below are reasons for the abolition of the death penalty.

#### 3.2 Justice System is not fallible

This is the most compelling reason for abolition of the death penalty. It is seen that many innocent people are convicted and sentenced to death as long as the 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 that innocent people may be executed<sup>59</sup>. So there is no Way to correct these errors as in the case of the punishment of imprisonment.

According to Karpel Singh human rights advocate in his opinion he says that "*no criminal justice system is perfect, being evolved by humans*. It is perhaps for this reason that the French philosopher **Voltaire** said in his work 'zidig' *it is better to rick Saving a guilty nan 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

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<sup>59</sup> Section 204,286(2) and 23 of the penal ode cap 120



advanced to that level where a lost soul could be resurrected: not at that soul has shed what has turned into dust<sup>60</sup>

Similarly, in the case of **Bachan Singh v State Punjab**<sup>61</sup> **Bhagwati J** (1982) 5 SCC 24 1983 SCR 1459. Dissenting observed arguments of the abolitionists, which have been substantially adopted by the learned petitioners, are as under; the death penalty is irreversible decided upon according to fallible of law by fallible human beings.....?

### **3.3 Death Penalty is Barbaric**

This is another argument for abolishing the death penalty, as the conditions, both mental at in which condemned prisoners are forced to live, constitute cruel, inhuman and degrading Hanging which is the method of execution in Uganda as in many African countries has been barbaric<sup>62</sup>

There have been witnesses to botched hanging where the executioner had to kill the prison hammers or other weapons. This case is clear in Uganda, where **Anthony Okwonga**, an Assistant commissioner of prisons, disclosed that incase the prisoners are not certifiably are killed by hitting them at the back of their heads with a hammer or a crowbar.

Condemned prisoners **in Luzira Upper Prison** live in extremely over crowded condition this may have improved slightly as over 100 prisoners have been moved recently to **Kirinya Jinja**.

The over crowding was bad, in November 2004 that prisoners are forced to sleep curled up on blanket on the floor. Many experience joint pains as a consequence which are exacerbated by lack of this is true in that, at least 250 condemned prisoners share cell space originally designed to house only 60 prisoners.

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<sup>60</sup> UPDF ACT CAP 307

<sup>61</sup> Opio (2007). Why people should understand what the court martial constitutes

<sup>62</sup> 1995 Constituion Of Uganda

### **3.4 Violation of the Human Rights laws**

The use of the death penalty violates the spirit if not letter of the international human rights laws that Uganda is a party to: The right to life is one that is specified in and considered the basis of almost every human rights document in existence around the globe. The enactment of such human rights began in 1948 when the United Nations adopted the universal declaration of human rights (UDH).

This cornerstone document has been described as the basic international pronouncement of rights that can not be taken away from all members of the human family.

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

Execution is the irreversible end to life, yet it can't be applied unjustly to the wrongly accused or unfairly tried, just as we all have irrevocable law, equal human rights written in international law. Sensitive, intelligent beings we also have less definable human capacities, to report, reform and forgive.

Terminating the life of an accused denies them the opportunity to appeal or to fulfill their potential, denies the living victims the opportunity to forgive. When a state convicts prisoners without affording them a fair trial, it denies the right to due process and equality before the law, irrevocable punishment of death removes not only the victim's right to seek legal redress for wrong conviction, but also the judicial system's capacity to correct its errors.

Like killings which take place outside the law. The death penalty denies the value of human life violating the right to life; it removes the foundation for the realization of all rights enshrined in

### **3.5 Universal Declaration of Human Rights.**

In this regard, Amnesty International observed that civilians and military courts in Uganda has continued to impose the death penalty for capital offences. According to the statistics from September, around 5005 people 35 of were women held on death row. It was seen in the case of **UG VS Kariang (2002)**. Soroti high court sentenced her to death as she was guilty of killing the husband

And Gawayya Tegufle says that.....” *in the Kotido case, the investigation, trial and execution took place less than hours after the crime haste which is I questionable internationally.*” Controversy as heightened by the bizarre pronouncement that the accused would be executed before the court had begun hearing the case.”<sup>63</sup>

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.”*

Thus the only road towards the realization of the different rights enshrined in our Constitution and universal declaration of human rights (UDHR) is by abolishing the penalty in Uganda.

### **3.6 A tool of Repression**

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

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<sup>63</sup> 14 AIR (1980)sc898

after coups and coup attempts and members of opposition groups have been eliminated as a matter of political expediency<sup>64</sup>

Even when executions have not taken place. The threat has been present through laws providing for death penalty for non-violent political acts such, as forming or being involved in political part groups opposed to the established regime. In many cases, the death penalty has been direct prominent individual political opponents. This holds true in Uganda, considering the fact **Abdullah Nassur** was pardoned by president Museveni, moreover **Hajji Musa Sehirunb** Eighteen others, were not pardoned.<sup>65</sup>

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

In many cases, the death penalty has been directed at prominent individual political opponent this matter therefore. **Margaret Sekagya**, former chair person Uganda Human Right Commission believes that death penalty is used disproportionately, against the poor and minority groups as a political repression<sup>66</sup>.

It is the irrevocable nature of the death penalty that makes it so tempting as a tool of reproducing thousands have been put to death under one government only to he recognized as innocent when a new government comes to power.

On whether people prefer the death penalty abolished on not, summary statistics are provided table.

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<sup>64</sup> Dominic Mnyarose Mbushuu and Kalai Sanaa Vrepublic (1994) 2Lrc 335.tan High court and (1995)

<sup>65</sup> New Vision 19<sup>th</sup> Nov 2004 p4

<sup>66</sup> The New Vision (3April 2002) at 19

**Table**

<b>Questions</b>	<b>Numbers</b>
Do you want the death penalty to keep in place?	105
Would you like the country to abolish the death penalty?	195
Total Number	300

This shows majority of the respondents want the death penalty abolished as some response are below.

Talking to corporal the prison warden of Luzira Upper Prison, the objective of the prison system is to rehabilitate a prisoner which is not the case with the death penalty. In fact many innocent people continuously get killed if the penalty is not abolished. The death penalty is an irreversible punishment makes it inherently unfair errors cannot be rectified. This is inline in the case of **Bachan State of Punjab**,<sup>67</sup> Bwagwati. J observed the chief arguments of the abolitionists which have been substantially adopted by the learned counsel for the petitioners, are as under the death penalty in irreversible decided upon according to fallible processes of law by fallible human beings. (one of the examples is that of **Mpagi** who spent 19 years in Luzira upper prison on charges of murder before released in 2000 yet the man they claimed was killed was found to be a live<sup>68</sup>.

As the researcher carried out research in Luzira Prison it was indicated that some prisoners are not guilty of the offences but have found themselves convicted of murder. Some reported that they were told by their lawyers to plead guilty though they were innocent. Prisoners said that their lawyers did

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<sup>67</sup> 14 AIR(1980) SC 898

<sup>68</sup> The New Vision 21<sup>st</sup> August 2001

not adequately review the evidence and some did not allow them to call witnesses.

The researcher believes that, the death penalty constitutes cruel, inhuman and degrading punishment. Flanging which is the method of execution in Uganda as in many African countries is barbaric. The prison warden interviewed said that they are often traumatized by having to look after the prisoners only to escort them to their death. The physical pain caused by the action of killing a

Human being can not be quantified. Nor can the psychological suffering caused by fore-knowledge of death at the hands of the state<sup>69</sup>.

**One of the ex-officers Luzira prison** lamented that *“I witnessed all the executions and found them to be cruel and inhuman. A part from the prisoners on the execution roll, prison warders, the executioner the prison medical doctor and various religion leaders witness the hanging. Nor only is it inhuman but it psychologically tortures us for life. It’s because of this that some wardens have continuously wanted to resign. I oppose the death penalty”*.

According to Prof .**Tibatamwa**<sup>70</sup>, capital punishment is cruel and makes human life cheap. It is premeditated murder by the state and once the state is empowered to destroy life. It may tend to disregard the lives of its citizens.

According to the researcher, the use of the death penalty violates the spirit of the international Human Rights laws for which Uganda is a party to. The right to life is one that specified in and considered the basis of almost every human document in existence around the globe.

### **3.7 Reasons against the Abolition of the Death Penalty**

This section is an attempt to examine the issue of the support for retention of the death penalty.

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<sup>69</sup> When the state kills.....Amnesty international law, 1989 pg2

<sup>70</sup> Tibatamwa, L.E (2005) offences against a person. Homicides Non – fatal Assaults in Uganda pg68

As individuals we 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. If we are victims then we want justice, retribution. We want to justice, retributions. We want to know that there are punishments in place that might , we hope have a deterring effect on those who would commit crime.

Certainly there is a need to punish the perpetrators of crime, the arguments commonly advanced in favour of the death penalty are clearly stipulated below:

### **3.8 The Deterrence Theory**

Retenionists of the death penalty argue that it deters potential criminals from committing heinous crimes. They insist that because taking an offender's life is a more severe punishment than any prison term, it must be a better deterrent. They also contend that without capital punishment there is no adequate for those already serving a life term who commits 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.

This score is common-place in all types of literature, including court decisions Thus in the South Africa one of **R.V.Robert**<sup>71</sup> in which the trial court had sentenced the accused to death in spite of the extenuating circumstances having been round the On approval **WYK.J** said upholding the decision of the trial judge that, "My duty is protect the public against the accused and other would be killers. The accused belongs to a class of persons whose conscience is grave impaired. They are deterred only by fear of detection and punishment. It is believed that the fear oft death sentence is still the strongest single deterring factor with this type of person. The researcher has strong feeling that if the accused were set free a gain, this desire to rape and do violence to women under the influence of liquor, may well manifest itself again.

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<sup>71</sup> (1957). As -A 265(AD)

According to the researcher, any body who should give the accused his liberty again will be risk to some body else's life. The accused committed a horrible murder a typical sex murder and may start again if given the opportunity."

It is the insistence on this purpose of deterrent that some cases, lead to miscarriage of justice 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 make sense. Rational people understand links between cause and effect and crime and punishment. A fea the possibility of death also affects the behaviour of most reasonable people.

This argument is particularly persuasive in Uganda, given the large amounts of crime in recent year. However, there have been no compelling studies indicating that 'the death penalty is more deterrent than life imprisonment.

The crime rate in some countries which have retained the death penalty is in fact higher than in countries which have abolished it.

Moreover, the crime rate has not dramatically risen in countries after the abolition of the death penalty but in some cases has in fact fallen:

For example, when the death penalty was abolished in **Canada in 1976**, homicide rate did not rise, but in fact fell. Statistics in Canada reports that the number of homicides in Canada in 2001 (554) was 23% lower than the than the number of homicides in 1975 (721), the 'rear before the death penalty was abolished, moreover homicides rates in Canada are generally three times lower than rate in US which retains the death penalty.<sup>72</sup>

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<sup>72</sup> [WWW.death\\_penalty\\_info.org/deterhtm](http://WWW.death_penalty_info.org/deterhtm)



The British Home Office released statistics which indicates that the murder rate in the US is more than three times that of many European countries that have abolished the death penalty<sup>73</sup>.

Deterrence as a basis of punishment for criminal offences and the death penalty has thus remained largely subject to criticism. For instance, severe punishment have never reduced criminally too any marked degree. There exists no scientific proof of the notion.<sup>74</sup>

That is to say, scientific studies have consistently failed to find convincing evidence that the death penalty deters crime more effectively than other punishments. The most recent survey of 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 execution have a research 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<sup>75</sup>

The facts that no clear evidence exists to show that the death penalty has a unique deterrent effect points to the futility and danger of relying on the deterrence hypothesis as a basis for public on 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 prevents that person from repeating the crime. But there is no way to be sure that the prisoner would indeed have repeated the crime if allowed to live, nor is there any need to violate the prisoner's right to life for the purpose of incapacitation, dangerous offenders can be kept away from the public without restoring to execution as shown by the experience of many abolitionist countries.

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<sup>73</sup> New York Times 11May 2002

<sup>74</sup> Barnes and Tecters, *New Horizons in Criminology* 33(1951)

<sup>75</sup> Amnesty International report

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

The overwhelming majority of serious studies on the death penalty have concluded that it has significant deterrent effect. **Professor A.A Adeyemi of the University of Lagos in Nigeria** comparison the statistic on the annual number of murders and executions in his country between 1967 and 1970 and found that: *“murder incidents have consistently increased for most of this time”* even that murder had always been widely known to be punishable by death, The incident of armed robbery increased since it became a capital offence through Nigeria in 1970.

An African scholar has noted that, in some parts of Africa, when thieves were being tied on trees public shooting, other thieves were busy stealing tyres and head lamps from cars<sup>76</sup>

It should be rightly asked whether the death penalty has a uniquely deterrent effect in Uganda? This can be answered in affirmative 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<sup>77</sup>.

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<sup>76</sup> Tibaniaya Mwene Mushenga the death penalty and its alternatives a paper presented at the conference on the death penalty in Africa at Ibadan Nigerian (1977).

<sup>77</sup> Amnesty international the death penalty a barrier to improving human rights 1993

### 3.9 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"<sup>78</sup>.

This has usually been interpreted as a divine warrant for putting the murderer to death. Retribution has been in form of "an eye for an eye", since many feel that when some one has killed, they themselves should be killed by the state.

However, the South Africa judgment on the death penalty indicates the fallacy of this argument. According to **Justice P. Chaskalson**; in the case of *state vs Makwanyane & other cct 31894 (1995)*<sup>3</sup> "*punishment must to some extent be identical to it*. The state does not put out eyes of a person who has blinded another in a vicious assault; nor does it 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 the cold and calculated killing of murders in order to express moral outrage at their conduct.

A very long prison sentence is also a way of expressing outrage and retribution upon the criminal

However, critics of the death penalty have argued that one can accept a retributive theory of punishment without necessarily resorting to the death penalty.

The stress that, "*there is no convincing argument that society cannot find other ways other than killing to express 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.

Like wise in the case of **Salvatoric Abuki V.A-G**<sup>79</sup> **J.P.M Tabro** said "How are we to punish offenders through rehabilitation or retribution? Speaking for my

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<sup>78</sup> Genesis 9:6

self, I think retribution is base and sordid and is only euphemism for a primitive instinct in man to revenge whenever wronged. But 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 scenes of public hangings at some people went a head to pick pocket others in attendance to witness the executions. So what is the utilitarian value of harsh punishment?

In civilized society the jurisprudence of a tooth for a tooth and an eye for an eye has no places.

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

In Uganda, government officials some times defend the death penalty on the grounds that public expects 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.

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 will 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.

For the government to seek justification in the death penalty on the grounds that therefore if the government does not execute the people will themselves act, is simply a failure to accept responsibility for law and order. It is also away of avoiding responsibility for introducing effective measures to human rights. There is no evidence to suggest that abolishing the use of the death would lead to a political collapse in the country, or that by using more humane

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<sup>79</sup> Constitutional petition No.2/97 at 12

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

However, in the case of **Rajandara Prasad V. state(1979)sc 97** the Supreme Court said: “special reasons necessary for imposing death penalty must relate, not to the crime as such but to the criminal. Thus the justifications of the death penalty on the ground of retribution seem to be out modeled in the civilized society like Uganda.

Because proportioning the severity of punishment to the gravity of crime does not require the primitive rule a life for a life.

### **3.10 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 penalty ensures that the dangerous criminal never commits the crime again.

The issues to be raised under this theory include: who are a dangerous person and what is the degree of dangerous required to remove someone for good?

It is argued that the policy of removal-for-social sanitation 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<sup>80</sup>

The death for prevention theory addresses the symptoms and not 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 doubled 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

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<sup>80</sup> Apollo N. Makubuya (2000): the death penalty in Uganda; a critical inquiry; p.228

should be executed as otherwise they might escape or bribe their way to liberty.

The 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.

### **3.11 The populist theory**

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

The position is reflected in the phenomenon of mob justice, where society takes it upon itself to punish criminals in mobs leading to their death.<sup>81</sup> The most obvious is that such punishments are meted out for all crimes and their intention is not always to kill the criminal, besides, a mob "*dispensing justice*" should not be seen as a representation of public opinion, public attitudes and values are by no means uniform, or constant.

It can be seen from a legal point of view that the constitutionality' of the death penalty cannot be founded on public opinion perse.

The issue is not what the majority of Ugandans believe to be a proper question of interpretation of the Constitution is vested in the courts.

The court cannot afford to allow themselves to be diverted from their duty of independent arbiters of the constitution by making choices on the basis that they will find favour with the public.

So if the public opinion were to be decisive, there would be need for constitutional adjudication.

Justice Jackson has in **West Virginia State Board of Education V. Barnet.(1994)319 v.s 624**

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<sup>81</sup> Amnesty international Uganda the failure to safeguard human rights (1992) p.58

O Commented that “ *one’s right to life liberty, property free speech a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the out come of election.*<sup>82</sup>

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.

A similar view that public support based on ignorance is seen by Justice Marshall of supreme court in the case **Furman v Georgia**<sup>83</sup> who argued that; the public knew the truth about the death penalty they wouldn’t support it. This statement is commonly referred to as the Marshall hypothesis suggests that support results from the lack of an informed citizenry

Uganda has been basing on the issue of public support in retaining the death penalty for instance the government submitted that the penalty was incorporated justifiably in the Constitution through the Constituent Assembly which was the vote of 26 million Ugandans who approved it as legitimate and appropriated punishment.<sup>84</sup>

In my considered observation, it seems that the public is considering vote on the retention of the death penalty, was not well informed. This due to the fact that most Ugandans are still illiterate.

Thus, the government would not be justified in torturing prisoners or persecuting an unpopular ethnic minority simply because the majority of the public demanded it. Yet when the death penalty is abolished there is usually no great public out cry and almost always remains abolished.

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<sup>82</sup> 319 US 624,638 (1943)

<sup>83</sup> (1972)408

<sup>84</sup> New vision 29 Jan 2005

### **3.12 Democracy**

Support of the death penalty implies being more democratic. Professor Carol steiker of HarvardLaw school asserts that; “ in light of the fact that large numbers of people support the death penalty in Europe as well as US. Some people claim that were are simple more democratic in giving effect to

These preferences. There is nothing to that, although it’s Americans seen to have a greater intensity in their preferences for the death penalty than Europeans do”.<sup>85</sup>

### **3.13 The threat of international Terrorism**

The world is growing smaller and smaller due to technological development facilitating greater mobility of persons and communications.

With the anti- social conducts multiply and intensify 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.<sup>86</sup>

Retenionists of the death penalty argue that it deters potential criminals from committing heinous crimes, they insist that because an offender’s life is a more severer punishment than any prison term, it must be a better deterrent for those already serving a life who commits murder incarcerated or for those who would be liable to a life term if arrested.<sup>87</sup>

The facts that clear evidence exists to show that death penalty has a unique deterrent effect points to the futility and danger of relying on the deterrence hypothesis as a basis policy on the death penalty. The death penalty is a harsh punishment. But it is not harsh crime.

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<sup>85</sup> Harvard law today (April 20004)

<sup>86</sup> Joseph M.N Kakooza : the 1<sup>st</sup> international conference on the application of the death in common wealth African opening address (2004)p.87

<sup>87</sup> Titus Reid (1997) Crime and Criminology pg519



Undeniably the death penalty, by permanently “capacitating” a prisoner, prevents that person from repeating the crime. But there is no way to be sure that the prisoner would indeed have repeated the crime if allowed to live or is there any need to violate the prisoner right to life the purpose of incapacitation dangerous offenders can be kept.

One of the respondents said that capital punishment is a strong deterrent to crime in a socially deprived society. This view seems not to hold truth in Uganda where most crimes are committed every day of which the death is imposed. It is just a pseudo solution.

Another respondent asserted that;

Unless you have never lost some body through mob justice and you take care of orphans. If you experience such you can never say the death penalty should be abolished Let it be there so that we all loose than others jubilating”

In **Tibatemwa (2005)** many murders in Uganda are committed not only by people with psychological problems but rather by normal people who intentionally kill in order to settle scores with their enemies or to eliminate business, political and other rivals or who hired to eliminate people’s enemies, the death penalty is a clear indication to all that life sacred and thus whoever takes the life of another must be deprived of life<sup>88</sup>

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<sup>88</sup> Supra 44

## CHAPTER FOUR

### CONCLUSION AND THE RECOMMENDATIONS.

#### 4.0 Introduction

This chapter includes the conclusion of the study and all the findings of the research. It also involves the researcher's recommendation over the study.

The death penalty should be abolished if not totally abrogated from the laws of Uganda just because it is contrary to the Cardinal principles of Human Right as they are provided under **Chapter 4 of the 1995 Constitution of Uganda**. It is also against the right to life which is a God given right. Therefore, death penalty does not give offenders chance to correct their criminal behaviors but instead it terminates the real life of the offender. Thus the researcher appeal to both International and domestic human right organizations to preach the gospel of demerits of the death such that we go away with that necessary evil.

In order to address the problem associated with the death penalty as a controversial form of punishment in Uganda, there is need of coming up with appropriate proposal for its abolition.

The researcher submits that although the government of Uganda still uphold the death penalty to offer a popular mechanism of punishment to offenders, and is likely to be reluctant to abolish it, the following considered recommendations may stimulate public debates on the abolition of the death penalty, These recommendations may be upheld or followed by different scholars and governments in the abolition campaign.

#### **Education.**

This recommendation should be geared towards changing the public opinion about the death penalty. This is so because, when opinion is changed the government may 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, an experiment conducted in 1972 illustrated the importance of Education. "A group of undergraduates 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 favor of capital punishment for these crimes.

After one academic year 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.

According to **Abu Mayaja**, (1992)<sup>89</sup> a former deputy premier/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 true in Uganda where most crimes are committed every day of which the death penalty is imposed. This is in line with Amnesty international that; the continuing frequent occurrence in Uganda of crimes for which the penalty is death strongly suggests that it has no deterrent effect whatsoever. Thus death penalty serves no useful purpose if it cannot deter the most serious crimes. And this calls for its abolition in Uganda.

In an article, 'The constitutionality of death penalty in Uganda; A critical inquiry' (2000) <sup>90</sup>Apollo N. Makubuya wrote that; the retentionists of capital punishment link the punishment to the deterrence theory through the argument they advance that; if the death penalty is abolished there will not be any punishment adequate enough to deter those criminals who are already serving long term sentence in prison or those who commit murder while incarcerated and even those who have not yet been caught but are potential criminals. Other groups of the people that the retentionists would like the

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<sup>89</sup> The new vision 10 march 1992

<sup>90</sup> East African journal of peace and human rights vol16 no.2 of 2000 at 227s

death sentence to be applied to are; terrorists, revolutionaries and spies. This retentionists base on the argument that taking the offenders life is the most severe than any other form of punishment, it therefore has a better deterrent effect to potential offenders. I think in regard to the research topic this argument is weak. This is because there has been arise in crime rates of which there is no proof that taking the offenders life has deterred the rate of crimes in Uganda. This argument thus shows that death penalty serves no useful purpose and this calls for its abolition in Uganda.

The researcher appeals to the Judges to exercise their discretionary powers wisely when it comes to offences which require the punishment of death penalty not to award it until when the alternative solution is provided just because it abuses the most respected right of life.

There should be community sensitization geared towards changing the public opinion on death penalty. Thus open debates and wide spread education would help the community get an informed opinion.

The literal application of 'an eye for an eye, a tooth for a tooth' seems to have long out grown and should be changed to better forms of punishment like life imprisonment.

The researcher strongly appeals to the Government particularly that of Uganda to revisit or amend and abolish such laws which give room to the old punishment of death penalty.

Therefore the researcher also advise the legislatures to propose Bills which give support to alternative punishments like community service and life imprisonment which can help the offender to regain his or her moral behaviors required in the society than following the biblical principle of an eye for an eye.

**SELF ADMINISTERED QUESTIONNAIRE ON DEATH PENALTY FOR THE RESPONDENTS**

Do you want the death penalty to keep in place?

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Would you like the country to abolish the death penalty?

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.....

Do you think it is ones right to live?

Yes No

Give reasons

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.....  
.....

General comment on the death penalty

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