THE EFFECTIVENESS OF THE DEATH PENALTY ON THE DETERRENCE OF THE CRIME OF MURDER: A NAMIBIAN SOCIO-LEGAL PERSPECTIVE

A Dissertation submitted in partial fulfilment of the requirement of the award of the Degree of Bachelor of Laws

By

Keneilwe Kgoadi

(St no: 200722221)

Prepared under the supervision of Y. Dausab (Ms)

At the Faculty of Law, University of Namibia

30 October 2011

DECLARATION

I, the undersigned, declare that the contained work in this dissertation for purposes of my Degree of Bachelors or Laws is my own work and that I have not used any other source than those listed in the bibliography and/ or quoted in my references

Keneilwe Kgoadi 21 October 2011

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SIGNATURE **DATE**

SUPERVISOR'S CERTIFICATE

I, ____________________________ hereby certify that the research and writing of this dissertation, was carried out under my supervision.

________________________ ____________________

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ABSTRACT

Until recently there have been an increasingly high number of outcries for the reinstatement of the death penalty in Namibia brought on by the response to the…murder of two young girls in Windhoek and Swakopmund. From this response, the public clearly feel that if Namibia still utilized capital punishment as punishment for murder, or reinstated it to its penal system such crimes would not occur or would be to a minimum because of the penalty's deterrent effect. There is really no assurance that if this system of punishment is to be incorporated that such crimes would not occur or would be scarce. Is there evidence that the abolition of the death penalty generally causes an increase in criminal homicides or that its re-introduction is followed by a decline due to deterrence?

DEDICATION

This dissertation is dedicated to my family.

To my father for his patience and support throughout my years of study, and

To my mother who encouraged me to work hard and never give up but keep my faith in God.

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LIST OF ABBREVIATIONS

AC	Appeal Cases
ACHPR	African Commission on Human and People's Rights
AHRLR	African Human Rights Law Reports
AI	Amnesty International
ANC	African National Congress
AU	African Union
BCLR	Butterworths Constitutional Law Reports
CA	Court Of Appeal
CAT	Un Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment
CC	Constitutional Court
DOC	Document
DRC	Democratic Republic Of Congo
ECHR	European Court Of Human Rights Reports
GA	General Assembly
HC	High Court
HRC	Human Rights Committee
ICC	International Criminal Court
ICJ	International Court Of Justice
ICCPR	International Covenant On Civil And Political Rights
PARA	Paragraph
RLR	Rhodesian Law Reports

SA	South African Law Reports
SC	Supreme Court
SCZ	Supreme Court for Zambia
TLR	Tanzania Law Reports
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCHR	United Nations Commission On Human Rights
UNHRC	United Nations Human Rights Committee
VOL	Volume
ZLR	Zimbabwe Law Reports

CHAPTER 1: INTRODUCTION

1.1 Background To The Study

Capital punishment is the legal imposition of a sentence of death upon a convicted offender.[1] It is another term for death penalty. There are different methods of execution that have been used worldwide to carry out this sentence; the electric chair, the gas chamber, lethal injections, the garrotte and hanging are a few of them.[2]

'Hanging is mostly used in Southern Africa. It entails a loosely tied rope being placed around the prisoner's neck then the hangman pulls a board or opens a door that has been keeping the prisoner up or pushes him over causing the latter to hang by his neck until he suffocates.'[3]

Notions of deterrence, just deserts, and retribution all come together in capital punishment. Given the many different philosophies of punishment represented by the death penalty it is not surprising that so much disagreement exists as to the efficacy of death as a form of criminal sanction. In this paper the writer will carry out an extensive research into the effect of capital punishment, if any, in deterring others from committing murder. Surely the sentence does have a positive effect on society, specifically on society's safety where it is still being carried out in some countries. Maybe if Namibia were to reintroduce it into its penal system it would prove efficient over time, or perhaps not. In this paper, positive and negative points will be advanced and discussed that could encourage or discourage the reintroduction of the death sentence in Namibia.

1.2 Background Of The Death Penalty

'The death penalty has been practiced in many countries all around the world, but was mostly popular during the medieval period. This is due to the fact that the church played a very prominent role in the regulation of rules and as present, and was in favour of capital punishment. Execution by way of stoning the culprit was very popular during this period. In other words it has been used by nearly all societies as a means to punish criminal behaviour. It was widely practiced in mostly poor authoritarian states and they used the death penalty as some sort of tool for political oppression. The application of the death penalty was not only restricted to religious communities or countries; it was also carried out in native communities as a form of

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1 Martin, EA & Law, J. 2006. *Oxford Dictionary of Law.* 6th edition. Ed. New York: Oxford University Press p. 73.

2 Frank, HG. (2003) *The Barbaric Punishment: Abolishing the Death Penalty*. The Hague: Martinus Nijhoff Publishers p. 36.

3 Frank p. 37.

communal punishment.'[4] According to Burger[5] It was during the 18th century that reformists began to perceive the laws as bent, and realised that punishment had become problematic in that it went against the values of forgiveness, mercy and compassion as depicted by Christianity and thus the more society resorted to violence, the more violent and barbaric society would become[6].

The death penalty was brought to Southern Africa by the colonizing powers, and was used for many offences. For example 'in British South Africa, treason, murder, and rape were considered capital offences'[7]. 'Before Independence in 1990, Namibia used the death penalty as one of its methods to punish people who committed murder and other crimes that were considered 'capital crimes'. Namibia, as South West Africa had its fair share of colonization under Germany and British South Africa. During this extensive period various legal systems were incorporated, the Roman-Dutch Law and the English Law. Like other British territories in colonial Africa, the law relating to murder in Namibia (South West Africa)[8] was based in principle and substance on English common law.'[9] Although Botswana, Lesotho, Namibia, South Africa, Swaziland, and to a lesser extent, Zimbabwe, operate under mixed civil law-common law legal systems as the distant descendants of the Dutch colony in South Africa, their twentieth century penal codes reflect primarily common law concepts.[10]

Hynd[11] states that as across colonial Africa, the penal system in Namibia was based on retribution and deterrence rather than reform, with the maintenance of law and order being the primary concern. The crimes most threatening to this order, at a village or national level, were those most severely punished. 'Before the development of the prison system, the fore runners of punishment were death, torture, banishment and fines.'[12] Banner[13] states that processions for these punishments always took place before the public, which consisted a jury which decided if the individual was guilty or not. Their guilt was also tested by how they took their punishment, and how they died. If the criminal died quickly, or if they did not scream, then the public decided that they were innocent, though it made no difference at this stage.

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[4] Available at http://www.pewforum.org; 'Death penalty', accessed on the 7 May 2011.

[5] Burger, EC. (2003) *Capital Punishment and Roman Catholic Moral Tradition,* University of Notre Dame Press p. 45.

[6] 'An eye for an eye would ultimately lead to a blind society'.

[7] Simon, RJ & Blaskovich, DA, *A Comparative Analysis of Capital Punishment* p. xiii.

[8] This is under British South Africa's rule.

[9] Hynd, S. (2002) *Power and Prejudice: Death Penalty Practises in Nyasaland, 1900-1955*, ST Cross College, Oxford University p. 4.

[10] Novak, A. (2010) *Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya* p. 1.

[11] Hynd p. 5.

[12] Banner, S. (2002) *The Death Penalty: An American History, Cambridge, Mass: Harvard University Press* p. 13.

[13] Banner p. 13.

Judge Belcher[14] in *R v Chatonda* was of the opinion that many African murderers were seen as acting according to tribal custom or natural 'warrior-instinct', a sentiment which was particularly prevalent during the Indirect Rule era. Africans were generally held to lack the self-control and discipline of the 'civilised European' and be more prone to violent acts, either through provocation or 'irresistible impulse'. One had the right to kill those who represented a biological danger to others. 'The idea of monstrosity allowed power to cast a criminal outside the human race; exclusion taking place through the scientific and moral demarcation of the incorrigible, creating the 'bio-criminal'.[15] The colonial era was one of rapidly changing moral discourse, which blurred the concepts of civilization, savagery, and evolution.

The very tropes of 'primitive mentality' and 'savagery' that could dehumanize an accused African and subject him to the death could also be used to deny full criminal responsibility or *mens rea* for his actions and to allow mercy. An elderly man, Bokosi, on trial in Nyasaland in 1932 for the murder of his young wife was instead convicted only of manslaughter after Judge Hanagin found 'no doubt being of the older generation, the accused still has a modicum of the old unrestrained spirit of the savage'.[16] Africans were assumed to have less self-control and discipline than Europeans, and such assumption was expressly used to justify mercy: 'it is an impulse of mind, naturally lacking the discipline and control possessed by civilised persons and inflamed by brooding over a supposed injustice. Fear of punishment will not prevent crimes of this nature. They will disappear only when the civilization and advancement of native life and standards of morality teach him that such action is extravagant and unjustified'.[17] The accused were frequently described as 'a low type of native, raw and quite uncivilized'.[18] Whilst such collective identification of Africans as 'types' or according to tribal characteristics was a form of de-individualisation which frequently contributed to dehumanization and subordination, it could also serve in trial narratives as an idiom of mitigation. Successful cultural defence arguments for African accused depended upon portraying them as 'primitives', 'low types' and 'savages' who could not be judged by the norms of 'civilised' white men. It was by reinforcing discriminatory hegemonic social relations that such legal narratives were able to inspire mercy.[19]

There was an inherent contradiction in capital punishment discourses in Africa, between the continued support for the death penalty as an effective deterrent, and the frequent assertions by

14 1926 NAM, J5/12/23
15 Hynd p. 8.
16 *R v Bokosi*, Judgement by Chief Justice Hanagin, 24 March 1932.NAM, J5/12/30
17 *R v Misi Kwanda*, Chief Justice Jackson to District Magistrate Dowa, 28 June 1920. NAM, J5/12/16
18 *R v Sanderam* CC14/1931, Judgement by Chief Justice Reed, 13 April 1931 NAM, J5/5/44
19 T. Loo, 'Savage Mercy: Native Culture and the Modification of Capital Punishment in Nineteenth Century British Columbia' in C. Strange (ed.), *Qualities of Mercy: Justice, Punishment and Discretion* (Vancouver, 1996), 104-29.

judges that the vast majority of murders committed by Africans were unpremeditated *crimes passionls*[20] on which the threat of death would have no effect.[21]

It is clear from the statements made by the various judges and writers that the death penalty was applied in a discriminatory manner during the colonial era. The colonizers thought 'blacks' were inferior and barbaric as well as incapable of controlling their 'animalistic' behaviour, which led to them committing crimes punishable by death. It seems that the decision, whether or not to impose a sentence of death was largely influenced by ones skin colour as well as tribe and political stand. Nevertheless, the death sentence was gradually abolished by many previously colonized African states, not only because of pressure from international, regional and national human rights instruments, but also as a tool for empowering the State. It was a big step to decolonization as the State now could determine whether to impose the same sentence of death that their rulers forced on them.

1.3 Statement Of The Problem

As compared to other African States such as South Africa, Zimbabwe and Tanzania, Namibia has a fairly low crime rate. This is partially because crime rates are usually higher in industrialized countries, developed countries and or countries with high populations or that are overpopulated. The reason for the increased crime rates in these categories is because of the competition, poverty and quickly increasing amount of technology that comes with such changes.[22] Namibia does not fall within these categories. It is slowly becoming an industrialized country with a slow growing population or may be described as a developing country with a fairly low population. This may account for its low crime rate. However, crimes such as murder are not motivated by much and if anything a murder rate of a developed country and a developing country may be on the same scale. For example in a developed, industrialized and over populated country the crime rate may be high because of high unemployment and the same may occur in a developing country, especially with the recent international economic crunch. The people of such countries become frustrated as they become poorer and poorer and the rich become richer, their desire for the finer things in life and their need to survive drive them to commit crimes such as murder as they may stop at nothing to attain their goals. This seems to be what is happening in Namibia.

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20 Crimes of passion.

21 *R v Misi Kwanda*, Judge Jackson to D.C. Bainbridge-Ritchie, 28 June 1920 NAM, J5/12/16

22 Studies have shown that where there is a fast development and importation of gadgets there is likely to be more crime as everyone wants and may need access to such but because they are not all as fortunate to afford such advancements this results in crime rates rising in order to acquire these objects.

Until recently there have been an increasingly high number of outcries for the reinstatement of the death penalty in Namibia brought on by the response to the sexual assault and murder of two young girls in Windhoek and Swakopmund last year. From this response, the public clearly feel that if Namibia still utilized capital punishment as punishment for murder or reinstated it to its penal system such crimes would not occur or would be to a minimum. There is really no assurance that had this system of punishment been incorporated such crimes would not occur or would be scarce.

1.4 Significance Of The Research

There has been an alarming rise in the number of protests over the reinstatement of the death penalty to reduce the murder rate. Thus the writer has established that the public needs clarity as to the effectiveness, justification and purpose, if any, of the death sentence on murder and what its incorporation would mean for the nation at large. This clarity is necessary not only to calm the public but to give them a legal perspective to the abolition and the re-introduction, if there is one, of the death penalty. They are also to be educated on the advantages and disadvantages of the sentence to highlight that such a sentence is a severe consequences that affects not only the sentenced but the mind-set of the victim's family and society at large. This shall be explained further in the bulk of this paper.

1.5 Limitations On The Research

For much of the colonial period capital trials were incompletely recorded, so for many cases the only record is that of the Judge's report and brief trial notes. Thus accurate information about the death penalty before independence in Namibia will be difficult to obtain. For this reason, this paper concentrates primarily on the narrative contained with these Judge's reports, which highlight their attitudes towards those accused who stood before them, but also often recorded the arguments of defence and prosecution lawyers, and the Native Assessors who advised the Judge on native customs and opinion.

The writer may experience difficulty getting opportunities to speak with law enforcement officers (lawyers, judges etc.) who have dealt with cases where the accused was on death row as some of these officers have since the abolition of the death penalty retired or moved to a different department. This would have helped the researcher to understand the sentencing, proceedings and mode used to implement the death sentence before independence.

A practical problem relating to the exercise is the lack of recent reliable information on the death penalty amongst the African countries. The literature is extremely sparse, and with the exception of South Africa, very little research has been done on the death penalty. Indeed, the absence in many countries of accurate, meaningful and recent criminal statistics makes any such research difficult. This explains why the discussion that follows is, in parts, impressionistic and the conclusions that it draws tentative.

1.6 Research Questions

1. Why do some African Countries employ capital punishment and Namibia not?
2. Is the crime rate for murder higher in retentionist countries than it is in Namibia?
3. Does the Namibian Justice Department feel that there is no remarkable change in the number of murder cases in countries with and without the death penalty?
4. Is Namibia perhaps over protecting their criminals?
5. Is capital punishment even effective in the deterrence of murder?
6. Is it even employed for the deterrence of murder in death penalty retentionist states?
7. What is the general perspective of the death penalty in Africa?
8. What is the international perspective towards capital punishment?
9. What is the rationale for and against capital punishment?

These are some of the questions that spring to mind when the debate of the reinstatement of the death sentence in Namibia is raised by civilians versus anti-death sentence jurists and legal instruments. These legal and social debates of advantages and disadvantages of reinstating the capital punishment as a sentence for murder will be highlighted by the writer.

1.7 Methodology

Comparative methodology through desktop research will serve as the most common approach to testing for the possible deterrent effect of the death penalty. Investigations will be carried out to examine homicide rates for a few African jurisdictions with and without capital punishment before and after the abolition and/ or reinstatement of the death penalty. The deterrence hypothesis is that murder rates should be higher in abolitionist states. In the case of longitudinal comparisons, the deterrence thesis predicts that abolition should be followed by an increase in murder rates, and reinstatement should result in a decrease in killings. In both types of investigations, the punishment measure of concern was the statutory provision or absence of the death penalty.

Literature review will also make up most of the methodology employed in this research to evaluate on whether the death penalty should be restored to the Namibian penal system? And whether it is effective in the deterrence of Murder?

Case Law of African countries either than Namibia, which will be discussed in Chapter three (3) will also be employed to highlight the evolution of the law as to the death penalty, various principles of law elucidated in the courts and the same or differing views of judges on the subject.

Survey research, a qualitative research technique will be used. This is a method of data collection.

1.8 Literature Review

William Schabas[23] in his book, *The Abolition of the Death Penalty*, addressed the issue of the death penalty in light of the International community. He analysed the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and its Second Protocol, International Humanitarian Law, The European Convention on Human Rights and its Sixth Protocol, and the Inter-American instruments and provided a detailed study of each. Though his work offers a broad overview of the legal progress in the international field, and he does brush on the African instruments he fails to give a detailed, practical analysis of the situation in Africa. However his work on the death penalty does shed light on and is necessary for this research as it specializes on the international perspective to the abolition of the death penalty.

Lilian Chenwi[24] wrote a very detailed book on *the abolition of the death penalty in Africa* from *a human rights perspective.* This book proved useful as the she targeted similar issues that the writer desires to cover, such as various African instruments, comparison of crime rates and possible reasons for such rates among African countries. Schabas[25] described the trend towards abolition from an international perspective and Chenwi tackled it from the African perspective reflecting the role and impact of relevant United Nations instruments on African states and analysing related regional African instruments, domestic law and case law. She did not hesitate to address the death penalty situation in each country in Africa country though not in dept.

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[23] Schabas, WA. (1993, 1997, 2003) *The Abolition of The Death Penalty in International Law*, 1st, 2nd, 3rd edition. New York: Cambridge University Press

[24] Chenwi, L. (2007) *Towards the abolition of the Death Penalty in Africa: A Human Rights Perspective*. Pretoria: Pretorian University Law press

[25] Schabas, WA. (1993, 1997, 2003) *The Abolition of The Death Penalty in International Law*, 1st, 2nd, 3rd edition. New York: Cambridge University Press

Though both writers provided rich and informative text on the abolition, their focus was mainly on that, why the death penalty was abolished or should be abolished. They never focused on any positive impact that the sentence had on the deterrence of murder rates, if any, and never discussed in depth what the sentence meant to the society and the consequences of the sentence on, for example, the dependents of the executed; and whether the state assisted them in any way.

Though this paper will look at such issues addressed by the two writers; it is also to establish reasons as to why the death penalty should be reintroduced, and to discover if the desired effect that the public hunger for is achievable with minimal strain.

Roger Hood's[26] experience of working for the United Nations as a consultant for the Secretary-General's Report on the Fifth Quinquennial Survey on 'Capital Punishment and Implementation of the Safeguards Guaranteeing the Protection of the Rights of those Facing the Death Penalty', which was presented to the Economic and Social Council in June 1995 gathered most of the information required for his books. These books focused on what was going on in world, not necessarily focusing on the various international, regional, or national instruments that permit or abolish the death penalty. His book can be described as a documentary piece and an important contribution to the general theory of deterrence, which is the bulk of what this paper is focusing on, thus it will assist the writer in this respect.

The writer will not only highlight the disadvantages of the sentence in the manner, or similar to that highlighted by previous writers but will also, focus on any advantages it may have on society; any positive impact it may have on society as a whole. For example not only whether it invokes a feeling of safety but whether it actually protects the society through deterrence.

1.9 Summary Of Chapters

This book comprises six chapters, with chapter four focusing on the effectiveness of the death penalty and the deterrence question.

Chapter one is the introductory chapter, which sets out the nature and magnitude of the history of the death penalty in Africa and briefly addresses the various methods of execution employed in Africa.

Chapter two examines the right to life and its relation to the death penalty in Africa and considers the protection afforded by various human rights instruments at the international,

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26 Hood, R. (1996, 2002). *The Death Penalty: A World Wide Perspective*. 2nd, 3rd ed. New York: Oxford University Press.

regional and national levels. This chapter outlines the rationale for the abolition of the sentence, and how it is a violation of the right to life.

Chapter three provides an overview of the history, current status and application of the death penalty in African states. This chapter however does not address the situation and motivation of every African state but of a few countries in various regions.

Chapter four constitutes the bulk of the paper, where the deterrence question and its effectiveness, if any, are addressed. Here the various effects that are desired when the death sentence is carried out are discussed and weighed against the effect that the death penalty itself has on the state as a whole, that is the psychological effects on its citizens, the crime rate and the question of safety.

Chapter five is a summary of the discussions in the previous chapters. It is the concluding chapter which sums up the findings of the research and recommendations that the writer has.

Chapter six consists of the Bibliography, table of case, table of selected statutes, table of international instruments and documents, and selected websites used throughout the paper.

CHAPTER 2: NORMATIVE FRAMEWORK

Capital punishment is not prohibited by international law; what is usually prohibited is the manner in which the trial leading to the sentence and the sentence itself are carried out. In *Prosecutor v Klinge*[27] the Supreme Court of Norway had conceded that the application of the death penalty in Norway is valid as it is not prohibited by international law, and thus could be legitimately imposed despite the fact that it was inapplicable under the country's criminal law. However the African Commission in *Interights et al (on behalf of Bosch) v Botswana*[28], acknowledged the development of international law and the trend towards the abolition of the death penalty. Thus the rational for the abolition of the death penalty arises from the method of execution, wrongful execution of the innocent and the right(s) it usually deprives the prisoner of, arguably the right to life, among other reasons. The death penalty is considered cruel, degrading and inhumane treatment of a prisoner. The method(s) by which a prisoner is executed such as garrotting, hanging, firing squad, lethal injection and so on cause the prisoner excruciating pain and suffering and to make matters worse these are usually public executions. International, regional and some national instrument may not prohibit capital punishment but they do prohibit torture, cruel, degrading and inhumane treatment as well as protect the right to life.

Namibia's legal and institutional landscape has changed remarkably since independence in 1990. The Constitution contains a comprehensive Bill of Rights and Namibia is party to various international human rights treaties, conventions and protocols and is, therefore, obliged to conform to their objectives and obligations.[29] As to the application of international law, after independence, a new approach was formulated, as embodied in Article 144 of the Namibian Constitution:

"Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia."

'Thus, the Constitution explicitly incorporates international law and makes it part of the law of the country. Public international law is part of the law of Namibia, with no need for any transformation or subsequent legislative Act. However, international law has to be in conformity with the provisions of the Constitution in order to apply domestically. In the event of a treaty

[27] *Prosecutor v Klinge* (1946) 13 Ann Dig 262 (SC Norway)

[28] *Interights et al (on behalf of Bosch) v Botswana*, Communication 39/90 (2000) AHRLR 57 (ACHPR 1997)

[29] Ruppel, OC & Ambunda, LN. (unknown) *The Justice Sector & The Rule of Law in Namibia: Framework, Selected Legal aspects & Cases.* Windhoek: Namibian Institute for Democracy & Human Rights and Documentation Centre, p. 54.

provision or other rule of international law being inconsistent with the Namibian Constitution, the latter will prevail.' [30]

The international and regional instruments which apply to Namibia that are considered a guard against the death penalty, whether directly or not will now be discussed as they are the anchor for the abolition of the death penalty.

2.1 Universal Declaration Of Human Rights

In 1948, all the nations who were members of the United Nations adopted the Universal Declaration of Human Rights. This document was to protect against the terrible atrocities which took place during World War II. After the war, the United Nations wrote the Universal Declaration of Human Rights in the hope that there would never again be such terrible abuse of human rights.[31]

'The UDHR is a statement of basic human rights. Every nation that joins the United Nations agrees to take action to promote respect for human rights, so every member of the United Nations is expected to follow the Universal Declaration of Human Rights. Since this document was first written, millions of people all over the world have looked to it for help, guidance and inspiration.'[32]

Why is the UDHR important?

- It is used as a standard of behaviours for all governments.
- Some of the principles in it have been used in other international documents, such as agreements between nations.[33]

The UDHR has influenced the constitutions, laws and court decisions of many nations. For example, some of the ideas in the Namibian Constitution come from it.[34]

It is important to examine the Universal Declaration of Human Rights influence on the death sentence as it is considered the cornerstone of contemporary human rights. It serves as a source of inspiration to other UN, international, regional and national bodies and instruments.[35]

The Universal Declaration on Human Rights proclaims both first-generation rights (civil and political rights) and second-generation rights (economic, social, and cultural rights) in the

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30 Ibid

31 Hubbard, D. (2001). *Law For All: Introduction to Namibian* Law, vol. 1. Windhoek: Out of Africa Publishers/ Namibian Institute For Democracy, p. 28.

32 Ibid.

33 Ibid.

34 Ibid.

35 Schabas, W. (2002) *The Abolition of the Death Penalty in International Law*. 3rd edition, Cambridge University Press p. 23.

language of aspiration. For the Declaration is not a treaty but a recommendatory resolution of the General Assembly and is therefore not legally binding on states.[36]

The UDHR protects the right to life. Article 3 states that 'everyone has the right to life, liberty and security of persons', but makes no reference to the death penalty. Since most African states still retain the death penalty, they could read this provision as allowing for its imposition.[37] This is because it creates a loop whole, in the sense that states may impose the death penalty as long as it is in a manner that is not cruel, inhuman, degrading or discriminatory, or a manner not prohibited by legislation.

Cruel treatment and torture are prohibited by the UHDR. Article 5 of the Universal Declaration of Human Rights states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." To the extent that they may be distinguished, torture may contain a notion of international cruelty designed to obtain information or a confession, whereas "treatment or punishment" is more concerned with the alleged goals of criminal law sanctions: deterrence, retribution, the protection of society, and rehabilitation.[38]

2.2 International Covenant on Civil and Political Rights: First and Second Protocol

The International Covenant on Civil and Political Rights has been ratified by fifty African States and signed by two[39] including Namibia in 28 February 1995. It is a binding treaty. The ICCPR which was adopted by the United Nations in 1966, affirmed in Article 6 (1)[40] that 'every human being has the right to life. This right shall be protected by law' and that 'no one shall be arbitrarily deprived of his life' but this did not bar capital punishment. The ICCPR therefore allows for the imposition of the death penalty as long as it is not arbitrary, as article 6 goes further to place restrictions on the use of the death penalty. According to article 6 (1), the death penalty is not prohibited except in respect of persons below the age of 18, and pregnant women.[41] It was, however, ringed around with conditions, the most important of which was embodied in Article 6 (2), namely that it should be restricted to 'the most serious crimes'.[42]

It was in 1971[43] and in 1977[44] that the United Nations took the first step towards declaring the abolition of the death penalty as a universal goal when it called for 'the progressive restriction of

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36 Dugard, J. (2005) *International law A South African Perspective*, 3rd ed. Lansdowne: Juta & Co. Ltd p. 314.
37 Chenwi, L. (2007) *Towards the Abolition of the Death Penalty in Africa: A human Rights Perspective*. Pretoria: Pretoria University Press. p. 22.
38 Schabas, WA. (1996) *The Death Penalty As Cruel Treatment and Torture: Capital Punishment Challenged in The World's Courts*. Boston: North eastern University Press p. 4.
39 Chenwi p. 62.
40 This article derives from article 3 of the Universal Declaration of Human Rights.
41 Dugard p. 316.
42 Hood. 2002 p. 15f.
43 Resolution 2857.
44 Resolution 32/61.

the number of offences for which the death penalty might be imposed, with a view to its abolition'.

In December 1989, the UN General Assembly adopted the Second Optional Protocol to the ICCPR. This Protocol outlaws the death penalty completely, but it has to date been accepted by a small number of States, including Namibia.[45] Article 1 of the Second Optional Protocol states: 'No one within the Jurisdiction of a State party to the present Optional Protocol shall be executed'; clause 2 of this article establishes the important principle that: 'The death penalty shall not be re-established in States that have abolished it'. Although Article 2(1) allows states to apply the death penalty, a reservation was made which provides for a most serious crime of a military nature committed during wartime, and not absolute abolition, the reservation can only be made at the time of ratification or accession. [46]

2.3 The Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted in 1984 came into force in 1987. [47] It was preceded by the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the same body in 1976. This instrument creates a committee charged with overseeing its implementation. The treaty provides for an individual petition mechanism, but this requires an optional declaration by states parties and, in practice, it hasn't really been utilized by international litigants.

This Convention has been ratified by 136 states[48]. Of the 136 states, it has been ratified by 42 African states, signed by five, and six are still to ratify and sign the Convention. Namibia ratified the Convention on November 28 1994.

The UN General Assembly's desire to make more effective the struggle against torture and other cruel, inhumane or degrading treatment or punishment throughout the world saw the adoption of the CAT. CAT deals mainly with torture, but obliges state parties to prevent other acts of cruel, inhumane or degrading treatment or punishment which do not amount to torture as defined in article 1[49] in any territory under its jurisdiction. Therefore, as noted earlier, though it is

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45 Dugard, p. 316.
46 Hood 2002 p. 16.
47 Dugard p. 325.
48 Dugard p. 325.
49 Article 1(1) of the Convention against Torture defines torture as an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for the purpose of obtaining from him or a third person information or a confession, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

questionable whether the application of the death penalty does amount to torture despite the fact that it has elements of torture, it is prohibited under article 16 of CAT.[50]

It is certainly premature to suggest that the universal norms prohibiting cruel treatment and torture (whether this be in customary or conventional form), now compels abolition of the death penalty. Yet, if it is understood that this norm must necessarily evolve as society matures, then we must already anticipate such a development; the slow but gradual abolition of the death penalty. This has begun to take place as demonstrated below by the Supreme Court of Japan in a 1948 judgement, where it affirmed that the country's constitution:

"should not be regarded as eternally approving the death penalty. The judgement of whether certain punishments are cruel is a question that should be decided according to the feelings of the people. However, because the feelings of the people cannot escape changing with the times, what at one time may be regarded as not being a cruel punishment may at a later period be judged the reverse. Accordingly, as a nation's culture develops to a high degree, and as a peaceful society is realized on the basis of justice and order, and if a time is reached when it is not felt to be necessary for the public welfare to prevent crime by the menace of the death penalty, then both the death penalty and cruel punishments will certainly be eliminated because of the feelings of the people."[51]

2.4 The African Charter on Human And Peoples Rights

The African Charter on Human and Peoples' Rights (ACHPR), also known as the Banjul Charter was adopted by the Organization of Africa Unity (OAU) in 1981 and came into force in 1986. Namibia ratified the Charter in 1992.

The charter makes provision for the right to life in article 4, which states:

'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of his right.'

The language used in this article with reference to deprivation of life is similar to that of article 6 (1) of the International Covenant on Civil and Political Rights, indicating a prohibition of the arbitrary use of the death penalty. In view of that qualification it can be said that it permits the death penalty, which is widespread in Africa, provided it is imposed in accordance with the law.

One scholar, Etienne-Richard Mbaya, 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

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50 Chenwi p. 102.

51 *Murakami v Japan Hanreishu* II, No. 3, 191 (Criminal)

law.[52] However, an objective and not subjective analysis of article 4 points towards abolition as a goal. Such an interpretation has to be made in good faith and in accordance with the ordinary meaning to be given to the terms of the African Charter in the context and in the light of its object and purpose.[53]

Article 5 of the African Charter states:

'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'

Although the African charter makes no mention of the death penalty in its right-to-life provision or the need to abolish it, scholars have considered that its unqualified recognition of the right to life does not mean that the death penalty, whose use is still widespread in Africa, is not prohibited, providing it is imposed in accordance with the law. However, the African Charter provides explicitly, in article 60, that it is to be construed with reference to the Universal Declaration of Human Rights.[54] Moreover, like all other human rights treaties, it should be interpreted in a dynamic fashion. Litigants have now began to argue that the "death row phenomenon" is incompatible with the current state of African human rights law and more specifically with the African Charter on Human and People's Rights[55]; this position is undoubtedly strengthened by developments like the judicial abolition of the death penalty in the Republic of South Africa in the case of Makwanyane.[56]

2.5 The African Commission On Human And Peoples' Rights

'The African Charter on Human and Peoples' Rights established a commission; The African Commission on Human and Peoples' Rights. The African Commission on Human and Peoples' Rights considers reports of state parties, which are of some help in interpretation. Little has been known about its petition procedure, and only recently have the Commission's reports begun to be rendered public.'[57]

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52 Schabas 2003 p. 355.
53 Chenwi, p. 66.
54 The African Charter on Human and Peoples' Rights invites recourse to international law on human and people's rights, including the Universal Declaration on Human Rights.
55 *Nemi v. The State*, [1994] 1 L.R.C. 376 (Supreme Court, Nigeria), at p. 386
56 Schabas 1996 p. 42.
57 Nigeria has been condemned at least twice by the ACHPR for violations of the ACHPR, in cases initiated by the Constitutional Rights project on behalf of death row inmates attacking the fairness of their convictions. Schabas 1996 p. 41f.

Situated in Banjul in The Gambia, the African Commission on Human and Peoples' Rights is the supervisory organ on the African Charter. The Commission's members are expected to promote, protect and interpret the rights in the African Charter[58]. The principal function of the Commission is to promote human rights in Africa by means of public education.

Although the Commission hasn't dealt with a lot of capital punishment cases, it was faced with the debate of the death penalty in the *Interights et al (on behalf of Bosch) v Botswana*[59]. The issues were whether the death penalty was a proportional penalty, and, whether the failure to give reasonable notification of the date and time of the execution amounted to cruel, inhumane or degrading punishment or treatment, in breach of article 5 of the African Charter. The Commission responded to the latter by stating that 'a justice system must have a human face in matters of execution of death sentences by affording a condemned person an opportunity to arrange his affairs, to be visited by members of his intimate family before he dies, and to receive spiritual advice and comfort to enable him to compose himself as best as he can, to face his ultimate ordeal'[60].

State parties to the *Charter* are required to submit periodic reports, although compliance is irregular and those that do not report, rarely refer to capital punishment. Nigeria, in its periodic report dated 1993, referred to abolition of the death penalty for drug trafficking, unlawful dealing in petroleum products and counterfeiting of currency, and its replacement with life imprisonment.[61]

At its twenty-sixth ordinary session, held in Kigali, Rwanda, in November 1999, the African Commission on Human and People's Rights adopted a 'Resolution Urging States to Envisage a Moratorium on the Death Penalty'[62]. The preamble to the resolution notes that article 4 of the African Charter 'affirms the right of everyone to life'. Reference is also made in the preamble to recent resolutions of the United Nations Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights calling for a moratorium on the death penalty. The preamble notes that three African States have ratified the Second Optional Protocol to the ICCPR, and that nineteen African States have abolished the death penalty either de facto or de jure.

The operative paragraphs of the resolution reads as follows:

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58 Article 45 of the African Charter.

59 *Interights et al (on behalf of Bosch) v Botswana*, Communication 39/90 (2000) AHRLR 57 (ACHPR 1997)

60 *Bosch (African Commission)* para 41.

61 Other States, such as Ghana, Cape Verde and Togo, make no reference whatsoever to the death penalty in their reports.

62 Resolution Urging States to Envisage a Moratorium on the Death Penalty, 13th Activity report of the African Commission on Human and People's Rights', OAU Dc. AHG/Dec.153 (XXXVI). Annex IV.

1. Urges States parties to the African Charter on Human and People's Rights that still maintain the death penalty to comply fully with their obligations under the treaty and to ensure the persons accused of crimes for which the death penalty is a component sentence are afforded all guarantees in the African Charter;
2. Calls upon all States parties that still maintain the death penalty to:

a) Limit the imposition of the death penalty only to the most serious crimes;
b) Consider establishing a moratorium on executions of death penalty;
c) Reflect on the possibility of abolishing the death penalty.

The resolution was a response to concerns expressed by non-governmental organizations about death sentences recently carried out in African Countries. The Commission's Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions, Mohamed Hatem Ben Salem, noting international activity aimed at abolition of the death penalty, proposed that the Commission make a statement on the subject and call for moratorium. Ben Salem agreed with a request from the Chair to prepare a draft text. During debate, representatives of Rwanda and Sudan opposed the resolution, adopting positions similar to those taken by these countries in the United Nations Commission on Human Rights.[63]

2.6 The Namibian Constitution

'The Constitution of a nation is not simply a statute which mechanically defines the structures of the government and the relationship between the government and the governed. It is a mirror reflecting the nation's soul, the identification of the ideals and aspirations of a nation, the articulation of the values bonding its people and disciplining its government.'[64]

As observed by Botha[65] "the values inscribed in the Constitution have their source and origin in the history and experience of the Namibian people. This document is a reaction to the authoritarianism and racial exclusivity which has characterized past constitutional practice. At the same time it draws heavily on international norms and standards … This is in stark contrast to the isolationism of the apartheid years."

Every constitution in common law Africa except for Namibia and South Africa possesses a death penalty savings clause, specifically immunizing the death penalty from constitutional challenge. All of these savings clauses are based on the original formulation in the European Convention on Human Rights (1950) at art. 2(1): 'Everyone's right to life shall be protected by

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63 Schabas 2003 p. 358.
64 S v Acheson 1991 NR 1 (HC)
65 Botha, H. 1994. "The Values and Principles Underlying the 1993 Constitution" *SAPL p. 233, 237.*

law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.' After 1953, the European Convention on Human Rights applied to all British colonies with the understanding that it would lapse upon independence.[66]

'Nearly every former British colony in Africa heavily altered its constitutional structure in the two decades after independence, particularly as to the structure of the executive and legislative branches. Only Botswana's constitutional structure survives from independence largely unreformed. That having been said, the common law death penalty was not a widely amended provision. Where the constitutional structure of the death penalty was altered, it was generally to broaden application, not restrict it, at least through the mid-1990s.'[67]

The Namibian Constitution came into force on the eve of the country's independence as the Supreme law[68] of the land and, therefore, the ultimate source of law in Namibia. All other laws in Namibia trace their legitimacy and source from the Constitution.[69] After independence the death penalty was abolished by the Constitution. As mentioned above the death penalty was not abolished directly, there was rather more emphasis placed on the right to life. This form of punishment was marked unconstitutional and contrary to chapter 3 of the Constitution; Fundamental Rights and Freedoms, article 6 which states:
"The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia." [70]

Both innocent and guilty persons have access to this right and no one, court or organ of state may for any reason execute persons, whether to justify the murder of another, or to console the family of the victim(s) or to limit or deter the murder rate in the country.

Professor Bill Lindeke, a political researcher who has researched extensively on constitutional matters discussing the possibility of reinstating the death penalty, says 'such calls for the reintroduction of the death penalty will never be realised in an independent Namibia. He said, in an interview with The Southern Times[71], that "although making provisions for amendments this

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66 Novak p. 3.

67 Novack note 5 at p. 2 Dale, W. (1993). *The Making and Remaking of Commonwealth Constitutions*, 42 INT'L AND COMP. L. Q. note 5 at p. 67-68.

68 Article 1(6) of the Namibian Constitution Act 1 of 1990 states: 'This Constitution shall be the Supreme Law of Namibia.'

69 Amoo, S.K. & I. Skeffers. 2008. "The Rule of Law in Namibia". In Horn, N. & A. Bösl (Eds.). *Human Rights and the Rule of Law in Namibia.* Windhoek: Macmillan Education, p. 17f.

70 Although the constitution provides for the limitation of some rights, the right to life is absolute, it has no limitation and there are no exceptions to this.

71 "Forget about The Death Penalty In Namibia" By Charles Tjatindi, *The Southern Time*, 6 June 2010.

is very particular in terms of acceptable amendments to chapter 3, which deals with the protection of fundamental human rights. The provisions on the Bill of Rights only provided for improvements and not the weakening of all articles in it - amongst it, the one relating to the death penalty. The constitution was drafted to mainly protect thousands of Namibians who were being mistreated at the hands of colonial occupants, and as such those who drafted it made sure that human life is protected and never to be lost at the hands of the state," Lindeke said:

"It is…Article 131 of the same constitution", argues Lindeke, "which makes it difficult for legislators to even ponder on the death penalty. The article provides that the repeal or amendment of the fundamental rights and freedoms enshrined in the Constitution that would diminish or detract from them is impermissible. Because the right to life is a fundamental right, the only way that Article 6 or portions thereof could be changed is to throw out the Constitution and begin the process anew. "

Namibia has signed and ratified a number of international treaties that similarly enshrine the protection of the right to life as well as prohibit cruel, inhuman, or degrading treatment. They include the International Covenant on Civil and Political Rights the Convention on the Rights of the Child and the Convention Against Torture and Other forms of Cruel, Inhuman or Degrading Treatment or Punishment. The country also has obligations to two regional treaties that enshrine the right to life and prohibit cruel, inhuman, and degrading treatment; namely the African Charter on Human and People's Rights and the African Charter on the Rights and Welfare of the Child

It is evident from the above discussion that none of these instruments fully endorsed the complete abolition of the death penalty. However the Constitution of Namibia as described by Professor Lindeke leaves no room for the reintroduction of the death penalty. One would wonder whether the drafters of this 'eighty day miracle' did not consider that perhaps the crime rate in Namibia would one day escalade to such an extent that it would raise alarming doubts in Namibians regarding their safety and the effectiveness of their penal and criminal justice system.

CHAPTER 3: SITUATION ANALYSIS: AN OVERVIEW OF THE AFRICAN SITUATION

The practical function of this research is to provide material which would form the basis of a general perspective of the criminal justice systems of Africa. The writer could have opted to carry out an international or world-wide comparison but research and experience have demonstrated that it is a 'pious hope' which is neither attainable nor desirable under existing world political and social conditions. It is for this reason that the research is based on select African countries. The selection of the countries to be compared with Namibia was based on a variety of reasons based on, geographical location, historical similarities and the same or close socio-economic development levels. The research if conducted at a regional level stands a greater chance of success; states situated in the same geographical area may be highly conscious of their regional affinity because of their cultural homogeneity and similar historical background. The comparison and contrast is rendered more easily by the close inter-relations which develop among the regional states.

If countries have the same or similar historical backgrounds then they are more likely to have incorporated the same penal systems and adopted and maintained the 'colonial reasoning' for imposing the death penalty. For example Namibia was a British colony under British South Africa and adopted the law that was in operation during that era. Some other countries which were colonized by Britain are more likely to have the same laws or rather same legal systems in operation but may be retentionist or abolitionist de facto or in practice unlike Namibia. It is necessary to examine the effect that such retention or abolition de facto of the death penalty has on each country in order to evaluate whether or not such abolition or retention has any effect on the murder.

The experiences of other systems of law are and have in the past been shown to be valuable not only in suggesting a foreign legal institution or solution as a model or guide, but also in showing what solutions to avoid. The experiences gained by other legal system in Africa as to the effectiveness of the death penalty as a legal solution to the rising murder rate may be most valuable as a guide in either reinstating the sentence or maintaining the abolitionist position in Namibia.

The continent of Africa contains fifty-three countries, many of whom have volatile histories of conflict. According to the Amnesty International Report[72], as of 1999, 4 countries had abolished the death penalty. In the six-year period since 1991, four more countries, Namibia and South Africa included, abolished capital punishment. But two countries, during this time, reversed their abolition of the death penalty and instead reinstated the death penalty. As of December 1996,

[72] Amnesty International Report-AFR 01/03/97,2-3

thirteen countries were de facto abolitionist, having not carried out an execution in more than ten years. As of January 1997, 30 countries in Africa retained the death penalty. There have been two major reasons for the setbacks to the abolition movement in Africa. First, the economic instability in many of the African countries has resulted in rising crime rates and poverty. Second, profound political instability has plaqued many African countries. The persistent argument for retaining the death penalty is that it is a deterrent of murder and public opinion supports the penalty.[73]

When the Morris Report (covering the years up to 1965) was published, no country in the African region south of the Sahara had abolished the death penalty. Twenty-two years later, in 1987, the then Chief Justice of Zimbabwe told an international conference on the death penalty: 'Looking at Africa the depressing fact is . . .all African countries retain the death penalty'.[74]

The intervening years, up to the end of 2001, have witnessed a remarkable transformation towards the abolitionist position among African countries. Nine have eliminated capital punishment completely: Mozambique and Namibia in 1990, when it was prohibited by their Constitutions; Angola in 1992; Guinea Bissau in 1993; and South Africa by a decision of the Constitutional Court in 1995[75] and the Criminal Law Amendment Act of 1997.[76]

William Schabas[77] suggests that "It would be wrong to exaggerate the scope of capital punishment in Africa. Leaving aside the Arab States north of the Sahara, nearly half of African States have stopped using the death penalty and many have abolished it de jure."

In countries suffering from a degree of civil unrest it is common for the death penalty to be introduced for a variety of 'political' offences. In South Africa in the 1960s, sabotage together with child-stealing and kidnapping were made capital offences after a number of politically-motivated incidents of these kinds had occurred.[78] Thus whether a country retains or abolishes the death penalty is dependent upon not only the crime rate of a country but its financial position and its citizens opinions. For example, if the people of an abolitionist country feel that the high crime rate is financially draining as well as a great risk to their lives they are more likely to ask for the reinstatement of the death penalty in order to minimise the damage already caused and to increase safety levels.

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73 Amnesty International Report-AFR 01/03/97,2-3

74 E Dumbutsena, 'The Death Penalty in Zimbabwe', *Revue International de Droit Pénal* 58 (1987), p. 524.

75 In *S v Makwanyane* 1995 s SA 391 (CC); 1995 2 SACR 1 (CC) the Constitutional Court held that the death sentence for murder is unconstitutional, because it is cruel, inhuman and degrading, and incompatible with the right to life and the right to dignity as guaranteed in the Constitution.

76 Hood, R. (2002). *The Death Penalty: A World Wide Perspective*. 3rd ed. New York :Oxford University Press. 38

77 Schabas 2002 p. 356.

78 Hodgkinson, P & Rutherford, A. (1996) *Capital Punishment: Global Issues and Prospects* (Ed), Volume II. Winchester: Waterside Press p. 159.

In this chapter an analysis of the situation in Africa; of a few countries that have common features similar to those of Namibia will be highlighted. The countries are divided into North-Central, East, and Southern Africa so as to avoid a purely geographical comparison and perspective.

3.1 Northern and Central Africa

Most of the states of the North and Central Africa continue to express their support for the death penalty and none have shown any signs of abolishing it. In fact, the trend is towards expansion of the scope of the capital punishment and, in several countries, a vigorous enforcement of it. Every one of the eleven countries which replied to the United Nations Survey on Safeguards in 1987 said that there were 'no official initiatives or plans to abolish the death penalty for any . . . offences'.[79]

3.1.1 Sudan

Since gaining independence in 1956, Sudan has witnessed a cycle of democratic governance alternating between military and authoritarian rule. In 1983 Shari's law was introduced into the Sudanese Penal Code by President Numeiri and remained in force under the rule of both the National Islamic Front and the military junta which succeeded it in 1989: and it was extended to Northern Sudan in 1991. Though the death penalty is still in use there are no official statistics on the number of executions that took place.[80]

The penal code provides for capital punishment by stoning or crucifixion to death, amputations, flogging for the traditional *hudud* crimes. Pardon cannot be granted for these crimes and the normal age limit of eighteen does not apply. The extent to which the harshest of these punishments is actually imposed is not known. During 1994 and 1995 no one was crucified, and only a handful of amputations were carried out.[81]

In 1998, Sudan approved a new constitution[82] that prohibits the imposition of the death penalty on Minors. Before it did not prohibit the execution of persons who were under the age of eighteen at the time the offence was committed.[83] Article 33 (Sanctity from death save in justice) states:
"(1) No death penalty shall be inflicted, save as retribution or punishment for extremely serious offences by law.

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79 These were: Algeria, Egypt, Morocco, Sudan, Syria and some Middle east countries such as Iraq.
80 Franck p. 123.
81 Franck p. 123.
82 The Constitution of The Republic Of The Sudan 1998
83 Franck p. 123

(2) No death penalty shall be inflicted for offences committed by a person under eighteen years of age; and such penalty shall be executed upon neither pregnant nor suckling women, save after two years of lactation; nor shall the same be inflicted upon a person who passed seventy years of age other than in retribution and prescribed penalties (hudud)."

'In Sudan, the death penalty can be imposed for a wide range of crimes, including sexual and political offences.'[84] 'Sudan is currently operating under modified Islamic law and not British common law, its death penalty regime has a different theoretical basis.'[85] 'Sudan, under the influence of Islamic law which was introduced in 1983, had made adultery[86], rape and sodomy capital offences. Sodomy is a capital offence under the Penal Code of 1991 based upon an interpretation of the Shari's. Some indication of the extent of its use was given by the Sudanese Minister of Justice in 1998 when he stated that 112 of the 894 sentences to death since 1989 for murder and armed robbery had been executed.' [87]

The return to normal political activity in 2000 has so far not had any effect on this issue of capital punishment. [88] Indeed in 1991, 19 people were executed, including ten by crucifixion. During that year the government established emergency tribunals in the western part of the country to try banditry cases. The emergency tribunals were composed of civil and military judges. Defendants were not permitted access to legal representation. The emergency tribunals ordered sentences such as death by stoning and amputations. Sentences ordered by emergency tribunals were carried out quickly with only one week allowed for appeal to the district Chief Justice. There were reports that persons were executed the day after sentencing. There were at least seven executions in 2001[89]. In June 2002 Amnesty International reported that at least nineteen people had been executed in the Dafus region of Western Sudan after being convicted by 'Emergency' courts of offences such as armed robbery, banditry, and murder. [90]

3.2 East Africa

3.2.1 Tanzania

In Tanzania the Report of the Nyalali Commission, whose membership represented a broad cross-section of society, unanimously reached the conclusion that the death sentence is to be

[84] Hood 2002 p. 39.
[85] Novack p. 1.
[86] The death penalty was applied retroactively to adultery between married persons after the introduction of Islamic law.
[87] Hood 1996 p. 63.
[88] Hood 2002 p. 39.
[89] Franck p. 123.
[90] Hood 2002 p. 39.

regarded as a barbaric form of punishment in democratic societies and morally unsupportable. However, public opinion seemingly remains firmly in favour of retaining the penalty although it has been argued that this is based on 'erroneous belief that capital punishment is the most effective deterrent' and that 'the government has a duty to put the true facts before the public interest of holding out to them that the death penalty is an instant solution to violent crime'.[91]

The last execution carried out in Tanzania was in 1994. In April 2002, Tanzanian President Mkapa commuted the death sentences of a hundred people to life imprisonment.[92]

It was held in the murder case of *Republic v Mbushuu alias Dominic Mnyaroje and Kalai Sangula*[93] that the death penalty violated the Constitution because it was 'a cruel, inhuman and degrading punishment and or treatment and also that it offends the right to dignity of man in the process of execution of the sentence'. Interestingly the Tanzanian Court of Appeal agreed that capital punishment was 'cruel, inhuman and degrading' but nevertheless held that 'there was no conclusive proof regarding its effectiveness and it was for the society to decide what was reasonably necessary': it was thus saved by Article 30 (2) of the Constitution of Tanzania, which provides for derogation from fundamental rights in the public interest.[94] The crux of its argument was that capital punishment could not be abolished while there was still such strong support for it. Indeed, it is these concerns that appear to be responsible for the reverse of abolitionist tendencies in several African countries, especially when connected with civil unrest or even military *coups d'état*.

3.3 Southern Africa

3.3.1 Botswana

The death penalty is still in force in Botswana. Botswana's legal system is based on Roman Dutch and local customary law. Its Constitution of March 1965 came into force on 30 September 1966. Botswana is one of the countries in Southern Africa that retain the use of the death penalty. The Constitution of Botswana permits the sentence of death in article 4(1); Protection of right to life, where it states: 'No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he has been convicted.'[95]

Section 4 of the Botswana Constitution is not the only section that makes provision for the death penalty. In other statutes, the death penalty is provided for by: section 25 and 26; relating to

[91] Hodgkinson & Rutherford 1996 p. 160
[92] Franck p. 123.
[93] Criminal Sessions case No. 44 of 1991, [1994] Tanzania Law reports 146-173 at 173.
[94] *Mbushu v. republic* [1995] LRC (Law Reports of the Commonwealth), 269 at pp. 216-217 and 232.
[95] The Constitution of Botswana of 1966.

different kinds of punishments, 203; relating to punishment of murder and 34; relating to treason of the Penal Code. Section 63 (2) of the Penal Code provides for the death penalty for assault with intent to murder during Piracy. Section 298 of the Criminal Procedure and Evidence Act deals with the sentence of death upon a pregnant woman while Section 299 of the same Act deals with the manner of carrying out death sentences.

As of 2002, 35 people had been hanged in Botswana since the country gained independence in 1966. However, between the years of 1987 and 1994, no executions were carried out.

There is little evidence that the death penalty has had a deterrent effect on crime, as statistics compiled by the Botswana police indicate a consistent increase in crime since 1966. Capital crimes are murder, treason, an attempt on the life of the head of state, and the military offences of mutiny and desertion.

Clemency has never been granted by a Botswana president. In 2001 there was a big national and international debate on the death penalty in Botswana surrounding the Marietta Bosch case, a white South African Woman who was executed for killing her lover's wife.[96]

'Botswana imported Roman Dutch common law with its concept of 'extenuating circumstances', sufficient proof of which gave the court the discretion to impose a sentence other than death.'[97] 'In Southern Africa, the doctrine of extenuating circumstances has softened the mandatory death penalty by allowing a person convicted of murder to present evidence in mitigation, but the defendant has the burden of showing extenuating circumstances beyond a fair preponderance of the evidence.'[98] 'In many cases the imposition of the death penalty depends upon a balancing of whatever extenuating circumstances can be adduced against those which are aggravating features of the crime. But such was the use made of this provision in Botswana that between 85 and 95 per cent of murder cases resulted in a sentence of life imprisonment because a plea of extenuating circumstances was accepted by the court.'[99] Nevertheless the failure of legislation to give any guidance as to what can constitute an extenuating circumstance means that there is a 'danger involved in making such a vital matter as extenuation depend upon the exercise of subjective moral judgement based on rather nebulous factors'.[100]

Nearly every former British colony in Africa heavily altered its constitutional structure in the two decades after independence, particularly as to the structure of the executive and legislative branches. Only Botswana's constitutional structure survives from independence largely unreformed. That having been said, the common law death penalty was not a widely amended

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[96] Franck p. 87f.
[97] Hood 1996 p. 146f.
[98] Novak p. 13.
[99] Paper by Dr Ntanda Nsereko, "The Death Penalty in Botswana' , 1987, *mimeo.*
[100] Hood 1996 p. 146f.

provision. Where the constitutional structure of the death penalty was altered, it was generally to broaden application, not restrict it, at least through the mid-1990s.[101]

Botswana has a partial savings clause protecting criminal punishments from challenge based on the fundamental rights portions of the constitution.[102]

3.3.2 South Africa

‘In South Africa the death sentence was an integral part of the apartheid regime and bitterly opposed by the African national Congress (ANC) and leading NGOs such as Lawyers for Human Rights and Black Sash. No executions took place after November 1989 and with political developments moving apace towards the creation of the New South Africa, the future of the death penalty came into question. In 1991 the South African Law Commission in its Interim report on Group and Human Rights described the imposition of the death penalty as ‘highly controversial’ and, as a result of comments received, adopted a ‘Solomonic solution’ under which the matter was left to the Constitutional Court to decide. The debate thus moved on to a familiar issue of whether, in the face of a sharp increase in violent crime, capital punishment was a necessary deterrent. Opinion polls of all races invariably showed considerable support for its retention and a pro-hanging Capital Punishment Campaign (CPC) was launched. However the South African Government remained abolitionist as did most NGOs.’[103]

The change in South Africa; which had been renowned for its extensive use of the death penalty, was particularly remarkable. The Society for the Abolition of Capital Punishment in South Africa had been established in 1971, but while apartheid persisted the government had rejected all calls for inquiries into the justice system. However, with the release of Nelson Mandela in February 1990 and the beginning of negotiations for constitutional change, the death penalty became one of the touchstones of commitment to a new social order. President F. W de Klerk announced an immediate moratorium on executions, the last one having taken place on 2 February 1989, and in July 1990 the Criminal Law Amendment Act abolished capital punishment for housebreaking with intent to commit a crime or with aggravating circumstances, and made the death penalty for murder discretionary rather than mandatory. A tribunal was set up to review death sentences imposed before July 1990 and, as a result, the Minister of Justice announced in 1992 that all executions would continue to be suspended, pending the introduction of a Bill of Rights for the New South Africa. Despite the fact that the South African Transitional Constitution of 1993 was silent on the matter of whether or not the death penalty was permissible, the Attorney General, in line with President Mandela’s long-held belief that the

[101] Novack p. 25.
[102] Novak p. 55.
[103] Hodgkinson p. 160

death penalty was barbaric, brought a case before the Constitutional Court, arguing that the death penalty should be declared unconstitutional. The Court, in the landmark judgement of *The State v T. Makwanyane and M. Mchunu*[104] in 1995, decided that capital punishment was incompatible with the prohibition against 'cruel, inhuman or degrading' punishment and with a 'human rights culture' which made the rights of life and dignity the cornerstone of the Constitution. A further influential argument was that it would be inconsistent with the spirit of reconciliation, post-apartheid. Thus, despite widespread concern about a tide of violent crime, and strong political pressures to reinstate the death penalty, the South African Parliament endorsed the opinion of Judge Chaskalson, the President of the Constitutional Court, that the way to reduce violence was to create a 'human rights culture' which respects human life. In 1997 the Criminal Law Amendment Act removed all references to capital punishment from the statute book.

Snyman[105] suggests that "South Africa can be proud of its new Constitution and the Bill of Rights enshrined therein, and for having turned its back on apartheid with all its evils. From this it does not necessarily follow that abolishing the death sentence was correct. The death sentence for murder ought to be reinstated. If the prevalence of crime in general, and murder in particular, were more or less the same in South Africa as in other civilised countries, there could be no objection to the abolition of the death sentence. However, in South Africa the incidence of crime in general, and murder in particular, is so high that the reinstatement of the death sentence is justified".

Dr Daniel Ntanda-Nsereko[106] claims that support for the death penalty in many African countries is rooted in 'customs and culture' that assume that 'for particularly reprehensible crimes such as murder, death is the only fitting punishment'. However, such opinions are just as prevalent in many abolitionist states, no doubt including South Africa. Perhaps it is more significant that countries which suffer from high rates of crime, weak policing and fears of political instability often regard the threat of capital punishment as an essential instrument of security, the abandonment of which would be interpreted as a sign of weakness in the apparatus of state control. Yet, the fact that South Africa has abandoned the death penalty, despite having one of the highest crime rates in the world, on the grounds that it infringes fundamental principles of human rights, gives grounds for optimism for abolition in other states.

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104 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC South Africa)

105 Snyman p. 29.

106 Nsereko, DD. (1986) 'Capital Punishment in Botswana', *United Nations, Crime Prevention and Criminal Justice Newsletter*, 12 and 13 p. 51f.

3.3.3 Namibia

The last execution in Namibia was carried out in 1988. In 1990, Namibia introduced a Constitution which became the Supreme law, which article 6 abolished the death penalty. On December 18, 2008 Namibia voted in favour of the Resolution on a Moratorium on the Use of the Death Penalty at the UN General Assembly. Namibia is a party to a number of International treaties, conventions and agreements that prohibit the use of the death penalty. They are the ICCPR, which Namibia became party to on 28 February 1995, the Convention on Rights of the Child; ratified on 30 September 1990, and the Convention Against Torture and Other forms of Cruel, Inhumane or Degrading Punishment ratified by Namibia on the 28 November 1994. More over Namibia has obligations to two regional treaties that enshrine the right to life and prohibit cruel, inhuman and degrading treatment; The African Charter on Human and People's Rights 1981 of which accession took place on the 12th July 1992 and the African Charter on the Rights and Welfare of the Child of July 1990 which was signed on 13 July 1999.

In June 2007 a Member of Parliament and President of the Democratic Turnhalle Alliance (DTA) Katutire Kaura formally asked the Minister of Justice Pendukeni Ivula-Itana in parliament to find a way to bring back the death penalty.[107] He asked "is it a crime, is it an abomination for this house to apply its democratic mind to rethink the possibility of finding a way to bring back the death penalty?" This was followed by the discovery of a woman's body on the roadside of a deserted area without limbs, just days after three other young women were killed.[108]

[107] Brigette Weidlich, The Namibian Newspaper, *Namibia: Bring Back Death Penalty-Kaura*, 29 June 2007

[108] Ibid.

Table 1. According to Amnesty International[109], this is the following status of the death penalty in countries in Sub-Saharan Africa:

ABOLITIONIST IN PRACTICE[110]	ABOLITIONIST FOR ALL CRIMES	RETENTIONIST
Benin	Angola	Botswana
Burkina Faso	Burundi	Chad
Cameroon	Cape Verde	Comoros
Central African Republic	Cote d'Ivoire	Democratic Republic of Congo
Congo (Republic of)	Djibouti	Equatorial Guinea
Eritrea	Guinea-Bissau	Ethiopia
Gabon	Mauritius	Guinea
Gambia	Mozambique	Lesotho
Ghana	Namibia	Nigeria
Kenya	Rwanda	Sierra Leone
Liberia	Sao Tome e Principe	Somalia
Madagascar	Senegal	Sudan
Malawi	Seychelles	Uganda
Mali	South Africa	Zimbabwe
Mauritania	Togo	
Niger		
Swaziland		
Tanzania		
Zambia		

109 Amnesty International, '*Abolitionist and Retentionist Countries*', available at http://www.amnesty.org/en/death penalty/abolitionist-and-retentionist-countries

110 These countries are defined as countries that have not performed a judicial execution in ten years and are believed to have an implicit or explicit policy against executions.

CHAPTER 4: IS THE DEATH PENALTY AN EFFECTIVE DETERRENT TO REDUCE INCIDENTS OF MURDER?

Few issues have received such intense and long term attention in law than the proper place, if any, of capital punishment in an enlightened criminal justice system and an ever growing and changing society. As mentioned earlier, there has been an outcry from the society to reintroduce the death sentence to the criminal justice system of Namibia following the vastly increasing number of murders in the country. Various scholars have discussed and debated the pros and cons of the death penalty but society does have a great impact on whether or not to abolish, retain or reintroduce a sentence. No matter how many times the matter is debated, the question still remains, is it effective despite the numerous points revolving around human rights advanced against it? A discussion of the arguments advanced for and against the death penalty will now follow, highlighting case law and situations in other countries. The chapter will focus mainly on whether the death penalty is or isn't effective as a deterrent against the crime of murder and whether reinstatement is possible.

4.1 Why Should Namibia Reintroduce The Death Penalty?

Even a brief sampling of the relevant literature demonstrates the tremendous breadth of the death penalty debate. Many issues are of a moral or ethical nature, and are therefore beyond the scope of legal inquiry. However, some core issues regarding the death penalty are factual in nature and have received considerable attention by social scientists. These include questions regarding the deterrent effect of capital punishment[111].

The deterrence issue has received the most systematic attention over the years. Here, the crucial question is whether capital punishment is more effective than alternative sanctions such as, long term of imprisonment, in preventing (deterring) murder. In other words, what is the deterrent effect, if any, achieved by capital punishment? This is the appropriate question since the sanctions for murder in Africa are death or imprisonment, not just death.

'A very common and seemingly logical justification given by those who support the death penalty is that executing this convicted murderer will reduce the number of future murders'[112]; because it will stop him or her from committing murder again and it will instil fear in other potential murderers. 'Any criminal sanction which promises to prevent future crime is very attractive, and this argument claims the ultimate benefit: saving innocent lives'[113] by executing

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111 Bedau, HA. (1997) *The Death Penalty in America: Current Controversies*(Ed). New York: OxFord University Press p. 135.

112 Streib Victor. (2008) Death Penalty in a Nutshell, 3rd ed. :Thomson West p. 16.

113 Streib p. 16.

murderers thus scaring potential murderers. The prevention argument appeals to everyone unlike retribution.[114]

The deterrence issue will now be looked at in depth; by highlighting the types of deterrence and how each will or can affect the murder rate.

4.1.1 The Individual Deterrence Theory

A distinction should be drawn between individual and general deterrence. 'Individual deterrence means that the offender as an individual is deterred from the commission of further crimes. The idea at the roof of individual deterrence is to teach the individual person, convicted of a crime, a lesson which will deter him from committing crimes in the future. In South Africa the premise of this theory is undermined by shockingly high percentage of recidivism[115], this lies in the region of 90% and suggests that this theory is not very effective, in any event not in South Africa.'[116] Individual deterrence can be equated with incapacitation as they both focus on the individual unlike general deterrence which focuses on the society at large. However incapacitation, as will be discussed below, has a more permanent effect on the criminal than individual or specific deterrence.

4.1.1.1 Incapacitation

'One basic mode of preventing future crimes is to take away the present offender's ability to commit them through incapacitation. This logic has led to cutting of hands of pickpockets, castrating rapists, and disbarring lawyers who steal from their clients. This approach is referred to as incapacitation or restraining the offender, preventing him or her from committing that particular crime at least for a given period of time. The focus of incapacitation is solely upon the future behaviour of this specific offender and not upon other potential offenders of a like mind.'[117]

Victor Streib[118] states that 'Incapacitation is not the same principle as specific or individual deterrence. The latter presumes punishing a past offender sufficiently will convince him to avoid repeating his criminal conduct in the future, not because he can't do it but because he fears…the punishment if he does. Incapacitation, in contrast, makes it essentially impossible for

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114 Streib p. 16.
115 Offenders who continue to commit crime after being released from prison.
116 Snyman p. 19.
117 Streib p. 16
118 Ibid.

the offender to repeat his crimes, not because he fears more punishment but because he is physically unable to commit the crimes'.

The death penalty is a form of incapacitation, not specific deterrence. Obviously, a full proof means of physically preventing a specific killer from ever killing again is to take his life. Incapacitation is the one justification that the death penalty serves better than could any other criminal punishment[119].

Death penalty opponents note that other than the extremely small chance of escape from prison, an imprisoned murderer also is incapacitated, essentially permanently, from committing any murders outside the confines of prison. Therefore, it may be that long term imprisonment is nearly as effective as incapacitation through the death penalty. In any event, research reveals that murderers are very unlikely to repeat their crimes, so the overall need for long term incapacitation is unclear.[120]

4.1.2 General Deterrence Theory

Death penalty proponents argue that use of the death penalty will deter the behaviour of others. 'The general deterrence means that the whole community is deterred from committing crimes. The emphasis is not, as in the previous theories, on the individual offender, who, by instilling fear in him, will supposedly be deterred from committing crime again. The emphasis here is on the effect of punishment on society in general: the purpose of punishment is to deter society as a whole from committing crime. The belief is that the imposition of punishment sends out a message to society that crime will be punished and that as a result members of society will fear that if they transgress the law, they will be punished. This fear will result in their refraining from engaging in criminal conduct.'[121]

Victor Streib[122] suggests that "the rationale of this principle of general deterrence is that others who were considering committing murders will be frightened away from that behaviour due to the threat of being executed for those murders. The appeal of this principle is that it is basically intuitive; a credible threat of being killed if you do something arguably would make anyone think twice before doing it. General deterrence is very popular in political campaigns as well, with almost all political candidates espousing their personal belief that the death penalty is a deterrent."

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119 Streib p. 16.
120 Ibid.
121 Snyman p. 19.
122 Streib p. 16.

There is a common misconception that the effectiveness of general deterrence depends only upon the severity of the punishment, and that this theory is accordingly, only effective if relatively severe punishment is prescribed and imposed. Although the degree of punishment is not irrelevant in judging the effectiveness of this theory, the success of the theory in fact does not depend on the severity of the sentence, but how probable it is that an offender will be caught, convicted and serve out his sentence. The theory is only successful if there is a reasonable certainty that an offender will be traced by the police, that the prosecution of the crime in court will be effective and result in a conviction, and that the offender will serve his sentence and not be freed on parole too early, or escape from prison. [123]

This general deterrence principle assumes, of course, such things as

(1) Your knowledge of the death penalty's existence,
(2) Your belief that you will be caught and convicted for your acts,
(3) Your calculation that you would be within the percentage of convicted killers who are actually executed and
(4) Your engaging in this detailed cost/benefit analysis before you pull the trigger.

Here is where this seductive theory breaks down in practice. An enormous amount of academic research has been performed around this thesis, and the results are as clear as any in social science can be. The death penalty is no greater general deterrent of the behaviour of other potential murderers than is long term imprisonment. It appears that most murderers don't tend to think before they act, plus they have an unrealistic view of their ability to escape arrest and conviction. In any event, fear of spending the rest of one's life in prison seems more than sufficient to provide the deterrent effect needed.[124]

However Rabies[125] contends that "deterrence is based on the principle that people are rationale beings and because of that, they are capable of being deterred from committing crime. He submits that if a person becomes aware that unpleasant consequences of punishment will follow the commission of a certain act, then he will refrain from the commission of that act or crime. This is based on the principle of rationality. In addition to that rationality, the punishment (specific) or threat of punishment to others (general) will cause any person to think twice before committing or even attempting to commit a crime.[126]

Samuel Hand[127] suggests that "The Punishment of death is unquestionably the most powerful deterrent, the most effective preventive that can be applied. Human nature teaches this fact. An

123 Snyman p. 19f.
124 Streib p. 16f
125 Rabies M.A, Mare M.C (1998), *Punishment, An Introduction to Principles*. Lex Patria Publishers p. 39.
126 Ibid
127 Samuel Hand, *The North American Review*, December 1881.

instinct that outruns all reasoning, a dreadful horror that overcomes all other sentiments, works in us all when we contemplate it."

Robert Crowe[128] concurs with Samuel Hand by suggesting that "It is the finality of the death penalty which instils fear into the heart of every murderer, and it is this fear of punishment which protects society. Murderers are not punished for revenge. The man with the life blood of another upon his hands is a menace to the life of every citizen. He should be removed from society for the sake of society. In his removal, society is sufficiently protected, but only provided it is a permanent removal."[129]

Charles Colson[130] doubts that the death- penalty is a general deterrent- and suggests that strong evidence exists that it is not likely to be a deterrent when it is seldom invoked. In light of this he says that "we'll never know how many potential murderers are deterred by the threat of a death penalty just as well as we will never know how many lives may be saved by it. But at the bare minimum, it may deter a convict sentenced to life from killing a prison guard or another convict. In such a case no other punishment is appropriate because all lesser punishments have been exhausted. And it will certainly prevent a convicted murderer form murdering again. In this regard, he referred to the words of John Stuart Mill:

"As for what is called the failure of death punishment, who is able to judge of that? We partly know who those are whom it has not deterred; but who is there who knows whom it has deterred, or how many human beings it has saved who would have lived to be murderers if that awful association had not been thrown round the idea of murder from their earliest infancy?"

Despite of his misgivings, Colson came to see punishment as an essential element of justice. He suggests that on the whole, the full range of biblical data weighs in its favour; society should not execute capital punishment offenders merely for the sake of revenge, rather to balance the scales of moral justice which have been disturbed. The death penalty is warranted and should be implemented only in those cases where evidence is certain, in accordance with the biblical standard and where no other punishment can satisfy the demands of justice.[131]

4.2 Why Should Namibia Remain An Abolitionist State?

At this point, when the murder rate in Namibia is increasing at a very high rate, it seems to the society that taking a big step such as reinstating the death penalty is necessary. However, 'it is

128 Crowe, RE. (February 1925). "Capital Punishment Protects Society", *The Forum*.
129 Winters, PA. (1997). *The Death Penalty Opposing Viewpoints*.(Ed) San Diego, CA: Green Press Inc. p. 42
130 Charles Colson "Capital Punishment: A Personal Statement", working paper, Prison Fellowship, Washington, D.C., May 1995.
131 Winters p. 64f.

very rare for capital punishment to be reintroduced once it has been abolished, even though opinion changes and there have been movements favouring a reintroduction. There have been many parliamentary debates where the arguments for abolition and the absence of negative consequences of such a move have won over the majority votes. When capital punishment has been eliminated for a certain crime, there has never been an increase in that kind of crime. The death penalty is often one ingredient in a generally unsuccessful criminal law policy in a country with a high crime rate. The fact that the crime rate remains high even with the death penalty in use shows that the deterrent effect is negligible. It can be seen, then that the main argument for the death penalty, i.e. its deterrence effect, has been effectively refuted and that there is a long series of substantial arguments against its use. These arguments keep gaining ground. On an international level there have been attempts to adopt and promote conventions[132] that will in the long-term result in the total abolition of the death penalty.'[133]

Abolitionist rationales include claims that:

1) The death penalty has, at times, been imposed on innocent people,
2) Human life is sacred and state-imposed death lowers society to the same moral (amoral) level as the individual murderer, and
3) The death penalty has been (and may still be) imposed in haphazard and discriminatory fashion.[134]

4. 2. 1 Executing The Innocent

Winters[135] states that "the danger of executing an innocent person, as well as the uniquely irremediable nature of such a mistake, can hardly be denied by even the most committed proponents of the death penalty. The majority of proponents of the death penalty- jurists/ writers and society- support it because, through a combination of deterrence, incapacitation and the imposition of just punishment, the death penalty serves to protect a vastly greater number of innocent lives than are likely to be lost through its erroneous application. Some may further believe that a society would be guilty of a suicidal failure of nerve if it were to forgo the use of an appropriate and deserved punishment simply because it is not humanly possible to eliminate the risk of mistake entirely."

The fundamental problem with the death penalty is clear: it is irrevocable and a mistake can never be put right. People who have been killed 'legally' by a state can obviously never be

132 Such as the Second Optional Protocol to the ICCPR and the Universal Declaration on Human Rights.
133 Franck p. 43.
134 For example if race, colour or sex are considered.
135 Winters p. 84.

brought back to life. The only way to make sure that such mistakes are not made is to abolish capital punishment.[136] The extraordinary remedies, Hans Góran Franck[137] says, are useless when the people they are meant to protect are no longer alive. The problem of the irrevocable nature of the death penalty is aggravated when people are sentenced to death after proceedings that do not meet internationally accepted standards for a fair and impartial trial. This is particularly tragic when death sentences are handed down in countries where the legal system does not even meet the most basic requirements for legal safeguards, namely that it must be possible to predict what the possible sanction will be for a certain crime.[138]

Some death penalty supporters say that even if a few innocent lives are taken, the deterrent effect of the death penalty excuses those risks. They contend that overall, more potential homicides of innocent victims are prevented by the death penalty than the number of innocent people who might be wrongfully executed.[139]

4. 2. 2 The Criminal Justice System

Snyman[140] suggests that there is a crisis in the justice system, and that is the reason why the death penalty doesn't work or isn't effective enough to retain. He illustrated this through the South African position in the following way:

"The South African criminal justice system can, with the best will in the world, not be described as other than dysfunctional. Since about 1990 crime has rocketed to levels never previously experienced in this country. It is an embarrassing fact that neither the introduction of the new Constitution with its Bill of Rights nor the abolition of the death sentence has succeeded in checking the staggering escalation of crime and securing adequate personal safety for citizens of this country." [141]

The general view amongst the public about Namibia's criminal justice system is that it has failed to suppress crime. 'Crime has been constantly increasing since 1990, due principally to the level of poverty in Namibia and the fact that the criminal justice system is significantly understaffed. In addition, the training of criminal justice professionals lacks depth and international benchmarking.' [142] The Inspector General of the Namibian Police Force and the Prosecutor General seem to acknowledge that the Namibian criminal justice system is dysfunctional and in

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136 Franck p. 40.
137 Ibid.
138 Franck p. 41.
139 Winters p. 85.
140 Snyman p. 25.
141 Snyman p. 26.
142 Nakuta, J. (unknown) *The Justice Sector & The Rule of Law in Namibia: Framework, Selected Legal aspects & Cases.* Windhoek: Namibian Institute for Democracy & Human Rights and Documentation Centre, p. 35.

a state of crisis. In 2005, Inspector General Ndeitunga told the Parliamentary Standing Committee on Constitutional and Legal Affairs, "Ideally, a police officer would have between 20 and 30 cases to investigate, but in reality they each had between 300 and 400 cases to investigate."[143] The Prosecutor-General, Martha Imalwa, cautioned that "until we have an effective criminal justice system, we can forget about talking about democracy, the rule of law, investment and peace and stability. The criminal justice system is the core to all of this. "[144]

'The Namibian criminal justice system is underperforming. Crime remains the single most prominent social concern. Prison overcrowding and institutional violence are amongst the most urgent challenges facing criminal justice in Namibia as the prison population has constantly increased since independence and the conditions of detention have deteriorated.'[145]

Namibia as illustrated by John Nakuta[146] currently has 194 per 100 00076 of the general population serving sentences in prisons or in pre-trial detention. This per capita rate of imprisonment places Namibia in the ten highest in Africa, and in the 64th position globally.[147] There has been a steady increase in the prison population since independence which raises the question of whether the pre-independence penal system was not more effective, this includes capital punishment for murder.

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4. 2. 3 Torture, Cruel, Inhuman Or Degrading Treatment And Punishment

The Namibian Constitution prohibits the use of torture, cruel, inhuman or degrading treatment or punishment in its article 8 on the right to respect for human dignity. Article 8 states:

(1) The dignity of all persons shall be inviolable.

(2) *(a)* In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.

(b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

This section highlights that torture, cruel, inhuman or degrading treatment or punishment should be avoided 'during the enforcement of a penalty'. Many writers consider the death sentence cruel, inhuman or degrading treatment or punishment and torturous. Thus if a sentence of death were to be implemented it would be unconstitutional, as it would be contrary to article 8.

143 Lindsay Dentlinger, "*The Criminal Justice System Is Overstretched*", The Namibian, 18 November 2005.
144 Ibid.
145 Nakuta p. 35.
146 Ibid.
147 Available at http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=africa&category=wb_poprate

The conditions surrounding the execution itself and the period between the sentence and the carrying out of the sentence, which is frequently quite long, make it possible to compare the death penalty to torture. The right not to be subjected to torture or any other cruel, inhuman or degrading treatment or punishment is a fundamental human right that is safeguarded by international law as discussed in chapter 2 above. 'The prohibition of torture, cruel, inhuman or degrading treatment or punishment is absolute'[148] and universal.

Torture is one of the most serious violations of human rights. The CAT requires each State Party to take effective legislative, administrative, judicial or other measures to prevent any and all acts of torture. As an indication of its commitment to the complete eradication of torture, Namibia acceded to the Convention on 6 October 1994. The Convention is therefore part of Namibian law in terms of Article 144 of the Namibian Constitution.[149]

In *Ex Parte, Attorney-General: In re Corporal punishment by organs of the State*[150], the judge stated that no derogation from the rights entrenched by Article 8 of the Constitution is permitted and that the state's obligation was absolute and unqualified. This case formed a significant watershed in the constitutional history of Namibia; it put to rest all cruel, inhuman and degrading treatment or punishment meted out by various institutions of the state and sought to promote the inherent dignity of all persons in our society. To date, beside the Constitution, there is no legislative enactment which outlaws torture in Namibia. Most of the torture-related cases are dealt with in accordance with the law pertaining to common law assaults, assaults with intent to do grievous bodily harm (GBH), murder, etc.[151]

Levy J in *S v Nehemia Tjijo*[152], argued that a life sentence would be unconstitutional in Namibia, because it is a cruel, inhumane and degrading punishment and because its effects are contrary to human dignity of offenders. There is no doubt that life imprisonment, like all long terms of imprisonment, is a very harsh punishment which can be destructive and degrading to the individual involved. On purely humanitarian grounds, as well as on the ground that it is intrinsically undesirable to allow the State powers of punishment which would entitle it to curtail

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148 *Huir-Laws v Nigeria Huri-Laws v Nigeria* Communication 225/98 (2000) AHRLR 273 (ACHPR) para. 41.

149 Ruppel, OC & Ambunda, LN. (unknown) *The Justice Sector & The Rule of Law in Namibia: Framework, Selected Legal aspects & Cases.* Windhoek: Namibian Institute for Democracy & Human Rights and Documentation Centre, p. 133.

150 1991(3) SA 76 (Nms).

151 Nghiishililwa, F. 2000. "The Constitutional Prohibition on Torture'. In Hinz. M.O., S.K. Amoo K & D. Van Wyk (Eds.). *The Constitution at Work: 10 Years of Namibian Nationhood.* Windhoek: University of Namibia, p 315.

152 Unreported judgement delivered on 4 September 1991.

permanently the fundamental freedom of a citizen, there are, as we have seen, sound arguments against the retention of the sentence of life imprisonment.[153]

However, the Namibian High Court has made the point that article 8(2)(b) is not intended to proscribe all punishment. In *S v Tcoeib*[154] it had been argued that a sentence of life imprisonment was cruel, inhuman or degrading punishment. O'Linn J dismissing this contention by stating that Article 8 had to be read as a whole and the language of the article did not mean that human dignity could not be violated by a lawful sentence by a court. Any punishment imposed thereby could not be cruel, inhuman or degrading but 'there is not injunction that punishment may not violate the dignity of the person convicted'.[155] The punishment, or treatment, in question must reach a certain level of indignity or suffering before it transcends what society may regard as acceptable in the circumstances. This seems a common sense approach and is supported by authorities.[156]

A representative from Amnesty International asked the following question on 21 December 1987, at a hearing before the Council of Europe's legal council:

'If a prisoner is given unbearable electric shocks so as to be forced to "confess", that is torture, which is unacceptable under any circumstances-why, then, is it acceptable to attach electrodes to a prisoner's body and give such massive jolt of electricity that life is extinguished? If a prisoner is made to renounce his or her beliefs by terrifying threats of being killed, that is torture-why, then, is it accepted to keep a prisoner for days and years contemplating his promised death at the hands of the state? What, need, is the death penalty if not the ultimate form of torture?'

The execution itself constitutes physical torture. The execution methods in use cannot guarantee immediate death. Instead, prisoners on death row risk being tormented to death little by little.[157]

4.3 Alternatives to The Death Penalty

'The abolition of the death penalty cannot be a one-off act. It is not like putting an end to one human rights abuse. When the death penalty is abolished, a substitute penalty has to be found for the crime. Considering the criminological arguments for the retention of the death penalty in

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153 Dirk Van Zyl Smit "Taking Life Imprisonment Seriously", Kahn, E. 1995) *The Quest for Justice. Essays in Honour of Michael McGregor Corbett, Chief Justice of The Supreme Court of South Africa* (Ed). Kenwyn: Juta & Co. Ltd p. 316.

154 1993 (1) SADR 274 (Nm).

155 1993 (1) SADR 274 (Nm) at 288

156 Naldi, GJ. (1995)*Constitutional Rights in Namibia: A Comparative Analysis with International Human Rights*. Kenwyn: Juta & Co, Ltd p. 51.

157 Franck p. 35.

Africa, it is obvious that there is some resistance to alternative sanctions to the death penalty. Generally, members of the public are ignorant of the availability and feasibility of alternative sanctions. Life imprisonment, for example, can also serve as a deterrent, and as a preventative, retributive and rehabilitative measure. There has been no proof that the death penalty in Africa, or elsewhere, deters more effectively than life imprisonment.'[158]

4.3.1 The Position In South Africa

In the absence of the death penalty the most powerful sanction that the state can use against a citizen is the power to detain him for the rest of his natural life. Opponents of life imprisonment argue that it goes too far, for the legitimate authority of the modern *Rechsstaat* is limited by the recognition that the power it exercises over its citizens is restricted. It follows that only determinate sentences are constitutionally acceptable.[159]

The introduction of a Bill of Rights means that the legality of life imprisonment, or aspects of it, is far more likely to be challenged than in the past. On the other hand, a high rate of serious crime may lead to a call for the introduction of mandatory life sentences, or for legislative provisions which would allow, or even compel, courts to pass life sentences which explicitly exclude the possibility of parole.[160]

'A number of penological arguments have been advanced against life imprisonment. It has been argued that, as in the case of the death penalty, there is no evidence that a sentence of life imprisonment has a greater deterrent effect, either on the individual offender or on society at large, than a fixed term of, say, fifteen years' imprisonment. More pointedly, it has been argued that a life sentence has a penal content which is morally unacceptable. In other words, the submission is that locking someone away for the rest of his natural life is simply so cruel a punishment, or in the language of a different constitutional tradition, is such a grave affront to human dignity, that no civilized society should allow it. The parallel with arguments about the death penalty is obvious, but the debate about what the 'acceptable penal content' of sentences has raises more general questions. Other sentences which objectively are less cruel than life imprisonment, for example, the public humiliation of someone serving a community sentence, are also widely regarded as unacceptable.'[161]

'…Bills of Rights exist to establish the nature of the social contract between the citizen and the state and to limit the absolute power which the state may be tempted to exercise...Whilst courts may pronounce a sentence of life imprisonment fairly frequently, they are very rarely

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[158] Chenwi p. 208.
[159] Dirk p. 316.
[160] Ibid p. 310.
[161] Dirk p. 316.

implemented in full. It is unusual for courts to discuss this approach in public: the rhetoric of 'the rest of his natural life' is still used freely, not least in South Africa. However, there are some examples of judicial candour.'

In *S v Letsolo* [162] the court held that life imprisonment should be substituted for the sentence of death as in the circumstances of the case it would serve to protect the public and also because 'it cannot be said that property directed discipline and training in a prison over a long period of time are not likely to result in the appellant's reformation'.

In the recent case of *P v Secretary of State for Home Department, Ex Parte Doody & Others*[163] Lord Mustill remarked:

'the sentence of life imprisonment is also unique in that the words which the judge is required to pronounce do not mean what they say. Whilst in a very small minority of cases the prisoner is in the event confined for the rest of his natural life, this is not the usual or intended consequence of a sentence of life imprisonment . . .'

The Namibian case of *S v Nehemia Tjijo*[164] set forth a number of arguments against the sentence of life imprisonment. First, Levy J declared that 'life imprisonment is a sentence of death', and that because the death sentence was prohibited by the Constitution of Namibia, life imprisonment should be prohibited as well. It would probably not be hard to persuade another court that this analogy is too simple, for no matter how lawful life imprisonment may be, it cannot be equated in any empirical sense with death. The notion that imprisonment is a form of 'civil death' has long been rejected.[165] Levy J gives as an additional ground for rejecting life imprisonment that life imprisonment "makes a mockery of the reformative end of punishment'. He couples this with a rejection of the argument that the possibility of parole makes the life sentence less drastic. In his view:

'for a judicial officer to impose any sentence with parole in mind, is an abdication by such officer of his function and duty and to transfer his duty to some administrator. Probably not as well equipped as he may be to make judicial decisions. It also puts into the hands of the Executive, where the sentence is life imprisonment, the power to detain a person for the remainder of his life irrespective of the fact that the person may well be reformed and fit to take his place in society.'[166]

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162 *S v Letsolo* 1970 (3) SA 476 (A) at 478B-C.
163 [1994] 1 AC 531 (HL), [1993] 3 WLR 154 at 158F.
164 Unreported judgement delivered on 4 September 1991.
165 Dirk p. 316f.
166 1993 (1) SADR 274 (Nm) at 275j-276b, Kahn, E. p. 324

It was said in *S v Tcoeib*[167] that it does not follow, however, that life imprisonment is always and under all circumstances necessarily unconstitutional. A harsh punishment for a serious offence is not necessarily unconstitutional. This was the thrust of the justification for life imprisonment advanced by O'Linn J in the context of the Namibian Constitution. A term of imprisonment of say fifteen years is also a harsh punishment, but may be justified in exceptional cases. On the other hand, the conditions of imprisonment may be such as to render it cruel, inhuman or degrading.

Alternative sanctions are rejected by members of the public not because they perceive that these punishments would not work or are not severe enough, but because they believe they fail to express condemnation as dramatically and unequivocally as the death penalty. Since the central theoretical premise of the case for alternative sanctions is that all forms of punishment are interchangeable along the dimensions of severity, a long prison sentence or life imprisonment can also express condemnation as dramatically and unequivocally as the death sentence. The fact that some African states have abolished the death penalty completely or for certain offences that were punishable by death is proof that alternative sanctions exist that can serve the purpose of punishment-deterrence, retribution, rehabilitation and prevention. Since the life sentence exists, it cannot be said that the death sentence is the only proper sentence to meet the purposes of punishment. Hence, Justice Lartey, a Supreme Court of Ghana nominee, has acknowledged imprisonment as an alternative to the death sentence, stating that instead of passing the death sentence on murderers or on those who have committed other offences attracting the death sentence, the offenders should be confined at a recognised place to die naturally. Also the Ugandan Minister of Justice and Constitutional Affairs, Mukwaya, has stated that 'the government is considering scrapping the death sentence on capital offences . . . Long jail terms will replace the death penalty'.[168]

Though the death penalty has been abolished in Namibia, the crime rate, particularly that of murder continues to rise as indicated. This raises the question whether the measures put in place to prevent or punish such murder are efficient? This does not seem to be the case; that is why a large number of Namibian's have asked for the reintroduction of the death penalty.

The death penalty which was enforced before independence, for the crime of murder, was replaced by the imprisonment sentence, after independence. There was contention as to the effect that life imprisonment has on the right to life and that of dignity. Arguments have been advanced that life imprisonment and capital punishment are on the same scale as they deprive a convicted prisoner of his right to life and are cruel, inhuman and degrading punishments. However, the *Tcoeib* case may be seen as authority to the fact that a sentence of imprisonment neither constitutes torture, cruel, inhuman or degrading punishment or a violation of the right to

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167 1993 (1) SADR 274 (Nm) at 275j-276b

168 Chenwi p. 209.

life if it implemented and carried out legally and the prison conditions are not degrading or inhuman.

CHAPTER 5: CONCLUSION

The extent to which the death penalty acts as a general deterrent has been widely studied. Some researchers, such as W.C Bailey[169], have compared murder rates between states which have eliminated the death penalty and those which retain it, finding very little variation in the rate at which murders are committed. Others have looked at variations in murder rates over time in jurisdictions which have eliminated capital punishment, with similar results. A 1988 Texas study provided a comprehensive review of capital punishment by correlating homicide rates with the rate of executions within the state between 1930 and 1986.[170] The study, which was especially important because Texas has been very active in the capital punishment arena, failed to find any support for the use of death as a deterrent. Opponents of capital punishment frequently cite studies such as these to claim that the death penalty is ineffective as a deterrent and should be abolished.[171]

The murder rate in Namibia has increased over the years since the abolition of the death penalty in 1990. Though some attribute such increase in murder rate to the abolition of the death penalty resulting in more and more murderers emerging because there was no permanent effect to committing the crime of murder, the failure of the criminal justice system to operate efficiently seems to be the main cause of the rise in the murder rate. In South Africa, which also abolished the death penalty after independence, Snyman[172] also attributes the rise in murder rate to the dysfunctional criminal justice system of the country. He highlights that ‘neither the introduction of the new Constitution with its Bill of Rights nor the abolition of the death sentence has succeeded in checking the staggering escalation of crime and securing adequate personal safety for citizens of this country.’ This, then eliminates the theory that the death penalty is effective as a deterrent for the crime of murder, as the criminal justice system fails to operate properly and the exact or proper estimation of the deterrent effect, if any, is hindered.

When one compares the murder rate of countries such as Sudan with that of Namibia, it is evident that Sudan has a higher rate compared to that of Namibia despite the fact that the death penalty is still in force in that country.

Besides the fact that there was no evidence deduced that proves that the death penalty has a deterrent effect on the crime of murder, the sentence may still not be imposed as it is

[169] “Deterrence and the Death penalty for Murders in Utah: A Time Series Analysis”, *Journal of Contemporary Law*, Vol. 5, no. 1 (1978), p. 1-20, and “An Analysis of the Deterrent Effect of the Death penalty for Murder in Califonia”, *Southern California Law Review*, Vol. 52, no. 3 (1979), p. 743-764.

[170] Scott H. Decker and carol W. Kohfeld, “Capital Punishment and executions in the Lone star State: A deterrence Study,” *Criminal Justice Research Bulletin* (Criminal Justice Center, Sam Houston State University), Vol. 3, no. 12 (1988).

[171] A problem of such methodology, surveys and comparisons arises when the death penalty is utilized for different crimes in each respective state. Schmalleger, F. (1996) *Criminology Today*. New Jersey: Prentice Hall, p. 150.

[172] Snyman p. 25.

considered torturous, cruel, inhuman and degrading punishment by international, regional and national instruments discussed in chapter 2. 'If the death penalty was not considered cruel, inhuman or degrading, for example, in the early 1990s, it may be considered so at present. A punishment can be cruel either because it inherently involves so much physical pain and suffering that civilised people cannot tolerate it, or because it is excessive and serves a legislative purpose that an alternative punishment could still serve. Even if a punishment serves a valid legislative purpose, it can still be unconstitutional because it is harsh, dehumanising or abhorrent to currently existing moral values. On the whole, if the above indicators are positive (which is the case), the death penalty is a cruel, inhuman and degrading treatment or punishment.'[173]

The right to life as discussed above, is guaranteed by various international human rights documents and has been described by the HRC as 'the supreme right of the human being'.[174] According to the Namibian Constitution this right cannot be derogated from or limited when carrying out a sentence. Under Article 131 of the Constitution, the rights and freedoms contained in Chapter 3 are entrenched, and the provisions may not be repealed or amended insofar as such repeal or amendment detracts or diminishes from such rights and freedoms. The Article states:
"No repeal or amendment of any provisions of Chapter 3 hereof, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that Chapter shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect."

Article 25 also protects the Bill of Rights as it states that:
"Save in so far as it may be authorized to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid".

John Nakuta[175] states that 'the Namibian Constitution places a high premium on human life. The right to life, in terms of Article 6 of the Constitution, is inalienable. The self-same Article also abolishes the death penalty in Namibia, which can therefore *never* be reinstated.' This is in accordance with the Second Optional Protocol to the ICCPR which states that 'the death penalty shall not be re-established in States that have abolished it'.

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173 Chenwi p. 98.

174 General comment on Article 6, UN Doc HRI/GEN/1, pp 5-6. The HRC stated further that this right should not be interpreted narrowly.

175 Nakuta p. 13.

The writer concurs with John Nakuta and suggests that as far as the constitution is concerned it appears impossible to reinstate the death penalty as the right to life is highly protected by article 6 and the prohibition of torture, cruel, inhuman and degrading treatment by article 8. Considering all legal writings, case law, international, regional and national instruments, as well as the situations in various other legal systems, the writer has come to the conclusion that the death penalty has no visible deterrent effect of the crime of murder. 'There is no evidence that the abolition of the death penalty generally causes an increase in criminal homicides or that its re-introduction is followed by a decline. The explanation of changes in homicide rates must be sought elsewhere.'[176] As highlighted above, had the findings been any different, the death penalty still could not be reinstated as such reinstatement is prohibited by the constitution and international instruments, especially the Second Optional Protocol to the ICCPR.

[176] Sellin, T. (1967). *Capital* Punishment, Ed. New York: Harper and Row Publishers, p 124.

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