

STUDY ON THE IMPLEMENTATION OF THE DEATH PENALTY AS A MEANS OF CRIME  
DETERRENCE IN NAMIBIA

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## **TABLE OF CONTENTS**

ACKNOWLEDGEMENTS .....	<b>Error! Bookmark not defined.</b>
DECLARATIONS .....	<b>Error! Bookmark not defined.</b>
ABSTRACT.....	<b>Error! Bookmark not defined.ii</b>
CHAPTER ONE: .....	3
INTRODUCTION .....	3
1.1 Background Information.....	3
1.2 Problem Statement.....	4
1.3 Purpose of Study.....	5
1.3 Significance of the Study.....	8
1.4 Methodology.....	10
1.4.1 Conceptual Framework.....	10
1.4.2 Data Collection and Research Design .....	11
1.4.3 Data analysis methods .....	12
1.5 Literature Review.....	13
CHAPTER TWO: .....	15
CRIME PREVENTION AND THE DETERRENCE THEORY.....	15
2.1 Crime Prevention in General .....	15
2.2 Deterrence Theory (and the Rational Choice Theory).....	15
2.3 Deterrence Hypothesis in Detail .....	17
2.3.1 Types of Deterrence.....	18
2.4 Evaluation of Rational Choice and Deterrence Theory.....	19
2.5 The Evidence against a Deterrent Effect .....	22
2.6 Evaluation of the Evidence against the Death Penalty .....	23

CHAPTER THREE: .....	25
A COMPARATIVE STUDY .....	25
3.1 Nigeria.....	25
3.1.1 Support for the Death Penalty in Nigeria .....	27
3.1.2 Sharia Law and Death Penalty in Nigeria .....	29
3.2 Botswana.....	30
3.3 Uganda.....	32
3.5 Singapore .....	36
CHAPTER FOUR:.....	38
ARGUMENTS FOR THE DEATH PENALTY IN NAMIBIA.....	38
4.1 Introduction.....	38
4.2 Issues Pertaining to Implementing the Death Penalty .....	42
4.2.1 "Life without parole" versus the death penalty.....	42
4.2.2 Pain and suffering – is the death penalty a cruel and unusual punishment? .....	43
4.2.3 Can capital punishment ever be "humane"? .....	44
CHAPTER FIVE: .....	47
RECOMMENDATIONS AND CONCLUSION .....	47
5.1 Recommendations.....	49
5.1.1 The Amendment of Article 131 or Introduction of a New Constitution .....	49
5.1.2 Namibia’s International Obligations .....	50
5.1.3 Improving the Namibian Legal System.....	50
5.1.4 Draft a Criminal Bill that clearly specifies capital crimes.....	51
5.1.5 Implement the Death Penalty .....	51
5.2 Conclusion .....	51

## **CHAPTER ONE:**

### **INTRODUCTION**

#### **1.1 Background Information**

“Robbed of a quiet and determined young woman”<sup>1</sup> the headline in a local daily newspaper began. “Thousands march for Magdalena”.<sup>2</sup> “The death of Magdalena Stoffels demands Government acts against crime with urgency”.<sup>3</sup> “Community Bays for Blood of Murder Suspect”.<sup>4</sup> “Pohamba deplores violence against women in 2010”.<sup>5</sup> “Rape curse on the rise”<sup>6</sup>. “Structural Violence - The Case of Magdalena Stoffels”.<sup>7</sup>

On the 27<sup>th</sup> of July 2010, a young seventeen year old school girl, Magdalena Stoffels was found in a river bed, raped and murdered. A man was later found nearby with a bloodied shirt and bruises on his leg. He was arrested. Angered, the public took to the streets, boiling and raging with fury, demanding that the suspect be handed over to them for street justice. Others who were more cool-headed demanded that the death penalty be implemented in Namibia with immediate effect.

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<sup>1</sup> J. Smith 2010, July 28. Robbed of a quiet and determined young woman. *The Namibian* [Online]. Available: <http://allafrica.com/stories/201008020560.html>. [2011, July 28].

<sup>2</sup> J. Smith 2010, August 2. Thousands march for Magdalena. *The Namibian*. [Online]. Available: <http://allafrica.com/stories/201008020560.html>. [2011, March 17].

<sup>3</sup> A. Hengari, 2010, July 30. The death of Magdalena Stoffels demands Government acts against crime with urgency *African Crisirs* [Online]. Available: <http://allafrica.com/stories/201007300505.html>. [2011, July 28]

<sup>4</sup> Smith, J. 2010, July 28. Community Bays for Blood of Murder Suspect. *The Namibian* [Online]. Available: <http://allafrica.com/stories/201007280065.html>. [2011, July 28].

<sup>5</sup> Pohamba deplores violence against women in 2010. 2010, January 4 *The Namibian*. [Online]. Available <http://allafrica.com/stories/201101040291.html>. [2011, January 4]

<sup>6</sup> E. Erastus 2010, November 29. Rape curse on the rise. *The Namibian Sun*. [Online]. Available: <http://mobi.namibiansun.com/story/rape-curse-rise>. [2011, July 28]

<sup>7</sup> I. Kloppers. 2010, August 27. Structural Violence - The Case of Magdalena Stoffels. *The Namibian* [Online]. Available: <http://allafrica.com/stories/201008270877.html>. [2011, July 28].

So much was the outcry that it sparked a debate on the weekly talk show “Talk of the Nation” on the Namibian National Broadcaster, NBC.

Crime rate in Namibia has escalated over the years after independence far rapidly in relation to its development. In comparison to other countries, most reach the level of crime that Namibia has reached many years after independence. This is a major concern, with legislature of all sorts aiming to prevent, curb and discourage crime. Yet crime still prevails and continues to trouble many people across the nation, violent acts are committed and innocent lives are lost unnecessarily. One may wonder, what other measures can be placed to ensure that less crimes are committed and people are safer and less at risk?

## **1.2 Problem Statement**

Crime is one of the most important social problems.<sup>8</sup> When it is committed, the police in the criminal justice process arrest a suspect. The prosecutor determines whether to prosecute the case or drop it, and the judge decides how much bail to require. If the decision is to prosecute, the prosecutor then determines what charges to bring against the defendant. The defendant must decide whether to plead guilty or to plead not guilty and have a trial. At the end of the trial a judge determines on the verdict. If the defendant pleads guilty or is found guilty after trial, the judge determines the punishment.

The underlying purpose of punishment is essentially to reduce crime. However, looking at the Namibian scenario, it seems this aim has not been reached, far from it.

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<sup>8</sup> S. E. Barkan 2009 *Criminology a Sociological Understanding* 4<sup>th</sup> ed. 138

It is with this situation that brings about the question: would the implementation of the death penalty reduce the commission of crime; would capital punishment deter would-be criminals from committing illegal acts?

### **1.3 Purpose of Study**

The purpose of this study is in addressing Namibia's crime problem, to question whether or not implementing the death penalty for murder and related crimes in Namibia could be a form of deterrence of such crimes.

Admittedly, the death penalty issue or debate is an old one. It has had a vast number of debates and research over the years, and for good reason too. However, it seems an almost worn out topic. In fact less and less people debate on the topic and even lesser attention is given to what is said about it.

To answer the inevitable question “why this topic then”, it is vital that I state that the Provisions of the **Namibian Constitution**<sup>9</sup> under **Article 6** and **Article 131** has made it difficult for legislators to even ponder on the institution of the death penalty for several years.

**Article 6 of Chapter 3 of the Namibian Constitution** 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”.

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<sup>9</sup> Act 1 of 1990

**Article 131** further states that:

“No repeal or amendment of any of the 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”.

This Article therefore makes it legally impossible to implement the death penalty under the current Constitution. As rightly put by a prominent Namibian political researcher, Professor Bill Lindeke, “The Namibian constitution [can] never be amended to reinstate the death penalty even if the legislature ponders on it”.<sup>10</sup>

However, as the old saying goes: ‘where there is a will, there is a way’. Also, ‘it’s only impossible until somebody does it’. The constitutional stance on the death penalty can be changed if there is cause for it and when stakeholders realise the seriousness of the matter.

There are two ways in which implementing the death penalty in Namibia could be possible. One approach would be by amending Article 131 of the Constitution, to make it then legally possible to amend Article 6, and thereby institute the death penalty.

The second viable tactic would be to totally do with the present constitution and promulgate a new constitution that allows the death penalty as a form of punishment for certain crimes.

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<sup>10</sup> C. Tjatindi Forget about the Death Penalty in Namibia. *The Southern Times*. [Online]. Available: [http://southerntimesafrica.com/article.php?title=forget\\_about\\_the\\_death\\_penalty\\_in\\_Namibia.html](http://southerntimesafrica.com/article.php?title=forget_about_the_death_penalty_in_Namibia.html). [2011, May 16]

It is correct to say that the above options will only be possible and followed when the realisation of the seriousness and abnormality of the crime rate in Namibia dawns on the hearts of the people.

Crime can be likened to a fast spreading cancer in a human body. Medical doctors who are cancer specialists when faced with a patient diagnosed with cancer tries all methods to cure the cancer. He does not first recommend mastectomy, unless as last resort to save the patients other body parts and life and to avoid spread the disease. It is drastic, radical and indeed a last resort. It may seem that situation has reached a stage where such drastic steps have to be taken to curb crime before more and more people are massacred with no effective measure in place. Implementing the death penalty may be considered as the ‘mastectomy’ needed to reduce crime.

Furthermore, there is an increasing outcry for the death penalty since people realise the severity of the situation of the nation. As one of the purposes of punishment is moral outrage, catharsis, relief for society and closure, one is made to wonder if the instituting of the death penalty will achieve this aim.

As stated, a vast work and research has been done on the topic of the death penalty. Some are in favour of it, and have their reasons, while others strongly oppose it providing their reasons too. Some believe that it serves as a form of deterrence while others propose that there is no evidence that the death penalty deters people from committing crimes.



Many authors have conducted research, comparing and contrasting countries that have implemented the death penalty with those that have not. Much attention is given to the crime rates in the countries referred to.

Reference will be made to some of this research in the literature review and in other parts of this dissertation.

However, and to the best of my knowledge, none have tackled the topic from the angle from which I wish to discuss, especially so that little research on the topic has been exclusively and explicitly done in relation to Namibia.

This essay therefore aims to look at the argument for and against the death penalty in general, weighing both lines of reasoning and the evidences for both sides. The essay will further do a comparative study of crime rates with *African* countries that have the death penalty and *African* countries that do not. Further, the essay will find out the possible route of implementing capital punishment in a country where the Constitution specifically protects the right to life, stipulates that no law may prescribe death as a competent sentence and that no executions shall take place in Namibia. In conclusion, the essay will give recommendations on how the death penalty should be implemented and predict how successful it will be to reduce the crime rates in Namibia.

### **1.3 Significance of the Study**

In 2004, the Government of the Republic of Namibia adapted Vision 2030, a document that clearly spells out the country's development programmes and strategies to achieve its national objectives. It has set a goal to build a safe society with legislative, economic and social structures

in place to ensure peace and equity. This vision is a precise step in the right direction in providing a safe country.

The study is highly significant because I believe it will be a vital contribution to the debate on whether or not the possible implementation of the death penalty in Namibia should be taken seriously.

This study aims to show that the instituting of the death penalty in Namibia would be to the greater good of the nation in fulfilling the Vision 2030 goals, in giving more protection against murder and therefore in saving lives.

Further, as this study aims to discuss and conclude on whether instituting the death penalty could serve as a measure of crime reduction in the Namibian nation, it is in the best interest of individuals, citizens and foreigners alike, and the nation at large.

The absence of a related study focused on the Namibian context also makes the study significant. This study undertaken in our society and among our people will be very relevant in the developmental stage of Namibian law, which is different from the western societies where most research has been carried out.

It is hoped this study may be helpful in future policy formulation and in assisting the Law Reform Commission.

## **1.4 Methodology**

This sub heading explains the way, which is selected for this independent study to show the applied research method in this part. It will give the reader an understanding of how the practical work and data collection has been conducted, as well as how the results have been analyzed. In this section, it consists of conceptual framework, data collection, and data analysis method.

The research methodology in this chapter brings about a framework that guides the process of research. The methodology that will be used in the fact finding process of this dissertation will be both qualitative research and quantitative research.

The qualitative research will explore attitudes, behaviour and experiences through such methods as interviews or focus groups. It will attempt to get an in-depth opinion from participants.

The quantitative research will focus on statistics through the use of large-scale survey research, using methods such as questionnaires or structured interviews.

### **1.4.1 Conceptual Framework**

The goal of this study is to examine the possible effectiveness of implementing the death penalty in Namibia as a punishment for severe crimes such as murder and rape. A descriptive method is selected for the study because it is proper when the focusing study is to explain the scope of the death penalty. In this study, it becomes clear that it is both a qualitative and quantitative nature. This is due to the broad extent of the subject and the difficulty by which perception is quantified.

Thus, it is important to understand the concept of the death penalty before trying to quantify support for it and its underlying factors.

#### 1.4.2 Data Collection and Research Design

Data can be collected by form of sources. Primary data is collected with the specific study, and then collected for the first time. Primary data sources will be utilized to gain a deeper understanding this study. This is the best way to collect data that focus. Interviews are one of the most important sources for the study. The interviews are based on questionnaires which asked both about facts and their views. It is important that the addressees be allowed to give their views and experiences.

Secondary data, this study will start with looking at secondary sources, primarily books and articles. Databases, such as the JSTOR Archives of journal articles, have been important means to find interesting articles. A comprehensive and literature review is the key of this study. Its main goal is to create a base on what has been done before on the subject. In this study, both primary and secondary data have been collected.

The method of data collection in this study is theoretical sampling, as data was collected from different literature. Interviews were also conducted and questionnaires were handed out.

Mouton and Marais<sup>11</sup> define a research design as “the arrangement of conditions of collecting and analyzing of data in a manner that aims to combine relevance to the research purpose with economy in procedure”.

For the purpose of this study, a research design is the guide to the researcher to help her follow a certain pattern when researching a problem. A research design refers to all the decisions a researcher makes in planning the study, not only about the type of design to use but also about sampling, sources and procedures for collecting data and data analysis plans. The research design and methods of collection and research are based on the specific research problem.

#### 1.4.3 Data analysis methods

The data analysis in this study was guided by the fact that the research is qualitative and quantitative in nature. Welman and Kruger<sup>12</sup> state that qualitative data analysis is a search for general statements about relationships among categories of data. While quantitative research may be more useful in hypothesis-testing research.<sup>13</sup> The researcher adopted the following procedures in data analysis:

- Organising the data
- Recording the data
- Testing the research question against the data
- Writing the conclusion

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<sup>11</sup> J. Bell 1999 *Doing Your research Project* 32

<sup>12</sup> J. Welman and J. Kruger *Research Methodology: for the Business and Administrative Sciences* 178

<sup>13</sup> Supra

In this study, questionnaires are used to be instrument for analysis. Specific research methods used include information from critical texts including published reports journal papers and articles from academia, industry organisations, and governmental groups.

## **Summary**

The methodology heading focused on the tactic used in the research process of this study. It gave an explanation of qualitative and quantitative methods as methods used to gather and analyse data.

### **1.5 Literature Review**

While researching on this topic, it has been revealed that quite a number of publications are available that touch on the topic of the death penalty or capital punishment.

Writings from Cesare Beccaria and Jeremy Bentham discuss the deterrence theory at length. Shavell's work also sheds some light on the deterrence theory. Steven Barkan goes to deep lengths in explaining the views of various authors on the rational choice and deterrence theories.

In the comparative study, quite a number of journal articles and internet articles were useful in gathering the necessary data.

Umeche's article provided keynote information on the death penalty in Nigeria. B.A. Robinson's article provided information on how Sharia law and the death penalty are practiced in Nigeria. In gathering information on the death penalty in Botswana, Novak's journal article sufficed.

The information on the death penalty in Uganda was supported by Ayume's work, as well as a reliance on case law.

In gathering information on the death penalty in Zambia, several internet and newspaper articles were referred to as backing the research.

Novak's work was once again referred to show the implementation of the death penalty in Singapore. Published work from Amnesty International was also useful in gathering the relevant data.

In my arguments for the implementation of the death penalty in Namibia, scripture was referred to to support the point that the Bible supports the death penalty. Sister Helen Prejean's book was also referred to, a true account relating to the death penalty.

M.Geerken and W. Gove's writing was referred to depict the importance of celerity in the implementing of the death penalty and in achieving deterrence of the targeted crimes.

Various writings such as K. Land et al, were also referred to support the claim that the death penalty has a deterrent effect, and therefore should be instituted in Namibia.

## **CHAPTER TWO:**

### **CRIME PREVENTION AND THE DETERRENCE THEORY**

#### **2.1 Crime Prevention in General**

The aim of crime prevention brings about incentives against acts that may cause harm being created by specific laws and regulations or from other aspect of a country's legal system or its culture. Criminal code systems typically rely on specific laws and regulations to shape behaviour.

Criminologists have over the years furnished various theories on why people commit crimes, ranging from biological reasons to sociological reasons, religious reasons to psychological reasons; and each of these theories have been evaluated and criticized. These theories then lead criminologists in determining how to prevent or reduce crime acts effectively. Some of such theories are biological theory, personality theory psychoanalytic theory, behaviour theory, control theory and containment theory. For the purpose of this study, focus will be on the rational choice theory and the deterrence theory.

#### **2.2 Deterrence Theory (and the Rational Choice Theory)**

The Deterrence theory and the rational choice work hand in hand and for this reason the rational choice theory will be briefly discussed.



Dating back to the writings of Beccaria<sup>14</sup> and Bentham<sup>15</sup>, proponents of deterrence have argued that in order for legal sanctions to be effective deterrents to crime, they must be severe, administered with certainty, administered swiftly (celerity), and administered publicly.

Rational choice theory assumes that individuals decide to commit crime after calculating that whether its potential rewards outweigh its potential risks.<sup>16</sup> The roots of this theory lie in the classical school, but its modern spur comes from economic models of rational decision making<sup>17</sup> and more generally from a growing emphasis in sociology and other fields on the rationality of human behaviour.<sup>18</sup>

Shavell's analysis<sup>19</sup> considers possible deterrence effects of non monetary sanctions such as imprisonment. This means the possible consequence of imprisonment in a potential criminal's mind would be a deciding factor in whether to commit the crime or not.

Since this theory presupposes that criminals weigh the risks of their actions, it also assumes that they can be deterred from committing crime if the potential risks seem too certain or too severe. To turn that around, theoretical belief in the law's deterrent impact is based on a rational choice view of potential criminals. For that reason, rational choice theory is closely aligned with

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<sup>14</sup>Beccaria, Cesare. 1764. *On Crimes and Punishments*, H. Puolucci, trans. Indianapolis, in R. Akers and C. Sellers 2008 *Criminological Theories: Introduction, Evaluation, and Application* 33

<sup>15</sup>B. Jeremy. 1843. *Principles of Penal Law*. Edinburgh in William C. Bailey 1980 *Deterrence and the Celerity of the Death Penalty: A Neglected Question in Deterrence Research*

<sup>16</sup>R. Akers and C. Sellers 2008 op cite note 18 at page 35

<sup>17</sup>I. Ehrlich and J. Gibbons 1977 *On the Measurement of the Deterrent Effect of Capital Punishment and the Theory of Deterrence* 6 *Journal of Legal Studies* 35

<sup>18</sup>R. Collins 1994 *Four Sociological Traditions* 76-77

<sup>19</sup>S. Shavell 2004 *Foundations of Economic Analysis of Law* 54

deterrence theory, which assumes that potential and actual punishment can deter crime; in fact the two theories are often considered synonymous.

### **2.3 Deterrence Hypothesis in Detail**

According to **Becker**<sup>20</sup>, the traditional and sociological views of criminals are incorrect. Many criminals are not deviant, sick or abnormal but rather most criminals differ merely in the fact that their choices are different from the majority of the population. A central result in Becker's theoretical formulation is therefore that an increase in the probability and the severity of punishment will reduce the potential criminal participation in illegitimate activities. The latter theory has been referred to as the deterrence hypothesis. However, the modern economic theory of crime also focuses more broadly on the costs and benefits accruing to the potential criminal as a result of committing an offence. In addition, to postulating rational behaviour on the part of the potential criminal, the economic theory of crime incorporates the notion of rational, maximizing behaviour on the part of potential victims of crime.<sup>21</sup>

The hypothesis therefore proposes the following:



**Diagram One: Process of Deterrence**

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<sup>20</sup> G. Becker 1968. "Crime and Punishment: An Economic Approach," *Journal of Political Economy*, Vol. 76, No. 2, pp. 169-217

<sup>21</sup> Barkan op cit note 8 at 435

**Ian Marsh et al**<sup>22</sup> seem to offer a somewhat different viewpoint when they suggest that as rational potential victims attempt to minimize the costs of crime and thus maximize personal benefits in the face of rising crime rates, they will demand more police resources. This theory suggests that at the aggregate level law enforcement resources demanded will be a positive function of the crime rate. The higher the crime rate, the greater will be the quantity of resources allocated to the criminal justice system. The criminal justice system (CJS), in turn, can be seen as using these resources to “produce” outputs such as clearances, convictions and imprisonments.

### **2.3.1 Types of Deterrence**

In addressing the deterrent effect of the law, scholars distinguish several types of deterrence. A first distinction is between general and specific deterrence. *General deterrence* is the doctrine that a community or a society of people can be deterred from committing a criminal act after having witnessed the punishment of an individual or individuals for having committed that act.<sup>23</sup> This occurs when members of the public decide not to break the law because they fear legal punishment. Taking the example of a traffic scenario, we may obey the speed limit because we do not want to get a speeding ticket.

Specific deterrence occurs when offenders already punished for lawbreaking decide not to commit another crime because they do not want to face legal consequences again. Remaining with our traffic example, if we have already received a speeding ticket or two are close to losing our licence, we may obey the speed limit because we do not want to suffer further consequences.

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<sup>22</sup> Ian Marsh , John Cochrane and Gaynor Melville 2004 *Criminal Justice: An Introduction to Philosophies Theories and Practice*

<sup>23</sup> E. See, 2004 Student Study Guide for Criminology Theories: Introduction, Evaluation, and Application 4<sup>th</sup> ed. 8

A second distinction of deterrence is between objective and subjective deterrence. Objective deterrence refers to the impact of *actual* legal punishment, whereas subjective deterrence refers to the impact of people's perceptions of the likelihood and severity of legal punishment, deterrence theory predicts that people are deterred from crime by actual legal punishment that is certain and severe, and also by their own perceptions that legal punishment will be certain and severe.

#### **2.4 Evaluation of Rational Choice and Deterrence Theory**

Researchers have studied all these types of deterrence. Suffice to say here that the evidence on deterrence is inconsistent, with many scholars believing that actual punishment has only a weak general or specific deterrent effect on crime and delinquency, and perhaps no effect at all.<sup>24</sup>

For example, although deterrence theory predicts that higher arrest and imprisonment rates should produce lower crime rates, this pattern often does not occur; sometimes crime rates decline when imprisonment rates rise, as deterrence theory would predict, but sometimes crime rates decline only slightly, do not change at all, or even increase.

During the late 1980s, U.S. imprisonment rates rose, but so did crime rates. Although crime rates finally declined after the early 1990s as imprisonment rates continued to rise, crime

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<sup>24</sup> M.Krohn 2000 "Sources of Criminality: Control and Deterrence Theories: Accounting for Racial Differences"; D. S. Nagin 1998 "Criminal Deterrence Research at the Outset of the Twenty-First Century". *Crime and Justice: A Review of Research* 23:1-42; In S. E. Barkan op cit note 8 136

declined less in states with the greatest increase in imprisonment rates than in states with lower increases in imprisonment rates.<sup>25</sup>

Even when studies show higher arrest and imprisonment rates linked with lower crime rates, it is not always certain whether this is as a result of a deterrent effect, or whether other factors are at play.<sup>26</sup>

Further, according to the deterrence theory when penalties for certain crimes are made stricter, the rates of these crimes should decline, but once again it is put forth that this often does not happen<sup>27</sup>. Moreover, although it seems obvious that offenders who are arrested and imprisoned should reoffend less because of their punishment, evidence of this specific deterrent effect is mixed at best, and there is even evidence of an opposite effect: that punishment *increases* the chances that offenders will break the law again.<sup>28</sup>

Finally, the rational choice and deterrence theories are based on the assumption that criminals calculate their behaviour. This assumption is critical for these theories because if criminals did not weigh the risks of their behaviour, then the threat of arrest and punishment could not deter them.

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<sup>25</sup>S.E. Barkan 2006 op cite note 8 138

<sup>26</sup>H. N. Pontell 1984. *A Capacity to Punish: The Ecology of Crime and Punishment*.

<sup>27</sup>S. Walker 2001. *Sense and Nonsense about Crime and Drugs: A Policy Guide*.

<sup>28</sup>D. Bishop 2000. "Juvenile Offenders in the Adult Criminal Justice System." *Crime and Justice: A Review of Research* 27:85; G. Pogarsky and A. Piquero 2003. "Can Punishment Encourage Offending: Investigating the 'Resetting' Effect". *Journal of Research in Crime and Delinquency* 40:112

Here again the research does not provide much support for deterrence theory. Although some crimes, such as corporate crime, involve careful planning and weighing of all risks,<sup>29</sup> many other crimes typically do not involve such efforts. Also, passion crimes such as homicide and aggravated assault in particular tend to be emotional crimes performed relatively spontaneously out of anger or other strong passions.

A study of property criminals found that they “simply do not think about the possible legal consequences of their criminals actions before committing crimes”.<sup>30</sup> Instead they thought mainly of the possible prize from committing crime because they believed they would not be caught. They thus commit their crimes “with little concern for the law, arrest, or imprisonment”.<sup>31</sup>

For this reason and as the evidence put forth, increases in the penalties for crimes do not seem to deter them. Overall, then, rational choice and deterrence theory might accurately describe the decision making of some criminals for some types of crimes, but it appears more limited in scope than assumed by its proponents.<sup>32</sup>

Some research also documents the deterrent effect of internal punishment (e.g. guilt, shame, embarrassment, and conscience) and of informal sanctions such as the disapproval of friends and loved ones.<sup>33</sup> However, such evidence says does not deal with the deterrent effect of *legal*

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<sup>29</sup>R. Paternoster and S. Simpson 1993. “A Rational Choice Theory of Corporate Crime”. In *Routine Activity and Rational Choice* R. V. Clarke and Marcus Felson (eds) 37-58

<sup>30</sup>K. Tunnel 1990 “Choosing Crime: Close Your Eyes and Take Your Chances” *Justice Quarterly* 7 p. 680

<sup>31</sup>Ibid at page 687

<sup>32</sup>Akers and Sellers 2008 op cite note 14 at page 34

<sup>33</sup>H. Grasmick, R. Bursikm and B. Arneklev 1993 Reduction in Drunk Driving as a Response to Increased Threat of Shame, Embarrassment, and Legal Sanctions” *Criminology* 31:45

punishment: “The question to be answered about deterrence theory is not whether punishment of any kind from any source deters, but whether the threat of punishment by law deters”.<sup>34</sup>

## **2.5 The Evidence against a Deterrent Effect**

The following are the evidences put forward to prove that the death penalty has no deterrent effect.<sup>35</sup>

First, decreases in crime rates have not always accompanied the huge increases in incarceration over the last two decades as already indicated above.

Second, at the state level only a weak and inconsistent relationship exists between severity of punishment (e.g. length of prison terms) and crime rates. Many states with longer prison terms have higher crimes rates than states with shorter terms. As with similar research on arrest rates, even when a long sentence-low crime rate relationship expected from a deterrence viewpoint is found, this does not necessarily mean that harsh sentences deter crime. Using a *system capacity* argument, it is just as likely that states with lower crime rates and presumably less crowded prisons can afford to keep their prisoners behind bars for longer periods.<sup>36</sup>

Third, studies of perceptual deterrence find little or no relationship between respondents’ awareness of the strictness of punishment and their chances of committing various offenses.<sup>37</sup>

Thus neither perceived severity of punishment nor perceived certainty appear to deter criminality.

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<sup>34</sup>Akers and Sellers 2008 op cit note 14 at page 25

<sup>35</sup>S. E. Barkan op cite note 8 at page 529

<sup>36</sup>Pontell op cite note at page 25

<sup>37</sup>Paternoster op cite note at page 28

Fourth, and perhaps most tellingly, decreases in crimes rates do not generally occur after the establishment of harsher penalties for various crimes.

## **2.6 Evaluation of the Evidence against the Death Penalty**

The evidence against the implementation and for the abolition of the death penalty is quite compelling to the conclusion that the death penalty does not serve as a form of deterrence for crime. However, it is to my observation that most of the research carried out where done with focus mainly on the United States of America, and Europe. Studies were carried out comparing states with the death penalty in the *U.S* with other states in the *U.S* that did not have the death penalty. Fewer comparative studies were carried out in European states.

It is therefore vital to note that as this essay aims to determine whether the implementation of the death penalty would serve as a deterrent for crimes in *Namibia*, an *African* nation, comparative analogy should be done with other *African* nations.

On weighing the evidence against the death penalty, practically, it is impossible to perhaps measure, with mathematical precision or certainty, how many people in the world have been saved because of deterrence, or how many people have restrained themselves from violent crimes, such as crimes of the murder and rape, because of their knowledge of probable consequences for the crime, the likelihood of the imposition of the ultimate punishment.

However, the mere fact that a murderer or rapist is sentenced to death ensures that he never commits such an offence again. The death penalty certainly deters the murderer who is executed.



Strictly speaking, this is a form of incapacitation. This alone goes to show the countless of lives spared because of the incapacitation of the criminal.

And surely the death penalty is the only penalty that could deter prisoners already serving a life sentence and tempted to kill a guard, or offenders about to be arrested and facing a life sentence. Perhaps they will not be deterred. But then they would certainly not be deterred by anything else. We owe all the protection we can give to law enforcers exposed to special risks.

As put by Ernest van den Haag, Professor of Jurisprudence and Public Policy, Fordham University “Execution of those who have committed heinous murders may deter only one murder per year. If it does, it seems quite warranted”.<sup>38</sup>

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<sup>38</sup> E. Van der Haag 1986 *The Ultimate Punishment: A Defense* 67

## **CHAPTER THREE:**

### **A COMPARATIVE STUDY**

This chapter will discuss mainly African jurisdictions like Botswana, Nigeria and Uganda so we can see how they have dealt with the issue of capital punishment in order to see if indeed the hypothesis of deterrence being achieved is really the case and also see how Namibia can learn from it.

In addition, one non Africa jurisdictions - Singapore will be briefly referred to as a comparative study is done.

Several books will be referred to; I will look at books on the death penalty and capital punishment in several jurisdictions.

Anti-death penalty campaigners always argue that death is not a deterrent and usually cite studies based upon American states to prove their point. This is, in my view, flawed and probably chosen to be deliberately misleading. Let us examine the situation in three countries.

#### **3.1 Nigeria**

The right to life is a universal right. However, various jurisdictions recognize permissible limitation to this right. In Nigeria, such permitted control includes the imposition of the death penalty.

The death penalty is provided for in **Section 33(1)** of the **Nigerian Constitution**<sup>39</sup>. Specifically, the cited section provides as follows:

“Every person has a right to life, and no one shall be deprived intentionally of his life save in execution of the sentence of a court in respect of a criminal offence of which one has been found guilty in Nigeria”.

In Nigeria, today, five offences are punishable by death. These are: murder, treason, treachery, directing and controlling or presiding at an unlawful trial by ordeal from which death results, and conviction for armed robbery.

In 2009 a bill passed by Imo State House of Assembly provides for the mandatory death penalty for anyone convicted of kidnapping. People whose premises are used by a kidnapper to hold someone hostage also face the death penalty<sup>40</sup>.

However, under the Sharia criminal law which is enforced in some states in northern Nigeria the offences punishable widened offences punishable by death. For instance, under Sharia law, death penalty can be applied for sexual crimes.

The Constitution of the Federal Republic of Nigeria being the supreme law of the land clearly supports the death penalty and therefore the constitutionality of death penalty is not in doubt. In

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<sup>39</sup> Nigerian Constitution of 1999

<sup>40</sup> Amnesty International, *Kidnappers face the death penalty in Nigeria's Imo State* 2009, May 8. Available: <http://www.unhcr.org/refworld/docid/4a07cd12c.html> [2011, October 21]

fact, the Supreme Court of Nigeria upheld the constitutionality of the death sentence in the case of **Onuoha Kalu v The State**<sup>41</sup>.

In this case, the appellant was charged with the offence of murder. The trial court found him guilty. The appellant was accordingly convicted and sentenced to death. Upon appealing, his conviction was upheld. He further appealed to the Supreme Court where he brought up an issue regarding the constitutionality of the death sentence in Nigeria. The Supreme Court, as usual, invited distinguished lawyers to address it on the issue. After considering submissions by all parties, the Supreme Court came to the conclusion that the death penalty was indeed constitutional.

In the holding of the Court, it was stated by Justice Iguh that:

“Upon a careful perusal of the various foreign authorities to which our attention was drawn by the opinion that the death penalty per se amounts to torture, inhuman and degrading treatment and therefore intrinsically unconstitutional seems to me a minority view. Indeed a close study of those decisions reveals that the foreign jurisdictions that have similar provisions in their constitution as ours have repeatedly pronounced the death penalty to be constitutionally valid.”

### 3.1.1 Support for the Death Penalty in Nigeria

The death penalty in Nigeria is supported for its retributive and deterrence measure. On its retributive extent, it is believed and supported that the criminal should die for the crime he has committed. Allowing him to go free is to make him a threat to others.

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<sup>41</sup> 1998 13 NWLR

Further, just as an individual has the right to safeguard as well as take his life whenever he pleases, the state has the right and duty to take the life of a citizen in order to increase its welfare. This argument hinges on the ethical principle that evil deserves castigation and wrong doing deserves reparation by adequate deprivation and punishment for the wrong doer<sup>42</sup>.

In the support of the death penalty on deterrence, it serves as a deterrent to future crimes and as a preventive act for capital offences.

The support for the death penalty in Nigeria stretches to the argument that if the death penalty is abolished, it may lead to an increase in the number of extra judicial killings by the police and survivors of violent crimes. This is known as street justice. For example, knowing that a shameless criminal would get only a life sentence with the possibility of state pardon may make an overzealous police officer or the victim of such an offence to seek revenge outside the law.

In 2004 the Nigerian Government began a national debate on whether or not the death penalty should be abolished<sup>43</sup>. Opinions collated during the debate formed the government's position on whether or not to abolish the death penalty.

In 2008 the European Parliament had a resolution on the death penalty in Nigeria<sup>44</sup> whereby it called on the state governments to abolish the death penalty.

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<sup>42</sup> Umeche, Chinedum Ikenna 2007, Aug 24. Death penalty in Nigeria: An evaluation of the arguments for and against its abolition *Panorama* [Online]. Available: <http://www.tigweb.org/youth-media/panorama/article.html?ContentID=15629&start=5174> [2011, May 16]

<sup>43</sup> S. Olukoya 2004, January 23. Nigeria begins death penalty debate. Available: <http://news.bbc.co.uk/2/hi/africa/3423143.stm> [2011, August 2]

<sup>44</sup> European Parliament resolution of 20 November 2008 on the death penalty in Nigeria

Yet, Nigeria still has the death penalty as a legal form of punishment. However, at the 4th Session of the United Nations Universal Periodic Review (UPR) in Geneva on 9 February 2009, Nigeria's Minister of Foreign Affairs said that “Nigeria continues to exercise a self-imposed moratorium on the death penalty.”<sup>45</sup>

### 3.1.2 Sharia Law and Death Penalty in Nigeria

Whereas Islamic Sharia Courts have jurisdiction over criminal cases in 12 of Nigeria's 36 States and these courts continue to hand down death sentences.

In March 2002, a woman, Amina Lawal Kurami, from the small village of Kurami in Katsina in northern Nigeria was sentenced to death for adultery. The sentence was delayed for about eight months until she has finished breast feeding her infant. She appealed the conviction, on the basis that the offence occurred before Sharia law came into effect. Her lawyers also claimed that she had no legal representation in her original court trial before a village court. The appeal was rejected by the Islamic High Court in Funtua in Katsina state. Dozens of spectators cheered and shouted "*God is great*". Her execution was delayed until at least January 2004 until her daughter finished breastfeeding. Her case was eventually dismissed on grounds that she was not given ample opportunity to defend herself.<sup>46</sup>

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<sup>45</sup> Amnesty International, *Kidnappers face the death penalty in Nigeria's Imo State* 2009 op cit note 40

<sup>46</sup> Compiled from B.A. Robinson 2002, September 2. Punishment for Non-Marital Sex in Islam: Examples of Convictions under Sharia Law Available: [http://www.religioustolerance.org/isl\\_adul.htm#menu](http://www.religioustolerance.org/isl_adul.htm#menu) [2011, October 27]

This would mean that had it not been dismissed, Amina would have been executed as sentenced. However, it is viewed that federal law does not punish adultery and trumps regional law, religious or otherwise.<sup>47</sup>

### **3.2    Botswana**

The death penalty has been in force in Botswana since the country became independent in 1966 and 42 executions have been carried out. The death penalty is available against those convicted for murder, treason, an attempt on the life of the head of state and the military offenses of mutiny and desertion in the face of the enemy.

On March 2, 2005 the African Commission on Human and Peoples' Rights called on Botswana to end its enforcement of 'inhuman and degrading' corporal and capital punishment. Botswana has defended its position on both issues, saying this was the will of its citizens. On December 18, 2007 Botswana voted against the Resolution on a Moratorium on the Use of the Death Penalty at the UN General Assembly and was one of the most vocal opponents of the resolution during the debates.

**Section 203** of the **Botswana Penal Code** creates a presumption in favour of the Death Sentence:

- 1) Subject to the provisions of subsection (2), any person convicted of murder shall be sentenced to death.

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<sup>47</sup> Helon Habila 2003, October 3 Justice, Nigeria's Way Available:  
<http://www.nytimes.com/2003/10/04/opinion/justice-nigeria-s-way.html?ref=aminalawal> [2011, October 27]

2) Where the Court in convicting a person of murder is of the opinion that there are extenuating circumstances, the Court may impose any sentence other than death.

3) In deciding whether or not there are any extenuating circumstances the Court shall take into consideration the standards of behaviour of an ordinary person of the class of the community to which the convicted person belongs<sup>48</sup>

This section retains a mandatory death sentence for the crime of murder, against the modern trend toward discretionary death penalty regimes. Since mandatory death sentences does not avail for sentencing discretion, Botswana introduced the doctrine of extenuating circumstances by which defendants may prove they lack moral blame-worthiness because of a factor that influenced their mind when committing the crime<sup>49</sup>. The doctrine however shifts the burden of proof to the defendant, it does not apply objective guidelines or standards outside of judicial precedent, and its application is subject to low scrutiny on appeal.

The doctrine of extenuating circumstances softens the rigidity of a mandatory death sentence. In theory, the doctrine allows a judge to consider circumstances that impacted a defendant's mind at the moment of the crime. Extenuating circumstances are those factors reflecting on the moral blameworthiness, as opposed to the legal culpability of the defendant<sup>50</sup>. The mandatory nature of Botswana's death penalty regime is not constitutionally required, and a discretionary death

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<sup>48</sup> Interpreted to create a presumption in favour of the death penalty in *State v Ntesang* [1995] 2 LRC 338 at 343, Court of Appeal, Judgment of Aguda JA

<sup>49</sup> Daniel D. Ntanda Nsereko, *Extenuating Circumstances in Capital Offenses in Botswana*, 2 CRIM. L.F. 235, 235 n.1 (1991).

<sup>50</sup> *State v Letsolo* 1970 (3) SA (A) at 476



penalty would be more transparent and thus would better prevent arbitrary application and the possibility of mistake.<sup>51</sup>

President Khama in reiterating his support for the death penalty said people who took their time to plan and deliberately killed others should know that they would be executed. This did not mean that the government enjoyed ‘doing it’ but it was the only way to discourage people from taking other individuals’ lives. “The fear of facing death penalty can make a would-be killer to think twice about murdering somebody,” he said. “Nobody wants to die.”<sup>52</sup>

The intentional homicide rate per 100,000 population in Botswana is between 14.2 and 21.5<sup>53</sup>. I think that Botswana is far more ahead of South Africa - good on them for protecting the innocent. The crime rate in Botswana is *moderate* compared to industrialized countries. An analysis was done using INTERPOL data for Botswana<sup>54</sup>.

### **3.3 Uganda**

Ugandan Statute makes provision for the death sentence if an offender has been convicted of either of the following crimes: murder, aggravated robbery, treason, terrorism, kidnap with intent to murder, defilement, rape, various military offences.

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<sup>51</sup> Andrew Novak 2009 *Guilty of Murder with Extenuating Circumstances: Transparency and the Mandatory Death Penalty in Botswana* Boston University International Law Journal Vol. 27 175 at 193

<sup>52</sup> 2008, November 03 Death penalty still stands in Botswana, says Khama *Palapye* [Online] Available: [http://www.gov.bw/cgi-bin/news.cgi?d=20081103&i=Death\\_penalty\\_still\\_stands\\_in\\_Botswana\\_says\\_Khama](http://www.gov.bw/cgi-bin/news.cgi?d=20081103&i=Death_penalty_still_stands_in_Botswana_says_Khama) [2011, August 2]

<sup>53</sup> Crime Statistics in Botswana. Available: <http://www.unodc.org/documents/data-and-analysis/IHS-rates-05012009.pdf>; [2011, May 10]

<sup>54</sup> Dr. Robert Winslow A Comparative Criminology Tour of the World - Botswana. Available: <http://www.interpol.int/Public/Statistics/ICS/1996/Botswana1996.html> [2011, October 27]

In Uganda the maximum sentence is usually reserved for worst examples of the kinds of offence in question. This is on the assumption that in fixing the maximum penalty the legislature must have had in mind the most aggravating circumstances of the commission of the offence and consequently the maximum penalty should be imposed rarely.<sup>55</sup>

Additionally for the offence of defilement, where the death sentence is discretionary, it is accepted that the death sentence should be the ‘maximum’ sentence<sup>56</sup>. “There is a need always to tailor the sentence to fit the crime. Though the maximum sentence prescribed by law is for this offence death, it was wrong in principle to have imposed...a sentence of life imprisonment.”<sup>57</sup>

The above provides an example of how the principles of individualised sentencing and proportionality should determine sentence even where the maximum sentence is a lot harsher than the sentence that was imposed.

During the debate of the Constitution of 1995 the Right Honourable Mr Mulenga sponsored an amendment to **Article 22(1)** of the **Ugandan Constitution**, which ensured for an appeal on sentence in capital cases. In relation to when the death penalty is applicable Mr Mulenga stated;

“We have already passed the clause about the protection of our fundamental rights, and the first one is the right to life. Therefore, it should be only in very exceptional circumstances that we justify deliberate taking away of life”<sup>58</sup>

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<sup>55</sup> Francis J Ayume 1986 Criminal Procedure and Law in Uganda 149

<sup>56</sup> Byakika James v Uganda Criminal Appeal No. 22 of 2001 SC at page 7

<sup>57</sup> Yanus Wanaba v Uganda Criminal Appeal No. 156 of 2001 Court of Appeal at page 8

<sup>58</sup> Right Hon. Mr Mulenga at p1891, para 2 LHC, sentence 2 of the Debates of the Constituent Assembly of Uganda

This statement shows it was the intention of the Constituent Assembly, the body responsible for the **Constitution of 1995**, that the death penalty should only be imposed in ‘very exceptional circumstances’ for the ‘worst examples of offences’. In other words the death penalty is the maximum penalty. In 2005 Supreme Court of Uganda<sup>59</sup> struck down the mandatory death penalty for murder as unconstitutional<sup>60</sup>.

The court further ruled that, after three years, a condemned prisoner has suffered cruel and unusual punishment and the death sentence should be commuted.

The crime rate in Uganda is low compared to industrialized countries (with the exception of murder). An analysis was done using INTERPOL data for Uganda<sup>61</sup>.

### **3.4   Zambia**

**Article 12(1)** of the **Zambian Constitution**<sup>62</sup> states that no person shall be deprived of life; however Zambia still retains the death penalty. It permits the use of death penalty in the execution of the sentence of a court in respect of criminal offence which that person has been convicted.

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<sup>59</sup>Attorney General v. Kigula, [2009] UGSC 6 (Uganda Sup. Ct.).

<sup>60</sup> Andrew Novak 2009 op cite note 43 at page 201

<sup>61</sup> Dr. Robert Winslow A Comparative Criminology Tour of the World - Uganda. Available: <http://www.interpol.int/Public/Statistics/ICS/2002/Uganda2002.html> [2011, October27]

<sup>62</sup> Act of 1991

In Zambia, the death penalty is provided for under various offences. Since 1964, when Zambia became independent, 53 people have reportedly been executed by hanging. Conversely Zambia has not executed anybody since 1997<sup>63</sup>.

Upon a challenge on the constitutionality of the death penalty, Supreme Court rejected the claim. Kevin Hang'andu, a prominent lawyer and activist, had argued that because the death penalty was a mandatory sentence in Zambia, it violated Article 15 of the Constitution banning "cruel, inhuman and degrading punishment".

The Supreme Court judgment has essentially certified the use of the death penalty in whatever circumstances, holding that article 12 of the constitution specifically allows the use of the death penalty derogating from the right to life.

Justice Deputy Minister of Zambia Bradford Machila said 41 people have been sentenced to death since 2001 although none of them has been executed<sup>64</sup>. This goes to show the low rate of people committing crimes that warrant the death penalty

The crime rate in Zambia is low compared to industrialized countries. For purpose of comparison, data were drawn for the seven offenses used to compute the United States FBI's index of crime<sup>65</sup>.

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<sup>63</sup> N. Sibanda. 2007, June 25. Death Penalty Concerned Zambian Activists Look Beyond Moratorium. Available: [http://new\\_focus/deathpenalty/index.asp](http://new_focus/deathpenalty/index.asp) [2011, August 2]

<sup>64</sup> Death penalty to remain in Zambia. 2007, February 25 *People's Daily* [Online] Available: [http://new\\_focus/deathpenalty/index.asp](http://new_focus/deathpenalty/index.asp) [2011, August 2]

<sup>65</sup> Dr. Robert Winslow A Comparative Criminology Tour of the World - Zambia. Available: <http://www.interpol.int/Public/Statistics/ICS/2002/Uganda2002.html> [2011, October27]

Now that the above three countries have been discussed, and the essay has had a look on how the death penalty works in these countries, let us skim through non-African states that have implemented or abolished the death penalty.

### **3.5 Singapore**

Singapore stands out in the common law world as having upheld their mandatory death penalty schemes from constitutional challenge<sup>66</sup>. The Singapore Court of Appeal upheld the mandatory death sentence from constitutional challenge by a 24-year old Australian national of Vietnamese origin, who had been sentenced to death for importing nearly 400 grams of diamorphine. Consequently, death sentences continue to be mandatory in Singapore for drug-related offences.

Singapore always carries out death sentences where the appeal has been turned down, so its population knows precisely what will happen to them if they are convicted of murder or drug trafficking. This concept deeply embedded into the sub-consciousness of most of its people acts as an effective deterrent

In 1995, Singapore hanged an unusually large number of 7 murderers with 4 in 1996, 3 in 1997 and only one in 1998 rising to 6 in 1999 (3 for the same murder)<sup>67</sup>. Singapore takes an equally hard line on all other forms of crime with stiff on the spot fines for trivial offences such as

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<sup>66</sup> In *Nguyen Tuong Van v. Public Prosecutor* (2004) SGCA 47

<sup>67</sup> A. Novak 2010. *The Death Penalty and the New Constitution of Kenya* 31 AFR. L. TODAY .

dropping litter and chewing gum in the street, caning for males between 18 and 50 for a wide variety of offences, and rigorous imprisonment for all serious crimes<sup>68</sup>.

It would seem that in Singapore which almost always carries out death sentences, there is far less serious crime. This tends to indicate that the death penalty is a deterrent, but only where execution is a virtual certainty<sup>69</sup>.

A death penalty jurisdiction that has low rates of crime due to the death penalty is Singapore.<sup>70</sup>

With this comparative study done, sufficient evidence shows that capital punishment in these countries have worked successfully and are further persuasive to show that the death penalty should be implemented in Namibia.

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<sup>68</sup> Alan Shadrake Once a Jolly Hangman: Singapore's Justice in the Dock,

<sup>69</sup> Amnesty International Ltd 2011 Death Sentences And Executions 24

<sup>70</sup> D. Sharp, Justice Matters, Death Penalty and Deterrence: Let's be clear. Available: <http://www.off2dr.com/modules/cjaycontent/index.php?id=23> [2011, October 21]

**CHAPTER FOUR:**  
**ARGUMENTS FOR THE DEATH PENALTY IN NAMIBIA**

This chapter will make a solid and ground argument for the implementation of the death penalty in Namibia, and will further discuss how this could be a reality.

**4.1 Introduction**

Opponents of capital punishment argue that capital punishment is not a deterrent; however such an effect is not measurable, because determining who intended to but opted not to commit a crime is virtually impossible. No one readily admits to wanting to commit a crime, particularly a capital crime, but chooses not to do so only because of the likelihood of sanction. Empirically, it is impossible to perhaps measure, with mathematical precision or certainty, how many people in the world have been saved because of deterrence or how many people have restrained themselves from violent crimes, such as crimes of the homicide or murder varieties, because of their knowledge of probable consequences for the crime, the likelihood of the imposition of the ultimate punishment.

Capital punishment antagonists use the morality argument, stating that it is against all moral values to take a person's life. A quote often used in their support is: "The law which attempts a man's life is impractical, unjust, inadmissible. It has never repressed crime -- for a second crime is every day committed at the foot of the scaffold".<sup>71</sup> Or like Helen Prejean wrote, "If we believe

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<sup>71</sup> Marquis De Sade, *Philosophy in the Bedroom*

that murder is wrong and not admissible in our society, then it has to be wrong for everyone, not just individuals but governments as well”.<sup>72</sup>

Virtually all religious scholars agree that the correctly translated commandment “Thou shalt not murder” is a prohibition against individual cases of murder. There is no biblical prohibition against the government imposition of the death penalty in deserving cases. Indeed, the government imposition of capital punishment is required for deliberate murder.

God, Himself, instituted the death penalty<sup>73</sup> and Christ regarded capital punishment as a just penalty for murder.<sup>74</sup> God gave to government the legitimate authority to use capital punishment to restrain murder and to punish murderers. Not to inflict the death penalty is a flagrant disregard for God’s divine Law which recognizes the dignity of human life as a product of God’s creation. Life is sacred, and that is why God instituted the death penalty. Consequently, whoever takes innocent human life forfeits his own right to live.<sup>75</sup>

A fact that is conveniently overlooked by anti-capital punishment campaigners is that we are all ultimately going to die. In some cases, we will know of this in advance and suffer great pain and emotional anguish in the process. This is particularly true of those diagnosed as having terminal cancer. It is apparently acceptable to be ‘sentenced to death’ by one’s family doctor without having committed any crime at all but totally unacceptable to be sentenced to death by a judge

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<sup>72</sup>H. Prejean 1994 *Dead Man Walking An Eyewitness Account Of The Death Penalty In The United States* 52

<sup>73</sup> Genesis 9:6 King James Translation 2004 Bible Society of Uganda

<sup>74</sup> Matthew 26:52 King James Translation 2004 Bible Society of Uganda

<sup>75</sup>Protestant scholar Rev. Reuben Hahn (Mt. Prospect, Ill.), *Human Events*, 3/2/85.



having been convicted of murder or drug trafficking (the crimes for which the majority of executions worldwide are carried out) after a fair and careful trial.

We are concerned here only with the imposition of capital punishment for the crime of murder and rape, and when a life has been taken or destroyed deliberately by the offender; we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction suitable to the most extreme of crimes.

Challengers of the death penalty also state that there is the inevitable possibility of errors in capital cases, and such errors cannot be corrected if discovered later, and thus capital punishment has considerable practical flaws that warrant elimination. Since the problem is known, it would be rational to improve on the system, put in place checks and balances to ensure that such errors are minimized, and if possible totally eliminated.

Execution is a very real punishment rather than some form of "rehabilitative" treatment, the criminal is made to suffer in proportion to the offence. Although whether there is a place in a modern society for the old fashioned principal of "lex talens" (an eye for an eye), is a matter of personal opinion. Retribution is seen by many as an acceptable reason for the death penalty according to my survey results.

Money is not an inexhaustible commodity and the government may very well better spend our limited resources on the old, the young and the sick, rather than on the long term imprisonment of murderers and rapists.

Anti-capital punishment campaigners in the U.S. cite the higher cost of executing someone over life in prison, but this, whilst true for America, has to do with the endless appeals and delays in carrying out death sentences that are allowed under the U.S. legal system where the average time spent on death row is over 12 years. In Britain in the 20th century, the average time in the condemned cell was from 3 to 8 weeks and only one appeal was permitted.

Does the death penalty deter? It is hard to prove one way or the other because in most retentionist countries the number of people actually executed per year (as compared to those sentenced to death) is usually a very small proportion. It would, however, seem that in those countries (e.g. Singapore) which almost always carry out death sentences, there is far less serious crime. This tends to indicate that the death penalty is a deterrent, but only where execution is a virtual certainty.

The death penalty is much more likely to be a deterrent where the crime requires planning and the potential criminal has time to think about the possible consequences. Where the crime is committed in the heat of the moment there is no likelihood that any punishment will act as a deterrent.

There is a strong argument here for making murder committed in these circumstances not punishable by death or for having degrees of murder as in the USA.

## **4.2 Issues Pertaining to Implementing the Death Penalty**

### **4.2.1 "Life without parole" versus the death penalty**

Many opponents of capital punishment put forward life in prison without parole as a viable alternative to execution for the worst offenders, and surveys in America have shown that life without parole (LWOP) enjoys considerable support amongst those who would otherwise favour the death penalty.

However, there are drawbacks to this:

It is argued by some that LWOP is in fact more cruel than death. This proposition was put forward in a UK parliamentary debate by the philosopher John Stuart Mill in the 19th century. It is interesting to note that no less than 311 prisoners serving life sentences in Italy petitioned their government in 2007 for the right to be executed. They cited LWOP as a living death where they died a little every day. One might be forgiven for asking what is the point of locking a person up to the day they die and one might wonder if it is indeed a far worse punishment than death.

Death clearly permanently incapacitates the criminal and prevents them committing any other offence. LWOP cannot prevent or deter offenders from killing prison staff or other inmates or taking hostages to further an escape bid - they have nothing further to lose by doing so and there are instances of it happening in the USA.

In **S v XehemiaTjijo**<sup>76</sup> it was even argued that life imprisonment constitutes a sentence of death.

In fact, **Levy J** in his conclusion in that case stated that life-imprisonment was a sentence of death, and concluded that a sentence of life imprisonment is unconstitutional. Even if such a

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<sup>76</sup>High Court of Namibia, 4/9/91. unreported

sentence does not conflict with **Article 6** of the **Constitution** it might still be unconstitutional if it is inconsistent with **Article 8(1)** of the **Constitution** which protects the dignity of all persons or **Article 8 (2)(b)** which protects all persons from cruel, inhuman or degrading treatment or punishment or if such a sentence is in conflict with any of the other constitutional provisions to which I have previously referred<sup>77</sup>. If this is the argument, the evitable question is that what would be the proper sentence for a convicted murderer and rapist; what possible sentence could a judge hand down to a cold blooded killer if both the death penalty and life imprisonment and not options?

Further, however good the security of a prison, someone will always try to escape and occasionally will be successful. If you have endless time to plan an escape and everything to gain from doing so, it is a very strong incentive.

Also, there is no guarantee that future governments will not release offenders, who were imprisoned years previously, on the recommendations of various professional ‘do-gooders’ who are against any punishment in the first place.

#### 4.2.2 Pain and suffering – is the death penalty a cruel and unusual punishment?

The **Convention against Torture and Other forms of Cruel, Inhuman or Degrading Treatment or Punishment** prohibits the imposition of cruel and unusual punishment. Whilst this would seem reasonable it never intended to guarantee a pain free death.

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<sup>77</sup> Lukas Tcoeib v State 1996/02/06 Case No: SA 4/93

Obviously one cannot be inside the brain of a person as they are being put to death to know what, if any, pain they are feeling. All we can do is to observe their reaction to the process and carry out an autopsy afterwards. If for instance in a measured drop hanging, there is no obvious struggling or movement after the drop and the autopsy finds that the neck has been broken and the spinal cord severed then it is reasonable to conclude that the person died a pain free death. In lethal injection if the person appears to lapse into unconsciousness within seconds of the commencement of the injection of the fast acting barbiturate that is normally the first chemical injected in the US we conclude the same.

It is equally clear that when any form of execution is bungled the prisoner often exhibits signs of great suffering. Therefore, all necessary precaution should be taken to avoid where possible any contravening of this provision.

#### **4.2.3 Can capital punishment ever be "humane"?**

I have never personally believed that any form of death, let alone execution, is either instant or painless. The question then arises, which method of capital punishment should a modern "civilised" society use?

Should our worst criminals be given a completely pain free death even if the technology exists to provide one, or should a degree of physical suffering be part of the punishment?

Whatever method is selected should have some deterrent value whilst not deliberately causing a slow or agonising death.

British style, hanging is an extremely quick process that is designed to cause instant and deep unconsciousness and also benefits from requiring simple and thus quick preparation of the prisoner. It also seems to have substantial deterrent value.

Lethal injection may appear to be more humane than other methods to those who have to administer and witness it, but it is a very slow process. It is essential that the catheter actually goes into a vein rather than through it or round it if the prisoner is to die a pain free death. If it doesn't, then the person may suffer a great deal of pain but will be unable to communicate this due to the paralysing effects of the second drug. The biggest single objection to lethal injection is the length of time required to prepare the prisoner, which can take from 20 to 45 minutes depending on the ease of finding a vein to inject into.

The gas chamber seems to possess no obvious advantage as the equipment is expensive to buy and maintain, the preparations are lengthy, adding to the prisoner's agonies, and it always causes a slow and cruel death. It is also dangerous to the staff and witnesses.

Electrocution can cause a quick death when all goes well, but seems to have a greater number of technical problems than any other method, often with the most gruesome consequences. This may in part be due to the age of the equipment - in most case 70-90 years old.

Shooting by a single bullet in the back of the head seems greatly preferable to shooting by a firing squad in that it is likely to cause instant unconsciousness followed quickly by death rather than causing the prisoner to bleed to death, often whilst still conscious.

It is easy to condemn capital punishment as barbaric, but is spending the rest of one's life in prison so much less brutal to the prisoner or is it merely a way of soothing society's conscience and removing the unpleasantness for the staff and officials?

With the following arguments put forward, I believe it is gripping and convincing that it will be in the best interest of the Namibian society if the death penalty was re instated.

## **CHAPTER FIVE:** **RECOMMENDATIONS AND CONCLUSION**

This chapter will close the essay by making recommendations and conclude on the matter.

The recent murder of a young school girl, Magdalena Stoffels has ignited debate on the reinstatement of the death penalty as a possible deterrent to the increasing number of gruesome crimes committed against women and children in the country.

Approximately 3,000 people, including schoolchildren from 10 schools, marched from Stoffels' school to the Magistrates' Court in Katutura to protest her rape and murder and to deliver a petition to the Deputy Prosecutor General Johnny Truter which pointed out the high rate of violent crime on Namibian children<sup>78</sup>.

It is advocated that the death penalty should be brought back as a measure to curb heinous crimes such as the recent gruesome murder of a woman whose body parts have been found in roadside rubbish bins, a Member of the Opposition has urged. "Innocent women were murdered, a twelve-year-old boy was executed in Walvis Bay in May 2006, and two twin babies were raped just a few days ago," said Katuutire Kaura, President of the DTA.

Adversely, **Article 6 of Chapter 3 of the Namibian Constitution**<sup>79</sup> under fundamental human rights and freedoms of the Namibian constitution states:

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<sup>78</sup>J. Smith 2010, August 2. "Thousands march for Magdalena". *The Namibian* [Online]. Available: <http://allafrica.com/stories/201008020560.html>. [2011, March 17].

<sup>79</sup>Act 1 of 1990



“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”.

It is however **Article 131** of the same constitution which makes it difficult for legislators to even ponder on the death penalty for several years. 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.

Further, 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**<sup>80</sup>, the **Convention on the Rights of the Child**<sup>81</sup>, and the **Convention against Torture and Other forms of Cruel, Inhuman or Degrading Treatment or Punishment**<sup>82</sup>.

Also, the country 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**<sup>83</sup> and the **African Charter on the Rights and Welfare of the Child**<sup>84</sup>.

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<sup>80</sup>Articles 6 and 7

<sup>81</sup>Article 37

<sup>82</sup>Articles 1 and 16

<sup>83</sup>Articles 4 and 5

<sup>84</sup>Article 5

With all this intact, it seems virtually impossible to institute the death penalty in Namibia. But as the old saying goes” where there’s a will, there’s a way.

## **5.1 Recommendations**

Economic studies “find each execution results in three fewer murders, five fewer homicides, between three and 25 fewer murders with an average of 14, between 8-28 murders with an average of 18, and even 150 fewer murders.” The death penalty does have deterrent effect. To say otherwise would be to admit that potential murderers are not rational (and thus admit that they should not be subject to criminal justice at all).

My recommendations<sup>85</sup> therefore are as follows:

### **5.1.1 The Amendment of Article 131 or Introduction of a New Constitution**

My first suggestion would be to amend Article 131 which states that Article 6 may not be amended. Once Article 131 is amended, legislature can thereafter amend Article 6.

Conversely, if it is evident that Chapter 3 of the Namibian Constitution cannot be amended, the other alternative for implementing the death penalty is if a new constitution bill is drafted and promulgated. This may seem a huge step to take, but as was mentioned in the essay, the effect of deterring crime will be worth it.

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<sup>85</sup>Which I believe should and would be submitted to the Law Reform Commission in Namibia

### 5.1.2 Namibia's International Obligations

In view of the fact that Namibia has signed and ratified international agreements that prohibit state killings, the State would have to withdraw from some, if not most of such agreements<sup>86</sup>. Subsequently it can then re – sign and ratify the treaties, with *reservations* to the specific Articles or Sections that deal with the death penalty.

### 5.1.3 Improving the Namibian Legal System

The death penalty is a dangerous sentence especially in countries where the legal system is weak. There is a danger that an accused person may be erroneously convicted. Usually, there are no advanced methods of proving guilt or innocence such as DNA. In some instances, poorly qualified lawyers represent people accused of committing murder. Whilst the retributive function of the penalty is open to debate basic, mistakes that occur when proving guilt or innocence render the sentence unsafe. In some countries, numerous people condemned to death are posthumously cleared of their alleged crimes.

In order to avoid this, the legal system needs to be tremendously improved to such an extent that errors are eradicated, or at the least very minimal. Suffice to say, the Namibian Police Force and the Namibian Judicial System are both competent; however there is always room for improvement.

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<sup>86</sup>The ICCR, the CRC, and the Convention against Torture. Also, the African Charter on Human and People's Rights and the African Charter on the Rights and Welfare of the Child.

#### 5.1.4 Draft a Criminal Bill that clearly specifies capital crimes

Obviously not all criminals should be sentenced to death; statute should be in place to list the crimes that *may* be punishable by death. Furthermore, no statute may make the death penalty a mandatory sentence for any crime.

In addition, the Criminal Procedure Act<sup>87</sup> should be amended to suit these provisions.

#### 5.1.5 Implement the Death Penalty

Once all the legal requirements are in place, the death penalty should be implemented in reality, and should be more than just a provision.

Additional, once criminals are sentenced to death, such executions should be taken out with celerity, as it has been proved that the deterrent effect depends on the celerity of the death penalty on homicide rates<sup>88</sup>.

If only about 2% of aggravated murderers (death eligible killers) get the death penalty, how could it be a deterrent when it is not used?

## 5.2 Conclusion

The death penalty should be introduced to Namibia. The fact is, from man's earliest days, capital punishment has received strong and continuing public support and has survived repeated legislative and/ or judicial scrutiny. Look at the term itself - capital punishment. It is a legal and

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<sup>87</sup>Not yet in force

<sup>88</sup>M.Geerken and W. Gove 1975. *Deterrence: Some Theoretical Considerations*. Law and Society Review 9 Spring 497-513.

effective form of punishment. And if only one potential murderer, assassin or terrorist is deterred from committing a capital crime because he or she fears the death penalty, then that single act of deterrence has effectively reduced the loss of lives.

Some say, “We must conclude that we lack strong statistical evidence that capital punishment deters ... There is no such evidence for non-deterrence either. The statistics available are simply inconclusive ...”<sup>89</sup>; however, in Canada, 27 years after the abolition of the death penalty, murder rates had fallen by 44 percent. Also, various recent academic studies in the USA have shown that capital punishment is a deterrent in the State of New York<sup>90</sup>.

Some commentators say that, “No one has the right to take another's life”. Yes, they are right. But does the convicted woman have the right to take the life of her victim? The death penalty should be there, not for innocent people, but for those who terrorise the innocent public

At the end of the debate, we would seem to be left with three options.

- 1) Not to have the death penalty and the genuine problems it causes and continue to accept the relatively high levels of murder and other serious crimes that we presently have.
- 2) Reintroduce capital punishment for just the "worst" murderers which would at least be some retribution for the terrible crimes they have committed and would permanently incapacitate them. It would also save a small amount of money each year which could, perhaps, be spent on the more genuinely needy. This option is unlikely to reduce overall crime levels.

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<sup>89</sup>L. Pojman 1998 “A Critique of Moral Relativism” in *Ethical Theory* ed. L. Pojman

<sup>90</sup> K. Land, R. Teske, Jr., and H. Zheng 2009 *The Short-Term Effects of Executions on Homicides: Deterrence, Displacement, or Both?* *Criminology*, vol. 47, no. 4, pp. 1009-1043. For further details of these go to <http://www.cjlf.org/deathpenalty/dpdeterrence.htm>

3) Reintroduce the death penalty in the really strict format outlined above and see a corresponding drop in serious crime whilst accepting that there will be a lot of human misery caused to the innocent families of criminals and that there will be the occasional, if inevitable, mistakes.

Faith Hathaway was 17 when she was murdered by Robert Willie, whose story became the inspiration for the film *Dead Man Walking*. Hathaway had just graduated from high school and was leaving for the Army the next day. She was abducted after leaving a farewell party in Mandeville, La. Willie and accomplice Joseph Vaccaro had been on an 8-day murder, robbery and rape spree. Hathaway was raped by both assailants and stabbed 17 times. She was raped again after she died.

If, only if, Robert Willie had been previously tried, convicted, sentenced and executed, the lives of young Faith Hathaway and the countless other victims would have been spared. It is tragic that the life of a person can be dependent on the actions of another: the abrupt end of a victim's life by a convict or the continuity of his/her life by state action in legally executing the villain. Let us not wait until this happens repeatedly in our community before we take the much needed action.

As regards capital cases, the trouble is that emotional men and women always see only the individual whose fate is up at the moment, and neither his victim nor the many millions of unknown individuals who would in the long run be harmed by what they ask<sup>91</sup>.

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<sup>91</sup>[T. Roosevelt](#), *Theodore Roosevelt, An Autobiography*

In Bill Mahe's words, "I think capital punishment works great. Every killer you kill never kills again". Finally, "I don't think you should support the death penalty to seek revenge. I don't think that's right. I think the reason to support the death penalty is because it saves other people's lives" - George Walker Bush.

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**DECLARATIONS**

I, Eunice Adeleke, declare hereby that this study is a true reflection of my own research, and that this work, or part thereof has not been submitted for a degree in any other institution of higher education.

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## **ABSTRACT**

“I think capital punishment works great. Every killer you kill never kills again.” - Bill Maher

“I don’t think you should support the death penalty to seek revenge. I don’t think that’s right. I think the reason to support the death penalty is because it saves other people’s lives.” - George

Walker Bush

“Capital punishment kills immediately, whereas lifetime imprisonment does so slowly. Which executioner is more humane? The one who kills you in a few minutes, or the one who wrests your life from you in the course of many years?” - Anton Chekhov, *The banker in The Bet*,

*Works*, vol. 7, p. 229, “Nauka” <1254>

“I personally have always voted for the death penalty because I believe that people who go out prepared to take the lives of other people forfeit their own right to live. I believe that that death penalty should be used only very rarely, but I believe that no-one should go out certain that no matter how cruel, how vicious, how hideous their murder, they themselves will not suffer the death penalty.” - Margaret Thatcher

The above are a few statements which supports the stance of this essay. The death penalty debate is an infamous one. After a review of the crime rate in Namibia and realising its severity, bringing its application to the Namibian criminal system is strongly advised in this dissertation.

