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***ASSESSEMENT OF DEATH PENALTY AND ITS JUSTIFICATIN
UNDER CRIMINAL LAW OF ETHIOPIA (CASE ANALYSIS)***

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JULY 25, 2000

ADDIS ABABA EHIOPIA

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I here by declare that this paper is my original work and I take full responsibility for any failure to observe the convention rules of citation

Name Fikru W/medhin

Signed

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Introduction

In earlier time, people has been punished a wide verities of punishment for their wide verities of doing wrong ,among them flogging, hard labor, slavery, fine, banishment and death penalty. From the type of punishment “Death penalty” is the most sever one and imposed to revenge the criminal offender. According to death penalty in criminal law of Ethiopia, imposed for a crime that are exceptionally grave and it inflicted only on case specifically provided under the law for offence which are completed and where there is no mitigating circumstance .Moreover, rules that warrant death penalty exceptional like when the criminal is believed to be a threat to the community because the criminal offender repeatedly commit crime and is dangerous in nature.

Therefore, there is a practical problem in relation to the assessment of death penalty and sentencing of life imprisonment unless, the law specify exhaustively types of crimes which are punishable by death and which are not.

The research paper contains four chapters. Chapter one deals with the purpose of punishment with relation to capital punishment and the general over views of early and modern criminal legal system. Chapter two deals with the justification and legal argument for and against, religious and ethical argument as well as it has been following the position of Ethiopia penal code and current criminal law of Ethiopia. Chapter three deals with criminal case analysis and court practice on the assessments death penalty and life imprisonment. The last chapter will be present conclusion and recommendation.

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Chapter One

The Purpose (Goal) of Criminal Punishment in Relation with Death penalty

1.1 Types of Punishment

There are four types of criminal punishment which has been historically applied in the history of man kind .These are: to the effect of retribution or revenge up on him/her (Retribution),to restrain his /her physically so as to make it impossible for him /her to commit further crime (Isolation\ Incapacitation), to deter the offender and other from similarly violating the law (deterrence),and to bring about the reformation(correction)of the evil-doer (Rehabilitation) (Reid, sue Titus, 2000: 65).

The writer will discuss their objective in detail with contrast to death penalty and the deterrence effects of the potential offenders.

1. Retribution

The term retribution means “some thing for recompenses.” It is primitive human reaction because people who get hurt want hurt back (Vetter and Silverman, 1986: 257). According to this purpose, the major objective of punishment is that the offenders should be punished for the crimes he/she deserves the punishment (Ibid, 578).

Retribution is "societal vengeance", it means that the punishment fit the crime i.e. “an eye for an eye, tooth for tooth”. According to this purpose, criminals are considered to be “wicked, evil people who are responsible for their action and deserve to be punished.”

Those who argue for retribution advocate execution is a very real punishment rather than some form of rehabilitative treatment; the criminal offenders have to suffer in proportion to the offence (Inciardi, 1987:449).

2. Isolation (Incapacitation)

An isolation is the second types of punishment. Its objective is simply the avoidance of dangerous criminal offenders from the societies. The main assumption is that crime may be prevented if criminals are physically removed from the community and restrained, thus,

protecting the societies from social evils (Tappan,1960:255,cole,1986 :457 ; Vetter and Silverman, 1986:258 -60; Inciardi; 1987, 450).

The major goal of isolation is crime prevention and community protection; sanctions have to be serving to be effective. Thus, death penalty is also considered to be effective forms of restraint and eliminate of the future crimes from the community (Inciardi, 1987, 45-51).

3. Deterrence

The classical thinker's believed that the major goal of punishment is to deter the criminals and potential offender through fearing of punishment. Deterrence has two aspects. That are specific and general (Reid, sue Titus; 2000:74).

Specific deterrence refers to the effects of punishment in preventing particular criminal offender from the community through sentencing in order to not commit additional crime (Ibid).

The specific deterrent purpose of punishment does not confirm with the justification of death penalty, because according to this purpose, the major goal of punishment is that direct toward re-socializing or rehabilitate of the criminal after the punishment. However, it is not possible to re-socializing once the criminal is executed (K.D. Gaur, 2000: 423).

Death penalty is not leading the criminal to re-incorporate in to the societies, rather it lead the criminal to their finals. According to this purpose, the goal of punishment does not deter the criminal (Ibid, 224)

General deterrence is based on the assumption that by punishing the criminal who is convicted of crime provides as an example to the potential offender, who is being rational person and wishing to avoid pain, will not violate the law (Reid, sue, Titus, 2000: 74).

According to this purpose, by punishing the criminal it is hopes, will serve as an example of to deter potential criminal from anti-social conduct (Vetter and Silverman, 1986: 572). The idea of deterrence is best illustrated by the words in 18th c the judge who told the defendant at a sentencing, "You are to be hanged not because you have stolen a sheep but in order to that other may not steal a sheep."(Inciardi, 1987:452).The idea of the general deterrent effect is that by punishing the criminal is to deter the potential offenders.

From the past experience is that crime does not decrease even though, the more frequently imposed death penalty (K.D Gaur, 2000, 424). It means that death penalty failed to deter the potential offender mean while, the criminal executed to teach the potential offender.

Let us see the well –known example the pick-pocket picking the pocket of a person in a crowd gathered at the execution ceremony. Thus, death penalty has failed as a device of deterrence

to the potential offender (Ibid, 436). The writer will try to discuss in brief in the following chapter capital punishment have no value of deterrence effects.

4. Rehabilitation

This is the last forms purpose of punishments of the offender. In this purpose there is an assumption that the “persons who commit a crime have an identifiable reason for doing so, and that these can be discovered and altered.”(Inciardi,1987,452).

Those who argue for rehabilitation advocate that it’s it the best method to teach offenders. According to this purpose, the major goal of punishment is to improve the behavior of the criminal and also re-incorporate (re-socialize) the offender in to the society once again and make them productive members. This purpose is widely supports because it takes positive approach in the attempt to eliminate criminal behaviors.

Rehabilitation, unlike the false hope of deterrence or the temporary measure of retribution and isolation, it is the only humanitarian mechanism for altering the criminals behavior of the offenders (Ibid).

The writer will discuss in brief the purpose of punishment in light of the early and modern criminal legal system of death penalty.

General Over View of Death Penalty

1.2 Definition of Death of Penalty

There is no universal definition of death penalty. But different legal scholar defined it in different ways. Death penalty, judicial ordered execution of a convicted criminal, carried out in the name of the state has been used in varying degrees through history (snare, 1992:55). Capital punishment refers to penalty that are inflicted by the power of the state, that is, the authority of the law after a court has been found the defendant guilty of a crime (Reid, sue Titus,2000:65). Capital punishment is punishment by death for committing a serious crime (Blacks Law Dictionary, 223).

1.3 Historical Background of the Punishment

In earlier time, people have been put a various forms of punishment for their various forms of wrong doing such as Fine, detention, flogging, hard labor, slavery, branding, beheading, banishment, and death penalty ... etc. In facts, those are sever and brutal kind of punishment which has been practiced in the past and some of it still in practice to the date. But my aim is only to show about the most sever punishment of death penalty. So, the writer will discuss in brief the early and modern criminal legal system of the death penalty with contrast to the above purpose of punishment as follow.

1.3.1 Death Penalty in the Early Criminal Legal System

In the early time, the issues of capital punishment were not concerned as controversial. It means that, it has been accepted morally for a long period (Arnold H Lowe, 2000:573).

Death penalty is the most serious and harsh punishment, that has been imposed throughout history and to the date in most countries (Donald and Patrick, 1984:404).

In the early legal document such as the code of Hamurabi, which pronounced the doctrine of retribution (Lex Talionis i.e “an eye for an eye, tooth for tooth” which means, if the man who shed blood of a man

by man is blood will be shed. Execution has been considered as real forms of punishment (cox and wade, 1989; 210).

Historically, societies considered that revenge has been one of the most important justification of punishment (Reid, sue Titus, 2000: 68). Especially, early legal provision such as code of hamurabi, Greeks and

Romans provided death penalty up on conviction for a wide range of offences (Cox and wade, 1989:210). In the late 15thc, British imposed death on the convicted criminal for the violation of eight different offences among them: robbery, rape, burglary, larceny, arson.... In the late 16th c death penalty was considered as the best solution nevertheless, it is interrupted in the 17th c and re-emerged in the late 18th (Ibid).

From the religious point of view, the Old Testament also incorporate the doctrine of equal retaliation i.e. “leg for leg, hand for hand, then you shall give life for life.” and it describes death as the punishments of over 15 crimes in Exodus, Leviticus, and Deuteronomy (Holy Bible, 1979: 49:79:130).

One of the most sever punishments in the Roman Empire had been used burning at a stack.

1.3.2 Death Penalty in the Modern Criminal Legal System

In the mid-18thc social commentaries in Europe began to emphasize the worth of the individuals and to criticize government practices considering unjust, and capital punishment.

Punishment became change in the late 18thc and early 19thc which was known as “the age of Enlightenment”. During this time, the concepts of rights of man were recognized (Barnes and Tatter, 1959:322: Cox and wade, 1989:211).

During 19thc there is various improvement has been taken place on prison administration and treatments of prisoners were introduce in varies parts of European (Andargachw Tesfay; 2004,166). This is clearly indicated that societies considered the right prisoners.

The first significant movement to abolish death penalty has been take place in the period of Enlightenment.

According to Ceasare Beccaria, on his famous essay on “crime and punishment in 1764 in which he directed penal philosophy away from punishment towards corrections. He disgust torture and capital punishment

instead advocates extensive use of other types of punishments (Cox and Wade, 1989:211-12).

However, in the late 18thc the judge who opposed the argument of Beccaria and passed a death sentence up on the convicted criminal by stating that; “you are to be hanged not because of you have stolen a sheep but in order to that other may not steal a sheep.

(Inciardi,1987,452). To conclude the above quotation is that, a man after he is hanged for nothing and that punishment used for the good of society court to be useful to society.

Beccaria recommended that against the execution of criminal and he indicated that:-

The purpose of punishment is to deter persons from commission of crime and not to provide social revenge. Not severity, but certainty and expeditiousness in punishment best secure this result. There should be no capital punishment (death penalty).Life imprisonment is a better deterrent. Capital punishment is irreparable and hence makes no provision for possible mistakes and the desirability of later rectification.”(Barnes and Tetters, 1959,323). This is clearly indicated that the main purpose of punishment is to rehabilitate criminal and potential offender rather than social revenge. Capital punishment is not leading the criminal and also not deter potential offender more than life imprisonment. Moreover, life imprisonment is better way of deterrent effect of criminal and potential offender. In addition, capital punishment is irrevocable and the mistake can never be rectified.

States have no right to impose a punishment greater than was necessary: “any law or punishment in excess of its limits is an abuse of

power, not justice, and no unjust may be tolerated, however useful it seems” (Reid sue Titus, 2000: 68).

As far as the issue of death penalty is concerned with relation to UDHR, it is the non-binding instrument among the states but played great role in the UN system and regional system even including most of the states in the world and rapid qualifying the customary international law requires every nation for the protection of human right (Paul sieghart; 1983,53).

In 1966 the UN adopted the international human right instrument International Convention on Civil and Political Rights (ICCPR). Art 6 of ICCPR clearly stated that the prohibition of the arbitrary deprivation of life (council of Europe, 2000:102).

The International Conventions on Civil and Political Right, the European Convention on human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples Rights clearly stated that the prohibition of an arbitrary deprivation of life (Jansuz, 2000:75). So, this indicated that, the right to life is protected against death penalty except provided expressly as an exception by the law or the right to life in international law guarantees that death penalty shall not be imposed by the empowered competent court without the following strict procedures.

In 1966 the UN adopted the international Human right instrument i.e international conventions on civil political right (ICCPR), art 6 of ICCPR is Clearly states that “Every human being has the inherent rights to life. This right shall be protected by law.

No one shall be arbitrary deprived of his life.” As far as death penalty is concerned in relation to this provision the state shall take in to consideration art.6 of ICCPR with Art 14 and 15 of the same instrument, indeed the state customary international law. (Nigel S.rodely, 1999, 218).

The European parliament in a Resolution of June 18, 1981, appealed to all countries of the world which still impose the death penalty, calling

for the repeal (abrogation) of this form of punishment. (KD.Gaur; 2003:418).

The General assembly proclaimed under the resolution 217 A (111) the universal declaration of Human Right (UDHR) to be a common standards of achievement for all people and all nations. Even though, universal declaration is silent on the issues of the death penalty, although it was discusses in the context of consideration in the right to life (Nigel S.rodely, 1999, 66).

Art 29(2) is stated that Human Right is subject to limitation but it is no more clear indication that the scope & extents of limitation. As we know that, there is no any universal document that prohibited death penalty and

yet there is no international agreement among the state to abolish it from there codes (Paras Diwan, 1998, 32).

As far as Western European countries concerned, they abolish death penalty during the draft of UDHR is practiced in 1948. At this time, most states maintained death penalty in their criminal code as an alternative punishment.

The sensitive debate continued among the fro and against, religious and ethical argument will be briefly highlighted in the following chapter.

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Chapter Two

Views (Opinion) on Death Penalty

2. Arguments For and Against Death Penalty

In most history, death penalty has not been considered controversial. However, in the mid 18thc, social commentators in Europe began to debate for the importance of individuals and to criticize government practice they considered unjust including death penalty. The controversy and debate over the government's utilization of the death penalty continued up to these

days. The first significant movement to abolish the death penalty began during the age of Enlightenment. Now, the writer will try to discuss the arguments of for and against, ethical and religious justification on death penalty as follow.

2.1 Arguments For Death Penalty

Various arguments have been forwarded in support of death penalty. The following are some of the best known arguments of supporter (Larry, Siegel; 2003; P. 544).

Those who support of death penalty that execution have always been used, and it is inherent in human nature. They further argued that it is fair to punish the wicked, and also they said capital punishment is practiced by the most states of American and three quarter of the world. They also mentioned the bible as their best reference that allows death penalty. Moreover, many moral philosophers and religious leaders, such as Thomas Moore, John lock and Immanuel Kant support it (Ibid).

Many retentions countries used the ultimate punishment of death is that just deserts i.e taking the life of one who has taken a life is the only justice. This is the traditional and the primitive societies have been used like retribution (Donald J. patrick, P.387).

As far as death Penalty is concernes in relation to its effectiveness or deterrence the proponent argued that the real threat of execution is a unique deterrent effect than mere restriction of ones liberty. Theybelieve

on serious sanction to prevent various potential criminals from taking the lives of innocent people (Larry siegel; 2003; P.546).

According to their argument that, death penalty is necessary to deter others from committing murder and other atrocious crimes. (Donald J. Patrick; P. 437).

The proponent of death penalty argued in relation to cost they said, the state may very well better spends its money to old, the young, the sick and for the sake of development rather than to life long term prisoners (debate on capital punishment wikipedia, the free encyclopedia). They further

mentioned, instead of keeping the crowded prison system and give expense of keeping an inmate for many years, execution make financial sense (Larry siegel, 2003; P. 544). It means that execution is very cheapness than life imprisonment.

2.2 Argument Against Death Penalty

There are a number of arguments forwarded against death penalty. Those states which have been abolish death penalty argued for capital punishment is the characterization of death penalty as human right issue, rather than a debate about the proper punishment of criminals. According to abolitionist states that Art 3 of UDHR, Art 6 of ICCPR clearly laid down “Every human being have the inherent right to life.” This statement is also similar to Art 14 and 15 of FDRE cons.

As far as death Penalty is concerned in relation to European Union (EU), is long standing and active opposition to death penalty in all circumstance. It declared on many occasions moreover, on the third world congress against the death penalty in Paris in February 2007 and at 4th session of the human right council in March 2007, they considered that the abolition of death penalty contribute to the enhancement of human dignity and the progressive development of human right (Germpreoseo41907.PDF). Those who are against death penalty forwarded their convincing ideas. They argued that, death penalty increases the probability of murder because of its referred as the brutalization effect.

They further argued that an execution murder may increase causing even the more death of innocent victims. According to the arguments of opponents is that the inherent brutality of death penalty it violate, cruel and unusual punishment which is prohibited. Even though, death penalty is supported by the public voice, the opponents argued that it is primitive way of revenge which stands in the moral progress (Larry siegel; 2003; p. 541).

In relation to the deterrence effects, the opponents also objects to the finality of it because they said, it preclude any possibility of rehabilitation. They also point out that capital punishment has never proven to be a deterrent effect any more than life imprisonment. They further argued that death penalty does not serve as effective deterrent, and also they said any

miscarriage of justice, which is inevitable in any legal system, would be irreversible. It means that, it is quite possible for an innocent person to be convicted of a crime; once a person is executed the mistake can never be rectified even by the state (Ibid; 547).

Based on the above statements the moral arguments of opponents argued that, they strongly defend the state /legislature/ can not morally demand the death penalty because they said, the state should not take away something unless, it can not give back again. This is clearly indicated that once innocent person executed, the mistake can never be rectified even by the state (Fasil Nahom; 2001, p.113).

Opponents of capital punishment also point out that, in those state that had capital punishment and later abolished it, there was no increase in capital crime where as, in those states that did not have capital punishment but later adopt it there was no decrease on crime. Thus, they concluded their arguments that death penalty have no any value for deterrence effect than other types of punishment (Donald J. patrick R. 438).

The opponents argued in relation to the cost effect that death penalty is both complicated and inaccurate, which means that capital punishment

is more costly than life imprisonment it is because they said, due to the extra court cost such as appeals and extra supervision (Ibid P. 439)

2.3 Religious and Ethical Arguments on Death Penalty

From the religious point of view, the writer will try to compare and contrast the two groups approaches used in their attempt to support and against death penalty.

Those in support of death penalty as a punishment for crimes argued by stating the Old Testament genesis 9:16 i.e, “who ever shed the blood of a man, by man shall that person’s blood be shed; From in his own image God made mankind.” Where as, those against tends to select passage from the New Testament that advocate love, forgiveness and mercy. They further mentioned matt 5:38-48 i.e “you have heard that it was said eye for eye, But I tell you, do not resist an evil person. If someone strikes you on the right cheek, turn to him the other also.... “You have heard that it was said. ‘Love

your neighbor and hate your enemy'. But I tell you: love your enemies and pray for those who persecute you, that may the son of you father in heaven.”(Religious and capital punishment, wikipedia the free in encyclopedia).

Those in support of death penalty argued that the murder has forfeited his life under the divine order as it is revealed in the scripture. And they said, death penalty, moreover serve to balance out the disturbance of moral order. On the other hand those against death penalty point out that “Thou shall not kill,” and to the Christ’s appeal in the sermon on Mount “I say unto you, love your enemies, bless those who curse you and do good to those who hate you!. Therefore, this is clearly indicated that the New Testament totally against death penalty and it tends to the rehabilitative punishment than retribution.

In relation to ethical arguments of death penalty, there is a philosophical content that is deontological. It is legal context of debate and categorized in to right argument and virtue.

According to deontological justification death penalty is argued that it is “right” by nature; they further stated that capital punishment is just based on the grounds of retribution. (Religious and capital punishment, wikipedia, free encyclopedia, 2008). They further believe that, if the states do not apply death penalty for heinous murder, would be unjust (Ibid; 2008). In relation to virtue, they strongly believe that without the proper retribution, the judicial system further brutalizes the victim or victims family and friends, this is also tantamount secondary victimization (Ibid).

Whereas, the deontological objection of death penalty by defense the above arguments. According to the opponents, death penalty is “Wrong” by its nature because they said, mostly due to the fact that it amounts to the violation of the right to life, which should be universal. In relation to virtue they argued that death penalty is also wrong based on the ground that it is

cruel and inhuman. In addition they said, it precludes the possibility of rehabilitation (Ibid). As far as death penalty is concerned with relation to ethical arguments, it is strongly believed that the later argument is the best and humanitarian than the former ones.

3. The Position of Ethiopian Criminal Code

3.1 Early & Modern Perspective

3.1.1 Early

3.1.2 Fetha Negast

The first written criminal code which is adopted in Ethiopia during the 15th is known as Fetha Negast. This code incorporates the Old, the New Testament, canon and early Roman law. Therefore, this code is based itself on the harsh punishment that adopts the principle of retribution which is equal retaliation of punishment. However, the code only applied to Christians. Muslim in Ethiopia were administered by their own courts which is known as sharia (Murado Abdo,2007, p.239).

The code had been allowed death sentence as real punishment and crime prevention and also the method of execution was very brutal (Ibid, p. 240).

3.2 Modern

3.1.2 The 1930 penal code

The 1930 penal code; this is the first penal code which tried to unifies traditional criminal matters. This code also took some rules and principles from the former ones. The code also known as the modernization of the administration criminal justice system in Ethiopia. Meanwhile, it lacks same general principle. Under this code, the courts were authorized to impose punishment if the accused acted out of superstition or “simplicity of mind.” The code was also strongly based on retribution and the judges have a discretionary power to impose a punishment in accordance of the degree of guilt. However, in the code there was also retained death penalty and it’s method of execution had been by hanging. This is very brutal and degrading the humanity of person (Ibid).

3.1.3 The 1957 penal code

The 1957 penal code; the primary objective of this code was to meet the demand of the developed nations. In the code, a significant system of jurisprudence was included in the world of today. The code also incorporates capital punishment in articles 116-19 based on the extenuating and aggravating degree of culpability. The method of execution was similar to the former one (Ibid).

3.1.4 The 2005 of Ethiopian Criminal law

As far as death penalty is concerned, under the current criminal law some amendments are made. That is, some words omitted from the previous penal law of 1957 without taking any radical change. The current criminal law clearly retains death penalty as an alternative punishment with life imprisonment. Meanwhile, there is only a change on the method of execution in the new criminal law. Previously execution used to take place for civilians by hanging whereas, by shooting for the military. Method of execution nowadays in Ethiopia is shooting for civilians.

According to the current criminal law of Ethiopia, under art 117(1) it clearly laid down that death penalty shall be passed upon the conviction of only the doer's dangerous offender, if he/she is a recidivist and has previous records and the crime committed by the offender is serious and grave.

Death penalty shall not be passed unless; the aggravating circumstance outweighs and in the absence of any extenuating circumstance.

Death penalty shall not be passed on a person whose age is under 18 years. The rationale behind this is that people who are not yet 18 years old have not been considered what they are doing and they do not understand their act because of lack of maturity and death sentence does not deserve as for an adult offender.

In accordance with Article 119 of the same code, death sentence shall not be passed or suspended upon a person who is fully or partially irresponsible, a seriously ill person, and a pregnant woman, if they remain in that state. That means, death sentence shall be passed upon the full or partially irresponsible person and a seriously ill person but, if and only if, the death sentence is passed on this person if he/she was restrained in the former position. In the case of a pregnant woman, she is waited until she gives birth.

If the baby born alive the death sentence is suspended and it is changed to life imprisonment this is because, the mother is considered as a nurse for the newly born baby. Whereas, if the baby born dead, the death sentence is executed up on her. The rational behind is that the law protects the interests of unborn child.

Ethiopian criminal law retain death penalty as an alternative punishment with life imprisonment which permits the judge to use arbitrary discretionary power as to impose whether death or life imprisonment. Therefore, the legislature should not morally demand death penalty, why there is no clear demarcation or proper limitation to impose whether death penalty or life imprisonment, death penalty violent the principle of human right provision, what are the criteria's to impose death penalty rather than life imprisonment, what if death penalty totally abolished from criminal law of Ethiopia will high lighted following chapter.

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CHAPTER THREE

Court Decision is Relation with Capital Punishment

INTRODUCTIONS

From the types of criminals punishment death penalty is the most sever one and imposed to revenge the criminal offenders. According to “Death Penalty” in criminal law Ethiopia, imposed for crimes that are considered exceptionally grave and it inflicted only on cases specifically provided under the law for offences which are completed and there is no mitigating circumstances. Moreover, rules that warrent death penalty is very exceptional like when the criminal is believed to be a threat to the community because the criminal offender repeatedly commit crime and dangerous in nature.

The repealed penal code of in 1957 clearly stated death penalty as an alternative punishment for life imprisonment similarly new criminal law of Ethiopian 2005.

The major problem here is that imposing death penalty or life imprisonment is left to the discretionary power to the judge. This means that the Judges may use their discretionary power considering evaluating the aggravating and mitigating circumstance. Death penalty according to penal law of Ethiopia, is only applied in the aggravating circumstance is out Wight and also where there is no or in the absence of any mitigating circumstance.

However, what we have to bear in mind is that even in the existence of such aggravating circumstance might not prevent the court from considering mitigating circumstance and changing the death penalty to life imprisonment by virtue of Art 184 of penal code. Meanwhile, the judge have the opportunity to apply his discretionary power by omitting the mitigating circumstance and impose death penalty this is done by evaluating two methods are subjective from judges to judges. This section is to intended to address

these problems by providing actual real cases where the judge used the discretionary power in the decision.

4.ANALYSIS OF CRIMINAL CASES FILE NO 7467, 6687 AND 5386 AND COURT PRACTICES ON ASSESEMENT OF DEATH PENALITY

In this section the writer will try to analyze the grounds and assessment process of entailing death penalty versus life imprisonment by the Supreme Court .For this purpose I have employed three real dead cases. The first case is filed no No 7467 the litigation between the parties Kifle Gebeyew versus public prosecutor and the case filed on No 5386 Abdela Ahmmed Ali and Mohammed Ibrahim versus public prosecutor as well as the case filed on No 6687 the litigation between the parties Derege Megarsa and Yiftu Megarsa versus public prosecutor. Those cases are used to the successful compilation and examination of the court consideration when its imposed death penalty or life imprisonment.

However, this commentary dealing with only the out came of the Supreme Court with relation to death penalty versus life imprisonment. Therefore, the commentary has two aspects that is analysis of the provision of the penal code which is relevant to the case and assessment of the decision in light of the provision.

4.1 Assessment of Death Penalty versus Life Imprisonment

The repealed penal code and the current criminal law of Ethiopia which is 2005 clearly retain death penalty as an alternative punishment for some grave and serious crime. More over, death penalty that warrant only the

case of very exceptional circumstance like which the criminal is believed to be threat to the community because of his /her repeated crime records and dangerous propensity.

Death penalty should not be passed on a person whose age is under 18 years. The rational behind is that persons who are not attain the majority did not understand what they are doing or acting because of that lacking of maturity and death sentence dose not deserve as of adult offender. And also death sentence should not be passed or

suspended to those group fully or partially irresponsible persons by virtue of Article 119 of criminal law of 2005.

However, there is mitigating circumstance listed down under article 86 of penal code. In all case the laws provided to the court mitigate the penalty it shall if it deems the mitigation justified. If one or more general mitigating circumstance exist, the court may pronounce a mitigate the penalty which is death to reduce rigorous imprisonment,20 years to life imprisonment, based on ordinary mitigation under article 184, of penal code.

Therefore, imposing whether death penalty or life imprisonment by the court is based on the aggravating and mitigating circumstance.

4.2. SUMMARY OF THE CASES

The supreme court was rendered a decision to Kifle Gebeyew versus public prosecutor here in after refer case one, Abdela Ahmmed Ali and Mohammed Ibrahim Versus public prosecutor here in after refer case two as well as Derege Megersa and Yifu Megersa Versus public prosecutor here in after refer case three, by appeal made against the decision of the Federal High Court and the Harrary Regional Supreme Court for the second case. The decision of the Supreme Court has been in favor of the first and the second cases of appellants and confirms the verdict of the lower court by amending the charge on case three.

In case one the appellant charged with by aggravated homicide i.e homicide in the first degree pursuant to Art. 522 (1) (a) and alternative charge with grave willful injury pursuant to Art 538 (b) and common willful injury pursuant to Art 539 (1) of penal code.

In case two the appellant charged with by aggravated homicide i.e Homicide in the first degree pursuant to Art. 522 (1) (a) and an alternative charge with related to armed raising and civil war pursuant to Art. 252 (1) (a) of penal code.

In case three the appellants charged with by aggravated Homicide in the first degree pursuant to the provision 522 (1) (a) and an alternative charge with related to theft by Art 630 of penal code.

The issue for appeal in case two and three is regarding the offence they charged with and the punishment whereas, in case one only the issue for appeal is only regarding the punishment.

4.3 ARGUMENTS OF THE LITIGANTS

In case one the appellant did not denied the charge. But he argued that even though, the crime was committed by him, it is not intentional to injure and revenge the victims in cruel manner. In addition, he argued that while he was committing the crime 60% of his mental and physical parts has been abnormal. So, he did not satisfied by the decision of the lower court rather than the charged with.

He further argued that the witnesses of public prosecutor are not testified whether the crime was committed intentionally or not. Moreover, he strongly argued that the lower court with down his documentary evidence without any ground and it was not justified. Therefore, he claims the court should be acquitted or its give equal justice based on considering the victims and his own mental and physical defects.

The public prosecutor on his part argued that his witness proved beyond reasonable doubt that the crime was committed by the accused himself and intentionally. According to the public prosecutor argument is that the defendant did not raised as evidence Article 48 and 49 of penal code in the

lower court and the argument raised by the defendant on this level is not acceptable. Therefore, the prosecutor argued to confirm the decision of the lower court.

In case two and three the appellants are totally denied the charge. They are also disinterested by the decision of the lower court regarding to the offence they were charged with and the punishment which imposed upon them.

They also further argued that the witness of the public prosecutor gave an inconsistent testimony one each others. Especially in case two the appellant further argued that in addition to on the above the offence they were charged is committed by the witness themselves.

In addition both appellants argued that their witness defend properly and they said that the decision of the lower court is against them based on not prove beyond reasonable doubt and they should be acquitted.

The public prosecutor on his part argued that, his witness do not testify inconsistent testimonies rather they support each other. So, the public prosecutor argued that the argument of the appellants is groundless. Generally he argued that, his witness proved beyond reasonable doubt the offences that appellants are charged with therefore the decision of the lower court should be confirmed.

4.4. RULING AND REASONING OF THE SUPREME COURT

The Supreme Court found that the appellant Kifle Gebeyew did not oppose the charge. According to, his documentary evidence shows that 60% of physical disabled when he was in military defense. So, the court concludes that the documentary evidence which brought by the appellant is not acceptable and fall under art 48 and 49 of penal code.

The court is also examining the witness of the defendant. The court concludes with regard to the witness of the defendant is that, the defendant witness gives their testimonies are inconsistent and contradict to one each other rather than to challenge the witness of the public prosecutor.

Therefore, the court conclude that the witness of public prosecutor prove beyond reasonable doubt on the appellant Kifle Gebeyew killed the deceased Abrham Takel and Amsaleka Yetbarek Feseha intentionally.

The second inquire of the court is that to screen out whether the offence is fall under the provision 522 (1) (a) of penal code. So, the courts conclude that so long as, the crime committed by the appellant with cruel manner, the appellant charged with the Provision of 522 (1) (a) i.e aggravated homicide by the lower court was correct.

In relation to the second appellant, the Supreme Court found that the appellant Abedella Ahimed Ali could not defend the offence which he is charged with.

According to the public prosecutor testimonies are inconsistence or not, the supreme courts conclude that the defendant could not challenge the witness of the public prosecutor. Therefore, the court concludes with regarding to this the witness of public prosecutor testimonies are not inconsistence to each other rather they prove beyond reasonable doubt considering the charge that the first appellant Abdella Ahimed Ali killed the deceased Abashankor and Mohammad Ibrahim intentionally.

With regard to the second inquiry of the court is examining that whether the offence is fall under the provision of 522 (1) (a) of penal code. According to this, the court concludes that so long as the crime committed against the prisoner who was under controlled by the appellant, the appellant charged with the provision of 522 (1) (a) i.e aggravating homicide by the lower court was correct.

In relation to the second appellant Mohammad Ibrahim Ail the Supreme Court stated that, the witnesses of public prosecutor testimonies are inconsistent. Therefore, the court concludes that, it is not said that the witness of public prosecutor testimonies proved beyond reasonable doubt and the court acquitted the second appellant pursuant to the provision of 195 (2) Cr.P.C

After all the examination of the court on those step, its concluded the punishment of the first appellant Kifle Gebeyew and the second appellant

Abdela Ahmed Ali, they are guilty of Aggravating homicide i.e homicide in the first degree offence under the provision of 522 (1) (a). According to this provision, whosoever intentionally commits homicide is, punishable with rigorous imprisonment for life or death. During the assessment of punishment by the supreme court take in to consideration the mitigating circumstance in both cases that is the first case appellant who is Kifle Gebeyew have a good character and have no

previous criminal record and also to the second appellant whose name is Abdela Ahimed Ali is also illiterate farmer and also have no previous criminal record on before. Therefore, the court take in to account those factor as of the mitigating circumstance pursuant to the provision 86 of the penal code and changed the decision of the lower court which was death penalty to 20 years rigorous imprisonment to the former appellant and life imprisonment to the second ones.

In case three also the same as case two the appellant did not admit the charge which brought by the prosecutor. In addition the appellant further argued that, the witnesses of public prosecutor are relative of the victims and there is partiality. According to them, their statement of confession gave at the police station was under coercion. They further stated that the witness of public prosecutor gave their testimonies in the absences of them and they can not make them cross-examine. Therefore, we should be acquitted. The public prosecutor on his part argued that his witness subject to oath before the lower court and so,they are impartial. Therefore, it must be confirm the decision of the lower court.

In its decision of the Supreme Court has been entailed punishment of death on the first appellant whose name is Derege Megersa because he was the supervisor of the second appellant who is murders of 13 people. And also life imprisonment has been imposed on the second appellant. According to the conclusion of the court based on the decision is that, the appellant could not defend the witness of public prosecutor, and they were charged

with the provision 522 (1) (a) and 630 of penal code which is amending the charge by the Supreme Court. During assessment of punishment the court shall take in to consideration both the two methods i.e aggravating and a mitigating circumstance. In the last case which is case three appellants have no any previous criminal record and they are also illiterate farmer and have many children. According to the Supreme Court decision those mitigating circumstance omitted and imposed death penalty on the first appellant, who is Derege Megersa.

4.5 CRITIQUES AND ANALYSIS OF SUPPRAM COURT DECISION

As mentioned on the above three actual cases, the first appellant argued that he did not opposed the charge but he asserted that even the crime was committed by him it was not an intention to injured and revenge to the victims in cruel manner. According to his assertion, while he was committed the crime 60% of his mental and physical parts has been abnormal. And he argued that the decision of the lower court has not been considered the above evidence and he was not satisfied. The second and the third appellants are totally denied the charge and they were not satisfied with the punishment of the lower court. Here in my focuses is only to critique on the assessment of death penalty and life imprisonment of the decision of the supreme courts on the above three cases.

In case one the court assessed the punishment under the provision of 522 (1) (a) of penal code which stated that whosoever intentionally commits homicide he / she punishable with rigorous imprisonment for life or death. The appellant is convicted of intentional homicide i.e Abreham Takel and Amsaleka Yitbarek Fesha killed both victims in cruel manner by throwing bomb.

In case two the court concluded that as of similar to the case one i.e the appellant convicted under Art 522 (1) (a) of penal code intentional homicide. The convicted criminal murders both victims Abashonkor and Mohoummad Ibrahim stabbing by 'Menca' is cruel manner.

In case three the court also conclude that the appellant convicted under the provision of penal code Art 522 (1) (a) and Art 630 respectively

The court shall take in to consideration aggravating and mitigating circumstance before rendering the decision. According to our penal code clearly stated that death penalty shall not be imposed if there is a mitigated factor i.e death penalty shall be impose only if there is no mitigating factor to the offender. According to the case one and two the

court take in to consideration the mitigating circumstance not to impose the death penalty based on only by aggravating circumstance with regarding to the offender committed the crime. According to the court, its conclude that based on the first and second appellants even though, the offenders commit the crime in cruel manner for the fact that the convicted criminals have no previous criminal record and have a good character and the second appellant Abdela Ahimed Ali is illiterate farmer and also have no previous criminal record therefore, the court reduce the punishment to 20 years rigorous imprisonment for the first case of appellant and life imprisonment to the second case of appellant pursuant to the provision of art 86 of penal code . So, the Supreme Court decision on the above two cases regarding of the assessment of imprisonment is very admirable.

But when we came to the third case between Derege Megrsa and Yiftu Megersa viruses public prosecutor the court assessed the punishment under the two provision of penal code Art 522(1) and 630 respectively. However, the court must be taken in to consideration the aggravating and mitigating circumstance before it passes a sentence. In case three the appellants are also illiterate farmers and have no previous criminal record that make similar mitigating circumstance from the above two case. But the court by omitting such mitigating circumstance in case three and more weighed the aggravating circumstance and passed death sentence on the first appellant Derege Megersa because he was convicted homicide in the first degree and theft against the victims.

In case three the sentence of the Supreme Court is not appropriate due to because of that death penalty is passed only for cases specifically laid down by the law as punishment for offences, which are completed and also in the absence of any mitigating circumstance. i.e the sentence of the supreme

court is on case three is that taken by disregarding mitigating circumstance this is also against principle of human rights when we compare with the above two case since the court taken in to

consideration the mitigating circumstance and to punished the first case with 20 years rigorous imprisonment and the second case with life imprisonment. Of course some one can bring a question how can the murder of 13 civilian populations and two civilian populations punish with similar punishment. But here is my target is not considering the number of convictions and similar kinds of punishment rather on the assessment of death sentence. Since death penalty is a unique kinds of punishment unlike other it must be taken due care which means that if there is mitigating circumstance present the court must be take in to consideration this factor and reduce the punishment of death to 25 years of imprisonment pursuant to the provision of the penal code of Art 184(a). So, based on the third cases it is clearly indicated that there is no properly limitation as the whether to impose death penalty of life imprisonment. Therefore, the legislature should not morally demand death penalty because an execution that arising by mistakly is not irrevocable and also innocent person may be punished by death penalty finally it may be found that judgment was give wrongly in this case it is hard to restore the executed person. Generally death sentence that was assessed by the Supreme Court on case three is not admirable and also is not fit the sprit of art 86 of the penal code.

Now a day, 135 countries abolished death penalty for all crimes, 33 countries abolished in law or practice as well as 62 countries are still practiced to the date. Except USA and Japan, industrial countries have abolished death penalty while non industrialization countries are much more likely retaining it. Accordingly as we seen in the above analyzed cases, in Ethiopia there is a practical problem in relation to death penalty starting from its assessment. Because the criteria to impose death penalty or life imprisonment is based on evaluating aggravating and mitigating

circumstance. This is indicated that, there is no clear demarcation or proper limitation between crimes which are punishable by death or life imprisonment. Therefore, the judges have discretionary power to choose the two punishments. Because evaluating of the two

Methods are different from judge to judge. It means, evaluating aggravating and mitigating circumstance is subjective. In the modern time death penalty is debatable issue, and death penalty by itself inhuman and cruel punishment for the mere fact that it is irreversible and uncompensated punishment, which is against article 18 of FDRE that is inhuman and cruel punishment is prohibited under Ethiopian constitution

CHAPTER FOUR

Conclusion and Recommendation

5.1 Conclusion

From the above criminal cases analysis. The writer suggests his own conclusion here under.

1. The legislature should not morally demand death penalty.
Because they can not take away some thing which can not replace it back again.
2. Imposition of death penalty or life imprisonment under criminal law of Ethiopia is made to be applied based on the methods of mitigating and aggravating circumstance. However, these two methods are applied by the judge on different ways. Therefore, different judges may use their arbitrary desecration power as to whether to impose death penalty or life imprisonment.
3. The criteria use to impose death penalty or life imprisonment is based on the above methods. This is clearly indicated that, there is no clear demarcation or proper limitation between crimes which are punishable by death or not.
4. By its nature death penalty is cruel and inhuman punishment. Thus, the application death totally is unable to either to deter nor to serve as an appropriate purpose of punishment.
5. Innocent persons may be punished by death penalty it may be found that judgment given wrongly in this cases it will be completely hard to restore the pre man

5.2 Recommendation

We have seen the problems that are found on the assessment of death penalty and its justification. Those problems are caused due to because of the criminal law of Ethiopia and court practices. Hence, before winding up there are certain recommendations that I want forward to solve the problems that I have identified and discussed in my research paper. Therefore, the writer of this paper recommends the following point to be taken in to consideration by the legislature and court.

1. The legislature does not morally support death penalty because, execution that arising by wrong judgment against innocent Person is irrevocable and uncompensated.
2. The legislature should try to specify exhaustively types of crimes which are punishable by death and or which are not.
3. If the state abolish death penalty, will have a great significant to rehabilitate/changing the behavior of the individual thinking words cruel crimes due to because, capital punishment has brutalization effect. In addition abolishing of capital punishment have also a great significant to the development of human right and moral ethics among the community for example, those states that had capital punishment and later abolished it, there is decrease capital crime whereas, in those state that did not have capital punishment but later adopt it there was no decrease on crime. However, if it is difficult to abolish death penalty based on the above recommendation the court should be take care before impose death penalty which means that the court should take care not to impose death penalty where there is mitigating circumstance.
4. Even in the absence of mitigating circumstance, the court should take due care not to impose death penalty so long as it is an

Irrevocable an uncompensated punishment

5. To rectify the over all problem that arises on the area of death Penalty would be better to abolish totally from the criminal law of Ethiopian.

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