

Zimbabwe's Constitution Making Process and the Death Penalty: A Philosophical Reflection

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Abstract

The institution of capital punishment has a long history. Despite growing consensus that the institution of capital punishment is not inherently sacrosanct and that it breaches fundamental human rights, the present Zimbabwean constitution embodies capital punishment as a penalty to a number of serious crimes such as high treason and murder. This paper reflects upon the justification of capital punishment in Zimbabwe's present constitution and the possibility of it being retained in the current process to rewrite the constitution despite widespread calls for its total abolition primarily because it fundamentally breaches, among others, human rights, the sanctity of life and human dignity. Over the years, capital punishment has been viewed from a tripartite perspective, that is, as a deterrent, reformative and retributive measure. First, the paper argues that a reexamination of capital punishment is both necessary and practical as part of the new vocabulary of concern that has redefined the death penalty as a human rights issue and limits of government power. Second, the paper submits the thesis that death penalty is not compatible with respect for human life, human dignity and respect for human rights thereof. Finally, the paper recommends the abolition of the death penalty in Zimbabwe's current constitution making process so that it can join progressive nations that have already abolished it.

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Introduction

Although the Constitution of Zimbabwe provides for the equal treatment of all human persons and also for the respect of human life and human dignity, still it is surprising to note that capital punishment is provided for by Section 12 of the Zimbabwean Constitution (1979) which clearly states that it shall be lawful for a person to be killed following a death sentence imposed on him/her by a court of law. In support of the death penalty, the Constitution of Zimbabwe, (1979:12) Section 12.1, categorically states that “no person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence for which he has been convicted.” In this regard, following section 12.1 of the Constitution of Zimbabwe (Ibid), it is apparent that, although the constitution guarantees the safeguard for human life and wellbeing, still, it gives the courts of laws the licence to proclaim and administer the death penalty to anyone found guilty of offences that attract the death penalty.

The death penalty as a punishment for specific forms of crimes has been used since time immemorial. For Msipa (2010), “in the holy bible, the death penalty was used for crimes ranging from murder, witchcraft and kidnapping” and up to this day countries such as the United States of America (USA), China and a number of African countries including Zimbabwe still use the death penalty as a form of punishment for certain crimes that they consider to be of a serious nature. The death penalty has been on Zimbabwe's statutes for a long time. However, the death penalty, as a form of punishment, remains one of the most controversial sentencing sanctions today. The debate on its merits or lack thereof is probably as old as the sanction itself. It is with great interest that, in the light of the current efforts by the Zimbabwean Government of National Unity (GNU) to come up with a new constitution, this paper advocates for the abolition of the death penalty in Zimbabwe. Currently, Zimbabwe's Government of National Unity is carrying out a constitution making process in order

to come up with a new constitution. Of the fundamental issues that have raising a lot of controversy and debate in the current constitution making process is the issue of whether the death penalty should be maintained or expunged. The death penalty is the legal killing of a person as punishment for a prescribed offence. In Zimbabwe's current Lancaster House crafted constitution, two crimes namely unmitigated first degree murder and high treason are punishable by the death penalty (Msipa, 2010). The proponents of the prohibition of capital punishment in the new proposed constitution of Zimbabwe disapprove of it on ethical and humanitarian grounds because killing a human person is a barbaric act and there are chances that an innocent person may be put to death because he has failed to defend himself.

Thus, a philosophical discussion of the morality of capital punishment within the Zimbabwean context is very critical to the understanding of the question of its moral justification and social justice in the light of the challenge of modernism and liberalism in Zimbabwe today. First, the paper presents a trajectory of capital punishment in colonial and post-colonial Zimbabwe. Second, the paper reflects upon arguments for the moral justification of capital punishment. It develops the thesis that the tripartite understanding of punishment is not only incompatible with contemporary drives towards the respect for human rights, but also does not seem to achieve the results that it is intended to achieve.

According to this tripartite understanding of punishment, it is generally believed that punishment is permissible in so far as it is used to deter, reform as well as to serve the retributive role. The same is also thought of the death penalty as a form of punishment. As Martin and Turner (2005:65) see it, "although the trend has been towards abolition [of capital punishment] over the last sixty or so years, it is possible that the majority of people do not agree, believing it either to be a deterrent or the right punishment for serious

transgression.” However, it is the submission of this paper here that the process of reform, deterring and retribution cannot be fully achieved by administering death. Thirdly, the paper assesses the compatibility of capital punishment with the respect for human life. In this section, it is noted that if in any way Zimbabwean society is to successfully talk of the respect for human and people’s rights, the new constitution should abolish the death penalty. It is established here that the way capital punishment is administered is contrary to the respect for human rights as well as respect for human life.

In the fourth and last section, it is recommended that the death penalty in Zimbabwe should be revisited and abolished if in any way Zimbabwe is to fit well within the other league of nations that have abolished the punitive penalty of death. Thus, the paper is a challenge to legislators and society in general, especially in the light of current efforts in Zimbabwe to draft a new constitution. It is a plea for Zimbabwe to devise better ways of dealing with its malcontents.

Background to Use of Capital Punishment in Zimbabwe

Zimbabwe was under colonial rule for ninety years and this sad chapter in the country’s history was, among others, characterised by forcible resource dispossession and dehumanizing treatment of the indigenous people of Zimbabwe by the white settlers. Such morally scandalous land dispossessions and inhumane treatment of the black people created racial tension that resulted in black uprisings in the 1890s and subsequent decades in order to redress the evils of colonialism. The colonial settler governments, therefore, used the death penalty as one of the ways of suppressing and silencing the dissenting voices among the indigenous people of Zimbabwe. For example, some of the icons of Zimbabwe’s struggles against colonial rule such as Mbuya Nehanda and Sekuru Kaguvi were sentenced to death in 1898 (The Standard, 25 April 2010) because of their political activities that tended to undermine the settler regime. Thus, in

colonial Zimbabwe, the death penalty was, to some extent, used as a political tool to silence opponents. The reason why Mbuya Nehanda and Sekuru Kaguvi were captured and subsequently hanged by colonialists after the first Chimurenga (1896-7) was because they wanted to silence the dissenting voices among the indigenous black people who wanted to question and dethrone the brutal and illegal colonial government. In this regard, the death penalty was used as a ploy to muzzle people's rights to, among others, free speech and association. In a similar fashion, "...during Zimbabwe's second Chimurenga, the death penalty was used both to intimidate people and eliminate nationalists and the so-called "terrorists" who were up against colonialism" (The Standard, 25 April 2010). The execution of Mbuya Nehanda and Sekuru Kaguvi, among others, could have been undertaken as a deterrent to those indigenous people who dared to oppose the white settler rule. Therefore, there is a sense in which capital punishment can be abused to settle political disputes.

When Zimbabwe got independence from colonial rule in 1980, the death penalty remained part of the constitution of the new Zimbabwe. Since independence, a number of offenders were legally executed. In Zimbabwe, offences such as first degree murder and treason can attract the death penalty. According to Zimbabwe Prison Service reports, "...76 African male prisoners were executed between April 1980 and December 2001. In the same period 244 inmates were sentenced to death by the High Court of Zimbabwe. Approximately two thirds of those sentenced had their sentences quashed by the Supreme Court or commuted to life imprisonment (<http://nodeathpenalty.santegidio.org/news.aspx?n=en&id=14&n=13788>). Although the death penalty in Zimbabwe has been justified constitutionally on the merits of its purported various deterrent, retributive and reformatory notions on society, there is a sense in which it may also work against fundamental freedoms that individuals should enjoy. The presence of the death penalty in society may stifle freedom of speech, expression and association.

Even though no legal executions have been carried out on political adversaries in post-independence Zimbabwe, there are suspicions that the death penalty has been used as a political strategy to intimidate and silence individuals that subscribe to different and divergent political opinions of the *status quo*. Hence, it is not surprising that some of the notable political figures in post independent Zimbabwe such as Ndabaningi Sithole, the leader of the Zimbabwe African National Union (ZANU) was charged with plotting to overthrow the government ahead of the 1996 presidential elections and Morgan Tsvangirai, the leader of the main opposition party Movement for Democratic Change (MDC) "...charged with treason three times, the last just ahead of the 2002 presidential elections and his trial lasted almost two years..." (Kwenda, 2007) only to end in a surprise acquittal. The Standard (25 April 2010) notes, and rightly so, that "the death penalty was introduced by colonialists in Zimbabwe for political reasons. Thus, the death penalty, while alien to this country, its political history is dirty. Hence its continued use in post-colonial Zimbabwe is reminiscent of how colonial regimes abused it to dispose off critics and opponents." Therefore, there is a sense in which the threat of death penalty has been used to suppress dissenting voices to the political *status quo* thereby muzzling people's rights to political associations and freedom of speech.

In the context of current efforts to make a new home-grown constitution, debate has centered, among other key issues, on whether the death penalty must be retained or abolished in the new constitution. Political polarisation on this issue raises suspicion that it could be used for retributive purposes among politicians. Docketed history of capital punishment has shown that it does not succeed in fostering desirable behaviour among citizens. Despite its presence in Zimbabwe's statutes since colonial times, individuals continued to commit offences that attracted capital punishment. For instance, Zimbabwe's liberation fighters, in their endeavour to dislodge the white settler government from power committed some offences that

were punishable by death. Thus, the purported retributive, deterrent and reformative function of the death penalty have been shown by empirical evidence that they do not make citizens avoid certain kinds of behaviour that would attract the death penalty. It is against this background that the paper recommends that the death penalty must be abolished in current effort to write a new constitution for post-independence Zimbabwe. By so doing, Zimbabwe would join progressive nations the world over that have abolished the death penalty on the grounds that it, among others, violates human rights and is grossly insensitive.

The Moral Justification of Capital Punishment: Deterrence, Retribution and Reform

Debate on the morality of capital punishment became a topical issue during the Enlightenment period at the same time when talk about the need to respect individual rights and the intrinsic dignity of human beings gained momentum (Boss, 2008: 256). Provided it is administered in a way that is not abusive to the offender's basic rights to human dignity, punishment in general should be morally acceptable in the process of making society to conform to its legitimate authority of the state. This thinking is informed by the social contract tradition. According to this theory, an individual who is part and parcel of society and who accepts the legitimate authority of the state freely consents to the principles that the state may impose punishment on those who break the law [Hobbes (1588-1679), Locke (1632-1704) and Rousseau (1712-1778)]. British natural rights ethicist, John Locke, for example, argued that the right to life is an important right that ought to be protected. However, for him, the right to life can be lost if one violates another person's right to life (Boss, 2008: 256). In his *Second Treatise of Government* (ibid), Locke notes that in a state of nature (ibid):

every man hath a right to punish the Offender, and be Executioner of the Law of Nature....Thus, it is, that every Man in the State of Nature, has a Power to kill a Murderer, both to deter others from doing the like, which no Reparation can compensate...and also to secure Men from the attempts of a Criminal, who having renounced Reason...hath by the unjust Violence and Slaughter he hath committed upon one, declared War against all Mankind, and therefore may be destroyed as a *Lyon* or a *Tyger*, one of those wild Savage Beests, with whom Men can have no Society nor Security: And upon this is grounded the great Law of Nature, *Who so sheddeth Man's Blood, by Man shall his Blood be shed.*

According to Locke's social contract theory, people decide to form government in order to avoid the uncertainties of life in a state of nature. Thus, in an organised society, the death penalty is justifiably administered by the state. It is the duty of the Lockean ideal state to prevent society from degenerating into a chaos through appropriate punishment of offenders. Hence, historically, the Social Contract theory is one such theory which attempts to reconcile the autonomy of the individual with the legitimate authority of the state to inflict punishment, including the death penalty.

Utilitarian philosopher, Mill (1806-1873) supported capital punishment because of its beneficial consequences to the generality of society. In his speech to the British House of Commons (Boss, 2008: 256) in 1868, Mill justified the death penalty as a suitable punishment for vicious crimes. In this regard, the death penalty acts as having a deterrent effect on those who may be tempted to engage in such punishable crimes. Thus, the deterrent thesis is one of the main arguments for the justification of the death penalty. Deterrence according to Owoade (1998: 47) refers to the restraint which fear of punishment imposes on those likely to commit crime. This theory of punishment rests on the understanding that the purpose of punishing

wrongdoers or criminals is to deter, prevent or frighten other people from doing the same wrong or criminal act (Dzurgba 2000:62). As Balogun (2009: 49) sees it “punishment as a deterrence may either deter the would be or potential criminals or offenders from carrying out the same wrong later in future.” It is because of this thinking in Zimbabwe and other nations that are still practicing the barbaric sentence that the death sentence frightens other would be criminals from performing actions that warrant capital punishment. For Boss (2008: 258), “...deterrence performs the broader social goal of keeping others from committing similar crimes...” Thus, against this background therefore, threat for punishment will almost always deter, frighten or prevent individuals from doing something that might invite capital punishment.

Van den Haag concurs with Mill that the threat of death through the inclusion of the death penalty in a country’s constitution acts as the decisive deterrent (Boss, 2005: 258) to those who may be tempted to engage in anti-social acts such as murder. The basic assumption of the deterrent argument is that the more severe the threat of punishment for certain offences is, the less likely are people inclined to commit such offences. Thus, fear of the ultimate punishment of death penalty is necessary in a country in order to keep in check those with a propensity to engage in high degree crimes. However, Boss (2008: 258) strongly questions the position that the severity of punishment logically entails a decrease of certain forms of crimes. In this regard, it seems doubtful whether the severity of the death penalty acts as a deterrent to violent and lawless behaviour. Thus, the proponents of the abolition of the death penalty argue that there is no sufficient empirical evidence to show that there is a connection between the use of capital punishment and a drop in the rate of violent crimes.

Also, from a utilitarian perspective, it is believed that capital punishment promotes the development of desirable character traits

for the greatest number of people by deterring, hence the thinking that it should be administered. According to Ross (1970:615) “punishment is justified only on the ground of the effects that it produces. The effect referred to are those of deterrence and reformation.” But however, whether capital punishment serves the deterrence or the reformation roles, that remains questionable. Supporting this utilitarian argument for the justification of capital punishment to murderers, Goldberg (1985:425) argued that:

It should be clear that capital punishment deters – if it does deter – not because the individual who is considering murder weighs the potential murder against the punishment and decides that, while life imprisonment is a cheap price to pay, execution is too dear. He is deterred by capital punishment – if he is deterred by capital punishment – because he has perceived, from childhood on, that murder is the most serious of all social offences.

It is apparent that the administration of capital punishment is supposed to strike fear into the hearts of individuals in society, who are potential criminals. However, the position of this paper is that the death penalty is far from producing this result. Rather, in actuality, nations that continue to administer death as a form of punishment continue to have higher crime rates that would warrant capital punishment. The problem here is as to whether the death penalty succeeds in deterring the offender in particular when he in actuality is dead. It appears the death penalty does not actually serve the preventive aspect that it is purported to.

Capital punishment can also be morally justified on the grounds that it makes sure that criminals are totally incapacitated from committing further horrendous crimes through killing them. Thus, unlike deterrence that seeks to warn society that certain crimes ought not to be committed, incapacitation seeks to make sure that an

offender will never commit crimes again because such an offender is killed in order to totally incapacitate him. Thus, for Boss (2008: 258), the government has a right to institute death penalty in order to safeguard society from the violence and lawlessness of some of its members.

German philosopher of the Enlightenment period, Kant (1724-1804) categorically dismissed the consequentialist argument for the rightness of capital punishment. In fact, Kant justified death penalty not because of its beneficial consequences to the society, but because this is the most appropriate way of satisfying the requirement of retributive justice. He is quoted by Boss (2008: 257) as remarking that:

The penal law is a categorical imperative; and woe to him who creeps through the serpent-windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment, or even from the due measure of it....For if justice and righteousness perish, human life would no longer have any value in the world....if you strike another, you strike yourself; if you kill another, you kill yourself. This is the right of retaliation (jus talionis)...whoever has committed murder must die.

Kantian philosophy emphasizes the centrality of reason in moral decision making and he argues that a rational being has the attributes of autonomy and freewill. Therefore, a rational being ought to be treated with dignity and respect as an end in himself. In this regard, Kant asserts that the state has a right to punish an offender, and the offender has a right to be punished because, as a rational and autonomous being, he is ultimately responsible for his actions. Since a rational being is capable of making a distinction between a morally right and wrong action, but chooses to do the morally wrong action in a given moral situation, the offender deserves to be punished for his offences. He, therefore, defends death penalty as a form of retribution for the murderer. However, opponents of the death penalty doubt

Kant's claim that murder ought to be punished by murder because the murderer rationally decides to commit such a serious crime. For them, there is evidence to suggest murderers do not engage in the kind of rational assessment of the act of murdering before they commit the offence (Boss, 2008: 259). By its very nature, murder is an act that is committed impulsively and is informed by irrational emotions as opposed to reason. Therefore, capital punishment in the case of murder is not morally justified because the murderer is not in full control of his rational faculties.

Kant, Locke and van den Haag, among other champions of capital punishment, are not worried about whether it would deter the would-be-offenders from committing horrendous crimes, but strongly argue that retributive justice alone is enough to justify death penalty (Boss, 2008: 259). The one who has committed a serious offence has to pay the ultimate price of death and Islamic ethics approve of death penalty for such serious offences. For Boss (2008: 259), the principle of proportionality is one of the most important principles of distributive justice whereby the severity of punishment ought to be proportionate to the crime committed. Kant is, therefore, quoted by Boss (2008: 259) as remarking that the murderer is "getting what he deserves" or "what is coming to him" through the death penalty. However, opponents of capital punishment such as Bentham, wonder how an evil act can cancel out an evil act. In a similar way, Bedau (2008) and Reiman (2008), though they accept the principal of retributive justice, they do not approve of 'an eye for an eye' treatment for criminals. In this respect, Boss (2008: 259) comments that "we do not rape rapists or burn the homes of arsonists; the deliberate killing of a murderer is also an inappropriate punishment" and such reasoning can be used as an indictment of retributive justification of capital punishment. Some traditional African societies do not approve of the death penalty as punishment for murder but instead ask for restitution as payment for a murder committed. Restitution, therefore, becomes an appropriate sanction against would-be-murderers.

Retributive justice is a theory of justice that considers that punishment, if proportionate, is a morally acceptable response to crime. It is a theory of criminal justice where capital punishment is justified on the grounds that the criminal has created an imbalance in the social order that must be addressed by action against the criminal. Looked at from this perspective, this theory of retributive justice is mainly centered on the attempt to the satisfaction and psychological benefits it can bestow to the aggrieved party, and society in general. Central to retributive justice are the notions of merit and desert. The basis of retributive capital punishment is that people should receive what they deserve. This means that people who work hard deserve the fruits of their labour, while those who break the rules deserve to be punished. This is the same thinking with capital punishment. It is assumed that those who kill deserve to be killed, and at the same time those who commit offences that are equivalent to death, also deserve death. In addition, the retributive justification of capital punishment rests on the thinking that people deserve to be treated in the same way that they voluntarily choose to treat others.

The idea that we should treat people as they deserve is commonly accepted. Mostly, this view rests on the expectation that society does not think that murderers should be allowed to live carefree lives after committing unspeakable crimes against humanity most of which warrant the death penalty like murder. However. Looking at the issue from a Zimbabwean and African idea of *ubuntu* however, it may be very difficult to justify capital punishment in Zimbabwe today. The idea of *ubuntu* in traditional Zimbabwean and African communities at large served as a watertight peacekeeping process that covered almost all offences across society. As Murithi (2006:31) noted:

In the most difficult cases involving murder, *ubuntu* societies sought to avoid the death penalty, because based the society's view of itself – as people through other people

– the death penalty would only serve to cause injury to the society as a whole. Though it would be more difficult to move beyond such cases, the emphasis would still be on restoring the broken relationships caused by the death of a member of the community.

Following the commonly accepted retributive intention of capital punishment, it is apparent that the aim of punishment would be to kill the offender so as to settle the dispute or crime that would have been committed. However, far from doing so, retributive means through infliction of the death sentence do not achieve the rebuilding and maintenance of the social order, trust and cohesion that should be guaranteed in society. Rather, retribution through the death penalty breeds a culture of vendetta to escalate between individuals, families and society; hence retributive capital punishment should not be a sound justification for the death penalty in Zimbabwe.

Retributive approaches to justice are inherently destructive. They are not only destructive to the offender, but to society in general. A society that practices retributive justice in essence destroys itself. In general, the notion of retribution is not only alien to African communities, but rather, it is incompatible with the communal approach to life found in Zimbabwe and Africa at large, where the individual, according to Mbiti (1969:108) “owes his existence to other people, including those of the past generations and his contemporaries.” Thus, the ontological pluralism found in the life of the Zimbabwean and African in general is rather incompatible with retributive approaches to justice in the form of capital punishment. In addition, there is also a dangerous tendency to slip from retributive justice to just an emphasis on revenge just for the sake of revenge. Sometimes, revenge typically involves anger, hatred, bitterness, and resentment. Such emotions are potentially quite destructive. Because these intense feelings often lead people to over-react. Thus, in a way, retributive capital punishment can be excessive and cause further

antagonism. Hence, retributive capital punishment is not necessarily fruitful. As Minow (1998) sees it, it is not surprising that revenge seldom brings the relief that victims seek. The victim simply gets caught up in feelings of hatred. Thus, following these arguments, it is reasonably to note that retributive capital punishment may not be the best of ways of instilling retributive justice in society, hence the need to revisit capital punishment in the current constitution making process in Zimbabwe.

According to Velasquez and Rostankowski (1985:419), the death penalty is “too severe a way of incapacitating a criminal when a permanent imprisonment can accomplish the same purpose.” Thus, rather than purporting to deter individuals in society through the death penalty, it would be meaningful to adopt the preventive approach as an option to death. This is where severe punishments of serious crimes that warrant death could be done by permanent confinement and not necessarily death. For Rawls (1971:314):

It is true that in a reasonably well-ordered society those who are punished for violating just laws have normally done something wrong. This is because the purpose of the criminal law is to uphold basic natural duties, those which forbid us to injure other persons in their life and limb, and to deprive them of their liberty and property, and punishments are to serve this end. They are not simply a scheme of taxes and burdens designed to put a price on certain forms of conduct and in this way, to guide man’s conduct for mutual advantage. It would be far better if the acts proscribed by penal statutes were never done.

Although it remains utopian to assume that all acts that are forbidden by penal statutes could be avoided, Rawls thinks that the justification of punishment in general lies in its reformatory notion. The other justification also lies on the liberty that ought to be safeguarded in society. However, it remains to be seen if in any way

the death penalty in Zimbabwe and other nation states that are still practicing it allows room for repentance, redemption and reform. However, retributive justice, if looked at in this way sounds backward-looking. Capital punishment is warranted as a response to a past event of injustice or wrongdoing. It acts to reinforce rules that have been broken and balance the scales of justice. But, however, it remains to be seen if in any way human life could be sacrificed for the sake of desert.

According to the reformatory theory, punishment should change the criminal so that in future he/she will not violate society's norms, values and laws. In other words, punishment is justified as a teleological instrument that is intended to prevent the person who is being punished from committing future crimes. Punishment for some, is a means of reforming, thus, forming certain desirable mental states. Hence, as Peters (1966:272) sees it, "it is desirable to arrange the conditions of punishment in such a way that there is some possibility of a person being reformed while being punished...[hence] it may be the case that prisoners can be treated constructively while they are being punished so that they emerge from prison as better people." (1966: 272).

Following the reformatory theory of punishment, it is believed that punishment and reform of offenders is fundamental to reducing crime and delivering justice. Against this background, thus, a just and civilized society is one where offenders are both punished for breaking the law and given the opportunity to reform and turn away from crime. However, it should be noted that reformation may not necessarily be an outcome of punishment sometimes. In essence, it is not always the case that punishment will almost always lead to reform, or that reform is a result of punishment.

A Case against the Moral Justification of Capital Punishment

Arguments against the morality of capital punishment have been linked to the desire to protect human rights. Above all, the administration of punishment through death is, in all respects contrary to the safeguard of human rights and human dignity. So, the traditional justification of punishment is that when an individual receives punishment for the wrongs that he/she would have done, he would be simply doing so freely just like in the way he/she would have freely and rationally consented to be part of civil society or state in general. So, in that light, following the deterrence, the reformative, the retributive approaches to capital punishment, if individuals decide that the death penalty be part of the Zimbabwean social contract or the constitution, then capital punishment in that respect becomes inevitable. However, the only question that still remains is the morality of the death penalty regardless of the fact that it is constitutional. There is a fundamental difference between the legality of an action and its morality.

Although legally the death penalty is not prohibited by international law, recently, there has been some strides to revisit it with a view to halt its execution. According to a report by the Amnesty International Zimbabwe: (Newsday, 2010:12 October), the United Nations General Assembly as well as the African Commission on Human and People's Rights have all adopted resolutions calling for a moratorium on executions with a view to abolishing the death penalty. For Boss (2008: 260), both the United Nations and Amnesty International are opposed to the death penalty for the reason that it violates human rights and related human values such as human dignity and right to life. It has been criticised as grossly heartless and brutal despite the fact that the one who is killed has committed a serious crime. However, Locke and Morris argue that even though human beings have certain basic rights, such as the right to life, human beings forfeit these basic rights if they purposely violate these basic rights (Boss, 2008: 260). By so doing, human beings lose their

moral standing and some moral rights thereof meaning that those who violate other people's right to life, in turn ought also to lose their right to life. Therefore, there is a sense in which capital punishment can be justified on the basis of upholding human rights whereby the one who has violated another person's right to life ought to lose his right to life as well.

Human rights, which are recognised in the Universal Declaration of Human Rights, the African Charter on Human and People's Rights and other International Human Rights instruments to which Zimbabwe is a signatory to the preamble to the Universal Declaration of Human Rights adopted on 10th December 1948 emphasizes that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human community is the foundation of freedom, justice and peace in the world." In Shaw, (1997:196). The contention of the argument here is that, regardless of the severity of the crime, the death penalty remains inhuman, degrading, unjust and contrary to the globalising world where freedom, peace and development are the order of the day.

Jeremy Bentham (1748-1832) strongly opposed death penalty and punishment in general because both these judgments lessen the happiness of society. He rejects the death penalty and punishment in general, and regards all punishment is evil because punishment simply adds more suffering and evil to the world (Boss, 2008: 256). Bentham would only approve of punishment if it is the only means of do away with an even greater evil. He, therefore, recommends a prison system that is based on reform and rehabilitation as a valid alternative to the death penalty. However, Mill, unlike his mentor, Bentham, approves of capital punishment because it tends to bring about the greater utility.

The opponents of death penalty such as Helen Prejean (2008) and Hugo Adam Bedau (2008) are opposed to the use of death penalty

as a deterrent and as a means of totally incapacitating the dangerous offenders from further inflicting harm on society. For them, life imprisonment and other punitive and restrictive measures such as solitary confinement are enough to incapacitate dangerous criminals. Prejean (2008) regards the death penalty as a cruel act both during and after the actual execution and the long wait before actual execution. French writer Albert Camus (1913-1960) bemoaned the moral contradiction that is associated with the death penalty whereby violence is punished by worse violence (Boss, 2008: 261). Bedau (2008) is an avid opponent of the death penalty. For him, the death penalty is not consistent with the principle of respect of human dignity. Therefore, it is immoral.

There is general consensus among opponents of capital punishment that since capital punishment involves intentional taking away of life it is inherently wrong (Boss, 2008: 29). The death penalty, instead of being simply a punishment to the offender, also drags society to the level of the murderer because society, through its legal system, also commits murder via the death penalty. Therefore, the death penalty ought to be abolished on the grounds that it violates human rights and other related values, and also sets a sad precedent whereby a wrong is punished by another wrong.

Recommendations and Conclusion

There have been noticeable calls for the abolition of the death in Zimbabwe, by and large, because of its insensitive nature. Interestingly, two former chief justices of Zimbabwe categorically voiced their concerns over executions. Chief Justice Enoch Dumbutshena was quoted by the Herald (December 7 1987) as having said that "I believe that many people we sentence to death for killing somebody should not be sentenced to death but given a life imprisonment term". In a similar fashion, his successor, Chief Justice Anthony Gubbay, when he was ruling on whether delaying executions and appalling conditions of incarceration were not

contrary to Section 15 (1) of the constitution (CCJP v AG and others (1991) (1) ZLR 242 (<http://nodeathpenalty.santegidio.org/news.aspx?ln=en&id=14&n=13788>)), he is reported to have remarked that: "what may not have been regarded as inhuman or degrading a few decades ago may be revolting to new sensitivities which emerge as civilisation advances" (ibid). In addition, the government-driven proposed new constitution that was rejected through the 2000 referendum, the parallel National Constitutional Assembly's proposed new constitution of 2000 and the current Kariba Draft, a product of major political parties in Zimbabwe, ZANU (PF), MDC-T and MDC-M that was drafted prior to the formation of the GNU, on the proposed new constitution interestingly do not contain the death penalty. However, the constitution making process under the GNU has brewed controversy on whether the death penalty should be abolished or upheld in the new proposed constitution. This paper recommends that the death penalty should be abolished because it negates offenders' rights to, among others, life and humane treatment.

Even though it is an actuality that first degree murder and other serious criminal offences such as treason are a threat to social stability and cohesion, it is immoral to punish evil acts with equally evil sentences such as the death penalty. In this regard, the paper, in line with the views of major proponents for the abolition of capital punishment, argues that the death penalty in Zimbabwe can be replaced by the lesser evil life imprisonment whereby the offender is confined to harsh prison condition for the rest of his life. It is the observation of this paper that the institution of capital punishment needs to be revisited if society is to escape the dilemma of reconciling punishment in general with the respect for human and people's rights. Oruka (1975:89) rightly noted that the institution of punishment itself is unjustified. For him (ibid), punishment should be unconditionally abolished at the expense of *treatment* which is a feasible alternative. In this regard, the offenders must be reformed so

that they cease to be a threat to peace and stability in society. By so doing, society absolves itself from evil deed of killing dangerous criminals among its members because the murderer, for example, is not punished by the same evil, that is, through death penalty. Thus, the death penalty in Zimbabwe can be abolished on the grounds that it is a form of punishment that is grossly inhuman and cruel.

In some cases, people can be wrongly convicted (Martin and Turner, 2005) and since death cannot be reserved, it becomes problematic if new evidence that exonerates the convict crops after he has been killed. Thus, it is reasonable to note that only *treatment* and not punishment can eliminate and eradicate the forces that give birth to crime. For Oruka (1975:89), society should deal with the criminal forces and not victims of these forces. The same applies to capital punishment. It is the contention of this paper that people who commit such crimes that warrant capital punishment are sick and need to be cured through *treatment*, and not necessarily to be killed. As Balogun (2009:50) sees it:

What induces us to commit crimes is not the use or misuse of our freedom, but certain criminal forces that are behind our controls. Thus, criminals are not to be held responsible for their actions, since they are only victims of circumstances, that is, the criminal forces.

Balogun (*ibid*) is of the view that Utilitarians and Retributivists miss the mark when they endorse punishment instead of getting deep down to the roots of criminality. So, instead of killing or administering the death penalty, this paper suggests that the current constitution making process in Zimbabwe should repeal the death penalty with a view to addressing certain fundamental issues that lead offenders to commit offences that warrant the death penalty. Research has, after all, shown that the death penalty is contrary to traditional African concepts of justice and beliefs where a human

being is treated with utmost respect and dignity. In 2007, during some campaigns against the death penalty, Zimbabwe's traditional chiefs rejected it because, for them, it is "... an alien and a colonial law contrary to traditional African concepts of justice and beliefs which treat human life as sacred" (The Standard, 25 April 2010).

Lastly, it has been the contention of this paper that the current efforts by the Zimbabwean GNU to craft a new constitution provides a unique opportunity for Zimbabwe to show its commitment to the protection of human rights including the rights of criminals by abolishing the death penalty. Although the individual citizens must be protected from the serious, dangerous and most persistent offenders who pose a threat to their communities, still, inflicting the death penalty remains an ugly business besides it failing to deter, reform and serve the retributive roles of punishments as has been established in this paper.

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