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ANATOMY OF THE IMPACT OF THE DEATH PENALTY ON INDIVIDUAL HUMAN RIGHTS

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The first time that I ever thought seriously about undertaking some research on the death penalty was after I had watched a debate on the subject on television in 1993. I knew nothing about the issues involved. Curiosity, then, drove me to apply to do an LLM in Public law so that I could undertake my own research on this subject and, in that way, register my own humble contribution to the whole debate. This work is the result of these endeavours. My research topic was conceived on my way to Cape Town in a taxi from Johannesburg. With the help of my supervisor, Dr Tiya Maluwa, and a discussion with Professor Christina Murray, my topic was perfected.

Like my expedition from Johannesburg to Cape Town, the road through this work was long and winding with fluctuating spells of happiness and depression. To be sure, this work could not have been possible had it not been for the contributions of a whole lot of people to whom I am sincerely indebted. Firstly, I would like to thank my loving parents Piet Lesiba and Helena Raisibe who encouraged me in this endeavour and literally gave away all they had to enable me to further my studies. Secondly, and most importantly I wish to thank my supervisor for his valuable advice and criticisms that influenced my perception of the death penalty debate. His patience was both heartening and encouraging. Thirdly, I wish to thank Professor Christina Murray for the valuable seminal discussion on this subject and for taking her time off to personally teach me how to research through a computer.

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INTRODUCTION

The death penalty or 'permanent removal of an individual from society by the authorities'[1], or to put it even more bluntly, 'the killing of an individual by the state authoritities'[2] has been in existence and has bedevilled legal systems all over the world from time immemorial. Sadly, in many countries, this is still the position. Arguments in favour and against the death penalty continue to fill volumes of different kinds of literature. Many disciplines have had the opportunity to examine the death penalty from their own perspectives.

Perusing the various writings on the death penalty one is bound to observe, sooner or later, that the subject is clouded with high emotions which inevitably blur the valuable process of logical thought. Therefore, without doubt attitudes towards the death penalty are 'deeply influenced by the emotional and psychological makeup of people holding those attitudes'[3]. The death penalty as traditionally treated in writings unavoidably incited emotional debates that unfortunately pit people of different views, as it were, against one another. Unfortunately such emotional differences cannot be resolved by the power of reason, 'but only by the success of one side converting the other to its faith'[4]. Many of those who contributed to the

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1 This was the phrase used, so it was alleged, by the South African authorities to signal the killing of certain political activists in the mid-1980s during the hey-day of apartheid.

2 *Vide* Amnesty International, *When the State kills - The death penalty v Human rights*, 1991, p1 for a fuller definition of the death penalty.

3 These words were employed by McNalty JA in *S v A Juvenile* 1990 (H) SA 151 (ZSC) at 170 A, in connection with corporal punishment.

4 Thorsten Sellin, *The penalty of death*, 1980, p39.

death penalty debate ended in this pitfall. Thus for a long time the death penalty debate has gone in vicious emotional circles. Because the arguments on either side are equally weighed, the debate has reached a stage of diminishing return. Ultimately, to provide a way out, 'the argument over the death penalty must rest not on emotions but on reason and universal respect for human rights'[5]. As comprehensive human rights norms took root at the end of the Second World War the traditional way of treatment of the death penalty debate is still common. Consequently, only a few writers, as exceptions, treat the debate with human rights underpining. These colossal developments have overridden tradition. Time is now opportune for us to 'lift up our eyes to the mountain whence cometh human rights' and begin to appreciate the full import of this innovation and thus employ it fully in sober analysis of the impact of the death penalty on individual human rights.

The focus should inevitably shift from the emotionalism characterising the traditional debate founded, in a nutshell, on the utilitarian value or otherwise of the death penalty to the appropriateness or otherwise of such 'punishment' in the eternal reigning era of human rights norms.

South Africa has unfortunately not been an exception to this debate. In fact she has been at the unenviable centre thereof[6]. This highly charged debate culminated in a

5 *Op cit* note 2 *supra* at p9.

6 *Vide*, for instance, Ellison Kahn 'The death penalty in South Africa' *THRHR* 1970 p108ff; Dennis Davis, *Capital punishment and the politics of the doctrine of common purpose: Towards Justice?*; Desirée Hansson & Dirk van Zyl Smit (eds). *Crime and State Control in South Africa*, 1990, p135ff; J Sloth-Nielsen, *Legal violence: Corporal and Capital Punishment*; B McKendrick and W Hoffmann (eds), *People and Violence in South Africa*, 1990, p73ff.

severely compromised provision in the interim constitution which states: 'Every person shall have the right to life'[7].

This section does not differ in any material way from the provision in the United States Constitution which stipulates: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law ...'[8].

Many countries have a similar provision in their constitutions. This however, does not prevent any state from imposing and carrying out the death penalty as the American experience shows. To my understanding such provisions go no further than imposing a duty on the state to protect individuals from villains by bringing such miscreants to justice.

The death penalty is the ultimate sanction that a state can mete out to an individual. A difficult task is to find out on which basis a state may claim for itself a right to kill individuals convicted of murder. International human rights law and indeed the South African Interim Constitution accord individuals a right to life. Various writers approach the right to life differently, and in it, they perceive varying contents. What seems to be a point of agreement is that the right to life is not only enforceable against the state, but enjoins the state to positively secure it for every individual in its jurisdiction. (By killing murder convicts does a state not act contrary to its duty to protect life?) Unfortunately a state, unlike

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7 Constitution of the Republic of South Africa, Act No 200 of 1993 section 9.

8 Fourteenth amendment passed by Congress on June 13, 1866 and ratified on July 9, 1868.

supporters or opponents of the death penalty, has no freedom to choose to be on either party's side. As the protector of the right to life the state has to be impartial and avoid the temptation to take life and give a bad example to the populace. If reliance is to continue to be put on retributivism and deterence to licence the state to kill murder convicts, at the end how much loss in terms of life accrues to society? The development of criminal law dramatizes an endeavour to completely remove from victims of crime, the need to carry out revenge. This step has not resulted in empowering the state to revenge the victims of murder by killing the perpetrators. By killing the state becomes partisan and thereby acts wrongfully by failing to protect the life of the person it kills, just as it failed to protect the life of the murder victim.

No doubt the right to life is the life-spring to all individual human rights. However, in considering the impact of the death penalty on individual human rights only those rights that are directly and immediately affected by the death penalty will be considered. These to a great extent will be the right of the doomed person. In addition thereto, the rights of third parties affected by the death penalty will also be discussed. To demonstrate the anatomy of the impact of the death penalty on individual rights it becomes necessary to consider the global state of the death penalty debate. This is so because the death penalty is a human rights issue. Consequently the history of the death penalty, theories of punishment and global and regional human rights instruments relative to the death penalty will be considered. And finally particular rights affected will be discussed to complete the examination of the anatomy of the death penalty. In conclusion it will be argued that the death penalty is unconstitutional and must, therefore, be abolished once and for all in order to give full effect and content to the right to life and the long overdue sanctity

of human life.) It will be contended therefore that the 'right to life' clause in the South African interim Constitution, if properly interpreted with due regard to the limitation clause[8] clearly atrophies the death penalty. Such interpretation would certainly spell out a new epoch for the South African legal system and a bed-rock for respect for human rights.

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8 *Op cit* note 7 section 33.

CHAPTER 1

A BRIEF HISTORICAL OVERVIEW

The historical path treaded by the death penalty has been a long one. With ups and downs, the road has often been wide but also narrow at times. And so has the temperature fluctuated in accordance with times. This shows the controversies inherent in this method of punishment. It is not clear from history whether this sanction was meant to measure the crime in which case reason and logic would dictate that it be restricted to instances where the offender murdered. Whether it was used generally to deter potential offenders is another matter which, however, seems more likely.

Those who trace the history of the death penalty to ancient Biblical times[1] are wont to refer to the leader Moses as the father of *lex talionis* principle enshrined in Mosaic law applicable at the time. The principle simply connotes that punishment of crime should equal the offence. Thus life for life, an eye for an eye. Seen in this light, the principle enshrines the modern concept of proportionality which in itself is fraught with controversy and defects especially in the realm of penology. For instance how would one measure x days of imprisonment to a contravention of a traffic speed limit? Quite strangely, even in those olden times a wide range of crimes were punishable with the death penalty[2]. A substantial distortion of *lex talionis* principle. Noteworthy though, is

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1 Thorsen Sellin, *The penalty of death*, 1980, pp3-4.

2 *Ibid*, although there were ways to eschew execution eg by escaping to a designated place of sanctuary.

the fact that capital punishment has not always gone without challenge[3].

In positive law the death penalty can be traced back as early as 1750 BC, in the *lex talionis* of the Code of Hammurabi[4]. Even then it covered a long list of offences. The same position obtained under Roman and Roman-Dutch law, which happens to be the common law of South Africa. A famous Roman-Dutch writer, Van der Linden, who wrote at the beginning of the last century, listed thirteen capital crimes including treason, murder, manslaughter, sodomy, fraud, arson, robbery, kidnapping, etc[5]. As Kahn observed, execution was 'normally by decapitation or hanging, but it could be by slow strangulation, burning alive, impaling or some other horrifying method'[6]. This was also practiced in South Africa during the days of the Dutch East India Company.

Generally, throughout history, the death penalty was always attended by brutality and publicity of enormous proportion. By the time Britain occupied the Cape Colony in 1795 for the first time she had two hundred capital crimes, including theft of five shillings and consorting with gypsies, and tolerated the hanging of children at the age of nine[7]. What this means is that it is possible that the same

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3 *Ibid*, especially with the rise of Christianity. Jesus taught brotherly love and warned against killing in any situation for whatever reason. Certainly this was a clear denunciation of Mosaic law.

4 William A Schabas, *The abolition of the Death Penalty in International law*, 1993, p2.

5 Ellison Kahn, 'Symposium on capital punishment', *Acta Juridica*, 1975, p220.

6 Ellison Kahn 'The death penalty in South Africa', 1970, *THRHR*, p108 at 109.

7 *Ibid.*

position obtained in the Cape during the period of British occupation at least.

The legitimacy of the death penalty has over the years been as controversial as the sanction itself. Grotius, the great Dutch jurist, found it acceptable with reference to the Bible and other examples of Christian mores and in fact used the acceptance of capital punishment to defend the legality of warfare while both Thomas Hobbes and John Locke admitted that the penalty was justifiable and so opined Diderot[8]. In what seemed to be a desire to reduce the death penalty application to its proper sphere was Jean-Jacques Rousseau's belief that 'in Society man had a right not to be killed as long as he did not kill anyone else'[9]. However, his belief cannot be seen as a desire to abolish the death penalty, nor can it be construed as a call for procedural safeguards in executing capital punishment. In fact it should be read as advocating strict adherence to the principle of *lex talionis*. Montesquieu made a clarion call for the application of the death penalty to murder, certain types of manslaughter and some offences against property. Schabas understands this call to amount to partial abolition of death penalty[10]. It is difficult to agree with him. A comparison of Montesquieu's call and Rousseau's belief demonstrates that while both philosophers were in favour of the death penalty, the latter limited it to murder whilest the former, even though to a certain extent desirous of limitation of its scope still left it to apply to non-murder cases.

A great influence towards abolition, as Schabas notes, was exerted by the great Italian criminologist, Cesare

8 *Op cit* note 4 at p3.

9 *Ibid*.

10 *Idem* at p4.

Beccaria[11]. Although an abolitionist himself, Cesare Beccaria did allow for capital punishment in exceptional conditions such as war or revolution[12]. Through his greatly commended work, *Dei delitti et delle pene*, Schabas points out that he was able to convince such statesmen as Voltaire, Jefferson, Paine, Lafayette and Robespierre of the uselessness and inhumanity of capital punishment and even led to ephemeral measures abolishing the death penalty in Austria and Tuscany[13]. The force of this influence gave rise to a tentative abolitionist movement which grew tremendously during the nineteenth century, 'rallying support of such important English jurists as Bentham and Romilly'[14]. What is interesting is the fact that there were no issues of human rights playing any role then. To a large extent, only the controversies and inconsistencies inherent in the death penalty made it lose support and legitimacy. In the result, Michigan became the first jurisdiction to abolish the death penalty in 1846 permanently, then followed by Venezuela and Portugal in 1867. The Netherlands then followed suit in 1870 as did Costa Rica in 1882, Brazil in 1889 and the Ecuador in a series. This trend could be attributed to a variety of possible factors. Apart from the controversial nature of the death penalty, its utilitarian value is doubtful and in many instances negligible if any.

This enlightening trend was soon to be intercepted at the beginning of the twentieth century. According to Schabas, this was in part owing to the influential criminological doctrines of Garofalo, Lombrose and Ferri,

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11 *Ibid.*

12 Ellison Kahn, 'The death Penalty in South Africa', 1970, *THRHR*, p108.

13 *Op cit* note 4 *supra* at p5.

14 *Ibid.*

who argued that the death penalty was scientifically necessary as a social measure[15]. The other part he attributes to the rise of totalitarianism in Europe after the First World War. Hitler in particular, was a fanatic of the death penalty and many people died at his hands, both civilians and political opponents thus signalling the last straw on any logic of *lex talionis*. The death penalty, wherever it was carried out, especially in public, symbolized barbarism of unimaginable proportions and unspeakable brutality. All this, in the name of deterrence and other mythical utilitarian purposes attributed to the death penalty.

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15 *Idem.*

CHAPTER 2

THEORIES OF PUNISHMENT - 'ON THE LINE'?

In considering punishment and its suitability, it becomes crucial also to consider the purpose thereof. This is so notwithstanding the form or nature taken by a particular sanction. Admittedly, punishment is entailed by commission of crime. Although it is controversial whether the death penalty is in fact a form of punishment, it will be treated as such for the purposes of the arguments that follow and indeed, for the purposes of this work.

Over the years, criminologists have formulated and agreed generally on a set of theories to justify punishment. The thrust of this chapter therefore, is to determine whether such theories provide any justification for the imposition of the death penalty. As theories, no matter what form they take or how 'complex their structure may be, they must share with all other theories the purpose of explanation'[1]. Most importantly, capital punishment should squarely fall within the ambit of at least any one of them if not all of them together. Are these theories *ad idem* or do they contradict one another? Do they leave any scope for criticism bearing in mind that the death penalty is the ultimate sanction?

The main theories of punishment therefore, are retribution and deterrence. Focus will be directed chiefly to these two theories as they form the main pillars of retentionist argument. Sometimes it has been said that the main purpose of punishment are, retribution, general deterrence, reformation and rehabilitation of the accused

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1 A statement by Conrad in Ernest van den Haag & John P Conrad, *The death penalty: A debate*, 1983, at p36.

and protection of the society[2]. Does the death penalty serve all these purposes? Do these theories leave any scope for human rights consideration in sentencing the accused or offender? If not is it proper to eschew the import of this far-reaching universal innovation? In this regard it needs to be consciously acknowledged and instilled in the authorities, that human rights norms apply to all people, the good and the bad equally and without exception no matter what the circumstances of a specific individual happen to be at a particular moment.

The major focus of retribution as a theory is the offence and the accused. This theory presupposes an absolute concept of the state[3]. This is not disputable since it is generally acceptable that the state should bring offenders to justice. It fits in well with the idea of depriving the victims of crime of the need to retaliate and thus take the law into their own hands. What the theory implies is that there should be an adequate proportion between the punishment and the seriousness or gravity of the crime. Seen in this light retribution does not differ in any material sense, at theoretical level, from *lex talionis*. Indeed this theory has frequently been criticized and has even been described as 'barbaric' because of its crude revenge basis, on the brutal treatment of offenders with which it is associated. Carefully considered, retribution, just like *lex talionis*, is vulnerable to abuse. With regard to murder, retribution, just like *lex talionis* would without much ado demand that the offender be executed. Then we are left with a vexing question, why waste time and money by waiting for the state to come and do what you could have done long ago - revenge. There is a thin line between the

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2 *Vide* M A Rabie & S A Strauss, *Punishment: An Introduction to Principles*, 1979, pp65-68.

3 *Op cit* note 2 *supra* at p6.

authority taking revenge on behalf of an offended individual and doing justice within the guidance provided for by the purposes of punishment alluded to above. It is an accident of history, the consequences of which we still suffer, that retribution form the basis of many criminal justice systems. However, the theory is not immune from reform.

The second main theory of punishment is that of deterrence which could be broken into individual and general deterrence. For a long time deterrence has provided a fertile ground for the death penalty debate. This is the utilitarian aspect of punishment. At the level of theory, retribution and deterrence work well together. Concerning the death penalty it is often claimed that by executing the offender three goals are achieved: (1) the satisfaction of the demand for retribution by making the criminal pay for his/her deed with his/her life; (2) the realization of the hope that his/her execution would discourage others from committing capital crimes; and (3) the removal of the danger that his/her survival would pose to society is prevention[4]. By so doing, it is claimed, execution cancels the offender's debt to society[5]. It is claimed further that if execution satisfies the community's demand for retaliation more than would any other punishment, it is morally justified. One could argue, though, that in case the community is against the death penalty, then execution of the criminal only satisfies that particular oppressive legislation or authority that provided for it. The problem with the deterrence theory is that it reduces the offender to an instrument, thus a means to an end, the purpose of

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4 Thorsen Sellin, *The death Penalty*, 1980, at p6.

5 *Ibid.*

his/her execution being to cause people to fear his/her fate and therefore avoid committing capital crimes[6].

In order for retribution and deterrence to achieve their goals, as history has shown, executions had to take place in public and in many instances preceded by acts of heinous torture[7]. In modern days this is a rare occurrence. It is generally assumed that previously such practice was necessitated by the high rate of illiteracy. The supposition opens the door to yet another assumption, that in those countries which still carry out the death penalty in public illiteracy rate is still high, which is not necessarily correct. On the contrary it would seem to be a question of slavish and misconceived belief in the deterrent power of the death penalty, even though it was never proved[8].

It was probably the conflicting results of researches into the deterrence power of the death penalty that led Lord Wright to observe that 'deterrence could obviously not be proved by evidence'. He further noted that it was a 'conclusion that must be drawn from experience, from looking around the world, from seeing how things are done and how people feel[9].

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6 *Ibid.*

7 Ellison Kahn, 'The death Penalty in South Africa', 1970 *THRHR*, p108 ff; *Vide* also *Amnesty International, When the State Kills - The death Penalty v Human Rights*, 1991, at pp97-239, lists countries which still impose the death penalty.

8 On this score various research results conflict sharply, some holding that in countries that have abolished the death penalty the murder rate dropped dramatically while others reached the opposite conclusion. Thus, the debate remains open-ended and fraught with controversies.

9 Cited by Thorsten Sellin, *op cit* note 4 *supra* at p79.

Once this is done, it would be easy to appreciate the reality of the backlash of the death penalty. This is clearly demonstrated by the 'brutalization hypothesis' which presents a bold argument against the deterrent belief of the actual carrying out of capital punishment. In fact, according to the 'brutalization hypothesis' the death penalty produces the opposite of what traditionally it has been believed to achieve. Accordingly, in the 'short term executions would stimulate the would-be killer by releasing inhibitions because she or he would be able to identify with the state as an enforcer and executioner seeking lethal vengeance'[10]. In other words, the lesson of an execution may be that those who have gravely offended us deserve to die and should therefore be killed. Sellin points out that the drama surrounding execution stimulates certain people to seek such notoriety or to see this as an alternative to suicide[11]. Therefore, according to the hypothesis, in the aftermath of executions there will be an increase, rather than a decrease, in murders.

A great deficiency of the deterrence argument is that it starts off on a wrong foot. It assumes that: (1) the would-be murderers act rationally in deciding whether to kill; (2) they know what constitutes a capital offence; (3) they are sensitive to actual variations in the likelihood of execution; (4) they view death as less acceptable than other punishments imposed for capital murder, and finally (5) deterrence message is not neutralized by other confounding or contrary messages conveyed by capital punishment[12].

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10 *Idem* at p120.

11 *Ibid.*

12 Kenneth C Haas & James A Inciardi, *Challenging Capital Punishment: Legal and Social Science Approaches*, 1988, at p30.

These assumptions are questionable. Take for instance the circumstances under which the accused in *S v Sefatsa*[13] murdered the Deputy Mayor of Lekoa in Sharpville (the 'Sharpville six' case). The accused were among an angry mob that attacked the deceased. It is arguable that they had no opportunity to reflect for a moment, on even a single one of the assumptions posited above. Only in very rare instances, do people sit down and contemplate murder. Whether they ever think of the legal consequences of their premeditated acts in a serious light is very doubtful.

From these experiences a number of conclusions could be drawn; (1) most murders are acts of passion between angry or frustrated people who know one another or their victims; (2) many murders are the unintended result of assaults occurring under the influence of alcohol or other narcotic substances; (3) many murderers are persons who have previously and repeatedly assaulted their victims; (4) encounters that end in murder typically involve 'face saving' or the maintenance of favourable 'situational identities' (depicted especially by racial and political murders) in the presence of threats, insults, and attempted intimidation[14]. Seen from this perspective therefore, the argument of deterrence cannot stand. In all cases[15] where the accused are sent to the gallows, the courts emphasise the existence of aggravating factors. In India, the courts try to confine application of the death penalty to 'the

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13 *S v Sefatsa & Five Others* 1988 (4) SA 297 (T).

14 William J Bower, *The effect of Execution is Brutalization, not deterrence* in *op cit* note 12 *supra*.

15 *Vide* eg *S v McBride* 1988 (3) SA 10 AD: *S v Maarman & Others* 1981 (4) SA 790 (CPD); *S v Nkwenza & Another* 1985 (2) SA 560 (AD); *S v Thomo & Others* 1969 (1) SA 385 (AD); *S v Nkomo* 1966 (1) SA 831 AD, etc.

rarest of the rare' cases[16]. Implied in the above tests is a disposition in the courts to impose the death penalty where in many instances the killing was particularly 'heinous', 'vile', 'atrocious', 'depraved' or where it occurred in the course of another crime, the cause of killing often prompted by alarm, desperation or fear of apprehension. In so doing the courts appear to be less concerned with the deliberation and premeditation of offenders than with the brutal, cruel, mindless, even irrational or spontaneous character of their crimes. What this suggests is that the courts are more serious about retribution or vengeance than about deterrence as the rationale for capital punishment[17]. If on the basis of retribution the state murders persons who have murdered, is there any difference between the two? If the state murders murderers in defence of public interest, how much loss accrues to society in terms of human life? It is wrong for the state to kill. The 'brutalization hypothesis' demonstrates this point. On the effects of execution on society Karl Marx wrote the following in 1849 after carefully observing the incidents pursuant to state murder: 'This table ... shows not only suicides but also murders of the most atrocious kind following closely upon the execution of criminals'[18].

Bowers points out that brutalization suggests an identification process different from the one implied by the deterrence theory. He argues that the potential murderers may equate someone who has greatly offended him with the executed criminal. He styles this disposition the

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16 Jill Cottrell, 'Wrestling with the death penalty in India' *SAJHR* vol 7 part 2 p186.

17 *Op cit* note 14 *supra* at p51.

18 Karl Marx, quoted in note 4 above by William J Bowers at p54.

psychology of 'villain identification'. Accordingly the potential murderer may identify with the state as avenger and the execution may justify and reinforce his resolve to exact lethal vengeance. Bowers argues further that 'to think of potential murderers as self-righteous avengers is uncommon and perhaps discomforting, but the assumption that they will identify with criminals who are executed may simply be wishful thinking'[19].

Executions carried out by the state cannot be justified because people tend to look up to the authorities as an example or a model. Because of human nature to imitate people would be disposed to act like a state where similar circumstances present themselves. Thus Bye observed the following:

> 'Lynchings are the sequel of the imposition of the death penalty by the state, which, setting the example of sending criminals to the gallows, leads mobs to adopt similar methods of punishment when aroused. This is not unlike the argument ... that the public executions of old, instead of deterring criminals from crime, led them into it by brutalizing their feelings and cheapening the value of human life'[20].

These undesirable consequences manifested themselves in South Africa particularly in the last decade when 'hangings' in this country were almost a daily occurrence[21]. The climax was reached when the so-called Kangaroo Courts imposed the death penalty on people suspected of collaborating with the police and also with regard to

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19 *Ibid.*

20 Bye, quoted by Bowers - *op cit* note 4 at p55.

21 *Vide Amnesty International, When the State Kills ... - The death Penalty v Human Rights*, 1989, at pp204-207.

violent mob reactions in dealing with those suspected of practicing witchcraft[22].

Many countries which still retain the death penalty have moved away from carrying it out in public[23]. Such development has considerably emasculated the deterrence argument. What could have been the reason[24]? It is submitted that authorities have consciously come to realise the brutalizing effect that the death penalty has on society. Moreover the death penalty is repugnant to the sensitivities of a civilized people. Here civilization refers to a people who are human rights conscious. To them, and indeed to the whole world the nature of punishment should not reflect the crime in a crude way but instead, the degree of punishment should not be repugnant to an established human rights trend which the world is following at present. In addition, it has become clear that the imposition of the death penalty overlooks and undermines the most essential objectives of criminal sanction, being to rehabilitate and reform the offender. The death penalty effectively removes the offender from society for good. This is more disturbing where such offenders have fallen foul of the law for the first time. The death penalty robs them of the opportunity to rehabilitate and reform. It is now time that focus in penology should shift from deterrence and retribution to efficient rehabilitation and reform of the offender with due regard to the sanctity of life. On this score there exist at present dozens of alternative forms of punishment. Proponents of abolition of the death

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22 T W Bennett, *A sourcebook of African Customary Law for Southern Africa*, 1991, pp90-97.

23 *Op cit* note 7 above.

24 *Vide* also Charles Duff, *A Handbook on Hanging*, 1961, at p55.

penalty are quick at offering life imprisonment as a viable alternative to the death penalty[25].

There are new methods and more humane ways of punishing offenders. It is time that these new developments should be taken into account when sentencing offenders. It is disturbing that in criminal cases the victim or his/her next of kin does not benefit anything other than the state murdering the offender supposedly, to appease them. That should not be the case. Alternative sentences such as restitution[26], no matter what form it takes, at least offers some kind of solace to the victims or their next of kin not only imaginary appeasement offered by the death penalty. What is more, take the situation where relatives of the murder victim are opposed to the death penalty. In that case, hanging the offender will give them no pleasure, but instead, it will exacerbate their grief. There are also a lot of so-called intermediate punishments[27] which auger well for rehabilitation and reformation of the offender. In no way do these innovative ways of punishing infringe on the sanctity of human life, and it is submitted that they are at par with human rights norms. Retribution and deterrence can no longer be rationally defended as methods of punishment in

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25 *Op cit* note 1 *supra*, by John P Conrad at p27. He emphasizes that long imprisonment enhances the chances of the criminal's reconciliation with the community. It is his belief that by adhering to that limit on punishment that is permitted to the state, reconciliation becomes the final phase of retributive justice. This statement offers, in my opinion, a shift in emphasis from the objectives of the traditional retribution as a theory.

26 Charles F Abel & Frank H Marsh, *Punishment and Restitution - A restitutionary approach to crime and the criminal*, 1984, pp1-91.

27 *Vide*, James M Byrne, Arthur J Lurigio & Joan Petersilia (eds), *Smart Sentencing - The emergence of intermediate sanctions*, 1992, parts I-IV.

modern societies striving to order their affairs in accordance with widely accepted human rights norms. Their utility, if any, is far outweighed by their negative impact on societies. As demonstrated above, states terrorized communities with the death penalty in the name of retribution and deterrence. Because these two theories do not offer any scope for consideration of human rights in sentencing they should be rejected and replaced with more acceptable and human rights conscious theories of criminal reform.

CHAPTER 3

REDUCTION OF CAPITAL CRIMES - DISTORTION OF *LEX TALIONIS*?

Much to the credit of civilization and developments in penology, the force of the old *lex talionis* has been minimized in terms of area of application. Thus we observe that today's penal systems no longer tolerate the burning of an arsonist's home, the rape of a rapist, or torture of a torturer. I should hasten to point out that it cannot be the reason that such systems tolerate such crimes. The reality is, societies have come to understand that they must be built on a different set of values from those that they condemn. A thriller is the skeleton in the closet, why still life for life? This is an anachronism that has got no place in modern societies. An execution cannot be used to condemn killing, simply because it is killing. 'Such an act by the state is the mirror image of the criminal's willingness to use physical violence against a victim'[1].

The recession from blatant, all and sundry application of *lex talionis* as a doctrine was accompanied by the withering away of the same in modern penological parlance which is replaced by retributive theory as a label. This occurred, so it is said, owing to the barbarism that *lex talionis* is associated with. However, it is difficult to accept retribution as enlightened either, for its sanctioning of the perpetration of the most critical aspect of *lex talionis*, life for life. Nevertheless, enlightening developments have taken root resulting in dramatic reduction in capital crimes. It must be emphasized though, that there are still countries that impose the death penalty for crimes other than murder[2]. This is a disturbing result of a

1 *Amnesty International, When the State Kills ... The Death penalty v Human Rights*, 1989 at p7.

2 *Op cit* note 1 *supra* at pp95-239.

slavish and stereotype belief in the myth that 'the death penalty deters' (my emphasis).

With the United Kingdom having reduced her capital crimes from two hundred to fifteen by the time of Queen Victoria's ascent to the throne in 1837[3], southern African countries were soon to follow suit. This trend proceeded uninterruptedly such that by the time of the Union in 1910, there were only three capital crimes in South Africa, viz, treason, rape and murder. Still then, however, this number grossly transcended and made a mockery of *lex talionis* or retributivism.

Traditionally, the death penalty has been mandatory on conviction of any capital crime. This has also been the position in South Africa, although until 1917, the death penalty was not statutorily regulated[4]. Just over a quarter of a century ago Mark Ancel observed:

> 'In general the modern tendency is more and more to drop the mandatory character of the death penalty. It is provided as the ultimate punishment but replaceable by another penalty'[5].

In South Africa the Criminal Procedure and Evidence Act[6] was passed in 1917 and made the death sentence discretionary for treason and rape and mandatory for murder except where the offender was a woman convicted of the murder of her newly born child or who was under sixteen years of age.

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3 Van Niekerk, B v D, 'Hanged by the neck ...', 1969 *SALJ* 461.

4 L Angus & E Grant, 'Sentencing in Capital Cases in the TPD and WLD : 1987-89', 1991, *SAJHR*, vol 7 at p51.

5 Quoted by Roger Hood, *The Death Penalty*, 1989, at p53.

6 No 31 of 1917.

At the time this Act brought South Africa in line with conditions in other countries. However, in many countries which were already ahead in legal developments, not only have mandatory death penalties been largely abandoned, but where they still existed they have been restricted to a narrower type of crime or their effect has been eased by some procedural devices[7], notably invocation of the device of extenuating circumstances. In South Africa, the device that was invoked to mitigate the severity of the mandatory rule between 1917 and 1935 was the prerogative of mercy[8]. Writing in 1970, Professor Kahn stated that 76 percent of condemned prisoners were reprieved during the period 1923 to 1934 and the majority of those who were sentenced to death were found guilty of murder[9].

The device of 'extenuating circumstances' has for a long time, wherever recognised, served to undermine the mandatory nature of the death penalty in non-discretionary cases. In so doing, it not only distorted *lex talionis*, as it already was, but frustrated it completely whenever found applicable in a given case. Although the origin of extenuating circumstances is not clear, it is arguable that it could be traced up to the time of Biblical Moses, the founder of *lex talionis*. Moses gave a rule to the effect that, 'Whoever strikes another man and kills him shall be put to death. But if he did not act with intent, but they met by act of God, the slayer may flee to a place which I shall appoint for you'[10].

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7 *Op cit* note 6 *supra* at p53.

8 E Kahn, 'Symposium on Capital Punishment', 1975, *Acta Juridica* p221.

9 E Kahn, 'The death penalty in South Africa', 1970, *THRHR*, p112.

10 *Vide*, *Exodus* 21.1.12 ff.

The salutory effect of extenuating circumstances is to reduce a capital to a non-capital offence. Therefore, sufficient proof thereof gives the court a discretion to impose a sentence other than death.

In South Africa, section 61(a) of the General Law Amendment Act of 1935[11] introduced the concept of extenuating circumstances. The aim was to mitigate the severity of the rule applicable to convicted murderers and where the death penalty was mandatory. The idea was to give the courts much wider discretion as far as the sentence was concerned. The onus was therefore on the accused to demonstrate, on a balance of probabilities, that extenuating circumstances were present at the time of the crime[12].

What turned out to be the greatest blunder concerning the 1935 Act, is the fact that it fails to give any definition of what constitutes extenuating circumstances[13]. Thus, commenting on a Zimbabwean legislation bearing resemblance to the South Africa Act in question, Geoffrey Feltoe pointed out that the failure of legislation to give any guidance as to what can constitute an extenuating circumstances means that there is a danger involved in making such a vital matter as extenuation depend upon the exercise of subjective moral judgment based on rather nebulous factors[14]. When determining the presence of extenuating circumstances the court in *R v Mifoni*[15] stated

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11 The General Law Amendment Act 46 of 1935.

12 *Vide*, *R v Lembete* 1947 (2) SA 603 (A); *S v Bala and Others* 1955 (3) SA 274 (A).

13 *Op cit* note 5 *supra* at p52.

14 G Feltoe, 'Extenuating Circumstances: A life and death issue', *Zimbabwe Law Review*, 1989-90, cited by Roger Hood, *op cit* note 5 *supra* at p87.

15 1935 OPD 191 at p193.

the following: 'only such circumstances as are connected with or have a relation to the conduct of the accused in the commission of the crime should have any weight at all and care should be taken to eliminate any factors which may be either of a purely sentimental character or which are only remotely connected with the crime'. In 1963 Holmes JA had this to say with regard to extenuating circumstances: 'But I venture the suggestion that trial courts might consider in exercising their functions, whether depending on the circumstances, the moral blameworthiness of a murder is reduced if it is committed with the constructive intention to kill as distinct from intention plus positive desire'[16]. Finally in *S v Mongesi en Ander*[17] the Appellate Division defined extenuating circumstances as circumstances which, at the time when the accused committed the crime, so influenced his state of mind as to render his conduct morally less blameworthy.

The fact of the existence of extenuating circumstances in a given case puts judges in an unenviable position where they have to exercise their own unguided discretion as to whether to take life or not. Such unguided discretion, it is submitted, calls for arbitrariness. Thus in the United States Justice Harlan in *McGautha v California* (1971) stated:

> 'To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be task which are at present beyond human ability'[18].

As already noted above, in India, the Supreme Court there has restricted capital punishment to only the 'rarest of the

16 *S v Mini* 1963 (3) SA 188 (A) at p192.

17 1981 (3) SA 204 (A) at 207.

18 Quoted by Roger Hood, *op cit* note 6 at p91.

rare cases'[19]. The test, as stated above, is that the court must find that the offence is of exceptionally depraved and heinous character and constitutes, on account of its design and manner of its execution, a source of great danger to the society at large.

In South Africa, however, the tendency of the courts has been that the determination of legal guilt and the determination of extenuating circumstances are two separate enquiries and that the factors taken into account at each stage are and should be different[20]. Commenting on our courts' approach to extenuating circumstances, Professor Dennis Davis[21] argues that the court in determining extenuating circumstances is required to exercise a moral judgment, (which would make the whole issue even more controversial) to determine moral guilt, as opposed to legal culpability. He says, however, that the factors which the court relies on are essentially the same, and the decision relating to extenuating circumstances is itself a discretionary act of the judge. Davis then concludes that the use of the concept of extenuating circumstances had become an obstacle in the way of a rational decision-making process and that it allowed judges to hide behind the law instead of taking full moral responsibility for their decisions to impose the death penalty.

It is proposed that the question of judicial discretion in sentencing will be revisited under the chapter on the arbitrariness of the death penalty. Apart from showing the

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19 *Ibid*; *Vide* also J Cottrell, 'Wrestling with the death penalty in India', *SAJHR*, 1991, vol 7, part 2, p 186.

20 *Vide*, for instance, *S v Shabalala* 1966 (2) SA 297 (A) at p300; *R v Taylor* 1949 60 SA 702 (A).

21 D M Davis, 'Extenuation - an unnecessary halfway house on the road to a rational sentencing policy', (1989) 2 *SACJ* 205.

reasons for the reduction of capital crimes (although the number of such crimes fluctuates considerably in some countries, South Africa included) this chapter aimed to highlight developments that severely undermined *lex talionis* and its surrogate, retributive theory, in so far as they were used as the basis for the imposition of the death penalty. The development of the notion of extenuating circumstances, unfortunately, by giving judges wide unguided discretion opens the door to arbitrariness and miscarriage of justice. Controversy still reigns supreme. What emerges, is the harsh reality that criminal sanction is at once prime guarantor and prime threatener of human freedom. But used providently and humanely it is a guarantor, used indiscriminately and coercively, it is a threatener. The contentions that inhere in the criminal sanction can never be wholly resolved in favour of guarantee and against threat[22]. Nevertheless, a satisfactory balance can be struck. This goal can only be secured if penology could be guided by human rights norms in particular, with regard to the death penalty. It is submitted that it is at the table of human rights norms that both supporters and opponents of the death penalty should sit and resolve the paradox that engulfed them for years. The paradox is that both groups regard themselves as defenders of the value of life. Understandably, one group defends the life of the offender and the other the life of the victim[23]. Thus the latter concentrates on the present, while the former focuses on the past and the future Human rights norms have a place for both groups and eschews debates in circles. It is to human

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22 H L Parker, *The limits of the criminal sanction*, 1969, at p366.

23 B Naudé, 'The case against Capital Punishment', *Criminal Justice and the death Penalty in South Africa: A Criminological Study by The Institute for Criminology*, UNISA, 1992, p1.

rights treaties and conventions that focus must now be shifted.

CHAPTER 4
INTERNATIONAL HUMAN RIGHTS REGIME AND THE DEATH PENALTY

4.1 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS[1]

As indicated in Chapter 1 human rights norms took root at the end of the Second World War and continued to evolve steadily but progressively. This development was inspired by the horrors of the war that had just ended. The first international human rights instrument to incorporate provisions carrying serious implications for the death penalty was the Universal Declaration of Human Rights which provided as follows:

> "Everyone has the right to life, liberty and security of person"[2].

This article 3 was reached as a compromise arrived at after some lengthy bargaining[3]. It is obvious from its neutral wording that it sustained strain from deliberating parties who took opposing positions with regard to the death penalty. It should not be over-looked, though, that at the end of the Second World War, overwhelming majority of states were still practicing capital punishment and only a few had already abolished it completely. It follows that although the United Nations was desirous of seeing the death penalty abolished world-wide, such a step, if it were to be taken immediately, had the potential of alienating retentionist countries and would lead to disintegration of the United Nations at such an early formative stage. With article 3, the United Nations, though concerned about the death penalty, was able to maintain a neutral stand and perhaps await the right moment.

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1 Of 1948.

2 Article 3.

3 *Vide* A W Schabas, note 4 *infra* at pp27-45.

Although the Universal Declaration does not mention the death penalty, the debates in the Commission on Human Rights, in its Drafting Committee, and in the Third Committee of the General Assembly, respecting adoption of the Declaration, indicate, as Schabas[4] has observed, that the issue of abolition of the death penalty was crucial in the drafting of article 3. Prior to the compromise the drafters considered three general approaches.

Firstly, it was proposed to recognize in express form the death penalty as a limitation or an exception to the right to life. However, this approach was critized for suggesting an endorsement of the death penalty by the United Nations and only harmed the eventual objective, which was abolition of the death penalty[5]. Secondly, it was proposed to proclaim without equivocation the abolition of the death penalty[6]. It was argued that, as the Declaration was a form of manifesto or statement of objectives, countries could recognize the goal of abolition even though their internal legislation still permitted capital punishment. Unfortunately this proposal resulted in article 3 as a compromise. Of major significance, though, is the fact that nowhere in the *travaux preparatiores*[7] of article 3 is there a defence of the death penalty as such. In that light the decision to exclude abolition was in no way intended as a statement that the United Nations in some way approved of or accepted the death penalty[8].

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4 A W Schabas, *The abolition of the death penalty in international law*, 1993, at p26.

5 *Ibid.*

6 *Ibid.*

7 *Idem* pp27-45.

8 *Op cit* note 3 at p27.

Debates continue to rage as to whether the Universal Declaration or at least some of its provisions represent a statement or codification of customary international law[9]. Beyond dispute is the fact that the Universal Declaration created an original norm, the right to life, and eschewed any reference to the death penalty[10]. Schabas argues that the conclusion that article 3 is abolitionist in outlook is inescapable. He points out that by its silence on the matter of the death penalty, it envisages its abolition and, at the same time, admits its presence as a necessary evil, and that a relatively fine line which in hindsight appears to have been rather astutely drawn[11]. Finally, it needs to be kept in mind that the Universal Declaration was never contemplated to be a convention binding on parties thereto, therefore its true purpose was to set goals or standards of achievement for humanity not to entrench the *status quo* in this regard the death penalty) and this need not be overlooked in any construction of article 3.

4.2 THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS[12]

This covenant was the first binding international instrument to deal directly with the issue of the death penalty. Owing to the polemical nature of this subject it is not surprising that it took the Commission on Human Rights and the Third Committee of the General Assembly, as principal architects (there were also other committees involved), more than fifteen years to complete. The result

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9 John Dugard, *International law - A South African Perspective*, 1994, at p204.

10 *Op cit*, note 4 *supra*, at p47.

11 *Idem* p49.

12 Adopted by the General Assembly in 1966.

was article 6 which comprises of six paragraphs. The article provides, in part, thus:

´1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant ...

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any state party to the present Covenant´.

Again in the negotiating committees, it was apparent that direct, immediate abolition of the death penalty was premature and could alienate retentionist countries. The settlement reached was to make the death penalty an exception to the right to life and encourage its eventual abolition. To encourage progress to this noble goal paragraphs 4 and 5 were added. The article gives persons sentenced to death a right to seek pardon, amnesty or commutation of sentence and proclaims that such may be granted in all cases. The latter paragraph excludes persons below eighteen years and pregnant women from the ambit of the death penalty. As it turned out, these two paragraphs provided support for the United Nations´ restrictive approach to the death penalty. Such approach entailed restricting the number of capital crimes, categories of persons falling within the reach of the death penalty and circumstances serving to render the death penalty inapplicable in given cases. Therefore, even if the death penalty is recognized as an exception to the right to life, the word ´abolition´ appears in two separate paragraphs, viz 2 and 6, clearly indicating that the Covenant contemplates abolition, without however, imposing an immediate obligation

on states parties[13]. Accordingly article 6 expresses a presumption in favour of abolition[14]. As Schabas notes, the abolitionist perspective emerged only slowly during the protracted drafting process of the Covenant[15]. More force was added to this trend when on 20 December 1971[16] and again on 8 December 1977[17] the General Assembly by its resolutions, affirmed that the main objective to be pursued was that of progressively restricting the number of offences for which the death penalty might be imposed, with a view to the desirability of abolishing that punishment in all countries. It did not come as a surprise when the Secretary General of the United Nations in his report on Capital Punishment presented to the Economic and Social Council in February 1973 observed (after citing article 3 of the Universal Declaration) that the United Nations has gradually shifted from the position of a neutral observer concerned about, but not committed on, the issue of capital punishment to a position favouring the eventual abolition of the death penalty[18].

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13 *Op cit* note 3 *supra* at p53.

14 M J Bossuyt, 'The death penalty in the travaux preparataires of the International Covenant on Civil and Political Rights' in Daniel Prémont (ed), *Essays on the Concept of the Right to Live*, 1988, p251 at p265.

15 *Op cit* note 11 *supra*.

16 Resolution 2857 (XXVI) of 20 December 1971.

17 Resolution 32/61 of 8 December 1977.

18 *Op cit* note 3, *supra*, at p147.

4.3 THE SAFEGUARDS GUARANTEEING THE RIGHTS OF THOSE FACING THE DEATH PENALTY[19]

Basically because the United Nations has been forced by practical realities to grudgingly accept the necessity of making an exception to the right to life in the form of the death penalty, it felt constrained to provide for the regulation of such punishment through guaranteeing safeguards. In this regard, certainly the United Nations was influenced to a great extent by articles 6, 14 and 15 of the Civil Rights Covenant, which attempt to provide for the safeguards, but in a rather timid and weak language. However, these safeguards, strictly speaking did not create new treaty norms. Nevertheless, they elaborate various standards that may lay claim to the status of customary norms[20].

Echoing the language of article 6 paragraph 2 of the Civil Rights Covenant the safeguards stipulate that capital punishment may be imposed only for the most serious crimes the scope of which should not go beyond intentional crimes, with lethal or other extremely grave consequences. Insistence is again made that the capital crime must be provided by law at the time of its commission. Perhaps the significant contribution of the safeguards was the expansion of the list of safeguards to persons below eighteen years of age and pregnant women. The safeguards added to the list new mothers and insane persons. The Committee on Crime Prevention and Control, which was charged with addressing additional matters in 1988 strengthened the safeguards in its resolution by adding the mentally handicapped to this

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19 Adopted by the United Nations Economic and Social Council in Resolution 1984/50 at its 1984 Spring session on 25 May 1984 and endorsed by the United Nations General Assembly in Resolution 39/118, adopted without a vote on 14 December 1984.

20 *Idem*, note 16 *supra* at p138.

ever increasing list[21]. Other safeguards relate to pardon, commutation of sentence, fair trial, appeals and finality of the trial. Concerning methods of execution, the safeguards demand a way that would inflict minimum possible suffering[22].

From the abolitionist spirit that influenced the drafters of article 6 of the Civil Rights Covenant and these safeguards, it certainly became obvious that apart from guaranteeing justice to persons facing the death penalty, the arduous burden of carrying out these safeguards in practice was intended to gradually poke the retentionists towards abolishing the death penalty so as to give full meaning and content to the right to life and undivided allegiance to human rights norms.

4.4 THE SECOND OPTIONAL PROTOCOL - ABOLISHING THE DEATH PENALTY[23]

The development highlighted above encouraged the abolitionist states to take up the issue of the death penalty in the General Assembly. The argument that sustained their effort was that only when capital punishment was abolished would the right to life be truly assured. This argument was given impetus by significant evolution in this domestic law of many states appertaining to the death

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21 ESC Resolution 1989/64.

22 *Vide* appendix 4, *Amnesty International, When the State Kills ... The death Penalty v Human Rights*, 1989, at pp245-6.

23 Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty adopted by the General Assembly of the United Nations on December 29, 1989 and entered into force on July 11, 1991, following its tenth ratification.

penalty culminating in important legal developments[24]. A research project into the death penalty and its effectiveness as a deterrent was set in motion. An expert Committee appointed to analyse the results of this research confirmed that modern science found little to redeem the death penalty. The combined force of studies by rapporteurs, the reports on five yearly basis by the Secretary General of the United Nations and the continuing debates around the death penalty in the General Assembly and *ad hoc* committees culminated in the Second Protocol in question. Article 1 of this short protocol provides thus:

'1. No one within the jurisdiction of the State party to the present Optional Protocol shall be executed.

2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction'.

This watershed protocol marked the beginning of an epoch in the gallant and indefatigable sweep of the human rights wave for the realization and respect for humanity. It is essential to notice that the article is written in obligatory language. Furthermore it does not make any exception to the right to life. The Protocol however, permits reservations regarding application of the death penalty in time of war 'pursuant to a conviction for a most serious crime of a military nature committed during wartime'[25]. This Protocol has dramatised progress made by abolition of the death penalty in international law. Looked at carefully the Protocol also encourages retentionist states to abolish the death penalty. States continue to ratify the Protocol. Although the number of those states that have already ratified is small, the trend to total global abolition of the death penalty is irreversible. The fact that the Protocol is not a declaration, but on the

[24] *Op cit* note 3 at p137.

[25] Article 2 para 1.

contrary, forms part of conventional law and is binding on the parties to it, adds even more impetus to the abolitionist trend.

CHAPTER 5

REGIONAL HUMAN RIGHTS INSTRUMENTS RELATIVE TO CAPITAL PUNISHMENT

5.1 THE EUROPEAN CONVENTION ON HUMAN RIGHTS[1]

The European Convention on Human Rights was in fact the first human rights instrument to tackle the death penalty in a more direct way. However, the approach followed in its drafting was more conservative and lacked the foresight necessary in human rights matters. Looked at closely, the Convention entrenched the *status quo*. Thus its guarantee of the right to life was riddled with so many exceptions that it was virtually incapable of constructive contribution to the continuing debate on the death penalty. Article 2(1) thereof provides as follows:

> 'Everyone's right shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law'.

The greatest blunder of the drafters of this Convention was their failure to include procedural safeguards to be observed in capital crime trials, nor did they make any effort to reduce capital crimes and at least sanction the death penalty with regard to most serious crimes only. To its credit, and unlike the United Nations human rights instruments, the European Convention established the European Commission and the European Court of Human Rights to implement it. Owing to the conservative nature of article 2 paragraph 1 of the Convention, it was soon out of step with social progress in Western Europe, and by the early 1970's initiatives to ameliorate the situation were

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1 Convention for the Protection of Human Rights and Fundamental Freedoms of 1955.

afoot in the Council of Europe. These eventually led, in 1988, to the adoption of Protocol No 6[2].

6.2 PROTOCOL NO 6 TO THE EUROPEAN CONVENTION[3]

As has just been noted, it was not long before the members of the European Convention realized the pitfall that they had landed in, in their careless draft of Article 2 of the European Convention. This fact could be attributed to a number of factors. Among others, and most importantly, it was the majority of the parties to the European Convention who argued vehemently and indefatigably at the United Nations for the abolition of the death penalty and of course, quite a substantial number of them were already abolitionists in practice. In 1957 the Council of Europe created an institution called the European Committee on Crime Problems. Not surprisingly, capital punishment appeared on the very first agenda[4]. To deal with the issue of the death penalty effectively, the Committee, in 1962 created a special sub-committee for that task. Marc Ancel, who at a later stage did the same work for the United Nations, was appointed as rapporteur, although others were also appointed subsequently. As a result and in the light of numerous reports received from several rapporteurs, in September 1981, the Committee of Ministers of the European Convention mandated the Steering Committee on Human Rights to prepare a draft protocol concerning abolition of the death penalty which was finally approved in December 1982. The cardinal article of the protocol provided as follows:

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2 A W Schabas, *The abolition of the death penalty in International law*, 1993, at p213.

3 Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty accepted by the Deputies at the 354th meeting held in December 6-10, 1982.

4 *Op cit* note 2 at p228.

'The draft penalty shall be abolished. No one shall be condemned to such penalty or executed'[5].

The protocol is written in prohibitive and yet encouraging language to those states which still retained the death penalty. Most significantly, the protocol allows neither reservations[6] nor derogations[7]. However, the protocol does make an exception 'in time of war or imminent threat of war'[8] This was understandably a compromise to placate and to attract the retentionist states to ratify the protocol. Nevertheless, the protocol marked another milestone in the steady progress towards according the right to life its full content and import. The impact of this protocol seems immense. Particularly in cases of extradition of criminals from European Countries to retentionist countries. A practice has developed, in the spirit of this protocol, for European states to refuse extradition of criminals to their countries of origin where they might face the death penalty. In so doing, the European Countries are exporting their abolitionist philosophy to other countries and in a way, putting pressure on them to do likewise.

5.3 THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN[9]

The Inter-American instrument was initially intended to be merely a declaration. However in 1967 it was given a normative character by the Charter of the Organization of

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5 Article 1.

6 *Vide* Article 4.

7 *Vide* Article 3.

8 Article 2.

9 Adopted in April 22, 1948.

American States. As an early instrument, this Declaration assumed most of the features of the United Nations Declaration. As such it was also neutral on the question of the death penalty. It only stipulated that:

> 'Every human being has the right to life, liberty and the security of his person'[10]

What is crucial however, is that like its European counterpart it contained provisions establishing effective mechanism for its implementation. However the mood of abolition could not be suppressed during the whole spell of its drafting. Containing far reaching provisions on the death penalty was the Convention that followed in the late 1960's.

5.4 THE AMERICAN CONVENTION ON HUMAN RIGHTS[11]

Of cardinal significance in the American Convention is Article 4. The article protects the right to life from the moment of conception[12], which forms quite an innovation. Apart from providing for safeguards, prohibits reestablishment of the death penalty in countries that have already abolished it[13], and proceeds to strictly forbid imposition of capital punishment for 'political offences or related common crimes'[14]. Furthermore, the article excludes among others, persons over the age of 70 from the ambit of the death penalty[15].

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10 Article 1.

11 The American Convention on Human Rights of 1967.

12 Paragraph 1.

13 Article 4 para 3.

14 *Ibid* para 4.

15 *Ibid* para 5.

5.5 THE PROTOCOL TO THE AMERICAN CONVENTION ABOLISHING THE DEATH PENALTY[16]

Deeply moved by the conduct of some states in extending the application of the death penalty, and also vast developments and progress respecting abolition of the same in both the United Nations and Europe, in 1984 the Inter-American Commission on Human Rights called upon all American governments that had not yet done so to abolish the death penalty[17]. As a result of debates, research and reports following this call the Protocol was finally concluded and adopted in 1990. The Protocol prohibits states from applying the death penalty in their territories to any person subject to their jurisdiction[18], and disallows reservations[19]. It should be noted however, that the Protocol does not impose a duty on states parties to abolish the death penalty. Nevertheless, the death penalty remains prohibited. The Protocol in a sense follows the United Nations approach in applying at all times, contrary to the European Protocol which does not apply in wartimes.

5.6 AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS[20]

The article in the African Charter relevant to the death penalty succinctly provides thus:

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16 Protocol to the American Convention on Human Rights to Abolish the Death Penalty adopted by the General Assembly of the Organisation of American States in June 8, 1990.

17 *Op cit* note 2 at p279.

18 Article 1.

19 Article 2.

20 Adopted by the 18th Assembly of the Heads of State and Government of the Organization of African Unity (OAU) on 27 January 1981 at Nairobi, Kenya.

> 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right'[21]

It cannot be said that this article, read *in toto* is abolitionist. The addition of the third sentence clearly sanctions imposition of the death penalty by implication. Were it not for this last sentence the article could be argued to be abolitionist, at least in a mild way. Addition of the words 'arbitrarily deprived' in the last sentence could be construed to lay an obscure safeguard on the imposition of the death penalty. But for its relative recentness, the article does not, however, foreclose any further constructive debate on the death penalty, taking into account developments that have already taken place internationally and in other regions as well. The international trend towards abolition is anticipated to influence the debaters/drafters when their time arrives.

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21 Article 4.

CHAPTER 6

INTERNATIONAL HUMAN RIGHTS NORMS AND THE SOUTH AFRICAN LEGAL ORDER UNDER THE TRANSITIONAL CONSTITUTION[1]

International human rights norms are generally recognised as part of international law. The manner of applicability of international law to a particular country is said to depend on an answer to the question whether such country follows a monist approach or a dualist one. According to the former approach the courts are entitled to apply international law directly without prior authorization by an Act of Parliament whereas the latter demands the opposite. South African courts have traditionally been prone to following the monist approach[2]. As a result of Rumpff CJ's dictum in *Nduli v Minister of Justice*[3], subsequent decisions have generally taken the position that the dualist approach should be followed. However, the 1993 Constitution has cleared this confusion. Section 231(4) states:

> 'The rules of customary international law binding on the Republic, shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic'.

This section is of particular importance in the area of human rights. Since basically, international law does not recognise individuals but states, the section opens a gate for application of human rights norms to individuals. The international law in this regard, seems self-contradictory, since human rights are for individuals enforceable where appropriate, against the state. Very often the central issue turns on the relationship between an individual and

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1 The Republic of South Africa Constitution Act No 200 of 1993.

2 J Dugard, *International Law - A South African perspective*, 1994, at pp42-5.

3 1978 (1) SA 893 (A).

the state, and a state and the international community[4]. In these relationships, the state is seen as a representative of individuals forming a nation.

As regards the shift of emphasis in human rights matters Ramcharan notes as follows:

> '... in modern times, there has been rising global insistence that states, governments, institutions and laws exist to serve the people and there is a persistent universal outcry for human rights and fundamental freedoms of the individual to be respected and assured. The human factor is emerging, at last, as the factor which should govern in every situation. With this objective in mind, the norms of international law are coming under persistent scrutiny from the point of view of whether they are conducive to the promotion and protection of the rights of the individual'[5].

A state should therefore, play the role of a conduit pipe of human rights from the international community to the individuals in its jurisdiction. Section 231(4) indeed facilitates this role of the state. This was demonstrated by the Supreme Court of India in *Francis Coralie Mullin v The Administrator, Union Territory of Delhi*[6]. The court *in casu* held that the right to live with basic human dignity, implicit in the right guaranteed under article 21 (of the Indian Constitution), included the right not to be subjected to torture or to cruel, inhuman or degrading punishment or treatment. The latter provision is not included in the Indian Constitution of 1948-50. In arriving at this conclusion the court read article 3 of the European Convention for the Protection of Human Rights and

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4 A D'Amato, 'The Relationship of the individual to the State in the Era of Human Rights', *World Justice? US Courts and International Human Rights*, 1991, p161 ff.

5 B G Ramcharan, 'The concept and dimentions of the right to life', B G Ramcharan (ed), *The right to life in international law*, 1985, p1.

6 AIR 1983 SC 746.

Fundamental Freedoms and article 7 of the International Covenant on Civil and Political Rights into the Indian article 21 (the right to life). Thus this right was made part of the domestic jurisdiction through constructive constitutional interpretation.

Now that South Africa has a bill of rights which is to a considerable extent modelled on the international human rights instruments and some regional human rights instruments, our courts will find it easy to develop our own human rights jurisprudence in accordance with the global trend. Indeed section 35 to this effect provides:

> 'In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter and may have regard to comparable foreign case law'.

The importance of sections 231(4) and 35 lies in the support that they lend to the Bill of Rights. As a document enshrined in the Constitution, the Bill cannot realistically list all individual rights as contained in international instruments. Thus direct reference to international law will often be necessary. Sections 231(4) and 35 therefore, facilitate that inevitability.

The constitutional Bill of Rights guarantees, like the Universal Declaration of Human Rights, every person the right to life[7]. In construing the so-called limitability of this right, the courts will surely make their way through section 35 to consider massive developments in international law that have taken place over the years around the question of the death penalty. Thus the door to consideration of the global trend to abolish the death penalty is finally open.

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7 *Vide* section 9.

So has the debate shifted from utilitarian value or otherwise of the death penalty to its appropriateness or otherwise in the imposing era of human rights. It is submitted that the court should give international law weight in construing the scope and import of the rights contained in Chapter 3 of the Constitution.

CHAPTER 7

THE RIGHT TO LIFE: ILLUMINATING THE ABYSS OF THE DEATH PENALTY

The right to life is the most basic right which every individual possesses by virtue of being alive. Understandably, this statement immediately sparks off controversy because *prima facie* it seems to be of no consequence since the living, whether or not there is a right to life, will still continue to live until naturally their lives come to an end. On this premise logic would in fact dictate that the right to life be ensured for the unborn (therefore an anticipatory right) and those falling under the spotlight of euthanasia. That is, those whose lives depend on the decisions and actions or omissions of some other persons[1]. But is the same logical argument not applicable to murder convicts whose mercy lies in the hands of the state? What about free individuals? Do they not need the right to life as a licence to call upon the state to protect them? The right to life therefore, applies to all and sundry, just as much as human rights norms do. It is neither radical nor exaggeration when very often the right to life is referred to as 'a primordial right upon which all other rights are based and without which all other human rights would be meaningless'[2] to boot.

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1 *Vide*, Irving J Sloan, *The right to die: Legal and Ethical Problems*, 1988, pp2, 15,41. Euthanasia is defined as the mercy act or practice of painlessly putting to death persons suffering from an incurable and distressing desease or handicap. Although some patients write their consent to termination of medical treatment should they go unconscious as their condition deteriorates others do not. Under such circumstances their lives will depend on the decisions and actions or omissions of others.

2 *Vide*, Hector Gros Espiel, 'The Right to Life and the Right to Live', Daniel Prémont (ed), *Essays on the Concept of the Right to Live*, 1988, p43 at 44; Yoram Dinstein, 'The Right to Life, Physical Integrity, and Liberty', in Louis Henkin (ed), *The International Bill*

As a direct consequence of international human rights standards the right to life in international law has become a legal right[3]. As such it is enforceable. No wonder therefore, that the inclusion of the right to life provision in the South African Interim Constitution was preceded by lengthy debates. This is so because such a right has serious 'implications for a number of controversial social issues, particularly the death penalty, euthanasia and abortion'[4]. Hence the reason why the negotiating parties at Kempton Park were greatly divided on this issue[5]. In the result, a compromised and general 'straightforward right to life was eventually entrenched'[6] in section 9 providing simply that 'Every person shall have the right to life'. A surprisingly non-committal language typical of the 1948 United Nations Universal Declaration of Human Rights[7], flying across the face of the modern international standards to its humble beginnings where South Africa left off after the downfall of General Jan Smuts' government.

At first sight the implications of section 9 as presently worded seem depressing. As it was observed in the discussion of international human rights and the death

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of Rights: The Covenant on Civil and Political Rights (1981), 114.

3 *Vide*, article 3 of the Universal Declaration of Human Rights of 1948; article 6 of the International Covenant on Civil and Political Rights of 1966.

4 A Cachalia et al, *Fundamental Rights in the New Constitution* 1994 p32.

5 *Vide*, L Du Plessis & H Corder, *Understanding South Africa's Transitional Bill of Rights*, 1994, pp54 and 146-147.

6 *Ibid.*

7 *Vide*, article 3 thereof.

penalty[8] above, such wording is open to various interpretations. Therefore, it does very little to advance the death penalty debate. Furthermore, it is neither abolitionist nor does it make any attempt at providing necessary safeguards in instances of trial of capital offenders. In sum, the effect of this provision is to entrench the *status quo*, no matter what that is. If South Africa is to follow international law in this regard from the beginning step by step up to the salutary present state, the fear is it will take four decades to catch up. One wonders why the South African right to life provision did not follow the latest international trend and thus eschew being the centre stage of the nagging death penalty debate with the risk of once more being the pariah of the world.

The Republic of Namibia, has followed this latter option. Article 6 of the Namibian Constitution provides thus:

> 'The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia'.

By so doing, Namibia has abolished the death penalty in no uncertain terms. Thus, that state will be able to focus its attention and economic resources to addressing the real causes of crime without shielding behind the tattered flag anchored on the unfounded belief that 'the death penalty is an effective deterrent to prospective criminals'. If a country's advancement in civilization is measured by its degree of promotion and protection of human rights then surely Namibia is more civilized than South Africa. This realization should certainly actuate the Constitutional Assembly to improve on the formulation of the South African

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8 *Vide*, chapter 3 *supra*.

right to life provision to give it more clarity in keeping with international standards.

Whatever the shortcomings of the right to life provision in the South African Constitution, it is interesting that all the rights contained in the interim Bill of Rights are limitable. Although it is unthinkable to figure out how a right to life can be limited, the limitation clause[9] in the Bill of Rights somehow offers the potential of putting South Africa on par with current international trends regarding the right to life and the death penalty. What this means is that it is only through the interpretation of 'the right to life' read with the limitation clause that the conundrum surrounding the constitutionality or otherwise of the death penalty can be resolved. This is the task that the negotiators through their compromise have left to the Constitutional Court (which is due to give its decision on the constitutionality or otherwise of the death penalty in South Africa) to determine. The decision of the Constitutional Court in this matter might be only of temporal significance at this stage since the final constitution is yet to be drawn. Consequently, no matter which position the Constitutional Court adopts with regard to the right to life and the death penalty, the Constitutional Assembly may alter it at a later stage. Of importance, though, is the fact that such decision will surely help the Constitutional Assembly to better formulate the right to life provision. Ultimately what is essential is the content of the right to life, to which I now turn.

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[9] Section 33.

7.1 THE CONTENT OF THE RIGHT TO LIFE

From the wording of the seminal international human rights instruments[10] providing for the right to life it is difficult to discern with any degree of certainty the envisaged content of such right. Nevertheless, as the right was further debated for inclusion in subsequent international and regional human rights instruments it seems as though it was intended as an instrument to be used against the death penalty and nothing more. However, the developments in international human rights law have pointed to the opposite direction. Such developments have contributed greatly to what we can now style with certainty, the 'tangible modern content' of the right to life. This conflates to a certain extent, both the narrow and the wide approach to the right to life.

The two approaches to the right to life arose out of the two contending interpretative schools of this right. The first school favours a more restrictive approach, ie a narrow construction of the right to life. Accordingly, the narrow view confines the protection offered by the right to life to such matters as capital punishment, abortion, disappearances, non-judicial executions, and other forms of intentional or reckless life-taking by the state[11]. On the other hand is the second school which advocates a broader view of the right to life. This approach is more recent and in keeping with international developments. Its basic thrust is an attempt to introduce an economic and social content into the right to life. In accordance with this approach, the right to life includes a right to food, to

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10 *Op cit* note 3 *supra*.

11 A W Schabas, *The abolition of the death penalty in international law*, 1993, p8.

medical care, and to a healthy environment[12]. The plausibility of this approach was acknowledged when the Human Rights Committee adopted it in the interpretation of article 6 of the International Covenant on Civil and Political Rights[13] and 'is shared by some of the states parties'. Thus the second approach to the right to life encompasses the aspects of the social rights to an adequate standard of living and to health which are recognized in Articles 11 and 12 of the International Covenant on Economic, Social, and Cultural Rights of 1966. In this way, it is logical that the second (wide) approach to the right to life is frequently alluded to as a 'right to live'. This however, does not make it an independent right, rather it should be seen as a cogent sub-category of the right to life. This point was made clear by Gros Espiel. After enunciating the wide approach to the right to life he proceeded thus:

> 'When this broad concept of the right to life has been fully understood and recognized, as is the case in current legal thinking and as probably will be the case in future, the stage is reached where, lato sensu, the right to life and the right to live are in legal terms regarded as synonymous'[14].

What is clear, though, is the fact that the human right to life *per se*, as Dinstein argues, is a civil right, and it does not guarantee any person against death from famine or cold or lack of medical attention[15]. Therefore, the right to life, in effect, is the right to be safeguarded against

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12 *Idem* at pp8-9.

13 *Ibid.*

14 *Op cit* note 1 *supra* at p44.

15 Y Dinstein, 'The right to life, Physical Integrity, and Liberty' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights*, (1981), 114 at p115.

killing. Noteworthy is the fact that both schools referred to above agree that the issue of the death penalty is at the core of the right to life, and this is confirmed, to a considerable extent, by an historical approach to the definition of this right[16]. An interesting question then is, what implications does the content of the right to life have on the murder or capital crime convict? Since many human rights instruments (the South African Interim Bill of Rights being one) contain a limitation or derogation clause, which has to be taken into account in interpreting rights subject to it, it will be convenient to deal with this question under the relevant topic following immediately below.

7.2 INTERPRETATION OF THE RIGHT TO LIFE CLAUSE IN THE INTERIM BILL OF RIGHTS WITH REGARD TO THE DEATH PENALTY

It should be made clear from the outset that had the Bill of Rights outlawed the death penalty this interpretation would not be necessary. Unfortunately the contrary obtains, thereby calling for a diligent interpretational exercise as such process carries serious implications for hundreds of convicts still languishing on death-row in major prisons of South Africa. The 'right to life' like every other right in that bill, as embodoed in the South African Bill of Rights, is subject to the limitation clause[17] which is worded as follows:

> 'The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation -
>
> (a) Shall be permissible only to the extent that it is-

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16 *Op cit* note 11 *supra* at p9.

17 Section 33(1).

(i) reasonable; and
(ii) justifiable in an open and democratic society based on freedom and equality; and

(b) shall not negate the essential content of the right in question'[18].

Before going any further, it is necessary to consider another variable of the right to life posited by some South African commentators[19]. This will facilitate a holistic approach to the determination of the reach of this right. Without considering the economic aspect of the right to life as it has evolved in international law, the learned authors opine that 'in the expression "right to life" the concept "life" could have either (or both) of the following meanings':

'(a) It can refer to human existence as such or being human in its entirety. This is expressed in colloquial speech as follows:

"Life has meaning".
"She leads an exemplary life".
"Never in my life would I do a thing like this".

(b) It can mean the nodal point of being human, thus referring to the living (human) beings underlying bond with reality. Looked at in this way, it is a condition (or "state of affairs") in which the individual human being has a vital interest. Un-like "objects" such as freedom or property, life can be taken away from a particular individual, but not restored - either in kind or in any other form. The knot with reality, once untied in a particular instance, cannot be retied'.

Their exposition may fairly be said to resemble an attempt to introduce a third dimension to the right to life, a purely South African approach. Problems, however, beset

18 *Ibid.*

19 *Vide*, L M Du Plessis, 'Whither capital punishment and abortion under South Africa's transitional constitution?', *SACJ*, (1994), vol 7, p145 at 152; and L M Du Plessis and H M Corder, *Understanding South Africa's Transitional Bill of Rights*, 1994, at p147.

proposition (a) above. Its major defect is that it proceeds from the premise of colloquy, something completely foreign to and unacceptable in international law which is rooted to a considerable extent on state practice and not individual interaction and utterings. Secondly, and most importantly, it overlooks the fact that human rights are not creations of individual states, but creations of the will of the international community, and therefore, interpretations of the rights proceeding from international instruments and legal systems have to be in accordance with the behests of that system. Viewed in that light, therefore, proposition (a) does not hold.

Proposition (b) however, is in line with the ever evolving interpretation of the right to life as seen through the international eye. It clarifies and advances the construction of the right to life provision read with the limitation clause. This tallies with the view of the narrow school of thought.

Coming back to the question posed above, viz what implications does the content of the right to life have on the capital offender convict, there are only two aspects of the right to life as advocated by the two schools referred to above. It cannot be emphasised enough that it is impossible to ever imagine a limitation of the right to life, both logically and legally. But if attention is brought to bear on the difference in emphasis between the narrow and the wide approach to the right to life, it is possible then to limit such right in a broad (economic) sense and not in a narrow sense. The latter is the most crucial because when a court of law imposes the death penalty it tramples once and for all, on this primary right. The impact is great because of the 'finality of death'. Here the argument of proportionality can not hold. Every human being has rights, and with due respect corpses do not.

If the state failed to protect one individual's right to life (eg murder victim) and thereby fell short of its international obligation, could it be justified on the basis of international human rights norms in killing the perpetrator to avenge the deceased? This is not a question of weighing the rights of individuals involved[20]. However it can be clarified as follows. The perpetrator remains in a strong position. He/she has a right to life which the state has a duty to protect and the deceased has got none, but still the state has a 'spurious' duty as regards the proper burial of the dead. Where does this leave the state in terms of justification for executions? Nowhere! The mere fact that one person has violated another's right, whatever the kind thereof, does not operate to deprive such a person of his or her rights, just as much as it does not entitle the state to renege on its duty to protect such person and ensure that he or she enjoys their human rights without discrimination arising from a previous incident. In this regard, indeed the Appellate Division in *Minister of Justice v Hofmeyr*[21] recognized that the fundamental rights of prisoners survive incarceration.

Turning on the test contained in the limitation clause, there might be disputes involving possibly the notion of proportionality[22]. This will relate to the reasonableness and justifiability (or otherwise) of the death penalty in an open and democratic society based on freedom and equality.

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20 Contrary to what Dion Basson says in 'South Africa's Interim Constitution' 1994 at p24.

21 1993 (3) SA 131 (A), quoted by Dirk van Zyl Smit, 'Sentencing and Punishment', unpublished paper, at p38-39.

22 *Vide*, Gerhard Erasmus, 'Limitation and Suspension' in David van Wyk, John Dugard, Bertus de Villiers & Dennis Davis (eds), *Rights and Constitutionalism - The new South African Legal Order*, 1994, p629 at 648-650.

But that is not the end. The ultimate test is whether such limitation negates the essential content of the right in question. It must be pointed out that the mere fact that the right to life is not mentioned under the stricter test of 'necessity' in the limitation clause does not weaken it. In fact to list it there would have been supererogatory. It is submitted that the right to life is sufficiently protected by the first or lower standard of limitation. What is important is that this right is included in the list of non-derogable rights, even under the state of emergency just as it is the case in international law[23]. There is no doubt therefore that taking life *per se*, negates the essential content of the right to life owing to the 'finality' of death. In the final analysis the imposition of the death penalty cannot pass this test. Indeed this result was foreseen by Chief Justice M M Corbett, in a memorandum submitted on behalf of the Judiciary of South Africa on the Draft Interim Bill of Rights, when he expressed the view that section 33(1)(b) read with section 9, effectively abolished the death penalty and outlawed abortion[24]. It is submitted that such interpretation and result is completely correct, perhaps except for abortion, and in step with international developments where the focus has shifted from merely countering the arbitrariness of the death penalty to straight-forward abolition. Ultimately it appears that the death penalty is itself sentenced to death. This then, is the only revenge that international human rights standards tolerate without demure.

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23 Section 34(5)(c).

24 Cited by L Du Plessis and H Corder *op cit* note 17 above at 147.

CHAPTER 8

ARBITRARINESS OF THE DEATH PENALTY - INIMICAL TO HUMAN RIGHTS?

Arbitrariness inherent in the capital trials involving capital offences and the general administration of the death penalty is an old, and probably insurmountable, problem that continues to harry by day and haunt by night both international human rights regimes and the municipal legal systems of retentionist states. The nature of this problem is intricate and multi-faceted. As it will be argued below, there is no solution to this problem within human ability that is consistent with the imposition and carrying out of the penalty of death. The only salutary solution which, however, is inconsistent with the death penalty, is its complete abolition. It is hoped in this chapter to demonstrate the reach of the impact of this problem on, and its undermining of individual human rights.

The concept of 'arbitrariness' with regard to the death penalty as employed in international law[1] was intended to provide the highest possible level of protection of the right to life and to confine permissible deprivations therefrom to the narrowest of limits[2]. It is this understanding of 'arbitrariness' that informs the safeguards guaranteeing protection of the rights of those facing the death penalty[3]. Ramcharan lays out five considerations to be taken into account relating to the concept of 'arbitrariness', four of which are as follows:

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1 *Vide* eg. Art 6 of the International Covenant on Civil and Political Rights of 1966.

2 B G Ramcharan, 'The concept and dimensions of the right to life' in *The Right to Life in International Law* 1983 p1 at 19.

3 *Vide* Chapter 5 above.

> '(a) whether a deprivation is arbitrary or not must be determined ultimately by reference to international human rights law:
>
> (b) the inherency of the right to life coupled with the primordial nature of the value protected require that the most stringent criteria must be applied, irrespective of the country, situation or context concerned:
>
> (c) no arbitrary deprivation of life can ever be lawful under the International Covenant on Civil and Political Rights:
>
> (d) arbitrariness needs to be determined on a case by case basis and, as societies evolve, so may the concept of arbitrariness.'[4]

In the municipal systems, where the nitty-gritties of the death penalty has to be tackled at first hand, arbitrariness assumes enormous proportions. This proceeds from the different kinds of municipal criminal systems. A notable distinction is the use of the jury in some countries and the non-use thereof in others. The importance of this distinction lies in the fact that the jury has great influence on the decision as to who should go to the gallows[5]. In addition to the jury, there is also the prosecutor who has a major influence on the ultimate sentence by his or her choice of charges. Not to be discounted are the police who investigate the particular crime. As they are not infallible, it is possible that they may arrest a wrong person and through their torturous tactics, they may force or unduly persuade the suspect to make an incriminating confession on which the court will rely for its finding of guilty to a capital offence. Furthermore, there is the burning issue relating to the legal representation for the accused in capital cases. In most cases such accused are indigent and rely on the

4 *Op cit* note 2 *supra*.

5 B Bakell & A H Kenneth, *The Arbitrariness of the Death Penalty*, 1987, at p20.

assistance of *pro-deo* counsel. Generally in practice, *pro-deo* counsel are appointed among the most junior of the members of the bar and are paid a pittance by the state to do a huge task for which they are ill-equipped and, further, demotivated[6]. Although the Bill of Rights'[7] makes provision for legal aid to indigent accused at state expense in South Africa, this does not alter the situation. Therefore it means that in most capital crimes, the accused are represented symbolically by inexperienced counsel out of parity with the seriousness of their cases. This is at odds with what the House of Lords stressed in *R v Home Secretary, Exparte Bugdaycay*[8]. The House of Lords proceeded thus:

> 'The most fundamental of all human rights is the individual's right to life and, when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny'.

This exhortation is as relevant to the capital crime trial as it was to the context in which it was made.

At the top of the hierarchy of influential officers to the result of a capital trial are judges. Quite strangely 'some judges will find any excuse not to impose the death

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6 Generally see Geoff Feltoe, 'The reliability of the decisions about whom to execute in Zimbabwe'. *Zimbabwe Law Review*, 1989, 162 at pp165-168. Although he discusses the situation in Zimbabwe with regard to the quality of criminal defences in capital cases, the discussion is of great relevance to most retentionist countries who make use of *pro-deo* counsel through legal aid schemes.

7 Republic of South Africa Constitution Act 200 of 1993, section 25(3)(e). The section does not, however, state whether the accused is entitled to be represented by a legal practitioner of his or her choice where such legal representation is at state expense, but otherwise the contrary obtains.

8 1987 All ER 840 at 952.

penalty whereas others are less reticent about imposing it.'[9] This is arbitrariness of a different kind, well hidden from international law scrutiny. Arbitrariness of this form can be likened to that which was objected to (although remotely) in the American case of *Furman v Georgia*[10]. *In casu* the impugned arbitrariness related to the jury's proceedings without standards or guide-lines in capital cases that allowed them wide discretion as to whether or not to recommend a death penalty in a given case.

There is no jury in South Africa, nevertheless the arbitrariness akin to the one that tormented the *Furman* court also haunts the South African courts through the device of extenuating circumstances. In South Africa as opposed to what obtained in the United States of America then, arbitrariness is within he judiciary itself, the final pillar of hope. The recognition of either extenuating or aggravating circumstances in a given case is a salutary concomitant of the non-mandatory imposition of the death penalty in certain jurisdictions (South Africa included). However, as already alluded to above[11], the difficulty in South Africa is that whereas the relevant legislation makes the death penalty discretionary[12], it never laid down guide-lines within which the judiciary is to exercise such an important discretion which is often wide and unrestrained.

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9 *Op cit* note 6 *supra* at p170.

10 408 US 238 (1972).

11 *Vide* Chapter 4 above.

12 The Criminal Law Amendment Act 107 of 1990, see in particular section 4 which amends section 277 of the Criminal Procedure Act 51 of 1977.

Although extenuating circumstances[13] are without doubt vital to the outcome of a given capital trial, the legislation does not make any attempt at defining this important device. The fear is, in the final analysis the fate of an accused in a capital trial lies completely on the individual idiosyncrasy of a specific presiding judge[14]. It is a daunting reality that just as much as the world is to a certain extent divided into retentionists and abolitionists, so is the judiciary. This fact carries serious implications for the capital crime accused. A study undertaken by three authors[15] in 1989 in the Cape Provincial Division to identify problematic areas in the process leading to judicial executions in fact noted that 'there was disparity in the use of the death penalty by individual judges', and it was therefore convincingly argued that 'this disparity must in part at least, be attributed to the personal disposition of the judges'[16]. In a letter from his chambers dated 15 April 1991, Justice Curlewis[17] in his response to the authors[18] who undertook a similar study in the Transvaal Provincial Division and the Witwatersrand Local Division and raised issues identical to the above, affirmed that this

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13 As to the guide-lines on discretionary death sentences see generally, James Lund, 'The decision to kill: discretionary death sentences, purposes, principles and the courts', *SACJ*, (1989), 2 SAS 189 at 197 ff.

14 *Vide* Laurel Angus & Evadné Grant, 'Sentencing in Capital Cases in the Transvaal Provincial Division and Witwatersrand Local Division: 1987-1989', *SAJHR*, (1991), vol 7, 50 at P53.

15 Christina Murray, Julia Sloth-Nielsen and Colin Tredeux, 'The Death Penalty in the Cape Provincial Division: 1986-1988', (1989), 5, *SAJHR*, 154 at 155.

16 *Ibid.*

17 D J Curlewis, 'Correspondence', *SAJHR*, (1991), vol 7, part 2, 229.

18 *Op cit* note 14 *supra*.

does in fact happen. He went on to put it on record that in fact the judges who are comfortable with the death penalty are the ones who preside in capital cases because the other judges 'cannot be sound on the imposition of the death penalty.'[19] What then is the implication of this practice for the capital crime accused? Does it not add to the arbitrariness of a special kind? Is it at all in harmony with individual human rights? As it will be demonstrated below, the arbitrariness of the death penalty goes further than this. What becomes clear, though, is that who lives and 'who dies may ultimately be determined by factors not directly related to guilt or innocence: errors, misunderstandings, different interpretations of the law, or the different orientations of prosecutors, judges, etc. The discovery of technical error on the part of police, prosecuting authorities or a judge may result in a sentence being quashed.'[20] What if it is not? On the other hand lack of skill on the part of the defence lawyer or delayed access to evidence (which is a frequent occurrence in respect of *pro-deo* counsel whose minimum fees do not allow for the appointment of an attorney who is crucial for the proper preparation of a capital defendant's case) may lead to execution. In sum, therefore, 'human fallibility makes it impossible for the death penalty to be fairly and consistently applied.'[21]

8.1 THE DEATH PENALTY VERSUS EQUAL PROTECTION OF THE LAW

Once it is admitted, or at least shown, that the death penalty is inherently and wholly arbitrary, it becomes necessary and logical to take stock of the damage this

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19 *Op cit* note 17 at p230.

20 *Amnesty International, When the State Kills ... The death penalty v human rights*, 1989, p30.

21 *Idem* at p31.

causes to society. The first issue that crops up relates to the eventual unfair and discriminatory distribution of this ultimate penalty. Researches throughout the world have demonstrated that the death penalty is applied disproportionately to the disadvantaged, people at the lower end of the social scale who would not have faced the death penalty if they had come from a more favoured sector of the community[22]. What is more, this can happen on account of the fact that such people are 'less able to function effectively within the criminal justice system' by virtue of their disadvantaged situation 'or because that system in some way reflects the predominantly negative attitude towards them held by society at large and by those in power.'[23]

In this connection the South African Bill of Rights provides in section 8(1) that:

> 'Every person shall have the right to equality before the law and to equal protection of the law.'

The interpretation and application of this section is yet to come before the court. It goes without saying, however, given the racial divisions in South Africa in the recent past, that this section is one of the most important components of the Bill of Rights. Nevertheless other jurisdictions already have developed vast jurisprudence on provisions similar to our own. Therefore, our courts will surely need to make a comparative study in this regard in finding its own theory to enable itself to better construe this section to ensure maximum parity in the application of the law. Generally, however, the starting point is the 'Aristotlean formulation of equality to the effect that equals must be treated equally and those who are not equal

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22 *Op cit* note 20 at pp27-28.

23 *Ibid.*

must, to the extent of the inequality, be treated unequally.'[24] Is this test applicable to the death penalty? If this simple test were to be applied it would assume that in capital trials those who have proved extenuating circumstances alternatively those against whom aggravating circumstances have been proved are as a group respectively equal and therefore should be treated alike. Thus the test will demand equal treatment for one group which is different to that meted out to the other.

For the moment the theory of individualisation of punishment may be left out. If it was not known that 'appearances are often deceptive' then this test would be as good as it appears at first sight. Taking the test further for application to the antecedent scenario, that is, to those who committed capital offences as a group of equals in need of equal treatment, the test breaks down completely. This test has correctly been criticised as mechanical and for failure to identify the criteria in respect of which the distinctions or classifications have to be evaluated and endorsed[25]. Fortunately section 8(2) does list criteria on which to determine discrimination. Apart from race and sex, however, those criteria are not relevant to the death penalty's arbitrariness engendered discrimination. Of course the equality clause[26] does not outlaw different treatment. But such development is for all intents and purposes understood and legitimised by its purpose and objective being to procure substantial equality. Such cannot be derived from the arbitrary discrimination of the death penalty application.

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24 A Cachalia et al, *Fundamental Rights in the New Constitution*, 1994, at p26.

25 *Vide*, *Mahe v The Queen* 42 DLR (4th) 514, quoted by A Cachalia et al, *ibid*.

26 Section 8.

In South Africa (prior to the moratorium that came into immediate effect in 1990 and operates up to the present), death sentences were imposed disproportionately on black defendants by an almost entirely white judiciary. Not surprisingly, execution was most likely if the victim was white and the defendant black. According to Amnesty International[27], between June 1982 and June 1983, 81 blacks were convicted of murdering whites and nearly half (38) were hanged. By contrast, out of 52 white defendants who were convicted of murdering whites, one was hanged. None of the 21 whites who were convicted of murdering blacks was executed, but 55 of the 2 208 blacks convicted of murdering blacks were hanged. This is only the tip of the iceberg.

An interesting detailed study was undertaken in the United States of America 'to discover why killers of white victims in the State of Georgia during 1970 had received the death penalty approximately eleven times more often than killers of blacks.' The researchers, according to Amnesty International[28], found racial disparities in the treatment of similar offenders at every stage of the judicial process from indictment to sentencing. Here the greatest influence was emanating from the prosecution and the jury[29]. If the prosecution and the judiciary have such a wide discretion what degree of legitimacy does the legal system command to entitle it to take life? Arbitrariness provides space for discrimination. Both factors breed injustice. The effect is the erosion of the capital accused's right to equality and equal protection of the law. Once this basic right is

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27 *Op cit* note 20 at p28.

28 *Ibid*; see also Raymond Paternoster & Annmarie Kazyaka, 'Racial considerations in capital punishment', *Challenging Capital Punishment - Legal & Social Science Approaches*, 1988, 113 ff.

29 *Idem* at 117-120.

impeached in this manner, the affected individuals are bound to feel sub-human which should not be. It is submitted that to conscientious judiciary, which stands as a final line of defence of individual rights, the imposition of the death penalty is an embarrassment. The Constitution and, in particular, the Bill of Rights espouse a vision of building a society based on freedom and equality. Therefore, equality before the law and equal protection of the law is integral to the achievement of that noble goal. By impacting on this right the death penalty stands as an insurmountable obstacle to this majestic end.

Justice is glorious when it is not only done, but also seen to be done. In South Africa it is a gross travesty of justice to mandate a judiciary which comprises members of heavily drawn from one sector of the community (which is in the minority) to impose the death penalty which is so disperately arbitrary. Furthermore, how can justice be rooted in confidence, if the majority of those sentenced to death are picked up from the communities which are not represented on the bench? This factor is similar to the one that informed Justice Stewart's statement that 'the death sentences are cruel and unusual in the same way as being struck by lightening is cruel and unusual.'[30] The discrimination in the death penalty is in the main racial, in addition it operates unfairly against the disadvantaged of our communities. However, it cannot be said further that such discrimination is also gendered. In this respect the true position is enunciated ably by Elizabeth Rapaport[31] which I wish to adopt. She argues convincingly that 'women are represented on death row in numbers commensurate with

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30 *Furman v Georgia* 408 US 238 (1972) at p309.

31 Elizabeth Rapaport, 'The death penalty and gender discrimination', *Law & Society Review*, vol 25, No 2, (1991), 367 ff.

the infrequency of female commission of those crimes our society labels sufficiently reprehensible to merit capital punishment.'[32] It is submitted that this sound reasoning is universally indisputable given the fact that many capital crimes are violent and frequently adventurous and out of keeping with the biological weakness of women.

The final issue that must not be discounted is the ever lurking possibility of judicial error which poses a serious risk to the innocent. Incidents of such errors have been recorded in various literature[33] where the innocent were executed. The invasion of equal protection of the law by such mistakes is intolerable. This actuated the French statesman Lafayette in a parliamentary debate in 1830 to say:

> 'I shall ask for the abolition of the death penalty until I have the infallibility of human judgment demonstrated to me.'[34]

Retentionists acknowledge this injustice, however grudgingly. In the words of Van den Haag:

> 'One of the most pursuasive arguments used against the death penalty is that innocent people may suffer it, owing to some mistake. This is an argument squarely based on justice - it objects to a possible injustice. However, rare, such miscarriages of justice are likely to occur. They weaken the argument of retentionists who favour the death penalty for the guilty because it is just. They have to admit that the execution of the

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32 *Idem* at p369 ff.

33 *Vide*, Amnesty International, *op cit* note 24 at pp31-32; Michael L Radelet & Hugo Adam Bedau, 'Fallibility and Finality: Type II Errors and Capital Punishment', *Chalenging Capital Punishment - Legal and Social Science Approaches*, 1988, pp91-110.

34 *Op cit* note 24 at p31.

> guilty necessarily implies the unintended execution of some innocents which is unjust.'[35]

This contention is not based on a desire to procure justice in equality. It is in fact just a step away from claimant advocacy for ritual killing for the sake of maintaining executions to please retentionists. Human rights standards frown on such injustices occasioned by unreasonable limitations of individual rights.

8.2 DEATH PENALTY - ERODING POLITICAL RIGHTS?

Political rights and freedom form the bed-rock and the nerve of democracy. It is unfortunate that despite the guarantee of these rights enshrined in both international[36] and regional[37] human rights instruments, experience has shown that the death penalty is very often used as an instrument of political repression. South African history is riddled with such examples. The chief instrument of political oppression in this country was 'apartheid' which was buttressed by draconian legislation[38] with far-reaching consequences. All this was backed up with the death penalty as a real threat to force the unrepresented majority into perpetual submission. In many other countries the death penalty has been used and continues to be employed to consolidate power after coups and coup attempts. The idea

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35 Ernest van den Haag & John P Conrad, *The Death Penalty: A debate*, 1983, at p55.

36 *Vide*, International Covenant on Civil and Political Rights of 1966; Articles 20 and 21 of the Universal Declaration of Human Rights of 1948.

37 *Vide*, for eg Articles 10 and 13 of the African Charter on Human and Peoples' Rights of 1981.

38 *Inter alia*, *vide* Terrorism Act 83 of 1967, Internal Security Act 12 of 1982, etc.

being to eliminate members of opposition political groups[39]. Alternatively, governments have sentenced their political opponents to death in the hope of silencing them or winning them over to their side[40]. This goal remains so much upfront that those eventually sentenced to death under these circumstances are not even given a fair trial.

In South Africa the Interim Bill of Rights[41] guarantees to 'every citizen' a package of political rights. Should the death penalty continue to be imposed in its ugly arbitrarisness, it is submitted, these rights carry a gloomy prognosis. They will remain smart on paper but virtually unfelt in practice. Although in pursuit of reconciliation and rectification of wrongs in the recent past, the so-called political prisoners are being pardoned in South Africa, the contrary obtains in other countries. This is evidenced by the fact that although many countries are willing to abolish the death penalty, they remain ever ready to offer every reason to keep it at least, for treason[42]. In the light of the above considerations, therefore, the death penalty and free political activity in general should be seen as mutually exclusive of one another. Political liberty has been denied for a long time through the threat of the death penalty. Now that it is achieved, is it not time for the death penalty to go?

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39 For a detailed account, *vide* Amnesty International, *op cit* note 24 *supra* pp46-51.

40 *Ibid.*

41 *Vide*, sections 21, 17, 16 and 15.

42 *Vide*, for instance, Angola, Bulgaria, Canada, Israel, Italy, Malta, Mexico, Mozambique.

values? Is it not the very international human rights regime that sets goals and standards of achievement for nations of the world? It has already been argued above that human rights are not creatures of individual states, but creations of the international community. It follows logically then that the international community is able to intervene where human rights are either abused or denied. In other words, where a specific country has failed to respect the values entailed in various human rights instruments. Surely Chief Justice Gubbay of Zimbabwe had this in mind when he spoke of 'the evolving standards of decency that mark the progress of a maturing society'[45]. He proceeded to say, 'what might not have been regarded as inhuman decades ago may be revolting to the new sensitivities which emerge as civilisation advances'[46]. That is where the learned Chief Justice mentioned the notion of 'value judgment' which as he correctly pointed out 'must not only take account of the emerging consensus of values in the civilised international community as evidenced in the decisions of other Courts and the writings of leading academics, but of contemporary norms operative in Zimbabwe and the sensitivities of its people'[47]. As to the latter I would say, at the risk of tautology, contemporary norms operative in a particular state provided they are not glaringly at variance with the trend pursued by the international community with respect to a particular issue of concern.

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45 *S v Ncube; S v Tshuma; S v Ndlovu* 1988 (2) SA 702 (ZS) at 717 B-D; *Catholic Commission for Justice & Peace, Zimbabwe v AG, Zimbabwe* 1993 (4) SA 239 (ZS) at 247 I-248 C.

46 *Ibid.*

47 *Ibid.*

There is no doubt that the international community has demonstrated a willingness to abolish the death penalty[48] and torture. In practice it would seem that the latter has been abolished absolutely both theoretically and otherwise. Whereas abolition of the death penalty seems at the moment, to be no more than a standard of achievement. The difference lies with the number of ratifications each convention receives. What is curious is that the question whether the death penalty is *per se* cruel, inhuman and degrading treatment or punishment has never come before an international court although certain aspects of it have been declared as such[49]. Is it not paradoxical that torture, which does not necessarily end in death be perceived as cruel, inhuman and degrading treatment or punishment while the ultimate sanction, the death penalty, continues to be seen otherwise? Surely to contend that the following principal methods of execution are not *per se* cruel, inhuman and degrading is disgusting: hanging, shooting by firing squad, electrocution, lethal injection, gassing, beheading, stoning, etc[50]. What is clear is that 'execution like physical forms of torture, involves a deliberate assault on a prisoner'[51]. Furthermore, there is no accurate method of execution which is guaranteed to be infallible. Very often the condemned take a long time to die[52] and the resultant

48 *Vide*, Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty adopted by the General Assembly of the United Nations on December 29, 1989 and entered into force on July 11, 1991, following its tenth ratification.

49 *Vide*, *Soering v United Kingdom* (1989) 11 EHRR 439, in the context of the long period of delay in death row awaiting execution.

50 Amnesty International, *op cit* note 24 *supra* at pp54-64.

51 *Ibid* at p54.

52 Louisiana ex rel *Francis v Resweber* 329 US 459 (1947) where the American Supreme Court held that it was not unconstitutional to send a prisoner for electrocution

mess is cause for restraint[53]. It is submitted that the contention of Amnesty International is correct, that 'just as it is not possible to create a death penalty system free of caprice, discrimination or error, so it is not possible to find a way to execute a person which is not cruel, inhuman or degrading[54].

The South African Bill of Rights in this regard provides:

> '11(2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.'[55]

It needs to be borne in mind that this is a basic fundamental human right. This fact is borne out by the recognition this right acquires in the limitation clause, that apart from being reasonable, justifiable and not negating the content of this right, any infraction of the same must also be necessary[56]. Furthermore, this right is absolute. It cannot be derogated from even under a state of emergency[57]. In this regard, it is submitted that this provision is granted the same reverence as it enjoys in international law as one of those rights that form 'the

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for the second time a month after the first attempt had failed. On the contrary, Britain reprieved John 'Babbacombe' Lee in 1885 after a third unsuccessful attempt was made to hang him, *vide*, David Pannick, *Judicial review of the death penalty*, 1982, at pp75 and 90.

53 *Vide*, Phyllis Naidoo, *Waiting to die in Pretoria*, 1990, p26; and the 'Rand Daily Mail' 12.6.1978 'The Chris Barnard Column' at p49.

54 *Op cit* note 51 *supra*.

55 Chapter 3 of the Constitution Act 200 of 1993.

56 *Vide*, section 33(1)(b)(aa).

57 *Vide*, section 34(5)(c).

foundation of freedom, justice and peace in the world'[58]. Although this section obviously finds its roots in international law, it goes further than its international counterparts in that it uniquely adds the word 'emotional' in the 'torture' portion and therefore invites a rather wide interpretational approach. This fits in well with the view expressed by Gubbay CJ in interpreting a similar Zimbabwean provision. The learned Chief Justice observed that such provision 'is nothing less than the dignity of man. It is a provision that embodies broad and idealistic notions of dignity, humanity and decency. It guarantees that punishment or treatment of the individual be exercised within the ambit of civilised standards.'[59] This provision has been perceived as involving a matter of degree determined by reference to the difference in the intensity of the suffering inflicted. This has been captured succinctly thus:

> "There seems to be, then, a scale of aggravation in suffering which commences with degradation, mounts to inhumanity and ultimately attains the level of torture ... . "Cruel" ... presumably ... is somewhere between inhuman conduct and torture.'[60]

Some authors prefer to interpret this provision disjunctively[61]. No matter however it is read, Gubbay CJ was correct in his view that central to this provision is the protection of human dignity. Seen in this light, this provision reinforces the right to the human dignity clause

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58 Preamble to the Universal Declaration of Human Rights of 1948, quoted by A Cachalia et al, *op cit* note 24 *supra* at p41.

59 *Op cit* note 45 *supra*.

60 Dinstein, 'Right to life' 123-4, quoted by L Du Plessis and H Corder, *Understanding South Africa's Transitional Bill of Rights*, 1994, at p153.

61 *Vide*, *op cit* note 24 *supra* at p37.

which provides: 'Every person shall have the right to respect for and protection of his or her dignity.'[62] This section receives maximum guarantee as section 11(2) and it is similarly also non-derogable.

What, then, is the relevance of these rights to the death penalty debate? In particular how and to what extent does the death penalty impact on them? Is the death sentence and the death row situation tantamount to a state of emergency or do they go beyond it in a 'legal' way thus allowing derogation from these rights? The relevance manifests itself in two prominent ways. Firstly, the unspeakable cruelty of execution[63] erodes these rights. Secondly, the period between sentence and execution, which is often too long, exposes the condemned prisoner to the so-called death row phenomenon which deprives him/her completely of his/her dignity owing to its dehumanising and degrading effect[64].

Although many courts still hesitate to pronounce the death penalty unconstitutional, as early as 1972 the California Supreme Court found it to be unconstitutional in *People v Anderson*[65]. The court observed that:

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62 Section 10.

63 As Dostoyevsky states, 'It's the preliminaries that are so awful. When they read out the death sentence, get the man ready for execution, pinion him, take him up the scaffold - that's what's so horrible.' - Quoted by David Pannick, *Judicial Review of the Death Penalty*, 1982 at p77.

64 John L Carroll, 'Death Row - Hope for the future', in Kenneth C Haas & James A Inciardi (eds), *Challenging Capital Punishment - Legal and Social Science Approaches*, 1988, p269 ff; *Catholic Commission for Justice and Peace, Zimbabwe v AG, Zimbabwe* 1993 (4) SA 239 (ZSC).

65 495 P 2d 880 (1972).

> 'The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanising effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalising to the human spirit as to constitute psychological torture'.[66]

In 1980 the Supreme Judicial Court of Massachusetts went the same route in *District Attorney for the Suffolk District v Watson and Others*[67]. It did not come as a surprise when in *Furman v Georgia*[68], Justice Brennan gave as one reason for his conclusion that capital punishment is *per se* unconstitutional the fact that 'mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death'. However, this notwithstanding, the death penalty remains constitutional in the United States of America because this case concerned the constitutionality or otherwise of the standardless procedures followed by the jury in death penalty cases. Nevertheless, the centrality of human dignity cannot be downplayed.

This fact has been recognised by the German courts in their interpretation of the right to life. Although the death penalty has long been abolished in that country, the courts interpret the right to life in article 1(I) in conjunction with the right to human dignity in article 102[69]. This approach could be attributed to the German

66 *Idem* at p894.

67 411 NE 2d 1274 (1980).

68 408 US 238 at 288 (1972).

69 *Vide*, Mantz-Düring/Herzog/Scholz, Kommentarzum Grund Gesetz, Band IV art 91(a)-146, München, 1993.

history prior to the second word war. It is submitted that the South African history is also fraught with massive human rights abuses. Is it not time that human dignity was given the respect that it deserves? If it is conceded that prisoners in general and the condemned in particular are not deprived of their human rights by virtue of their circumstances, 'save those inevitably removed from them by law, expressly or by implication'[70], why should it be with the condemned? In this vein it is indisputable that the death penalty at least, by implication, when carried out removes these rights under consideration. Given the strong position in the Bill of Rights enjoyed by both the right to human dignity and security, is it enough that they may be removed by implication? Obviously any law that purports to remove these rights expressly will not survive the stringent test in the limitation clause. Surely imposition of the death penalty cannot be tolerated on the basis that it erodes these very fundamental rights as a matter of fact.

Apart from actual execution of the death sentence, the period the condemned has to spend between sentencing and execution raises major problems. Whether that period is long or short it cannot escape controversy; herein lies the dilemma. This arises owing to, *inter alia*, basically two factors. Firstly, although international human rights norms do not tolerate capital punishment it is recognised that there are countries which still impose the death penalty. In this regard meticulous safeguards have been worked out respecting the protection of those facing the death penalty. For the condemned therefore, these safeguards are a fundamental human right that cannot be dispensed with. These include, *inter alia*, the right to appeal to a court of higher jurisdiction, the right to seek pardon or commutation of sentence etc. Full compliance with these international

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70 *Vide*, *op cit* note 64 at p247G and cases referred to.

standards takes a long period of time. On the other hand, if the period between sentencing and execution is short, the inevitable conclusion is that these safeguards were disregarded. Of course to expedite execution would unavoidably necessitate the same. The second factor relates to the conditions on death row and their implication on the mind, health and dignity of the condemned. This aspect has been thoroughly dealt with by psychologists, penologists and criminologists in their various studies[71]. They describe confinement under sentence of death as exquisite psychological torture, wherein many inmates suffer obvious deterioration and severe personality distortions, including denial of reality. It is proposed therefore, not to review it in detail except to point out several facts. In South Africa[72] and probably throughout the world the condemned prisoners are treated differently from other prison inmates. They are generally isolated each in their own small cells, maltreated by prison officers and generally live in squalid conditions with poor and inadequate food[73]. Whereas other prison inmates enjoy the support of their family members and friends as demonstrated by regular visits, it is not at all uncommon for this resource to be unavailable to death row prisoners[74] owing to shame and grief felt by those who were

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71 Bluestone & McGohee, 'Reation to Extreme Stress Impending Death by Execution', 1962, *The American Journal of Psychiatry* at 393; Kaplan, 'Administering Capital Punishment' (1984) 36 *University of Florida Law Review* pp181-5; R Johnson, 'Under Sentence of Death: The Psychology of Death Row Confinement' (1979) 5 *Law and Psychology Review* at 141; Lewis Jolyon West, 'Psychiatric Reflections on the Death Penalty' in Hugo Adam Bedau & Chester M Pierce (eds), *Capital Punishment in the United States*, 1975, p419 ff.

72 *Op cit* note 53 *supra*.

73 *Vide*, *Catholic Commission for Justice and Peace, Zimbabwe*, case, *op cit* note 64 *supra* at 245 D-246 G.

74 Michael C Lambrix, 'The Isolation of Death Row', Michael L Radelet (ed), *Facing the Death Penalty* -

close to the condemned prior to sentence in view of his/her plight. Consequently, the condemned has to rely on the temporal friendship of fellow condemned whose execution before him/her leaves him/her completely traumatized. In sum the condemned are deprived of all the creature comforts of life, forced to contemplate a sudden and violent death by a means already ordained and known to them. This is a period during which the soul and spirit of any mortal is severely tested[75]. The paradox is whether the situation of the condemned amounts to cruel, inhuman or degrading treatment or punishment in view of the legal imposition of the death sentence in a particular state Courts of various jurisdictions have reached different conclusions. However, the weight of authority supports the view that the horrendous conditions on death row, often called the 'death row phenomenon', constitute cruel, inhuman or degrading treatment or punishment.

In *Soering v United Kingdom*[76] the European Court of Human Rights decided for the first time that extradition of the applicant to the United States of America to face murder charges could amount to a breach of article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms which prohibits torture or inhuman or degrading treatment or punishment. In reaching its conclusion the court relied on the assessment of death row conditions at Mechlenburg Correctional Centre, Virginia, where the applicant would eventually be incarcerated if extradition were allowed. The court therefore appreciated the reality of the death row phenomenon and its infraction

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Essays on a Cruel and Unusual Punishment, 1989, p198 ff.

75 *Idem*, Watt Espy, 'Facing the Death Penalty', p27.

76 (1989) 11 EHRR 439.

on a given right. The Indian Supreme Court in *Sher Singh and Others v State of Punjab*[77], per E Chandrachud CJ said:

> 'The prolonged anguish of alternating hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional, and physical integrity and health of the individual can render the decision to execute the sentence of death an inhuman and degrading punishment in circumstances of a given case.'

A curious view was taken by the majority of the Canadian Supreme Court in *Re Kindler and Minister of Justice*[78]. The case involved the extradition of the fugitive convicted in the United States of America of murder and liable to be sentenced to death. The court propounded a narrow view that, as the condemned prisoner is never compelled to undergo the full appellate and *habeas corpus* procedures, the period of his confinement on death row resulting therefrom cannot be considered a violation of his fundamental rights, no matter the agony that he is suffering. The effect of this apparently intolerant approach is to discourage the death row prisoners from exhausting their rights to appellate jurisdiction and to seek clemency. Such view is inimical to the purpose of human rights. The apposite approach was taken in *Vatheeswaran v State of Tamil Nadu*[79] where the court stated:

> 'We think that the cause of the delay is immaterial when the sentence is death. Be the cause for the delay the time necessary for appeal and consideration of reprieve or some other cause for which the accused himself may be responsible, it would not alter the dehumanising character of the delay.'

This approach has been described as 'more in accord with an humane understanding of the desire to "cling to life" as

77 (1983) 2 SCR 583 at 519 D-E.

78 (1991) 67 CCC 3d 1.

79 AIR 1983 SC 361 at 364.

long as possible'[80]. In the recent case, *Catholic Commission for Justice and Peace, Zimbabwe v AG, Zimbabwe*[81] which turned on the constitutionality or otherwise of the long period of delay before execution of the condemned. Gubbay CJ rejected the argument that the 'unabating stress is inherent in the death penalty'. The learned Chief Justice pointed out that 'where the anguish attains an unacceptable level due to delay in carrying out the sentence, it is always open to the condemned prisoner to move the court for relief' and that the court will ensure that the suffering ceases ...'[82]. The court held the delay and the concomitant suffering endured by the condemned prisoners on death row to constitute cruel, inhuman and degrading treatment or punishment and set aside the death sentences which were then substituted with imprisonment for life.

In South Africa therefore, the death row phenomenon and a period of delay would in addition to being cruel, inhuman or degrading treatment or punishment, constitute, in the language of s11(2), physical, mental and emotional torture which undermines respect and protection of human dignity. In conclusion it needs only to be appreciated, just how far-reaching the impact of the death penalty is, on the rights considered in this section.

8.4 THE EFFECTS OF THE DEATH PENALTY ON THIRD PARTIES - GOING BEYOND ITS RETRIBUTIVE TARGET?

It would require unearthly courage and insensitivity to deny the reality of the effect of the death penalty on the next of kin of the condemned. This, however, does not suggest that the relatives of the murder victim do not get

80 Gubbay CJ, *op cit* not 64 at p265 B.

81 1993 (4) SA 239 (ZSC).

82 *Idem* at p251 A-B.

negatively affected by the untimely termination of an innocent life. The far-reaching trauma that besieges them is indisputable. Certainly there is nothing to compare with the impact and profound shock of a sudden unexpected death. As a matter of fact, the family members have had no opportunity to prepare for death, and no chance to say good bye to their relative[83]. This makes homicide especially cruel to the survivors and it may take them a long time to forget.

As for the relatives of the condemned the effect of a pending death is even worse. It is a fact that sometimes it takes years before the condemned prisoner is executed. Such 'prolonged anticipation of death creates enormous strains and problems for the families'[84]. Here the families are reduced to helpless bystanders in a slow dying process which renders them feeling completely vulnerable[85]. Admittedly a common experience to both the families of the condemned and homicide victim is the loss of a relative by violent means, although the type of violence is very different in the two situations. On the one hand, 'the homicide victim dies by sudden, passionate, individual violence, while the condemned prisoner, on the other hand, dies by slow, deliberate and collective violence'[86]. In the result, the families of both must live with the knowledge that their relative died from the intentional acts of others and that the death was

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83 Margaret Vandiver, 'Coping with Death - Families of the Terminally Ill, Homicide Victims and Condemned Prisoners', Michael L Radelet (ed), *Facing the Death Penalty: Essays on a Cruel and Unusual Punishment*, 1989, 123 at 125.

84 *Idem* at p127.

85 *Vide*, Shirly Dicks, *Death Row - Interviews with Inmates, their Families and Opponents of Capital Punishment*, 1990, at pp109-129.

86 *Op cit* note 83 *supra* at 128.

avoidable. However, the families of the condemned prisoner are differently situated. They know that the death penalty was not only deliberately imposed, but it is arbitrary and selective in its operation, striking upon the indigent, the disliked and the unfortunate. They find themselves in an invidious position where they blame themselves and feel ashamed of the situation of the condemned prisoner. This feeling is engendered by a hindsight belief that they could have altered the result of the trial and appeals by selecting a different lawyer or another legal strategy. The feeling of guilt on their part remains with them until their own death. They also face ostracism from the community which puts enormous pressure on them. Like the condemned prisoner they keep on anticipating a reprieve, clemency or commutation as the appeals progress. This keeps them in a continuous state of anxiety and suspense thus exposing them to an unmeasurable degree of mental and emotional torture which is prohibited by s11(2) of the Bill of Rights. Such torture is exacerbated by the knowledge that their relative's death is actively desired and thereby they find themselves without social support which they desperately need. Their frustration leads them to focus their anger on the legal system in particular, and generally on all the actors involved in it. As the last straw, the family of the condemned prisoner is denied a glimpse of his/her corps after execution, neither is it allowed to mourn at the graveside[87] and perform burial rites according to their culture, conscience and belief as ordained by s14(1) of the Bill of Rights.

While the brutalization of the society by the death penalty need not be over-emphasized, it must be mentioned that capital punishment intrudes on the work ethics of the medical profession. Doctors have to be present throughout

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87 *Op cit* note 53 at p26.

the killing ritual to testify the former condemned prisoner dead. In this regard attention is drawn to the United Nations Principles of Medical Ethics[88]. Principle 2 thereof provides that:

> 'It is a gross contravention of medical ethics as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively in acts which constitute, participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment'.

In line with these United Nations principles, is the World Medical Association Declaration of Tokyo[89], Article 1 thereof prohibits doctors from countenancing, condoning or participating in the practice of torture or other forms of cruel, inhuman or degrading procedures, whatever the offence which the victim of such procedures is suspected, accused or guilty of and whatever the victim's beliefs or motives, and in all situations, including armed conflict and civil strife. Even more stringent is article 2 which provides that 'the doctor shall not provide any premises, instruments, substances or knowledge to facilitate the practice of torture or other forms of cruel, inhuman or degrading treatment or to diminish the ability of the victim to resist such treatment'. Finally, article 3 prohibits the doctor from being present during any procedure during which torture or other forms of cruel, inhuman or degrading treatment is used or threatened. It is submitted that execution, as the ultimate form of torture, and a humiliating and degrading punishment, forces the medical profession to operate contrary to their international ethics which is unfair to them. In this respect the dilemma of a doctor or psychiatrist begins at the trial stage. A

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88 United Nations Principles of Medical Ethics of 1982.

89 World Medical Association Declaration of Tokyo of 1975.

physician is sworn to devote himself/herself to the preservation of human life. In a capital trial physicians have to 'deal out opinions whereby the survival or destruction of another human being hinges on the turn of a word'[90]. Then throughout to the end the doctor is present. If a death row inmate can no longer handle the death row phenomenon and goes maniac, execution is postponed and the doctor has to come in to attend to such patient so that on execution, such condemned prisoner must be in full possession of his/her mental faculties so that he or she can appreciate what is being done to them. Thus reflecting the revenge basis of execution[91]. Surely the death penalty is the only punishment which has such a wide ranging, negative impact on a large number of people. It denies everyone it affects, in one way or another, their fundamental human rights which in its absence would be enforced to the fullest.

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90 Louis Jolyon West, 'Psychiatric reflections on the death penalty', *Capital Punishment in the United States*, 1975, p419 at 424.

91 *Idem* at p425.

CONCLUSION

The history of the death penalty is a long one. It has been in place and practiced for time immemorial before the present era of human rights norms was ever conceived of. It is still with us today. Penologists and criminologists from all walks of life have done far reaching researches aimed at improving modes of punishment of offenders that are in keeping with civilization. Despite all these efforts, the death penalty remains incurably arbitrary, discriminatory, irreversible, cruel, inhuman and degrading in the extreme. Driven by the state, it erodes all the rights that a human being possesses. What then is the purpose of human rights norms? In particular, what is the object of a bill of rights? Is it not to protect an individual against massive state power? Put in proper context, is the objective not to limit a state power?[1] If this was not the case there would be no need for human rights. The power of a state over individuals is limited by recognising the rights of such individuals against the state. Included in the qualification of a state power over an individual is the limitation of the state's power to punish. Has this been achieved through the Interim Bill of Rights? On this score the Bill proscribes the subjection of a person to 'torture of any kind, whether physical, mental or emotional', as well as subjection to 'cruel, inhuman or degrading treatment or punishment'[2]. Whether this is a real 'limit on the power to punish or a mere constitutional rhetoric'[3] is yet to be

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1 *Vide* generally, Raoul Berger, *Death Penalties*, 1982, pp27-28.

2 Section 11(2).

3 Joseph L Hoffmann, 'The "cruel and unusual punishment" Clause - A limit on the Power to Punish or Constitutional Rhetoric?', David J Bodenhamer & James W Ely, Jr (eds), *The Bill of Rights in Modern America - After 200 Years*, 1991, p139 ff.

seen. However, the literal reading of this provision suggests that it is a limit, but in practice it might be otherwise. It is submitted therefore, that as a limit its reach must extend to all punishments to make them comply with the values protected in this right. It follows that the death penalty as an extreme punishment must be limited. Capital crimes may still be there, but another appropriate punishment must be substituted, eg life imprisonment. In interpreting the right to life in a capital case, the limitation should not be directed at such a right, as it would 'negate the essential content' thereof and be itself unconstitutional. Punishment is not a human right, by limiting it in appropriate cases offers human rights a better chance to flourish.

The right to life and the right to human dignity form the basis of all other rights. It is intolerable that the death penalty should be allowed to erode them. In this regard, when faced with the question of the constitutionality or otherwise of the death penalty, the Hungarian court[4] took the view that human life and human dignity form an inseparable unity. They are, as it were, indivisible and unrestrainable. The Hungarian court, quite correctly, concluded that the rights to human life and dignity taken together as an absolute value create a limitation on the criminal jurisdiction of the state[5]. This view recognises the perennial animosity that exists between human rights and the death penalty, and that the two are mutually exclusive of each other in practice. Therefore, the death penalty has to go, human rights are here to stay.

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4 Decision of the Hungarian Constitutional Court of 24 October 1990 (23 1990 (X 31) AB).

5 Dirk van Zyl Smit, 'Sentencing and Punishment', unpublished paper, pp26-27.

The impact of the death penalty on individual human rights is so great that only abolition is an appropriate remedy.

The death penalty also has a negative impact on the state itself. This manifests itself in two ways. Firstly, there is a constitutional right for the indigent accused to legal representation at state expense[6]. In addition, international safeguards for the protection of the rights of those facing the death penalty put pressure on the legal system to be extremely meticulous in death penalty cases. In the result, 'the death penalty proceedings must therefore, conform to a higher standard than other criminal proceedings'[7] and this needs more money and an experienced judiciary. Secondly, the death penalty carries with it the propensity to sour foreign relations between retentionist and abolitionist countries as demonstrated in the *Soering* and *Re Kindler and Minister of Justice* cases. The cases posit the modern trend to refuse extradition of persons to countries where they might face the death penalty[8]. It is submitted that this stance is in accord with the international trend towards abolition of the death penalty.

To recap on the two main theories of punishment, retribution and deterrence, a need arises to consider whether they are in harmony with human rights norms. As

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6 Section 25(3)(e).

7 Michael D Hintze, 'The costs of retaining the death penalty: Some lessons from the American experience', Vol 111 *SALJ* part 1 1994 p54.

8 *Vide* Richard B Lillich, 'The Soering Case', *AJIL*, vol 85 1991 p128 ff; Allan Manson, 'Kindler and the Courage to deal with American Convictions', *Criminal Reports* 8 C.R (4th) 1992 p68 ff; Christine Van Den Wyngaert, 'Rethinking the Law of International Criminal Cooperation: The Restrictive Function of International Human Rights through Individual-Oriented Bars', *Principles and Procedures for a New Transnational Criminal Law*, 1991 p489 ff.

regards retribution, the statement of Gubbay CJ in the *Catholic Commission for Justice & Peace, Zimbabwe* case[9] is instructive. He said:

> 'Because retribution has no place in the scheme of civilised jurisprudence, one cannot turn a deaf ear to the plea made for the enforcement of constitutional rights. Humaneness and dignity of the individual are the hallmarks of civilised laws.'

It stands to reason, therefore, that retribution as a theory and an important weapon of retentionists cannot survive in the era of human rights. The same fate would go for deterrence. Deterrence focuses on individuals who have not committed any crime whatsoever, hoping to prevent them. Its relevance is minimal in human rights issues and its purpose almost nonexistent. Focus and emphasis should now be directed to reformation, rehabilitation and other more humane methods of punishment which has nothing to do with retribution and to a certain extent deterrence as well.

Finally, a word on the perennial question relating to the relevance or otherwise of public opinion in determining the fate of the death penalty. It should be pointed out that public opinion is an integral part of a healthy democratic setting. Nevertheless, in appropriate circumstances, in order to defend itself, and for the sake of progress in the life of a nation, it becomes imperative for democracy to dispense with public opinion. Public opinion, being an unruly horse, needs diligent circumspection. This is particularly so in regard to the relatively new issues of human rights concerning which the public is almost ignorant. Just as the relevance of public opinion diminishes beyond putting politicians into power, it cannot be relied on to determine the import and reach of human rights norms. No country should be allowed to hide

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9 *Supra* at p270C.

behind the emotional shield of public opinion where international human rights standards demand that it acts in a certain way, eg protect the value of life, outlaw apartheid, open its doors for refugees, etc. It was on this understanding that despite continued public support for the death penalty the legislators in the United Kingdom, Canada and Germany voted to abolish the death penalty[10]. Consequently the death penalty is no longer an issue in these countries neither is public support thereof any more discernible, nor is the crime rate any higher than before abolition.

Only the United States of America and the Islamic world seem adamant to retain the death penalty for reasons relative to them. Whereas other countries are rapidly moving towards abolition, the U.S. employs public support of the death penalty as her reason for retention, while the Islamic world relies on entrenched and immutable religious doctrines that insist on the death penalty in certain instances[11]. As for the U.S., Duff[12] outlines the problem thus:

> '... the example of USA teaches the world little that is useful in regard to the abolition of the death penalty. Crime is endemic there, mainly because of a moral code which teaches that acquisitiveness and greed are the greatest desiderata in life. Money is held to be above all else; and, hence, men will do anything for it, as Christian missionaries do for their faith. The thief will commit murder for money, and with its aid, feels almost certain to go his way unmolested. The "apprehension" of a murderer is regarded in the same light as a thunderbolt or an earthquake, namely, as an "Act of God".'

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10 William A Schabas, *The Abolition of the Death Penalty in International Law*, 1993, p297.

11 *Idem*, at p298.

12 Charles Duff, *A handbook on Hanging*, 1961, at p53.

It falls on international law to assist in the battle for public opinion in both the USA and other akin countries, 'by demonstrating a growing world-wide consensus as to the fundamental principles of world order'[13]. In the Islamic world there is a need for 'Islamic legal scholars who can demonstrate an alternative and more progressive view or religious law'[14] that keeps abreast with international developments, to the end of removing 'cultural relativism' as an obstacle to universal trends.

The South African Constitution of 1993 clearly states that in interpreting the provisions of the Bill of Rights a 'court of law shall promote the values which underlie an open and democratic society based on freedom and equality ...'[15]. It is controversial whether in doing so, the court should reflect public attitudes found in present South African society, or the views and values of an 'ideal' democratic public even if these differ from current public opinion. Obviously on issues such as the death penalty, the Constitutional Court cannot await public polls to be conducted in order to base its decision thereon. The Constitution is not a rigid document, it espouses idealistic goals to the achievement of which public opinion is remotely relevant, if at all. It was in this light that on one occasion, during a debate on the role of public opinion, Judge Didcott commented:

> 'We are here to interpret the constitution, not to conduct a poll among members of the public'[16]

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13 *Op cit* note 101 *supra* at p298.

14 *Ibid.*

15 Section 35(1).

16 Sunday Times, April 2, 1995, p21.

This is a plausible stance because it is only a human rights conscious court and not the public that can fully appreciate the anatomy, the extent and the reach of the impact of the death penalty on individual human rights.

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