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# **CAPITAL PUNISHMENT IN ZAMBIA AND THE PRESIDENTIAL PREROGATIVE OF MERCY**

By

**BAKO CHIPOLA**

**DECEMBER 2004**

**UNZA**

# **CAPITAL PUNISHMENT IN ZAMBIA AND THE PRESIDENTIAL PREROGATIVE OF MERCY.**

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**BAKO CHIPOLA**

**An obligatory essay submitted to the Faculty of Law of the University of Zambia in  
partial fulfilment of the requirement for the award of Degree of Bachelor of Laws (LL.B)**

**THE UNIVERSITY OF ZAMBIA**

**SCHOOL OF LAW**

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Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils all the requirements relating to the format as laid down in the regulations governing obligatory essays.

24/12/04

Date



**Mr. Enoch Mulembe  
Supervisor**

**THE UNIVERSITY OF ZAMBIA  
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**Mr. Enoch Mulembe  
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## DEDICATION

This research study is dedicated to my family and my late sister Martha Bako. To my father Mr. Bruno Bako, my mother Mrs. Joan Kalenga Bako. You will always be my inspiration. Thank you for your love and care. To my big brother Binda, you set the pace. If you can become a teacher, then I can be a lawyer. To my young brothers Mbumba and Isolo and my young sisters Margaret, Chisuwa, Mwiza, Chihinga and my niece Anneta. You are incomparable. To you guys, the pace has been set; it's for you to follow. There is no limit.

*Je vous adore beaucoup.*

## ACKNOWLEDGEMENTS

This research would not have come to completion without the help of a number of people. I would like to thank sincerely every one who assisted me.

Firstly, I would like to thank My Dear Heavenly Father, Jehovah God, who is always fulfilling my desires according to his will and for bringing me this far.

Secondly, to my parents, for their financial, moral and spiritual support, without which I would not have reached this far.

Thirdly, to my supervisor Mr. Mulembe who gave me all the audience I could ever ask for even when he was busy at his office. His corrections and brotherly advice I will forever cherish.

Most of the information used in this study could not have been accessed without the patience and assistance of certain people whom I would like to thank. I would to thank the Deputy Registrar of the Lusaka High Court for granting me access to the court's records and the materials I received. I would like to thank also the Police Headquarters Corporate Image Officers for their assistance.

I would like to thank all my friends at campus for making my stay at campus bearable. In the same vein, I would like to thank all my church mates and friends from different fellowships on campus.

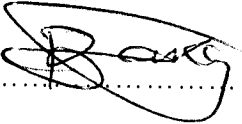
To my classmates and all Law Schoolmates, I thank you for the time we have been together. You made the programme shorter. I would like to thank especially, Mario, Gabby, Ze DON, Bar, Twaambo, Joshua, Nkumbiza, Lombie boy, to whom I owe my computer skills, Banji, Suzanne, Mr. Sinyangwe, Mr. Ngosa and Victor Musabula.

Lastly, to my roommate, Somanje for the brotherly love we shared.

**DECLARATION**

I hereby declare that the works contained in this essay are wholly mine. The opinions expressed in this study do not reflect those of the supervisor nor the University of Zambia but are the author's own. Where information has been borrowed from other sources, acknowledgement has been given in that regard. All the omissions and mistakes are entirely mine.

Signed.....

A handwritten signature in black ink, appearing to be 'B. B. B.', written over a dotted line.

Date .....

20<sup>th</sup> / 12 / 2004



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## **INTRODUCTION**

This study seeks to look at the issue of capital punishment as a form of punishment to criminal offenders. This is in the light of growing international pressure to have it abolished in all countries.

The Zambian Government in trying to respond to this pressure conducted a large-scale consultation so that it could decide on whether to accede to the Second Optional Protocol to the International Covenant on Civil and Political Rights, which abolishes capital punishment. The outcome indicated the desire by the people was to retain it.<sup>1</sup> To that effect, a conference was organised in September of 2000, where people from different sectors were invited. The then Legal Affairs Minister Vincent Malambo told the conference that Government will only accede to this protocol when a full national consensus has been arrived at.

The same result was obtained earlier from the 1995 constitutional review submissions. Furthermore, the current President, Mr. Levy P. Mwanawasa, attacked the punishment on the basis that it serves no purpose. This has rekindled the debate as to whether capital punishment, which is also referred to as death penalty, should be retained. Many differing views have been submitted in the on going debate from all sectors of society. However, president Mwanawasa, like his counter part Bakili Muluzi (now former president) from Malawi, declared that he would not be a chief hangman. That is to say, he would not issue death warrants. To that effect, the last execution was carried out in 1997 under the reign of Dr. Frederick Chiluba.<sup>2</sup>

### **Statement of the problem**

There is still an on-going debate on whether or not to abolish capital punishment. One prominent argument is that it should be abolished because crime statistics are still high implying that it is not an effective punishment. It is against this

background that this study intends to analyze the arguments as to how the effectiveness of capital punishment can be assessed. Furthermore, realising that capital punishment is still in force, it is urged that in any jurisdiction retaining capital punishment, there should be a fair extra-judicial remedy as the human justice system is not infallible. However, this is in the sole discretion of the president of the country and is apt to abuse. Moreover, very little is known as to who is eligible for presidential mercy.

It is not clear what cases are referable to the advisory committee (the prerogative of mercy committee), or when and how such cases are to be referred. It is also not clear which considerations and evidential material, if any, the committee is to take into consideration before advising the president on the exercise of the prerogative of mercy. What is true is that there is a backlog of cases before the advisory committee and this has led to high numbers of inmates on the death row.

This study urges the people to fully understand some of the arguments behind the abolition move so that their condemnation of capital punishment is not empty, and done out of habit.

The study does not however, categorically support capital punishment neither does it condemn it. It rather gives an achievable way of abolishing the same if it were so wished. It does so basing on the prevailing social, economic and political situation. To this end, the study attempts to present the material that the masses would need to be equipped for this debate.

**Chapter one** discusses the historical application of capital punishment.

**Chapter two** highlights on the important factors which impact on the crime rates in society and on the effectiveness of capital punishment.

**Chapter three** looks at the legality or constitutionality of capital punishment.

**Chapter four** looks at the presidential prerogative of mercy as an extra –judicial remedy, realising that it is axiomatic in every society retaining such a sentence to have <sup>an</sup> institution. This is because human justice system is not perfect.

**Chapter five** gives recommendations and conclusions.

## ENDNOTES

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<sup>1</sup> Zambia is not a state party to the 1990 Second Optional Protocol to the Covenant on Civil and Political Rights that obliges all state parties to abolish the death penalty for all crimes. And thus government will only accede to the protocol only when it has achieved full national consensus on this issue. It is Government's considered view that there is no consensus on the issue as reinforced by the submissions of ordinary citizens during the consultative process on the National Capacity Building Programme for Good Governance in Zambia. The then Minister of Legal Affairs, Vincent Malambo, at the Death Penalty Conference Report held at the Mulungushi Conference Centre on September 2, 2000, revealed this.

<sup>2</sup> Amnesty International Report: Zambia Time to Abolish the Death Penalty, 2001. It is however, perplexing to note that the president gave instructions to the ~~Home Affairs~~ Minister to the effect that all those on death sentences serve life imprisonment. Hon. Ronnie Shikapwasha was quoted as saying: 'we have a Christian president, a Baptist in President Mwanawasa. He has since written to me instructing that all those on death [penalty] sentences serve life imprisonment. In his wisdom he has gone ahead to refuse carrying out the death penalty'. Legally this, supposed to be done through the prerogative of mercy. The Post, Friday 16, 2003. Mwanawasa refuses to carry out death sentences.

## **CHAPTER ONE**

### **1.0 HISTORICAL APPLICATION OF CAPITAL PUNISHMENT**

#### **1.1 Introduction**

This chapter sets out to look at the practice in Zambia in so far as the application of the death penalty or capital punishment is concerned. Thus, a historical background as to when and how capital punishment was used is the main issue of this chapter. It concludes with a finding as to how the current Zambian criminal law has reserved capital punishment for the offences of treason, murder and aggravated robbery.

The use of capital punishment can be traced back to the time when Zambia had not yet been born. It is imperative, therefore, to look at its evolution in terms of when and how it was practiced. To have a vivid understanding of the historical use of capital punishment, a survey as to its use at different political epochs in Zambia cannot be over emphasized. There are, thus, three stages which have remarkable significance on the legal systems in which this punishment was practiced. These are: the pre-colonial era, colonial era and post independence era. This will be done by looking at the way it was applied by different ethnic groups such as the Bemba, Ila, and Lozi among others.

#### **1.2 Pre-Colonial Era.**

Prior to colonial occupation, the indigenous people had their own system of governance. They had a king or a chief as their supreme ruler assisted by the Council of Elders. They used to apply customary laws through their own courts. It is from these courts that capital punishment can be traced.

It is however, important to note that the study of the practice of capital punishment in the different ethnic groups is intended to show its practice, hence the scope is confined to a study in a merely general way.

The first ethnic group to which reference is made is the Bemba. This group is deemed to have settled in present day Zambia around 1730 from Luba – Lunda migrations, under Mwata Kazembe.<sup>1</sup> They had a court called the *wakabiro* presided over by the king. Serious cases were heard in camera and the others were heard openly. Cardinal to note is that the penal law of these ancient communities is not the law of crimes but the law of wrongs and sins against religion and morality.<sup>2</sup>

Capital punishment was used in the following instances:

(i) High Treason was deemed to be a very high offence. It was considered to be against the 'son of God.'<sup>3</sup> This is because Kings were considered to be sons of God and any plot to oust them was deemed to be High Treason. That is, the accused was considered to have plotted and woven enchantments against the son of God. If there is alleged treason, a séance was carried out where the *mfumu ya mipashi*<sup>4</sup> gave dark hints as to who was behind it. This was done in the presence of the *wakabiro*. The suspect from the hints given was brought before the king and made to swallow a poisonous substance called the *mwavi* to determine his innocence as there was a presumption of guilt until proven innocent. If the suspect engorged shortly afterwards, it meant that he was guilty and the king's servants immediately surrounded and killed him, his body being cut into pieces and burnt by the medicine men.<sup>5</sup>

(ii) Adultery with the king's wives was another deed met by capital punishment. Where the adulterer was caught *flagrante delicto*, the guilty pair was dispatched by a spear thrust through the back. The spear with blood was taken to the father of the female to provide a replacement without delay. Mere intimacy was met



with ruthless execution by gunshot at the principal gate of the village. In one case, Chitimukulu Mwamba ordered the adulterer and his partner to be burnt in shame alive.<sup>6</sup>

(iii) Capital punishment was also applied in cases where one murders the king or a member of the royal blood. The murderer was smitten between his eyes with a knobkerrie, his body being subsequently cut piecemeal and burnt.<sup>7</sup>

These instances alluded to relate to the king only. However, capital punishment was also applied to wrongs between equals that is, among the commoners.

The first instance is murder. What used to happen is that the clan, whose member had been killed, pursued the murderer killing him out of hand, unless he gained sanctuary with the district headman.<sup>8</sup>

There was no accidental death unless there is shown some evidence of extenuating circumstances. An extenuating circumstance may be having a bad dream were the deceased was cursing the other.<sup>9</sup>

In terms of adultery, when the adulterous pair was taken in the act, the husband slew both. There were no proceedings for murder or manslaughter against him. He would merely return the blood-stained spear to his father-in-law, who, by his words in the marriage ceremony "*you shall spear the man who lusts after your wife,*" was estopped from taking vengeance for the death of his daughter and was compelled either to find another or refund the dowry.<sup>10</sup> This absorbed him from any wrong upon killing the two if found *flagrante delicto*. If the husband decided not to kill them, 'the incontinent wife and her partner in sin were dragged outside the village and impaled on sharp stakes, amid the taunts and jeers of the bystanders, who only desisted when death had stilled their writhing agonies'.<sup>11</sup> However, in some instances compensation

was used to deal with such cases especially where the adulterer and the partner were not found *flagrante delicto*.<sup>12</sup>

The practice amongst the Lozi was quite similar to that of the Bemba. Disputes were settled through the *kuta*, which was an assembly of leaders of the people, which met to deliberate or to try cases.<sup>13</sup>

Similarly, the Ila had the same practice. However, with regard to murder, they regarded every member of the community to have a value. Thus, the idea of killing someone who killed another, *lex talionis*, (an eye for an eye) was not embraced. However, it was resorted to if the murderer was an inevitable danger to the others. The cardinal consideration therefore was that the person should not be a danger to the community itself.<sup>14</sup>

With regard to witchcraft, it was taken to be the supreme offence and there was no mitigation hence death was the only punishment. The rationale was that the whole community was threatened and therefore the danger must be permanently removed.<sup>15</sup>

In terms of theft, the practice was that the property stolen was to be returned to the owner or he could be compensated and this closed the case. However, where theft involved theft of cattle, then the death penalty was applied without mitigation.

As in most other groups, in serious cases where intellect, intuition and other considerations of the courts failed to come up with a finding of the case, they resorted to the use of ordeals. These included the *mwavi* ordeal, the boiling water test and the coffin pointing out the killer methods.

The *mwavi* ordeal according to the Lozi customary law with regard to a sorcerer, involved the isolation of a number of suspect(s) by a diviner and then taken to the *kuta*. On a special mound near Lialui, he was seated on a platform over a fire

and given to drink it. If the *mwavi* stupefied him so that he fell into the fire, he was guilty and killed, if he vomited the *mwavi* he was innocent.<sup>16</sup> This was illustrated in the case **R V Palamba S/O Fundika and Kamumbi S/O Smith**<sup>17</sup>, where the appellants were convicted of murder and appealed after administering the *mwavi* on four women and resulted on the death of two older ones. Eleven of the appellants' children had died. They called upon the medicine men to get the *mwavi* in order to find who had caused the death of the children. It was administered orally in powder form on the end of a knife. The women were compelled to take it with a lot of water with one appellant standing with a gun stating that anyone refusing to drink the ordeal would be shot.

It was accepted by the learned trial judge that the *mwavi* was a local lore and this came from common knowledge based on the traditional use of *mwavi*. In addition, *mwavi* was a poison but could only result in death upon being taken if the accused is guilty. Thus, the conviction for murder without having any other evidence of the properties of the *mwavi* was fatal to the conviction. This is because everyone expected the either result, death or vomiting.

The boiling water test involved making the suspect to place his hand in a container of boiling water and take a stone from the bottom. If his hand was found to be blistered this was a clear indication of his guilt.

In the last form of evidence, was illustrated in the case of **R V Matengula**<sup>18</sup>, where the pall bearers were under a supernatural force and could not control their actions. This was after the coffin pointed out an old woman by ramming her chest causing injuries from which she later died.

It is important to note, however, that trial by ordeal though initially relied upon as a form of establishing the guilt of the accused especially with regard to

witchcraft; it could not be relied upon anymore. This is because there was some evidence of some arrangement between the diviner and the accused to lessen or adulterate it with some stupefying substance to secure his innocence. Thus, king Lewanika of the Lozi banned its use in 1891 prior to the arrival of the white settlers.<sup>19</sup> It is the more reason why witchcraft is missing from the three most heinous offences receiving the death penalty as will be seen later.

### 1.3 Colonial Rule

The arrival of the colonialist brought about an entirely new different legal system in the territory.<sup>20</sup> English law was introduced and with it came English style court, administration and punishments. Imprisonment, which was very alien, was introduced for the first time. Thus, one Bemba stated the following with reference to prisons: “why should we take this big *mulandu* (case) to the white man who will only put iron around the prisoner’s neck and give him good food and clothing?” Being an avenger for the death of his relative, he promptly took the guilty man to the stream and drowned him without ado.<sup>21</sup>

The English criminal law applied uniformly in the territory. In 1931 a Penal Code was adopted as the primary source of criminal law. Prior to this, common law in a written form was applied.

The Penal Code provided for murder though with variations with regard to when a conviction could be secured. The presumption of innocence was introduced in the 1935 amendment and the burden of proof was on the prosecution in criminal matters. In addition defences like provocation were introduced.

### 1.4 Post independence Era

Zambia got her independence in 1964. When the new government took over the administration of the state, it retained the same criminal law pattern even after 1964. The treatment of offenders remained the same. The Penal Code remained the primary source of criminal law. In the period between 1961 and 1965 capital punishment was abolished for the offence of rape. It remained applicable only to treason and murder. From the colonial times capital punishment has always been mandatory for murder and treason.

In 1974, Zambia extended capital punishment to aggravated robbery where firearms or other offensive weapons or instruments are used and grievous harm is done. This is because there was a dramatic increase in the violent crimes especially in urban areas.<sup>22</sup>

### 1.5 Conclusion

From the above discourse, it is evident that the methods used to carry out the executions varied. Wrongs were committed in different circumstances and were caused by different causes and had varying effects on the community. Thus, different methods of punishments were applied. For instance, under Ila legal system, theft of any property was not considered to be a serious offence with no alternative punishment to death.

Therefore, the effect of the wrong on the community was of cardinal consideration in almost all the ethnic groups and the kind of punishment inflicted was to curb such offences. Thus, where the danger to society was high, even the cruellest punishment was used. For instance, mutilations, burning and strangulation.

Today, the law provides for executions to be carried out by the state in a uniform manner, whether one is convicted of murder or treason. That is, death by hanging at Mukobeko Maximum Prison. In addition, the category of persons who can be executed excludes persons, who, at the time the offence was committed, they were below the age of 18 and females who are pregnant at the time they are convicted; they are sentenced to life imprisonment. Thus, its use has been restricted.

Having looked at the historical use of capital punishment, the next chapter highlights the factors that play a major role in crime control and prevention and ultimately determine the effectiveness of capital punishment.

## ENDNOTES

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<sup>1</sup> Zambia Information Services. (1964). Zambia Today: A Hand 'Book On The Republic Of Zambia. Lusaka: Government Printers. At pp. 6-12.

<sup>2</sup> C. Gouldsbury And H. Sheane (1911). The Great Plateau Of Northern Rhodesia. London: Edward Arnold. At pp.52.

<sup>3</sup> Ibid. The king was considered to be the fount of justice and the council of elders was a repository of wisdom.

<sup>4</sup> This means the king or the lord of the spirits

<sup>5</sup> Ibid

<sup>6</sup> Ibid At P. 54

<sup>7</sup> Ibid

<sup>8</sup> Ibid

<sup>9</sup> Ibid

<sup>10</sup> Ibid

<sup>11</sup> Ibid

<sup>12</sup> Ibid at p. 59

<sup>13</sup> J.Hatchard and M. Ndulo (1994) Readings In Criminal And Criminology In Zambia. Lusaka: Multimedia Publications. At p. 5.

<sup>14</sup> Ibid at p. 3

<sup>15</sup> Opcit

<sup>16</sup> Supra note 12.

18 5NRLR 148 (H&N) 133

<sup>17</sup> 14 EACA 96 (H&N 199). As quoted in supra note 12.

<sup>18</sup> 5 NRLR 148 (H &N133)

<sup>19</sup> Finding by Smith W.E (1920). The Ila speaking people of Northern Rhodesia. In supra note 13 at p.4

<sup>20</sup> Supra note 13

<sup>21</sup> Supra note 13 at p.56.

<sup>22</sup> Mwansa .T. Aggravated Robbery And The Death Penalty In Zambia. An Examination of The 1974 Penal Code Amendment No. 2. Zambia law journal (1984) at p. 67.

## CHAPTER TWO

### 2.0 CAPITAL PUNISHMENT: A NON-DETERRENT

#### 2.1 Introduction

This chapter endeavours to look at the argument advanced in the debate on the abolition of capital punishment by the abolitionists that, there being no empirical evidence that capital punishment actually deters would be criminals so as to effect crime reduction in the country and world at large, capital punishment should be removed from the statute books. This is because it is deemed to serve no purpose. This chapter contends however, that capital punishment cannot on its own as a form of punishment be a deterrent to curb crime. Thus, it argues that the escalating crime rates are not as a result of the non-deterrent effect of this form of punishment. It submits that the rise in the crime rate of the three most heinous offences in the land is a product of numerous factors, which play a vital role in crime control and prevention. These include, inter alia, the effectiveness and efficiency of the police service, the social-economic situation of the country, and the profitability of some of these offences in monetary and property value terms (aggravated robbery especially).

To that effect, each of the aforementioned factors will be discussed by highlighting only the salient features of their roles. Thus, emphasis will be laid on how they induce citizens to commit capital offences of treason, murder and aggravated robbery. The chapter begins by looking briefly at the non-deterrent argument from the Zambian perspective so as to have a clearer understanding of this argument.



## **2.2 Move towards Abolition: Capital Punishment A Non-Deterrent.**

Capital punishment in Zambia has been in existence prior to the colonial rule as shown in the first chapter. It is a considered view of many people in the country and the world over that its existence has not in any provable way led to the reduction of capital offences. This is evidenced by the rapid increase of some of these offences year by year, even when executions have been taking place.<sup>1</sup>

However, the only rebuttal to this assertion was a reduction in robbery rates from 35.9 per cent in 1974 to 28.7 and 25.5 in 1975 and 1976 respectively.<sup>2</sup> This occurred immediately after the Penal Code amendment of 1974 whereby a mandatory capital punishment was introduced for aggravated robbery where a firearm or an offensive weapon was used in the commission of the offence. However, the reduction was a temporary one as in the following years there was a sharp rise. Moreover, the other capital offence of murder had almost been constant in increase since 1964 as is shown below.

The non-deterrent effect of capital punishment can be illustrated by some statistics with regard to murder from 1949 to 1980 and from 1974 to 1982 for aggravated robbery. Treason has been omitted in that no one was ever charged with treason in the colonial era. In addition, its occurrence in Zambia has been quite rare as compared to the other two offences, hence will be considered later.

The murder rate was at 6.4 per cent per 100,000 population in 1948. Twelve people were sentenced to death in 1949 and this led to a reduction of the murder rate to 4.2 per cent per 100,000 in 1950. A further 15 persons were sentenced to death in 1950

resulting in a downward trend of the murder rate as it came to 2.3 per cent per 100,000 in 1951. By 1955 the murder rate stood at 2.5 per cent per 100,000 showing an increase in the four years of 0.2 per cent per 100,000. Fourteen people were sentenced to death in 1955 but the murder rate in 1956 was at 3.1 from 2.5 per 100,000. Five persons were sentenced in 1956 but this led to a reduction in the murder rate to 2.7 per cent per 100,000 in 1957. Over a period of five years the murder rate rose to 4.5 per cent per 100,000. In 1963, 24 people were sentenced to death while the murder rate rose to 6.7 per 100,000 in 1964.<sup>3</sup> The other distribution is as shown in the tables for both murder and aggravated robbery.

Crime statistics since 1964:

**Murder. Table 1.**

	Murder rate / 100,000
1965	4.7
1966	5.3
1967	5.3
1968	6.7
1969	6.8
1970	7.5
1971	6.9
1972	7.5
1973	7.1
1974	7.0
1975	7.0
1976	6.7
1977	8.4
1978	8.5
1979	9.5
1980	10.2

**Aggravated Robbery**  
Reported                      Rate per  
Robberies                      100,000 population  
**Table 2.**

1974	1,680	35.9
1975	1,431	28.7
1976	1,315	25.5
1977	2,676	31.6
1978	2,264	41.3
1979	2,250	39.8
1980	2,645	46.6
1981	3,138	54.1
1982	3,437	58.3

Any kind of punishment has an objective.<sup>4</sup> Capital punishment was meant and is considered to be a deterrent to capital offences. Thus, Aaron Milner, the then Minister of Home Affairs, during the 1974 amendment of the Penal Code debate was of the view that it would make the task of the police service and other security wings of government much easier.<sup>5</sup> This assertion was premised on the reasoning that it would reduce the crime rate to very low levels as would be offenders would fear to be executed.

However, the success of any punishment is found by looking at its objective.<sup>6</sup> Capital punishment is meted out in this time and age not for retributive purposes but to deter both the offender and any like-minded persons in society.<sup>7</sup> To that effect, the abolitionists consider it safe to say that capital punishment has not served its objective as shown by the increase in crime rates. Thus, Beccaria Cesare, one of the renowned anti-capital punishment advocates, with regard to this form of punishment being a deterrent stated:

“It is not the intensity of punishment that has the greatest effect on the human spirit, but its duration, for our sensibility is more easily and more permanently affected by slight but repeated impressions than by a powerful but momentary action.”<sup>8</sup>

It is important to note in the debate on the abolition of capital punishment in Zambia, however, that the mere fact that the crime is punishable by death does not deter people with propensity in that direction. For this reason, the reported incidences can be escalating as the punishment only comes into effect when the offenders have been detected, arrested, convicted and sentenced. This only happens when the institution of the police detects and arrests the offenders.<sup>9</sup> Thus, it can be said that if not arrested the severe punishment is but mere inscriptions on statute books invoked upon finding an offender.

This is because intent and opportunity are two major factors that led to the occurrence of a crime.

An individual cannot commit a crime unless he gets an opportunity even if he has an intention to commit one.<sup>10</sup> It must be understood that the real strategy, which has been lacking in crime control is minimizing the opportunity for criminals to commit crimes. This entails increasing tremendously the chances of being caught. That is to say, the more stringent measures taken to control the opportunity structure for a particular type of crime, the more the chances of reducing it.<sup>11</sup>

Crimes occur in different ways and for different reasons and have different effects in almost all countries, as “there is a change in the forms and dimensions of criminality with the changes in the living style of the society and the social values.”<sup>12</sup> To this end “crime occurs and seems to increase with the acceleration of change and development, which in recent years has been specially associated with such crucial processes as industrialization, urbanization, social mobility and the development of technology.”<sup>13</sup>

The key for capital punishment to being a deterrent is the increase of the likelihood of being detected, arrested and prosecuted so that the punishment can be invoked. The increase of crime cannot be viewed adequately without considering the position of the Zambia Police Service.<sup>14</sup> It is incumbent to look at the institution of the police service to have a vivid understanding of its role in so far as crime control is concerned.

### 2.3 Factors that play a vital role in crime control in Zambia.

#### 2.3.1 The Police Service.

According to Simon Kulusika in his article '*Understanding Police Role*' he states that:

"The police is a social institution, concerned with and for the protection of the interests of the public through policing for the people; the prevention and reduction of crime, and the provision of social services such as in emergency."<sup>15</sup>

Furthermore, he submits that it prevents and reduces crime by instituting efficient and effective policing processes.

Among the other functions of the police includes recording offences, identifying and arresting offenders, detaining them and interrogating them.<sup>16</sup> The police may bring offenders to justice by proceeding with the prosecution according to the law. Thus, the police service is the cornerstone of criminal justice in any society.<sup>17</sup>

In the execution of the function of crime reduction, the police needs well-structured crime control mechanisms aimed at reducing the opportunity to commit crimes. This calls for police patrol, effective crime detection and investigation and the availability of rapid response mechanisms.<sup>18</sup>

The crime situation in the country is on the rise and the police's functions seem not to be carried out. Furthermore, criminals such as aggravated robbers seem to have ample time when carrying out their robberies entailing that there is no rapid response. If press reports are something to go by, the police usually arrive at the scene of the crime way after the robbery has been staged.<sup>19</sup> It is against this milieu that the police have been criticized and condemned to be inept and spend tranquil nights at the police station

instead of carrying out night patrols.<sup>20</sup> Therefore, the demand for an efficient and effective police force is increasing every day. However, there are certain factors which have hampered the effectiveness and efficiency of the police. Among the major problems is that of lack of manpower, resources and poor relations with the public.

Due to lack of manpower, crime reduction effects cannot and have not been realized. Thus, it was noted in the 1986 Police Annual Report:

“There is an acute shortage of both administrative and operational manpower. Crime, which could easily be contained, has accelerated due to lack of beat and general controls by the police. The little manpower which is available is engaged in guarding vital installations, banks, and VIPs and only a few are left to patrol and protect the general public.”<sup>21</sup>

Though this was noted almost twenty years ago, the situation is the same today, as the recruitment pattern is financially restricted. For instance, there is only one Police School at Lilayi in Lusaka. Moreover, there are 13,000 police officers instead of the minimum required of 27,000.<sup>22</sup>

The then Minister of Home Affairs Peter Machungwa attributed the high incidence of serious crimes to the depreciating economic standards, Zambia's geo-political system, family instability, high urbanization, increasing population levels and wars in the neighbouring countries. In order to make the police effective, Mr. Machungwa said that an air wing would be introduced and vehicles equipped with state of the art communication system would be bought and be used for patrols.<sup>23</sup> He further stated that 100 walkie-talkies for the police would be bought and a mechanism for ensuring good relation between the police and the public would be established where the informers with information leading to the arrest of wanted criminals would be rewarded.

Previously, the police had bad relations with the public in the sense that informers were treated as prime suspects. Additionally, involvement of police in crime was one

other factor that affected relations of the police and the public.<sup>24</sup> However, the situation has improved to some extent and the essence of such relations to crime reduction can be seen from the arrest of gangs of armed robbers through public tip-offs.<sup>25</sup>

It is regrettable to note however, that these efforts and proclamations from the government on ways of improving police services are taking an extremely slow pace. Thus, looking at the daily incident reports, it was found that there is a big disparity between the incidences reported and crimes taken to court for prosecution. This can be seen in the Tables 3 and 4 for the most populated provinces in the country. For instance, in the year 2002 there were 780 reported incidences of aggravated robbery in Lusaka Province and only an estimated 167 incidences were taken to court for prosecution. This implies that just a quarter of incidences of aggravated robberies were detected and the perpetrators arrested and prosecuted.

Out of an estimated 275 cases taken to court, 167 cases were for aggravated robbery and 74 for murder. This shows that there is high incidence of these serious crimes. It is important to note that these high incidences are not as a result of the ineffectiveness or non-deterrent nature of capital punishment. This is a result of failure to detect and arrest the perpetrators of these crimes. Moreover, since 1999 to mid 2004 only about 10 persons were found guilty and sentenced to death.<sup>26</sup> To that effect, capital punishment is left rather to be a myth than reality due to its scarcity. This is because a perusal through the court records revealed that the prosecution more often than not entered nolle prosequi, discharges and a number of them were acquittals.

**Lusaka Province. Table 3.**

YEAR	Murder	Aggr/robb Person	Aggr/robb M/V	Defile ment	Theft Stock	Theft M/V	Rape
1999	27	161	221			381	11
2000	48	175	251		2	378	5
2001	30	89	116	1	3	250	
2002	52	358	422		1	281	1
2003	20	168	142		1	96	

**Copperbelt Province Table 4.**

<b>YEAR</b>	<b>Murder</b>	<b>Aggr/robb M/V</b>	<b>Aggr/robb Person</b>	<b>Defilem ent</b>	<b>Theft Stock</b>	<b>Theft M/V</b>	<b>Rape</b>
1999	45	18	128	25	1	7	26
2000	56	20	120	49		6	74
2001	49	11	84	27	8	7	12
2002	37	10	77	38		4	7
2003	41	6	56	38		2	4

**KEY** M/V = Motor vehicle, Aggr/ robb = aggravated robbery.

**Source:** Daily Incident Report. Police Headquarters Crime Statistics Department.

In addition, those who were convicted were convicted for lesser offences hence received sentences ranging from three years to 15 years with hard labour. These could be attributed to the lack of refresher courses for prosecutors in the country especially police officers, revised laws and lack of enough office space for analysing cases before taking them to courts.<sup>27</sup>

According to Cohen and Felson "crime presupposes a potential perpetrator, a suitable victim or object and inadequate protection of the victim or object."<sup>28</sup> Indeed one can subscribe to the assertion that there is no adequate protection of the victim by the police. For example, armed robbers are now sophisticated using weapons of warfare in carrying out their criminal activities. They carry out robberies even in broad daylight and if confronted by the police they engage in heavy exchange of fire. Moreover, some suspects are said to use magic to elude arrest by the police. Hence, they manage to be on the loose for years.<sup>29</sup>



### 2.3.2 Social – Economic Situation.

As stated earlier, there is a change in the forms and dimensions of criminality with the changes in the living style of society and social values. Any measures aimed at crime control to be effective, must cover not only the criminal justice system but also, those aspects of education, health, labour, social welfare, agriculture industry and other sectors of the economy that have obvious relevance for crime production and crime prevention.<sup>30</sup>

To appreciate the role the socio-economic situation plays on crime rates, it is imperative to look at the economic development indicators in Zambia. This will give a clear picture of Zambia's depreciating economy and its effects on crime rates. As noted by Machungwa, the depreciating economy, family instability, high urbanization, increasing population levels and wars in neighbouring countries were increasing crime in Zambia.

The economy of Zambia took a socialistic stance a few years after independence. The government controlled most of the social and economic activities until after 1991 when the economy was liberalized. For instance, agriculture was controlled by government, which set up producer prices each year for the major crops. The government also heavily subsidized this sector. The mining industry was the major foreign exchange earner. The government was the major employer, as most industries were owned by it.<sup>31</sup>

However, due to the economic policies taken to revamp the "collapsing economy" such as Structural Adjustment Programme (SAP), new concepts of cost sharing were introduced in the delivery of services such as health and education. At the same time, the

Government privatized most parastatals, which saw formal employment levels dwindle drastically.

For example, in 1997, there were 43,498 employees in the mining sector. After four years the levels went down to 36,780 in 2000 and this downward trend is predicted to continue. This leads to a rise in the poverty levels. For instance, in 1996 the poverty levels stood at 69.2 per cent but rose to 72.9 per cent in 1998.<sup>32</sup>

Furthermore, there are higher poverty levels in rural areas than in urban areas. There is also easy household access to facilities such as health, education, water and postal services in urban areas. This has led to rural to urban migration. However, due to the inability to raise education fees and lack of employment among others, abuse of drugs such as dagga and alcohol, has become the order of the day.<sup>33</sup> Thus, many youths resort to crime as a means to meet their needs.

All these by and large are the repercussions of the economic policies taken by the government. Thus, all the suffering the people are undergoing is but the responsibility of the government. Thus, the conduct of the politicians running the government is questioned. They are said to breed discontent among the populace and hostility towards them. Economic waste, corruption, concentration of power and wealth in a few hands, rule in perpetuity, escalating unemployment, electoral malpractices, tribalism, political perversion, fundamental human rights are some of things which sets the stage for military intervention which is often well received by the people who in turn consider the intervenists as redeemers and their former rulers as tormentors.<sup>34</sup>

The intervenists are deemed to have committed the offence of treason. One is said to be guilty of treason if he prepares or endeavours to overthrow by unlawful means the

government as by law established. However, the effects of a coup d'état include, *inter alia*, the obliteration of the legal system, that is, the constitution and all the laws based upon it or made under its authority.<sup>35</sup>

In Zambia, after the introduction of the One-Party system of government, the desire among the opposition especially the African National Congress (ANC) of Nkumbula, was to get rid of this system. To achieve their desire, the inner circle of ANC organized a contingent of 100 strong men under the command of Timothy Kalimbwe Lupasa with a view to overthrowing the Zambian Government. Kalimbwe Lupasa was later whisked and sentenced for treason and served for seventeen years until President Kaunda's general amnesty in 1990.<sup>36</sup>

There has notably been four attempted coup plots in Zambia since 1964, the latest being the 1997 coup attempt.<sup>37</sup> In all the coup attempts, the major impetus has been the desire to get rid of the government due to its determination to cling to power *ad infinitum* whilst the economic situation depreciates to very low levels and the living conditions of the people become very bad with no apparent indication of things ever getting better. But it is important to appreciate that all the coup plots have been unearthed either in their preliminary stages or when they are just about to be executed. This is mainly attributed to the intelligence wing of the government, which has been able to detect the plots and arrest the plotters so that they can be made to face the law. Therefore, one would not be entirely wrong to assume that the low rate of treason in the country is a result of the high likelihood of being detected in spite of the prevalence of the very things, which necessitate a coup.

However, once the coup is successful and a new government is installed, it rules by decree. No criticism of its general conduct is tolerated. Thus, one of the 1966 Ghana coup- makers in his book *"Politics of the Sword"* stated:

"I have become convinced that military rule is not the answer to Africans perennial political and economic problems ... military governments have seldom provided the answer to any country's political, economic or social problems."<sup>38</sup>

This further reiterates the *raison d'être* of treason in the statute books, as its consequences on society are devastating.

### **2.3.3 Profitability of the criminal acts.**

The profitability of criminal acts like aggravated robbery can be seen from the colossal sums of money and value of the property found on the robbers when apprehended or reported to have robbed. Robbers are usually found in possession of goods ranging from household electrical appliances, industrial machinery, vehicles and money.<sup>39</sup> It is for this reason that many are induced to carry out such activities as the "turnover" is very attractive and is worth the risk especially that the chances of being caught are usually very slim. This has been exacerbated by the family instability caused by the depreciating economic situation where extended families are now being shunned.<sup>40</sup> As a consequence, people care less about what some one is doing to earn a living as long as he is able to make ends meet. Even if someone is known by the family to be robbing others or doing any criminal acts to make ends meet, he will not be reported to the police nor would the family reprimand him because he would be the breadwinner.

In 1997 alone, K54 billion worth of property was reported robbed.<sup>41</sup> This further indicates the profitability of robbery.

## **2.4 Conclusion.**

The argument that capital punishment should be abolished on the basis that it does not deter capital offences as evidenced by the high crime rates is not on firm ground to suffice for such a move. This is because it is just a form of punishment like any other and its effects are only brought into reality when the offenders are arrested and taken before the courts of law for prosecution. Otherwise it remains a myth to the ordinary person on the streets.

Intent and opportunity are the two major factors, which lead to the occurrence of a crime. Thus, the key for capital punishment to being a deterrent is increasing the probability of being caught for those who have the opportunity to commit crime so as to inculcate fear in them of the ultimate punishment.

Furthermore, it is important to note also that crimes occur in different ways and for different reasons and have different effects on society. Just as it is in society that crime is committed, so it is in society that crime incubates. If the members of the community do not report their fellow members involved in criminal activities then, the crime rate will escalate.

There has not been any coup plot, which has succeeded in Zambia. This can be attributed to the intelligence surveillance of the security wings of government and the quick response of the armed forces to foil such coup plots.

Finally, countless people have been killed, impoverished and others mentally traumatized by criminals. People, both the rich and the poor, are in constant fear of being

robbed and killed. They have, therefore, responded to the insecurity in different ways. For the poor, they have responded by being aggressive to the offenders. This has been/is done through “mob justice.” The well-to-do have responded by building high electric wall fences and employing security guards. Suffice to state however, that even with this kind of security, robbers have still continued to be even more sophisticated to the extent where they are unstoppable in the absence of the police. This can be seen from the robbing and murdering of rich people at their well-secured residents. The next chapter looks at the legality or constitutionality of capital punishment in Zambia.

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## **CHAPTER THREE.**

### **3.0 CONSTITUTIONALITY OF CAPITAL PUNISHMENT**

#### **3.1 Introduction**

This chapter discusses the constitutional validity of capital punishment in Zambia in the light of the constitutional petition brought in **Banda Benjamin and Cephas Kufa Miti V the Attorney General**.<sup>1</sup> In order to achieve this objective, the chapter will look at the law governing punishment in Zambia and review the above case.

#### **3.2 The law governing capital punishment in Zambia.**

The law governing capital punishment in Zambia is found in the Constitution of Zambia, the Penal Code and the Criminal Procedure Code. The Constitution under Article 11 guarantees the individual the inalienable right to life among others. However, the Constitution provides further that the enjoyment of these rights and freedoms so guaranteed is subject to limitations designed to ensure that the enjoyment of the said rights and freedoms does not prejudice the freedoms and rights of others or the public. Hence article 12(1) provides that:

“A person shall not be deprived of his life intentionally, except in execution of the sentence of a court in respect of a criminal offence under the law in force in Zambia of which he has been convicted.”

This indicates that there is an exception to the right to life, in that if one is convicted of committing a criminal offence for which the death penalty is applicable, his fundamental right to life will be lawfully infringed. The law as regards the nature of these offences alluded to above is prescribed in the Penal Code. Section 24 of the Penal Code

*under Part VI provides for several punishments among them, death. Section 25 prescribes how the capital punishment is to be carried out, that is, by hanging by the neck until pronounced dead. It excludes persons under the age of 18 at the time of commission of the offence and women found pregnant in accordance with section 306 of the Criminal Procedure Code.*

The offences that attract capital punishment upon conviction as stated earlier include murder, aggravated robbery and treason. Under section 201 of the Penal Code, the sentence for murder is death. It is important to note that this sentence can only be passed if it has been proven beyond any reasonable doubt that one had malice aforethought. Section 200 of the penal code provides:

“Any person who of malice aforethought causes the death of another by an unlawful act or omission is guilty of murder.”

In addition, section 201 (b) states: “that the death penalty need not be imposed where there are extenuating circumstances.” These extenuating circumstances have been defined as being any fact associated with the offence which would diminish morally the degree of the convicted person’s guilt taking into account the standard of behaviour of an ordinary person of a class of the community to which the convicted person belongs. The courts have found extenuating circumstances in a number of cases. In **Whiteson Simusokwe v The People**,<sup>2</sup> it was stated that a failed defence of provocation nonetheless affords extenuation for the murder charge. Thus, the court did not feel justified to impose the mandatory death sentence because of an extenuating circumstance. The courts have found extenuating circumstances in cases where the murder occurred in circumstances where drunkenness was prevailing<sup>3</sup> and the deceased started a fight.<sup>4</sup>

Furthermore, section 24(2) of the Penal Code provides for a mandatory death sentence for aggravated robbery committed while armed with a firearm or any other weapon as long as there is intent to cause grievous bodily harm and it is caused. Thus the court can only impose capital punishment if the above requisites are satisfied. The above shows that courts have some latitude to impose other sentences other than capital punishment. However, this is not the case with the offence of treason provided for in section 43 (1) of the Penal Code. The only punishment to be given is death. Once such a punishment is imposed, the execution of the convicted person can only take place upon signing a death warrant by the president of the republic. This he does after receiving a report from the judge who tried the case and gave the sentence.<sup>5</sup>

### **3.3 Case Review Involving the Constitutionality of Capital Punishment.**

The constitutional validity of capital punishment was recently challenged in the High Court of Zambia. The two petitioners petitioned the court to reverse their death sentences on the basis that to execute them would be unconstitutional and in breach of international law standards. The two petitioners were convicted of aggravated robbery in accordance with the provisions of section 24(2) of the Penal Code.

#### **3.3.1 Benjamin Banda and Cephas Kufa Miti V The Attorney General.**

The particulars of the case were that the dual whilst acting together armed with an AK 47 rifle robbed a Mr. Kasonde of his pistol. They were convicted on 8<sup>th</sup> October 1999 and sentenced to death five days later with a statutory declaration that each petitioner be

hanged by the neck until pronounced dead. The petition was based on the following grounds:

**( i ) Inhuman and degrading treatment**

**a) Method of Execution.**

They prayed that it may be determined that the said sentence of death is contrary to article 15 of the constitution because the method by which it is carried out, hanging the prisoner by the neck until pronounced dead, is inhuman and degrading and therefore void for being ultra vires the article 15. The aforesaid article provides:

“...a person shall not be subjected to torture or to inhuman or degrading punishment or other like treatment.”

The petitioners contended that the legislature’s intent is to forbid any punishment that is torturous, cruel, inhuman and degrading. Furthermore, they contended that this protection is absolute, hence allows no derogations. The thrust of this ground was that since hanging cannot produce instantaneous death, it is torturous and cruel method of putting a prisoner to death and that article 15 is superior to the derogation in article 12 which ceases to have any effect. For this reason, it was the petitioners’ vehement argument that articles 12 and 15 were in conflict and urged the court to apply the constitutional interpretation principle *in favorem libertatis*. That is to say, the court is to favour the article, which favours the fundamental right of an individual.

The court in response to the conflict alluded to by the petitioners stated:

“I am not to consider an enactment competently enshrined in our constitution under article 12 (1) as against article 15 to be incompetent even if I have the competence to strike down a conflicting article or pieces of legislation on such grounds, because unlike the South African grand norm, ours is clear on the competence of the death penalty.”<sup>6</sup>

Due to the above view, the court did not delve into establishing whether capital punishment was inhuman and degrading or not. The court decided instead to weigh article 12(1) against its competence and needs in society. To that effect, the court was in heavy reliance on the decision in the Tanzanian case of **Mbushi and Other V the Republic**,<sup>7</sup> where it was stated that:

“The death sentence amounted to inhuman and degrading punishment, which is prohibited under the Tanzanian constitution, but despite this finding, it was not unconstitutional. The constitution authorizes derogations to be made from the basic rights for legitimate purposes and derogation is lawful if it is not arbitrary and was reasonably necessary for such purposes. The legitimate purpose to which the death sentence was directed was a constitutional requirement that everyone’s right to life shall be protected by law.”

There are difficulties encountered in trying to specify the method of execution which would not be torturous and inhuman. The Human Rights Committee in **Chitat Ng V Canada** tried to hold that only those execution methods, which cause death in 10 minutes, could be said not to be inhuman and torturous. To that effect, execution by cyanide gas was held to be inhuman. This conclusion did not go undissented. Austrian committee member Kurt Herndl stressed that:

“...the imposition of capital punishment is still legally possible under the covenant. Logically therefore, there must be methods of execution that are compatible with the covenant. Although any judicial execution must be carried out in such a way as to cause the least possible physical and mental suffering ... mental and physical suffering will inevitably be one of the consequences of the imposition of the death penalty and its execution. To attempt to establish categories of methods of judicial executions, as long as such methods are not manifestly and arbitrary and grossly contrary to the moral values of a democratic society, and as long as such methods are based on a uniformly applicable legislation adopted by democratic process, is futile, as it is futile to attempt to qualify the pain and the suffering of any human being subjected to capital punishment.”<sup>8</sup>

It can also be said that such a requirement of less than 10 minutes to cause death was in itself stating that there is no method that can be accepted hence, no executions can be justified as being human.

In the celebrated South African Constitutional Court decision in **The State v Makwanyane and Mchunu**,<sup>9</sup> capital punishment was held to be unconstitutional and therefore void. A critical analysis of the judgment as rendered by Chief Justice Arthur Chaskalson and the concurring opinion of Justice Albie Sachs reveal that the decision was heavily influenced by the constitutional provisions and the prevailing social political situation. Justice Albie Sachs stated the following:

“Two centuries have passed since then, and it would not be surprising if the framers of the constitution felt that further qualitative evolution has taken place...Mozambique and Namibia both have expressly outlawed capital punishment in their constitutions. The position adopted by the framers of the Mozambican and the Namibian constitutions were not apparently based on the bending of the knees to the foreign ideas ... but rather on the massacres and martyrdom in their countries.... It is not unreasonable to think that similar considerations as well were taken in account. In avoiding any direct or indirect reference to death sentence, they were able to pay due regard to the fact that one of this country’s greatest assets was the passion for freedom, democracy and human rights amongst the generation of persons who fought hardest against injustice in the past.... Accordingly, the idealism that we uphold with this judgment is to be found **not in the minds of the judges**, (emphasis added) but in both the explicit text of the constitution itself, and the values it enshrines.”<sup>10</sup>

From this judgment it can be reasonably inferred that capital punishment was used in an era of oppression and hence the need to outlaw it in the constitution. What can be learnt from this is that, the interim constitution of South Africa was worded in such a manner as to ensure exclusive or absolute protection of the right to life. The Namibian constitution referred to expressly outlaws capital punishment under article 6. It states:

“The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No court or tribunal shall have the power to

impose a sentence of death upon any person. No execution shall take place in Namibia.”

Once the constitutional provisions can be seen to favour capital punishment, buttressed by the prevailing social situation indicating its necessity, it would be a far-fetched hope that in the nearest future the Zambian courts will ever render such a decision. This is evident in the sentiments of the court when it held that:

“It is therefore my view to consider capital punishment not as abhorrence but a special though permanent but effective punishment which ensures that innocent life continues. In my country serial and ritual murders, and armed robberies are rampant and I take judicial notice of their continuity even though the Amnesty International statistics show no downward trend of such offences, one should not only be statistical because human social and psychological responses have to be taken into account, even economic effect, both sides are vital in my view. It would be hypocritical to encourage an alternative sentence of life at the cost of society because there is no proven record of reform, and I endorse the view that at present death penalty is an indispensable weapon if we are serious about curbing these heinous crimes.”<sup>11</sup>

Accordingly, the court concluded under this ground that deprivation of life or its permanent removal under article 12 (1) should not be seen as degrading and inhuman under article 15.

#### **(b) Death Row Phenomenon.**

This refers to the situation and treatment of individuals sentenced to death and waiting execution for many years under harsh conditions of detention. Continued stay on death row is said to cause anguish and mounting tension of living in the ever present shadow of death.

In the case under review, it was contended that the inherent delay of executing the sentence occasioned by the mandatory or automatic appeal to the Supreme Court and the requisite confirmatory opinion of the prerogative of mercy committee to the president, before executing a prisoner, constitute psychological and mental torture on the one hand and cruel and inhuman and degrading treatment on the other hand and thereby void for being ultra vires article 15.

The court in response stated that the death row phenomenon is part of the due process. It was also of the view that it is a reasonable, cautious and considerate process; it has all the human appreciation. The court however, did not state the period which would trigger inhuman and degrading treatment. However, in **Pratt and Morgan v Attorney General for Jamaica**,<sup>12</sup> the judicial committee of the Privy Council held that holding a convicted prisoner on death row for 14 years amounted to inhuman and degrading treatment. Therefore, the committee concluded that:

“In any case in which the execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute inhuman or degrading or other treatment.”

This rule was not welcomed in many jurisdictions retaining capital punishment. Some resorted to express or swift executions while others renounced the jurisdiction of the Human Rights Committee and the Privy Council to hear complaints from those on death row as this meant exceeding the 5 years rule. It was further argued that in fact it is the prisoners who are the beneficiaries of these appellate procedures in which inherent delays lie. Hence Lord Griffiths of the Privy Council observed that:

“A state that wishes to retain capital punishment must accept the responsibility of ensuring that the execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration for reprieve. It is part of the human condition that a condemned man will have every opportunity to serve



his life through the use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearing over a period of years, the fault is to be attributed to the appellate system that permits such delays and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become part of the established part of our jurisprudence.”<sup>13</sup>

The death row phenomenon is very rife in Zambia. This has been mainly due to the fact that the courts are sentencing people to death while the president who is supposed to issue a death warrants for their execution does not do so on time. Just after independence, there were systematic executions until in the late 1980s. The last execution was carried out in 1997 involving eight prisoners.<sup>14</sup>

The president also has the power to pardon or to commute the sentences. However, this takes very long and many cases are still pending to an extent where it is not unusual to find someone spending more than ten years on death row in heavily congested prison cells. Timothy Kalimbwe Lupasa spent 17 years in prison on death row on treason charges.<sup>15</sup> He was sentenced to death on 15<sup>th</sup> July 1974 and only released in July 1990 under a presidential pardon. Another case involves Lewis Mwewa who was sentenced to death in 1976 for aggravated robbery but was only pardoned in October of 2002.<sup>16</sup>

### **(c) Capital Punishment: A Cruelly Disproportionate Punishment.**

It was also argued that capital punishment is cruelly disproportionate and excessive since the victim of the said robbery did not suffer loss of life. This argument is also advanced ferociously with regard to the charge of treason constituting only a foiled coup without any loss of life. The court stated:

“Death penalty is competent in all respect even if in this regard where no life was lost under the offence of robbery contrary to section 294. It is the principle of the enactment that provided for the death sentence. To argue on the premise of no loss of life is sentimental but carries no legal force.”<sup>17</sup>

The question on the excessiveness of the punishment was also raised in **Lubuto v Zambia**,<sup>18</sup> where the author argued that the imposition of the death sentence was disproportionate since no one was killed or wounded during the robbery. The state party submitted that the author’s conviction was in accordance with the law. The state party explained that armed robberies are prevalent in Zambia and that victims go through traumatic experiences. For this reason, the state party submitted that it sees aggravated robbery involving the use of firearm as a serious offence, whether or not a person is injured or killed. Further, the state submitted that competent courts pronounced the author’s sentence.

The Human Rights Committee concluded by stating:

“In this case use of firearms did not produce the death or wounding of any person and that the court could not under the law take these elements into account in imposing the sentence.”

The mandatory death sentence was therefore seen as a violation of article 6 (2) of the International Covenant on Civil and Political Rights.

Looking at the parliamentary debate which led to the enactment in issue, it is reasonably deductible that the intention of the legislature was to curb at all costs the use of firearms in robberies as the offence of robbery was and is already provided for.

The court in **Gregg v Georgia**,<sup>19</sup> asked the question what is excessive punishment? Two guidelines were set out. The first one was that the punishment must not involve the unnecessary and the wanton infliction of pain. The second one was that the punishment must not be grossly out of proportion to the severity of the crime. In

Zambia, only three offences receive capital punishment hence, it is arguable that they are severe enough to befit such a punishment.

#### **(d) Biblical Argument**

This is of great significance because the Constitution declares the Republic to be a Christian nation and therefore its laws must be in conformity with Christian values. It has been argued by the abolitionists that from the biblical point of view capital punishment cannot be sustained. It is contended that executing someone is tantamount to playing the role of God who encourages forgiveness as vengeance belongs to him. However, it is also arguable that God ordained the leadership of man in society and called upon every one to respect those with the mantle of authority.

In Romans 13 v 1 and 4, the bible provides:

“Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God. Whoever therefore resisteth the power resisteth the ordinance of God. Verse 4, “for he is the minister of God to thee for good. But if thou do that which is evil, be afraid for he beareth not the sword in vain: for he is the minister of God, avenger to execute wrath upon him that does evil.”

This indicates that those in leadership can come up with legislation for the good of society and this includes criminal sanctions as long as the people are agreeable to such legislation, *lex injuria non est lex*. Once such a social contract is formed, any one who acts in defiance of it would be sanctioned to ensure justice and protection of those who are obedient.

### **3.4 Conclusion.**

This chapter has shown that capital punishment has been held to be constitutional in Zambia by the court and that this holding is in consonant with the views of the majority as evidenced in the 1995 Government Survey on whether to abolish it or not. This entails that the punishment will continue to be meted out until such a time when the people will want to have it abolished. The next chapter therefore, looks at the exercise of the presidential prerogative of mercy as the act of clemency is to be seen as part of the constitutional process of conviction, sentence and the carrying out of the sentence.

## ENDNOTES

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<sup>1</sup> (2002) HP/1008

<sup>2</sup> SCZ Judgment NO. 15 of 2003.

<sup>3</sup> High Court 1999 ZR 194.

<sup>4</sup> Mwandama V People 1995-97 ZR 133.

<sup>5</sup> Section 305(4) of Cap 88. Criminal Procedure Code.

<sup>6</sup> Supra note 1 p. 5

<sup>7</sup> Tanzanian Court of Appeal.

<sup>8</sup> (Communication no. 469/1991)

<sup>9</sup> Case No. CCT /3194, Judgment Of June 1995. Quoted at p. 40. Supra Note 9

<sup>10</sup> Supra note 9

<sup>11</sup> Supra note 1

<sup>12</sup> (Communication No.210/1986and 225/1987) views adopted on 6 April 1989.

<sup>13</sup> Supra note 9. At p.50-53

<sup>14</sup> Amnesty International: Zambia Time to Abolish the Death Penalty. (2001).

<sup>15</sup> Partrick Wele (1995) Zambia's Most Famous Dissidents. At p. i and ii

<sup>16</sup> The Legal Resource Foundation News No. 46. December, 2002.

<sup>17</sup> Supra note 1 at p. 22

<sup>18</sup> (Communication NO. 469 /1999) UN DOC A/49/40 V. II

<sup>19</sup> 408 US (1976)

## **CHAPTER FOUR**

### **4.0 THE PRESIDENTIAL PREROGATIVE OF MERCY**

#### **4.1 Introduction**

It is an undisputed fact that no criminal justice system is perfect. That is, judges are human and are liable to fall into error. Thus, this chapter looks at the presidential prerogative of mercy as extra-judicial remedy. It will give an overview of the law governing this power, the purpose, its nature, procedure for accessing this mercy, a critique of its use and its amenability to judicial review, as it is apt to abuse.

#### **4.2 The Law Governing the Prerogative of Mercy.**

The President of the Republic is the only one who sanctions the execution of prisoners sentenced to death. The Constitution endows him with the power to either pardon or commute the sentence of a convict. By so doing, the president does not issue a death warrant. The president issues a death warrant if mercy is denied, or an order for the sentence to be commuted, or pardon under his hand and the seal of the Republic, to give effect to the said decision.<sup>1</sup>

Thus, article 59 of the constitution provides:

“The president may

- a) grant to any person convicted of any offence pardon, either free or subject to lawful conditions;
- b) grant to any person a respite, either indefinite or for specified period, of the execution of any punishment on that person for any offence;
- c) Substitute a less severe form of punishment for any punishment imposed on any person for any offence...”

Under article 60,<sup>2</sup> the president is required to set up an advisory committee whose members he appoints and serve at his pleasure and he sets the terms of reference. This committee advises him on the exercise of this prerogative of mercy.

### 4.3 The Purpose of the Prerogative of Mercy.

As stated earlier, the human justice system is not perfect; one of the main purposes of the prerogative of mercy is to function as a corrective institution for miscarriages of justice. It serves as a post conviction remedy. There are a number of cases where one is convicted and sentenced to death and sometimes executed, but later found to have been innocent. This may have been due to an error or omission in the court which may reasonably be considered to have brought about the conviction or any material irregularity in the course of the trial or the judgment being wrong on a point of law.

The other purpose is where the convicted person does not wish to contest his innocence as he admits his guilt and pleads for the president's mercy.<sup>3</sup> In this way, the prerogative of mercy introduces some aspects of mercy in the criminal justice in the sense that there may be instances, where though a man offends against the letter of the law, peculiar circumstances may entitle one for the presidential mercy. It was stated in reference to this purpose that:

“Just as we in our private lives aspire to behaving in a merciful manner, in delegating the authority to the president who executes the laws on our behalf we also grant him the power to exercise mercy in our instead.”<sup>4</sup>

The prerogative of mercy also serves the purpose of providing an opportunity for the executive to initiate or participate in a dialogue regarding the wisdom, efficacy, or constitutionality of the laws.<sup>5</sup>

The other purpose the prerogative of mercy serves involves fulfilling an important role in allowing the president to achieve broad policy goals that may be unrelated to achieving justice in individual cases but which nevertheless advance the public welfare. These goals may include inter alia, binding together a divided country following insurrection or civil war and rewarding individuals who were guilty of

crimes but who had rendered great service to the nation and preventing punishment of individuals who in the view of the president, had been subjected to indictment for acting patriotically in the country.<sup>6</sup>

#### 4.4 The Nature of the Prerogative of Mercy.

The nature of the prerogative of mercy can be deduced from the articles 59 and 60. Article 59 for instance, uses the language which is indicative of discretion. He can grant mercy to whoever, he wishes. The president has the discretion in the exercise of this power. The review of death penalty sentences is based on non-legal considerations such as morality, extenuating circumstances, policy environment and the country's legal position internationally.<sup>7</sup>

Chief Justice John Marshall in **United States V Wilson** defined the prerogative of mercy as,<sup>8</sup>

“An act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.”

This definition implies that the president can dispense such powers to any one, as the article so provides also, in any manner, in any form and at any time, as it is an act of grace. However, the court in **Biddle V Perovich**,<sup>9</sup> could not agree with the formulation by Chief Justice Marshall. The court stated therefore that:

“A pardon in our days is not a private act of grace from an individual happening to possess power. It is part of the constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting what is less than what the judgment fixed. Just as the original punishment would be imposed without regard to prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare not his consent determines what shall be done.”

The above formulation brings to light the fact that in the exercise of this power, the president should do so in the interest of the Zambian society.



#### **4.5 Procedure before the Advisory Committee.**

Article 59 which vests the president with clemency powers does not provide how clemency seekers are supposed to have their application heard. The only procedure available is that which is stipulated in Criminal Procedure Code.<sup>10</sup> It provides that the trial judge must submit as soon as possible to the president the record of the case accompanied by his recommendations. The president if he sees it fit may constitute an advisory committee to advise him on the case. He states the terms of reference for each case.

Practically, however, there has been another way which has been used to apply for clemency. This has been through the press, supported by the Church and Non-Governmental Organisations. This was evident when the families of the 1997 failed coup plotters called upon the president to exercise mercy on their relatives on the death row.

Furthermore, it is not clear what considerations the committee takes into account, where they meet from, when they meet and if at all they need any evidential material.

It was revealed at the Death Penalty Report Conference<sup>11</sup> that the committee meets at private and secret locations and they base their recommendations only on moral grounds, extenuating circumstances and the public attention a case attracts.

##### **4.5.1 Composition of the Advisory Committee**

The President who constitutes it determines the composition of the advisory committee. He changes the members at will. The committee that looked at the 1997 failed coup attempt comprised five cabinet ministers and the Vice President and the Secretary to the Cabinet.<sup>12</sup> This committee acknowledged that there were a lot of cases pending. One could easily infer that this committee was not well equipped for

such a task. Firstly, the members are heavily burdened at their ministries. How then can they be expected to be efficient? Worse still, they were dealing with matters of life and death, implying that they need to be thorough in their work.

Furthermore, the decisions of the committee are not binding on the president. In fact, by the very fact that the president himself if present chairs the meetings and his being in possession of the power to hire and fire members of the committee, imply that to a larger extent that the committee's decisions are not a true reflection of the individual members' perception of the application.

#### **4.5.2 Critique of the Procedure before the Advisory Committee**

The procedure before the advisory committee does not provide for cases where what is in contention is that the applicant was wrongfully convicted. This may be as result of misdirection at law or in fact. However, the committee does not deal with cases involving someone contesting their innocence but rather those who admit their guilt and only seek grace. This means that those who contest their innocence are left at the mercy of the committee regardless of the basis for their belief.

#### **4.6 Amenability to Judicial Review.**

Amenability to judicial review refers to whether such powers can be subject to control by the courts of law. The language in which this power is couched is so wide that it seems to be unfettered. However, on the basis of the purpose for which this power is given, it is possible to seek judicial review. In **Derrick Chitala (Secretary of the Zambia Democratic Congress) V Attorney General**,<sup>13</sup> the court stated:

“...Judicial review now lies against inferior courts and tribunals and against any persons or bodies which perform public duties or functions. There is of course, no blanket immunity from the judicial review even for the president.”<sup>14</sup>

This clearly shows that the courts can be called upon to review this discretionary power if its exercise does not conform with the purpose of the legislation. Thus, if the president decides to pardon an unrepentant serial killer, it would be a good ground to challenge, as the society's interests would not be said to have been taken into account.

The Supreme Court in **Mbaalala Munungu and the Legal Practitioners Act**,<sup>15</sup> adjudicated upon the use of discretionary powers and its requisites. In this case, the petitioner sought to have his name restored to the Roll, by way of the discretionary powers enjoyed by the Chief Justice. He was struck off in 1977 following his conviction of theft by public servant, but had since rehabilitated and was employed as a legal assistant with the permission of the Law Association of Zambia. It was held that the Chief Justice's discretion to restore to the Roll should be exercised on the basis of special factors or grounds founded on principle. In this regard public interest or the interest of the profession must override those of the individual seeking restoration. Thus, restoration was refused.

#### **4.7 Conclusion**

This chapter has looked at the law governing the prerogative of mercy, its nature, purpose, the role and composition of the advisory committee. It has also alluded to the amenability of this executive power to the judicial review. The next chapter will look at recommendations and conclusions.

## ENDNOTES

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1 Section 305 (4) cap 88 of the laws of Zambia

2 Constitution of Zambia, Chapter One Of The Laws

3 Rule Governing Petitions for the Executive Clemency. United States Department, Washington D.C.

4 *ibid*

5 *ibid*

6 *supra* note 3 . 7. Death Penalty Report (2022) September. Lusaka  
 8 32 US (7 pet). 150 (1883)

9 274 US 480 (1925)

<sup>10</sup> Sections 305 (2-5)

<sup>11</sup> Daily Mail , Wednesday February 4, 2004.

<sup>12</sup> *Ibid.* Mercy committee to hear Treason convicts' plea for leniency soon.

<sup>13</sup> (1995-97) ZR 91 (SC)

<sup>14</sup> *ibid* 97

<sup>15</sup> Judgment no. 6 of 1992

## **CHAPTER FIVE**

### **5.0 RECOMMENDATIONS AND CONCLUSION**

This chapter shall give a summary of the study, recommendations on the approach to abolish capital punishment and on the effective use of the clemency powers and finally a conclusion.

#### **5.1 Summary of the study**

This research paper has looked at capital punishment in Zambia and the presidential prerogative of mercy.

This has been done by first looking at how capital punishment was applied prior to colonialism, during colonialism and after independence to today. It has alluded to the different offences, which attracted death as punishment in some of the ethnic groups in the country, and how it was carried out. It has shown that the coming of the colonialist saw the introduction of a uniformly applied criminal law through the 1930 Queens Penal Code which forms the basis of Zambia's criminal law.

The Second Chapter looked at the finding that capital punishment is not a deterrent. It has submitted however, that the mere presence of a sanction such as death penalty cannot deter would be offenders. It has looked at the other factors which play a vital role in crime prevention such as, effective and efficient police service, stable economic and social situation and the profitability of some criminal acts.

The Third Chapter went to look at the legality of capital punishment in Zambia. It has discussed the only case which has come before the court to determine the constitutionality of capital punishment. This was in the light of an apparent conflict between articles 12 and 15 of the grand norm. It has also made reference to other cases from different jurisdictions and scholarly writings on the subject matter.

The Fourth Chapter has looked at the prerogative of mercy of the President. It has looked at the purpose, nature, and the amenability to judicial review of this power.

The Fifth chapter makes recommendations as to the way to achieve national consensus required for abolishing the death penalty and how in the mean time the clemency powers can be made efficient.

## **5.2 Recommendations.**

1. If capital punishment is to be abolished in the nearest future, it is recommended that all those organisations campaigning against capital punishment should direct their focus and resources to helping revamp the police service. This can be in terms of investigation techniques, recruitment capacity and other paraphernalia. This will enable the service to meet its duties of crime control and prevention thereby increasing the chances of arrest of any offender. This will in turn reduce on the feeling of insecurity of the people in the country.

2. With regard to the prerogative of mercy, the presidential prerogative of mercy should provide for a remedy in cases where the prisoner contests his guilt. This would differentiate them from those who admit their guilt and only pray for mercy based on moral considerations. Thus, the advisory committee should constitute people having a relevant understanding of the law and should have its considerations of eligibility known to the clemency seekers.

### **5.3 Conclusion**

There are a lot different arguments against and for capital punishment. This is because the argument is a moral one. Large-scale consultations carried out in the country indicate that people still feel that capital punishment should be retained. This is because capital cases are on the upswing and the anti capital punishment advocates have not provided an effective alternative. The Government has indicated that it will not abolish capital punishment unless the people so desire. Thus, capital punishment shall continuously be applicable until the recommendation rendered above is effected.

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