CAPITAL PUNISHMENT AND HUMAN RIGHTS – THE CASE OF ZAMBIA

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be accepted for examination. I have carefully checked it and I am satisfied that it fulfils the requirements relating to format as laid down in the regulations governing directed research.

21/11/03 ..... Supervisor .....

Date *Mr. Enock Mulembe*

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Dedication

This work is dedicated to my Father, Mr. Clement Banda and my Mother, Mrs. Elizabeth Banda.

Acknowledgments

"Always be strong, reasonable, practical and dedicated. When faced with a crisis, never lose your head." (Nelson Mandela)

Firstly, I wish to thank Mr. Enock Mulembe for agreeing to supervise me on this work. It was not easy for him to create time for me out of his busy schedule. I shall forever appreciate his advice and encouragements he rendered to me through out this work.

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CHAPTER ONE

INTRODUCTION: THE RIGHT TO LIFE

International human rights law characterizes the right to life as the supreme human right[1]. This is because any other human right depends on the continued enjoyment of the right to life by a particular person. It is, therefore, not surprising that the major international instruments as well as our own constitution here in Zambia attach great importance to this right to life. This chapter shall define the right to life broadly and narrowly. It shall also look at the international standards and the Zambian standards of this right.

Definition of the Right to Life

There are basically two definitions of the right to life. These are the traditional or narrow definition and the broad definition.

The Traditional or Narrow Definition

The traditional or narrow definition of the right to life is one which is found in most constitutions. Tikhonov writes:

> "The most important peculiarity of the first stage in the conceptualization of the right to life and its consolidation in international law consists in its traditional interpretation, as it were, in the spirit of the Habeas Corpus and other constitutional instruments. The distinctive features of such an interpretation is: on the one hand, the strictly individual nature of this right while, on the

[1] Paragraph 1 of the General Comment No. 6 (16th Session) adopted by the UN Human Rights Committee on 27 July, 1982.

> other hand – accentuation of the predominantly intra-state aspects thereof. This is confirmed, in our view, by the existing international legal instruments."[2]

Hence, it is not surprising that most writers cite provisions of various documents on human rights as narrow definitions of the right to life[3].

The most classical example of the narrow definition of this right is the one found in Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) which provides:

> "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of this life."

This narrow definition, as is seen above, puts much emphasis on the individual, as is the case with the rest of the political and civil rights.

A similar definition is also to be found in the Universal Declaration of Human Rights particularly Article 3 (1)which states that everyone has the right to life, liberty and their security of the person. This particular narrow definition is also similar to what is found in the Zambian Constitution, Chapter 1 of the Laws of Zambia, particularly in Article (12), which provides:

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

Similar definitions of the right to life are to be found in Article 2 of the European Convention of Human Rights, Article 4 of the American Convention on Human Rights and Article 4 of the African Charter on Human and People's Rights.

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[2] A.A. Tikhonov, The Inter-Relationship Between the Right to Life and the Right to Peace; Nuclear Weapons and other Weapons of Mass Destruction and the Right to Life, in B.G. Ramcharan (Ed.), The Right to Life in International Law: International Studies in Human Rights. (1985) P. 99, Boston: Markinus Nishoff Publishers.

[3] Also see B.G. Ramcharan (Ed.), Ibid P. 99.

The Modern or Broad Definition of the Right to Life

With the recent developments in the world, it has been inevitable not to stick to the traditional or narrow definition of the right to life. Thus there is what is known as the modern or broad definition of the right to life.

Credited with this definition, are resolutions of the Human Rights Committee especially. This is a Committee which is created under Article 28 of the ICCPR to supervise the implementation of the covenant by States Parties. In General Comment Number 6(16th Session) adopted by the Human Rights Committee on 27th July, 1982, the Committee took a broad definition of the right to life and discussed its scope in areas such as the reduction of infant mortality; increasing life expectancy, especially by adopting measures which eliminate malnutrition and epidemics; states of emergency; wars; acts of mass violations; acts of genocide; thermo-nuclear war; missing and disappeared persons; arbitrary killings and the death penalty. In this general comment, the Committee, in fact, expressly stated that the right to life had been previously narrowly interpreted. It therefore put standards to all States Parties to the ICCPR aimed at enhancing the protection of the right to life. Six points could be noted on these standards.

The first point to note is that the right to life encompasses not merely the protection against the intentional or arbitrary deprivation of the right to life, but also places a duty on the part of each government to pursue policies which are designed to ensure access to the means of survival for every individual within its country. If after its best efforts, in good faith, a government is unable to meet the survival requirements of its people, then the residue duty rests upon the international community to assist through

appropriate forms of international co-operation. In fact, the Committee, in its resolutions of 19th February, 1982 and adopted by the General Assembly, placed a duty on the state to ensure that it puts in place the survival requirements of every person within its jurisdiction. This resolution refused to accept a situation where millions of children worldwide, as it is today, continue to die each year on account of hunger and disease, and in which millions of human beings have their life span drastically reduced.

The second point to note, is that the Committee, in the General Comment No. 6 (16th Session) of 27th July, 1982 urged all states to protect the right to life by avoiding the use of weapons of mass destruction, such as nuclear weapons. This protection implies, at the very least, a duty to negotiate in good faith to achieve disarment and procedural safeguards concerning the use of weapons of mass destruction.

Thirdly, the right to life is closely inter-related with rights such as the right to peace, and the right to a safe and healthy environment and the right to development. This was contained in Resolution 1983/43 of the Human Rights Committee adopted by the UN General Assembly on March 9, 1983. This resolution further stated that in fact, these other rights take their cue from the right to life since this is the primordial human right.

The effective protection of the right to life, which is the fourth point to note, is closely related to, and affected by the implementation of human rights standards directed at regulating situations in which threats to life are particularly susceptible. According to Ramcharan[4], these standards include the norms for the protection of human rights during states of emergence; norms regarding the treatment of prisoners and detainees; norms regarding torture, disappearances and arbitrary or summarily executions.

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[4] Ibid, P. 100.

Fifthly, if the right to life is to be adequately protected in the future, there is a range of issues awaiting the urgent attention of international lawyers. Ramcharan[5] argues that more and more deprivations of the right to life are carried out by governmental authorities or by their cohorts, in such a manner as to circumvent the safeguards provided for in national laws.

The final point to note is that the right to life is closely related to the promotion and protection of human rights in general. Ramcharan[6] argues on this point that the establishment of an environment conducive to the respect for human rights and fundamental freedoms in general diminishes the risks of excesses committed against the lives of individuals. He further argues that where the right to life or any other right such as the right to food or health is violated, it is necessary to attack not only the manifestations of such violations, but their root causes as well. This can only be done by working for the overall protection of all the human rights. In short, if for instance, the right to food is protected by giving an individual food, such an individual will not die from hunger hence his or her life to life would have been protected.

International Standards of the Right to Life

The basic international standards on the right to life are contained in Article 3 of the Universal Declaration of Human Rights (UDHR), Article 6 of the International Covenant on Civil and Political Rights (ICCPR), Article 2 of the European Convention on Human Rights (ECHR), Article 4 of the American Convention on Human Rights (ACHR), and Article 4 of the African Charter on Human and People's Rights (ACHPR).

[5] Ibid, P. 100.
[6] Ibid, P. 100.

Although the language used in these various documents may be different, the aim seems to be the same – the protection of the right to life, which should not be deprived arbitrarily but through the process of the established court system of a state, which is impartial and independent. An examination, for instance, of these documents shows that the UDHR, ICCPR and the ECHR refers to this right as the 'right to life'. The ACHR and the ACHPR on the other hand, refers to this right by the phrase 'respect for life'. In addition, the ICCPR, ECHR and the ACHR require it to be 'protected by law' while the ACHPR calls for the 'right to life of every human being to be respected.' The ICCPR, the ACHR and the ACHPR forbid any 'arbitrary deprivation of the right to life' while the ECHR forbids any 'intentional deprivation of the right to life.'

A further examination of these documents shows that the ECHR refers to certain instances where deprivations may be permitted. Article 2(1) of this document provides that no one should be deprived of his life except in a situation where "it is in execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." The ICCPR and ACHR also deal with the issue of the death penalty but go further to provide for amnesties, commutations or pardons from sentences involving the death penalty. Article 6(4) of the ICCPR, for instance, provides:

> "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases."

Guarantees on the right to life are also provided for in several protocols on humanitarian law as well as the Genocide Convention. Article 23 of the Hague Convention on Land Warfare 1907, for instance, provides:

> "... it is especially prohibited to kill or wound an enemy who having down arms, or having no longer means of defence has surrendered ..."

Thus, in a war situation, an enemy soldier who surrenders must not be killed, the hostile Government must protect his right to life.

The Zambian Standards of the Right to Life

The Constitution of Zambia protects the right to life as much as the international documents discussed above do. This document, which is the supreme law of the country provides in Article 12(1):[10]

> "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."

There are three crimes in Zambia upon which one may suffer death penalty if found guilty. These are treason, murder and aggravated robbery which are provided for in sections 43, 200 and 294 (2) of Penal Code, Chapter 87 of the Laws of Zambia.

Other exceptions, where the right to life is permissible by law to be taken away, is when one kills another when defending himself from violence or protecting property but the force used resulting in the death of the deceased must be reasonable or proportionate to the force actually used by the deceased[7]. The right to life may be deprived legally where one is trying to effect a lawfully arrest or to prevent the escape of a person

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[7] Article 12(3) of the Zambian Constitution and Penal Code Section 17 (Ibid) allows the use of English Law in matters relating to defence of person or property. The law in England as regards the use of force in defence of person or property is that reasonable force must be used, or indeed, the force used by the person defending himself or property must be proportionate to the force actually used by the deceased (J.C. Smith and Brian Hogan, Criminal Law, 6th Edition, (1989) P. 245 London: Butterworth and Co. (Publishers) Ltd.

lawfully detained[8]. In addition, this right can be deprived lawfully in circumstances where the purpose is to suppress a riot, insurrection and mutiny (this is usually by security forces like the police) or indeed where one dies as a result of a lawful act of war[9]. The other exception to the right to life is where one is killed when he or she is committing a crime and the person who killed him or her was trying to prevent the commission of that crime[10].

The other point which is critical to the right to life is abortion. In Zambia, both the Constitution[11] and the Termination of Pregnancy Act (TPA), Chapter 304 of the Laws allow abortion only in circumstances where it is to save the life of the mother or indeed to ensure her good health. Section 3(1) of the TPA provides:

> "... a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated... the continuance of the pregnancy would involve:-
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> i) risk to the life of the pregnant woman, or
>
> ii) risk of injury to the physical or mental health of the pregnant woman; or
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> iii) risk of injury to the physical or mental health of existing children of the pregnant woman; greater than if the pregnancy were terminated; or
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> (b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped."

[8] Ibid, Article 12(3) (b) of the Zambian Constitution.
[9] Ibid, Article 12 (3) (c) of the Zambian Constitution.
[10] Ibid, Article 12 (3) (d) of the Zambian Constitution.
[11] Ibid, Article 12(3) of Zambian Constitution provides: "a person shall not deprive an unborn child of life by termination of pregnancy except in accordance with conditions laid down by an Act of Parliament for the purpose."

The TPA expressly requires that the above circumstances permitting abortion should be proved by at least three registered Medical Doctors[12]. This drives home the point that the right to life of an unborn child is so important in Zambia that it should be protected as much as possible.

Conclusion

In the afore mentioned statement, it has been established that the right to life is protected by both international documents and the Zambian Constitution. The UDHR, ECHR, ICCPR, ACHR and ACHPR provided the traditional or narrow definitions of the right to life as well as the minimum standards of this right which States Parties to these instruments must observe, and where possible, they must protect this right more than these documents recommend.

Zambia subscribes to the UDHR by virtue of being a member of the United Nations. The country acceded to the ICCPR on 10th April 1984. It has also been a state party to the ACHPR since 1986.

This Chapter has also given the broad definition of the right to life. This definition, has mainly come from the Human Rights Committee. In addition this Chapter, has established that Zambia, too, recognizes this right. The Zambian Constitution defines this right in more or less the same language as the UDHR, ICCPR and ACHPR to which the country is a party. Of course, the right to life in Zambia is not absolute as is the case with the international documents discussed hence its derogation is allowed like in treason, murder, aggravated robbery and in very special circumstances,

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[12] Ibid, Section 3(1), TPA.

abortion. However, what is important for Zambia is that it respects this right to life, by international standards.

CHAPTER TWO

EXISTENCE OF CAPITAL PUNISHMENT IN ZAMBIA.

Introduction

Capital punishment exists in Zambia. This form of punishment has been here since the laws of England began to apply to the territory. Of course at the time the laws of England applied to this country as a Protectorate, capital punishment was still in force in England. Capital punishment for murder offences was abolished in England in 1965 after the Murder (Abolition of Death Penalty) Act, 1965 came into operation on 9th November, the same year.

This Chapter shall discuss the existence of capital punishment in Zambia. It shall further look at some of the reasons why some countries still have this form of punishment despite recent international human rights law developments which agitate for the abolition of the same. Another important issue of interest in regard to capital punishment that shall be discussed is understandable murder; Common Law Judges may in extreme situations reduce a murder sentence to understandable murder in which case the convict escapes the death penalty.

Death Penalty in Zambia

There are three offences in Zambia for which one would be made to suffer capital punishment if found guilty. They are treason, murder and aggravated robbery, which are

found in sections 43, 200 and 294 (2), respectively, of the Penal Code[1]. These particular provisions do not in any way come into conflict with the Constitution as regards its protection of the right to life. In Article 12 (1) the Zambian Constitution provides:

> "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."

All that the prosecution has to prove to the court is that the accused is guilty of the offence (either treason, murder or aggravated robbery) beyond reasonable doubt. If the court is convinced, then the accused shall suffer capital punishment.

In Zambia, only the High Court and the Supreme Court have jurisdiction to handle treason and murder cases. Actually, the High Court[2] has original jurisdiction to try the three offences and the Supreme Court acts as the appellate court in most cases.

Most of the people who have been executed in Zambia as a consequence of capital punishment have had murder related charges. This normally happens after their various defences to the charge of murder like self-defence, provocation, insanity or diminished responsibility fail.

Where the defence of self-defence succeeds, the accused person is set free that is, the defence leads to complete acquittal. Provocation and diminished responsibility, if they succeed, the charge of murder is reduced to manslaughter in which case the convicted person escapes the death penalty. In the case of the defence of insanity, the convict is kept in detention at the President's pleasure, thus escaping the death penalty.

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[1] Chapter 87, of the Laws of Zambia.

[2] Section 11(2) of the criminal Procedure Code, Cap. 88 of the Laws of Zambia provides: "No case of treason or murder or any offence of a class specified in a notice issued under the provisions of subsection (1) shall be tried by a subordinate court unless special authority has been given by the High Court for such trial."

In most cases people who succeed on this defence are kept in places where people with mental problems are confined. For instance, here in Zambia they are kept at Chainama Mental Health Hospital. However, if the person charged with murder has not succeeded on all the defences raised, then he or she will have to face the death penalty.

In Chitenge v. The People[3], the appellant and a man named Njimba lived in a compound with their houses next to each other. At a party the appellant and Njimba had a fight and shortly afterwards the appellant left the party leaving Njimba behind. The appellant being angry and set on revenge went to Njimba's house whose door was locked and set fire to the house. Unknown to him, the deceased who had been staying with Njimba for a week now, was sleeping inside, and the deceased received fatal injuries.

The appellant claimed that he had no intention to harm the deceased whom he did not know and had no idea that he was staying with Njimba although he had seen him and Njimba eat together. He was guilty of murder and appealed.

This appeal was dismissed by the Supreme Court and the convict had to face capital punishment, that is, he had to hang until pronounced dead.

To date, both the High Court and the Supreme Court have handled a number of cases involving murder like the one above. Where respective defences have failed, the convicts have been put on the death row and in some cases, they have been actually executed.

Since independence from Britain in 1964, there has only been one case of treason that has been concluded both in the High Court and the Supreme Court. This was the case of Shamwana and Others v. The People[4]. The case of Steven Lungu and Others v.

[3] (1967) Z.R. 37.
[4] (1985) Z.R. 41.

The People[5], the most recent case of treason in Zambia, trial was concluded in the High Court and fifty-nine soldiers were sentenced to death for their alleged involvement in the coup attempt of 28th October, 1997. However, they have all appealed against this sentencing and the Supreme Court is still hearing the appeals.

In Shamwana and Others v. People[6], seven of the appellants were convicted of treason while one was convicted of misprision by the High Court. Originally, all of them were charged with one count of treason alleging that they prepared to overthrow the lawful Government. Various defences were raised by the accused but most of them failed resulting in the affirmation of the High Court's decision by the Supreme Court that Edward Jack Shamwana, Godwin Yoram Mumba, Thomas Mapunga Mulewa, Deogratia Syimba and Albert Chilambe Chimbalile face capital punishment. The other three; Valentine Shula Musakanya, Anderson Kambwali Mporokoso and Laurent Kanyimbu had their appeals allowed which in effect meant that they were released from prison. Dr. Kenneth Kaunda, who was the then Republican President, used his constitutional powers to commute the death sentences of the other five to life imprisonment[7]. Thus, Mr. Shamwana and the four others escaped the death penalty and were subsequently released from prison in 1990 due to political pressure[8].

The alleged coup plot by Lieutenant General Christon Tembo of 1988 had not yet been concluded by the High Court as at the time the Court was trying the case, the amnesty given to Mr. Shamwana and the others by Dr. Kaunda was also extended to him and his co-accused. The same was the case with Lieutenant Mwamba Luchembe who on

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[5] Unreported.
[6] Ibid.
[7] Under Article 56© of the Zambian Constitution, the President may substitute a less severe form of punishment for any punishment imposed on any person for any offence.
[8] J.M. Mwanakatwe, End of Kaunda Era, P. 172, (1994) Lusaka: Multimedia Publications.

30th June 1990 announced on radio that the Zambia Army had over-thrown the government. However, the coup attempt failed and he was arrested. In fact, trial for Lieutenant Luchembe never even took off as his amnesty came much earlier than the start of his trial[9].

The third offence in Zambia for which one would suffer capital punishment is aggravated robbery. It is important at this point to emphasize that it is only when the following elements are satisfied will one suffer capital punishment from aggravated robbery:

i. that a firearm was used in the robbery;

ii. or where a firearm was not used, a weapon or instrument used resulted in the causing of grievous harm to the victim of that robbery.

These elements are found in Section 294 (2) of the Penal Code.

In John Timothy and Feston Mwamba v. The People[10], the appellants were convicted of aggravated robbery, the allegation being that whilst acting together and being armed with a firearm they stole a considerable quantity of property from a dwelling-house and used and threatened violence against the occupants. A servant of the complainants succeeded in summoning the police without the knowledge of the robbers, but when the police arrived the robbers made their escape; shots were fired by the police and one of the robbers was killed. The first appellant was found hiding in the grounds of the complainant's house; the second appellant was found on the afternoon of the day following the robbery, and some considerable distance from the scene, with an injury to his left buttock.

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[9] Ibid, Mwanakatwe, p. 174.
[10] (1977) Z.R. 394.

A firearm similar to that described by the prosecution witnesses was found five days after the robbery at a place one mile away from the complainant's house. There was no evidence that this gun was the one used in the robbery and no effort was made to test it for fingerprints.

The Supreme Court in this case affirmed the conviction of aggravated robbery for one appellant within the meaning of section 294(2) of the Penal Code so that he was going to face capital punishment whilst the other appellant had his appeal allowed on the technicalities of fingerprints so that he escaped the death penalty. This case, is among other numerous cases which confirm that, in Zambia, one can be sentenced to death for aggravated robbery.

Why are some States still Keeping Capital Punishment on their Statutes?

There are basically two reasons which international law has recognized as to why some states like Zambia still have capital punishment even today. The first reason is that States consider capital punishment to be, like most of the issues related to the Penal Code, a matter within their domestic jurisdiction. Therefore, even if they are sometimes ready to accept an obligation to abide by certain international regulations such as one requiring them to abolish death penalty, they will not renounce their freedom of the decision as to whether this penalty should be retained or abolished[11].

Secondly, international law considers the death penalty as a moral and political question, that is, one that goes beyond political debates. Sapienza Observes:

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[11] This fact was noted in United Nations Document A/37 406 of – 30th September in 1992. This was a report by the Secretary General of the United Nations, containing answers from States to a note verbale inviting them to submit comments and observations on the elaboration of Second Optional Protocol to the International Covenant on Civil and Political Rights, which aims at abolishing the death penalty by the State Parties.

> "Nevertheless, even if only for purposes of record, one may say that retentionists tend to consider Capital Punishment as the only means of dealing with incorrigible individuals, a general deterrent from crime and as the only way of just retribution for particularly serious crimes."[12]

Both arguments, of course, do not justify the existence of capital punishment in States like Zambia. For instance the death penalty is not the best form of justice in that once carried out, it is irrevocable. Therefore, it does not offer a thorough redress of judicial mistakes since the convict would have been executed, any way.

As regards its deterrent value there is indeed not enough evidence to support it. For instance in the Gibson and Klein Data[13] it was difficult to tell whether the homicide cases had increased or reduced in England owing to the abolition of capital punishment in 1965. Zimring and Hawkins observed the following on the deterrent effect of capital punishment in line with the Klein Data:

> "Our analysis of these data points up a general problem in the content analysis of before-and-after crime rates... The change, of and by itself, can produce changes in the nature of content of the crime rate. These changes, which will be independent of changes in gross crime-rate, may seem to provide a measure of the effects of policy changes but will in fact be an unreliable index as to whether the change in punishment policy has achieved any significant measure of crime prevention.[14]

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[12] R. Sapienza, International Legal Standards on Capital Punishment, in B.G. Ramcharan (Ed) The Right to Life in International Law: International Studies in Human Rights. Boston: P. 294 (1985) Markinus Nishoff Publishers.

[13] This was an analysis of data concerning the abolition of capital punishment in England in 1965 which was carried out by Gibson and Klein of the Home Office in 1969. Their task was to consider whether the homicide cases had increased or reduced after the abolition of the death penalty and look at the period between 1957 to 1969.

[14] F.E. Zimring and G.J. Hawkins, Deterrence – the Legal Threat in Crime Control , P. 290 (1973) Chicango: The University of Chicago Press.

Therefore, capital punishment does not reduce the commission of the crimes it purports to reduce, like murder for instance.

No Death Penalty for Understandable Murder

The common law has recognized the cruelty of the death penalty and does, in special circumstances, convict the accused of understable murder as opposed to murder. In such a case, the convict escapes the death penalty, which is a mandatory sentence if the charge of murder succeeds.[15]

The circumstances which may give rise to the case of understandable murder differ from case to case. It is indeed the court which decides whether in a particular set of facts understandable murder exists or not. Understandable murder is never a defence to the charge of murder but rather a development within the common law which ensures that justice is administered where a convict with no defence of what so ever to a charge of murder, escapes the death penalty because the circumstances of the case dictate so.

In Lungu v. The People,[16] the appellant was convicted of the murder of his wife. He gave no evidence and made no defence and the case rested entirely on the evidence of the prosecution, which for practical purposes was not disputed. The evidence was simply that after stabbing his wife, the appellant went to his mother's house carrying a spear and said that he had done this act.

The post-mortem examination revealed that the deceased had sustained a serious wound and had a laceration on her head. Death was due to peritonitis resulting from the stab wound.

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[15] Section 201 of Penal code, Cap 87 of the Laws of Zambia.
[16] (1972) Z.R. 95.

When arrested on a charge of murder, the appellant said: "I admit the charge that I stabbed her with a spear on the stomach. I hit her with a stone on the head."

The learned trial judge found that the appellant had stabbed the deceased willfully. He pointed out that no light had been thrown on the reasons for the stabbing, but that there was no evidence which could support provocation, self-defence, accident or a special verdict. He also pointed out that the accused did not intend to kill his wife because the size of the wound made it unlikely that he had such an intention. He, however, sentenced the appellant to suffer capital punishment by convicting him of murder since the wound was within the meaning of Section 180(c) of the Penal Code, and enough to form the malice aforethought as required by the same Section 180.

The appellant appealed to the Supreme Court. The Supreme Court, then ruled that the circumstances of the case gave rise to constructive or understandable murder and not murder. Baron J.P., who delivered the Judgment on behalf of the other learned Supreme Court Judges (Gardner and Hughes, J.J.A.), substituted the murder conviction for manslaughter and the convict escaped the capital punishment!

This case has shown how the common law itself has evolved rules on how to enable a convict of the charge of murder escape the death penalty if justice will be achieved this way even where he or she has no defence.

Conclusion

Capital punishment, sadly still exists in Zambia today despite recent developments in international human rights law urging all states to abolish it. In this country a number of people have actually been executed for murder and aggravated

robbery charges but no one has yet been executed for the treason charge. Most states, including Zambia, feel that maintaining the death penalty in defiance of international law developments is a way of proving sovereignty as well as answering the moral deterrence value question of capital punishment. Of course, such reasons have been criticized heavily and it appears that more pressure has to be exerted on such states if the human rights issue concerning capital punishment is to be addressed. However, not all hopes are lost in Common Law States which still have capital punishment on their statutes like Zambia. This is because sometimes, the Court may invoke the common law rule of understandable or constructive murder and let the convict escape death penalty. However, this is applied in very special circumstances and is not available for other crimes attracting capital punishment like treason or aggravated robbery. Therefore, the only way to deal with this issue of human rights here in Zambia is to abolish the death penalty.

CHAPTER THREE

PRESSURE FROM INTERNATIONAL AND REGIONAL HUMAN RIGHTS TREATIES AND ORGANIZATIONS TO ABOLISH CAPITAL PUNISHMENT

Introduction

Of late, there has been growing pressure on States to abolish capital punishment. This pressure has generally come from international treaties and organizations on human rights. Indeed, there has been great success on this aspect of human rights especially in the Western World where most countries in Europe have abolished the death penalty. England, for instance, abolished the death penalty for murder in 1965 when the Murder (Abolition of Death Penalty) Act was enacted. This particular Act came into operation on 9th November 1965. German, is another of the many European countries which have abolished the death penalty.

The United States of America presents an exciting case. From the 52 states, some have abolished it while others like Texas and California still have Capital Punishment on their statutes. In Africa, there has been generally slow progress towards the abolition of the death penalty. Some countries like South Africa, Namibia and Botswana have abolished it.

This Chapter shall discuss the international and regional treaties on human rights which agitate for the abolition of the death penalty. Also to be discussed, are human rights organizations which are fighting for the same cause.

The International Covenant On Civil And Political Rights

According to Nowak[1], Article 6 of the 1966 United Nations (UN) International Covenant on Civil and Political Rights (ICCPR) is phrased already in a language aiming finally at the abolition of capital punishment. This is, of course, true because of the many limitations or restrictions as to when capital punishment has to be implemented. Article 6(2) and (5) of the ICCPR, for instance, directs States Parties to the ICCPR to impose the death penalty only in situations where crime committed is 'most serious' and such punishment is in accordance with the law in force at the time of the commission of the crime. This punishment should only be carried out in pursuant to a final judgment rendered by a competent Court. In other words, this kind of punishment should never be carried out before the convict is given a chance to appeal to the highest court of the land.

A further limitation of the ICCPR is that which is found in Article 6(4), which provides that a State should pardon the convict, or commute the sentence to a lesser charge so that the convict can be imprisoned for life or just to serve a term of years, or, indeed, grant the convict amnesty.

Another limitation, of course, is that a State should not impose the death penalty on persons who were below the age of eighteen years when the crime was committed.

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[1] Manfred Nowak, Is the Death penalty an Inhuman Punishment? In S. Orlin, Allan Ross and Martin Scheinin (Ed), Jurisprudence of Human Rights Law: a Comparative Interpretative Approach, P. 28 (2000), Turku/Abo: Institute for Human Rights, Abo Academy University.

Another restriction is that the death penalty should not be imposed on a pregnant woman[2].

Of particular interest, is the fact that most of these limitations have found their way into the laws of Zambia. If Nowak's argument is to be sustained, then it will be correct to argue that even here, the legislators have recognized the fact that such a punishment is undesirable hence the many restrictions on its imposition. Section 25, for instance, of the Penal Code, provides:

> "(2) Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the court that, at the time when the offence was committed, he was under the age of eighteen years; but in lieu thereof the Court shall sentence him to be detained during the President's pleasure...
>
> (4) Where a woman convicted of an offence punishable with death is found in accordance with the provisions of Section three hundred and six of the Criminal Procedure Code to be pregnant, the sentence to be passed on her shall be a sentence of imprisonment for life instead of a sentence of death."

As can be noticed in the above provisions, these limitations on the State are a matter of right. No one in Zambia can be sentenced to death if he or she was eighteen years at the time he or she committed a particular act punishable by the death sentence. Neither can a woman who is pregnant be sentenced to death.

As regards amnesty, pardon or commutation, unfortunately these are not a matter of right in Zambia, although the Constitution recognizes them. They are discretional and only exercisable by the President on special occasions like independence eve and this is called the prerogative of mercy. Article 59, of the Constitution of Zambia, provides:

"The President may-

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[2] See Article 6(5) of the ICCPR.

(a) Grant to any person convicted of any offence pardon, either free or subject to lawful sanctions;

(b) Substitute a less severe form of punishment for any punishment imposed on that person for any offence."

Nowak's argument is indeed correct, although very difficult to sustain. The fact that the limitations on capital punishment have been recognized by the laws of Zambia, and in particular the Constitution, it is a good development in as far as the country's human rights are concerned. The legislator's recognition of the fact that capital punishment is undesirable, must indeed make them move a step further and abolish the death penalty.

Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (1990)

This particular Protocol aims at abolishing the death penalty. Its preamble, reads in part:

> "...believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights.
>
> Noting that article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable.
>
> Convinced that all measures of the abolition of the death penalty should be considered as progress in the enjoyment of the right to life.
>
> Desirous to undertake hereby an international commitment to abolish the death penalty..."

The strong language used in the preamble of this Protocol is reflected in the entire protocol. This suggests the importance of the abolition of the death penalty to international human rights lawyers. Article 2(1) of the Protocol for instance, explicitly rejects any reservations to be made except one made at the time of ratification or

accession[3]. The idea is to ensure that the States Parties to it abolish capital punishment. In fact, such reservations must be related to the deprivations of the right to life in war times only.

By implication, therefore, any accession or ratification to this Protocol, must lead to the abolition of the death penalty by the acceding or ratifying State since it is not only difficult to invoke a reservation, but a reservation is limited to war times only. Zambia unfortunately, has not yet ratified this Protocol. However, 49 States have so far ratified[4].

The European Convention for the Protection of Human Rights and Fundamental Freedoms

The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) also imposes limitations as to when the death penalty can be imposed on an individual. If the same construction as the one used by Nowak[5] when examining the ICCPR is to be used then it will be correct to say that even the ECHR is framed in such a way as to abolish capital punishment or the death penalty. Article 2(1) of the ECHR, for instance, imposes a duty on the States Parties to invoke the death penalty only in circumstances where an individual has been sentenced by a competent court and such a particular penalty must be recognized by law.

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[3] Article 2 of the Protocol provides: The State Party making such a reservation shall at the time of ratification or accession communicate to the Secretary General of the United Nations the relevant provisions of its national legislation applicable during war time.
[4] See Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties, as of 7 July, 2003, www.unhchr.org.
[5] Ibid, P. 28.

All Member States of the Council of Europe are parties to the ECHR and as already stated, most of these countries have already abolished the death penalty. England and German are classical examples.

Protocols No. 6 of 1983 and 12 of 2000 of the ECHR expressly provide for the abolition of the death penalty in Europe. It, however, authorizes the States Parties to make legal exceptions in respects of acts committed in time of war or of imminent threat of war. This particular protocol has been ratified by 35 member States of the Council of Europe.

American Convention on Human Rights (1969)

The 1969 American Convention on Human Rights (ACHR) is unique in the sense that it goes further to prohibit the extension of the death penalty to other crimes than those to which it applies at the time of ratification as well as from being established in states that have abolished it. It further prohibits the death penalty from being imposed on political offences or related common crimes and on persons who were the age of 70 years at the time the crime was committed. These are all provided for in Article 4 of the ACHR. The ACHR has been ratified by 25 Member States of the Organization of American States (OAS).

The African Charter on Human and Peoples' Rights (1981)

The 1981 African Charter on Human and Peoples' Rights, unfortunately, does not elaborately deal with the death penalty. The only issue that comes out in Article 4 of the ACHPR is the quest for the States Parties to protect the right to life. However, the fact

that it explicitly discourages the arbitrarily deprivation of the right to life, it is a clear indication that the treaty is not in support of the death penalty, per se, although this has not been couched in the language used in other international treaties, particularly the Second Protocol to the ICCPR (1990). Zambia ratified the ACHPR in 1988.

Death Penalty-Political Pressure to Abolish

According to Nowak[6], a number of non-governmental organizations, like Amnesty International and intergovernmental bodies like the European Parliament and the Parliamentary Assembly of the Council of European, have on a number of occasions called for the abolition of capital punishment worldwide. The UN Commission on Human Rights has also joined in the fight for the abolition of the death penalty. For instance, the UN Commission on Human Rights Resolution 1997/12 called upon all States that had not yet abolished the death penalty, like Zambia, to restrict the number of offences for which it might be imposed. The resolution further urged all States that had not yet abolished the death penalty to abolish it. Later in 1998, the UN Commission on Human Rights even used stronger words when they stated in the UN Commission on Human Rights resolution 1998/8:

> "Upon all States that still maintain the death penalty...
> to establish a moratorium on executions, with a view
> to completely abolishing the death penalty"[7].

This kind of pressure has, of course, yielded tremendous results. According to Amnesty International 61 countries had abolished capital punishment by 1997. Thirty nine other countries, were considered to be abolitionist in practice only. This means that such

[6] Ibid, P. 28.
[7] Quoted by Nowak, Ibid, P. 29.

countries still had capital punishment on their statutes but did not invoke it in circumstances warranting it due to political will. As a result, by 1997 102 States were considered to be abolitionist in law and practice.

Conclusion

Recent developments in international human rights treaties, pressure from international human rights organizations like the United Nations Commission on Human Rights, Amnesty International and intergovernmental bodies such as the European Parliament, have all paid dividends in that most countries from the European Union have abolished the death penalty. The pressure has indeed succeeded even here in Africa. Some countries like South Africa, Botswana and Namibia have abolished capital punishment.

As for the international treaties, the Chapter has established that the ICCPR, to which Zambia is a party, encourages States Parties to abolish capital punishment and restrict its application to serious offences. This is through the construction of Article 6. This is because of the many limitations as to when capital punishment should be imposed as well as the many duties that the ICCPR imposes on the States Parties in situations where it is to be inflicted on an individual. The ACHPR on the other hand, to which Zambia is a party, does not give enough pressure on the States Parties as regard the abolition of the death penalty as much as the ICCPR, ECHR or the ACHR do. However, individual States like Zambia are encouraged to abolish the death penalty by the international human rights organizations like the UN Commission on Human Rights and Amnesty International.

CHAPTER FOUR

THE METHODS OF EXECUTION AND DEATH ROW PHENOMENON IN CAPITAL PUNISHMENT – CONSTITUTING CRUEL, INHUMAN AND DEGRADING TREATMENT

Introduction:

International human rights lawyers have condemned most methods employed in executing a person who has been condemned to suffer capital punishment. The method which Zambia uses is equally bad, Section 25(1) of the Penal Code, provides:

> "When any person is sentenced to death, the sentence shall direct that he shall be hanged by the neck until he is dead."

Hanging with a rope or any device to ensure that a person is executed, indeed, does not conform to international human rights law of ensuring that one is not subjected to cruel, inhuman or degrading treatment as required by Article 7 of the International Covenant on Civil and Political Rights (ICCPR). This Chapter shall discuss the methods of execution and the death row phenomenon and it shall establish that they are both cruel, inhuman and degrading treatment within the meaning of most documents on human rights.

Before going into detail on the methods of execution and the death row phenomenon, it is important to note that relatively minor forms of corporal punishment are today considered to be degrading punishment and, therefore, absolutely prohibited.

On the international scene the case of Tyrer v. The United Kingdom[1] provides proof for this proposition.

Here in Zambia, John Banda v. The People[2] provides evidence of the prohibition of corporal punishment. In this case, the Police, whilst patrolling a street in Libala Stage 4B with a vehicle, met and challenged the Appellant who was in a company of his friends to stop. The Appellant and his friends did not stop but ran away in different directions. After giving a chase, the Appellant was apprehended. In the process of executing an arrest, the Appellant became violent and broke the rear lens of the Police vehicle. The Appellant was found guilty of malicious damage to property by the Magistrate Court and was sentenced. This sentence was for him to have ten strokes. This was in fact, corporal punishment. He appealed against this sentence to the High Court.

The High Court held that the ten strokes amounted to corporal punishment as provided for in Section 27 of the Penal Code, and this was ultra vires Article 15 of the Constitution of Zambia which does not allow anyone to be subjected to torture, inhuman or degrading punishment or other like punishment. Thus in Zambia today, corporal punishment is prohibited[3].

Developments like these are of course important in human rights law, although corporal punishment is not as serious as capital punishment. The challenge, therefore, is that if corporal punishment can be held to be inconsistent with Article 15 of the constitution, then capital punishment, too, should be inconsistent with the same provision either on account of the methods of execution, or the continued stay on the

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[1] Judgment of 25th April, 1978, publications of the European Court of Human Rights, Series A, No. 26.
[2] (1999) Unreported – High Court Case No. HPA/6/1998.
[3] Atleast, this decision binds all the Magistrate Courts and Local Courts in Zambia so that these two Courts cannot order corporal punishment any more.

death row of the convict. This is called the death row phenomenon and it refers to the negative effects of one's prolonged stay on death row.

Methods of Execution

On this issue, the provisions of the international documents which prohibit the subjection of a person to cruel, inhuman or degrading treatment, have themselves been the center of controversy. After interpreting Article 7 of the ICCPR, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) or Article 5 of the American Convention on Human Rights (ACHR), some human rights law experts have argued that if one has been executed in accordance with the human rights law standards, then one would not have been subjected to cruel, inhuman or degrading treatment. They have further submitted that one would only be subjected to cruel, inhuman or degrading treatment if aggravated methods of execution like stoning to death or death on the wheel were employed. In relation to the methods of execution, the Human Rights Committee, in its General Comment on torture, gave the following as the standard:

> "The death penalty ... must be carried out in such a way as to cause the least possible physical and mental suffering."[4]

In some cases, however, this standard has presented difficulties to the Committee itself especially when it comes to defining it. This is simply because the Committee cannot easily identify which methods of execution will cause 'the least possible physical and mental suffering.'

[4] General Comment No. 20 (44th Session) of 3 April, 1992, UN.DOC. HRI/GEN/1Rev. 3, 31-33, at Para. 6.

Some methods of execution however, have been held by the Human Rights Committee to be in conformity with the above standard, while others have been held not to be in conformity. In Kindler v. Canada[5], the Human rights Committee held that execution by means of lethal injection was below the threshold of cruel, inhuman or degrading punishment. In the landmark decision of Charles Chitat Ng v. Canada,[6] on the other hand, the Committee ruled that the execution by gas asphyxiation as practiced in California violates Article 7 of the ICCPR. The majority in this case argued as follows:

> "The Committee is aware that, by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of Article 7 of the Covenant; on the other hand, article 6, paragraph 2, permits the imposition of capital punishment for the most serious crimes ... in the present case, the author has provided detailed information that execution by gas asphyxiation may cause prolonged suffering and agony and does result in death as swiftly as possible, as asphyxiation by Cyanide gas may take over 10 minutes. The State party had the opportunity to refuse these allegations on the facts; it has failed to do so ... in the instant case and on the basis of the information before it, the Committee concludes that execution by gas asphyxiation, should the death penalty be imposed on the author, would not meet the test of 'least possible physical and mental suffering,' and constitutes cruel and inhuman treatment in violation of Article 7 of the Covenant."

Use of gas asphyxiation to execute people who have been condemned to suffer capital punishment is in violation of Article 7 of the ICCPR falls squarely on the method of hanging which is used in Zambia. Gas asphyxiation as used in California, is in fact not as worse as the hanging method which Zambia has adopted.[8] This is because hanging is not

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[5] (Communication No. 470/1991), views adopted on 30 July, 1993, official records of the Human Rights. Committee 1992/93, Vol. II (New – York: United nations, 1977), 559-72.
[6] (Communication No. 469/1991) Views adopted on 5 November 1995, Report of the Human Rights Committee, UN DOC. A 149/40, Vol. 11, 189-220.
[7] Paras. 16-2-16.4.
[8] Ibid, Section 25 of the Penal Code.

only brutal, but makes the victim feel a lot of pain before he or she finally dies. The challenge for Zambia, therefore, is that if a lesser brutal method of execution like gas asphyxiation has been condemned by the Human Rights Committee, then surely the hanging method which it employs should lead to the prohibition of capital punishment since the method used not only violates Article 7 of the ICCPR, but Article 15 of the Zambian Constitution as well. Article 15 of the Zambian Constitution is similar to Article 7 of the ICCPR and provides as follows:

> "A person shall not be subjected to torture, or to inhuman or degrading punishment or other like treatment."

This is the same Article of the Zambian Constitution, of course, which the High Court used in John Banda v. The People[9] to prohibit corporal punishment. In fact, if comparisons are to be made between corporal punishment and capital punishment, it would be noted that in Zambia, a person who is being hanged to death as a consequence of capital punishment, is subjected to a more cruel, inhuman or degrading treatment than one who is being caned. If logic is to be followed, it will be correct to assert, therefore, that capital punishment violates Article 15 of the Zambian Constitution and it should be prohibited.

The Death Row Phenomenon

According to Schmidt[10], the term death row phenomenon, refers to the situation and treatment of individuals sentenced to death and awaiting execution for many years under particularly harsh conditions of detention. This particular situation and treatment

[10] Marks G Shmidt, The Death Row Phenomenon, in S. Orlin, Allan Ross and Martin Sheinin (Ed.),Jurisprudence of Human Rights Law: A Comparative Interpretative Approach- Institute for Human Rights, p.47-48 (2000), Turku/ Abo: Abo Academy University.

has been condemned the world over as it violates Article 7 of the ICCPR, Article 3 of the ECHR, Article 5 of the ACHR and some constitutions of various countries. In this part we discuss how the Supreme Court of Zimbabwe, the Constitutional Court of South Africa, the Supreme Court of India, the Judicial Committee of the Privy Council, the Supreme Court of Canada, some courts of the United States of America and the United Nations Human Rights Committee have dealt with the issue of the death row phenomenon.

The Supreme Court of Zimbabwe

The Supreme Court of Zimbabwe, in June 1993, handed down a remarkable judgment addressing the death row phenomenon. This was in the case of The Catholic Commission for Justice and Peace in Zimbabwe v. The Attorney General and Others.[11] The case concerned four Zimbabwean citizens who had been sentenced to death in 1987 and 1988, respectively. When served with warrants for their executions in March 1993, they argued that the execution would be unconstitutional because of the dehumanizing factor of prolonged delay, viewed in conjunction with the harsh and degrading conditions of inmates who are confined to the condemned section at Harare Central Prison. The Supreme Court held that the execution was unconstitutional.

The Constitutional Court of South Africa

Similarly, on 6 June 1995, South Africa's new Constitutional Court handed down a remarkable judgment, declaring that the death penalty is contrary to South Africa's (then interim) Constitution. This was in the case of The State v. Makwanyane and

[11] Supreme Court of Zimbabwe Judgment of June 1993, Judgment No. S.C. 73/93.

Mchumu.[12] The judgment concluded that the death penalty constituted cruel, inhuman and degrading punishment within the meaning of Section 11(2) of the country's interim constitution. This provision, though not textually identical, is very similar to that found in all contemporary human rights instruments and most national constitutions.

The Supreme Court of India

Although the Indian Constitution does not have specific provisions which prohibit torture or inhuman and degrading treatment, the Supreme Court of India, since the 1980s, has filled this void by interpreting the Bill of Rights in the Indian Constitution in the light of international norms, notably Article 3 of the ECHR and Article 7 of the ICCPR. On the basis of this, for instance, the Supreme Court in Vatheeswaaran v. State of Tamil Nadu,[13] observed as follows:

> "It is true that a period of anguish and suffering is an inevitable consequence of sentence of death. But a prolongation of it beyond the necessary for appeal and consideration of reprieve is not. And it is no answer to say that the man will struggle to stay alive. In truth, it is this ineradicable human desire which makes prolongation inhuman and degrading. The anguish of alternating hope and despair, the agony of uncertainty, the mental, emotional and physical integrity and health of the individual are described in the evidence of the effect of the delay."

With this reasoning, therefore, the Supreme Court allowed the appeal and commuted the death sentence to life imprisonment. In fact, in an Obiter dictum, the Court suggested that a delay exceeding two years should be deemed sufficient to trigger the application of

[12] Case No. CCT/3194, Judgment of 6 June 1995 reprinted in Human Rights Law Journal 16 (1995): 154-208

[13] AIR 1983, S.C. 361.

Article 21 of the Constitution of India, which guarantees certain fundamental rights. However, this Obiter dictum was overturned by the Supreme Court in the case of Sher Signh and Others v. The State of Punjab.[14] In this case, the Supreme Court observed that it was quite normal for appellate proceedings to exceed two years and that it would be inconceivable if an individual, under the sentence of death, could ultimately delay execution to such an extent by filing frivolous proceedings, for instance, that it had to be commuted under such a rule.

The Judicial Committee of the Privy Council

The death row phenomenon has been dealt with in a number of cases by the Judicial Committee of the Privy Council. In the landmark 1982 judgment in Riley et al v. Attorney – General of Jamaica,[15] for instance, the Privy Council concluded, by a narrow three to two majority, that whatever the reasons for the delay in the execution of a death sentence lawfully imposed, such a delay could not be deemed to constitute a violation of Section 17 of the Jamaican Constitution, which prohibits cruel, inhuman and degrading punishment. This conclusion, however, was in effect, overturned by the judgment of the Judicial Committee of the Privy Council in Pratt and Morgan v. Attorney – General of Jamaica et al.[16] In this case, it was held that prolonged delay of carrying out the execution could constitute cruel, inhuman or degrading treatment in light of the mental anguish the convict goes through.

[14] (1983) 2 S.C.R. 583
[15] Privy Council Appeal No. 10 of 1993, Judgment Delivered on 2 November 1993.
[16] Privy Council Appeal No. 10.

The Supreme Court of Canada

By the year 2000, the Supreme Court of Canada had dealt with the death row phenomenon in two cases which were decided in 1991, and which display facts and legal issues in many ways similar to those discussed by the European Court of Human Rights in the Soering Case.[17] In the case of Joseph Kindler v. Minister of Justice,[18] the Supreme Court of Canada refused, by the narrowest of majority of four to three, to block the extradiction of Mr. Kindler from Canada to the State of Pennsylvania, where he had been convicted of first degree murder and kidnapping and the Jury had recommended the imposition of the death penalty. Before sentencing, Kindler had managed to escape and to flee Canada. For the Court majority Justice La Forrest took the view that:

> "While the psychological stress inherent in the death row phenomenon cannot be dismissed lightly, it ultimately pales in comparison to the death penalty. Besides, the fact remains that a defendant is never forced to undergo the full appeal procedure, but the vast majority choose to do so. It would be ironic if the delay caused by the appellant's taking advantage of the full and generous avenue of the appeals available to him should be viewed as a violation of fundamental justice."

The Court Opinions of the United States of America

The Supreme Court of the United States is yet to address the death row phenomenon. In the Clarence Lackey Case,[19] however, which was brought before the Supreme Court from Texas in April 1995, the Court stayed the execution and directed a lower federal district court in Texas to hear statements by two British lawyers. The lawyers argued that the prisoner's execution after 17 years of detention on death row constituted cruel and unusual punishment within the meaning of the Fifth Amendment of

[17] Ibid, Shimidt, P. 58.
[18] (1991) 67 S.C.C. ed. 1
[19] Case of Clarence Larckey, Stay ordered on 28 April 1995, Reuters Press Release, 28 April, 1995.

the US Constitution. The lower court was directed, in particular, to review whether state prosecutors in Texas had been responsible for the extensive delay in the petitioner's execution.

According to Shmidt,[20] most courts of the United States have denied stays of execution on the ground that the length of time spent on death row constituted cruel and unusual punishment. Therefore, periods of detention on death row of 12 years[21], of over 13 years[22] and of over 16 years[23] were deemed to be so prolonged as to make the execution of the prisoner contrary to the Fifth Amendment of the Constitution. In the majority of these decisions, it was pointed out emphatically that the delay in execution of the capital sentence was due, above all, to the skillful and persistent efforts of the prisoner's lawyer to exhaust all available avenues of appeal.

However, two State Supreme Court opinions have pointed to the relevance of delays in the execution of a death sentence, including detention on death row, as a relevant ground for constitutional challenges to the death penalty itself. This kind of approach was adopted, for instance, by the Supreme Court of Messachusetts in the case of District Attorney for the Suffold District v. Watson[24] in which it was held that the death penalty violated the State Constitution of Massachusetts, which prohibits cruel punishment. The delay and mental anguish experienced while awaiting the execution was an important part of the court's ratio decidendi as expressed in the opinion of the Chief Justice:

"The mental agony is, simply and beyond question, a horror...

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[20] Ibid, P. 64
[21] Chessman v. Dickson (1960), court of Appeals for the Northern Circuit.
[22] Potts v. State (1989), Supreme Court of the State of Georgia.
[23] Richmond v. Lewis, 948 F. 2d 1473 (1991).
[24] Mass 411 E. 2d 1274 (1980).

> We know 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."

A similar conclusion was reached in the case of The people v. Anderson,[25] where the Supreme Court of California had to determine whether the death penalty violated Article 6 of California's Constitution which prohibited cruel and unusual punishment.

The United Nations Human Rights Committee

The United Nations Human Rights Committee was one of the first international instances to address the death row phenomenon under international law.[26] It is a body of 18 independent experts which may determine individual complaints from citizens of states which have ratified the Optional Protocol to the International Covenant on Civil and Political Rights. Although its decisions are not legally binding stricto sensu, they constitute highly authoritative decisions which States Parties are expected to implement.[27]

The Committee has received individual complaints on the death row phenomenon for over ten years now. In most of these complaints (most of which have come from the Caribbean region), the complainants have argued that the length of their detention on death row constitutes inhuman, cruel and degrading treatment, contrary to Article 7 of the ICCPR. It has found in a substantial number of cases, above all against Jamaica, that harsh conditions on death row might amount to inhuman treatment in violation of

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[25] 493 P. 2d 880 (1972).
[26] Ibid, Schmidt, P. 48.
[27] The Committee's decisions are not binding, Stricto sensu, because they do not confer an enforceable title upon the complainant in the event of favourable decision by the Committee.

Articles 7 and/or 10 of the ICCPR. However, it has been held that prolonged periods of detention on death row do not per se constitute cruel, inhuman or degrading treatment.

In Randolph Barrett and Clyde Sutcliffe v. Jamaica,[28] the applicants, who had been detained on death row since their conviction in 1978 – that is, for a period of over 13 years – once again claimed that the duration of their confinement to death row was contrary to Article 7 of the ICCPR. The Committee observed as follows:

> "Prolonged judicial proceedings do not per se constitute cruel, inhuman and degrading treatment even if they may be a source of mental strain and tension for detained persons. This also applies to appeal and review proceedings in cases involving capital punishment... In States whose judicial system provides for a review of criminal convictions and sentences, an element of delay between the lawful imposition of a sentence of death and the exhaustion of available remedies is inherent in the review of the sentence; thus, even prolonged periods of detention under a severe custodial regime cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies."

In the applicants' cases, the Committee concluded that a delay of 10 years between the dismissal of their appeal by the Court of Appeal of Jamaica and the judgment of the Judicial Committee of the Privy Council was 'disturbingly long; but that the delay in Judicial proceedings was primarily attributable to the applicants themselves.

The Committee is reluctant to hold that the prolonged stay of one on the death row is contrary to Article 7 of the ICCPR because if they did so, states would execute the convicts immediately after passing the judgment. This is why it usually holds that it is the conditions in prison in which the people on the death row live, which are contrary to Article 7 of the ICCPR. In Errol Johnson v. Jamaica,[29] the Committee observed:

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[28] (Communications Nos. 270/1988 and 271 (1988), views adapted on 30 March 1992, Official records of the Human Rights Committee 1991/92, Vol. 11 (New York: United nations, 1995).

[29] (Communication No. 588/1994), views adopted on 22 March 1996, UN Doc. CCPR/C56/588/1994

> "Life on death row, harsh as it may be is preferable to death... therefore, the Committee should avoid adopting a line of jurisprudence which conveys a message to States parties retaining the death penalty that they should carry out a capital sentence as expeditiously as possible after it was imposed."

The European Court of Human Rights

In the Soering case,[30] the European Court of Human Rights, dealt with the issue of the death row at length. Soering was a German national who was sought for two murders committed in Virginia. He fled to Europe but was arrested for an unrelated offence in the United Kingdom. Shortly thereafter, he was indicted on two murder charges in Virginia, and the United States sought his extradition under the 1972 Extradition Treaty with the United Kingdom. Germany, which had abolished the death penalty, also sought his extradition since, as Soering's country of origin, it had jurisdiction to try him for crimes pursuant to Section 7, subsection 2, of the German Criminal Code. The United Kingdom sought assurances from the United States that if, surrendered, Soering would not be executed. But rather than providing these assurances, the United States only forwarded an affidavit from the District Attorney for Bedford County in Virginia to the effect that he would convey the wish of the United Kingdom Government to the sentencing judge. Soon thereafter, a United Kingdom Judge held that Soering could be extradited, and appeals against the decision were dismissed. At this juncture, the applicant turned to the European Commission of Human Rights.

In the proceedings before the European Commission, Soering contended that his extradition from the United Kingdom to the United States would amount to a violation of Article 3 of the European Convention on Human Rights (that is, the equivalent of Article 7 of the ICCPR) by the United Kingdom, in that the conditions of detention at

[30] Judgment of 7 July 1989, Publications of European Court of Human Rights, Series A, No. 161.

Mecklenburg State Prison, where he would be incarcerated if sentenced to death in Virginia, were particularly harsh and thus inhuman and degrading.

The European Court of Human Rights unanimously concluded that there was a real risk that the court in Bedford County, Virginia, would sentence Soering to death and that, if surrendered, Article 3 of the ECHR would be violated by the United Kingdom. This Court, too, like the United Nations Human Rights Committee, stressed that the conditions of detention at Mecklenburg State Prison constituted cruel, inhuman and degrading treatment.

This case shows that the continued stay of one on the death row, violates Article 7 of the ICCPR, which is similar to Article 3 of the ECHR.

Conclusion

This chapter has discussed the pressure to abolish capital punishment on States which still retain it. This pressure has mainly come from the international treaties and international human rights bodies like the UN Human Rights Committee. In addition, the Chapter has discussed the death row phenomenon and how courts of different countries have dealt with it.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

(a) CONCLUSIONS

First and foremost, it has been established that the right to life is the supreme right. This is because a person can only exercise other rights when he or she continues to enjoy the right to life. This particular fact was recognized by the General Comment number 6 (16th Session), which was adopted by the UN Human Rights Committee on 27 July 1982.

It has been established, too, that the right to life, like most rights, is recognized by many States Constitutions and international treaties. The Zambian Constitution protects the right to life in Article 12. It also restricts the situations where one would be denied the enjoyment of his or her right to life. For instance the derogation of the right to life is allowed in Article 12(1) if this is in execution of the sentence of a court in respect of a criminal offence under the law in force in Zambia of which he or she has been convicted. This can be murder, treason or aggravated robbery. Similarly, Article 12(2) permits the termination of a pregnancy (abortion) if this will be in the best interest of the mother's health.

International treaties which protect the right to life include the 1966 United Nations (UN) International Covenant on Civil and Political Rights (ICCPR) and the 1981 African Charter on Human and People's Rights (ACHPR).

Sadly, Zambia still retains capital punishment. According to the Penal Code, this form of punishment is provided for treason, murder and aggravated robbery.

Of course, the Zambian Constitution does allow the derogation of the right to life if it is in fulfillment of the court's sentence. However, this extent may only be reached if the sentence has been handed down by an independent and impartial court. In most cases here in Zambia, it is the Supreme Court which confirms the imposition of this kind of punishment. A similar standard is also set by the ICCPR, the ECHR and the ACHR.

Chapter Four, has stated that most methods employed on people sentenced to death are cruel, inhuman and degrading treatment so that they are contrary to most States' Constitutions and international treaties on human rights.

It has further established that the continued stay on the death row by the person sentenced to death (the death row phenomenon) violates most constitutions and international treaties on human rights. This is because the conditions in prisons for these people as well as the mental anguish they go through for not knowing the day they will be executed constitute cruel, inhuman and degrading treatment.

(b) RECOMMENDATIONS

It is acknowledged that there is nothing illegal with a State carrying out the death penalty. Article 6(2) of the ICCPR provides:

> "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 and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court."

However, this paper has established that this form of punishment violates Article 7 of the ICCPR as well as most States Constitutions. Therefore, States Parties to the ICCPR which carry out this form of punishment like Zambia, should abolish this form of punishment. It is further submitted that decisions of the United Nations Human Rights Committee should have enforceable mechanisms. Currently, its decisions are not enforceable. The enforceable mechanisms may take the form of economic sanctions and diplomatic relations. The Committee has ruled in several cases that the death row phenomenon and methods of execution are contrary to Article 7 of the ICCPR even though capital punishment may be legal according to Article 6 of the ICCPR.

Related to this, Article 6 itself must be changed. This is because it allows for the carrying out of capital punishment. This state of affairs has brought a conflict between the rulings of the UN Human Rights Committee and the ICCPR itself. The Committee sees the methods of execution and the death row phenomenon to be contrary to Article 7 of the ICCPR when Article 6(2) of the ICCPR allows the carrying out of the punishment.

In addition, there should be no reservation on the ICCPR, particularly for all those provisions which seek to protect the right to life. The UN should never allow a State like it did with the United States of America when it entered a reservation on Article 7 of the ICCPR to allow for the carrying out of the death sentence in some of its States[1]. Similarly, the International Monetary Fund (IMF) and the World Bank should attach ratification or accession to the Second Optional Protocol to the ICCPR as a condition for financial assistance. The IMF and the World Bank should ensure that such States adhere to the Optional Protocol.

[1] The USA, in 1992, entered a reservation on Article 7 of the ICCPR to allow the imposition of capital punishment in some of its states.

Here in Zambia, capital punishment should be expressly prohibited by amending Article 12(1) of the Constitution, Sections 43, 20 and 294(2) of the Penal Code which allow the carrying out of capital punishment on the convicts.

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