

CHAPTER THREE

REBUTTING THE ARGUMENTS FOR THE RETENTION OF THE DEATH PENALTY IN AFRICA

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3.1 Introduction

Punishment has been defined as a deprivation or suffering inflicted by a court of law, as specified by the law transgressed by the sentenced person.¹ Criminal law specifies the punishment, and in cases where the violation is serious, such as intentional homicide, the punishment may be death. Justice Stewart has stated that capital punishment for the crime of murder is not disproportionate to the severity of that crime.² Thus, the death penalty comes into question with regard to severe crimes.

Generally, in ancient societies, acceptance of the death penalty depended on three principal factors: first, the insignificant value attached to human life; second, individual and tribal vengeance which was seen as just and necessary; and third, the sovereign was both the only source of justice and the guardian of peace or public security, with the right to inflict death in the name of the organised society he incarnated.³ In recent societies, different reasons have emerged which make recourse to the death penalty appear necessary.

Some African states, for example Tanzania, retain the death penalty because the government believes that it has “a part to play in the society”, as a deterrence tool.⁴ Also, Togo has justified the retention of the death penalty on the social and political reality of the country at the time the Togolese Penal Code was drawn up.⁵ In Swaziland, King Mswati III has justified the retention of the death penalty on the ground that, if repealed, it would increase the threat of serious crimes such as ritual

¹ Van den Haag & Conrad (1986) 55.

² *Gregg v Georgia* (1976) 428 U.S. 153, para 155. The issue in this case was whether the imposition of the death sentence for the crime of murder under the law of Georgia violates the Eighth and Fourteenth Amendments of the United States (US) Constitution. The Supreme Court held that it did not violate the Constitution. The Court’s position was that capital punishment might be the appropriate sanction in extreme cases (Justices Brennan and Marshall dissented).

³ Ansel (1967) 4–5.

⁴ Third periodic report of Tanzania submitted under article 40 of the ICCPR, UN Doc. CCPR/C/83/Add.2, 7 October 1997, para 52.

⁵ Third periodic report of Togo submitted under article 40 of the ICCPR, UN Doc. CCPR/C/TGO/2001/3, 5 July 2001, para 107.

murder.⁶ As seen in this chapter, defenders of the death penalty believe that execution is less painful than most natural ways of dying and that the death penalty is legitimate and necessary. Some members of parliament in Kenya during the 1994 motion in parliament to abolish the death penalty argued that abolishing capital punishment would be tantamount to “licensing murder”.⁷ Thus, they saw the death penalty as necessary to prevent murder. Schutte, former South African member of parliament, has seen the death penalty as imperative to uphold law and order, and to ensure respect and confidence in the criminal justice system.⁸

Opponents to the death penalty (abolitionists), as seen in this chapter, see the death penalty as not necessary or not desirable. Some defenders of the death penalty, like Anderson, have acknowledged the fact that the death penalty is not desirable, but Anderson goes further to state that this “awful punishment” is forced by ice-cold brutal reality.⁹ Thus, he sees capital punishment as an instrument among many in the fight for a more righteous and better world.

In addition, as noted in chapter two, the death penalty has been seen as the definitive measure of sovereignty. Sarat points out that capital punishment is seen as one of the dramatic symbols of the presence of sovereignty in states where sovereignty is fragile, and that the maintenance of capital punishment in such states is essential to the demonstration that sovereignty could reside in the people.¹⁰ The death penalty has also been seen as necessary to safeguard state security. Barishaki, the Ugandan Commissioner for civil litigation, has argued that the death penalty is necessary to safeguard state security by barring errant soldiers from deserting and killing

⁶ D Mavunduse, “A new millennium free from death penalty in southern Africa?”
<<http://www.sardc.net/editorial/sanf/1999/09/30-09-1999-nf2.htm>> (accessed 30 June 2004).

⁷ D Mugonyi & M Njeru, “President Kibaki pardons 28 death row convicts”
<http://www.santegidio.org/pdm/news2003/26_02_03_b.htm> (accessed 18 March 2003).

⁸ Maduna (1996) 194.

⁹ D Anderson, *The death penalty: A defence* (2001) 1 (Introduction), Chapter 2
<http://w1.155.telia.com/~u15525046/ny_sida_3.htm> (accessed 1 October 2003), hereinafter referred to as Anderson (2001).

¹⁰ Sarat (1999) 5.

civilians.¹¹ However, the sovereignty and state security argument above is questionable, as sovereignty and state security cannot be a substitute for human rights considering the universality of human rights or its progressive acceptance by African states.

On the other hand, the death penalty's existence is questioned, as it is seen as a violation of human rights as seen in chapters four, five and six below. Moreover, some Africans have stated their opposition to it. For example, Konaré, former president of Mali and Chairperson of the AU Commission, has on several occasions stated his opposition to the death penalty.¹² The Ethiopian Human Rights Council has argued that the death penalty is barbaric and described as flawed arguments that claim that it reduces crime in society.¹³ Further, Kamakil, the Kenyan Commissioner of prisons, has stated his opposition to the death penalty in the following words: "We are longing for the day Parliament will remove the death penalty from the Constitution. Sometimes many people are hanged for wrongs reasons".¹⁴

As mentioned in the introduction chapter, one of the research questions of this thesis is: Why do most African states retain the death penalty? This chapter discusses the main arguments by Africans for the retention of the death penalty in Africa. It first postulates, without embracing the various arguments; then, the validity of each of them are considered, specifically from a human rights point of view. These arguments are discussed with a view to providing the reader with an understanding of the reasons why most African states retain the death penalty. It should be noted that reference is also made to examples or cases from outside Africa to substantiate certain arguments for the retention of the death penalty in Africa. Also, the question of alternatives to the death penalty in Africa is mentioned briefly, as it is dealt with in the concluding chapter of this thesis.

¹¹ H Abdallah, "Army executions necessary" <<http://allafrica.com>> (accessed 23 January 2004).

¹² *Amnesty International Report* (2001) 166.

¹³ "Call to abolish death penalty in Ethiopia" *Mail and Guardian*, 3 October 2003; see <<http://www.mg.co.za/Content/13.asp?ao=21422>> (accessed 13 October 2003).

¹⁴ D Mugonyi & M Njeru, "President Kibaki pardons 28 death row convicts" <http://www.santegidio.org/pdm/news2003/26_02_03_b.htm> (accessed 18 March 2003).

3.2 International law

International law has been defined as a body of rules and principles that are binding upon states in their relations with one another.¹⁵ Historically, international law was viewed as a law of sovereign states. However, as Schabas points out, this view evolved in the 20th century. He states that international law is no longer restricted to the rights and obligations of states between themselves but now encompasses rights and obligations that states undertake to respect vis-à-vis individuals.¹⁶ It has as one of its aims the protection of the human rights of the individual against his or her own government. Therefore, human rights can be seen as one of the principal themes of international law as they have been incorporated into it.

3.2.1 The death penalty is provided for in international law

Defenders of the death penalty (retentionists) are of the view that the death penalty has not been abolished by international law. This argument is fully elaborated here, and its validity is considered in 3.2.2 below. For example, Malabo of Zambia, who was once president Chiluba's legal adviser, insists that the death penalty in Zambia has a constitutional basis and is in line with the ICCPR, which reserves the death penalty for the most serious crimes.¹⁷ Justice Chaskalson also acknowledged the fact that capital punishment is not prohibited by public international law in *S v Makwanyane*, when he pointed out that

[c]apital punishment is not prohibited by public international law, and that is a factor that has to be taken into account in deciding whether it is cruel, inhuman or degrading punishment.¹⁸

¹⁵ Dugard (2000) 1. It should be noted that international law also includes non-binding rules and principles, such as those enshrined in resolutions of, for example, the UN General Assembly.

¹⁶ Schabas (1996) 17.

¹⁷ AFRICANEWS – “Zambia: Prisoners challenge capital punishment” <<http://lists.peacelink.it/afrinews/msg00190.html>> (accessed 12 February 2004).

¹⁸ *S v Makwanyane* 1995 (3) SA 391, para 36 (hereinafter referred to as *Makwanyane* (1995)).

Looking at international instruments, it is clear that capital punishment is not prohibited by international law.¹⁹ The subsequent paragraphs discuss provisions in international instruments with the aim of showing that it does not prohibit the use of the death penalty, but some merely place restrictions on its use. Some international instruments make no mention of the death penalty, for example, the UDHR. Article 3 provides that “everyone has the right to life, liberty and security of person”, but makes no reference to the death penalty. Since most African states still retain the death penalty, they could read this provision as allowing for its imposition.

Article 6(1) of the ICCPR is silent on the death penalty. It provides that “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”. The ICCPR therefore allows for the imposition of the death penalty as long as it is not arbitrary, as article 6 of the ICCPR goes further to place restrictions on the use of the death penalty. According to article 6(1), the death sentence is acceptable if those sentenced to death are given “the right to seek pardon or commutation of the sentence”. The granting of amnesty, pardon or commutation of the sentence is not mandatory due to the use of the word “may” in this article. In other words, those sentenced to death have the “right to seek” pardon or commutation, but the granting of such pardon or commutation is a matter of discretion.

Furthermore, article 6(5) excludes the imposition of the death penalty on persons below 18 years of age and prohibits the carrying out of executions on pregnant women. Thus, the death penalty is a valid sentence as long as it is not imposed on someone below 18 and a pregnant woman is not executed. It should be noted that the ICCPR does not prohibit the imposition of the death sentence on a pregnant woman.²⁰

The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty goes further than the ICCPR. But still, it does not provide for absolute abolition of the death penalty. Article 2(1) of the Protocol allows states to apply the

¹⁹ It should be noted that the Supreme Court of Norway had conceded that the application of the death penalty in Norway is valid as it is prohibited by international law, and thus could be legitimately imposed despite the fact that it was inapplicable under the country’s criminal law (*Prosecutor v Klunge* (1946) 13 Ann. Dig. 262 (Supreme Court, Norway), cited in Schabas (1997) 1).

²⁰ See chapter two for a discussion on this provision.

death penalty in time of war to a conviction for a most serious crime of a military nature committed during wartime, if a reservation was made to this effect at the time of ratification or accession. In addition, the CRC does not abolish the death penalty. It merely prohibits its imposition on persons below eighteen years of age.²¹

Treaties of international humanitarian law do not prohibit the death penalty but merely provide rules regarding its imposition in time of war. The Third Geneva Convention protects prisoners of war by limiting the scope of imposition of the death penalty on them, and provides that where a death sentence has been passed, the execution shall not be carried out before the expiration of a period of at least six months.²² Therefore, an execution is valid if carried out after the expiration of a period of six months.

The Fourth Geneva Convention protects civilian persons in time of war. It does not prohibit the imposition of the death penalty. It only prohibits the deprivation of the right of petition for pardon or reprieve for those condemned to death.²³ The Geneva Conventions have two Protocols limiting the scope of application of the death penalty but not abolishing or prohibiting its use. Protocols I and II prohibit the application of the death penalty on pregnant women or mothers and on juveniles.²⁴ The death penalty is thus a valid punishment as long as certain conditions are met.

²¹ Article 37(a).

²² Articles 100 and 101, Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 (Third Geneva Convention), 75 U.N.T.S. 135.

²³ Articles 68 and 75, Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Fourth Geneva Convention), 75 U.N.T.S. 287.

²⁴ See Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), articles 76(3) and 77(5); and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), article 6(4).

With regard to human rights instruments in the various regional human rights systems, most of them do not abolish the death penalty absolutely as seen below. In the European human rights system, with regard to states that are yet to ratify Protocol No. 13,²⁵ the death penalty could be imposed as an exception to the right to life under article 2(1) of the European Convention on Human Rights (European Convention).²⁶ A look at article 2 reveals that it does not envisage abolition of the death penalty. Moreover, it makes little provision for safeguards or limitations on the use of the death penalty. Subsequently, Protocol No. 6 to the European Convention was adopted,²⁷ which does not completely abolish the death penalty. In *Soering v United Kingdom*, the European Court of Human Rights pointed out that article 2 of this Protocol does not preclude the death penalty, as it allows member states to use the death penalty in time of war.²⁸

In the Inter-American human rights system, the American Convention does not preclude the death penalty but merely places limitations on its use. Article 4(3) of the American Convention prevents states that have abolished the death penalty from reintroducing it. Therefore, the American Convention is an abolitionist instrument only to the extent that states that abolished the death penalty before ratifying the American Convention are bound as a question of international law not to use the death penalty. However, those that have not, or did not abolish the death penalty before ratifying the Convention, are free to use it as long as they adhere to the safeguards on its use. The American Convention further provides safeguards and limitations on the death penalty, excluding its use for political crimes and related common crimes, and for juveniles and the elderly,²⁹ but in other cases, the death penalty is a legitimate sentence.

²⁵ See 3.2.2 below for a discussion of Protocol No.13.

²⁶ Adopted in 1950, entered into force on 3 September 1953 (E.T.S. 5, 213 U.N.T.S. 222). The Convention is the only instrument to attempt an exhaustive list of exceptions to the right to life.

²⁷ Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, adopted on 28 April 1983, entered into force on 1 March 1985 (E.T.S. 114).

²⁸ *Soering v United Kingdom*, Series A, No. 161 (1989), para 103 (European Court of Human Rights), hereinafter referred to as *Soering* (1989).

²⁹ Article 4(4) and 4(5) of the American Convention respectively.

The American Convention was supplemented by a Protocol dealing with the abolition of the death penalty.³⁰ However, the Protocol does not prohibit the death penalty as article 2 makes provision for a reservation to be made by state parties regarding application of the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature.

In the African human rights system, as stated in chapter two, the African Charter in article 4 prohibits the “arbitrary” deprivation of life. This article could be read to imply that it permits the death penalty, as the African Charter as a whole makes no mention of the death penalty or the need to abolish.³¹ In addition, as noted in chapter two, the African Children’s Charter and the African Women’s Protocol do not preclude the death penalty, but for certain categories of persons.

Regarding the Islamic system, capital punishment is considered an integral part of the law. The Islamic human rights system has no convention, but the Islamic Council has adopted a Universal Islamic Declaration of Rights, which guarantees the right to life and provides for the death penalty under the authority of the law in its article 1(a).³² In addition, the League of Arab States has adopted the Arab Charter on Human Rights,³³ which proclaims the right to life in its article 5. It goes further to provide for the imposition of the death penalty for the most serious crimes, prohibits its imposition for political offences, and on a person under the age of 18, a pregnant woman prior to her delivery or on a nursing mother within two years from the date on which she gave birth.³⁴ Thus, the death penalty is a legitimate punishment in the Islamic human rights system.

³⁰ Protocol to the American Convention on Human Rights to Abolish the Death Penalty, adopted on 8 June 1990, entered into force on 28 August 1991 (O.A.S. Treaty Series No. 73 (1990), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 80 (1992)).

³¹ Generally, the African Charter has been criticised as falling short of truly effective human rights protection (see Flinterman & Henderson (1999) 395.

³² Adopted on 19 September 1981 (21 *Dhul Qaidah* 1401).

³³ Adopted on 15 September 1994, reprinted in (1997) 18 *Human Rights Law Journal* 151 (it had not yet been ratified by any members of the league of Arab States as of December 2004).

³⁴ Articles 10, 11 and 12 respectively, of the Arab Charter on Human Rights.

It is clear from the abovementioned that the death penalty is provided for in international law. While some instruments make no mention of the death penalty, others allow its application in certain circumstances or restrict the offences for which it is imposed.

3.2.2 Rebuttal of argument

To begin with, it should be borne in mind that caution has to be taken in dealing with capital punishment in international law because capital punishment is also related to domestic jurisdiction. Each country has its own laws on the death penalty. However, these laws have to be in accordance with international human rights law. International law is comprised of global and regional (human rights) treaties. And the silence of some of these treaties, for example, the African Charter, on the death penalty is not a bar to calling for abolition of the death penalty. International law contains minimum obligations; states may go beyond those obligations by elevating international law standards in their domestic systems. Thus, the international law argument is not conclusive.

The argument that the death penalty is allowed under international law is subject to compliance with the restrictions placed on its imposition and procedural safeguards with regard to its imposition. In the light of progressive acceptance of human rights, a systematic reading of the existing human rights instruments inevitably leads to the conclusion that the death penalty is a violation of human rights.³⁵ In the African continent, “human rights” has been the basis for the abolition of the death penalty in South Africa in the landmark judgment passed by the South African Constitutional Court in which it declared the death penalty unconstitutional.³⁶

As noted above, article 3 of the UDHR makes no mention of the death penalty, guaranteeing the right to life in clearly unqualified terms. As discussed in chapter four, looking at the *travaux préparatoires* and subsequent interpretations of this article by the UN General Assembly and ECOSOC resolutions, it is clear that the

³⁵ Slama (2001) 427.

³⁶ *Makwanyane* (1995), see chapters four and five for further discussion of the case.

death penalty was considered to be incompatible with the right to life.³⁷ According to Schabas, article 3 of the UDHR is abolitionist in outlook for the reason that by its silence on the death penalty, it directly envisages its abolition and implicitly admits its existence as a necessary evil.³⁸ Therefore, the UDHR cannot be used to justify the application of the death penalty, especially considering the fact that the right to life provision is not qualified.³⁹

Under the ICCPR, the Third and Fourth Geneva Conventions, the European Convention, the American Convention, and the African Charter, the imposition of the death penalty will only be a valid punishment if the safeguards and restrictions on its implementation are respected. Further, with the adoption of Protocol No. 13 (discussed below), it is my view that the European Convention cannot be used at present, even by states that have not ratified the Protocol, to justify the argument above that the death penalty is provided for in international law. Article 2 of the European Convention could be interpreted, taking into consideration for example the developments in the European system after 1994 as seen below, to imply that it precludes the death penalty.⁴⁰ The Parliamentary Assembly of the Council of Europe in recommendation 1246 (1994)

[considered] that the death penalty has no legitimate place in the penal systems of modern civilised societies, and that its application may well be compared with torture and be seen as inhuman and degrading punishment within the meaning of Article 3 of the European Convention on Human Rights.⁴¹

³⁷ Roosevelt, chairperson of the drafting Committee of the UDHR referred to movement in progress in some states to abolish the death penalty, and recommended that it might be better not to make explicit mention of the matter (UN Doc E/CN.4/AC.1/SR.2, 10). For more on this, see Schabas (2002) 30. For subsequent interpretations, see General Assembly resolution 2393 (XXIII), General Assembly resolution 2857 (XXVI), General Assembly resolution 44/128, and ECOSOC resolution 1930 (LVIII).

³⁸ Cited in Slama (2001) 403.

³⁹ See chapter four for a discussion of the effect of qualified and unqualified right to life provisions in relation to the death penalty.

⁴⁰ Generally, the object and purpose of the European Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective (*McCann and Others v United Kingdom* (1995) Series A, No. 324, Application No. 18984/91 (European Court of Human Rights), para 146).

⁴¹ Parliamentary Assembly of the Council of Europe recommendation 1246 (1994) on the abolition of capital punishment, para 3, adopted on 4 October 1994.

The Parliamentary Assembly has further acknowledged the importance of countries that have not yet abolished the death penalty to join the trend for abolition. In resolution 1044 (1994), it called “upon all the parliaments in the world which have not yet abolished the death penalty, to do so promptly following the example of the majority of the Council of Europe member states”.⁴² In the same resolution, the Assembly made it obligatory for all new member States to sign and ratify Protocol No. 6 and to introduce a moratorium on executions.⁴³ Abolition of the death penalty became a pre-condition for membership of the Council of Europe. In resolution 1097 (1996),⁴⁴ the Parliamentary Assembly, making reference to resolution 1044 (1994), reminded applicant states to the Council of Europe that the willingness to sign and ratify Protocol No. 6 to the European Convention and to introduce a moratorium upon accession has become a prerequisite for membership on the part of the Assembly.

The Parliamentary Assembly of the Council of Europe has also indicated its interest to delete the second sentence of article 2(1) of the European Convention that allows for the death penalty so as to match theory with reality.⁴⁵ The adoption of Protocol No. 13 to the European Convention, which abolishes the death penalty in all circumstances, in my opinion, changes the interpretation of article 2 of the European Convention and rebuts article 2 of Protocol No. 6 stated above.⁴⁶ Protocol No. 13 provides in its preamble that “abolition of the death penalty is essential for the protection of [the

⁴² Parliamentary Assembly of the Council of Europe resolution 1044 (1994) on the abolition of capital punishment, para 7, adopted on 4 October 1994.

⁴³ Resolution 1044 (as above) para 5.

⁴⁴ Parliamentary Assembly of the Council of Europe resolution 1097 (1996) on the abolition of the death penalty in Europe, para 6, adopted on 28 June 1996.

⁴⁵ The reality, that strengthened the interest of the Parliamentary Assembly, is the fact that more modern national constitutional documents and international treaties no longer include such provisions. See Parliamentary Assembly Opinion No. 233 (2002) on the draft Protocol to the European Convention on Human Rights concerning the abolition of the death penalty in all circumstances, para 5. Similarly, with regard to amending article 2, the European Court of Human Rights has noted that abolition status of the death penalty throughout Europe, should be seen as an agreement by contracting states to amend article 2(1) of the European Convention (see *Öcalan v Turkey*, Application No. 46221/99 (2003) ECHR 125, judgment of 12 March 2003, para 175; (2003) 7 *Amicus Journal* 24).

⁴⁶ Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, adopted by the Committee of Ministers in February 2002, entered into force on 1 July 2003. 29 countries have ratified Protocol No. 13, and 14 countries have signed but are yet to ratify the Protocol (see Amnesty International, “Ratification of international treaties” <<http://web.amnesty.org/pages/deathpenalty-treaties-eng>> (accessed 31 March 2005)).

right to life] and for the full recognition of the inherent dignity of all human beings”. Article 1 of the Protocol abolishes the death penalty, article 2 goes further to prohibit any derogation, and article 3 prohibits any reservations, in respect of the provisions of the Protocol. Article 5 of the Protocol provides that “[a]rticles 1 to 4 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly”. This, therefore, implies that an interpretation of article 2(1) of the European Convention in the light of this Protocol inevitably leads to the conclusion that the death penalty is precluded.

With regard to the CRC, African Children’s Charter and African Women’s Protocol, their scope is limited to the protection of specific vulnerable groups. The death penalty has been prohibited for those groups in the above instruments, thus they abolish the death penalty as far as their scope reaches.

Furthermore, the African Charter cannot be used to justify the argument that the death penalty is provided for in international law. The fact that article 4 of the Charter makes no mention of the death penalty could be interpreted, in the light of article 60 of the Charter, to imply that it precludes the death penalty.⁴⁷ Also, adopting Schabas’ view on the UDHR mentioned above, it could be said that the African Charter is abolitionist in outlook, as it makes no mention of the death penalty unlike other human rights instruments in the African system or other regional systems.

Even if an interpretation is to the effect that the death penalty is allowed, its application is, however, limited. Article 4 of the African Charter prohibits the arbitrary use of the death penalty, thus it allows for the death penalty only if it is in accordance with the law. Nonetheless, similar provisions in other jurisdictions prohibiting the arbitrary deprivation of life have been interpreted to preclude the death penalty.⁴⁸ In other words, the death penalty has been seen to be an arbitrary deprivation of life. Also, the conclusions of Justice Chaskalson and other judges of the South African Constitutional Court that the death penalty is “arbitrary” is powerful

⁴⁷ See chapter four for further discussion on a possible interpretation of article 4 of the African Charter leading to the conclusion that it precludes the death penalty.

⁴⁸ See the decision of the Hungarian Constitutional Court, Decision 23/1990 of 24 October 1990, discussed in chapter four (4.6.2) of this thesis.

support for an interpretation of article 4 of the African Charter to the effect that it prohibits capital punishment.⁴⁹ Taking this into consideration, as required under article 60 of the African Charter, it could be said that the Charter does not allow for the death penalty.

Based on the above, there are some question marks about the argument that the death penalty is provided for in international law, as the death penalty is a violation of human rights.⁵⁰ Even where international instruments place restrictions on its imposition, these restrictions are usually not respected, as discussed in chapter six of this thesis.

3.3 Traditional African societies

It is important to note that, in discussing capital punishment, one has to keep in mind the issue of cultural diversity. Every culture has its peculiarities, thus, one has to respect the viewpoint of each of them, provided that it is consistent with the principles of democracy, the rule of law and human rights.

3.3.1 Some African traditional philosophies allow for the imposition of the death penalty

This argument highlights the need for traditional justice to return. Retention of the death penalty with regard to African traditional philosophies is supported on the basis of two main arguments:

First, the death penalty is a valid punishment as death was imposed for certain offences in pre-colonial African societies, as seen in chapter two. For example, in indigenous Igbo society, an ethnic group in Nigeria, death was seen as the sole punishment for murder. Aja writes that the traditional Igbo was and still is at pains in

⁴⁹ See *Makwanyane* (1995). It should be noted that Members of the Supreme Court of Nigeria have shown some interest in the arguments by which article 4 is held to prohibit capital punishment (see *Nemi and Others v The State* (1994) 1 LRC 376).

⁵⁰ Other writers also hold this view. See, for example, Slama (2001) 427.

understanding why certain murderers are not sentenced to death for lack of evidence or some other technicalities.⁵¹

Second, retention of the death penalty is justified on the ground that some African traditional practices that have been taking place in pre-colonial and colonial Africa, and are currently taking place in some African countries, allow for its imposition. Imposition of the death penalty is similar to these practices, as the practices permit the taking of the life of a person for certain reasons. In other words, the same as the death penalty allows the state to take the life of a criminal convicted of a capital offence, so does a traditional practice allow a person or the community to take the life of another for reasons of defending the honour of one's family, for purposes of ritual or for a crime punishable with death that the particular individual has committed. Abolishing the death penalty would, therefore, mean discarding such practices. The subsequent paragraphs examine some of these practices.

“Trial by ordeal” is one of the African traditional practices that allow for the killing of another human being. “Ordeal” means miraculous decisions or judgements employed in determining the truth or falsity of a claim. Trial by ordeal takes place in cases in which guilt is uncertain. During such trials, the accused is submitted to painful, dangerous, and lethal tests, which are believed to be under the spell of supernatural forces. The ordeals used include the ordeal of the bier, the fire ordeal, and the water ordeal.⁵² The Ashantis of Africa believe that the corpse would, in some way or other pinpoint the murderer, who will then be killed, as death is the punishment for those who commit murder.⁵³ Also, trial by ordeal still takes place with regard to theft or murder cases in some rural parts of Cameroon, especially in the North West region.

With regard to the fire ordeal, the accused has to walk through the fire unscathed so as to prove his innocence; and with water ordeal, the accused, bound hand and foot and

⁵¹ Aja (2000) 230-231.

⁵² The ordeal of the bier has occurred in Europe and Africa. See H Thein, “Trial by ordeal” <<http://www.myanmar.com/gov/perspec/2003/1-2003/tri.htm>> (accessed on 5 January 2004).

⁵³ As above.

fastened with a rope is thrown into water.⁵⁴ The belief is that the water would receive him if he is innocent or cast him up or reject him if he is guilty. If he is innocent, he is then pulled out. If he is not innocent, he is allowed to drown and die in the water. Thus, some trials by ordeal lead to death as punishment for the crime committed and abolishing the death penalty will mean that trials by ordeal that lead to death will not be legitimate. Since trials by ordeal are seen as the best way of ascertaining guilt in some African societies, retention of the death penalty will enable the continuance of such practices that facilitate the administration of justice.

“Honour killings” also allow for the imposition of the death penalty. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions, with regard to the question of traditional practices and customs, has confirmed the occurrence of practices such as honour killings in which husbands, fathers or brothers murder their wives, daughters or sisters in order to defend the honour of the family in some countries, including African states.⁵⁵ The Special Rapporteur further noted in the report that honour killing is usually a decision by a tribunal consisting of male family members, and is as a general rule, carried out by an under-age male relative of the woman. It is also alleged that the police often fail to intervene to stop potential honour killings brought to their attention. The fact that the police fail to intervene means that this practice is recognised as a legitimate African traditional practice.

Honour killings tend to be more prevalent in, but are not limited to, countries with a majority Muslim population. In Africa, such killings take place mainly in North Africa; and honour killings have been reported in Egypt, Morocco and Uganda. For example in Egypt, a father is reported to have paraded his daughter’s severed head through the streets shouting, “I avenged my honour”.⁵⁶

⁵⁴ As above.

⁵⁵ Report of the Special Rapporteur on extrajudicial, summary or arbitrary execution on country situations (E/CN.4/1999/39/Add.1).

⁵⁶ “Widespread violence against women in Africa documented”
<http://www.afrol.com/categories/women/wom003_violence_unfpa.htm (accessed 5 January 2004).

“Ritual murder” is another traditional African practice that allows for the killing of persons for the purposes of rituals. Ritual murder is practiced in certain parts of sub-Saharan Africa,⁵⁷ such as Congo and South Africa (KwaZulu-Natal). From the above African traditional practices, it is clear that abolishing the death penalty would mean discarding such practices that are embedded in some African societies.

3.3.2 Rebuttal of argument

It is not disputed that the taking of life (“death penalty”) has been a form of punishment for certain offences in some traditional African societies. However, it was rarely or never imposed in some societies. Soga has pointed out, with regard to the Ama-Xosa (South Africa), that the “death penalty” was never imposed for the reason that – “Why sacrifice a second life for one already lost?”⁵⁸ This attests to the fact that everyone’s life is valuable, and even murderers have to be treated in light of the value of their lives. The fact that some kings were opposed to the “death penalty” brings its validity into question. For example, the Sotho King Moshoeshoe was opposed to capital punishment.⁵⁹

As noted in chapter two, death for certain offences existed in traditional African societies as an exception and not a law. Accordingly, Justice Kriegler has stated that the relatively well-developed processes of indigenous societies did not in general encompass capital punishment for murder.⁶⁰ In some African societies, customary notions of compensation and restitution were mostly relied on with regard to capital offences. African courts were much more ready to promote reconciliation and order compensation. For example, though the Baganda killed a murderer in some instances, generally, the penalty was the payment of blood money.⁶¹ The usual method of

⁵⁷ H Clerc, “Police fear ritual murder has spread to Europe”
<<http://www.mg.co.za/Content/13.asp?a=13&o=4012>> (accessed on 5 January 2004).

⁵⁸ Cited in *Makwanyane* (1995) para 377.

⁵⁹ *Makwanyane* (1995) para 378.

⁶⁰ *Makwanyane* (1995) para 381.

⁶¹ Elias (1956) 136.

punishment among the Busoga was fines.⁶² The Luo of Western Kenya and traditional Sudanese societies also resorted to compensation, as the murderer of a man was required to marry the wife of his victim.⁶³ This is because killing the murderer would mean loss of two breadwinners thereby making two families fatherless. In the Igbo society, in the case of wilful murder, the murderer could go on exile and upon return after a stipulated period, and after having performed the appropriate sacrifices and made prescribed restitutions, was integrated into the community.⁶⁴ Byamukama writes that in some African ethnic groups of western Uganda, Rwanda and northwestern Tanzania where a murderer was killed, compensation was an available option that could be arranged before angry relatives could avenge the death of their relatives.⁶⁵ Thus, the death was considered as a last resort.

Conceptually, there is difficulty accepting the taking of life in traditional African societies as the “death penalty”. Death was imposed as a response to the crime, when caught in the act. Concrete cases have not been documented showing that the death penalty was institutionalised in African societies or that a murderer, for example, was confined in a place (or prison) waiting to be killed. Hence, the death penalty in Africa as practiced today is not in the African tradition⁶⁶ (that is, the present death penalty system is not as it was practiced in traditional African societies), but as was introduced by the colonial powers since “African governments continue to echo the colonial rulers’ claims that execution is an appropriate and effective form of punishment”.⁶⁷

With regard to the argument that certain African practices allow for the taking of life, it is not disputed that it is important to take into consideration traditional practices, including those that allow for the killing of a person, when dealing with the death

⁶² Roscoe (1924) 102.

⁶³ Agostoni (2002) 76.

⁶⁴ Aja (2000) 231.

⁶⁵ Agostoni (2002) 74.

⁶⁶ This view has been portrayed by president Olusegun Obasanjo of Nigeria during the meeting of the Organisation of African Unity (OAU) in 1999. See Agostoni (2002) 76.

⁶⁷ Agostoni (2002) 77.

penalty. Justice Kriegler has acknowledged the need to take into account the traditions, beliefs and values of all sectors of a society with regard to developing jurisprudence.⁶⁸ Although abolishing the death penalty could mean discarding some African traditional practices, Justice Kriegler noted, with regard to the South African context, that in order to ensure compatibility with the principles of the new constitutional order, many aspects and values of traditional African law will have to be discarded or developed.⁶⁹

The necessity to discard such practices or philosophies comes to light if one considers the clash between traditions and modern values. Due to this clash, the evolution of such traditions, beliefs and values has to be taken into account in determining whether it is important to rely on them to justify the retention of the death penalty in Africa. At this point, it is important to understand what tradition actually means. Tradition is “a belief or practice transmitted from one generation to another and accepted as authoritative, or deferred to, without argument” or a practice or belief that is inherited, accepted, and preserved from previous generations.⁷⁰ Modernity refers to “the ideas, principles, and ideals covering a whole range of human activities that have underpinned western life and thought since the seventeenth century”.⁷¹ Every society in our modern world, from the point of view of a deep and fundamental conception of tradition, is traditional in as long as it maintains and cherishes values, practices and outlooks handed down to it by previous generations.⁷²

In general, based on the intelligibility of the concept of the modernity of tradition, traditions are not irreconcilable with modernity. However, some African traditional philosophies or practices, such as those that allow for the taking of life, are irreconcilable with modernity. Bearing in mind the fact that no human culture is unchanging, a traditional society does undergo varieties of changes eventually. The

⁶⁸ *Makwanyane* (1995) para 361.

⁶⁹ *Makwanyane* (1995) para 383.

⁷⁰ Gyekye (1997) 219, 264 & 271.

⁷¹ Gyekye (1997) 271.

⁷² Gyekye (1997) 217.

question that one needs to ask therefore is: What is the place of African traditional philosophies in modern African societies? In answering this question, the relevance of African traditional philosophies that allow for the taking of life in modern African societies has to be assessed. In carrying out this assessment, I will rely on two criteria provided by Gyekye, to judge the relevance of traditional values and ideas (and practices) to the circumstances of the present.⁷³ The fundamental nature of such African traditional philosophies or practices, and their functionality in the setting of the present are the two important criteria to be used.

How fundamental are these African traditional practices that allow for the imposition of the death penalty to human existence? The fundamental nature of a traditional practice has to be determined by human desires, wants and sentiments. Therefore, a traditional practice will be fundamental in a modern society if human desires or sentiments with regard to such practices are strong, and vice versa. The fact that fewer societies resort to trials by ordeal, ritual murder, honour killings, and other African traditional practices that allow for the taking of the life of a person shows that human sentiments or desires for such practices to go on is weakening.

In addition, the decline in sentiments and desires towards such practices is evidenced by the fact that African “courts”, presided over by chiefs and other traditional authorities, were much more ready to promote reconciliation and order compensation. For example, amongst the Moudang of Chad, one of the modes of conflict settlement is vengeance, under which the debit of an offence is measured by a human life. A murder victim’s clan has only two days to kill the murderer or one of his brothers. If this period expires, divination is resorted to. If the murderer is still alive after two days, vengeance comes to a close. Conciliation and compensation is then used to settle the conflict.⁷⁴ Therefore, such African traditional practices that allow for the taking of human life are not fundamental to human existence, and accordingly, not essential in modern African societies.

⁷³ Gyekye (1997) 260.

⁷⁴ Rouland (1994) 275.

With regard to the second criteria, the question one needs to answer is one of functionality - whether or not the African traditional practices that allow for the imposition of the death penalty play any effective or meaningful role in modern African societies. If such practices are effective and meaningful, then they have a place in modern African societies; if not, then they have to be regarded as outdated. Therefore, they have to be discarded, as they have no place in a modern society. As discussed above, trial by ordeal is used to ascertain guilt. But in modern African societies, trials take place in courts where guilt can be ascertained without submitting an accused to lethal tests.

An example of changing customs with regard to the death penalty, which goes to show that certain traditional practices have no role in a modern society, is that of the Basotho people. Previously, under the laws and customs of the Basotho people of southern Africa, notorious stock thieves, who are likely to put the country to war by stealing from neighbouring nations, were sometimes put to death. But in recent times, such cases are now heard under statute law in subordinate courts, where stock thieves are not put to death.⁷⁵ Moreover, the death penalty was not very fundamental in Basotho laws as not all murderers were put to death. Someone who commits murder was fined ten head of cattle, and if the murder was accidental, he was fined four or five head of cattle.⁷⁶

Thus, after considering the above two criteria, it is clear that African traditional philosophies or practices that allow for the taking of life for certain reasons or as punishment for a crime, have no place in modern African societies. This is so, especially if one takes into consideration the fact that the death penalty as practiced today is not in the African tradition and that there is a worldwide trend towards abolition of the death penalty.⁷⁷

⁷⁵ Duncan (1960) 112.

⁷⁶ Duncan (1960) 104-106.

⁷⁷ See chapter seven for a discussion of the abolition trend.

3.4 Religions in Africa

3.4.1 Major religions in Africa prescribe the death penalty

In addition to the death penalty being a philosophical, criminal-policy, human rights and social issue, it is also a religious issue. This is because it deals with issues like morality, life, and death. As Anderson rightly points out, it is natural for the death penalty to have religious points of attachment as it falls within the natural law ideology, contrary to the positivistic legal ideology.⁷⁸ Defenders of the death penalty, as seen below, are often of the view that major religions in Africa prescribe the death penalty, and therefore, it is justified for it to be used. Religion is relied on here because of its role and importance as a source of morality and law in Africa. The religious argument, with regard to the Bible and Islam (*Shari'a*), is discussed below, in each instance by postulating the argument for and by a rebuttal of the main contentions in favour of the death penalty.

3.4.1.1 The death penalty is prescribed in the Bible

For the purpose of this study, the literalist interpretation of two texts (the Old Testament and the New Testament), as advocated by proponents of each view, is adopted, without generalising the religion and its precepts as such. The Bible has been defined as “the sacred book of Christians, comprising the Old Testament and the New Testament” or “the sacred book of some other religion”.⁷⁹ It is an important cultural document, which continues to influence a great part of the world. It should be noted that two religions have roots in the Bible: first, Judaism, which originates from the Old Testament, and second, Christianity, which originates from both the Old and the New Testament of the Bible. The most influential factor accounting for the early and widespread acceptance of the death penalty was undoubtedly the Bible.⁸⁰ The subsequent paragraphs examine the Old and the New Testament of the Bible in

⁷⁸ Anderson (2001) 1, Chapter 5

⁷⁹ See *Longman Dictionary of the English Language* in *Penguin Hutchinson Reference Library* (1996) (CD-ROM).

⁸⁰ Megivern (1997) 9.

relation to the death penalty with the aim of showing, as defenders of the death penalty hold, that it prescribes the death penalty.

The Bible adopts a retributivist position on punishment. It places emphasis on the principle of retribution as can be seen in Exodus 21:23-25, which provides that punishment shall be “life for life,” an eye for an eye, a tooth for a tooth. Anderson has interpreted this to mean the following:⁸¹

If we harm another fellow human we at the same time admit that – according to the spirit of [this principle, “an eye for an eye”] – that others (i.e. the state governed by law) can do the same to us ... The principle means that the punishing consequence should be equal to what the victim has suffered ... The Biblical principle of “eye for eye” lays the foundation for the death penalty. The fundamental rule is that a life has to be paid for with a life. The Biblical expression “life for life” (Ex[odus] 21:23) often meant a death penalty, but not always.

Death is provided for in the Bible⁸² for crimes such as murder, cursing one’s parents, kidnapping, assault against one’s parents, magic, sexual relations with an animal, offering of sacrifices to other gods, homosexuality, blasphemy, adultery, incest, disobedience, and rape.⁸³ The provisions in the Bible on the death penalty also state the methods of execution - stoning, using a sword, spear or arrow, and burning are the manners of executions that could be used.⁸⁴

Some African priests such as Pastor Leicher, with reference to the Bible, have therefore justified the use of the death penalty in Africa and elsewhere. Pastor Leicher of the Pro-death Penalty Party in South Africa, who feels strongly about the death penalty, has relied on the Bible to justify why it should be reintroduced in South Africa and its retention in general. He argues, basing his argument on the premise that murder is the unlawful taking of life while killing is not, that the sixth commandment

⁸¹ Anderson (2001) 1, Chapter 5. The expression “life for life” does not mean a death penalty if a person accidentally kills someone he does not hate or did not intend to hurt or was not his enemy.

⁸² *Good News Bible* (1994).

⁸³ See Genesis 9:6; Exodus 21:12 & 15-17, 22: 18-19, 31:14; Leviticus 20:1-5 & 10-14, 19-21& 27, 21:9, 22: 20, 24:14-16, 23; Deuteronomy 13:1-5, 17:2-1 & 8-13, 18:20, 19:16 & 19, 22:22-25; Numbers 15:32-36, 35:16-21; Matthew 18:6.

⁸⁴ See Leviticus 20:17, 21:9; Exodus 19:13, 32:27; and Numbers 25:7-8.

reads, “Thou shall not commit murder” and not “Thou shall not kill”, meaning that it allows for the death penalty.⁸⁵ Therefore, the Bible allows the state to kill a murderer, but it is unlawful to commit murder.

Other retentionists have regarded the death penalty as a reflection of the will of God. Fischer, former South African Member of Parliament has stated as follows:

[T]he holy character of God is the basis of capital punishment ... The fact that God is holy and righteous, that He will not tolerate lawlessness, and that He seeks to punish it and expunge it from societies by placing a sword in the hands of the State, are foundational principles of our understanding of the legitimacy of capital punishment ... the civil government has the duty to put murderers to death.⁸⁶

In addition, Anderson has pointed out that that God’s use of the death penalty for certain crimes shows that he values mankind and the eternal moral principles, and that capital punishment exists as a defence and recognition of the high dignity and value of mankind.⁸⁷ The Bible’s position on the death sentence could be seen as firm as it denounces compensation in its place. In Numbers 35:31 it is stated, “a murderer must be put to death. He cannot escape this penalty by the payment of money”.

The New Testament does not attack or condemn capital punishment. Jesus actually agreed to the Old Testament law on murder as can be seen in Matthew 15:3-4. In his preaching, he reminded people to respect the law on the death penalty by saying: “And why do you disobey God’s command and follow your own teaching? For God said ... ‘whoever curses his father or his mother is to be put to death’”. Defenders of the death penalty could see this statement as an acknowledgement by Jesus that the death penalty is justifiable and valid. He accepts the death sentence as can be seen in Matthew 18:6, where he says that if anyone causes a Christian to sin, he should be

⁸⁵ Pastor Steve Leisher believes God has sent him a message “to fight for the death penalty so as to bring justice to the land”. He stated his view during a discussion on “Death and democracy”, broadcasted on Special Assignment, SABC 3 at 21h30 on 9 March 2004 (South Africa). For further information on the discussion on “death and democracy”, see <<http://www.sabcnews.com/specialassignment/deathdemoc.html>> (accessed 4 April 2004).

⁸⁶ Maduna (1996) 193.

⁸⁷ Anderson (2001) 5-6, Chapter 5.

punished with death by drowning. Even Jesus himself was later a victim of capital punishment. The death sentence was pronounced on him. The manner of his execution was by nailing him on a cross. In sum, defenders of the death penalty in Africa, maintain that it should be retained, as the Bible prescribes it.

3.4.1.2 Rebuttal of argument

Abolitionists have acknowledged the fact that the Bible recognises the death penalty as a form of punishment, and prescribes the death penalty for certain offences. However, at the very least, the argument is not beyond dispute or conclusive. Prejean, a nun and a well-known abolitionist has stated as follows:

It is abundantly clear that the Bible depicts murder as a capital crime for which death is considered the appropriate punishment, and one is hard-pressed to find a biblical “proof text” in either the Hebrew Testament or the New Testament which unequivocally refutes this. Even Jesus’ admonition “Let him without sin cast the first stone,” when he was asked the appropriate punishment for an adulteress (John 8:7) – the Mosaic Law prescribed death – should be read in its proper context.⁸⁸

Therefore, the provisions in the Bible have to be read in their proper context. Pastor Leicher of the Pro-death Penalty Party in South Africa, argues that the sixth commandment allows for the death penalty, as it reads, “Thou shall not commit murder” and not “Thou shall not kill”.⁸⁹ He supported his argument by stating that “murder is the unlawful taking of life”, while killing is lawful,⁹⁰ implying that if someone takes the life of another unlawfully (commits murder), the death penalty has to be imposed on that person. This argument is fundamentally flawed as he fails to consider other versions of the Bible that read - “thou shall not kill”. The above commandment can, therefore, not be used to justify the retention of the death penalty, as the wording of the text is not uniform, thus providing a loophole for wrong interpretations. The late Pope used this same verse of the Bible to argue against the

⁸⁸ Prejean (1996) 248.

⁸⁹ He stated this argument during a discussion on “Death and democracy”, broadcasted on Special Assignment, SABC 3 at 21h30 on 9 March 2004 (South Africa).

⁹⁰ As above.

death penalty, further stating that the Catholic Church welcomes all initiatives protecting human life, including abolition of the death penalty.⁹¹

Furthermore, it appears that Numbers 35:31, as stated above, denounces compensation, thus justifying the imposition of the death sentence. However, pardon and amnesty have not been denounced in the Bible, as there are instances in which a murderer can get amnesty or pardon. A murderer can escape the death penalty if the evidence in support of the accusation for murder is only that of one witness as provided for in Numbers 35:30. It states:

Anyone accused of murder may be found guilty and put to death only on the evidence of two or more witnesses; the evidence of one witness is not sufficient to support an accusation for murder.

Thus, the death penalty is not an absolute sentence as defenders of the death penalty try to portray. In the Old Testament, the deliberate murderer need not under all circumstances be put to death.⁹² In the New Testament, because of Jesus' teaching of love and forgiveness, there have been cases in which pardon has been granted. In John 8, Jesus sets free a woman who was about to be stoned to death for committing adultery. This rebuts the argument that the Bible allows for the death penalty. Thus, Jesus' distinctive teachings in the New Testament on non-retaliation, forgiveness, and love, even for one's enemies, runs counter to the above argument by defenders of the death penalty. Religious leaders have used three instances in the Bible to show the inappropriateness of the death penalty – the example of Jesus offering forgiveness at the time of his own unfair death, God's boundless love for every person, and the biblical imperative of reconciliation wherever there is conflict.⁹³

⁹¹ Message of his Holiness, Pope John Paul III, presented at the "Second World Congress against the Death Penalty" held in Montréal, Canada from 6-9 October 2004. The author of this thesis was present at this Congress.

⁹² C Henry, "Does Genesis 9 justify capital punishment? Yes" in R Youngblood, *The Genesis Debate* (1990) 241, cited in Megivern (1997) 13.

⁹³ Megivern (1997) 394.

It is clear from the above that the Bible cannot be used to justify the retention of the death penalty. Most of the provisions on the death penalty are found in the Old Testament, which was written before the New Testament. The New Testament lays emphasis on forgiveness, non-retaliation and love. The New Testament supersedes the Old Testament. Jesus said in Matthew 5:38-39 that “you have heard that it was said, 'An eye for an eye and a tooth for a tooth.' But I tell you ... whoever slaps you on your right cheek, turn the other to him also.” This goes to invalidate the phrase “an eye for an eye” in the Old Testament.

In addition, Chimhini, former executive director of ZimRights has stated that “the legendary eye for an eye concept is outdated, inhumane, immoral and evil.”⁹⁴ Also, the Zambian President’s refusal to sign execution orders because he is a Christian⁹⁵ shows that the Bible cannot be used to justify the retention of the death penalty. Mwanawasa has gone further to justify the abolition of capital punishment from a Biblical point of view. He states the following:

The first known and recorded murder is the murder by Cain, who killed his brother Abel. God as judge did not impose capital punishment on Cain but sentenced him to life imprisonment adding that whoever shall kill Cain shall be punished seven times. It is also noted that the sixth of the ten commandments that God gave to Moses states as follows: “thou shall not kill”... It will be misleading to cite verses in the Bible, particularly from the Old Testament, out of context as representing Christian thinking ... Even for those proponents who justify death for vengeance purposes, my submission is that, it is not for man to perpetrate vengeance. This should be preserved for God (see Romans 12:9) ... I feel strongly about the issue of capital punishment that I have informed the Prerogative of Mercy Committee that as long as I remain President, I shall not execute a death warrant.⁹⁶

On the whole, progressive acceptance of human rights standards on the abolition of the death penalty supersedes the Bible. Thus, Migivern has stated that whatever “right to kill” may have accrued to states in circumstances of the past, it has been fully

⁹⁴ D Mavunduse, “A new millennium free from death penalty in southern Africa?” <<http://www.sardc.net/editorial/sanf/1999/09/30-09-1999-nf2.htm>> (accessed 30 June 2004).

⁹⁵ *Legalbrief News Diary*, 23 May 2003 <<http://www.legalbrief.co.za>> (accessed 10 July 2003).

⁹⁶ Hands Off Cain (2004) 9-11.

superseded by the “right to life” of the human person in the circumstances of the present.⁹⁷

3.4.1.3 The death penalty is prescribed in the *Shari’a*

The *Shari’a* contains the rules by which a Muslim society is organised and governed, and it provides the means to resolve conflicts among individuals and between the individual and the state.⁹⁸ Islam is one of the major religions in Africa that prescribe the death penalty. Some Arab scholars are of the view that the retention of the death penalty is “essential for the maintenance of law and order”.⁹⁹ African countries with legal systems that adopt Islamic law (the *Shari’a*) are the major supporters of the death penalty. In North Africa, support for the retention of the death penalty has been strengthened by the growing influence of Islamic law.¹⁰⁰ Muslims in Nigeria have repeatedly emphasised that the abolition of death penalty will be perceived as a direct affront to their religion.¹⁰¹ It is their contention that the religion provides for the application of death penalty and such provisions are immutable.¹⁰² Against the backdrop of constant religious crisis in the country, it portends a grave danger to abolish the death penalty without resolving the religious questions raised by the

⁹⁷ Megivern (1997) 489.

⁹⁸ The word *Shari’a* means "the path to a watering hole". It denotes an Islamic way of life that is more than a system of criminal justice. *Shari’a* is a religious code for living, in the same way that the Bible offers a moral system for Christians. Most Muslims to a greater or lesser degree, as a matter of personal conscience, adopt it. But it can also be formally instituted as law by certain states and enforced by the courts. Many Islamic countries have adopted elements of *Shari’a* law. See S Steiner, “Sharia law” <<http://www.guardian.co.uk/theissues/article/0,6512,777972,00.html>> (accessed 1 October 2003), for further information on the Islamic legal system.

⁹⁹ H Yahmdi, “Between human rights and religion about capital punishment’ in *Realités* (2000) 7, No. 758, Tunisia; cited in Slama (2001) 398, 419.

¹⁰⁰ For example, in Nigeria; see A Olajide, “Shariah gains more ground in Yorubaland” in *Weekly Trust* (Kaduna), 15 November 2002 <<http://allafrica.com/stories/200211150139.html>> (accessed 1 October 2003). See also, S Steiner, “Sharia law” in *Guardian Unlimited*, 20 August 2002 <<http://www.guardian.co.uk/theissues/article/0,6512,777972,00.html>> (accessed 1 October 2003).

¹⁰¹ Stated in the report of the national coordinator of Nigeria, Jude Ilo, presented at the “First International Conference on the Application of the Death Penalty in Commonwealth Africa” held in Entebbe, Uganda from 10 – 11 May 2004 (see <<http://www.biicl.org/deathpenalty>> (accessed 30 June 2004)).

¹⁰² As above.

Muslims.¹⁰³ Also, at the UN General Assembly late in 1994, Sudan expressed the view that “capital punishment is a divine right of some religions. It is embodied in Islam and these views must be respected”.¹⁰⁴ The government, therefore, used the provision of the death penalty under Islamic law to justify its retention in Sudan.

It is important to first look at the sources of Islamic law and capital offences in order to better understand the argument that the death penalty should be retained because Islamic law prescribes it. There are two sources of Islamic law: first, the Koran (*Qu’ran*), which contains the words of Allah (God). It was definitively transcribed some 40 years after the death of the prophet Mohammed, and is arranged in 114 *sura* (chapters). The second source is the *Sunna*, which was compiled 136 years after the death of the prophet Mohammed. The Koran is the principal source of the *Shari’a*, which is supplemented by the *Sunna*.¹⁰⁵ It should be noted that there is no dispute among Muslims that the Koran is the basis of the *Shari’a* and that its specific provisions are to be scrupulously observed.¹⁰⁶

With regard to the death penalty in the *Shari’a*, the question of interpretation has to be examined. Bassiouni has pointed out that “to understand the *Shari’a* in all its complexities requires knowledge of the jurisprudential and scholarly interpretations and applications” throughout different Muslim regions characterised by “different cultures, customs and mores” that influence the way they interpret and apply the *Shari’a*.¹⁰⁷ There have been debates among different schools of jurisprudence as to whether the Koran and the *Sunna* should be interpreted literally, or on the basis of the intent and purpose of the text, or both. Thus, whether or not capital punishment is a legitimate punishment in *Shari’a* will depend on the form of interpretation.

¹⁰³ As above.

¹⁰⁴ Hood (2002) 38.

¹⁰⁵ Bassiouni (2000) 65. It should be noted that when it comes to interpretation of the law, there are other sources of law that supplement the above two sources. These sources include: *Al-Urf* (custom and usage), *Maslaha* (public interest), *Istihsan* and *Istihlas* (equity), *Ijtihad* (best reasoning), treaties and pacts, and the edicts of the *Khalifas* and local rulers.

¹⁰⁶ “Islamic law - The Sharia” <<http://www2.ari.net/gekl/islam/law.htm>> (accessed on 1 October 2003).

¹⁰⁷ Bassiouni (2000) 73.

There are three categories of interpreters: first, traditionalists who are also seen as literalists and rely on the purposes of the *Shari'a* in their interpretations of the Koran. Second, fundamentalists who are dogmatic and seek solutions of earlier times as a remedy for difficult contemporary problems. The reason is that fundamentalists have a firm conviction that Islam cannot be altered. Third, reformists and *Ilmani*¹⁰⁸ who search for the purposes and policies of the *Shari'a* so as to address contemporary problems, and also rely on jurisprudential techniques in light of scientific knowledge because they seek to achieve the legislative goals of the *Shari'a*.

As regards capital offences, there are three sets of crimes within *Shari'a* for which the death penalty could be imposed. These are *Hudud*, *Qesas*, and *Ta'azir*. These crimes do not have the same sources of law, thus, multiple sources of law are used to define crimes. The subsequent paragraphs examine these crimes with regard to the death penalty with a view to showing, as argued above, that *Shari'a* law prescribes the death penalty.

The penalties for *Hudud*¹⁰⁹ crimes are set out in the Koran, and the Sunna supplements them. In general, the penalties for *Hudud* crimes are not universally adopted as law in Islamic countries. Some countries, such as Saudi Arabia, which applies Islamic law in its entirety, enforce the penalties for *Hudud* offences. In others, such as Pakistan, the penalties have not been enforced. The majority of Middle Eastern countries, including Jordan, Egypt, Lebanon and Syria, have not adopted *Hudud* offences as part of their state laws. Death is the penalty for certain *Hudud* crimes: *Haraba* (brigandage or armed robbery that results in homicide), *Baghi* (transgression or uprising against a legitimate ruler), *Zena* (adultery committed by a married person), and *Ridda* (apostasy). The Koran or the *Sunna* prescribes the death penalty for these crimes.

Qesas crimes relate to transgressions against the physical integrity of a person, which includes homicide and infliction of physical injury. Penalties for *Qesas* crimes are provided for in the Koran. With regard to *Qesas* crimes, the Koran adopts a

¹⁰⁸ *Ilmani* means those who use knowledge and refers to the forward thinking traditionalists.

¹⁰⁹ In Arabic, *Hudud* means the limits or the limits prescribed by Allah.

retributivist position on punishment, as the punishments emphasise the principle of “an eye for an eye, a tooth for a tooth”.¹¹⁰ Death is the punishment for homicide (premeditated or intentional murder) if the family of the victim seeks retaliation.

The penalties for *Ta'azir* crimes can be the same as that for *Hudud* and *Qesas* crimes. Because *Ta'azir* crimes can be legislated, their penalties reflect cultural perspectives and social policy choices. With regard to *Ta'azir* crimes, the death penalty can be imposed as punishment for espionage and sodomy.¹¹¹ From the aforementioned, it is clear that the death penalty can be imposed under *Shari'a* law.

3.4.1.4 Rebuttal of argument

The death penalty for most offences under *Shari'a* law is discretionary, for instance, *Hudud* crimes must satisfy all evidentiary requirements. Due to the fact that the *Shari'a* is concerned with the paramount issues of fairness, procedural safeguards have been put in place to ensure a fair trial.

With regard to the above crimes, the prosecution is bound to prove its case on an absolute standard of certainty, free from all ambiguity or doubt. This burden of proof, with its intricate system of checks and balances, is so rigorous that it is surmised by some Islamic scholars that the *Hudud* does not permit proof by circumstantial evidence.¹¹² For example, as proof of the offence of adultery, the Koranic requirement is four “reputable” adult witnesses (known as persons of impeccable moral uprightness) and who were independent witnesses to the actual act. Otherwise the person alleging the offence of adultery would be flogged 80 times, for bearing false witness. The verse states: “And those who launch a charge against chaste women and

¹¹⁰ *Qesas* means equivalence. It can be seen as *Talion* law because it calls for the infliction upon the wrongdoer of the same injury that he caused to his victim.

¹¹¹ Slama (2001) 420.

¹¹² M Iman, “Punishments under Sharia and their significances” *Newswatch* (Lagos), Volume 36, Number 18, 4 November 2002 <<http://allafrica.com/stories/200211040748.html>> (accessed 1 October 2003).

produce not four witnesses-Flog them with 80 stripes; And reject their evidence ever after: for such men are wicked transgressors” (Surah An-Nur 24:23).¹¹³

The above implies that imposition of the death penalty under the *Shari'a* is an exceptional measure. Thus, the *Shari'a* cannot be a firm base for arguing for the retention of the death penalty, since very strict requirements have to be satisfied, and in case of doubt, the law is always interpreted for the benefit of the accused,¹¹⁴ and the *Qu'ran* precludes punishment (including capital punishment) where an offender genuinely repents.¹¹⁵

Moreover, some opponents of the death penalty have stated that the death penalty for several crimes in Muslim states is a policy choice, but not one that is necessarily mandated by *Shari'a*, as its application for most offences is either optional or conditional.¹¹⁶ For example, *Hudud* crimes must satisfy all evidentiary requirements. The death penalty is optional for all *Hudud* crimes but for armed robbery where it results in homicide.¹¹⁷ However, this punishment can be remitted if the offender repents before arrest. In Sudan for example, that adopts *Shari'a* law, section 169(1) of the Penal Code 1991 provides that the penalty (which is the death sentence) for armed robbery can be remitted if the offender repents before his arrest. Even for adultery, where the death penalty is optional, if imposed it can be remitted if the offender retracts his confession or if a witness retracts his testimony.¹¹⁸

With regard to *Qesas* crimes, the death penalty will not be imposed in cases of murder, where there is forgiveness by the victim and the heirs of the victim. For example, section 38(1) of the Sudanese Penal Code 1991 provides that execution for *Qesas* shall be remitted with pardon of the victim or his relatives. The *Shari'a* does

¹¹³ Iman (as above).

¹¹⁴ Bassiouni (2000) 83.

¹¹⁵ Bassiouni (2000) 82-83.

¹¹⁶ Bassiouni (2000) 84.

¹¹⁷ Bassiouni (2000) 78.

¹¹⁸ See, for example, sections 146 & 147 of the Sudanese Penal Code 1991.

not provide for the death penalty for *Ta'azir* crimes. Such crimes can be legislated by secular legislation, thus can be the subject of penalties other than death.¹¹⁹ Therefore, Muslim states can inhibit the death penalty and still remain consistent with the *Shari'a*.¹²⁰

3.5 Public opinion

The concept of public opinion, it should be noted, is unquestionably open to a number of interpretations. Public opinion refers to the opinions, views or beliefs held by the general public, especially on an issue of national importance.¹²¹ Public opinion can be established through polls, referendum or other surveys. Public opinion surveys carried out in some African states, as seen below, have shown that the majority favour the death penalty.

In South Africa for example, a number of surveys have shown that the majority of the population favoured the retention of capital punishment.¹²² A Markinor survey in 1995 indicated that 62 per cent of the entire population favoured the retention of capital punishment.¹²³ In 1996, a Human Sciences Research Council survey found that 71.4 per cent of the South African population favoured the death penalty.¹²⁴ Another survey was conducted during the same period by the University of Stellenbosch, which indicated that 64 per cent of the African National Congress (ANC) membership favoured the return of the death penalty in South Africa.¹²⁵ Also, in 2004, an opinion

¹¹⁹ Bassiouni (2000) 82.

¹²⁰ For example, in 1980, the death penalty was reduced in Libya to only four crimes. This can be seen as a step towards abolition see chapter two for a discussion on the restriction of the number of offences for which the death penalty is imposed as a step towards abolition.

¹²¹ See *Longman Dictionary of the English Language* in *Penguin Hutchinson Reference Library* (1996) (CD-ROM).

¹²² For more information on these surveys, see Human Sciences Research Council, *In focus forum*, October 1996 Volume 4, Number 2.

¹²³ As above.

¹²⁴ As above.

¹²⁵ As above.

poll was carried out in South Africa with regard to whether the death penalty should be reinstated.¹²⁶ 90 per cent of the population voted for the reinstatement of the death penalty and 10 per cent voted against it.¹²⁷

3.5.1 Public opinion in Africa favours the death penalty

On the basis of available evidence (discussed in this section), it is assumed that the majority in all African societies favour the retention of the death penalty. Therefore, “public opinion demands it” is one of the reasons commonly given for retaining the death penalty in Africa. According to this argument, the laws of a country are to mirror the will of the people. This reason has been put forward not only by retentionists generally but also by officials who say that they personally oppose capital punishment.¹²⁸ Despite continued campaigning against the death penalty by Tanzanian Non-Governmental Organisations (NGOs) and religious groups, the Justice Minister said in July 2002 that the government had no plans to abolish the death penalty, stating that it had widespread public support.¹²⁹ Also, in Zanzibar (Tanzania), the Minister of State in the president’s office responsible for constitutional affairs, Mwakanjuki, stated that Zanzibar will not be swayed by ongoing crusades worldwide against the death penalty, as the government believes the death penalty is still accepted by the people of Zanzibar since it has received no complaints condemning it.¹³⁰ The president of Botswana in a *BBC Hardtalk* interview with Sebastian after Bosch was executed, asserted that there is nothing that he could do in terms of granting clemency since the law and the people are in favour of the death penalty.¹³¹

¹²⁶ The question for the opinion poll “should South Africa bring back the death penalty?” was posed by the presenter of the programme Special Assignment, SABC 3 at 21h30 on 9 March 2004. For further information, see <<http://www.sabcnews.com/specialassignment>> (accessed 4 April 2004).

¹²⁷ The results of the opinion poll were released during the next broadcasting of the programme Special Assignment SABC 3 at 21h30 on 16 March 2004.

¹²⁸ Amnesty International (1989) 22.

¹²⁹ *Amnesty International Report* (2003) 245.

¹³⁰ “Death penalty to stay” *Daily News* (Tanzania), 23 October 2003.

¹³¹ O Tshosa, “The death penalty in Botswana in the light of international law” 8, paper presented at the “First International Conference on the Application of the Death Penalty in Commonwealth Africa” held in Entebbe, Uganda from 10 – 11 May 2004 (see website <<http://www.biicl.org/deathpenalty>> (accessed 30 June 2004)).

Those who put forward the public opinion argument often cite opinion polls evidently showing strong support for the death penalty, and argue that it would be undemocratic in the face of such support for the death penalty to be abolished as abolition without public support would undermine confidence in the law and possibly lead to private vengeance. Therefore, the strength of public opinion in favour of the death penalty counts against its abolition. For example, Malabo, legal affairs minister of Zambia, has stated that the government will only accede to the Second Optional Protocol to the ICCPR when it has achieved full national consensus on the abolition of the death penalty.¹³²

Some governments or courts in Africa have used public opinion as one of the barometers for deciding whether the death penalty is constitutional or not, or whether it violates evolving standards of decency. Public support for the death penalty has been used by the government of Tanzania to head off a challenge to capital punishment. In *Republic v Mbushuu and Another*,¹³³ the Tanzanian High Court had to decide on the constitutionality of the death penalty. It was pointed out in this case that it can be asserted with certainty that the majority of the people in Tanzania support the death penalty, and that the minority support abolition. It was argued by counsel for the Republic that

[i]n a democratic state like Tanzania, the views of the majority should be respected. This is because for any system of justice to work, it must be credible in the eyes of the people of the country concerned. For this reason the court's and parliament's attitudes should not be radically different from those of society as a whole. It is very dangerous in fact to allow penal policy to jump too far ahead of the population, since it will result in the loss of public confidence in the criminal justice system and concomitantly in the alienation of the public from it. There is abundance evidence that members of the Tanzanian public often resort to mob justice in a situation in which they feel that the criminal justice system and/or its agencies lack the competence or the will to protect them against crimes. Therefore no civilised community should provoke such a situation in the name of a so-called 'progressive' penal policy.¹³⁴

¹³² AFRICANEWS – “Zambia: Prisoners challenge capital punishment”
<<http://lists.peacelink.it/afrinews/msg00190.html>> (accessed 12 February 2004).

¹³³ *Republic v Mbushuu and Another* [1994] 2 LRC 335 (hereinafter referred to as *Mbushuu* (1994)).

¹³⁴ *Mbushuu* (1994) 349.

The above passage is to the effect that the abolition of the death penalty will go against public support for the death penalty, and if this is done, then people will lack confidence in the law or criminal justice system and might resort to vengeance. Despite the above, the High Court went ahead to rule that the death penalty was unconstitutional because it found that it is not in the public interest.¹³⁵ On appeal, the Tanzanian Court of Appeal declared the death penalty to be constitutional on the ground that the society deems the death penalty as reasonably necessary.¹³⁶ The Court was of the view that it was for the society to decide whether or not the death penalty is reasonably necessary, and since society favoured the death sentence, the “reasonable and necessary” standard had been met. The Court of Appeal expressed its view in the following words:

[I]t is our decided opinion that what measures are necessary to deter the commission of capital crimes or to protect society are matters for decision by every individual society...the crucial question is whether the death penalty is reasonably necessary to protect the right to life. For this we say it is the society which decides. The trial judge in the above passage acknowledges that presently the society deems the death penalty as reasonably necessary. So, we find that although the death penalty as provided by s 197 of the Penal Code offends art 13(6)(a) of the Constitution it is not arbitrary, hence a lawful law, and it is reasonably necessary and it is thus saved by art 30(2).¹³⁷

Seleoane has pointed out that one has to recognise the fact that the people are never in agreement on matters such as capital punishment.¹³⁸ It is necessary that an opportunity be created for people to express themselves fully on such matters, and it is not for the Court to decree that the people should never be afforded the opportunity to influence the outcome of the debate on capital punishment.¹³⁹ Thus, he saw the South African Constitutional Court’s placing of the issue beyond the reach of the people in *S v*

¹³⁵ *Mbushuu* (1994) 358.

¹³⁶ *Mbushuu and Another v Republic* [1995] 1 LRC 216, 232 (hereinafter referred to as *Mbushuu* (1995)).

¹³⁷ *Mbushuu* (1995) 231-232 (CA).

¹³⁸ Seleoane (1996) 47.

¹³⁹ Seleoane (1996) 47-48.

Makwanyane as fairly undemocratic, as the Court did not receive statistics on the attitudes of the population to capital punishment.¹⁴⁰

With regard to the point that public opinion cannot be relied on as it fluctuates or that the public is inconsistent, defenders of the death penalty, such as Seleoane, do not see this as a problem because people's attitudes are always influenced by what is happening on the ground, and a community is always changing and evolving. The fact that attitudes change does not mean that people should not be able to determine the laws that they are expected to live under. They should be able to determine these laws through their elected representatives. In support of this, Seleoane states the following.¹⁴¹

[I]n pronouncing that the people must never be afforded the opportunity to decide whether we shall have capital punishment or not, the Constitutional Court [in the *Makwanyane* case] was no longer interpreting the Constitution. The Court was then prescribing that its judgement is timeless and immutable. The Court was laying down that provisions of the Constitution which allowed it to arrive at the particular judgement the Court arrived at, in my respectful view, is undemocratic: and the Court itself says so. The pronouncement of the Court, in my respectful view, goes against nature itself: nothing in nature is timeless and immutable.

Thus, a wide opinion among the people supporting the death penalty is a reason for its retention. Anderson, in support of this point, states that

the death penalty is a serious question concerning life or death for people. It is therefore reasonable to assert that people – after an impartial and unbiased information and when both sides have got as much space in media – should be allowed to state their opinion by a consultative popular vote, concerning the being or non-being of the capital punishment. This would be healthy for democracy and for the modern state governed by law.¹⁴²

Anderson is, therefore, of the opinion that it will not be healthy for a democracy if public opinion is not taken into consideration in deciding whether to abolish or retain the death penalty. A crisis of democracy will arise if the government manifestly

¹⁴⁰ As above.

¹⁴¹ Seleoane (1996) 78.

¹⁴² Anderson (2001) 2 (Argument 16), Chapter 2.

ignores the will of the people. For example, the people elect the Constitutional Assembly because for the constitution to be legitimate, it has to be written by those who have the people's mandate (that is, those who have been elected by the people to write the constitution according to the will of the people). In such circumstances, it is difficult for the government to come up with any clear basis on which they can ignore the will of the people. Thus, failure to take cognisance of the will of the people will be to ridicule the whole exercise.

Furthermore, in a democratic society, as can be deduced from the position in the USA, states have to give the people (both retentionists and abolitionists) an opportunity to state their opinion on the death penalty. The process used to arrive at a decision should also be democratic. In *Furman v Georgia*, Justice Powell stated that in a democracy, the first indicator of the public's attitude must always be found in the legislative judgments of the people's chosen representatives.¹⁴³ The majority of the United States Supreme Court held, and in support of the above, in *Gregg v Georgia*, that the fact that state legislators had revised their laws in order to ensure that capital punishment could be enforced against the most egregious type of murderer was an expression of public sentiment; and that this cannot be overturned by an abstract judgment that the death penalty, by itself, was "cruel and unusual punishment".¹⁴⁴

Legislative steps, as stated above, are not the only indicator of public opinion. Another indicator of public opinion can be found in the views, not necessarily legislative actions, of the citizen's elected officials or representatives. For example, the United States stated in a report to the UN Human Rights Committee that, "the majority of citizens through their freely elected officials have chosen to retain the death penalty for the most serious crimes, a policy which appears to represent the majority sentiment of the country".¹⁴⁵ Also, Botswana has uttered the view that the

¹⁴³ *Furman v Georgia* (1972) 408 US 238 at 436-437.

¹⁴⁴ See *Gregg v Georgia* 428 U.S. 153. See also, S Dike, *Capital punishment in the United States* (1982) 60, cited in Hood (2002) 235.

¹⁴⁵ Initial report of United States of America submitted under article 40 of the ICCPR, UN Doc. CCPR/C/81/Add.4, 24 August 1994, para 139.

state must “express the will of the people”¹⁴⁶ In addition, the European Court of Human Rights has pointed out the importance of taking into consideration the opinion of the public with regard to the law, and that public opinion cannot be ignored in a democracy. Walsh J in *Dudgeon v United Kingdom* stated as follows:

[I]n a democracy the law cannot afford to ignore the moral consensus of the community. If the law is out of touch with the moral consensus of the community, whether by being either too far below or too far above it, the law is brought into contempt.¹⁴⁷

It is clear from the aforementioned that, as argued by defenders of the death penalty in countries where public opinion is in support of the death penalty, it should be retained, as abolishing it in the face of such support will be undemocratic. Moreover, abolition of the death penalty without public support would undermine confidence in the law and possibly lead to private vengeance.

3.5.2 Rebuttal of argument

In some African states where there is reliance on the public opinion argument, public opinion surveys have not been carried out. Thus, it is doubtful if the assertions are accurate. In *Republic v Mbushuu and Another*, in which the public opinion argument was raised, it was asserted with confidence that the majority of the people of Tanzania are not against capital punishment and that the abolitionists are a minority group, although no public opinion survey was carried out at that time.¹⁴⁸ In other countries, public opinion polls or surveys have been carried out. In Uganda, for example, an opinion survey was carried out among ordinary people in the capital Kampala, which showed opposition to the execution of Ugandan soldiers carried out in 2002.¹⁴⁹

¹⁴⁶ Hood (2002) 233.

¹⁴⁷ *Dudgeon v United Kingdom* (1982) 4 EHRR 149 at 184.

¹⁴⁸ *Mbushuu* (1994) 349.

¹⁴⁹ “Ugandan soldiers executed” <http://www.santegidio.org.pdm/news2003/06_03_03_b.html> (accessed 11 February 2004).

Furthermore, the fluctuating and inconsistent nature of public opinion is problematic, although defenders of the death penalty fail to see it as a problem as noted above. Public opinion is strongly divided and more often than not, it is based on an incomplete understanding of the relevant facts and the results of opinion polls vary depending on the type of questions posed.¹⁵⁰ This points to the fact that public opinion cannot be relied on to defend the death penalty.

The inconsistency of public opinion is due to its reliance on irrational reasoning that is based on ignorance. Research has shown that public opinion on capital punishment, in for example South Africa and USA, is generally ignorant and often based on incorrect beliefs.¹⁵¹ These include the belief that the death penalty is a deterrent to crime. Didcott J in *S v Makwanyane* stated that “most members of the public who support capital punishment do so primarily in the belief that, owing to its uniquely deterrent force, they and their families are safer with than without persecution”.¹⁵² But it has not been proven to deter more effectively than other forms of punishment as discussed below.

However, some weight has to be given to public opinion, and it may be accepted that, at present, a majority of Africans do support the death penalty. But since public opinion is bound to fluctuate, the question that arises is: When can public opinion be relied on? Dworkin distinguishes two categories of issues – “choice sensitive” and “choice-insensitive” issues.¹⁵³ The former relates to policy decisions, that is, “issues whose correct solution, as a matter of justice, depends essentially on the character and distribution of preferences within the community”.¹⁵⁴ The latter relating to decisions

¹⁵⁰ For example, in a study carried out in New York by William Bowers, 71 per cent supported capital punishment. But the number dropped to 19 per cent when asked if offered the alternative of life without parole plus restitution to the victim’s family (Hodgkinson (2000) 22).

¹⁵¹ Garland (1996) 10.

¹⁵² *Makwanyane* (1995) para 188.

¹⁵³ R Dworkin, “What is equality? Part 4: Political equality” (1987) 22 *University of Francisco Law Review* 1, referred to in Viljoen (1996) 666.

¹⁵⁴ As above.

of principle, that is, those issues the right answer to which does not depend substantially on what a majority of people might think.¹⁵⁵

Although Dworkin does not clearly identify the issue under which capital punishment falls, it is suggested that, since determining what category under which it falls is a choice-intensive issue and considering its severe nature, the death penalty falls under the second category. The South African Constitutional Court in addressing the role of public opinion in the context of the death penalty, though not explicitly, places the question of the constitutionality of the death penalty under the second category. As can be inferred from the *Makwanyane* decision below, determining whether or not to abolish the death penalty does not depend substantially on what the majority of people think.

In the landmark case of *S v Makwanyane*, in which the Court had to decide on the constitutionality of the death penalty, Justice Chaskalson stated as follows:

Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty ... By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority.¹⁵⁶

The Court is clear that in order to protect minorities, it has to reject the merits of public opinion relating to important constitutional issues. Justice Chaskalson goes further to state his disagreement with the decision in the *Mbushuu* case in which the Court of Appeal of Tanzania found the death penalty to be constitutional on the ground that society favoured the death sentence, thus, meeting the reasonable and necessary standards.¹⁵⁷ He noted that the Court in deciding whether the death penalty

¹⁵⁵ As above.

¹⁵⁶ *Makwanyane* (1995) para 88.

¹⁵⁷ *Makwanyane* (1995) para 114-115.

is constitutional considers societal attitudes in evaluating whether the legislation is reasonable and necessary, but the ultimate decision must be that of the Court and not the society.¹⁵⁸ In support of the above, Didcott J stated that

[t]he issue is also, however, a constitutional one. It has been put before [the Court] squarely and properly. We cannot delegate to Parliament the duty that we bear to determine it, or evade that duty otherwise, but must perform it ourselves ... To allow ourselves to be influenced unduly by public opinion would, in any event, be wrong.¹⁵⁹

Madala J, clearly states that the Court does not have to “canvass the opinions and attitudes of the public” when deciding on the constitutionality of the death penalty or any enactment.¹⁶⁰ Kentridge J in the same case also pointed out that

[c]apital punishment is an issue on which many members of the public hold strong and conflicting views. To many of them it may seem strange that so difficult and important a public issue should be decided by the eleven appointed judges of this court.¹⁶¹

In a nutshell, public opinion cannot be a decisive factor with regard to the constitutionality of the death penalty. It should be noted that the extent to which governments will respect public opinion in penal policy matters depends on their political ideology and the sources from which they believe the authority of the law should emanate. However, it is suggested that respect for, and protection of, human rights should never be dependent, for the most part, on public opinion.

3.6 Criminological justifications for the imposition of capital punishment

The death penalty is unavoidable in discussions of punishment. Therefore, understanding the theories of punishment is important in understanding the debate on the death penalty. There have been a considerable number of criminological studies on the issue of punishment, which deal with the theories of punishment. Retentionists

¹⁵⁸ *Makwanyane* (1995) para 115.

¹⁵⁹ *Makwanyane* (1995) para 188.

¹⁶⁰ *Makwanyane* (1995) para 256.

¹⁶¹ *Makwanyane* (1995) para 192.

have used the purposes of punishment to justify the imposition of the death penalty. The main theories behind the concept of capital punishment concern retribution, deterrence, prevention and rehabilitation.¹⁶² The subsequent paragraphs discuss these theories, as used by Africans, to justify the retention of the death penalty.

3.6.1 Retribution

3.6.1.1 The death penalty has to be imposed for the purpose of retribution

Retribution is one of the arguments used to justify the retention of the death penalty in most retentionist African states. In Sudan, for example, the death penalty is allowed for the purposes of retribution.¹⁶³ The Libyan government has stated that the death penalty is restricted in Libya to, amongst others, cases in which it can be imposed by way of retribution.¹⁶⁴ The Attorney General in *S v Makwanyane* contended that the imposition of the death sentence “meets the sentencing requirements for extreme cases of murder more effectively than any other sentence can do”, basing his contention on, *inter alia*, the fact that it meets the need for retribution.¹⁶⁵

The retributive theory is based on the premise that the commission of a crime disturbs the balance of the legal order, which will only be restored once the offender is punished for his crime.¹⁶⁶ In other words, since a crime is a negation of the law, punishing the offender is an attempt towards cancelling the crime, thus restoring the balance of the legal order. If this balance is not restored, society will succumb to popular justice - people taking the law into their own hands. In the death penalty context, retribution implies that only the taking of the murderer’s life restores the

¹⁶² Seleoane (1996) 5. Also see generally, Loewy (2000).

¹⁶³ See section 33 of the Constitution of the Republic of Sudan 1998, providing for the infliction of the death penalty for the purposes of retribution.

¹⁶⁴ See the third periodic report of Libya submitted under article 40 of the ICCPR, UN Doc. CCPR/C/102/Add.1, 15 October 1997, para 27.

¹⁶⁵ *Makwanyane* (1995) para 112.

¹⁶⁶ Snyman (1992) 17-18.

balance of justice and allows society to show believably that murder is intolerable and will be punished in kind.¹⁶⁷

Expiation, formal denunciation, and mollification of the injured party are three variants to retribution that have been recognised by Burchell and Hunt.¹⁶⁸ Expiation aims at purifying society by removing the criminal from its midst. With expiation, emphasis is placed on the offender's moral blameworthiness – the more moral blameworthy the offender, the more severe will be the punishment.

As regards formal denunciation, punishment is justified on the ground that it is a categorical denunciation of the crime by the community. The community denounces the crime because it is a way of expressing its compassion towards the affected victim(s) of the crime, affirming that the violent criminal or murderer does not deserve the compassion of the state, and promoting respect for human life. In *Republic v Mbushuu and Another*, it was argued that

[s]ociety through the death penalty must denounce the taking of human life in the most emphatic manner possible and it is therefore right that society's extreme disapproval and indignation should be signified by imposing the ultimate penalty of death. By doing so society reinforces and promotes public respect for life.¹⁶⁹

Lord Denning has also emphasised the importance of punishment as an emphatic denunciation of crime by the community. In 1953, before a Commission of Inquiry investigating the desirability of retaining the death penalty in Britain, he stated:

Punishment is the way in which society expresses its denunciation of wrong doing: and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them...The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not ... The

¹⁶⁷ Michigan State University and Death Penalty Information Centre, "Arguments for and against the death penalty" (2000) <<http://deathpenaltyinfo.msu.edu>> (accessed 3 October 2003).

¹⁶⁸ Burchell & Hunt (1970) 69-72.

¹⁶⁹ *Mbushuu* (1994) 353.

ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of the crime.¹⁷⁰

Mollification involves preventing the public from taking the law into its own hands. It is to the effect that the offender should be punished in such a way that the aggrieved party will be satisfied, and not take the law into his or her own hands, since the offender will now see the law as effective and will continue to respect it. Pasteur Bizimungu, former president of Rwanda, in support of the death penalty stated that the death penalty will prevent people from taking the law into their own hands.¹⁷¹ The Attorney General in *S v Makwanyane* put forward the same argument. He maintained that the law will be brought into disrepute if the courts impose lenient sentences on convicted criminals; and that in such a situation, members of the society will then take the law into their own hands.¹⁷² In addition, Schreiner J pointed out in *R v Karg* that

it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands.¹⁷³

Also, in *Republic v Mbushuu and Another*, it was argued in favour of the Republic that to prevent the law from falling into disrepute, the law must satisfy the peoples' thirst for vengeance, as many people believe that murderers deserve to die.¹⁷⁴ Thus, satisfying peoples' thirst for vengeance discourages them from revenging or taking the law into their own hands. In support of this, during debates by the Constituent Assembly in Uganda, it was stated that the death sentence gives mental satisfaction to the bereaved family and discourages them from revenge.¹⁷⁵

¹⁷⁰ *Report of the Royal Commission on Capital Punishment (1949-1953)* 18; reference has also been made to the statement of Lord Denning in *Seleoane* (1996) 7, and in *Furman v Georgia* (1972) 408 US 238 at 453.

¹⁷¹ Amnesty International, "Africa: A new future without the death penalty" AI Index: AFR 01/003/1997, 1 April 1997.

¹⁷² *Makwanyane* (1995) para 124.

¹⁷³ *Seleoane* (1996) 8.

¹⁷⁴ *Mbushuu* (1994) 355.

¹⁷⁵ Amnesty International, "Africa: A new future without the death penalty" AI Index: AFR 01/003/1997, 1 April 1997.

Retribution has its basis in religious values that maintained that it is appropriate to take “an eye for an eye” and “a life for life”. Therefore, retribution or *lex talionis* is a reflection of the Roman *jus talionis*, the law of retaliation, which calls for the infliction upon the wrongdoer of the same injury that he or she caused to his or her victim.¹⁷⁶ For example, section 28 of the Sudanese Penal Code 1991 provides that a person who has committed a given violation of law should be punished in the same way and by the same means that he has used in harming another. Capital punishment is associated with retribution, especially with respect to those condemned to death for murder. Thus, retribution has been seen as “a murder for a murder”.

Retributivists see punishment as something morally deserved by criminals. Society, therefore, has a moral obligation to impose capital punishment. Kant, in support of the retributive theory, states the following:

If [he] has committed a murder, he must die ... [t]here is no substitute that will satisfy the requirements of legal justice. There is no equality between the crime and the retribution unless the criminal is judicially condemned and put to death.¹⁷⁷

Those who support the death penalty, thus, see it as the only punishment deserved by offenders who commit the most cruel and heinous crimes; no other punishment can substitute this. This is because executing the offender brings closure to the ordeal for the victim’s family and ensures that the murderer will not commit such crimes again. As mentioned above, the Attorney General in *S v Makwanyane*¹⁷⁸ contended that the imposition of the death sentence “meets the sentencing requirements for extreme cases of murder more effectively than any other sentence can do”. Therefore, any lesser punishment would be seen as undermining the value society places on protecting lives. Furthermore, despite substantial evidence that the death penalty has been inequitably applied, retributivists still justify the application of the death penalty by arguing that inequitable application is not inherent in the penalty, and that it is

¹⁷⁶ Slama (2001) 400

¹⁷⁷ I Kant, “The general theory of justice” in *The metaphysical elements of justice*, trans. J Ladd (1965) 102. Referred to in Van den Haag & Conrad (1986) 22.

¹⁷⁸ *Makwanyane* (1995) para 112.

better that some receive their “just deserts” however biased the sample executed, than that none do.¹⁷⁹

According to the retribution argument, certain offenders must be killed not to prevent crime but because of the demands of justice.¹⁸⁰ The government of Ethiopia has stated that it supports the retention and use of capital punishment for most serious offences such as genocide and multiple crimes against humanity, as retaining the use of the death penalty means bowing to the demands of justice from victims and their relatives.¹⁸¹ Thus, justice requires the death penalty as the only suitable retribution for heinous crimes. Justice in such cases is not only about arresting the criminal and getting a conviction, but primarily about the punishment, which has to be just.

In a society that aims at law and order, justice has to be administered, but if justice is not administered, then “justice” and “law” in its usual and original meaning has ceased to function. Anderson argues that, “as long as a punishment bears no proportion to a crime the justice is weak and deadly sick” and that if the death penalty is not imposed on a murderer, then complete justice has not been performed.¹⁸² The state’s role in dispensing justice, to punish criminals, is therefore a justification for capital punishment.

3.6.1.2 Rebuttal of argument

There is some difference of opinion as to the propriety of considering retribution as a legitimate purpose of punishment. An examination of the operation of the death penalty reveals that the retribution argument is fundamentally flawed. Retribution can be seen as vengeance under the guise of justice. It is important at this point to look at the meaning of “justice” so as to understand if imposing the death sentence for purposes of retribution amounts to justice. Justice has been defined as follows:

¹⁷⁹ Lempert (1981) 1178-1179.

¹⁸⁰ Amnesty International (1989) 16.

¹⁸¹ Amnesty International, “Africa: A new future without the death penalty” AI Index: AFR 01/003/1997, 1 April 1997.

¹⁸² Anderson (2001) 5-7 (Argument 1), Chapter 2.

An attempt (a) to punish persons guilty of crime, (b) not to punish innocent persons, (c) to punish the guilty according to what is deserved by the seriousness of the crime and the culpability of the persons guilty of it.¹⁸³

Based on the above definition, it is clear that all forms of punishment by their nature are retributive, not only the death penalty. Therefore, a criminal who has done something wrong, deserves punishment – a repayment (retribution) for the wrong he did. Abolitionists, even those that are relatives of victims of crime, have refused to accept that murderers deserve to die.¹⁸⁴ In the light of this, it could be argued that someone who has committed murder or any serious offence must not only be put to death. Another punishment other than death can be inflicted.

As mentioned above, retributivists justify the death penalty as a categorical denunciation of crime by the community. But they fail to advance any convincing argument that the community cannot find alternative ways of showing its denunciation of crime. A severe punishment, such as life imprisonment, can adequately demonstrate the community's denunciation of crime, and will prevent the public from taking the law into its hands. In support of this and in rebutting the retribution argument for the death penalty, Justice Chaskalson in *S v Makwanyane* stated:

The righteous anger of family and friends of the murder victim, reinforced by the public abhorrence of vile crimes, is easily translated into a call for vengeance. But capital punishment is not the only way that society has of expressing its moral outrage at the crime that has been committed. We have long outgrown the literal application of the biblical injunction of “an eye for an eye, a tooth for a tooth”. Punishment must to some extent be commensurate with the offence, but there is no requirement that it be equivalent or identical to it. The State does not put out the eyes of a person who has blinded another in a vicious assault, nor does it punish a rapist by contrasting him and submitting him to the utmost humiliation in gaol. The State does not need to engage in the cold and calculated killing of murderers in order to express moral

¹⁸³ Van den Haag & Conrad (1986) 55.

¹⁸⁴ For example, Coretta Scott King, widow of Dr Martin Luther King stated that “[a]lthough both my husband and mother-in-law were murdered, I refuse to accept the cynical notion that their killers deserve the death penalty ... Forgiving violence does not mean condoning violence ... For too long we have treated violence with violence and that's why it never seems to end”. See Amnesty International, “Africa: A new future without the death penalty” AI Index: AFR 01/003/1997, 1 April 1997.

outrage at their conduct. A very long prison sentence is also a way of expressing outrage and visiting retribution upon the criminal.¹⁸⁵

Justice Chaskalson further stated that “to be consistent with the value of *ubuntu*, ours should be a society that ‘wishes to prevent crime... (not) to kill criminals simply to get even with them’”.¹⁸⁶ Therefore, in the political context of democratisation in Africa in general, and national reconciliation in African states breaking through a past characterised by violence, the insistence on retribution as argued by retributivists, would mean insisting that vengeance be done, which does not accord with the concept of *ubuntu*.¹⁸⁷

Similarly, in *Republic v Mbushuu and Another*, Mwalusanya J, as seen in his statement below, saw the retribution argument as some crude urge for vengeance. It was argued in this case that the death penalty is in the public’s interest because it shows in emphatic terms that the government denounces murder; and that by imposing the sentence of death, society reinforces and promotes public respect for life.¹⁸⁸ What about respect for the life of the criminal? The right to life is still the “supreme right” and the most fundamental of all human rights. As discussed in chapter four, even murderers have to be treated in light of the value of their lives, a value not erased by the harm or injustice their lethal violence has caused the innocent. Thus, sentencing to death and executing a person violates that person’s right to life since even a murderer has an indisputable right to life. Therefore, if the Tanzanian government has to actually reinforce and promote public respect for life, it can only do so if it abolishes the death penalty. Mwalusanya J, in response to the argument by the Tanzanian government, stated:

¹⁸⁵ *Makwanyane* (1995) para 129. The concept of *ubuntu* recognises a person’s status as a human being, entitled to respect, dignity, value and acceptance from the members of the community such person happens to be part of (Langa J, para 224). The concept carries in it the ideas of humanness, social justice and fairness (Madala J, para 237).

¹⁸⁶ *Makwanyane* (1995) 131.

¹⁸⁷ It should be noted that the concept of *ubuntu* was part of the post-amble to the Interim Constitution under the heading of “national unity and reconciliation”.

¹⁸⁸ *Mbushuu* (1994) 353.

[E]ven if it is the case that the majority of the public do subscribe to some sort of an eye-for-an-eye retaliation approach in murder cases, a progressive government will not feel obliged to execute persons simply to satisfy some crude urge for vengeance. Rather, it will assume the responsibility for informing the public and seek to influence their views in a more enlightened direction. Often vengeful sentiments stem from fear in the face of increasing rates of violent crime. The death penalty, however, is not an instant solution to violent crime and the government should not hold it out as such. Retribution has no place in a civilised society and negates the modern concepts of penology.¹⁸⁹

In addition to the aforesaid, the retributivist argument in support of the death penalty fails to adequately address the crucial question “whether the state should be allowed to execute murderers”. Most of the attention of retributivists is directed at the question whether murderers deserve to die, which is not sufficient to justify the application of the death penalty.

Generally, retribution makes impossible demands on the criminal justice system.¹⁹⁰ A decision to execute everyone convicted of murder, for example, because they deserve to die, would undoubtedly fail to meet the fundamental requirements of fairness. This is because retributive capital justice is tainted by bias and by the influence of factors beyond the control of courts of justice, such as the poverty of the defendant, which prevents him from engaging competent counsel skilled in the art of criminal defence.¹⁹¹

3.6.2 Deterrence

The primary purpose of legal punishment is to deter crime. In other words, deterrence is the main purpose of the threats of punishment and of punishment itself.¹⁹² However, it should be borne in mind that threats of punishment cannot and are not meant to deter everybody all of the times, but are meant to deter most people most of the time.

¹⁸⁹ *Mbushuu* (1994) 355.

¹⁹⁰ Amnesty International (1989) 17.

¹⁹¹ Amnesty International (1989) 17.

¹⁹² Van den Haag & Conrad (1986) 56.

The deterrence theory operates at two levels – individual and general deterrence. The concept of individual deterrence aims at thwarting further criminal activity by the particular defendant who is before the court.¹⁹³ With individual deterrence, the offender is treated in such a way that he or she will in future shun away from committing other offences. In other words, the offender is treated in such a way that he or she will be deterred from committing an offence again. Strictly speaking, the death penalty is not concerned with individual deterrence in the sense that once the offender is executed, it cannot be said that the offender will be deterred from committing future crimes. Broadly speaking, the death penalty certainly “deters” the murderer who is executed, by preventing the murderer from murdering again.

General deterrence is to the effect that punitive sanctions imposed on a convicted criminal will deter others with similar tendencies from engaging in such conduct.¹⁹⁴ With general deterrence, the offender is treated in such a way that the treatment provides a lesson for the public at large. It can be deduced from this that deterrence protects the social order by restraining potential offenders from committing offences. The death penalty is associated with general deterrence.

3.6.2.1 The death penalty serves as a deterrent to crime

The deterrent argument is used to justify the imposition of the death penalty. The central premise of deterrence – that executing murderers will save more lives than are taken – provides a reasonable moral basis for a system of state executions.¹⁹⁵ Most African states, as seen below, retain the death penalty because of the belief that it is a deterrent to crime. Retentionist African states often argue that it is necessary to kill an offender so as to dissuade other people from committing the same kind of crime. They further contend that the threat of capital sanction, or the apparent risk of being executed, deters those who are about to commit a capital offence, than would other forms of punishment.

¹⁹³ Loewy (2000) 6.

¹⁹⁴ Loewy (2000) 6

¹⁹⁵ Lempert (1981) 1187-1188.

In 1994, the Zambian government held a series of nation wide consultations to enable it to decide on whether or not it should accede to the Second Optional Protocol to the ICCPR.¹⁹⁶ However, the government did not proceed with its proposal because the vast response was in favour of retaining the death penalty as a deterrent due to rising crime rate in the country.¹⁹⁷ Also, the Gambian military government used the deterrent argument when it was reinstating the death penalty in 1995. The preamble of the Death Penalty (Restoration) Decree 1995 states:

The existence of the death penalty as a lawful form of punishment for any offence under the laws of The Gambia is considered to be a deterrent to reduce or completely eradicate acts of homicide and treasonable offences and therefore consistent with The Gambia's commitment to the protection and promotion of human rights.

It would appear the government of The Gambia was not aware of what constitutes promotion and protection of human rights, as killing someone cannot be seen as promoting respect for life or protecting the right to life of the offender. Considering the progressive acceptance of human rights standards on the abolition of the death penalty, reinstating the death penalty cannot be seen as a commitment to the promotion and protection of human rights.

Further, it is reported that the president of Botswana, with reference to the death penalty, stated that “[t]he frequency of the occurrence of these heinous crimes makes it imperative that stringent laws be maintained to deter these perpetrators.¹⁹⁸ The government of Guinea has also justified the retention of the death penalty on the fact that it deters people from committing murder.¹⁹⁹

¹⁹⁶ Hatchard & Coldham (1996) 160.

¹⁹⁷ Hatchard & Coldham (1996) 160.

¹⁹⁸ *The Sun*, 8 November 1995, referred to in Amnesty International, “Africa: A new future without the death penalty” AI Index: AFR 01/003/1997, 1 April 1997.

¹⁹⁹ Amnesty International, “Africa: A new future without the death penalty” AI Index: AFR 01/003/1997, 1 April 1997.

In 2004, the Minister of Justice and Keeper of the Seals, in justifying the retention of the death penalty in Cameroon, stated that it is a deterrent measure.²⁰⁰ The deterrent justification has been uttered during trials regarding the constitutionality of the death penalty in some African states. For example, in *S v Makwanyane*, the Attorney General attached substantial weight to the need for a deterrent to violent crime. He asserted that “the death sentence is an indispensable weapon if [South Africans] are serious about combating violent crime”.²⁰¹ The increase in violent crime in South Africa over the past five years, during which the death sentence had not been enforced, was used to substantiate this assertion.

The deterrent argument is frequently used with regard to the crime of murder. It has been argued that since society has the highest interest in preventing murder, it should use the strongest punishment available to deter murder, and that is the death penalty.²⁰² Those in support of the death penalty in Tanzania have argued that executing murderers will effectively deter potential murderers from killing.²⁰³ Also in *Republic v Mbushuu and Another*, it was argued in favour of the Republic that the death penalty has some deterrent effect and is, thus, necessary to protect society, as executing some of the murderers will deter at least some potential killers from committing murder.²⁰⁴ Potential murderers will, therefore, think twice before killing for fear of being sentenced to death and executed. This is because people fear death, due to the death penalty’s finality, more than anything else.

Some African scholars like Snyman have voiced the deterrent justification. As maintained by Snyman, there is every indication that the death penalty does serve as a deterrent. He relied on statistics supplied by the South African Police Service, which

²⁰⁰ See *Le Messenger* (a Cameroonian newspaper), No 681 of 5 July 2004, p 3.

²⁰¹ *Makwanyane* (1995) para 116.

²⁰² Michigan State University and Death Penalty Information Centre, “Arguments for and against the death penalty” (2000) <<http://deathpenaltyinfo.msu.edu>> (accessed 3 October 2003).

²⁰³ Stated in the report of the national coordinator of Tanzania, Richard Shilamba, presented at the “First International Conference on the Application of the Death Penalty in Commonwealth Africa” held in Entebbe, Uganda from 10 – 11 May 2004 (see <<http://www.biicl.org/deathpenalty>> (accessed 30 June 2004)).

²⁰⁴ *Mbushuu* (1994) 352.

clearly show that in the decade following the abolition of the death penalty, the murder rate was approximately twice as high as in the 1970s, when the death sentence was still in force.²⁰⁵ Other non-African scholars have asserted that the death penalty does deter.²⁰⁶ From the studies of scholars (both African and non-Africans), it is clear that reliance on the deterrence theory is used to justify the retention of the death penalty. However, it is also clear that there is very little statistics in Africa to justify the argument that the death penalty serves as a deterrent to crime.

3.6.2.2 Rebuttal of argument

Many have seen the deterrent argument as flawed and argue that the death penalty is not an effective deterrent. For example, the Ethiopian Human Rights Council has described as flawed arguments that claim the death penalty reduces crime in society,

²⁰⁵ Snyman (1992) 29-30. Generally, the deterrent effect of the death penalty has since mid-1970s been proved by calculating over time or across jurisdictions or both, the correlation between the rate of executions and the rate of homicides. However, this is done only after all other factors that may affect both these rates have been controlled through the use of “multiple regression analysis” (Hood (2002) 213). In 1967, Norval Moris observed that the deterrent effect of the death penalty may be tested using three standard methods: First, the commission of capital crimes such as murder may be measured in a given jurisdiction before and after the abolition or reintroduction of the death penalty. Secondly, the rate of crime of two or more jurisdictions – similar except that at least one has abolished the death penalty – may be compared. Thirdly, the commission of a crime such as murder within a single jurisdiction may be measured before and after widely publicised executions of murderers. (see United Nations, *Capital punishment developments 1961 to 1965* (1967) 40-41). There are, therefore, four standard methods by which the deterrent effect of the death penalty may be proved.

²⁰⁶ Van den Haag has insisted that, even though statistical demonstrations are not conclusive, and perhaps cannot be, capital punishment is likely to deter more than other punishments because people fear death deliberately inflicted by law more than anything else (see “The ultimate punishment: A defence” <<http://www.pbs.org/wgbh/pages/frontline/angel/procon/haagarticle.html>> (accessed 13 October 2003)). He substantiates his argument by looking at what most prisoners under sentence of death will prefer – execution or life in prison? He states that 99 per cent of all prisoners under sentence of death, who have the choice between life in prison and execution, prefer life in prison. An indication of this preference can be seen by means of appeals, pleas of commutation, and the use, by the prisoners under sentence of death, of any means at their disposal to prevent execution (see Van den Haag & Conrad (1986) 68). Ehrlich has also shown in his investigations that the death penalty does have a clear deterrent effect. He studied the relationship between homicide rates and executions in the United States between 1935 and 1969, which led him to the conclusion that the higher the rate of executions the lower the homicide rate. He further concluded that his study has indicated “the existence of a pure deterrent effect of capital punishment” and suggested that, “an additional execution per year over the period in question may have resulted, on average, in seven or eight fewer murders” (See I Ehrlich, “The deterrent effect of capital punishment: A question of life and death” (1975) 65 *American Economic Review* 397-419; referred to in Hood (2002) 222-223). A subsequent study conducted by Ehrlich, in which he used a cross-sectional method and not a time series method as used in his earlier study, confirmed the conclusions of his earlier studies (see I Erlich, “Capital punishment and deterrence: Some further thoughts and additional evidence” (1977) 85 *Journal of Political Economy* 741-788; referred to in Hood (2002) 222-223).

as it has not been proven that the death penalty reduces crimes more than other forms of punishment.²⁰⁷ The executive director of Inter-African Network for Human Rights, Mwanajiti, has also pointed out that the death penalty had failed to reduce crime in most jurisdictions.²⁰⁸ Van Rooyen has also stated that the death penalty as a unique deterrent argument can have no credibility at all.²⁰⁹

This brings into question the effectiveness of the death penalty as a deterrent to crime, which can be determined by three factors: First, the credibility of the threats, which involves issues like the magnitude of the risk for the offender being apprehended, convicted and punished as threatened, and the proportion of offenders that are actually punished. Second, the size of the threatened punishment, which concerns the triviality or credibility of the punishment. Third, the attractiveness of the crime from which the threat is to deter.²¹⁰

From the above factors, it is clear that any form of punishment can be an effective deterrent as long as it is consistently and promptly employed. Bedau has rightly noted that capital punishment cannot be effectively and promptly employed.²¹¹ This is because only a small number of those who are charged with capital offences are sentenced to death, and only a small proportion of those sentenced to death are actually executed.

In *Republic v Mbushuu and Another*, it was noted that the deterrent effect of the death penalty is diminished by the fact that not all murderers are hanged but only a few are hanged and in private.²¹² Mr Mwambe, arguing for the Republic, conceded that

²⁰⁷ “Call to abolish death penalty in Ethiopia” *Mail and Guardian*, 3 October 2003; see <<http://www.mg.co.za/Content/13.asp?ao=21422>> (accessed 13 October 2003).

²⁰⁸ “Zambia: Fight to abolish the death penalty” <<http://www.irinnews.org/print.asp?ReportID=40989>> (accessed 20 May 2004).

²⁰⁹ Van Rooyen (1991a) 4.

²¹⁰ Van den Haag & Conrad (1986) 56.

²¹¹ H Bedau, “The case against the death penalty” <<http://www.aclu.org>> (accessed on 8 January 2004).

²¹² *Mbushuu* (1994) 352.

hangings in secret as done at present in Tanzania have no deterrent effect.²¹³ The relative infrequency with which the death penalty is imposed, therefore, suggests a minimal deterrent effect.²¹⁴

As mentioned above, defenders of the death penalty have argued that it is necessary to kill an offender so as to dissuade other people from committing the same kind of crime. That the obvious risk of being executed deters those who are about to commit capital crimes from doing so, and that a potential murderer will think twice before committing murder for fear of being sentenced to death and later executed. Therefore, the death penalty is seen as an indispensable weapon in combating violent crime. However, one of the problems with the deterrent argument is that defenders of the death penalty do not seem to understand what the greatest deterrent to crime actually is.

Abolitionists do not dispute the point that the threat of capital punishment or execution may deter some people. What they avow is that it is not the greatest deterrent. Most people who commit murders either do not expect to be caught or do not carefully weigh the differences between a possible execution and life in prison before they act. In *S v Makwanyane*, Justice Chaskalson rightly pointed out that “the greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished”.²¹⁵ Justice Chaskalson was of the opinion that both the death penalty and life in prison are deterrents and that the main question should be “whether the possibility of being sentenced to death, rather than being sentenced to life imprisonment, has a marginally greater deterrent effect”.²¹⁶

The above statement by Justice Chaskalson with regard to the greatest deterrent to crime being the likelihood of being apprehended reminds one of the “pickpocket anecdote” that is often referred to in the literature of abolitionists. In 18th century

²¹³ *Mbushuu* (1994) 352-353.

²¹⁴ Lempert (1981) 1192-1193.

²¹⁵ *Makwanyane* (1995), para 122.

²¹⁶ *Makwanyane* (1995) para 123.

London, numerous pickpockets were seen to be active in a crowd that had gathered to see a pickpocket hanged. The fact that someone was being hanged at that same moment did not deter the pickpockets from committing a crime for which death was the punishment. The fact that the pickpockets selected the moment when the strangled man was swinging above them as the happiest opportunity to commit the crime attest to the point that “the greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished”. They knew that everybody’s eyes were on the strangled person and all were looking up, so the possibilities of their being apprehended were very slim.²¹⁷

The death penalty fails as a deterrent for the reason that murders are, more often than not, committed in the heat of the moment, in moments of passion or anger, or by criminals who are substance abusers and acted impulsively. In *Republic v Mbushuu and Another*,²¹⁸ the above was reiterated to show why the death penalty fails as a deterrent. It is impracticable for such persons to be deterred by the threat of the death sentence and execution from committing murder. Moreover, these persons may or may not have premeditated their crimes. Even if they had premeditated their crimes, they plan its commission carefully so as to ensure that they are not caught. The threat of the death sentence being imposed or execution carried out would not deter such planners.

Furthermore, the lack of conclusive evidence that the death penalty is a deterrent to murder or other crimes implies that defenders of the death penalty merely speculate its deterrent effect. In support of the point that such speculations are unacceptable, Justice Chaskalson in *S v Makwanyane* cites Wright J in *The People v Anderson*, who points out that “a punishment as extreme and as irrevocable as death cannot be predicated upon speculation as to what the deterrent effect might be”.²¹⁹

Justice Chaskalson also rebuts the argument put forward by the Attorney General (stated above) that the increase in the incidence of violent crime was due to the fact

²¹⁷ For further discussion on this, see Van den Haag & Conrad (1986) 244-246 & 249-250.

²¹⁸ *Mbushuu* (1994) 352.

²¹⁹ *Makwanyane* (1995) para 127.

that the death sentence was not enforced. Justice Chaskalson's argument was that though death sentences were not carried out throughout the period referred to above, the death sentence was still a lawful punishment and was imposed by the courts.²²⁰ When the moratorium was not official,²²¹ criminals had no assurance that any death sentence passed on them will not be carried out, yet they were not deterred from committing crime. Justice Chaskalson then rightly attributed the increase in crime to social change, associated with political turmoil and conflict in the country, homelessness, unemployment and poverty.²²² Therefore, there is no proof that the death penalty deters more effectively than imprisonment. A survey conducted for the United Nations in 1988 and updated in 1996 concluded that research has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment.²²³ Such proof is unlikely to be forthcoming, and that the evidence as a whole still gives no positive support to the deterrent hypothesis.²²⁴

The lack of qualitative evidence to the effect that the death penalty serves as a deterrent to crime requires that the death penalty be abolished. Human rights activists and the Catholic Church in Zambia have argued that capital punishment should be abolished, as it has never been known to be a deterrent to crime.²²⁵ Further, studies have been conducted on the relationship between homicide rates and executions, which purport to show that the death penalty does not have a deterrent effect. Kalinde, a University of Zambia law lecturer, has stated that a research, which was carried out in Zambia, proves that the death penalty was not a deterrent to crime.²²⁶ One of the most cited studies conducted in Africa in this regard is that of Adeyemi, a professor of

²²⁰ *Makwanyane* (1995) para 118.

²²¹ The moratorium was only formally announced on 27 March 1992.

²²² *Makwanyane* (1995) para 119.

²²³ "Let's get rid of the death penalty: Why the death penalty should be abolished" <http://www.amnesty.org.nz/web/pages/home.nsf/0/7e228581809defc3cc256a680019056b?OpenDocument> (accessed 8 January 2004).

²²⁴ As above.

²²⁵ AFRICANEWS – "Zambia: Prisoners challenge capital punishment" <http://lists.peacelink.it/afrinews/msg00190.html> (accessed 12 February 2004).

²²⁶ As above.

law and criminology in Nigeria.²²⁷ He compared statistics on murders and executions between 1967 and 1985, and found an increase in murder rates even though murder was punishable by death; and an increase in armed robberies, also punishable by death.²²⁸ The introduction of the death penalty for armed robbery in 1970 was followed by an increase rather than a decrease in armed robberies.²²⁹ The study, therefore, concluded that "no efficacy can be shown for the operation of the death penalty" for murder and armed robbery in Nigeria.²³⁰

In addition, it was reported in 1996 that despite the executions in Nigeria, the crime rate, most especially armed robbery, has continued to increase.²³¹ This implies that the executions did not deter armed robbers from committing more robberies. Subsequently, in June 2001, the State Governor of Oyo in Nigeria proposed that Nigeria abolish the death penalty from its legislation, as death sentences have not reduced the number of innocent people murdered.²³²

The conclusion of most deterrence studies is that the death penalty is, at best, no more of a deterrent than a sentence of life in prison.²³³ Since defenders of the death penalty argue that it serves as a deterrent, they bear the burden of proving that the death penalty deters more than other severe forms of punishment. However, capital

²²⁷ Amnesty International, "Africa: A new future without the death penalty" AI Index: AFR 01/003/1997, 1 April 1997.

²²⁸ As above.

²²⁹ Hood (2002) 216. A Ugandan law lecturer, Mukubwa, also stated in 1994 that there has been a marked increase in armed robberies since the execution of prisoners at Luzira prison in 1993; and that the introduction of capital punishment for defilement was followed by an alarming increase in reported cases of defilement (See *The New Vision*, 19 July 1994).

²³⁰ Amnesty International, "Africa: A new future without the death penalty" AI Index: AFR 01/003/1997, 1 April 1997.

²³¹ As above.

²³² Amnesty International, "West Africa: Time to abolish the death penalty" AI Index: AFR 05/003/2003, 10 October 2003.

²³³ Michigan State University and Death Penalty Information Centre, "Arguments for and against the death penalty" (2000) <<http://deathpenaltyinfo.msu.edu>> (accessed 3 October 2003).

punishment does not solve society's crime problem but leaves the underlying causes of crime unaddressed, as less attention is paid to the causes of crime.²³⁴

An examination of crime statistics in abolitionist states shows how flawed the deterrent argument is, as crime rates still increase despite the abolition of the death penalty, implying that other factors influence crime rates. For example, in South Africa, recorded murders decreased between 2000 and 2002 by two per cent, which is a continuation of a trend whereby the yearly number of murders has been declining since 1994 (before abolition of the death penalty) and after abolition.²³⁵ This goes to show that the increase in crime rates cannot be used to justify the retention of the death penalty as crime rates can decrease or increase with or without the death penalty on the statute books.²³⁶

Increase or decrease in crime rates could, therefore, be associated with the factors listed above that affect crime. Since so many variables are involved as regards crimes, the argument that the death penalty deters cannot be justified objectively. It is relatively safe to conclude that the overall serious crime rate is influenced by many other factors, thus rendering the deterrent argument objectionable.

Moreover, it is without doubt that executions encourage disrespect for human life and for the human body and could even incite violence. Some African governments and lawyers have held the same view. For example, a Zimbabwean lawyer, Feltoe, wrote that “[i]n symbolic terms the official killing of killers can hardly be said to foster respect for the sanctity of life. It is contradictory to killing people to show that killing

²³⁴ These include: unemployment, poor economic growth, political instability, social problems, racial and cultural oppositions, alcohol and drug abuse, psychological illness, the ease to supply guns, an ineffective police force, insufficient child raising, poor home and school environment and a legal system that lacks the trust of the people.

²³⁵ Leggett et al (2003) 14. Also, a state-by-state analysis of homicide rate in the United States showed lower rates of homicide in states that do not have the death penalty in their statutes (Hodgkinson (2000) 20). In Canada, the homicide rate was 43 per cent lower in 1999 than it had been in 1997, the year before abolition (Hood (2002) 214).

²³⁶ For example, in New York, a dramatic drop by 50 per cent over the past decade in homicide rate was attributed to a policy of “zero tolerance” by the former chief of police Bratton and not to the reinstatement of the death penalty in 1994 after two decades of abolition (Hodgkinson (2000) 20).

is wrong”.²³⁷ Former president of The Gambia, Jawara, has stated that the “[d]eath penalty can never be a solution; violence only asks for more violence”.²³⁸ Thus, its use is an example of state violence that only goes to promote a culture of violence, and not to deter others from committing crimes.

3.6.3 Prevention

3.6.3.1 The death penalty prevents an offender from committing other crimes

Prevention means an offender should be prevented from committing other crimes. Thus, those who favour the retention of the death penalty also rely on the preventive theory to justify its imposition. This theory is based on the idea that punishing an offender will prevent him or her from committing other crimes. Proponents of this theory hold the view that the death penalty, as a form of punishment, prevents the commission of a crime permanently thus very effective.

Burchell and Hunt have stated that the death penalty “may certainly validly, if cynically, be defended as a permanent preventative”.²³⁹ Once the criminal is executed, he is incapacitated forever. Death incapacitates totally and permanently, as opposed to imprisonment that incapacitates only partially and temporarily. This appears to be an obvious argument that even abolitionist cannot refute. Executing a criminal means a clear-cut stop of new crimes committed by that criminal as the dead criminal cannot commit future crimes or do harm to others.

Often linked to the prevention argument, is the argument that in preventing criminals from repeating their crimes or committing further crimes, the death penalty creates a somewhat safer society. An illustrative example of how the death penalty creates a

²³⁷ Amnesty International, “Africa: A new future without the death penalty” AI Index: AFR 01/003/1997, 1 April 1997.

²³⁸ As above.

²³⁹ Burchell & Hunt (1970) 73. They further argue that while prevention is legitimate, it must be balanced by “considerations of ‘fairness and consistency’ and the moral blameworthiness of the offender”.

safer society is provided by Anderson.²⁴⁰ He states that after a man who has raped and strangled two young children is sentenced to death, all of society can once again feel at ease and they will no longer have to keep their children indoors. Safety returns to society, and society does not have to fear his upcoming release, or failed custody and rehabilitation treatment.²⁴¹

3.6.3.2 Rebuttal of argument

The preventive argument is flawed in that, first, there are other ways of preventing an offender from committing future crimes. In this regard, Justice Chaskalson in *S v Makwanyane* stated the following:

Prevention is another object of punishment. The death sentence ensures that the criminal will never again commit murders, but it is not the only way of doing so, and life imprisonment also serves this purpose. Although there are cases of goal murders, imprisonment is regarded as sufficient for the purpose of prevention in the overwhelming number of cases in which there are murder convictions, and there is nothing to suggest that it is necessary for this purpose in the few cases in which death sentences are imposed.²⁴²

From the above, it is clear that life imprisonment can also prevent criminals from ever committing murder, and life imprisonment without parole could be seen as a permanent preventative measure. In support of alternative preventive measures, which indicates that the preventative argument is flawed, Van Rooyen has stated that a person who does not “deserve” to live in society can be permanently removed from it, by means of life imprisonment, without being exterminated, and that a person who is a danger to society can likewise be incapacitated permanently.²⁴³

It is worth noting that although political instability could result in the release of some prisoners, imprisonment is still a valid option as it gives the prisoner an opportunity to

²⁴⁰ Anderson (2001) 1 (Argument 10), Chapter 2.

²⁴¹ As above.

²⁴² *Makwanyane* (1995) para 128.

²⁴³ Van Rooyen (1991a) 9.

reform, which the death penalty does not. Thus, the preventive argument in the context of the death penalty is also flawed in that it does not offer the offender an opportunity to be reformed. Some African states have considered abolishing the death penalty for this reason, amongst others. For example, the Ugandan Minister of Justice and Constitutional Affairs, Mukwaya, has stated that “the government is considering scrapping the death sentence on capital offences because it does not give the culprit time to reform. Long jail terms will replace the death penalty”.²⁴⁴ The president of Malawi has called on African heads of state to abolish the death sentence, as he believes that a person can reform.²⁴⁵

3.6.4 Rehabilitation

It is desirable for punishment to reform as it is for the benefit of society if an individual who has contravened society’s standards is rehabilitated. According to the rehabilitative theory, punishment is to help adjust the offender to the prevailing norms.²⁴⁶ Rehabilitation assumes that a person commits an offence because of some personality disorder that can be corrected. Punishment here is intended to change the offender’s intent, motivation or even character towards law-abiding conduct.

3.6.4.1 Rehabilitation is expensive and ineffective

As Loewy points out, there is serious difference of opinion as to the relative importance of rehabilitation. While some believe that it is unjust to take the taxpayers money to finance the rehabilitation of those they consider “less worthy” (since criminals represent the worst in society), others believe that rehabilitation, though desirable, should be subordinate to other purposes, such as deterrence,²⁴⁷ as it is ineffective. With regard to the first belief, those who hold such belief find it offensive

²⁴⁴ “Death sentence to be repealed” <<http://allafrica.com/stories/printable/200404300382.html>> (accessed 14 May 2004).

²⁴⁵ S Tejan-Sie, “The death penalty: A growing human rights issue” in *Concord Times* (Freetown), 11 October 2004

²⁴⁶ Seleane (1996) 10.

²⁴⁷ Loewy (2000) 2.

to the sense of justice and feels that it is unreasonable, unfair and morally unsound to know that the taxpayer's money supports a living murderer or violent criminal. This was the argument of the government of Tanzania in *Republic v Mbushuu and Another*, where it argued that dangerous murderers should be executed rather than wasting large sums of public money in keeping them locked up in maximum-security prisons.²⁴⁸ Retentionists, therefore, see the death penalty as cheaper for the society as every execution means economical advantages in many areas for the society and the taxpayers. Their main concern is not how much money they spend but where the money principally goes or what it is used for. In support of this, Anderson states that

the main thing is not what is most expensive – the death penalty or lifetime in prison. The main thing is what the society's money is used for. The money used for in death penalty cases is mainly for the judicial system itself so that law and order can [be] guaranteed as far as possible until the execution. That is well invested money. The money used for when it comes to lifetime in prison is also used for the judicial system *but* more for expenses after a judicial process, when the violent criminal or the murderer in many years will be [paid] for guarding, room, food clothes, medical service, activit[ies] etc, and that from the citizens purse. *This is for many outrageous and offensive.*²⁴⁹

On the second belief above, retentionists are of the view that rehabilitation should be subordinate to other theories of punishments, such as deterrence and retribution. This implies some sort of divergence of opinion on the purpose of punishment.²⁵⁰ The fact that legal systems try to strike a balance between all theories of punishment by trying

²⁴⁸ *Mbushuu* (1994) 354.

²⁴⁹ Emphasis added. See Anderson (2001) 2 (Argument 17), Chapter 2.

²⁵⁰ Seleoane in acknowledging the divergence of opinion on the purposes of punishment asserts the following: Firstly, the requirement that the purpose of criminal law is to protect society against conduct which undermines certain minimum social standards should be borne in mind when offenders are punished. Secondly, some weight has to be assigned to the prevailing moral climate when offenders are punished. Lastly, in punishing an offender, regard must be had not only of the offender's rights, but also of the rights of the aggrieved person and of society as such, as failure to take the rights of the aggrieved person and of society into account poses a threat to the legal and/or judicial framework. See Seleoane (1996) 11-12. Seleoane's last assertion is very important as one of the arguments that has been raised by retentionists to justify the imposition of the death penalty is that capital punishment restores a victim's dignity thus giving back human value and respect for the victim's right to dignity. Furthermore, as mentioned above, it has been argued that the death penalty provides a safer society. Thus, in punishing an offender, regard must be had of the right of society to peace and security, and as argued by retentionists, the death penalty provides for peace and security as the criminal who is a threat to peace and security in the society is eliminated. Retentionists further argue that the death penalty means the greatest mark from the state that it defends the ordinary citizen's life, which means the state takes the citizen's life into account when punishing an offender.

to assign appropriate weight to the competing theories of punishment in every case that comes before the courts reveals this divergence. In acknowledging this divergence, Derham stated as follows:

No system of law adheres to one theory. Even primitive law, apparently based on vengeance, is also built on the hope of deterring others. A successful reform of the prisoner will prevent him from offending again. On the other hand, *the easiest way to prevent a prisoner from offending again is to hang him*, but this can scarcely be called a reformatory method.²⁵¹

In spite of the above difference of opinion, criminologists consider rehabilitation as a worthwhile goal of punishment. Defenders of the death penalty have not disputed this either. However, apart from the fact that supporters of the death penalty believe rehabilitation should be subordinate to other theories of punishment, their real objection to rehabilitation is simply that it does not work. Punishment for the sake of rehabilitation has not been shown to be effective. Proponents for the retention of the death penalty use the high degree of “recidivism”²⁵² among those who have been imprisoned as proof of the ineffectiveness of rehabilitation or the prison as a rehabilitative environment.

Surveys have shown that violent criminals and murderers who have been sentenced to prison and later released relatively often relapse into crime.²⁵³ High recidivism rates have been registered in some African states. The recidivism rate in South Africa stands at approximately 80 per cent according to South Africa's Institute for Security Studies, and prison personnel are unable to conduct programs that will both reduce the numbers of criminals in prison and rehabilitate those who are open to changing their lives.²⁵⁴ Financial constraints exacerbate the inability of prisons in Africa to rehabilitate prisoners. Defenders of the death penalty have argued that the very nature

²⁵¹ Emphasis added. See P Derham, *A text-book of jurisprudence* (1964) 320 cited in Seleane (1996) 10.

²⁵² Recidivism means the habit of relapsing into crime.

²⁵³ Anderson (2001) 2 (Argument 8), Chapter 2.

²⁵⁴ “International Narcotics and Law Enforcement: FY 2004 budget justification – Africa” Released by the Bureau for International Narcotics and Law Enforcement Affairs (June 2003) <<http://www.state.gov/g/inl/rls/rpt/cbj/fy2004/21883.htm>> (accessed 5 January 2004).

of the prison system runs counter to rehabilitation. For example, requiring a criminal to associate with other criminals makes it difficult to break the criminal of criminal tendencies.

3.6.4.2 Rebuttal of argument

As mentioned above, rehabilitation is a worthwhile goal of punishment. With regard to the first belief that it is unjust to take the taxpayers money to finance the rehabilitation of those they consider “less worthy”, if the main concern of defenders of the death penalty is where the money principally goes and what it is used for, then they should also be concerned about money used for capital trials. Even if the above argument had some basis, it cannot be morally acceptable for a criminal to be executed because of fear of spending one’s money on that criminal if the criminal is locked up. If a criminal is represented by a state appointed attorney, it will still be state’s money, including the taxpayer’s money that is used to pay that attorney. The enormous concentration of judicial services on capital trials in retentionist states to ensure that the death penalty is imposed actually diverts valuable resources away from other more effective areas of law enforcement.

Concerning the cost of imprisonment, the opinion of Mwalusanya J in *Republic v Mbushuu and Another* was contrary to that of those who support the death penalty. The government in this case argued that dangerous murderers should be executed rather than wasting large sums of public money in keeping them locked up in prison. However, Mwalusanya J stated the following:

In my considered opinion, if we are talking about expense, we should not forget that we are forced to spend large amounts to process through the elaborate system we have to decide whom we should execute. Clearly, it would be cheaper to kill murderers than to keep locked up for long periods, but it is a morally unacceptable argument that we should kill criminals because it is cheaper to do so. Considerations of economy cannot justify the taking of life ... Murderers imprisoned for life will be put to work whilst in prison and at least part of the profits generated by such work shall be used to pay compensation to the survivors. However, that cannot be achieved if the murderers are sentenced to death.²⁵⁵

²⁵⁵ *Mbushuu* (1994) 354-355

In addition, studies conducted in Canada and the United States have shown that it is not cheaper to kill murderers than to keep them locked up for long periods. For instance, a study done in New York in 1982 revealed that the average capital trial and the first stage of appeals alone cost the taxpayer about 1.8 million US dollars, more than twice as much as it would cost to keep a person in prison for life.²⁵⁶

The second belief suggesting that rehabilitation should be subordinate to other purposes of punishment denotes rejection of the possibility of rehabilitation of convicted persons. This is contrary to the reformatory theory, which considers punishment as a means to an end, that end being the reformation of a convicted person. In this regard, Madala J in *S v Makwanyane* notes that an offender has to be imprisoned for a long period for the purpose of rehabilitation; and that by treatment and training, the offender is rehabilitated or, at the very least, ceases to be a danger to society.²⁵⁷ This statement goes to rebut the argument that murderers should be executed due to the ineffectiveness of rehabilitation.

3.7 Conclusion

The abolition or retention of capital punishment is primarily a political issue; and political issues are resolved by the political branches of government, acting with at least one eye focussed on public opinion.²⁵⁸ Some defenders of the death penalty are of the view that the state has a natural right to kill.²⁵⁹ Many governments still believe that they can solve urgent social and political problems by executing a few or even hundreds of their prisoners; and many citizens are still unaware that the death penalty offers society no further protection but further brutalisation.²⁶⁰ Nevertheless, the best case for abolition rests on a commitment to respecting substantive due process, to respecting liberty, autonomy, and privacy except when there is no alternative but to

²⁵⁶ Amnesty International (1989) 24.

²⁵⁷ *Makwanyane* (1995) para 242.

²⁵⁸ Beschle (2001) 766.

²⁵⁹ Ramolotja (1998) 12.

²⁶⁰ Mihálik (1991b) 136.

limit them in order to accomplish some pressing social objective.²⁶¹ Moreover, supposing that there are strong arguments to both sides, the death penalty is so far reaching in its consequences that the argument of its importance should lie with those who defend it.

With the alarming increase in terrorist activities in Africa²⁶² and the current “war” on terrorism in general, it is without doubt that the public outcry for the death penalty may be high and political pressure may, in many circumstances, demand the implementation of the ultimate penal sanction (the death penalty). However, considering the fact that a large number of offences that fall within the category of terrorism cannot be classified as “most serious crimes”²⁶³ and the duty of all states to enforce and uphold human rights, increase in terrorist acts cannot be used to justify the retention of the death penalty in Africa.

Abolishing the death penalty would not only encourage respect for the right to life, but could also go a long way to reduce crime, as more attention would be given to the root causes of crime. In fact, executions have been seen as symbols of the inability or willingness of governments to tackle the root causes of crime, such as, poverty and inequality.²⁶⁴ In this regard, Van Rooyen noted that

[the death sentence] is a very convenient political alternative to real effective and difficult public protection and crime prevention programmes. It is a cheap way for politically inclined people to pretend to their fearful constituencies that something is being done to combat crime, to protect the innocent. It obscures the real difficulties, the real causes of crime. It delays long-term commitment to address these meaningfully.²⁶⁵

²⁶¹ Sarat (1999) 11.

²⁶² Cilliers (2003) 91. See also, A Botha, “Background: Terrorism in Africa”, paper presented at the Institute for Security Studies Seminar on Terrorism, 18-19 September 2003, 5-6, available at website <<http://www.iss.co.za/seminars/tero19sep03>> (accessed 5 May 2004).

²⁶³ J Yorke, “Extradition, terrorism and the death penalty in Africa: Charting through the Labyrinth”, paper presented at the “First International Conference on the Application of the Death Penalty in Commonwealth Africa” held in Entebbe, Uganda from 10 – 11 May 2004 (see <<http://www.biicl.org/deathpenalty>> (accessed 30 June 2004)).

²⁶⁴ Agostoni (2002) 77.

²⁶⁵ Van Rooyen (1991a) 9-10.

Thus, abolition of the death penalty will turn the focus of African governments to the true causes of crime, which will in turn lead to a reduction in crime rate if the causes are addressed efficiently.

Furthermore, opposition to the death penalty by past and current African leaders denotes that the death penalty is undesirable. Some former and current African head of states have clearly stated their opposition to the death penalty and their desire not to sign execution warrants. For example, the former president of Zambia, Kaunda, has called for the abolition of capital punishment, stating that he was mainly forced by circumstances during wartime to sign death warrants - "It has pained me to sign the death warrants during my tenure, I did so with utmost reluctance".²⁶⁶ Also, Konaré, former president of Mali has consistently stated his opposition to the death penalty.²⁶⁷ In December 1998, Dr Muluzi, then president of Malawi, stated:

I have promised that I will never sign the death sentence for a fellow human being. I would like to reaffirm this commitment. Life is sacred, I believe a person can reform. I believe that forgiveness makes all of us better persons. In the cause of truth and justice I invited all heads of state in Africa, our common home, to abolish the death sentence, to work for the removal of violence among our peoples and to prepare a better future for our children.²⁶⁸

In spite of the opposition to the death penalty by some African leaders and the fact that the arguments for its retention are flawed or not so convincing, most African states still retain the death penalty in their laws. The leaders who oppose the death penalty have or did not go ahead to abolish it. This could partly be attributed to the lack of a combined effort of, among others, the executive, legislature and judiciary to abolish the death penalty. Moreover, as seen in chapter two, broader political factors impacted on current abolitionist states that led them to abolition. For example, abolition of the death penalty in former Portuguese colonies was largely due to colonial influence. Abolition in Djibouti was achieved through factors including

²⁶⁶ D Mavunduse, "A new millennium free from death penalty in southern Africa?" <<http://www.sardc.net/editorial/sanf/1999/09/30-09-1999-nf2.htm>> (accessed 30 June 2004).

²⁶⁷ *Amnesty International Report* (2001) 166.

²⁶⁸ Statement from his speech to the Eight General Assembly of the World Council of Churches in Harare, Zimbabwe, quoted in Agostoni (2002) 16.

public opinion, political will and empirical evidence.²⁶⁹ The adoption of a new constitution that abolished the death penalty was preceded by a change in government in Côte d'Ivoire²⁷⁰ and the return to multiparty politics in Seychelles.²⁷¹ The arbitrary use of death penalty during colonial period resulted in the constitution providing for abolition in Namibia.²⁷² In addition to other factors, constitutional reviews led to the abolition of the death penalty in Angola, Guinea Bissau and South Africa.²⁷³

Abolition of the death penalty in Africa has, therefore, coincided with democracy, the affirmation of the rule of law and the promotion of, and respect for, human rights. As most African states, at least formally, now embrace human rights and democracy, it will be appropriate for them to reconsider their policies on the death penalty, to consider abolishing it. This will accord with, *inter alia*, the promotion of, and respect for, human rights, since the death penalty conflicts with the right to life, the right not to be subjected to cruel inhuman and degrading treatment and fair trial rights as revealed in the subsequent chapters of this thesis.

²⁶⁹ Hood (2002) 39.

²⁷⁰ As above.

²⁷¹ Hatchard & Coldham (1996) 161, footnote 39.

²⁷² Hatchard & Coldham (1996) 161.

²⁷³ Amnesty International, "Africa: A new future without the death penalty" AI Index: AFR 01/003/1997, 1 April 1997.