

**NATURAL LAW ETHICS, *HUNHUISM* AND THE CONCEPT
OF RETRIBUTIVE JUSTICE AMONG THE *KOREKORE* –
NYOMBWE PEOPLE OF NORTHERN ZIMBABWE: AN
ETHICAL INVESTIGATION**

By

Fainos Mangena

*B.A Dual Honours in Philosophy and Religious Studies (Z'bwe), M.A in
Philosophy (Z'bwe), Diploma in Communications and Journalism (Z'bwe)*

Thesis Submitted to the Department of Religious Studies, Classics
and Philosophy of the University of Zimbabwe in Fulfilment of
the Requirements for the Degree of Doctor of Philosophy in
Philosophy

Faculty of Arts

Supervisor: Dr. Jameson Kurasha

November 2007

ABSTRACT

This work first looked at the evolution and power of natural law ethics and retributive justice in regulating human behaviour in contemporary society in general and in *Korekore-Nyombwe* culture in particular. This background was necessary for purposes of positioning the argument that retributive justice when applied to capital cases is a violation of natural law ethics and is alien to Shona culture. The death penalty was criticised in this work on the grounds that it has a retributive rather than a restorative function as upheld by the Shona/Korekore people. It was argued in this work that *ngozi* underlies the notion of ethics and supernatural ethics as *bunhuism's* practice of restorative justice may be guided by *ngozi*. The work also looked at the convergence of criminal (human) law with natural law particularly regarding capital punishment, and it established that human laws have their origin and justification from natural law ethics, considered by this work to be the highest law in the universe. The common good thesis was invoked to try to reconcile both the retributive and restorative notions of justice, but in the final analysis it was established that restorative justice is more relevant and appealing to the Shona/Korekore society than is retributive justice; this is one reason to move towards repudiating the death sentence in Shona/Korekore society.

Qualitative research was used to collect data in this work and this included the use of textbooks, journals, oral interviews and the internet. Data were also collected from seminar papers and presentations. In short, the work utilised interdisciplinary methods that integrated the philosophical and sociological approaches as expected at this level. It is hoped that three things will be accomplished by the findings of this work. First, the thesis will add currency to the growing calls for the abolition of the death penalty in Zimbabwe. Second, the thesis will show that abolitionist arguments can be much stronger and valid if supported by a theory such as natural law. An appeal can be made to natural law theories and the restorative justice argument when it comes to the moral implications of the death penalty in Zimbabwe's Shona societies. This will offer a new and refreshing look at the morality of the death penalty in Zimbabwe. Third, the work will show that not only politicians and traditional leaders can participate in the death-penalty debates in Zimbabwe. Instead, there is need to engage all stakeholders that also include civic groups, academics, the church and ethicists.

ACKNOWLEDGEMENTS

I would like to express my sincere gratitude to all the individuals and institutions that assisted me in coming up with this academic piece of work. I owe a huge debt to my supervisor and mentor Dr. Jameson Kurasha (Houghton N.Y./UZ), who sacrificed his time to discuss some critical areas of this dissertation with me. His comments and suggestions were incisive and helpful. He was available for me when I needed him most. Dr. Kurasha demonstrated that he was, indeed, a well-polished philosopher and a distinguished mentor by the manner in which he shaped my argument in this work. He also taught me to speak with my own voice.

Besides his intellectual humility and fatherly touch, Dr. Kurasha went out of his way to give me some of his personal valuables such as the laptop and memory stick to ensure that the project is completed. How many people can do that in this world? He was very helpful and encouraging throughout and I never looked back because of this encouragement and support. Thank you *Soko* for a job well done. Special thanks also go to his wife, Dr. Primrose Kurasha, the first woman Vice-Chancellor of the Zimbabwe Open University (ZOU) who spent the greater part of her time without her husband as he was helping me to

produce this work. Thanks for the food that I used to enjoy every time I visited the Kurasha homestead during the production of this work and thanks for the hospitality. Thank you very much Mai Flora, may God bless you abundantly! I also would like to express my indebtedness and profound gratitude to Professor Ezra Chitando, who took over as my stand-in supervisor during the time when Dr. Kurasha was on sabbatical. He was very instrumental in the administrative part of preparing this thesis. Without his inspiration and encouragement, this work could not have been completed. Thank you, big brother, may God bless you!

I also owe a huge debt to all the members of my department, the department of Religious Studies, Classics and Philosophy, for supporting me during the time I was doing this research. Special mention goes to the seniors in the department especially the acting Chairman, Mr. M. Madambi, Mr. T.A. Chimuka, Dr. T. Shoko, Mr. R Matikiti, Mr. N.T. Taringa, Dr. A.M. Moyo and the departmental Chief Secretary, Mrs. M. Sabeta. May God bless you ladies and gentlemen!

This dissertation would not have been complete without the contributions of Professor Claude Gumbucha Mararike, who also heeded my call to have an interview with him at a very short notice. I

learnt a lot from him especially his insights on the Shona conceptions of justice. Thank you very much *Museyamma*, may your ancestors guide and protect you! During the time when I was conducting this research, I managed to interview traditional leaders such as chiefs and headmen in Nyombweland. But in my words of thanks, Chief Kandeya will be singled out for special mention because he managed to give me much valuable information that helped broaden my knowledge of the *Korekore-Nyombwe* culture and its ethical orientation.

At institutional level, I would like to give special thanks to Arrupe College–Jesuit School of Philosophy and Humanities, especially the dean Fr. Dr. Stephen Buckland, S.J. and his deputy, Mr. Simon Thiong’o, S.J. The Arrupe community, in general, made life easier for me as I had access to their state of the art library for the literature that helped inform this work. The computer laboratory staff, manned by young, energetic Theoneste Ubalijoro and serene Fr. John Moore, S.J. was very helpful and receptive. At times I felt I was almost becoming a bother to them, as I was, at times, technically challenged by computer technology during the production of this work. Thanks Fr. Moore and thanks brother Theo, may God bless you! Last but not least, my family played a very important role in the production of this work. My mother (Georgina),

my wife (Shylet) and my son (Arthur) were there for me when success seemed to be unreachable and the journey to it riddled with uncertainties; they re-invigorated my energy and gave me the will power. I especially thank my mother for not aborting me when I was still a foetus, *tinotenda VaMamoyo!*

Special thanks also go to my late grandmother Selina Nhliziyo (*Mbuya va Mukaradhi*), who is responsible for my upbringing, my uncle Mark Mangena who paid for my “O” level fees and who always wanted to see me scaling dizzy heights in the ladder of success; to you I say *rambaimakadaro Gono!* To my mother’s young sister, the late Firidha “Mankaa” I thank you for your tender heart and spiritual encouragement, to you I say may your soul rest in eternal peace!

To my late father Jabson Muweli Janhi Moyondizvo, I say you should have lived to see your son’s success but fate had it otherwise. Rest in Eternal Peace *Moyondizvo-Bvumavaranda!* Credit as well goes to my late mother Lydia Janhi, who taught me the virtues of hard work and perseverance during the short time I stayed with her. Rest in Eternal Peace *VaChibera!*

My blood brothers and sisters also deserve a place in my heart and these include among others the late Jawbreaker Jabson Janhi, the late Jabulani Janhi and the late Dhehwa Janhi. Big brother Sahi Loverose Janhi, Sisters Silethiwe, Swelline, Skumbuzo, Makundai, Svukuma, Stabile (in the UK) and all the young brothers: namely Dickson, Vasahi, Sailous, Bvumavaranda and Jahxani. In fact, all the members of the Janhi family, including our children, are **GREAT PEOPLE**. May God shower them with lots and lots of blessings! I also would like to give special thanks to my-in-laws, Mr. and Mrs. Henry Kuvapfaira from Nyombweland, for giving me an industrious, loving and caring wife, Shylet. Thank you very much *Nzou-Samanyanga*, may God bless you!

DEDICATION

To Jabson, Georgina, Selina, Mark, Firidha, Shylet and Arthur. I say, you have a special place in my heart. To those on death row and those who have been executed erroneously or otherwise by the Zimbabwean justice system, I say may justice prevail even beyond the grave!

GLOSSARY OF SHONA/KOREKORE TERMS

<u>WORD</u>	<u>ENGLISH EQUIVALENT</u>
Hupenyu	Human life
Humhondi	Murderous acts
Korekore-Nyombwe	<i>Makorekore</i> from Nyombweland
Makorekore	The <i>Korekore</i> people (plural)
Mukorekore	The <i>Korekore</i> person (singular)
Ngozi	The “avenging/angered” spirit
Shona/Korekore	Shona people from northern Zimbabwe
Nyombweland	Land of the <i>Korekore-Nyombwe</i> people
ChiKorekore	<i>Korekore</i> dialect
ChiNyombwe	Sub-dialect for the <i>Korekore-Nyombwe</i>
Hunhuism	African conceptions of morality
ChiZezuru	Dialect for the Zezuru people from Mash East
ChiNdau/ChiManyika	Dialect for the people from Manicaland
ChiKaranga	Dialect for the people from Masvingo/Midlands
Gore ne gore	Year after year
ChiTande	Sub-dialect for the <i>Korekore-Tavara</i>

ChiBudya	Dialect for the <i>Korekore</i> from Mtoko
Dotito	A district in Mt. Darwin North (Nyombweland)
Chakoma	A Village near Dotito
Ruya	One of the biggest rivers in Nyombweland
Nyamazizi	A Village in Nyombweland
Chawanda	A Village in Nyombweland
Bveke	A Village in Nyombweland
Chironga/Karanda	A Village in Nyombweland
Zvomarima	A Village in Nyombweland
Masiya	A Clan in Zvomarima village
Kajokoto	A Village in Nyombweland
Pachanza	A Village in Nyombweland
Mavuradonha	Mountain ranges in Nyombweland
Dande	The valley stretching to Mkumbura border post
Nzou-Samanyanga	Totem for the largest tribe in Nyombweland
Nhari-Unendoro	Totem for one of the tribes in Nyombweland

Tembo-Mazvimbakupa	Totem for one of the tribes in Nyombweland
Hungwe-Zenda	Totem for one of the tribes in Nyombweland
Munhu	Shona black man/woman
Munhumutapa	Empire established by the Rozvi people in the Dande valley
Murungu	Whiteman/woman
Kutyora muzura	Women's way of greeting elders by bending their knees
Mhondi	Murderer
Mhombwe	Adulterer
Kuda	To love
Tsika dzakanaka	Good character
Munhu akaipa	A bad person
Munhu akanaka	A good person
Munhu ha-apfi	A Shona black person does not die
Munhu ha-arovi	A Shona black person does not sleep forever
Muroyi	A witch/wizard
Munhu aneutsinye	A malicious/mean person
Nduru ye garwe	Crocodile bile

Mupari	Perpetrator
Kachasu/Gununzvu	Home-made brew in Nyombweland, very harmful
Midzimu	Ancestors
Hunhu hwakanaka	Good personality
Kurohwa ne shamhu	Punishment
Kutadza	Deviating from the expected moral standard
Runyoka	A concoction used by men to protect their wives from straying
Mashavi	Alien spirits (plural)
Shavi	Alien spirit (singular)
Mapfeni	Baboonic spirits
Mwari/Musikavanhu	The creator, God
Nehanda	Influential Shona territorial spirit medium in the first Chimurenga
Kaguvi	Influential Shona territorial spirit medium in the first Chimurenga
Chaminuka	Spirit medium of the first Chimurenga
Muzukuru/Dunzvi	Nephew
Mukombe	Calabash

Mbanda/Futa	Traditional Medicine in Nyombweland
Sekuru	Grandfather, spirit of a departed male
Ambuya	Grandmother, spirit of a departed female elder
N’anga	Traditional healer (‘witch doctor’)
Mutambi	Dancer
Ndarira	Bangle
Munyama	Misfortune
Runyararo	Peace
Kusagadzikana	Unstable
Dzinza	Clan
Ridotadza	That deviates from the normal practice
Kuremekedza	To respect
Sadza	Stiff porridge
Rukweza/Zviyo	Millet meal
Chiguvare	Threshold of the hut
Kutamba guva	The bringing back ceremony
Jiti/Jezi	Traditional dance in Nyombweland

Sahwira	Family friend
Hakata	Shona bones of divination
Matare	Traditional courts in Shona society
Kushaya hunhu	Lack of humanness
Chikorokoza	Gold panning
Matororo	Terrorists at least in the eyes of the Rhodesians
Vana	Children
Zvido zveruzhinji	The Common good
Vadoroorana	Married each other
Kufukura hapwa	To expose oneself in public
Kuporika	To deviate from the standard norm
Gwara	Right direction
Kuembera/ Kuponda gusvi	<i>Korekore</i> way of greeting
Tavara	The original inhabitants of Nyombweland

GLOSSARY OF FOREIGN TERMS

<u>FOREIGN TERM</u>	<u>ENGLISH EQUIVALENT</u>
<i>Actus non facit reum, nisi mens sit rea</i>	Without a vicious will, there is no crime
<i>Actus reus</i>	Actual criminal act
<i>Analytic a priori</i>	True by definition
<i>Cogito ergo sum</i>	I think, therefore, I exist
<i>Cognatus ergo sum</i>	I am related by blood, so I exist
<i>Corpus delicti</i>	Body or content of the crime
<i>Gaudium et Spes</i>	The Church in the modern world
<i>Inter alia</i>	Among others; the list is long
<i>Jus talionis</i>	The right of retaliation
<i>Lex naturalis</i>	Latin for natural law
<i>Lex aeterna</i>	Latin for eternal law
<i>Lex talionis</i>	Latin for law of retaliation or equal punishment
<i>Logos spermatikos</i>	The rational seed or sperm
<i>Mala in se</i>	Evil, criminal
<i>Mens rea</i>	A culpable or criminal state of

	mind
<i>Per aliud nota</i>	True without a middle term
<i>Per se nota omnibus</i>	Known through themselves to all, self evident
<i>Poena forensica</i>	Judicial or juridical punishment
<i>Poena naturalis</i>	Natural punishment
<i>Raison d'etre</i>	Function, role or purpose
<i>Akan</i>	One of the biggest tribes in Ghana

KEY TO ABBREVIATIONS

G.C.N.	Girl Child Network
H.I.V.	Human Immuno Virus
A.I.D.S.	Acquired Immune Deficiency Syndrome
U.D.H.R.	Universal Declaration of Human Rights
U.S.	United States
L.O.M.A.	Law and Order Maintenance Act
C.A.P.S. United	Central African Pharmaceutical Services United
U.D.I.	Unilateral Declaration of Independence
U.N.	United Nations
Z.A.P.U.	Zimbabwe African People's Union
U.S.C.C.	United States Catholic Conference
C.C.C.B.	California Catholic Conference of Bishops
Z.C.B.C.	Zimbabwe Catholic Bishops' Conference
V.O.M.	Victim-Offender Mediation
F.G.C.	Family Group Conferencing
N.V.C.	Non-Violent Communication
C.R.Bs	Community Restorative Boards

MAPS AND ILLUSTRATIONS

Map 1: Showing the distribution of the Shona/Korekore people in general in Zimbabwe (see page 65)

Map 2: Showing Nyombweland, the area demarcated for study (See page 66)

TABLE OF CONTENTS

Abstract.....	ii
Acknowledgements.....	iii
Dedication.....	viii
Glossary of Shona/Korekore Terms.....	ix
Glossary of Foreign Terms.....	xv
Key to Abbreviations.....	xvii
Maps and Illustrations.....	xviii
Table of Contents.....	xix

Introduction.....	1
-------------------	---

<u>Chapter One</u> : The Evolution and Power of Natural Law Ethics and the Concept of Retributive Justice in Moral Theorising.....	5
--	---

<u>Chapter Two</u> : The Shona/Korekore Concept of Justice: An Exercise in <i>Hunhuism</i> and Supernatural Ethics	60
--	----

<u>Chapter Three</u> : The Convergence of Criminal Law with Natural Law Ethics: Mapping the Legal Landscape on Death Penalty Discourses in Zimbabwe.....	96
--	----

<u>Chapter Four</u> : Natural Law, Shona Communalism and the Common Good.....	131
---	-----

<u>Chapter Five</u> : Restorative Justice in Nyombweland.....	164
---	-----

<u>Chapter Six</u> : Conclusion and Recommendations.....	190
--	-----

Selected Bibliography.....198
Appendix.....206

INTRODUCTION

The power of the natural law ethics has been felt in virtually all the countries of this world, including Zimbabwe. As this work will demonstrate, natural law ethics is the highest law in this universe and it informs all the other laws. An attempt shall be made, in this dissertation, to relate natural law theories to human laws such as those establishing penalties, including the death penalty, to see whether it is possible to revisit familiar arguments with regard to the moral implications of capital punishment in the world today. This will be done in a bid to determine the validity of the folk claim that retributive justice (which is the reason behind the institution of the death penalty, among others) is irrelevant to the *Korekore-Nyombwe* concept of justice as enshrined in *bunhuism* and that it is a violation of natural law ethics which regards human life (including the life of a murderer) as a basic human good that cannot be dispensed with at will.

RESEARCH OBJECTIVES

The following objectives will inform this work:

1. To give a historical background to the growing debates on the need to abolish the death penalty in Zimbabwe and to foreground the idea that the murderer has a right to life as member of the human or moral community.
2. To appeal to *bunhuism* philosophy in establishing standards by which human behaviour can be regulated in Shona society.

3. To consider supernatural motivation for ethical behaviour, particularly in Korekore-Nyombwe society, and to notice the role of *ngozi* in that regard.
4. To show the extent to which retributive theories can be said to have no place and relevance in *Korekore-Nyombwe* society and to justify the call for restorative justice and the abolition of the death penalty in Zimbabwe's Shona societies.

METHODOLOGY

In terms of methodology, this is basically a reflective inquiry - a philosophical investigation. The methodology is also interdisciplinary utilising qualitative research in terms of its epistemological and theoretical underpinnings, case study and ethnographic researches in terms of the research type and specific research techniques that included and were not limited to oral interviews, use of the internet, books, book chapters, conference proceedings, seminar papers, periodicals and journals. Using oral interviews, about eight traditional leaders were interviewed in Nyombweland and these included chiefs and headmen. The information ferreted from these traditional leaders was subjected to a rigorous conceptual analysis that also incorporated descriptive and hermeneutical methods.

The information gathered showed that some of the traditional leaders were victims of the avenging spirit while others were coming from families whose

relatives had been murdered and were in the process of mending bridges with the guilty families. Distinguished academics such as Professor Claude Gumbucha Mararike (a celebrated Zimbabwean Sociologist) and priests were also interviewed, and it was established that the death penalty debate was inconclusive with all the stakeholders from civic groups, politicians, the church and the general public being deeply divided over the issue. In terms of citation, the work utilised the Harvard style, which is the method used in many academic theses today. This was done on both the footnoting and the selected bibliography.

CHAPTER BREAKDOWN

THE CHAPTER BREAKDOWN WILL BE AS FOLLOWS:

Chapter one looks at the evolution and power of natural law ethics and retributive justice in the light of the growing debates on the morality of the death penalty in the contemporary world in general and in *Korekore-Nyombwe* society in particular. Key terms like natural law ethics and retributive justice shall be defined in this work while retentionist and abolitionist arguments shall also be given due consideration in a bid to lay a firm foundation for the smooth progression of this work. *Chapter two* discusses the Shona/Korekore concept of justice as embodied in a philosophical ethics of *hunbuisim*. *Hunbuisim* could oppose retribution and the death penalty without appealing to *ngozi*, yet in supernatural ethics the threat of punishment by the avenging spirit (*ngozi*) strengthens motivation to avoid

murdering in *Korekore-Nyombwe* and other Shona societies, at least as established by this study. *Chapter three* looks at the convergence of criminal law with natural law in a bid to establish the causes and moral implications of crime in Zimbabwe and to map the legal landscape thereof. The crime of murder will be used as a reference point especially as it occurs in Nyombweland. A brief history of the death sentence will also be considered, of course, from two historical epochs, the colonial and post-colonial epoch.

Chapter four brings to the fore the common good argument as way of reconciling the notions of retributive justice and restorative justice in Shona/Korekore society. It is argued, in this chapter, that crime in *Korekore-Nyombwe* society is interpreted in communal and not in individualistic terms, hence an added reason to develop the morality of restoration rather than retribution. *Chapter five* dismisses the death penalty on the grounds that it has a retributive function. The main subject in the present thesis is that retributive justice is not in tandem with the Shona moral notions of justice premised on restoration and bridge-building. Besides, the death penalty (because of its emphasis on retributive justice) is a violation of natural law ethics. *Chapter six* knits all the five chapters together and prescribes some recommendations.

CHAPTER ONE

THE EVOLUTION AND POWER OF NATURAL LAW ETHICS AND RETRIBUTIVE JUSTICE IN MORAL THEORISING

The purpose of this chapter was to give background information regarding the relevance and place of retributive justice in Shona society. To this end, the chapter looked, in considerable details, at the evolution and power of the natural law theory and retributive justice in moral and legal theorising. It was established in this chapter that the natural law theory regards life as the grounding good and capital punishment as having a three tier function: namely social protection, deterrence and retribution. The chapter began by considering the definition and characterisation of natural law ethics and retributive justice as an entry point to the subject of this thesis.

INTRODUCTION

Strong convictions are firmly entrenched on both sides of the death penalty controversy.¹ From one side, we hear in forceful tones that “murderers deserve to die.”² We are also told that no lesser punishment than the death penalty will suffice to deter potential murderers.³ From the other side of the controversy, in tones of equal conviction, we are told that the death penalty is a cruel and barbarous form of punishment, effectively serving no purpose that could not well be served by a more humane punishment.⁴ “How long,” it is asked, “must we indulge this uncivilised

¹ Mappes, T.A. and Zembaty, J.S. (1997), *Social Ethics: Morality and Social Policy*, McGraw-Hill Companies, New York, p.104

² Ibid.

³ Ibid.

⁴ Ibid.

and pointless lust for revenge?”⁵ In the face of such strongly held but opposed views, each of us is invited to confront an important ethical issue, the morality of the death penalty.⁶ This is also the rationale behind this present thesis. But while these arguments are quite appealing to most reflective and non-reflective minds, this chapter brings to the fore the influence of natural law theories on the death penalty discourse in order to set the tone for a bruising battle against retentionist theorists, that is, those who believe that the death penalty has both a deterrent and retributive function and is, therefore, morally unobjectionable. This is an attempt to add currency to other abolitionist voices in the ethical terrain and to fill the theoretical gap that seems to weaken abolitionist reactions to the death penalty. The Shona society will be used as a case study and the setting will be the *Korekore -Nyombwe* society.

THE DEFINITION AND CHARACTERISATION OF NATURAL LAW ETHICS

From the onset, it is important to note that the principles of natural law (*lex naturalis*) thus understood, are traced out not only in moral philosophy or ethics... but also in political philosophy and jurisprudence, in political action and adjudication, and in the life of the citizen.⁷ As Sayre Geoff McCord postulates, the natural law theory

⁵ Mappes, T.A. and Zembaty, J.S. (1997), *Social Ethics: Morality and Social Policy*, McGraw-Hill Companies, New York, p.104

⁶ Ibid.

⁷ Finnis, John. (1980), *Natural Law and Natural Rights*, Oxford University, Oxford, p.23

marks the beginning of a certain class of ethical theories far removed from the modern and contemporary ethical theories. To this end, the natural law theory has a variety of meanings to contend with. As McCord would argue, “some writers refer to it as any moral theory with a version of moral realism, that is to say, any moral theory which holds that some positive moral claims are literally or objectively true,”⁸ while some writers use it to refer to any moral theory that is grounded in a specific form of Aristotelian teleology.⁹

But whichever way one looks at it, natural law principles refer to those just laws that are immanent in nature, that is, they can be discovered instead of being created by such things as the bill of rights or that they can emerge by natural processes of resolving conflicts (as embodied by common law).¹⁰ Natural law principles exist independent and outside the legal process itself, rather than simply being principles whose origins are inside the legal system.¹¹

⁸ McCord, Geoff Sayre, at <http://plato.stanford.edu/entries/natural-lawethics/>, updated on 23 September 2002

⁹ Ibid.

¹⁰ Wikipedia, the free encyclopedia, available at http://en.wikipedia.org/wiki/natural_law, updated 2005

¹¹ Ibid.

Natural law is based on the idea that the principles of the ethical life and of the legal order are related to the specificity of human nature.¹² Natural law theories focus exclusively on basic human goods such as human life, which are both self-evidently and intrinsically worthwhile, and these goods reveal themselves as incommensurable with one another.¹³ The main subject of the present work is to demonstrate how natural law theories can be invoked to challenge the contemporary retentionist notions on capital punishment especially as it (capital punishment) disregards the rights of the murderer and values the life of the victim.

It is the submission of this work that human life, whether it is the life of the murderer or his or her victim, is a gift from God. Even the murderer has a natural right to life as part of the rubric of his or her personal liberty or autonomy. This is in keeping with the provisions of the Universal Declaration of Human Rights (UDHR) articles 1, 3 and 5. Capital punishment or the death sentence is, therefore, morally unacceptable because it unjustifiably takes away human life. But while these definitions will go a long way in ascertaining the meaning of natural law ethics, the most elaborate and clear definition of natural law ethics comes from St. Thomas Aquinas.

¹² Schockenhoff, E. (2003), *Natural Law and Human Dignity: Universal Ethics in an Historical World*, The Catholic University of America Press, Washington D.C, P.12

¹³ McCord, Geoff Sayre, available at <http://plato.stanford.edu/entries/natural-lawethics/>, updated on 23 September 2002

St. Thomas, as quoted by John Finnis, argues that there are two key features of natural law ethics.

1. First, when one focuses on God's role as the giver of natural law ethics, then natural law ethics is one aspect of divine providence.¹⁴
2. Second, when one focuses on the human being as a recipient of the natural law then natural law constitutes the principles of practical reason.¹⁵ It is on the basis of this understanding that, natural law ethics can be defined as the principles by which human action is to be judged as reasonable or unreasonable. The theory of natural law ethics is, from this perspective, the pre-eminent part of the theory of practical reason.¹⁶

In the next section attempts shall be made to explore the two key features of natural law ethics: namely, natural law as divine providence and natural law as practical reason. These features are distinctions St. Thomas is trying to make between the divine and secular nature of natural law ethics. Distinctions that are very crucial in a work of this nature. We will now zero into these features and/or distinctions.

¹⁴ Finnis, John, available at <http://plato.stanford.edu/entries/natural-lawethics/>, updated on 23 September 2002

¹⁵ Ibid.

¹⁶ Ibid.

NATURAL LAW AS DIVINE PROVIDENCE

While the major thrust of this work will be to establish the status of natural law ethics in all secular discourses which are to do with capital punishment or the death penalty in *Korekore-Nyombwe* society, there shall be a shift in emphasis where the notion of natural law as divine providence shall be given prominence in this chapter. To this end, the fundamental thesis affirmed by Aquinas is that the natural law ethic is a participation in the eternal law (*lex aeterna*).¹⁷ The eternal law, for Aquinas, is that rational plan by which all creation is ordered; natural law is, therefore, the way that the human being participates in this (eternal) law.¹⁸

As matter of emphasis, natural law is not something “different from the eternal law”, but rather a certain participation of it.¹⁹ While non-rational beings have a share in the eternal law, only by being determined by it, their action non-freely results from their determinate natures, natures whose existence results from God’s eternal plan.²⁰ Human beings are able to grasp their share in the eternal law and

¹⁷ Finnis, John, available at <http://plato.stanford.edu/entries/natural-lawethics/>, updated on 23 September 2002

¹⁸ Ibid.

¹⁹ Rhonheimer, Martin. (2000), *Natural law and Practical Reason: A Thomistic View of Moral Autonomy*, Fordham University Press, New York, p.65

²⁰ Finnis, John, available at <http://plato.stanford.edu/entries/natural-lawethics/>, updated on 23 September 2002

freely act on it. It is this feature of the natural law ethic that justifies, on Aquinas' view, our calling of the natural law "law."²¹ For law, as Aquinas puts it:

Is a rule of action put in place by one who has care for the community and as God has care for the entire universe, God is choosing to bring into existence beings who can act freely and in accordance with principles of reason. This is enough to justify our thinking of those principles of reason as law.²²

It is not clear in this paragraph why God freely chooses human beings; but probably it is because human beings are at the centre of the universe because, if we are to go by the scriptures, God created men in his own image and likeness. Besides, human beings can freely grasp their share in the eternal law because they are rational beings that can choose and deliberate on actions, something which lower beings are not capable of doing. But what enables human beings to choose and deliberate? It is probably because by participating in the eternal law and by having the faculty of reason, they discover natural laws or principles that should govern their behaviour, and they give credit to God as the author of such laws. With this brief look at natural law as divine providence, it is imperative that we now shift our focus on the discourse of natural law as practical reason. This is important to give enough background to the evolution and power of the natural law discourse.

²¹ Ibid.

²² Ibid.

NATURAL LAW AS PRACTICAL REASON

St. Thomas maintains that there are moral laws discoverable by our reflection on nature and these moral laws constitute the principles of practical reason which are analogous to the physical laws of nature. These moral laws of nature are “decreed” by nature just as physical laws of nature are.²³ Among them are rules or principles requiring people to return things that have been entrusted to them by others and the obligation to honour their parents as well as rules or principles forbidding people to kill fellow human beings, commit adultery or steal.²⁴

As St. Thomas maintains, these principles of practical reason are *per se nota omnibus* (that is, they are known through themselves to all).²⁵ They are not *per aliud nota* (that is, they do not need something else, a middle term, to be shown to be true). They need not, and cannot, be proved.²⁶ The principles of practical reason are self-evidently true; for instance, the self-evidence of the first principle, which is also called the formal principle (“the good is to be done and pursued, and evil is to be avoided”) can be explained as the self-evidence of an analytic *a priori* proposition. That is to say, it is by virtue of understanding what the words “good” and “evil”

²³ Aquinas, St. Thomas, in: Baumgarth, W and Regan, R. J. (1988), *Saint Thomas: On Law, Morality and Politics*, Hackett Publishing Company, Indianapolis, p. 85

²⁴ Ibid.

²⁵ Aquinas, St. Thomas in: Gomez-Lobo, Alfonso. (2002), *Morality and the Human Goods: An Introduction to Natural Law Ethics*, Georgetown University Press, Washington, D.C, p.127

²⁶ Ibid.

mean in ordinary language that anyone can know it to be true.²⁷ Human beings discover this and other principles of practical reason through the reflection of reason.²⁸ The theory of natural law ethics, through the principles of practical reason, endorses the familiar idea that the right thing to do is whatever course of conduct has the best reasons on its side.²⁹ Reflecting to search for the best reasons, we naturally recognise that murder is wrong because it is unreasonable and so is capital punishment. The two (that is, murder and capital punishment) are unreasonable because they take away human life considered by natural law theories to be the grounding good. The principles of natural law and practical reason are universally binding and knowable by nature, and the moral life is the life lived according to the “dictates of reason.”³⁰

These precepts are binding by nature because no beings can share our human nature and fail to be bound by these precepts.³¹ This is so because these precepts direct us toward the good and the various particular goods.³² For Aquinas, the good and particular goods provide the rationale for rational creatures to act; the good is the

²⁷ Aquinas, St. Thomas in: Gomez-Lobo, Alfonso. (2002), *Morality and the Human Goods: An Introduction to Natural Law Ethics*, Georgetown University Press, Washington, D.C, p.127

²⁸ Aquinas, St. Thomas in: Barcalow, E. (1994), *Moral Philosophy: Theory and Issues*, Cambridge University Press, Cambridge, p.151

²⁹ Rachels, J. (1999), *The Elements of Moral Philosophy*, McGraw-Hill Companies, Boston, p. 63

³⁰ Ibid.

³¹ Finnis, John, available at <http://plato.stanford.edu/entries/natural-lawethics/>, updated on 23 September 2002

³² Ibid.

fundamental principle of natural law.³³ Put into the context of this work, the good among the Shona people includes respecting human life and avoiding anything that results in the loss of human life, hence the good must be done and pursued, evil avoided. The good includes this realisation that, *hupenyu hwakakosha kupfuura zvinhu zvese* (human life is the grounding good). In this light, murder occurs when one deliberately takes away somebody's life (and as the *Korekore-Nyombwe* people will put it: *humbondi kutora hupenyu hwe munhu nhandu*).

Particular goods inspire us to pursue life and knowledge. The affirmation of the claim, "life is good," "knowledge is good," and "friendship is good," among others makes intelligible the persistent pursuit of these ends by rational beings.³⁴ To this end, this work defends the position that human life is a basic human good that should be valued in *Korekore-Nyombwe* society. Since the murderer also has an inalienable right to life, the state has no moral jurisdiction to prescribe the sentence of death to him or her under whatever circumstances and for whatever reasons. For purposes of positioning our argument, human life as a particular good shall be discussed as we quest to establish a form of justice that is relevant to the Shona people of Zimbabwe especially the *Korekore-Nyombwe* people of northern Zimbabwe.

³³ Finnis, John, available at <http://plato.stanford.edu/entries/natural-lawethics/>, updated on 23 September 2002

³⁴ Gomez-Lobo, Alfonso. (2002), *Morality and the Human Goods: An Introduction to Natural Law Ethics*, Georgetown University Press, Washington, D.C, p.10

LIFE AS A BASIC HUMAN GOOD

What is human life according to natural law theorists? For Finnis, the term life signifies every aspect of the vitality (*vita*, life), which puts a human being in good shape for self-determination: Hence, life includes bodily (including cerebral) health, and freedom from pain that betokens organic malfunctioning or injury.³⁵ Human life for Finnis is a basic human value.

For Finnis, not only is human life central to natural law ethics, it also makes it possible for other lives to be transmitted or generated through procreation.³⁶ This should not be interpreted to mean that new reproductive choices which have made it possible for a dead person to procreate can be disregarded. The most important thing, for Finnis, is that one life begets another. By the way, procreation is one of the core values of natural law theories as it is arguably the purpose and end of human sexuality. Certainly, it is tempting to treat procreation as a distinct, irreducibly basic value, corresponding to the inclination to mate/reproduce/rear.³⁷

While there are good reasons for distinguishing the urge to copulate from both the urge to self-preservation and the maternal or paternal instincts, the analytical situation is different as we shift from the level of urges/instincts/drives to the level

³⁵ Finnis, John. (1980), *Natural Law and Natural Rights*, Oxford University Press, Oxford, p. 86

³⁶ Ibid.

³⁷ Ibid.

of intelligently grasped form of the good.³⁸ What Finnis probably means here is that natural law ethics is about reason rather than the lower level of inclination or drive, which we act when we do sex for pleasure and not for procreative purposes. One cannot be sure about what Finnis meant by the urge to copulate, but it can be supposed that he was probably referring to the urge to copulate merely as a lower level biological instinct, while procreation and self-preservation were at the apex of nature.

We can distinguish the desire and decision to have a child, from the desire and decision to cherish and educate the child.³⁹ The former desire and decision is a pursuit of the good life, in this case, life at its transmission; the latter desires and decisions are aspects of the pursuit of the distinct basic values of sociability (or friendship) and truth, running alongside the continued pursuit of the value of life that is involved in simply keeping the child alive and well until it can fend for itself.⁴⁰

Whatever else is implied in this characterisation, the transmission of life by procreation of children is at the core of the good life, it is the ultimate end of sex. Alfonso Gomez-Lobo, like Finnis, also attaches importance to life as a basic good. For Gomez-Lobo, life means human life at the basic biological level, manifesting

³⁸ Finnis, John. (1980), *Natural Law and Natural Rights*, Oxford University Press, Oxford, p. 86

³⁹ Ibid, p. 87

⁴⁰ Ibid, p. 87

itself in the typical functions of a human organism (taking nourishment and growing, among other things).⁴¹ For Gomez-Lobo, whether a certain organism is human will depend entirely on whether it has a complete set of standard human chromosomes or a deviation wherefrom that counts as human genetic abnormality.⁴² An egg or a sperm by itself does not qualify, neither of them... has the complete set.⁴³

A toe or a tumor or some drops of blood do have cells each of which has the required chromosomes, but none of them is a complete organism, these are sufficient, however, to understand what happens when someone dies: there is a cessation of basic biological functions and because of that there also is a cessation of every other higher function.⁴⁴ By implication, it means rationality as a higher function also ceases at death and so does moral consciousness. This makes human life a basic human good in the sense that without it everything ceases to exist. Human life is, therefore, valuable in the biological sense if we are to go by Aquinas and Gomez-Lobo's characterisations. But to limit human life to a complete set of chromosomes will be to make a grave mistake, because even the egg or sperm has the potential to form into life.

⁴¹ Gomez-Lobo, Alfonso. (2002), *Morality and the Human Goods: An Introduction to Natural Law Ethics*, Georgetown University Press, Washington, D.C, p.10

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

Human life does not only begin when we have a complete organism with a fully developed genetic code and the required number of chromosomes. Even the fetus has the potential to develop into a full human being and should not be destroyed before it fully realises its potential. The egg or sperm is human life in potentiality. This work will, however, heighten the debate by saying that life should be desired for its own sake and not for the sake of anything. Anyone who takes away human life including the life of a murderer should be liable to moral condemnation.

As Gomez-Lobo takes this point further, even the execution of a murderer is a terrible thing.⁴⁵ This work is, however, aware of the retributive argument proffered by the Kant and others, which holds that the murderer automatically forfeits his or her life by killing or by committing acts of murder. But while this point is granted, it should be noted that there is a sense in which the death penalty should be morally disregarded as a form of punishment because it values the life of the murder victim more than that of the murderer.

There is also need to overemphasise the point that human life is not the sole good though (we can possess many other goods beyond being merely alive) but it is surely

⁴⁵ Ibid, p.11

the very first one.⁴⁶ Without it we cannot partake in any other goods, human life in this sense is the grounding good. But if human life is intrinsically good as Gomez-Lobo puts it, why do some people commit suicide or request for physician-assisted suicide? Why do some people long to die? What makes life bad or unbearable are some of the evils that are closely associated with it and these are; disease, misfortune and poverty *inter alia*.⁴⁷ Gomez-Lobo also expands this list to chronic illness, acute physical pain, and destitution, being lonely and being forsaken by friends and relatives.⁴⁸

For Gomez-Lobo, it is not life that is bad; the illness, pain, poverty and so forth, are the bad things.⁴⁹ It is therefore reasonable conclude that these evils motivate suicidal tendencies. There is a good that is closely connected with human life and analogous to it: the good of health and this good, in turn, manifests itself in other worthwhile bodily operations such as perceiving, sensing and moving on one's own.⁵⁰ Health does not play a strictly grounding role, however, because it is possible to be in poor health and yet enjoy other non-bodily goods such as friendship. But, of course, a life lived for the most part in good health will be better than one with long periods

⁴⁶ Gomez-Lobo, Alfonso. (2002), *Morality and the Human Goods: An Introduction to Natural Law Ethics*, Georgetown University Press, Washington, D.C, p.11

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

of illness.⁵¹ It is axiomatic (that is, it is good without proof) that health is something that is good.⁵² In the next section, this work looks at the evolution and power of the natural law theory by way of laying a solid foundation for the thesis that the death penalty is morally irrelevant to the Shona/Korekore society because of its violation of the natural law and its emphasis on retributive justice, which is alien to Shona cultures.

THE EVOLUTION AND POWER OF NATURAL LAW ETHICS IN MORAL THEORISING

It is important to note that Plato and Aristotle developed early accounts of the natural law tradition, although the Stoics had set the ball rolling in the pre-Socratic period. The Stoics believed that human beings had within them a divine spark (*logos spermatikos* -“the rational seed or sperm”) that enabled them to discover the essential eternal laws necessary for individual happiness and social harmony.⁵³ For the Stoics, the laws that exhibited rationality governed the whole universe.⁵⁴ But the final fruition of the natural law tradition is, however, found in the medieval period - thanks to the insights of St. Thomas Aquinas, who gave this theory its definitive

⁵¹ Gomez-Lobo, Alfonso. (2002), *Morality and the Human Goods: An Introduction to Natural Law Ethics*, Georgetown University Press, Washington, D.C, p.11

⁵² Ibid, p.12

⁵³ Pojman, L.P. (2002), *Ethics: Discovering Right and Wrong*, Wardsworth Thomson Learning, Canada, p.43-44

⁵⁴ Ibid.

formulation and justification.⁵⁵ Proceeding then to the Christian thinkers of the middle ages, natural law doctrines or theories, at first, enjoyed a rather more dubious status although, earlier on, Plato and Aristotle had made attempts to revive them.⁵⁶ Henry B. Veatch remarks that in the later middle ages and the renaissance, there occurred something like an eclipse, only to be followed by the great sunburst of natural law traditions, albeit in somewhat altered form in the seventeenth and eighteenth centuries.⁵⁷ The pioneers of this project during the time were, among others, Hugo Grotius and Samuel Pufendorf. John Locke and Jean Jacques Rousseau came somewhat later.

For Veatch, the story is only too familiar of how their influence spilled to the age of reason when doctrines of natural rights seemed to crop up everywhere and not least in America with the publication of the declaration of independence, followed by the numerous bills of rights in the various state and federal constitutions.⁵⁸ From a literal reading of the works of St. Thomas, it is not clear what influenced the great sunburst of natural law traditions in both the 17th and 18th centuries. But whatever it is, the flourishing of natural law in this period (eighteenth century) was followed by its apparent demise in the nineteenth century.

⁵⁵ Pojman, L.P. (2002), *Ethics: Discovering Right and Wrong*, Wardsworth Thomson Learning, Canada, p.43-44

⁵⁶ Crowe, M. B. (1977), *The Changing Profile of Natural Law*, Nijhoff, The Hague, p.246

⁵⁷ Veatch, Henry B. (1978) "Natural Law: Dead or Alive?"-available at http://oii.liberty.org/index.php?option=com_content&task=view&id=168&Itemid=259

⁵⁸ Ibid.

For Crowe, “the philosophers tended to say that the natural law was not natural and the lawyers, that it was not law.”⁵⁹ Nevertheless, with the Thomistic revival in the later part of the nineteenth century, an interest in natural law appeared to be in full swing again by the first quarter of the twentieth century particularly in Catholic circles.⁶⁰ This period saw the birth of natural lawyers such as John Finnis, Alfonso Gomez-Lobo and Charles Rice following St.Thomas’ footsteps. The views of these scholars will illuminate this treatise. From the evolution and power of natural law ethics, we move on to the definition and characterisation of the concept of retributive justice.

THE DEFINITION AND CHARACTERISATION OF THE CONCEPT OF RETRIBUTIVE JUSTICE

We cannot look at retributive justice without distinguishing it from some utilitarian theories of punishment to which the deterrent argument is part. Theories of retributive justice are concerned with punishment for wrongdoing and they basically answer three fundamental questions: 1. Why punish? 2. Who should be punished? 3. What punishment should they receive? While utilitarian theories look forward to the future consequences of punishment, retributive theories look back at particular acts

⁵⁹ Crowe, M. B. (1977), *The Changing Profile of Natural Law*, Nijhoff, The Hague, p.246

⁶⁰ Veatch, Henry B. (1978) “Natural Law: Dead or Alive?”-available at http://oii.liberty.org/index.php?option=com_content&task=view&id=168&Itemid=259

of wrongdoing and attempt to balance them with deserved punishment (just deserts).⁶¹ For the retributivist, if someone does something wrong, we must respond to it and to him or her as an individual, not as part of a calculation of overall welfare.⁶² Retributivism emphasises retribution, that is, payback rather than maximisation of welfare, justice is giving everyone what he or she deserves.⁶³ It says that all guilty people and only guilty people deserve appropriate punishment. But what punishment should they receive?

According to the retributive theory, punishment must have an element of *lex talionis* and proportionality. *Lex talionis* means giving equal punishment for equal crimes; it takes after the biblical maxim of “an eye for an eye,” and in capital cases, only death can balance death. *Proportionality* means that certain crimes deserve worst forms of punishment than others. In the case of murder, only death will be the proportional punishment. These shall also be discussed in chapter four where the common good argument shall be central. But while it is important to define and characterise retributive justice, it is also important to make a distinction between retributive justice and vengeance, as more often moral and legal philosophers and the public

⁶¹ Wikipedia, the free encyclopedia, available at <http://en.wikipedia.org/wiki/justice>, last updated 9 August 2007

⁶² Ibid.

⁶³ Ibid.

confuse these two concepts. This distinction is vital in order to position our argument.

RETRIBUTIVE JUSTICE AND VENGEANCE

Is retributive justice the same as vengeance? This is the question that has challenged the minds of many moral and legal philosophers, one that has no easy answers. This work defends the position that retributive justice is different from vengeance in the following ways; while retributive justice is driven by the desire to punish a murderer because of his or her unjust deeds, vengeance is driven by cunningness and cruelty, it goes beyond the principle of proportionality and is informed by the common Shona adage; *tsvaru wakadana tivu* (revenge is sour).

Locating this within the context of this work, when the spirit of the negative *ngozi* strikes the guilty family, every person within the guilty family feels its devastating effect. Even the innocent people also suffer for the crime that they will not have committed by virtue of belonging to the family of a murderer. The element of retribution is absent here. In chapter five it shall be demonstrated that the death sentence has no place in Shona society as it has a retributive function, which is absent in Shona society. Instead, there is vengeance, which is premised on the idea of restorative justice in a way such as the following:

The positive *ngozi* challenges the murderer and the murderer's family, educating them to practice restorative justice. If they fail, the methods of education may become harsher as the positive *ngozi* shows the wrongdoer and his or her family how it feels to be wronged. Only as a last resort does *ngozi* become negative and practice vengeance. Thus, the threat of vengeance is intended to function restoratively. As J Daryl Charles will take this point further, the moral outrage that is expressed through retributive justice (as opposed to that of vengeance) is one that is first and foremost rooted in moral principle, not mere emotional outrage or hatred.⁶⁴ Its outrage is the expression of abiding moral markers, for example, *thou shalt not murder*, as enshrined in the Hebrew bible.⁶⁵ This should not, however, be interpreted to mean that there is mere emotional outrage in vengeance, even if moral outrage is intended, the quest for social equilibrium cannot be overemphasised. For Daryl Charles, "vengeance is matter of retaliation, of getting even with those who have hurt us."⁶⁶

Vengeance also serves to teach wrong doers how it feels to be treated in certain ways that violate a person's natural right to life.⁶⁷ But Jeffrie G. Murphy draws

⁶⁴ Charles, D.J. (2001), "Thoughts on Revenge and Retribution," available at <http://pewforum.org/deathpenalty/resources/reader/20.php3>

⁶⁵ *The Holy Bible*. (1989), The New Revised Version, Exodus 20:13, Oxford University Press, Cambridge.

⁶⁶ Charles, D.J. (2001), "Thoughts on Revenge and Retribution," available at <http://pewforum.org/deathpenalty/resources/reader/20.php3>

⁶⁷ Ibid.

some stark similarities between retributive justice and vengeance. Murphy postulates that like retributive justice, vengeance or revenge is a response to wrongs committed against innocent victims and reflects the proportionality of the scales of justice.⁶⁸ But my problem with this view is that much as retributive punishment may appeal to the occident, it is problematic when applied to Africa, in particular to the *Korekore-Nyombwe* people of Zimbabwe.

As we shall see, here it would be better to focus strongly on restorative justice. Africans in general do not believe in individualism when it comes to reward and punishment but they subscribe to a communal way of life. The implication of this statement is that what an individual does affects his or her kith and kin. If an individual does something good, the clan receives due praise and if an individual does something bad the whole clan is held responsible.

In *Korekore-Nyombwe* society, if one individual commits murder or any other grievous or felon crime, the whole clan is condemned. It then becomes very difficult to agree with Murphy when he says that there is an element of proportionality in vengeance and that it reflects the scales of justice. As noted above, this is not so in the Shona society, particularly among the *Korekore-Nyombwe*

⁶⁸ Ibid.

people. As shall be seen in chapter 5, vengeance comes as a last resort only when restoration has failed. But once bridges have been built between the family of the murder victim and the guilty family, there will not be any vengeance and the spirit is pacified. But Murphy makes an about turn by arguing that vengeance focuses on the personal hurt involved and it typically involves anger, hatred, bitterness and resentment.⁶⁹ Such emotions are potentially quite destructive because they often lead people to overreact resulting in excessive punishment.

For Daryl Charles, the retributive act distinguishes itself from vengeance in several important ways-whereas vengeance is wild and insatiable, that is, it is not subject to limitations; retribution has both upper and lower limits.⁷⁰ It acknowledges the repugnance of assigning draconian punishment to petty crimes.⁷¹ Vengeance has a thirst for injury and delights in bringing evil upon the offending party.⁷² This work defends the position that since the *Korekore-Nyombwe* people believe in building bridges, their concept of punishment is premised on the idea of restoration-which carries with it vengeance only if no propitiation is done by the guilty family.

⁶⁹ Murphy, J.G, available at <http://pewforum.org/deathpenalty/resources/reader/20.php3>

⁷⁰ Charles, D.J. (2001), "Thoughts on Revenge and Retribution," available at <http://pewforum.org/deathpenalty/resources/reader/20.php3>

⁷¹ Ibid.

⁷² Ibid.

It will be unjust for murderers to be liable to capital punishment for purposes of retribution as this defeats the whole purpose of justice as social equilibrium. This thesis will be discussed in detail in the next chapters as we seek to position our argument. In the meantime, we will look at the evolution and power of the concept of retributive justice in the occident. This is important to see how this concept was developed in the West and how it falls short when applied to Africa particularly to Shona societies.

THE EVOLUTION AND POWER OF THE CONCEPT OF RETRIBUTIVE JUSTICE IN MORAL THEORISING

In the beginning, punishment was viewed as a collective responsibility, that is, everyone in the community was supposed to take a swipe at errant behaviour by one of the members because the idea was to prevent whatever caused the crime to happen from spreading throughout the social group.⁷³ But as time went by legal systems developed, and societies decided to shed off this responsibility to a more formal legal system to perform this function.⁷⁴ This is how the judiciary system was born. This is how the concept of retributive justice was also founded as we have it today.

⁷³ Punishment and Penology, available at <http://faculty.ncwc.edu/TOCONNOR/294/294lect02.htm>

⁷⁴ Ibid.

The Code of Hammurabi (Circa 1700 B.C) is often cited as the world's first legal code.⁷⁵ This code specified a substantial role for those whose job was to chop off hands or impale somebody on stake.⁷⁶ Under this code, an attempt was made to enact sympathetic punishment or justice in form of "life for life", "eye for eye", "tooth for tooth", "hand for hand", "foot for foot," "burning for burning," "wound for wound" and "stripe for stripe."⁷⁷ Within this history, secular and theological views on retributive justice need to be explored for purposes of lining up our premises in this work. These are rational aims of punishment and biblical views on punishment.

RATIONAL AIMS OF RETRIBUTIVE JUSTICE

Philosophical reflection on retributive justice is an effect of developments in the understanding of punishment in the past and present. A generation ago, criminologists and penologists became disenchanted with the rehabilitative effects of programmes conducted in prisons aimed at this end.⁷⁸ This disenchantment led to skepticism about the feasibility of the very aim of rehabilitation within the realm

⁷⁵ Punishment and Penology, available at <http://faculty.ncwc.edu/TOCONNOR/294/294lect02.htm>

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Martinson, R (1974), available at <http://plato.Stanford.edu/entries/punishment/>, last updated on 8 July 2005

of penal philosophy.⁷⁹ To these was added skepticism over the deterrent effects of punishments and as an effective goal to pursue in punishment.⁸⁰ This left apparently two possible rational aims to pursue in the practice of punishment under law: social defense through incarceration and retributivism.⁸¹

Public advocates insisted that the best thing to do with convicted offenders was to imprison them in the belief that the most economical way to reduce crime was to incapacitate known recidivists (repeat offenders) via incarceration or even death.⁸² Whatever else may be true, this goal at least has been achieved on a breathtaking scale, as the enormous growth in the number of state and federal prisoners in the United States of America (some 6.5 million in year 2000, including over 3700 on death row) attests.⁸³

Possibly such incarceration or threat of death may have changed the behaviour of some would-be murderers in the USA, but in Zimbabwe murder cases have been on the increase probably due to the social and economic hardships currently being experienced which have forced people to ‘swap’ their ethics for anything that will

⁷⁹ Wilson, J.Q. (1975), available at <http://plato.Stanford.edu/entries/punishment/>, last updated on 8 July 2005

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

⁸³ Ibid.

put food on their tables. The cases of Edmund Masendeke and Stephen Chidhumo bear testimony to this claim. Even in America, a prison sentence during this time proved to be inadequate, and thus was born the doctrine of “just deserts” in sentencing.⁸⁴ In the next section, we devote space and time to the biblical notions of retributive justice as it has often been argued that the very foundations of retributive justice are located in the Jewish bible.

BIBLICAL NOTIONS OF RETRIBUTIVE JUSTICE

Biblical notions of retributive justice can be fully understood when placed within the old and new covenant contexts.⁸⁵ Within the old covenant context, the history of crime begins in the first book of the bible, Genesis.⁸⁶ Whether the genesis account of Cain and Abel is accepted as a historical fact or allegory, the principle of retributive justice is as explicit and old as recorded history.⁸⁷ In Exodus 21v24, the often misquoted “eye for an eye” verse, when read in context is a statement of the modern rule of proportionality standard used in our courts today, that is, the pay back (penalty) is proportionate to the harm actually caused; this is a legal principle in biblical, rabbinical and common law.⁸⁸

⁸⁴ Sterling, John A. (2002), “Historical Development of Theories of Crime and Punishment,” in: Concepts of Justice, Past and Present, available at <http://www.lawandliberty.org/justice.htm>, last updated on 15 October 2005

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

In Deuteronomy 17v6, the modern principle of two or more witnesses is found.⁸⁹ This is a requirement that direct testimony corroborated by other direct testimony should be the standard of admissible evidence in capital cases.⁹⁰ Besides setting a standard for capital punishment, this verse and the following verses (8-13) acknowledge that there are hard questions of law, which should be decided at the appellate level.⁹¹

When principles of justice seem to be in conflict with the law, it is given to the wisest and best educated to discern and judge the law.⁹² For example, when verse 8 speaks of, “between blood and blood,” it means that a distinction needs to be made between the degree of culpability in cases of murder and homicide.⁹³ The ancient principle of common law is also found in these verses. While principles of retributive justice have been emphasised, the deterrence principle has not been ignored. In Deuteronomy 17v12-13, the death penalty is pronounced on men who refuse to obey the edicts of the court.⁹⁴ The principle herein articulated is that legitimate government, being conducted in accordance with the principles of God, is a sacred trust and that the conditions of continued blessing for a nation depend

⁸⁹ Sterling, John A. (2002), “Historical Development of Theories of Crime and Punishment,” in: Concepts of Justice, Past and Present, available at <http://www.lawandliberty.org/justice.htm>, last updated on 15 October 2005

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

on the observance of God's law.⁹⁵ Thus, to keep people from destroying good governments, the death penalty is imposed on those who act presumptuously with regard to established law.⁹⁶ Within the new covenant context, there is a continuation of the old covenant legal principles.⁹⁷ The distinction, however, is that the same principles of law which were external before are now internalised through the spirit of Christ.

1 Timothy 1v7-9 reveals that there were people (then as now) who wished to teach the law but who were ignorant of the principles upon which the law was founded.⁹⁸ Verse 8 affirms that the purpose of the law is good when it is used lawfully; that is, in accord with principles, verse 9 explains that the purpose of the external law is to keep rebellious people in check and is completely unnecessary for a righteous man.⁹⁹ Having a judiciary system that abuses the law in order to achieve personal or political ends is not just a modern day phenomenon.¹⁰⁰ History abundantly records acts of malfeasance in every culture; it is also troubling when the judiciary is also the clergy.¹⁰¹ In acts 3v1 through 4v20, a kind deed which harmed no one, the healing of a lame man at the temple steps, results in the

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

arrest of Peter and John for “breaking” the law.¹⁰² The principle here is that acts of kindness, charity and good works, should not be outlawed according to the scripture.¹⁰³

In his second letter to the Corinthian church, Paul speaks a word in defense of his gospel team, and in the course of his long journeys and his ministry in those churches, he says, “... we have wronged no man, we have corrupted (spoiled) no man, we have defrauded (fooled) no man.”¹⁰⁴ The inward “spirit” of Christ manifested itself externally by the keeping of the letter of the law.¹⁰⁵ So the history of retributive justice, just as that of natural law, can be best explored if one looks at it from secular and biblical narratives. While the above propositions seem to be far removed from the biblical stipulations of retributive justice, they add spice to the view that the concepts of retributive justice and law also fit with the bible.

For now focus shall be on those popular contemporary arguments on capital punishment. The contributions of Kant, Primoratz, Richard Brandt, Jonathan Glover and Anthony G. Amsterdam are handy in this present thesis. But before a critical analysis of these popular contemporary arguments, it is critical to consider one typical case of execution as witnessed by George Orwell. The following is

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

what Orwell had to report after witnessing what he termed an, “...emotional and gruesome hanging:”

It is curious, but till that moment, I had never realised what it means to destroy a healthy, conscious man. When I saw the prisoner step aside to avoid the puddle I saw the mystery, the unspeakable wrongness, of cutting a life short when it is in full tide. This man was not dying, just as we are alive. All the organs of his body were working-bowels digesting food, skin renewing itself, nails growing, tissues forming-all toiling away in solemn foolery. His nails would still be growing when he stood on the drop, when he was falling through the air with a tenth of a second to live. His eyes saw the yellow gravel and the grey walls, and his brain still remembered, foresaw, reasoned, even about puddles. He and we were a party of men walking together, seeing, hearing, feeling, understanding the same world; and in two minutes, with a sudden snap, one of us would be gone-one mind less, one world less.¹⁰⁶

While it can not be disputed, from the above quote, that Orwell’s message is charged with emotion following the execution of one of his colleagues, it should also be noted that execution is a terrifying experience to both the executed and the onlookers. It leaves the world much poorer especially if young and energetic brains are just taken away. It makes life cheaper and meaningless.

POPULAR CONTEMPORARY ARGUMENTS ON CAPITAL PUNISHMENT

The death sentence or capital punishment continues to be an intensely debated form of punishment within the circles of morality and other legal fora today. Orwell’s account coupled with that of the execution of former Iraq president

¹⁰⁶ Orwell, George. (1931), “A Hanging at Adelphi,” in: White James E. (1994), *Contemporary Moral Problems*, West Publishing Company, Minneapolis, St. Paul, New York.

Saddam Hussein heightens this debate. Orwell's account on capital punishment has captured the imagination of many human rights activists and scholars from various disciplines such as ethics, sociology, history, psychology and theology especially where the custodians of justice have been accused of giving members of society the impression that violence solves violence. This account calls for the need to re-look at the nature and purpose of punishment. But what makes the Hussein case unique is the fact that foreign forces in the form of the Americans are thought to have influenced his execution. This has forced many human rights groups and neutrals to view this execution with moral suspicion. The execution can best be described as a moral façade judging by the failure by the Dujail court to allow for a fair trial, free of the incidence of intimidation to the defense team.

Those who are against the death sentence or capital punishment (also known as abolitionists) have argued that Hussein was never given a fair trial as his defense team was intimidated, harassed and killed as the trial proceeded, confirming the position of this work that the whole exercise was kind of a moral farce. Hussein was tried in a victor's court. It could have been fair and just if the international court of justice (at The Hague) in Holland had tried him. The trial could best be described as arbitrary and capricious. It was arbitrary in the sense that conditions for fair trial were absent due to the intimidation, harassment and killing of members of the defense team, there was standard less discretion. Even if the

panel of judges had included Nelson Mandela, Martin Luther King (Jr.) and Desmond Tutu, the fairest jury one can ever imagine, the presence of these people in the panel would not have justified the execution of Saddam Hussein in view of the fact that he had an inviolable or inalienable right to life. But those who argue in favour of capital punishment have maintained that Hussein deserved his fate because he committed crimes against humanity that included the alleged brutal killing of about 148 Shi`ites at a village called Dujail. Their argument is that Hussein's trial and subsequent conviction was long overdue, as he had caused the suffering of many people during his tenure as Iraq president.

But when all have been said and done, what is the purpose of capital punishment? In general, capital punishment may serve several purposes, one of which being to protect society from wrongdoers. This view has two aspects:

1. The first aspect is to prevent those who have already done wrong from repeating their wrongdoing.¹⁰⁷ Yet abolitionists remind us that wrongdoers can be counseled or educated in order to rehabilitate them, that is, if they are temporarily removed from society.

¹⁰⁷ Barcalow, E. (1994), *Moral Philosophy: Theory and Issues*, Cambridge University Press, Cambridge, p.244

2. The second aspect is to prevent or deter people from doing wrong in the first place by threatening them with punishment.¹⁰⁸ By so doing, society hopes that people's fear of being punished will deter them from engaging in heinous acts such as first-degree murder.

3. Another purpose of capital punishment from a western viewpoint is retribution. We may say that independent of considerations of preventing wrongdoing, some people simply deserve to be punished because of their misdeeds.¹⁰⁹

Punishment should be proportional to the crime committed if justice is to be achieved. Retributive justice calls for a fair and just punishment. In other words, the punishment meted by the jury must be proportional to the crime committed otherwise there will not be any justice. But in what sense will the punishment be proportional to the crime committed? It must be proportional in the sense of "an eye for an eye" and "a tooth for a tooth..." or in the sense of "death for death."

One aspect of the proportional argument, as noted in earlier sections of this chapter, is that some worse crimes deserve worse forms of punishment, thus, murder is inflicting death on another such that the murderer deserves to have

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

death inflicted on him also. Moral arguments in capital cases are two-pronged, namely:

1. Retentionist arguments, which call for the retention of capital punishment. Retentionists have argued that capital punishment has both a retributive (backward-looking) and deterrent (forward-looking) function.
2. On the other hand there are abolitionists who argue that capital punishment should be abolished because, for them, it is tantamount to judicial and/or legally organised murder. They argue that punishment does not have any deterrent effect. But their premises seem to have no theoretical underpinnings making them argue from a rather weaker position.

RETENTIONIST ARGUMENTS CONSIDERED

KANT ON RETRIBUTIVE JUSTICE: A CRITICAL ANALYSIS

In Kant's retributive theory of punishment, punishment is not justified by any good results, but simply by the criminal's guilt. Criminals must pay for their crimes; otherwise an injustice has occurred. Furthermore, the punishment must fit the crime. Kant asserts that the only punishment that is appropriate for the crime of murder is the death of the murderer. As he puts it, "whoever has committed murder must die."¹¹⁰

Kant believes that murderers should be punished because they are responsible for their heinous acts. Kant invites us to treat or view life as intrinsically good, that is,

¹¹⁰ White, James E. (1994), *Contemporary Moral Problems*, West Publishing Company, Minneapolis, St. Paul, New York, p.198

as something that should be valued for its own sake and not for the sake of anything else. Anyone who intentionally takes away human life does not deserve his or her life as well if the scales of justice are to be balanced. Popular contemporary discourses have embraced and celebrated this Kantian approach to capital punishment especially its emphasis on retribution.

As Kant would argue, judicial or juridical punishment (*poena forensica*) is to be distinguished from natural punishment (*poena naturalis*), in which crime as vice punishes itself and does not, as such, come within the cognisance of the legislator.¹¹¹

For Kant, juridical punishment can never be administered merely as a means for promoting another good, either with regard to the criminal himself or to civil society but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime.¹¹²

For one man ought never to be dealt with merely as a means subservient to the purpose of another, nor be mixed up with the subject of real right.¹¹³ Against such treatment, his inborn personality has a right to protect him, even though he may be condemned to lose his civil personality.¹¹⁴ He must first be found guilty and

¹¹¹ White, James E. (1994), *Contemporary Moral Problems*, West Publishing Company, Minneapolis, St. Paul, New York, p.198

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid.

punishable, before there can be any thought of drawing from his punishment any benefit for himself or his fellow citizens.¹¹⁵ It should be noted from the onset that Kant does not believe in punishment for preserving the common good as shall be discussed in chapter four, rather the punishment is meted so as to show the murderer that crime does not pay.

In fact, Kant does not hide this fact from the onset when he attacks punishment done for purposes of the common good or other such social utility. He argues that a law which prescribes a penalty for a crime “is a categorical imperative” and woe to him who creeps through the serpent windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment.”¹¹⁶ By “guilty” Kant seems to be saying that the murderer must be responsible for the act, and by “punishability” Kant here is probably referring to the gravity of the crime and the intention or motive to kill. It is one thing to be guilty and quite another to be punishable. Some acts of killing do not necessarily pass as first-degree murder because of the absence of the intention or motive to take away life. First-degree murder can be distinguished from second-degree murder in that with first-degree murder there is intent and malice on the part of the murderer, while with second-

¹¹⁵ White, James E. (1994), *Contemporary Moral Problems*, West Publishing Company, Minneapolis, St. Paul, New York, p.198

¹¹⁵ Ibid.

¹¹⁶ Mackinnon, Barbara. (1998), *Ethics: Theory and Contemporary Issues*, Wardsworth Publishing Company, p.297

degree murder there malice and absence of pre-meditation and deliberation.¹¹⁷ This, therefore, takes us to the distinction between homicide (unintentional killing or killing for self defense) and the intentional and deliberate taking away of someone's life. More on these distinctions will be fully explored and discussed in chapter three. But it is the latter which Kant calls murder and which deserves both equal and proportional punishment which is the main subject of the present thesis.

As Kant aptly puts it, "whoever commits murder must die."¹¹⁸ But what is the mode and measure of punishment which public justice takes as its principle and standard? For Kant, it is just the principle of equality, by which the pointer of the scale of justice is made to incline no more to the one side than the other.¹¹⁹ This is also referred to as the mirror-image principle of punishment where punishment should mirror the crime exactly in seriousness and severity.¹²⁰

Kant says: "The undeserved evil which anyone commits on another is to be regarded as perpetrated on him."¹²¹ Hence it may be said:

If you slander another, you slander yourself; if you steal from another you steal from yourself; if you strike another, you strike yourself; if you kill another, you kill yourself.' This is the right of retaliation (*jus talionis*) and properly understood

¹¹⁷ White, James E. (1998), *Contemporary Moral Problems*, West Publishing Company, Minneapolis, St. Paul, New York, p.198.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Hospers, J. (1982), *Human Conduct*, Harcourt Brace Jovanovich, New York, p.341

¹²¹ White, op. cit. p.198

it is the only principle, which can definitely assign both quality and quantity of a just penalty.¹²²

This principle leads Kant to inevitably endorse retributivism; for in response to murder, only death is a sufficiently stern penalty. In one of his most classic quotes, Kant remarks:

Even if a civil society is resolved to dissolve itself with the consent of all its members as might be supposed in the case of people inhabiting an island resolving to separate and scatter throughout the whole world; the last murderer lying in prison ought to be executed before the resolution was carried out. This ought to be done in order that everyone may realise the desert of his deeds...¹²³

Kant's retributive justice also carries with it a deterrent aspect as demonstrated in the above quotation. In summation, Kant remarks that, "slanderers should be defamed, thieves should be deprived of property, and assault should be repaid with corporal punishment while murder should be repaid with death (capital punishment)."¹²⁴ This, for Kant, is what justifies retribution.

But what makes the intent to murder worse than the intent to steal? For Kant it is the selfishness or uppediness of the intent to murder that makes it worse as it is a more grievous violation of the victim's autonomy, than the intent to steal.¹²⁵ But it

¹²² White, James E. (1998), *Contemporary Moral Problems*, West Publishing Company, Minneapolis, St. Paul, New York, p.198.

¹²³ Rachels, J. (1999), *The Elements of Moral Philosophy*, McGraw-Hill Companies, Boston, p.139

¹²⁴ Ibid.

¹²⁵ Ibid.

is not clear why Kant is taking a swipe on utilitarianism but probably it is because utilitarianism tries to take away responsibility from the murderer and tries to focus on some other end to justify punishment. It does not matter whether an act of murder will increase utility to the generality of the population; for Kant acts of murder are intrinsically wrong because there is an element of disrespect for human life and that the murderer or murderess is responsible for his or her actions. Human life for Kant has intrinsic value.

From the foregoing it seems that by according intrinsic value to human life, Kant referred to the life of the victim of murder. But isn't the life of a murderer also valuable? Doesn't it make sense also to consider the plight of the murderer's family especially in cases where the murderer is the only breadwinner of the family? How do we measure or ascertain the intent or motive of the murderer?

Kant does not seem to address these questions adequately, making his distinction between first-degree murder and homicide subtle and problematic. Further, if we ignore extenuating circumstances behind any murderous acts, we will end up addressing the symptoms rather than the causes. Take for example, a person who commits acts of murder out of a desire to atone for the death of his father who was murdered in cold blood by a mafia gang, but the culprits behind his father's

death are tried and erroneously acquitted and the man still has a big scar on his heart. If, by any chance, he comes across a member of this mafia gang and kills him, would he not be justified? Kant does not seem to consider that as he places intent at the core of his retributive theory on punishment.

But whatever it is, Kant's theory seems to be fairly attractive and applicable to all known human societies especially the aspect of respect for human life, which is also at the centre of all discourses in natural law ethics.

CAPITAL PUNISHMENT AND DETERRENCE: A CRITIQUE

One answer to the question of whether capital punishment is morally justifiable is, "Yes, if (and only if) the punishment could be fashioned to prevent or deter crime."¹²⁶ The general idea involved in this thinking is that for a law to be a law, and not just a request, sanctions must be attached to it. It must have force behind it.¹²⁷ Capital punishment, according to this reasoning, is for the purpose of preventing people from breaking the law, deterring them from doing so, or both.¹²⁸ Broadly interpreted, the deterrent argument involves these two mechanisms. We can prevent crime by detaining prospective or actual criminals, that is, by simply holding them somewhere so that they cannot do social

¹²⁶ Mackinnon, Barbara. (1998), *Ethics: Theory and Contemporary Issues*, Wardsworth Publishing Company, New York, p.290

¹²⁷ Ibid.

¹²⁸ Ibid.

damage.¹²⁹ We can also prevent crime by means such as increased street lighting, more police officers and stricter handgun laws.¹³⁰ We can deter crime by holding out a punishment as a threat, so as to persuade those who contemplate breaking the law not to do so.¹³¹ If a punishment works as a deterrent, it works in a particular way, through the prospective lawbreaker's thought and decision-making processes.¹³² One considers the possibility of being punished for doing some contemplated action and concludes that the gain achieved from the act is not worth the price to be paid.¹³³

As Brandt takes this point further, a traditional utilitarian thinking about criminal justice has found the rationale of the practice, in the United States, for example, in three main facts:

1. People who are tempted to misbehave, to trample on the rights of others, to sacrifice public welfare or the common weal for personal gain, can usually be deterred from misconduct by fear of punishment, such as death, imprisonment or fine.¹³⁴

¹²⁹ Mackinnon, Barbara. (1998), *Ethics: Theory and Contemporary Issues*, Wardsworth Publishing Company, New York, p.290

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Ibid.

2. Imprisonment or fine will teach malefactors (convicted criminals) a lesson; their characters may be improved, and at any rate a personal experience of punishment will make them less likely to misbehave again.¹³⁵
3. Imprisonment will certainly have the result of physically preventing past malefactors from misbehaving, during the period of their incarceration.¹³⁶

On the basis of the above three points, it is vital to note that capital punishment does not only hold the murderer responsible for his or her actions and punish him or her according to his misdeeds, it is also other-directed as it is meant to maximise social utility or to preserve the common good. In view of these suppositions, argues Brandt, traditional utilitarian thinking has concluded that having laws that forbid certain kinds of behaviour on pain of punishment and having machinery for the fair enforcement of these laws is justified by the fact that it maximises expected utility.¹³⁷

Misconduct is not to be punished just for its own sake; malefactors must be punished for their past acts, according to law, as a way of maximising expected utility.¹³⁸ The utilitarian principle holds that punishment must be severe enough so that it is to no one's advantage to commit an offense even if he receives the punishment. As Jeremy Bentham puts it, since many criminals will be undetected,

¹³⁵ Mackinnon, Barbara. (1998), *Ethics: Theory and Contemporary Issues*, Wardsworth Publishing Company, New York, p.290

¹³⁶ Ibid

¹³⁷ Ibid.

¹³⁸ Ibid.

we must make the penalty heavy enough in comparison with the prospective gain from the crime that a prospective criminal will consider the risk hardly worth it, even considering that it is not certain he will be punished at all, in short, the heavier the penalty, the greater the deterrent value.¹³⁹

The deterrent arguments by both Mackinnon and Brandt seem quite attractive in the sense that they discourage people from committing felony crimes not because of some other extrinsic considerations, but because they respect the edicts of the law and its provisions. The problem though with these arguments is that people should not be expected to obey the law because they are afraid of punishment but because there is something intrinsically good about a crime-free life. What will happen is if the deterrent force is removed, then people will have no reason to obey the law. Studies have shown also that in countries where capital punishment is not binding or has been repudiated there are fewer murder cases. For example, the murder rate in Canada actually declined after the country abolished the death penalty in 1976.¹⁴⁰

Other studies found no correlation between having or instituting or abolishing the death penalty and the rate of homicide.¹⁴¹ To make a good argument for capital

¹³⁹ Simon, Thomas. (2001), *Law and Philosophy: An Introduction With Readings*, McGraw-Hill, New York, p. 459

¹⁴⁰ Mackinnon, Barbara. (1998), *Ethics: Theory and Contemporary Issues*, Wardsworth Publishing Company, New York, p. 296

¹⁴¹ Ibid.

punishment on deterrence grounds, a proponent would have to show that it works as a deterrent.¹⁴² In addition, the proponent would have to show that capital punishment works better than life in prison without the possibility of parole (that is, the release of a prisoner before serving his full term on condition that he or she behaves well).¹⁴³ Shifting from Kant, Brandt and Bentham; focus shall now be on Primoratz's views on capital punishment. As Primoratz postulates, with respect to the larger question of the justification of punishment in general, it is the retributive theory that gives the right answer.¹⁴⁴ Capital punishment ought to be retained if justice is to be done in cases of murder, murderers must be punished according to their just deserts.¹⁴⁵ Primoratz is aware of some of the arguments which have been put forward to dismiss capital punishment, for instance, as violation of the right to life – a right which is fundamental, absolute and sacred.¹⁴⁶

Primoratz believes that the right to life is not absolute, for instance, “would we take seriously the claim to an absolute, sacred, inviolable right to life coming from the mouth of a confessed murderer?”¹⁴⁷ To Primoratz, the answer is a big NO, for the obvious reason that it is being put forward by a person who confessedly

¹⁴² Mackinnon, Barbara. (1998), *Ethics: Theory and Contemporary Issues*, Wardsworth Publishing Company, New York, p. 296

¹⁴³ Ibid.

¹⁴⁴ Primoratz, Igor. (1989) in: Mappes, T.A. and Zembaty, J.S. (1997), *Social Ethics: Morality and Social Policy*, McGraw-Hill Companies, New York, p.126

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid, p.127

denied another human being this very right.¹⁴⁸ So, because the murderer violated somebody's rights, he should lose the same rights as well.¹⁴⁹ But as this work will observe, by executing murderers, can we not also argue that the jury should lose the same rights? For Primoratz, the value of human life is not commensurable with other values, and consequently there is only one truly equivalent punishment for murder namely death.¹⁵⁰ But if one is to stretch Primoratz a bit, one will see that there is a problem with his argument, for instance, what does he mean by the value of human life? Whose life is this? Does not the murderer also possess human life? These three questions will lead us into the abolitionist arguments on capital punishment.

ABOLITIONIST ARGUMENTS CONSIDERED

Abolitionists have argued that capital punishment does not deter murderers from murdering again. In their view, removing a murderer from society by imprisoning him provides sufficient social protection. In this worker's own words, removing a murderer from society by imprisoning him is a moral safety valve. If a murderer or murderess will pose a threat to society, as long as he or she lives, then he or she

¹⁴⁸ Primoratz, Igor. (1989) in: Mappes, T.A. and Zembaty, J.S. (1997), *Social Ethics: Morality and Social Policy*, McGraw-Hill Companies, New York, p.127

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

can be imprisoned for life.¹⁵¹ The probability of a murderer killing again can be made extremely low by reforming or abolishing parole and by increasing prison security.¹⁵²

This point is not without its own de-merits, as hard-core criminals can still devise ways to escape prison. They can connive with prison staffers or use maximum force. The cases of Chidhumo and Masendeke who made their way out of Chikurubi maximum prison (the biggest jail in Zimbabwe) about seven years ago need to be brought to the fore here. But it is also fundamental to note that such cases are rare and that the justice system today is making sure that dangerous criminals such as serial killers are kept under check. Governments in the West have also tried as much as they can to pay the prison staff decently so as to curb incidence of connivance as enunciated above. Abolitionists maintain that there is really no proof as to whether or not the threat of death is more effective deterrent than the threat of a long prison sentence. Many studies have shown that people do not shun murderous acts because of the threat of punishment (death) but because of the respect for human life. There is also need, however, for abolitionists to argue more carefully for the statement, “the threat of death is no more effective a deterrent than the threat of a long prison sentence,” for it seems to me that people

¹⁵¹ Barcalow, E. (1994), *Moral Philosophy: Theory and Issues*, Wardsworth Publishing Company, Belmont, p.244

¹⁵² Ibid.

are afraid of death more than anything else. Why? Precisely because with a long prison sentence, the chances of being released and walking scot-free are high due to the fact that there can be a change of government or amnesty which may target first offenders. But death is final and irrevocable. But still, this cannot give credence to the deterrent argument because those who kill do so after having been overcome or clouded by emotion that there no room to think about the consequences of their actions.

But whether one can sustain the view that people may not shun murderous acts because of the threat of punishment (death) depends in part on whether abolitionists will be able to convince a sufficient number of people that life is intrinsically valuable given the egoistic nature of human beings. Human beings have this tendency to do things that suit their personal egos and if murdering somebody will be to their own advantage, they will take the initiative. But this should not be interpreted to mean that the state has the right to execute murderers because this more often creates a vicious murder cycle. The issue of respect for human life needs to be clarified here if such arguments are going to be convincing. In any case, the abolitionist views on capital punishment seem to point to the fact that human life is very sacrosanct, this also includes the life of a murderer or murderess or a serial killer. This cannot be overemphasised in this work.

Jonathan Glover (a fellow and tutor in Philosophy at New College) and Anthony G. Amsterdam (a lawyer) have argued that capital punishment does not have any retributive value; neither does it have any deterrent effect to the would-be-offender. For Glover, capital punishment can only be justified if the number of lives saved exceeds the number of executions.¹⁵³ Due to the bad side effects of execution, as well as other undesirable features, capital punishment is not justified unless it has a deterrent value or effect.¹⁵⁴

As Glover argues, one reality that seems peculiarly cruel and horrible about capital punishment is that often the condemned man has the period of waiting, knowing how and when he is to be killed.¹⁵⁵ Many of us would rather die suddenly than linger for weeks or months knowing we were fatally ill, and the condemned man's position is several degrees worse than that of the person given a few months to live by doctors, he has the additional horror of knowing exactly when he will die, and of knowing that his death is a ritualised killing by other people, symbolising his ultimate rejection by members of his community.¹⁵⁶

¹⁵³ Glover, Jonathan. (1977), *The Moral Problems of Abortion, Infanticide, Suicide, Euthanasia, Capital Punishment, War and Other Life or Death Choices: Causing Death and Saving Lives*, Pelican Books, New York, p.233

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid, p.232

It could actually be a tortuous experience where one is to come to terms with the reality of his or her imminent and inevitable death. This removes the whole aspect of retributive justice in the sense that, psychologically, the punishment no longer mirrors the crime committed. A person who knows when and at what time death will befall him suffers more than the victim of murder.

More often murderous acts are spontaneous and instantaneous and in the case of the victim of murder, the psychological trauma associated with knowing when and how one will die is completely zero. But one can imagine how Timothy Evans (who was executed but later on proved innocent, in Great Britain) and Saddam Hussein were feeling two to three days before their execution and some few hours before this experience. Or coming closer home one can imagine what was in the minds of Mbuya Nehanda and Sekuru Kaguvi (who were the first casualties of capital punishment in Zimbabwe – in 1896) a day or two before their hanging.

For reasons of this kind, capital punishment can plausibly be claimed to fall under the U.S. constitution's ban on "cruel and unusual punishment," or as H.L.A. Hart

put it, “too barbarous to use whatever their social utility.”¹⁵⁷ Due to the extreme cruelty of capital punishment, many of us would, if forced to make a choice between two horrors, prefer to be suddenly murdered than to be sentenced to death and be executed. As Glover would put it:

It must be appalling to be told that your husband, wife or child has been murdered, but this is surely less bad than the experience of waiting for a month or two for your husband, wife or child to be executed.¹⁵⁸

Another argument advanced by both Glover and Amsterdam is that there is also the possibility of mistakenly executing an innocent man. Moral errors are bound to be committed if the judicial system fails to execute its duties properly. Amsterdam reminds us of the emotional case of Timothy Evans, an innocent man whose execution was among the reasons for the abolition of the death penalty in Great Britain. What is rather more painful is the fact that such errors cannot be corrected. But what happens if errors are committed while the innocent is serving a life sentence? He or she can be released from jail and be compensated. But if one has already been executed, there is no room for correction. The error cannot be rectified because death is final and irrevocable.¹⁵⁹

Capital punishment also has harmful effects on people other than the condemned

¹⁵⁷ Glover, Jonathan. (1977), *The Moral Problems of Abortion, Infanticide, Suicide, Euthanasia, Capital Punishment, War and Other Life or Death Choices: Causing Death and Saving Lives*, Pelican Books, New York, p.232

¹⁵⁸ Ibid.

¹⁵⁹ Barcalow, E. (1994), *Moral Philosophy: Theory and Issues*, Wards worth Publishing Company, Belmont, p.251

man and his family.¹⁶⁰ For most normal people, to be professionally involved with executions whether as a judge, prison warden or executioner (hangman) must be highly disturbing.¹⁶¹ Arthur Koestler quotes the case of the executioner Ellis, who attempted suicide a few weeks after he executed a sick woman “whose insides fell out before she vanished through the trap.”¹⁶² Murders and executions are both ugly, vicious things, because they destroy the same sacred and mysterious gift of life, which we do not understand and can never restore. To borrow Orwell’s words, they cut life short, which is in full tide, and they both deserve moral condemnation.

Capital punishment degrades human worth and it rips off a person’s dignity as a rational being.¹⁶³ Justice Brennan reinforces Amsterdarm’s point when he states that the “the death penalty is uncivilised, inhuman, and inconsistent with human dignity and with the sanctity of life.”¹⁶⁴ It treats members of the human race as non-humans, as objects to be toyed with and discarded...Execution involves the

¹⁶⁰ White, James E. (1998), *Contemporary Moral Problems*, West Publishing Company, Minneapolis, St. Paul, New York, p.198.

¹⁶¹ Koestler, Arthur. (1956) in: Glover, Jonathan. (1977), *The Moral Problems of Abortion, Infanticide, Suicide, Euthanasia, Capital Punishment, War and Other Life or Death Choices: Causing Death and Saving Lives*, Pelican Books, New York, p.234

¹⁶² Ibid.

¹⁶³ White, op.cit. p. 212

¹⁶⁴ White, op.cit. p. 212

denial of humanity to the executed.¹⁶⁵ With this detailed background on the evolution and power of natural law ethics and the concept of retributive justice in the world today, it is imperative that chapter two looks at the Shona/Korekore concept of retributive justice. Particular reference shall be made to the *Korekore-Nyombwe* people who occupy the northern part of Mt. Fura (present day Mt. Darwin). The land of these people shall, throughout this work, be referred to as Nyombweland. It is vital, at this stage, to note that the Shona/Korekore concept of justice has a metaphysical justification as opposed to the popular contemporary model of retributive justice, which lacks this dimension.

CONCLUSION

This chapter looked at the evolution and power of natural law ethics and retributive justice in moral theorising. This was done in a bid to give this work the background to defend the thesis that retributive justice is not compatible with the Shona traditional notions of punishment. The chapter traced the history of natural law ethics back to the pre-Socratics, Aristotle and St. Thomas Aquinas; the contributions of Finnis and Gomez-Lobo were also appreciated, especially as these two theoreticians gave shape to the project that was, as noted above, pioneered by Aristotle and St. Thomas. In particular, Finnis and Gomez-Lobo gave an enticing and heartrending discussion on human life as the grounding good. Finnis

¹⁶⁵ White, James E. (1998), *Contemporary Moral Problems*, West Publishing Company, Minneapolis, St. Paul, New York, p. 212

demonstrated that human life was more than sacrosanct and it represented every aspect of vitality. Human life, for Finnis, included the full gamut of bodily health and freedom from pain. Finnis also placed procreation at the core of his natural law ethics; for him, procreation, as opposed to sexual pleasures, was the pursuit of the good life. Gomez-Lobo, on the other hand, noted that genetic formation was key to human life. He emphasized the bodily aspects of life more than its spiritual or creative aspect. For him, the end of bodily life marked the end of life. Gomez-Lobo however admitted that human life was not the sole good as humans could possess other goods beyond being alive, but human life was the first one, without it humanity would not partake in any other goods. This made human life to be the grounding good because it was worth having on its own.

For Gomez-Lobo, human life was sacrosanct to the extent that even the execution of a murderer was a terrible thing. From the evolution and power of natural law ethics, the work looked at capital punishment (retributive justice) from two schools of thought. The retentionist school emphasised the need to retain the death sentence for purposes of retribution, social protection and deterrence. The contributions of Immanuel Kant, Igor Primoratz and Richard Brandt were handy in this regard. Kant in particular, emphasised the need to balance death with death because by taking somebody's life the murderer had automatically forfeited his or her life as well. The same theme ran throughout Primoratz's work.

The abolitionist school emphasised the need to abolish the death sentence because, among other reasons, the chances of mistakenly executing an innocent man were real. Besides, they believed that life imprisonment was enough deterrence. Jonathan Glover and Antony G. Amsterdam are some of the well-known abolitionist theorists. In the next chapter, the Shona/Korekore concept of justice shall be considered within the context of supernatural ethics. Efforts shall be made to show that the retributive argument has no place in *Korekore-Nyombwe* society.

CHAPTER TWO

THE SHONA/KOREKORE CONCEPT OF JUSTICE: AN EXERCISE IN *HUNHUISM* AND SUPERNATURAL ETHICS

This chapter looked at the avenging spirit (*ngozi*) as it manifests itself among the Shona/Korekore people of Mt. Darwin, north of the Ruya river. The people found in this area are affectionately known as *VaNyombwe* (a term which is derived from their sub-dialect—*chiNyombwe*). This work reflected on and strove to synthesise some contending views on the nature and manifestation of the *ngozi* spirit among the Shona people and how this spirit has been understood to underlie the Shona notions of *bunhu* or *ubuntu* which guides and motivates the practice of justice. Professor Michael Gelfand's works on the concept of *ngozi* among the Shona/Korekore people in general helped to shape the arguments in this present thesis.

INTRODUCTION

The work begins by looking at the various dialects that make up the Shona language with more emphasis being put on *chiKorekore* as one of the building blocks of the Shona language. The Shona concept of punishment as enshrined in supernatural ethics shall also be given due consideration. This will be done in a bid to position our argument and to remain contextual.

The second section looks at the geographical location of the *Korekore-Nyombwe* people while the third section describes and analyses the spiritual hierarchy of the *Korekore-Nyombwe* people in the light of some selected metaphysical themes such as *ngozi* and how they help to direct behavior in *Korekore-Nyombwe* society. This will be discussed under the banner of supernatural ethics.

THE SHONA PEOPLE AND THEIR LANGUAGE

The Shona people make up about three quarters of Zimbabwe's total population.¹⁶⁶

They are the majority, followed by the Ndebele who occupy the South and Western part of the country, with two provinces, namely Matabeleland North and South. The Ndebele also live in some parts of the Midlands such as Zvishavane, Mberengwa, Shurugwi, Nkayi and Gweru. But as the majority, the Shona people occupy six provinces out of ten. The provinces are; Mashonaland East, Mashonaland West, Mashonaland Central, Masvingo, the Midlands and Manicaland.

Each and every province has its own dialect, hence we have *ZeZuru*, which is the dialect spoken by people from Mashonaland East and part of Mashonaland West; *Korekore*, which is spoken by people from Mashonaland Central, some parts of Mashonaland East and some parts of Mashonaland West; *Karanga*, which is the dialect for the people from Masvingo and some parts of the Midlands province; and *Ndau* and *Manyika*, dialects for the people from Manicaland province. All in all there are five dialects that make up the Shona language and these are *chiZeZuru*, *chiKorekore*, *chiKaranga*, *chiManyika* and *chiNdau*. As Gombe observes, the Shona language is made up of closely related dialects and every dialect has its own sub-

¹⁶⁶ Gombe, Jairos Marufu. (1998), *Tsika DzeVashona*, College Press, Harare, p.17

branches.¹⁶⁷ Since this work is an attempt to look at the *ngozi* spirit as it manifests itself among the *Korekore-Nyombwe* people and its influence on crime and punishment, it is worthwhile to devote more space to the origins of *MaKorekore* and their dialect, as discussions of any culture cannot proceed without appreciating the language of the people in that cultural milieu. One needs to study a culture from within in order to penetrate its ontological, epistemological and ethical underpinnings. The best way to do this is to first appreciate the language of that culture.

THE ORIGINS OF *MAKOREKORE* AND THEIR DIALECT

As Gombe puts it, *chiKorekore* as a Shona dialect was not popularised by missionaries, colonial hunters and Arab traders, as is the case with other Shona dialects such as *chiZezuru*, *chiKaranga*, *chiManyika* and *chiNdau*.¹⁶⁸ But the name *Korekore* was used with reference to a group of people of the Munhumutapa tribe who migrated from Masvingo and conquered the land of the *Tavara* people in northern Zimbabwe about six hundred years ago. Various theories have been put forward to explain the origins of this name. The first theory holds that the name was given as a nickname and it had more to do with the conquering prowess of these people,¹⁶⁹ while the second theory holds that when these people finally settled

¹⁶⁷ Gombe, Jairos Marufu. (1998), *Tsika DzeVashona*, College Press, Harare, p.17

¹⁶⁸ Ibid,p.22

¹⁶⁹ Ibid,p.22

in the land of the *Tavara* people (present day Nyombweland) after displacing the *Tavaras*, they adopted a culture of migrating year after year (*gore ne gore*) hence the origin of the name *Kore-kore* from *gore ne gore*.¹⁷⁰ These people became numerous after conquering the *Tavara* people, and today their name has remained popular; it is even more popular than the name *Tavara*, the name given to the original and rightful owners of the land that is today occupied by the *Korekore-Nyombwe* people. But as time passed, intermarriages between the *Korekore* and *Tavara* people began; and when the British colonisers came in the early 1890s, they all assumed the name *MaKorekore*.¹⁷¹ But the distinctions can still be made as we have *MaKorekore-Tavara*.

Please note that *ma-* is plural for more than one *MuKorekore* (singular usage). *ChiKorekore*, like other Shona dialects, has another sub-branch such as *chiTavara* which is the sub-dialect for the *Korekore-Tavara* of Hurungwe and Makonde.¹⁷² The other sub-branch is *chiShangwe*, which is the sub-dialect for the people from Sanyati and Gokwe. There is also *chiTande*, the sub-dialect for the people from the Dande valley; *chiBudya*, the sub-dialect for the people from Mutoko.¹⁷³ Finally, and more importantly for this work, there is *chiNyombwe*, the sub-dialect for the Nyombwe people from Mt. Darwin, the area which has been demarcated for study by this

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

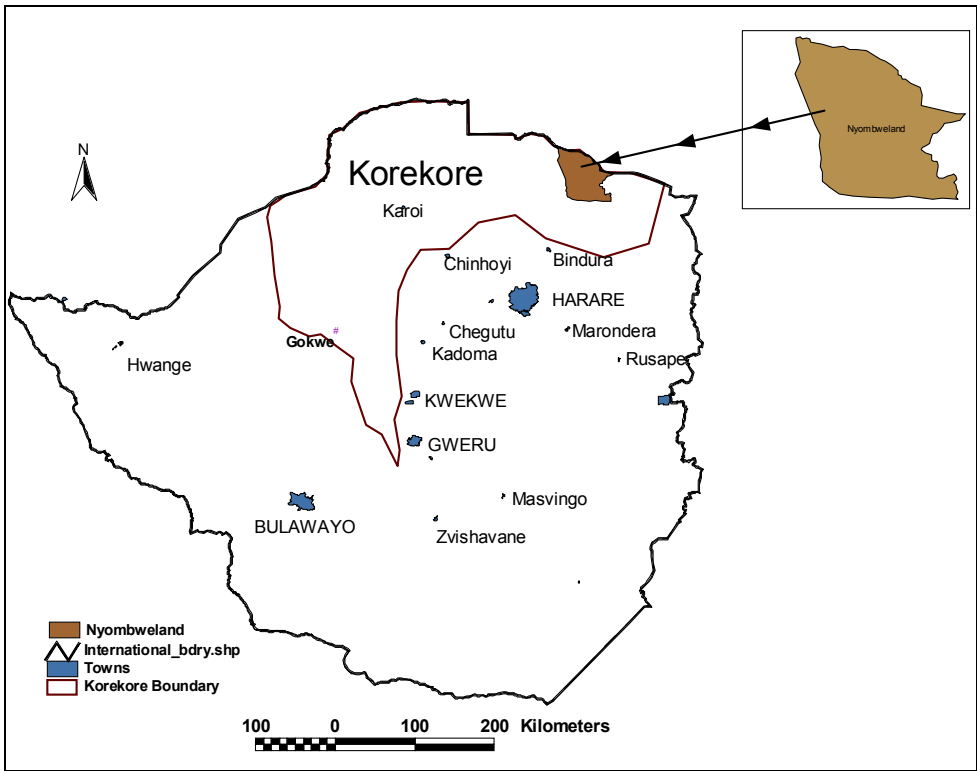
¹⁷² Ibid.

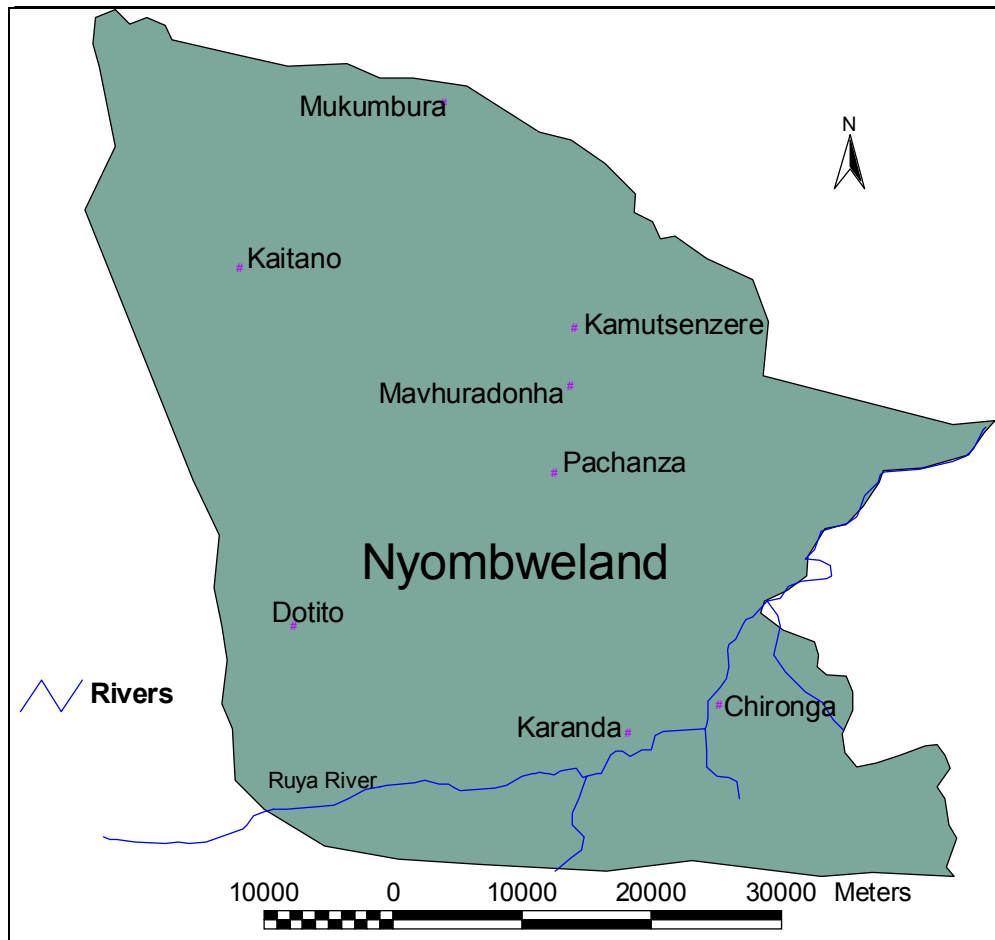
¹⁷³ Ibid.

researcher. But for now, we will look at the geographical location of the *Korekore-Nyombwe* people.

THE GEOGRAPHICAL LOCATION OF THE *KOREKORE-NYOMBWE* PEOPLE

The *Korekore-Nyombwe* people occupy the northern part of Mt. Darwin's Ruya (Ruia) river as earlier on intimated. The *Nyombwe* area stretches from Mt. Darwin centre right up to *Mkumbura* border post. But this work will be confined only to areas such as *Dotito, Chawanda, Nyamazizi, Chironga, Karanda, Bveke, Kajokoto, Pachanza* and *Kamutsenzere* communal lands. Serve for *Kamutsenzere, Kaitano* and *Mkumbura*; these are areas that lie between Ruya River and Mavuradonha Mountains as we gravitate towards the *Dande* valley. *Dande* valley is situated in the lowveld and is characterized by very high temperatures and is Tsetse-infested. Most of the people that are found in this area are of the *Nzou-Samanyanga, Nhari-Unendoro, Tembo-Mazvimabakupa* and *Hungwe-Zenda* totem. The two maps below help to locate the *Korekore-Nyombwe* people.





SUPERNATURAL ETHICS AND *HUNHU* IN NYOMBWELAND

The word '*bunhu*' or '*ubuntu*' is prominent in the work of Stanlake Samkange and Tommie Marie Samkange (1980) and then the more recent work of Mogobe B. Ramose (1999). Both Samkange and Ramose have contributed immensely in the discourse of *bunhuism* or *ubuntu* philosophy at least as understood by the Shona. The Zulu/Ndebele word '*ubuntu*' has its Shona equivalent '*bunhu*' or '*unhu*', which is the root of African philosophy. The being of an African in the universe is inseparably

anchored upon *ubuntu* or *hunhu*.¹⁷⁴ By way of definition, the word ‘*hunhu*’ or ‘*unhu*’ and its Ndebele equivalent ‘*ubuntu*’ consists of the prefixes ‘*hu-*’ or ‘*ubu-*’ respectively, these prefixes evoke the idea of being (existence).¹⁷⁵ They denote enfolded being before manifestation in the concrete form or mode of existence of a particular entity.¹⁷⁶

As Samkange and Samkange argue, *hunhu* says something about the character of a person and his moral aptitudes. It is, therefore, used in the predicative sense.¹⁷⁷ So, like the Western conceptions of being, Shona metaphysics is also anchored on ontology and predication. In *Korekore-Nyombwe* understanding, ontology is all about the kind of things in existence - particularly *vanhu* (people). Predication is about what we say about *vanhu* –*Tinoti vane hunhu kana kuti havana hunhu* (they are good or bad). At the ontological level, there is no strict and literal separation and division between *hu-* and *-nhu* as well as *ubu-* and *-ntu* respectively, they are mutually founding.

As Ramose postulates, they are mutually founding in the sense that they are two aspects of be-ing as a one-ness and an indivisible wholeness.¹⁷⁸ *Hu-nhu* or *Ubu-ntu* is the fundamental ontological and epistemological category in the African thought of

¹⁷⁴ Ramose, Mogobe B. (1999), *African Philosophy through Ubuntu*, Mond Books, Harare, p.49

¹⁷⁵ Ibid, p.50

¹⁷⁶ Ibid, p.50

¹⁷⁷ Samkange, Stanlake and Samkange, Tommie. M. (1980), *Hunhuism or Ubuntuism: A Zimbabwean Indigenous Political Philosophy*, Graham Publishing Company, Salisbury, p.38

¹⁷⁸ Ramose, op. cit. p.50

the Bantu-speaking people including the Shona people of Zimbabwe. *Hu-* is said to be distinctly ontological while *-nbu* is distinctly epistemological, the same can be said of *ubu-* and *-ntu* in that order.¹⁷⁹ As Ramose maintains, the prefix *mu-* or *umu-* shares key ontological features with the prefix *bu-* or *ubu-*.¹⁸⁰ Whereas the range of *bu-* or *ubu-* is the widest generality, *mu-* or *umu-* tends towards the more specific. Joined together with *-nbu* or *-ntu* the words become *munbu* or *umuntu* respectively.¹⁸¹ For Samkange and Samkange, the word *munbu* in Shona and *umuntu* in *isi Ndebele* means a person: a human being.¹⁸² It means more than just a person, human being or humanness because when we see two people, one white and the other black, coming along, we say, “*bona munbu uyo arikufamba nomurungu,*” or in *isi Ndebele*, “*nanguyana umuntu obamba lo mlungu,*” (There is a *munbu* walking with a white man).¹⁸³

Now, is there a sense in which we can say a white man lacks something, which we will always identify with or in an African? Yes, black Americans, for instance, identify something they call “soul” as being almost exclusively among the black folk.¹⁸⁴ The thing called soul is indefinable but identifiable among black people.¹⁸⁵

The attention one human being gives to another: the kindness, courtesy,

¹⁷⁹ Ramose, Mogobe B. (1999), *African Philosophy through Ubuntu*, Mond Books, Harare, p.49

¹⁸⁰ Ibid.

¹⁸¹ Ibid, p.51

¹⁸² Samkange, Stanlake and Samkange, Tommie. M. (1980), *Hunbuisim or Ubuntuism: A Zimbabwean Indigenous Political Philosophy*, Graham Publishing Company, Salisbury, p.38

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

consideration and friendliness in the relationship between people; a code of behaviour, an attitude to other people and to life is embodied in *hunbu* or *ubuntu*.¹⁸⁶ *Hunbuisism* is, therefore, about something more than just humanness deriving from the fact that one is a human being.¹⁸⁷ Since there are as many as three hundred linguistic groups with *-ntu* or a variation in the word for person, all believed to have originated from a single source, argue Samkange and Samkange, it is reasonable to suppose that these groups – the Bantu people – by and large, share a common concept of *hunbuisism* which varies only to the extent that individual groups have undergone changes not experienced by others.¹⁸⁸ Thus, in terms of the code of behaviour, the attitude to other people and to life of a ruler, an *induna*, in a highly centralised military *Nguni* kingdom will be different from that of an *ishe* (chief) in a less centralised and less martial Shona state.¹⁸⁹

At the level of a broader community, the *Korekore-Nyombwe* people also subscribe to this *hunbu* or *ubuntu* philosophy, because their being is defined by their purpose of existence in relation to safeguarding the interests of their departed elders, the ancestors and their relationship with other spiritual entities. The knowledge of their environment also helps to direct the course of their livelihood. The *Korekore* people,

¹⁸⁶ Samkange, Stanlake and Samkange, Tommie. M. (1980), *Hunbuisism or Ubuntuism: A Zimbabwean Indigenous Political Philosophy*, Graham Publishing Company, Salisbury, p.38

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid, p.39

therefore, see reality as dual as they find themselves in a physical world which is directed or informed by the spiritual world. They are in constant touch with their departed elders who now occupy a metaphysical space. So, a *Korekore* man or woman can safely be defined as *munhu* or *umuntu* in the same breath as a *Karanga*, *ZeZuru* or *Manyika* man or woman. In short the word *munhu* or *umuntu* refers to the Shona or Ndebele people of Zimbabwe. But this is only as far as the ontological and epistemological status of the *Korekore-Nyombwe* people, as a sub group of the Shona, can be established. What about their ethical worldview?

The notion of ethics, just as that of ontology and epistemology, cannot be separated from *hunhu*. In fact, morality means *hunhu* in Shona societies such as Nyombweland. A person who has *hunhu* is a virtuous person, a good person. As Gelfand reinforces this point, a man who has *hunhu* behaves in a decent, good, rational, responsible way; a worthy man has *hunhu*.¹⁹⁰ *Hunhu* is, therefore, the ethical benchmark of Shona society. A person who possesses *hunhu* can control himself, his passions and instincts, but should his desires overcome him, then he is defined as having no *hunhu*.¹⁹¹ In Shona society morality comes with maturity, children cannot be expected to exhibit *hunhu* up until they have reached a certain age.¹⁹² Gelfand also makes a distinction between a human being and an animal. He observes that the

¹⁹⁰ Gelfand, Michael. (1968), *African Crucible: An Ethico-Religious Study with Special Reference to the Shona-speaking People*, Juta and Company Ltd, Cape Town, 1968, p.53

¹⁹¹ Ibid.

¹⁹² Ibid.

difference between a human being and an animal is the former's possession of *bunhu*, that is, a human being acts with reason.¹⁹³ A baboon steals and eats. It does not act reasonably.¹⁹⁴ As this study established, among the *Korekore-Nyombwe* people, a person with *bunhu* is gentle and respectful; such character traits are seen by the way in which the *Korekore-Nyombwe* women or girls greet their elders. When greeting, they bend their knees, which is called *kutyora muzura*. Men and boys clap hands after greeting their elders or colleagues; this is called *kuembera* or *kuponda gusvi*.

As Gelfand argues, *bunhu* includes a sense of good foresight and appreciation of the situation, the person who acts without *bunhu* is said to be immoral (*ba-ana bunhu*).¹⁹⁵ A person who has *bunhu* must never be harsh to the young or old; and when he is at a beer party, he must conduct himself well and with dignity, be patient and share a laugh with others.¹⁹⁶ A man who has built up a good reputation because of his *bunhu* finds that other families are eager to have their daughters marry his sons.¹⁹⁷ On the other hand, if it should become known that the character of a man or the reputation of the family is bad everyone will be told to avoid them.¹⁹⁸ More precious than

¹⁹³ Gelfand, Michael. (1968), *African Crucible: An Ethico-Religious Study with Special Reference to the Shona-speaking People*, Juta and Company Ltd, Cape Town, 1968, p.53

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

anything to the African is a good personality (*hunhu*).¹⁹⁹ It is common to hear a *Korekore* man or woman lambasting murderers and fornicators in Nyombweland: *Mbondi ne mbombwe ndivo vamwe ve vanhu vasina hunhu muNyombwe* (murderers and adulterers are among the people who are not good persons in Nyombweland). The man with *hunhu* possesses good manners, good morals, good intelligence and knowledge.²⁰⁰ A good man is always ready to help others when they are in need of help, he helps with finances without any coercion.²⁰¹ At a beer party, the good man shares his beer with all people without any discrimination.²⁰² A good man teaches his children to love (*kuda*) everyone and to pay their due respects (*tsika dzakanaka*) to people. The children of a good man should follow their father in his good manners and behaviour.²⁰³

Conversely, the bad man causes discord in society. There are two main categories of the bad man in Shona society: namely the witch (*muroyi*) and the malicious man (*munhu aneutsinye* or *pfini*). The *muroyi* is far worse in that he or she kills far more people,²⁰⁴ the malicious man has a jealous streak in him.²⁰⁵ A bad man is also one who has a lust for other men's wives. He covets somebody else's wife and attempts

¹⁹⁹ Gelfand, Michael. (1968), *African Crucible: An Ethico-Religious Study with Special Reference to the Shona-speaking People*, Juta and Company Ltd, Cape Town, 1968, p.54

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Ibid, p.55

to have sexual relations with her.²⁰⁶ Another example of badness is murder (*kuponda*). The murderer or murderess has a special place in this work because he or she is portrayed as far worse than any other moral offender. In the next sections, our discussions will be centred on the Shona concept of murder, its moral underpinnings and the manifestation and power of *ngozi* in that regard. The setting will be Nyombweland.

In *Korekore-Nyombwe* understanding, *munhu ha-apfi* or *munhu ha-arovi* (a human being does not die or sleep forever). What it means is that the *Korekore-Nyombwe* people believe in the metaphysical realm of life after death. They believe that the end of bodily life marks the beginning of spiritual life. Hence, the morality of the *Korekore-Nyombwe* people is endorsed by the spirit world. From the study conducted by this work, it is the elders who make moral rules and principles and the spiritual world endorses them through various sanctions that include misfortunes, deaths, and illnesses to the moral deviant.

When misfortunes such as failure to get a job or failure to get married on the part of a woman, illness or mysterious deaths occur, then one knows that certain moral rules have been broken and there is need to bring back the moral order. This is also

²⁰⁶ Ibid, p.55

the context in which the avenging spirit (*ngozi*) operates. *Korekore-Nyombwe* society subscribes to both vertical (supernatural ethics) and horizontal (secular ethics). The *Korekore-Nyombwe* people, just like the other Shona people, believe that if a person's life is deliberately taken away through cold-blood murder (*kupondwa*) or beer poisoning (*kuisirwa nduru yegarwe muhwahwa*) then that human person's spirit will come back and fight for justice by haunting the family of the perpetrator (*mupari*) until reparations are made.

It should not be surprising why beer poisoning is cited among the various kinds of murder among the *Korekore-Nyombwe* people; it is because the use of the crocodile bile (*nduru yegarwe*) is common in *Korekore-Nyombwe* society, and it accounts for the majority of murder cases in Nyombweland due to the people's unquenchable thirst for *Kachasu* or *Gununzvu*, which is a traditional brew and is very cheap when compared to other traditional brews in Shona society.

When the spirit of the dead victim is not compensated for or no restitution is made, there is moral disorder and so the spirit fights back in order to bring moral sanity. Among the *Korekore-Nyombwe*, the guilty family lives in perpetual fear and anxiety for as long as restitution is not paid. Once restitution has been paid, the spirit of the dead victim will be contented. The *Korekore-Nyombwe* people often say, *munhu anonekwa no hunhu hudonaka asi akatadza midzimu inotsamwa uye anorohwa noshambu peno* (a

human being is defined by his or her character, but if he or she becomes a moral deviant, then the spirit world will intervene and punish him or her). A person who always misbehaves is seen as forfeiting or relinquishing his humanness; in *chiNjombwe* they say, *hapana zvemunhu ipopaye* (He lacks humanness). When one, deliberately or otherwise, murders his or her fellow colleague or a stranger, that person automatically forfeits his humanness as well. This view is in tandem with Kant's notion of defining all murderous acts as self-inflicted murder, as observed in the preceding chapter; "...if you strike another, you strike yourself; if you kill another, you kill yourself."²⁰⁷

But it should be noted from the onset that this is where the similarities begin and end, as the concept of retributive justice is alien to Shona society. This shall be discussed, in detail, in chapter five. Within the *Korekore-Njombwe* people's code of ethics, as is also the case in other Shona cultural groupings, there is no retribution when the guilty family has failed to own up and clean its mess by paying restitution; the *ngozi* strikes viciously and harshly by not only targeting the perpetrator of the crime but his kinsmen as well. As MFC Bourdillon remarks, "*ngozi* is fearsome and terrifying because it attacks suddenly and very harshly."²⁰⁸ It can also cause serious

²⁰⁷ White, James E. (1994), *Contemporary Moral Problems*, West Publishing Company, Minneapolis, St. Paul, New York, p.198

²⁰⁸ Bourdillon, Michael. (1976), *The Shona Peoples: An Ethnography of the Contemporary Shona with Special Reference to their Religion*, Mambo Press, Gweru, p.233

quarrels in the guilty family, loss of property, wealth or any devastating misfortune.”²⁰⁹

In Nyombweland, murder is the worst form of crime one can commit and punishment by the negative *ngozi* is the worst that a murderer or murderess can endure. Other serious forms of criminal acts and punishments such as taking somebody’s wife and becoming intimate with her (adultery) also define the *Korekore–Nyombwe* culture. This form of crime is punishable by death but this death is not a prerogative of the *ngozi* spirit. The death is caused by *runyoka*, a concoction used by men in Nyombweland to protect their wives from straying or from becoming intimate with other men. The “death penalty” for adultery is reasonable in Nyombweland because adultery has multiple effects, in the eyes of the community and the victim. It breeds shame and the husband of the adulteress is regarded by members of his community as a weak man. This is what motivates men to “fence” their wives in Nyombweland against intruders.

This, however, is not the theme in the present thesis as focus for now is on the avenging spirit (*ngozi*). As noted above, more details on the repercussions of failing to appease or restore the *ngozi* spirit shall be covered in chapters four and five. In this section we will try to look at how the *ngozi* spirit manifests itself in

²⁰⁹ Ibid.

Nyombweland and how it influences Shona moral thinking especially in capital cases.

THE KOREKORE-NYOMBWE PEOPLE AND NGOZI

We cannot establish the nature and manifestation of the avenging spirit (*ngozi*) before making sense of some of the spiritual entities that exist in Shona society in general and in *Korekore-Nyombwe* society in particular. The *Korekore-Nyombwe* people believe in a plethora of spiritual entities such as the ancestral spirits (*midzimu/ amadlozi*), alien spirits (*mashavi*) and angered or avenging spirits (*ngozi*).

This work gives credence to the *ngozi* spirit especially as it manifests itself among the *Korekore-Nyombwe* people and how the *Korekore-Nyombwe* people regard it as a source of punishment for errant behaviour such as murder and disrespect for one's parents. This *ngozi* spirit underlies the Shona conceptions of morality and justice. It is paramount to note from the onset that the Shona people live in a dual world, that is, the physical or material world and the metaphysical or non-material world. Ethically speaking, the physical world in part is governed by moral laws which we may call natural law ethics.

The physical world is the world of the living while the metaphysical world is the world of the departed members of the community who now exist in spiritual and

invisible form. This world is populated by various kinds of spirits who all have a direct bearing on the lives of the living. The biggest spirit is the Supreme Being known as *Mwari*, who works together with his lieutenants, the ancestral spirits. Ancestral spirits are thought to direct events in the life of the Shona man and woman. Ancestral spirits are represented by the following categories: Firstly, those that are responsible for guarding national territories such as the spirit of *Nebanda*, *Kagwi* and *Chaminuka* can be classified under territorial spirits. Secondly, those that protect the interests of the whole tribe are known as tribal or clan spirits.

Thirdly, those that are responsible for protecting members of the immediate family are the family spirits. These spirits are appeased in order to perform their duties and they, in turn, protect the family members or clan against diseases, misfortune and deaths. Another diverse group of spirits includes the alien spirits of those people who died far away from their homes and who hover around until they manifest themselves in other families. Alien spirits also fall under different categories depending on the occupation or trade of the departed person: namely the spirit of hunting (*shavi rekuwhima*), the spirit of prostitution (*shavi rechipfambi/chihure*), the spirit of witchcraft (*shavi rekuroya*), the thieving spirit (*shavi rekuba*) and the baboon spirit (*shavi re Bveni*) among others.

Within the category of other spirits is included the avenging or angered spirit (*ngozi*). This spirit is there to make sure that certain behaviours among the Shona such as disrespecting one's biological parents or killing other fellow members are kept under strict surveillance. The spirit carries with it a moral package which includes restorative punishment, as shall be demonstrated in the present thesis. Before zeroing into the details of this *ngozi* theme, there is need to pay a rapt attention to definitions and types of this *ngozi* spirit.

Ngozi is the spirit of a dead man or woman who has been killed or murdered.²¹⁰ His spirit is restless and angry and returns to seek restoration and propitiation for the crime. It only appears if the person is killed deliberately and not if the death is accidental.²¹¹ There are two kinds of *ngozi* among the *Korekore-Nyombwe* people, at least as conceptualised by Michael Gelfand.²¹² The first corresponds to the benevolent spirit (*mudzimu mudiki wepamusha*). This spirit cares for and protects the whole family unit and appears among the members through a selected medium.²¹³

²¹⁰ Gelfand, Michael. (1962), *Shona Religion with Special Reference to the Makorekore*, Juta and Company Ltd, Cape Town, p. 69

²¹¹ Ibid.

²¹² Ibid.

²¹³ Ibid.

The second type of *ngozi* is the aggrieved spirit of a man or woman poisoned or killed, or who died with an unrighted wrong.²¹⁴ It should be noted that each of these spirits arises from a member of the family and, therefore, is really a *mudzimu*, but because the spirit makes its presence felt through a medium, it is called *ngozi*.²¹⁵ From the above definitions, it can be observed that there is a positive *ngozi* and a negative *ngozi* depending on how the spirit manifests itself and how the person will have died.

While these distinctions are highly noticeable as understood by the *Korekore-Nyombwe* people, this work argues that there is only one type of *ngozi* which manifests itself in two different forms at any given time. The positive *ngozi* is so called because it initiates restorative dialogue between the guilty and the offended family. This dialogue eventually leads to restorative justice if the guilty family agrees to pay reparations or restitution to the family of the murdered victim.

The positive *ngozi*, therefore, reinforces *hunbuisim* by reminding the guilty party that justice lies in the restoration of relationships. The negative *ngozi* is the one that punishes the perpetrator of murder and his or her family if they refuse to pay

²¹⁴ Ibid.

²¹⁵ Ibid.

restitution. The concept of restorative justice shall be fully explored in later chapters of this work. This is just a snap survey of what is to come later in this work.

MANIFESTATION AND RESTITUTION OF *NGOZI* IN NYOMBWELAND

Gelfand conducted his ethnographic research on the spirit of *ngozi* among the *Korekore-Nyombwe* people under chief Dotito in 1962 and came up with a religious worldview of the manifestation and nature of this *ngozi* spirit among the *Korekore-Nyombwe*. This work is an attempt to come up with a philosophical worldview of the nature and manifestation of the *ngozi* spirit among the same people.

According to Gelfand, if a person is killed or deliberately poisoned by an enemy, his spirit is aggrieved and carries this grievance into the spirit world.²¹⁶ The spirit will seek restitution from the guilty family until full compensation for the misdeed has been made.²¹⁷ It first makes its presence felt by appearing in the dreams of its nephew (*muzukuru* or *dunzvi*), telling him that he was killed and wishes to be brought back into contact with the living.²¹⁸ For instance, the *dunzvi* may begin dreaming this every night after the uncle has died.²¹⁹

²¹⁶ Gelfand, Michael. (1962), *Shona Religion with Special Reference to the Makorekore*, Juta and Company Ltd, Cape Town, p. 70

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Ibid, p.71

As soon as the *dunzvi* realises the significance of these persistent dreams, he procures a calabash (*mukombe*) known as *mukombe unovava* (sour calabash), because it has been used for a long time in the preparation of beer or cereal.²²⁰ He fills it with millet meal (*rukwezwa*) and covers it with what is known, in Nyombweland, as *mbanda* (medicine).²²¹ In the evening, he takes it to the grave of the murdered man, but he must go on his own, and no one must see him.²²²

At the grave, the *dunzvi* kneels and speaks to the spirit, “*sekuru*, if there is someone who has killed you, you must wake up and go to him and tell him all that you want from him.”²²³ He breaks the calabash on the grave on the spot where the dead man’s head was laid.²²⁴ The *dunzvi* then leaves, taking care not to turn his back on the grave and returns to his own hut, not looking behind him until he reaches his home.²²⁵ The spirit of the uncle has been awakened by this procedure and is now a *ngozvi*.²²⁶

²²⁰ Gelfand, Michael. (1962), *Shona Religion with Special Reference to the Makorekore*, Juta and Company Ltd, Cape Town, p. 71

²²¹ Ibid.

²²² Ibid.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Ibid.

After he has been inside the hut, the *dunzvi* must go out again and find a black goat without a single spot on it (or a pitchy black fowl).²²⁷ He takes the creature into his hut, kneels, claps his hands and says, “*sekuru*, when you awaken you must not come into my house, but go to the place where the trouble came from.”²²⁸ He leads the goat back to where he found it; as soon as the *ngozi* enters the village; the goat dies suddenly and mysteriously, without developing any preceding illness.²²⁹

The *dunzvi* watches the goat, and as soon as he discovers it has died, he cuts pieces of meat from every part of its body and carries the pieces to a place somewhere near the village where he disposes of them.²³⁰ Nobody is permitted to eat them. Unless the spirit is given this goat or fowl, it is believed that one of the *dunzvi*'s children will be carried off by an illness just to let him know that the *ngozi* is now awake.²³¹ Within a few days of the death of the goat or fowl and the disposal of its meat, the *ngozi* moves into the village of those responsible for his premature death.²³² One or more deaths may take place and the family of the guilty person seeks advice from a *n'anga* (traditional healer) who warns them of the gravity of their plight.²³³ He tells them that the tragedies have been caused by the anger of a *ngozi*, that is, the spirit of a

²²⁷ Gelfand, Michael. (1962), *Shona Religion with Special Reference to the Makorekore*, Juta and Company Ltd, Cape Town, p. 71

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Ibid.

²³² Ibid.

²³³ Ibid.

certain person murdered by a member of the family and that the *ngozi* will not rest or leave them in peace until it is fully compensated.²³⁴ As Gelfand chronicles, the members of the guilty family return from the *n'anga* to their village and within a few days the *ngozi* spirit possesses one of the small boys in the family and speaks through him: "If you do not give me this daughter, I shall kill the whole family."²³⁵ You must go and call my son and tell him to come here to your village so that I can tell him what I want."²³⁶ The frightened family immediately hurries to the village of the murdered man and invite all its male members to visit their village.²³⁷

The *dunzvi* and all the brothers and sons of the deceased go to the village of the guilty and after their arrival, the little boy who is still possessed selects one of the new comers, sits on his lap and says; "... I am your *sekuru* who was killed by these people."²³⁸ The relative of the *ngozi* answers, "as you have come, what did these people pay you?" The boy replies, "I was given a girl."²³⁹ The relative says: "*Sekuru*, as these people have paid, you can leave them and come to our own village, we are taking this girl with us right now."²⁴⁰ A girl is taken back to the village and given a

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Ibid.

hut to occupy while the family erects her one of her own.²⁴¹ When her dwelling is ready, the *dunzvi* escorts her there. A mat is spread on the ground and all the relatives are invited to the hut.²⁴² The young girl sits on the mat and the *dunzvi* addresses her saying, “see *Sekuru*, this is your village to which you have come today. This is your house in which we have put your *mutambi* (dancer) for which you have paid.”²⁴³ The men in the hut clap hands and the women shrill.²⁴⁴

They all remain in the village a few days longer until the *ngozi* enters it and possesses his male *dunzvi* (nephew) in the evening.²⁴⁵ As he becomes possessed, the *dunzvi* utters a loud cry, which awakens all the people in the village, who hurry to his hut. “Who are you?” asks one of the elders, handing a *ndarira* (bangle) to the possessed man.²⁴⁶ The *dunzvi* answers: “I am your *sekuru* who has come. I have fought with those people who killed me and they have given me a wife and the wife is here now with you in the village.”²⁴⁷ In short, this is how the *ngozi* spirit manifests itself among the *Korekore-Nyombwe* culture and the Shona society in general. In the next section, we shall try to critique the view that the restitution demanded by *ngozi* is still possible in *Korekore-Nyombwe* culture in order to foreground our thesis.

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

RESTITUTION AND *NGOZI* IN NYOMBWELAND: A CRITICAL EVALUATION

When it comes to the restitution demanded by *ngozi* today, the same fines are still being paid although there have been other moral considerations such as the ravaging AIDS pandemic which has made it very difficult for the grandsons or the nephews of the murdered man to accept a girl from the guilty family as a wife. Modernity has also placed autonomy at the centre of everything to the extent that the girl can also refuse to be sacrificed for the wrongs done by somebody she does not even know; we have the Girl Child Network (GCN) which now protects the rights of the girl child in view of the fact that the number of girls abused since the beginning of the new millennium has doubled.

At law, it is illegal to sacrifice a girl for purposes of appeasing the *ngozi* spirit. Moreover, modernity has slowly done away with the extended family in favour of the nuclear family which comprises the father, the mother and their progeny (biological children). In this family set up, the whole concept of kinship or interactions within the clan disappears; every family minds its own business. In such a situation it is difficult to find parents who can agree to sacrifice their daughter for the cause of the clan. It is also paramount to note that people today are becoming skeptical about the reality of *ngozi* making the idea of restitution unnecessary or

meaningless. In this regard, the negative *ngozi* has been dismissed by what this work will call a psychological argument. If taken seriously, however, this argument can lead to disastrous consequences. According to this argument, it can be reasonably affirmed that *ngozi* (whether positive or negative) is nothing more than a creation of the human mind as it is highly possible that the murderer or murderess, and maybe his or her family may become, in a sense, their own victims. Their guilt may inspire fear in them to the extent that the fear will probably cause psychological trauma or problems which, in turn, may cause physical or mental problems.

Maybe even these physical or mental problems may expose them to disease and subsequent death. According to this psychological argument, this explains the multiple deaths in *Korekore-Nyombwe* families rather than the viciousness of *ngozi*. Otherwise, *ngozi* will be acting unreasonably if it demands more than the life of the murderer. But this argument will probably make sense in a society that does not believe in spiritual realities and that upholds and celebrates individualism at the expense of a communal way of life as we find in Shona societies. Despite the influence of modernity, Shona society is still anchored on the values of community rather than the individual.

But while, theoretically, it appears easy to pay restitution to the family of the victim, it is in fact very difficult and in the majority of cases families considered guilty end

up succumbing to *ngozi* after failing to meet the demands of this avenging spirit. Therein lies a serious problem. The Shona have to contend with *ngozi* while at the same time they are physically liable to the whims of the Roman-Dutch law with regard to the sentence of death. Isn't it asking for too much? Where is proportionality and equity in the punishment? There is nothing equitable or proportional about the alleged acts of *ngozi* if and when it wipes out several members of a clan including the murderer if he or she is still living. There is no "eye for eye." Instead, there are "eyes for an eye." This is part of the argument to be defended in this work.

Even where restitution or compensation is made, there is no proportionality when we have a situation where somebody who was murdered was a bachelor but now he wants a wife; or a spinster but now she wants a husband. In short, the traditional Shona notion of capital punishment brought about by *ngozi* is excessive; and this is one of the reasons why this present work is seeking the repudiation of capital punishment as enshrined in the Roman–Dutch law, in addition to claiming that a *ngozi*'s inflicting capital punishment (if it did occur) would have an unjustifiable retributive function and not a reasonable restorative function that is compatible with Shona culture.

But whatever it is, the whole concept of punishment among the Shona has a metaphysical or spiritual justification. The metaphysical world enforces Shona morality and law, and as alluded to earlier on, this world brings moral sanctions in the form of deaths, misfortune or disease. The only sure way to avoid *ngozi* and to escape the moral sanction of death(s) is to pay restitution to the offended family (*mushonga we ngozi kuiripa*). This has, however, been met with various challenges. First, it is very difficult to detect the presence of *ngozi* in a family or a clan partly because death can come through natural causes. It becomes very difficult to separate deaths caused by *ngozi* and natural deaths. The situation becomes even more complicated if the *ngozi* spirit manifests itself to the third or fourth generation of the perpetrator (*mupari*).

It is also more difficult these days with the prevalence of HIV and AIDS, although some scholars now argue that the *ngozi* spirit can cause one to succumb to AIDS by engaging in risky behaviour. They argue that *ngozi* breeds misfortune (*munyama*) that will force one to indulge in risky behaviour thereby exposing one to the dreaded disease. This is not the argument to be pursued in the present thesis, however, although it is very important for other academic discourses that border on *ngozi* among the Shona. It is fundamental to note that while the above moral challenges are prevalent in Shona society in general, the *Korekore-Nyombwe* people are still culturally and morally conscious, as the practice of restitution or restoration of the

deceased victim is still evident. This study established from George Masiya (the son of a headman) from *Zvomarima* village near *Nyamazizi*, that in 1995 a family from *Zvomarima* village was asked to pay seven beasts and a girl to the family of the murdered victim and the family complied because of a spate of deaths and illnesses, which had wreaked havoc and affected its members between 1989 and 1995.²⁴⁸

According to Masiya, a story is told that more than fifty years ago the *Zvomarima* people murdered their son-in-law who was from the *Masiya* clan, a man who was a prominent hunter, and his spirit manifested itself in 1989 to demand justice.²⁴⁹ The family duly complied and restitution was paid and the *ngozi* spirit was pacified.²⁵⁰ So, it is crucial to note that restitution is still being paid in *Korekore-Nyombwe* society and the idea of restorative justice is still evident. This argument shall be taken to its logical conclusions in chapter five.

It is also very important to note that among the *Korekore-Nyombwe* people, there is not only the often negative aggrieved spirit that is more vicious and harmful. There is also *ngozi yemumusha*, which is more positive and beneficial to the family and clan. The *Zvomarima* and *Masiya* people have been living together in harmony ever since that restorative ritual was enacted. In the next section, the work looks at the

²⁴⁸ Masiya, G. (2005), “On the Restitution of *Ngozi* in Nyombweland”, Interview held in Harare on August 21, 2005

²⁴⁹ Ibid.

²⁵⁰ Ibid.

manifestation of this type of *ngozi*. This is important for an outsider to critically understand the concept of *ngozi* as it underlies or characterises moral consciousness in Nyombweland.

MANIFESTATION OF THE POSITIVE *NGOZI* IN NYOMBWELAND

Among the *Korekore-Nyombwe* people, there is another kind of *ngozi*, one that harms no one and is the helpful and kindly spirit of the departed grandfather (*sekuru*) or of the grandmother (*ambuya*). This *ngozi* spirit is known as *mudzimu mudiki*.²⁵¹ The belief in this kind of *ngozi* still persists among the people of *Chakoma, Chawanda, Nyamazizi, Bveke* and *Kapfudzaruwa* communal areas today.

Generations have passed and this metaphysical belief has outlived the test of time. As R Pasi of Pasi village near Chironga remarked during an interview with this researcher; *mudzimu mudiki ndivo unochengetedza mburi, uye unoitika kuti misha igare inerunyararo*.²⁵² *Muno muNyombwe, dzinza ridotadza kuremekedza mudzimu uyo ridogara rine urwere kana jambwa* (the positive benevolent spirit cares for and ensures that there is always peace in the family).²⁵³ Here in *Nyombwe*, a family or clan that does not pay homage to the positive benevolent spirit is always afflicted with diseases or

²⁵¹ Gelfand, Michael. (1962), *Shona Religion with Special Reference to the Makorekore*, Juta and Company Ltd, Cape Town, p. 69

²⁵² Pasi, R. (2006), "On the Nature and Character of the Positive *Ngozi* in Nyombweland," Interview held at Pasi village near Chironga, on June 22, 2006

²⁵³ Ibid.

misfortunes).²⁵⁴ In short, the positive *ngozi* is there to ensure that families are protected from impending dangers. In Chakoma village, Gelfand observed that for one to be a positive or benevolent *ngozi* after death, he or she should take a special medicine called *futa or mbanda* before his or her death.²⁵⁵ According to Gelfand, the medicine can only be obtained from special people who know the secret but *n'angas* cannot be consulted.²⁵⁶

In *Chironga* and *Bveke* villages, this study established that these special people are *ana-asekuru na-ana ambuya vaguma kubereka* (elders—both men and women who have gone past the age of child bearing). A person who wishes to be a benevolent *ngozi* purchases the special medicine and brings it home, where stiff porridge (*sadẓa*) of millet meal (*rukweẓa*) is prepared.²⁵⁷ He spreads this medicine on the porridge and eats the whole portion in a kneeling position at *chiguware* (threshold of the house) by dipping his clenched fist into the porridge and spooning it into his mouth, this is done secretly.²⁵⁸ It is only when he has become terminally ill that he reveals this secret to one of his sons.²⁵⁹ The manifestation of this *ngozi* spirit is dramatised

²⁵⁴ Pasi, R. (2006), “On the Nature and Character of the Positive *Ngozi* in Nyombweland,” Interview held at Pasi village near Chironga, on June 22, 2006

²⁵⁴ Ibid.

²⁵⁵ Gelfand, Michael. (1962), *Shona Religion with Special Reference to the Makorekore*, Juta and Company Ltd, Cape Town, p.74

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Ibid, p.75

²⁵⁹ Ibid, p.75

through a ritual called *kutamba guva* (the bringing back ceremony) that takes place a year or perhaps a few months after his death. The ceremony is characterised by song and dance a night before the bringing back ceremony. This singing and dancing is called *jiti* or *jezi* and is brightened by drinking traditional beer (*bwahwa bwe makuva*) throughout the night and on the following day. The *sahwira* (family friend) brews the beer.

The spiritual cosmology of the *Korekore-Nyombwe* is quite complex as the *sahwira*, who is often a stranger to the family, plays a central role in this bringing back ceremony. The *sahwira* also kills the male goat that is eaten unsalted at the grave of the deceased. He or she also clears the grass around the grave. As Gelfand observed, after this ceremony, the *ngozi* begins to act by making one of his grandchildren (*chizukuru*) ill.²⁶⁰

A *n'anga* is consulted and his bones of divination (*bakata*) show that the illness is due to the appearance of the grandfather's spirit which wants to possess the child and is prepared to speak to the family only through him.²⁶¹ The spirit is one that does not wish to kill but to help the family and is thus a good or benevolent *ngozi*.²⁶² The *n'anga* tells the father to place an axe, the tail of an ox and a black cloth near the

²⁶⁰ Ibid.

²⁶¹ Ibid.

²⁶² Ibid.

head of the sick child. As the father does this, he kneels, claps his hands and says, “if you are my father who caused my son’s illness, you may come in a good way.”²⁶³ I have been told this by the *n’anga* who informed me that you are the one who caused the illness. You want to say something to us at this village; I do not want you to kill anybody.”²⁶⁴ The child recovers and a year or two may pass without a further sign from the *ngozi*.²⁶⁵ The *ngozi* may choose anytime it likes to speak to the family and whenever it wishes to contact them, it possesses the child.²⁶⁶ Sometimes it asks how they are.²⁶⁷ On the other hand, if the family is concerned about an important matter, such as illness in the family, they communicate with the *ngozi* through the child.²⁶⁸

CONCLUSION

This chapter began by an appraisal of the Shona culture, tracing the roots of the Shona people and their dialects. The concept of *hunhu* or *ubuntu* philosophy was also explored. The origins of the *Korekore* people occupied the second section of this chapter, where it was noted that the *Korekore* people originated from *Munhumutapa* after conquering the *Tavara* people, the original inhabitants of

²⁶³ Ibid.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ Ibid.

²⁶⁷ Ibid.

²⁶⁸ Ibid.

Nyombweland. The geographical location of these people was also considered. In a bid to position our thesis, the work looked at the place of supernatural ethics with the emphasis being on *hunhu* or *ubuntu* among the *Korekore-Nyombwe* before a discussion on the manifestation of *ngozi* and restitution *ngozi* calls for in Nyombweland. The central argument in this chapter was that *hunhu* or *ubuntu* underlies the judicial or moral aspect of crime and punishment in Shona society and that the death sentence is inconsistent with Shona culture.

CHAPTER THREE

THE CONVERGENCE OF CRIMINAL LAW WITH NATURAL LAW ETHICS: MAPPING THE LEGAL LANDSCAPE ON DEATH PENALTY DISCOURSES IN ZIMBABWE

This chapter looked at the convergence of criminal law (as enshrined in human law) with natural law ethics with a view to establish how and to what extent natural law theories can be invoked to inform human laws. These were discussed within the context of the death sentence in Zimbabwe. As Thomas Simon once remarked, “criminal law shows the state at its best when it deals with its worst citizens and confronts the nastier aspects of human behaviour. Without criminal law, madness and immorality would erupt.”²⁶⁹ This chapter noted that criminal law is subordinate to and is informed by natural law ethics.

INTRODUCTION

The arguments on the moral implications of the death penalty in Shona/Korekore society will be incomplete without looking at criminal law in Zimbabwe. For it should be borne in mind that all forms of punishment have both a moral and a legal justification. In chapter one, this work considered the moral justification of punishment, which was, of course, based on retribution and deterrence while the second chapter concentrated on the Shona notions of justice as enshrined preferably in restoration (but if this fails—in retaliation).

This chapter considers the modern concept of criminal law in Zimbabwe as drawn from the colonial-inspired Roman-Dutch law by way of juxtaposing it with natural

²⁶⁹ Simon, Thomas. (2001), *Law and Philosophy: An Introduction with Readings*, McGraw-Hill, New York, p. 407

law ethics and the Shona notions of crime and punishment. To buttress the foregoing, the last section looks at the nature and scope of murder acts and the death sentence in Zimbabwe. But with natural law while it is crucially important to concentrate on criminal law, natural law and murder cases in Nyombweland, it is also vital to define key terms first as an entry point into this discourse.

CRIME, CRIMINOLOGY AND CRIMINAL LAW: A DEFINITION

In this work, it is crucial to define the terms: *crime*, *criminology* and *criminal law* and to situate these terms within the Zimbabwean context. To begin with, the term *crime* can be defined from various perspectives (social, political and legal). But it is the social and legal aspects of the definition of crime that are fundamental, at least in this work because *crime* is committed within a particular social context that upholds certain norms, precepts and/or values. To this end, there are several schools of thought that inform the social definition of *crime*. Each school of thought has its own view on what constitutes criminal behaviour and what causes people to engage in criminal activity.

The schools of thought include the functionalist or consensus view of crime, the conflict view of crime, and lastly but not least, the interactionist view of crime. While this work would not want to be drawn into sociology of some sort, it is important that the three social definitions of crime be explored in order to

foreground the idea that crime is socially constructed. It should, however, be noted that the researcher is mindful of the need to remain contextual and in sync with arguments on the morality of crime and punishment in Zimbabwe.

THE FUNCTIONALIST VIEW OF CRIME

The functionalist view of crime maintains that crime reflects traditional ethics and the values of any given society. The origin of the functionalist view of crime can be traced back to the functionalist school of sociology.²⁷⁰ Functionalism emphasises the contributions each part of society makes to the sustenance of the whole society or social institution. According to the functionalist model, the various parts of a society are organised into an integrated structure and a change in one area of the institution exerts a powerful influence on other areas.²⁷¹ In a perfectly integrated culture, social stability exists and societal members agree on norms, goals, rules and values.²⁷²

From a functionalist viewpoint, criminal law reflects traditional values, beliefs and opinions of a given society. Crimes are defined as violations of the criminal laws and are believed to be behaviours repugnant to societal expectations.²⁷³ This is referred to as the functionalist view of crime since it implies that there is a general

²⁷⁰ Shephard, John. (1981), *Sociology*, West Publishing Company, New York, p.11

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ Ibid.

agreement among a majority of citizens on what behaviour should be governed by the criminal law and henceforth viewed as criminal. Several attempts have been made to create a concise, yet thorough, consensus definition of crime. The eminent criminologists Edwin Sutherland and Donald Cressey have taken the popular stance of linking crime with criminal law:

Criminal behaviour is behaviour in violation of the criminal law... [I]t is not crime unless it is prohibited by the criminal law(which) is defined conventionally as a body of specific rules regarding human conduct which have been promulgated by political authority, which apply uniformly to all members of the classes to which the rules refer, and which are enforced by punishment administered by the state.²⁷⁴

This approach to crime implies that crime is a function of the beliefs, morality and direction of the legitimate power structure.²⁷⁵ For Sutherland and Cressey, criminal law is applied “uniformly to all members of the classes to which the rules refer.”²⁷⁶

This statement reveals the authors’ faith in the concept of the ideal legal system that can deal adequately with all classes and types of people. According to the functionalist view, crime is essentially a legal concept.²⁷⁷

By and large, crime reflects the presence of moral deviants in any given society. It also shows that in any given society there are certain values and moral precepts that

²⁷⁴ Sutherland, E and Cressey, D (1970), *Criminology*, Lippincot, Philadelphia, p.8

²⁷⁵ Ibid.

²⁷⁶ Ibid.

²⁷⁷ Siegel, Larry J. (1989): *Criminology*, West Publishing Company, New York, p.12

ensure that the society functions properly, but within that same society there are certain elements whose behaviour needs to be constantly checked. From the functionalist view we move on to the conflict view of crime.

THE CONFLICT VIEW OF CRIME

In opposition to the functionalist view of crime, the conflict view depicts society as a collection of diverse groups—owners, workers, professionals and students, as well as minority groups - who are in conflict with one another about a number of issues.²⁷⁸ Groups able to assert their political and economic power use the law and the criminal justice system to advance their own causes.²⁷⁹ Criminal laws, therefore, are viewed as acts created to maintain the existing power structure and the economic system under its control.²⁸⁰ According to conflict criminologists, the key to achieving success is power.²⁸¹ Groups that obtain power, usually through wealth and position, can control behaviour of others and gain a disproportionate share of what society has to offer; conflict criminologists often compare and contrast the severe penalties exacted on crimes of the lower classes (burglary and larceny) with mild penalties for upper class crimes (polluting the environment and securities violations).²⁸²

²⁷⁸ Siegel, Larry J. (1989): *Criminology*, West Publishing Company, New York, p.12

²⁷⁹ Ibid.

²⁸⁰ Ibid, p.15

²⁸¹ Ibid, p.15

²⁸² Ibid, p.15

Moreover, they charge that while the poor go to prison for minor law violations, the wealthy are given lenient sentences for even the most serious breaches of law. Thus, the conflict perspective views the scope and definition of crime as being affected by the wealth, power and position of those who control the political and law-making processes and not by moral consensus or conventional values.²⁸³ As theorist, Richard Quinney once remarked:

Crime, as a legal definition of human conduct, is created by agents of the dominant class in a politically organised society...Definitions of crime are composed of behaviours that conflict with the interests of the dominant class.²⁸⁴

According to this definition, even prohibiting violent acts such as rape and murder may have political undertones: banning violent acts (such as murder) ensures domestic tranquility and guarantees that the anger of the poor and disenfranchised classes will not be directed at the wealthy capitalists who exploit them. So the conflict view of crime considers crime to be a function of class antagonism and a ploy by the affluent and powerful to keep the poor majority at bay.

THE INTERACTIONIST VIEW OF CRIME

With respect to crime, the interactionist view falls somewhere between the consensus and conflict perspectives. Unlike functionalist model, the interactionist

²⁸³ Siegel, Larry J. (1989): *Criminology*, West Publishing Company, New York, p.15

²⁸⁴ Quinney, Richard. (1975), *Criminology*, Little-Brown, Boston, p.37

view portrays crime and law as independent from the concept of an absolute moral code. According to this perspective, the definition of crime reflects the preferences of people who hold social power in a particular legal jurisdiction and who use their influence to impose their definition of right and wrong on the rest of the population.²⁸⁵ Criminals are individuals whom society chooses to label as outcasts or deviants because they have “violated” social rules.²⁸⁶ Thus, the prevailing interactionist view is that crimes are outlawed behaviours simply because society defines them that way and not because they are inherently evil acts.

Even then, the most serious *mala in se* crimes such as murder or theft may be viewed as violations of the current social concerns and not as breaches of absolute human morality. For example, while the US culture labels the willful taking of another person’s life as murder, it condones such an action under certain circumstances—during war time, in self defense, when a law enforcement agent believes a criminal fleeing from arrest is dangerous to her or himself or to others, or when a person is executed after conviction for a capital crime.²⁸⁷

Of late, the US (as a superpower in a unipolar system) has been in a crusade to “put things in order” in Iraq and this crusade has seen them invading this Islamic country

²⁸⁵ Siegel, Larry J. (1989), *Criminology*, West Publishing Company, New York, p.16

²⁸⁶ Ibid.

²⁸⁷ Ibid.

in search of the so-called weapons of mass destruction, weapons which have not been found until this day. But, as noted in chapter one, they ended up venting their anger on Saddam Hussein whom they accused of violating human rights by killing about 148 Shi'ites in 1982 as he was trying to purge his enemies.

Through the influence of America, Saddam was tried and subsequently sentenced to death resulting in his execution in December 2006. Yet after the execution, more and more lives were lost and are still being lost, in fact, more lives than Saddam is purported to have taken during his tenure as President of Iraq. Is not this a serious failure in applying natural law ethics? One often wonders.

But the question is: who defines crime? In this case, the interactionist will argue that it is those who are powerful in society who choose definitions that suit their political and material interests. In the eyes of the Americans and other likeminded people, Saddam Hussein committed crimes against humanity and deserved retributive punishment. But for others like the Sunnis, an ethnic group to which Saddam Hussein belonged, he was not wrong. Understood this way, the definition of crime becomes relative and highly suspicious. It is vital to note that each of the three models of crime provides important insights into the nature, structure and intent of

crime.²⁸⁸ The functionalist view of crime concentrates on crime's social origins and its expression of existing moral values; the conflict view helps us understand the power relations working in criminal definitions while the interactionist perspective enables us to see the relativity and transience of crime.²⁸⁹ But because no single view of crime exists, criminologists have taken different directions in their quest to make sense of the nature and scope of crime and its control.²⁹⁰

Considering these moral and legal definitions of crime, it is possible to take elements from each school of thought to formulate an integrated definition of crime as follows:

Crime is a violation of societal rules of behaviour as interpreted and expressed by a criminal code created by people holding social and political power. Individuals who violate these rules are subject to sanctions by state authority, social stigma, labeling and loss of status.²⁹¹

As Siegel maintains, this definition combines the functionalist view's position that the criminal law defines crimes as deviations from agreed norms and values, with the conflict perspective's emphasis on political power and control and the interactionist concept of stigma and labeling.²⁹² Thus, crime is defined here as a political, social

²⁸⁸ Siegel, Larry J. (1989), *Criminology*, West Publishing Company, New York, p.17

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² Ibid.

and economic function of modern life.²⁹³ This definition is very relevant to this work. But it will be a disservice to this work to concentrate only on the social definitions of crime without considering the legal definitions as this work is in the area of ethics and legal philosophy (jurisprudence). Besides, there is no way the concept of crime can be discussed outside both the legal and moral framework. This is the context in which the legal definition of crime comes to the fore in this work.

But what is crime from a legal perspective? Lawrence Friedman and Jeffrey Reiman emphasise problems with social and political judgments about crime, but problems also arise with regard to legal judgments about what constitutes crime.²⁹⁴ Crime from this perspective takes into account the “*actus non facit reum, nisi mens sit rea,*” which when translated means that without a vicious will there is no crime at all.”²⁹⁵

A crime (the *corpus delicti*, or body of the crime) must have a *mens rea* and an *actus reus*.²⁹⁶ It must include a particular mental state and a certain act. For example, with larceny, the accused must have intended to permanently take away property that he

²⁹³ Siegel, Larry J. (1989), *Criminology*, West Publishing Company, New York, p.17

²⁹⁴ Simon, Thomas. (2001), *Law and Philosophy: An Introduction with Readings*, McGraw-Hill, New York, p.417

²⁹⁵ Ibid.

²⁹⁶ Ibid.

or she knew belonged to someone else.²⁹⁷ If the state fails to prove the *mens rea* elements of larceny, the accused goes free.²⁹⁸ *Mens rea* here refers to the culpable or criminal state of mind.²⁹⁹ There may also be an element of ‘negligence’ in *mens rea*. *Mens rea* and *actus reus* sometimes do not operate in tandem. An emphasis on one produces a different legal and moral judgment about crime than does an emphasis on the other.³⁰⁰ If the judgment places a high value on culpability (*mens rea*) and the actual criminal act (*actus reus*), then attempting to commit crime may be as bad as completing the crime.³⁰¹ In the culpability theory, therefore, a person who attempts a murder should face as severe a penalty as the person who completes the act.³⁰²

Alternatively, if the judgment places a low value on culpability and a high value on the resulting harm, then attempting a crime should not carry any criminal liability if no harm is done or if some good just happens to result from the completed act.³⁰³ This difference applies to torts and criminal law.³⁰⁴ Tort liability requires proof of harm, but criminal law may punish even harmless acts or attempts.³⁰⁵ So, what ever it is, crime is committed when there is culpability, intent or motive on the part of the

²⁹⁷ Simon, Thomas. (2001), *Law and Philosophy: An Introduction with Readings*, McGraw-Hill, New York, p.417

²⁹⁸ Ibid.

²⁹⁹ Nyasani, J.M. (1995), *Legal Philosophy*, Consalata Institute of Philosophy Press, p.77

³⁰⁰ Simon, op.cit. p.417

³⁰¹ Simon, op.cit. p.417

³⁰² Schulhofer (1974) in: Simon, Thomas (2001), *Law and Philosophy: An Introduction with Readings*, McGraw-Hill, New York, p. 17

³⁰³ Ibid.

³⁰⁴ Simon, op. cit. p.417

³⁰⁵ Simon, op. cit. p.417

perpetrator. The *mens rea* component is very important to the commission of a crime especially in the case of felonies such as larceny and murder. Armed with this background on the definition of crime, we will now move on to the semantic discourse of *criminology*, and according to John E Conklin, *criminology* is a discipline that gathers and analyses empirical data in order to explain violations of the criminal law and societal reactions to these violations.³⁰⁶ *Criminology* from this point of view tries to ascertain the extent to which criminal laws respond to criminal behaviour and how society reacts to such behaviour(s).

As earlier on intimated, criminal law can be distinguished from tort law. While tort law covers largely private matters, criminal law transforms some seemingly private matters among individuals into public ones.³⁰⁷ For example, the punishment of children within the privacy of the home becomes public when it turns into criminal abuse.³⁰⁸ Criminal law's public nature goes beyond collective concerns to concerns that reflect society's morals.³⁰⁹ A catalogue of criminal acts such as murder or rape represents a codification of what society regards as morally disproportional.³¹⁰ Tort law has moral elements, often expressed as "blameworthiness" that casts blame on a

³⁰⁶ Conklin, John E. (1989), *Criminology*, Macmillan, New York, p.18

³⁰⁷ Simon, Thomas. (2001), *Law and Philosophy: An Introduction with Readings*, McGraw-Hill, New York, p. 407

³⁰⁸ Ibid.

³⁰⁹ Ibid.

³¹⁰ Ibid.

wrongdoer.³¹¹ Tortuous wrongs, however, pale in comparison with criminal ones.³¹²

The next section looks at criminal law and natural law ethics in Nyombweland in order to buttress the foregoing.

CRIMINAL LAW AND NATURAL LAW ETHICS IN NYOMBWELAND

The main position of the present thesis, as shall be elaborated in chapters four and five, is that if the death sentence has only a retributive or deterrent function, then it is irrelevant to the Shona/Korekore society which is premised on restorative arrangements. The *ngozi* spirit reinforces restorative justice and it comes out of the realisation that human beings, as products of nature, should not take away human life because they did not create it in the first place; it is only *Musikavanhu* (the creator) who has the power to create and destroy human life. While this fits with the true meaning of justice in Shona/Korekore society, this is also a typical natural law position defended by the likes of St. Thomas, supported by the likes of John Finnis, Gomez-Lobo and Charles Rice.

Criminal laws human or otherwise, must be subordinate to the natural law as this is the highest law. As Rice argues, criminal laws are derived from the natural law, “that

³¹¹ Simon, Thomas. (2001), *Law and Philosophy: An Introduction with Readings*, McGraw-Hill, New York, p. 407

³¹² Ibid.

one must not kill may be derived as a conclusion from the basic principle that one should do no harm.”³¹³ For Rice, the natural law theory has two basic functions with respect to criminal law; it has a *constructive* and *protective* function.³¹⁴ In its *constructive* function, natural law provides a guide for the formulation of criminal laws to promote the common good.³¹⁵

Natural law principles of morality and social justice ought to inform the public discussion of issues such as the family, the economy and the prevention of racial discrimination.³¹⁶ For example, in light of the harmful effects of permissive divorce especially to the children involved, legislators ought to consider restrictions on divorce as a means of restoring the status of the family as a social institution that is divinely ordained.³¹⁷ On the same breath, in light of the harmful effects or moral torture that the families of murderers endure after the sentencing and subsequent execution of their family member and the fate of *ngozi* striking sooner or later, legislators in Zimbabwe, together with traditional leaders, must move towards abolishing the death sentence in the Shona society of Zimbabwe, particularly with reference to the *Korekore-Nyombwe* people.

³¹³ Rice, Charles. (1993), *50 Questions on the Natural Law—What it is and why we need it*, Ignatius Press, San Francisco, p.54

³¹⁴ Ibid.

³¹⁵ Ibid.

³¹⁶ Ibid.

³¹⁷ Ibid.

As Rice argues, in its *constructive* role, the natural law offers not a cookbook of legal and social recipes but a reasonable guide to principles and general objectives.³¹⁸ So, while it is reasonable to consider restrictions on divorce as a means of restoring the status of the family, it is also reasonable to call for the abolition of the death sentence in order to respect human life and to restore the status of the family.

In its *protective* function, natural law provides a shield against laws that violate the moral principles of nature.³¹⁹ This role involves criticisms of the human or criminal law. Although the *protective* function is critical in that sense, its primary effect is to protect the rights of the people.³²⁰ Without the natural law, people have no basis other than the pragmatic and utilitarian whims on which to respond to unjust laws. These do not suffice because they are prone to manipulation by those who occupy important social positions otherwise known as artificial positions.

The natural law theory provides a basis for drawing the line and criticising an act of the state as unjust and void.³²¹ This is how natural law theories can be invoked to challenge the sentence of death in *Korekore-Nyombwe* society and other Shona societies. As this study established, there are no clearly defined judicial structures

³¹⁸ Rice, Charles. (1993), *50 Questions on the Natural Law—What it is and why we need it*, Ignatius Press, San Francisco, p.54

³¹⁹ Ibid.

³²⁰ Ibid.

³²¹ Ibid.

that take care of murder cases in Nyombweland, precisely because even if it were possible to summon, try and punish the murderer or murderess in traditional Shona courts (*matare*), he or she would still face the wrath of *ngozi*. So there is no reason why there should be any judicial structures, in the modern sense of the word, that are meant to try and punish murderers who will still be punished by the spirit world anyhow.

The *ngozi* spirit is there to bring checks and balances in capital cases in Shona society. It ensures that people respect human life as a natural gift from *Musikavanhu* (the creator, God). And as part of the package of *bunhu* or *ubuntu* (as discussed in chapter two of this work) murderers have no place in Shona society. They are the subjects of much scorn. This clearly shows that Shona society, through the guidance of reason, values human life more than anything else and any one who takes away human life is seen as a threat to the progress of human society. This is in keeping with Jeremy Bentham's dictum, "the greatest happiness for the greatest number," which proposes utility as the scale against which all goodness can be measured.³²²

Applied to criminal justice, one can argue that criminal acts are evil and vicious and that they are deviations from the natural law stipulations. So, one can argue that criminal laws partake in the natural law theory and that human life needs to be

³²² Quinney, Richard. (1975), *Criminology*, Little-Brown, Boston, p.5

protected by enacting laws that ensure that there are no murderers (perpetrated by either the individual person or the state), because it (human life) is the grounding good. This work defends the position that although criminal law is there to protect human life, it seems that it is only the life of the murder victim that matters and not the life of the murderer himself or herself, yet the natural law theory does not make any distinction. This also becomes critical when one considers the fact that in Shona society people give a certain degree of respect to the murderer, probably out of the realisation that the murderer is still a member of society despite his lack of humanness (*Kushaya hunhu*). The next section explores, in considerable details, the nature and scope of murder in Shona society in order to buttress the foregoing.

MURDER AND MURDER CAPITALS IN ZIMBABWE

What is murder? Is all killing murder? These two questions will be critical as we try to make sense of what murder really entails. In common law, *murder* is defined as the “unlawful killing of a human being with malice aforethought.”³²³ It is the direct killing of an innocent person, and an innocent person is one who has not forfeited his or her right to life.³²⁴ In most state jurisdictions, in order for a person to be legally responsible for killing another, that person must intentionally and with malice have desired the death of the person killed.

³²³ Siegel, Larry J. (1989), *Criminology*, West Publishing Company, New York, p.260

³²⁴ Gonsalves, M.A. (1985), *Fagothey's Right and Reason: Ethics in Theory and Practice*, Times Mirror/Mosby College Publishing, St. Louis, Missouri, p.247

Two types of malice are recognised at law; and these are *express malice*, which is the state of mind assumed to exist when someone kills another person in the absence of any apparent provocation, and *implied malice*, which is considered to exist when a death results from negligent or unthinking behaviour, even though the intention to kill was absent—for example, when a drunk driver kills a pedestrian or when a bystander is killed during the course of robbery. Even though the perpetrator did not wish to kill the victim, the killing was a result of an inherently dangerous act and is, therefore, considered to be murder.³²⁵

As noted in chapter one, murder can be categorised in terms of whether it is first degree or second degree or felony. Murder in the first degree occurs when a person kills another after premeditation and deliberation.³²⁶ Premeditation means that the killing was considered beforehand and suggests that it was motivated by more than a simple desire to engage in an act of violence.³²⁷ Deliberation means the killing was planned and decided on after careful thought, rather than carried out on impulse.³²⁸ “To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice; having

³²⁵ Siegel, Larry J. (1989), *Criminology*, West Publishing Company, New York, p.260

³²⁶ Ibid.

³²⁷ Ibid.

³²⁸ Ibid.

in mind the consequences, he decides to and does kill.”³²⁹ The planning implied by this definition need not involve a long drawn process but rather may involve an almost instantaneous decision to take another’s life.³³⁰ A killing accompanied by another felony such as robbery or rape also constitutes first-degree murder if the robber or rapist had decided to kill if resisted. Second-degree murder requires the actor to have malice aforethought but not premeditation or deliberation.³³¹

A second-degree murder occurs when a person’s wanton disregard for the victim’s life and his or her desire to inflict serious bodily harm on the victim results in the loss of human life.³³² An unlawful homicide without malice is called manslaughter and is usually punished by anywhere between 1 and 15 years in prison.³³³ Voluntary manslaughter refers to a killing committed in the heat of passion or during a sudden quarrel considered to have provided sufficient provocation to produce violence. While intent may be present, malice is not. While it is important to catalogue the definitions of murder and homicide, it is also important to look at the conditions conducive for murderous acts; these will be discussed in the next section under the banner of murder relations in Nyombweland.

³²⁹ Lunde, Donald T (1977), *Murder and Madness*, San Francisco Book Company, San Francisco, p.3

³³⁰ Siegel, op. cit. p.261

³³¹ Ibid.

³³² Ibid.

³³³ Ibid.

MURDER RELATIONS IN NYOMBWELAND

As Siegel puts it, one factor that has received a great deal of attention from criminologists is the relationship that allegedly exists between the murderer and the victim.³³⁴ As Reidel and Zahn (quoted in Siegel) argue, unlike most other criminals, murderers, other than those who kill committing another crime, usually know their victims and have had some sort of personal relationships with them.³³⁵ This point is also supported by Conklin, who argues that murder occurs more often between an offender and a victim who are known to each other than it does between strangers.³³⁶

In Nyombweland, it is very common for neighbours to be involved in a scuffle at beer gatherings, *jiti* or *jezi* festivals especially when they are fighting for a woman or other petty issues like gambling. Such scuffles may subsequently lead to the death of one of those who fight. The majority of these murder cases are premeditated and carefully planned in that the murderer goes to a beer pub armed with a knife or any other dangerous weapon and starts the scuffle after his victim has become acutely drunk more than he is.

³³⁴ Siegel, Larry J. (1989), *Criminology*, West Publishing Company, New York,, p.263

³³⁵ Ibid.

³³⁶ Conklin, John E (1989), *Criminology*, Macmillan, New York, p.36

This study gathered that in 2005 and 2006 alone there were about fifteen to twenty murders in Nyombweland and most of them involved drunkenness. This is a worrying statistic in a country that tops the list in the fight against human rights abuses in the world today with Amnesty International Zimbabwe leading the way in this regard. Murderers and victims are also found among married couples especially if the wife (as always the case in the Shona culture) is accused of infidelity or having adulterous affairs with other men. This is also common in other parts of the world as noted by Wolfgang:

The marital relationship is sometimes conducive to murder. In a study of marital homicide in Philadelphia, wives killed their husbands almost as often forty seven times as husbands killed their wives fifty three times.³³⁷

In Zimbabwe, the highest number of murder cases is found in Masvingo, which, ironically, is among those provinces with the highest literacy rate in the country. As *The Herald* of July 25, 2007 stated: “Masvingo province has become notorious for murder cases.” This statement followed the death of one constable Ashby Muchabaiwa, who was allegedly fatally assaulted in a nightclub. He died in the aftermath of a dispute which arose between CAPS United and Dynamos supporters after the Harare derby at Rufaro stadium on Sunday, July 22, 2007.³³⁸ Other than this one, gruesome murders have taken place in Masvingo in the last four to five years. These murders have involved married couples and other acquaintances. But

³³⁷ Wolfgang, Marvin. (1958), in: Conklin John E (1989), *Criminology*, Macmillan, New York, p.36

³³⁸ *The Herald*, July 25, 2007, A Zimpapers Publication, Harare

it should be emphasised that it is not only Masvingo province which is notorious for murder cases, as other provinces like Mashonaland Central also top the list of murder statistics in Zimbabwe. Most of the cases in Mashonaland Central, just as in Masvingo, take place at beer gatherings. So it is reasonable to conclude that Masvingo and Mashonaland central are the murder capitals of Zimbabwe because they have recorded higher murder crimes as compared to other Shona provinces.

THE DEATH SENTENCE IN ZIMBABWE

Debates on criminal law and the death penalty in Zimbabwe cannot be fully captured without also looking at the history and origins of the death sentence. It does not need to be overemphasised that during the colonial period, there were quite a number of crimes that were punishable by death. Such crimes included political crimes, arson, treason and murder among others. As time went on and as the Rhodesian government saw reason in amending some sections of the law that gave credence to the death sentence, it became imperative to apply the death sentence to murderous and treasonous acts only. In Zimbabwe today, the death sentence is still being applied to those who commit acts of murder and treason, but this is despite the fact that many civic groups, Christian denominations and traditional leaders have called for its abolition as it is deemed to be highly immoral. The debates seem to have gathered momentum following the execution of former Iraq leader, Saddam Hussein which was beamed live on most TV broadcasts in the

world raising prospects for both moral and legal outrage. In the next section, we will critically look at the death sentence in colonial Zimbabwe.

THE DEATH SENTENCE IN COLONIAL ZIMBABWE

To begin with, between the Unilateral Declaration of Independence (UDI) in 1965 and 1979, Rhodesia's courts have sentenced approximately four hundred and twenty people to death; more than two hundred are believed to have been executed.³³⁹ They include people convicted of ordinary crimes such as murder or rape and others convicted of certain political offenses under the far-reaching Law and Order (Maintenance) Act (LOMA) of 1960.³⁴⁰ By far, the majority of executions have been carried out since 1973, when the guerilla warfare began in earnest, and most of those executed are believed to have been sentenced to death because of their involvement in the nationalist armed struggle.³⁴¹ Not only was the death penalty extensively used, frequently on a mandatory basis, but also it was sometimes imposed at the end of trials conducted wholly or partly in camera.³⁴² As the Amnesty International Report of 1979 noted:

Executions are carried out without notification. Moreover, the lawful authority of the Smith government to carry out executions has always been put under scrutiny by the British government (the colonial power responsible for Rhodesia) and the United Nations (UN) following the UDI by the Smith

³³⁹ Amnesty International Report. (1979), "The Death Penalty," Amnesty International Publications, London, p. 52

³⁴⁰ Ibid.

³⁴¹ Ibid.

³⁴² Ibid.

government. Since the UDI, the Smith government has been regarded as an illegal regime lacking all constitutional and legal validity.³⁴³

While it is in the in the interest of this work not to be drawn into political emotions, it is also vital to note that death sentences and subsequent executions during the Smith regime were not legally and morally justifiable especially coming from a background where these were not constitutional as expressed in the quotation above. The Rhodesian regime and the Rhodesian appeal court ratified the death sentence on the three condemned prisoners James Dhlamini, Victor Mlambo and Duly Shadreck, and these were hanged at Salisbury central prison on the morning of 6 March 1968 thereby defying the queen's order not to do so.³⁴⁴

In March 1968, shortly before the first executions took place (at least the first after the hanging of Mbuya Nehanda and Sekuru Kaguvi in 1896), a total of 85 people were reported to be under the death sentence in Rhodesia; five of them were executed in March, but by December 1968 the number of people on death row had risen to 118.³⁴⁵ The storm of international protests provoked by the March executions caused a cessation of hanging in Rhodesia until 1973, when the outbreak of guerilla warfare led the regime to resume executions.³⁴⁶ More than 190 people

³⁴³ Amnesty International Report. (1979), "The Death Penalty," Amnesty International Publications, London, p. 52

³⁴⁴ Ibid.

³⁴⁵ Ibid, p.53

³⁴⁶ Ibid, p. 52

were allegedly executed between 1973 and 1977.³⁴⁷ However, in contrast to the position adopted in 1968, it was now the British government's policy to advise Queen Elizabeth II not to exercise her prerogative of clemency as a matter of course in all cases where the death sentence was imposed in Rhodesia.³⁴⁸ Indeed, it seems clear that the British government did not intend to hold the members of the illegal Rhodesian Front administration personally accountable for the continued use of the death penalty in Rhodesia. The LOMA was amended and strengthened many times to include a wide range of political offences thereby imposing strict limitations on all forms of African political activity and organisation.³⁴⁹

Moreover, the LOMA reversed the onus of proof so that it was now for the defendant to demonstrate innocence rather than for the state to prove guilt. In 1963, section 37 of the act had been amended so as to provide the mandatory death penalty for crimes involving arson or the use of explosives. In 1967, section 48A of the Act was also amended so as to introduce the mandatory death penalty for acts of terrorism.³⁵⁰ By the way, African civilians were regarded as terrorists for resisting oppression by the Smith government, hence the Shona name *matororo*. The death

³⁴⁷ Amnesty International Report. (1979), "The Death Penalty," Amnesty International Publications, London, p. 52

³⁴⁸ Ibid.

³⁴⁹ Ibid, p.54

³⁵⁰ Ibid, p.54

penalty was therefore meant to punish *matororo* who were allegedly committing “political offences” against the Rhodesian Front Government.

But both these amendments were repealed in 1968 on the grounds that the existence of the death penalty on a mandatory basis made the so-called terrorists to be resilient and resist arrests.³⁵¹ In December 1974, the LOMA was again amended when a mandatory death penalty was introduced under section 23A of the Act covering unlawful military training and the recruitment of guerillas.³⁵² Various sections of the LOMA also provided for the use of capital punishment on a discretionary basis.³⁵³ Therefore, at the end of 1977, the death penalty could be imposed under any of the following sections of the Act.³⁵⁴

1. Section 23A, subsection 1: For recruiting or encouraging any person to undergo terrorist training within or outside Rhodesia.
2. Section 23A subsection 2: For a person to undergo terrorist training.
3. Section 36: For the possession of arms of war.
4. Section 37: For arson and the use of explosives.
5. Section 48A, subsection 8: For the commission of any act of terrorism or sabotage with intent to endanger the maintenance of law and order. This included *inter alia* an act that caused or was likely to cause substantial financial

³⁵¹ Ibid.

³⁵² Ibid.

³⁵³ Ibid.

³⁵⁴ Ibid.

loss in Rhodesia to any person or to the government, as well as crimes of violence.

6. Section 48B: (a) harbouring, concealing or assisting a person whom the offender knows, or has reason to believe to be, a terrorist; or (b) refusing to disclose information relating to a terrorist he has harboured, concealed or assisted.³⁵⁵

On 8 September 1976, the LOMA was amended yet again to the effect that pregnant women and people under the age of 16 were to be exempted from the death sentence under the Rhodesian law.³⁵⁶ People between the ages of 16 and 18 were to be either sentenced to death or to life imprisonment.³⁵⁷ Many of the two hundred people believed to have been executed under UDI were either captured guerilla fighters or people convicted of offences in some way connected with the guerilla war.³⁵⁸ But in the view of the African nationalists, captured guerillas were supposed to be regarded as prisoners of war and treated in accordance with the Geneva Convention.³⁵⁹ The Rhodesian regime rejected this view, however, and

³⁵⁵ Amnesty International Report. (1979), "The Death Penalty," Amnesty International Publications, London, p.54

³⁵⁶ Ibid.

³⁵⁷ Ibid.

³⁵⁸ Ibid.

³⁵⁹ Ibid.

continued to prosecute captured guerillas either for murder or under the provisions of the LOMA.³⁶⁰

More death penalties were carried out in Rhodesia in 1976 than in any other year since UDI. On 22 April 1975, The Rhodesian Ministry of Justice had announced that information concerning executions would no longer be made available to the public, as the issue of the death penalty had become “an emotive one”.³⁶¹ By the end of 1976, more than a hundred political prisoners had been tried and sentenced by the so-called special courts.³⁶² Twenty-nine death sentences were imposed by the end of the same year. In July 1977, the regime proceeded with the execution of Robert Mangaliso Bhebhe, a long time member of the Zimbabwe African People’s Union (ZAPU) and a former Amnesty International adopted prisoner of conscience, despite concerted international appeals.³⁶³ He had been convicted of encouraging several young blacks to leave Rhodesia to join African nationalist guerillas in Zambia. Two other prisoners whose identities were not revealed were hanged with him.³⁶⁴

³⁶⁰ Ibid, p.55

³⁶¹ Amnesty International Report. (1979), “The Death Penalty,” Amnesty International Publications, London, p.55

³⁶² Ibid.

³⁶³ Ibid.

³⁶⁴ Ibid.

At this juncture, it is fundamental to note that the death penalty in colonial Rhodesia was discriminatory as it was motivated by racial prejudice. It was therefore repugnant, contributing to its failure to be effective in Zimbabwe today. More of this will be explored in later sections.

THE DEATH SENTENCE IN POST- COLONIAL ZIMBABWE

Soon after independence in 1980, the then prime minister, comrade Robert Mugabe came out strongly against the death sentence.³⁶⁵ He and others in government had spent long periods of time in prisons where executions were carried out and had experienced first hand the terrible atmosphere which such executions created.³⁶⁶ Speaking on television in December 1980, Mugabe said that because of his own experiences in prison, he could not reconcile himself to capital punishment and he did not think there would be any hangings while he was in office.³⁶⁷ However, the unrest resulting from the South African inspired banditry led to the retention of the death sentence. In 1982, criminals were executed once again but government said on a number of occasions that it would move to abolish the death sentence when that banditry had been quashed.³⁶⁸

³⁶⁵ Feltoe, Geoffrey. (1993), "Should We Abolish the Death Penalty in Zimbabwe? – Proceedings of the Sentencing Workshop, Held in Victoria Falls on September 1-5, 1993", p.66

³⁶⁶ Ibid

³⁶⁷ Ibid.

³⁶⁸ Ibid.

In December 1984, the then Minister of Justice, Mr. E. Zvobgo stated that the government was averse to capital punishment and that it thought that it should move in the direction of the abolition of the death sentence. From 1982 to the end of 1987, a total of 34 persons were executed. All the persons hanged had been convicted of murder.³⁶⁹ In 1992, the government passed a legislation abolishing the death sentence for a number of offences but not for murder. This legislation produced no effective change because since independence the death sentence had never been imposed for any of the offences which were now being made non-capital offences (the offences for which the death sentence could no longer be imposed included rape and attempted rape, robbery and attempted robbery if committed in circumstances of aggravation, and certain statutory offences in terms of legislation such as the LOMA chapter 65).³⁷⁰ No one was executed between 1987 and 1992.

However, early in the year 1993 the government announced that it was going to recommence hangings.³⁷¹ It identified four men it intended to hang.³⁷² This led to a Supreme Court case in which the issue was raised as to whether or not the protracted delay in executing these four men was a violation of the prohibition in

³⁶⁹ Ibid.

³⁷⁰ Ibid.

³⁷¹ Ibid.

³⁷² Ibid.

the constitution against inhuman or degrading punishment.³⁷³ This same point had been argued in a number of other countries such as India.³⁷⁴

THE DEATH SENTENCE IN ZIMBABWE: A CRITIQUE

It is the submission of this work that the death penalty in colonial Zimbabwe was not administered very differently from the way it was administered in some other parts of the world, particularly in the West, the only difference was that most of the victims of this sentence were the black majority. It is not the prerogative of this work to demonstrate whether this was coincidental or not but from the foregoing, one can observe that the death penalty was used by the coloniser as a repressive tool meant to strike fear among the locals or the African civilians (as the Rhodesian Government preferred to call them). This is shown by the number of African civilians who were executed in the period between 1960 and 1977.

Most of those executed were alleged to have committed “political crimes” by going against the Smith regime, and so they had to pay the price. While this colonial legacy has remained in our history today, it has raised both ethical and legal questions regarding the administration of the death sentence especially in political cases. For instance, to what extent can a political crime (especially where there is no

³⁷³ Ibid.

³⁷⁴ Ibid.

killing or murder) have the same magnitude as that of a crime of murder? How does the question of retribution or just deserts come into play when a person is executed for resisting oppression and repression? Does the punishment mirror the crime committed? Is it possible to come up with a justice system that is fair to everyone in a colonial set up?

All these questions are there to challenge both the moral and legal legitimacy of the Smith government in coming up with a justice system that was meant to serve the interests of both the Rhodies (the white minority) and the African civilians (the black majority) in Rhodesia. This work is not an attempt to demonstrate the moral and legal gap which was there between the Rhodesian Front government and the political will power of the African civilians to resist oppression but to demonstrate that the judicial system then did not have the moral stamina to really fight for justice in the strictest sense of the word as it was driven by caprice and racial malice. Neither is it an attempt to blame the white minority regime for supporting and sustaining the death sentence in colonial Zimbabwe.

It is the submission of this work that the death sentence and the subsequent execution even of a murderer are wrong, because the murderer has an inalienable right to life, which is a gift from God. This is clearly a natural law position. Applied to Shona society, the death sentence or capital punishment is also wrong because the

Shona spiritual cosmology is responsible for rewarding hard workers and punishing offenders. But this work criticises the fact that twenty years after independence from British rule Zimbabwe is still a retentionist.

Of course, it has been refreshing to hear some traditional leaders such as chiefs debating this issue in the chief's council but nothing concrete has been done to abolish this barbaric and uncivilised form of punishment. In any case, many countries in the world (including Canada which abolished the death penalty in 1976) today are moving towards abolishing this form of punishment which is a gross violation of human rights and natural law ethics. Amnesty International Zimbabwe has been on the forefront condemning this kind of punishment, but the powers that be have not taken heed.

CONCLUSION

In this chapter criminal law was discussed and was juxtaposed with the natural law ethic. In order to enhance understanding of the concepts discussed in this chapter, the first section was devoted to an analytic discourse about crime, criminology and criminal law before some theories of crime were reviewed to give this chapter shape. Three key theories were discussed and these included the consensus theory of crime, the conflict theory and the interactionist theory. The consensus theory hinged on the functional aspect of those principles and values that govern the society, and

according to this theory crime is seen as a deviation from these principles and values.

The conflict theory depicts society as a collection of diverse groups who are in discord with one another about a number of issues. The criminal justice system is used by the more powerful to advance their selfish interests. Criminal laws are, therefore, viewed as acts created to maintain the existing power structure more than anything. The interactionist perspective saw crime as a relative term and its definition as reflecting the preferences of people who hold social power in a particular legal jurisdiction and who use their influence to impose their definition of right and wrong on the rest of the population. According to the interactionist view, crime was, therefore, a product of labeling, criminals were individuals whom society had chosen to label as deviants for violating social rules.

After the analytic discourse, the work looked at the confluence of criminal law with natural law ethics. It was noted that natural law ethics informed criminal laws, including in Shona society. Finally, the work critically looked at the death penalty from the colonial period up to the present, and the underlying argument was that there is need to usher in a new dispensation and abolish the death sentence in Zimbabwe as it is incompatible with Shona culture. In chapter four, we will discuss the concepts of natural law, Shona communalism and the common good thesis as

we seek to foreground the idea that the death penalty has no place in *Korekore-Nyombwe* society. Recently, in Mashonaland Central, the situation has been compounded by the activities of gold panning (*chikorokoza*) that have been on the rise in the province particularly in Nyombweland. Besides, this area is known for the brewing and consumption of poisonous liquor called *kachasu*.

From the study that this researcher conducted in Nyombweland, it is clear that some murder cases are going unreported due to high levels of illiteracy in the area; and besides some areas like Dande and Mzarabani are too remote, they are inaccessible. Given these circumstances involved in murder cases, one can argue that the death penalty might have little deterrent effect.

CHAPTER FOUR

NATURAL LAW, SHONA COMMUNALISM AND THE COMMON GOOD

The purpose of this chapter was to knit the theories of deterrence and retribution with the common good argument as enshrined in the natural law theory and the general ethical theories. The idea was to see if the common good argument can fit into the Shona concept of *bunhu* or *ubuntu* law, as shall be discussed in chapter five. As this work established, the common good argument operates from the premise that human law is there not to serve the interest of particular individuals in society but to benefit all the members of society. To this end, argued Aquinas, “if the continual existence of a pestiferous murderer threatens the common good, then he should be put to death.”³⁷⁵ It was also demonstrated in this chapter that the common good argument is also in agreement with the idea of Shona communalism, which celebrates the virtues of shared duties and responsibilities.

INTRODUCTION

St. Thomas Aquinas’ natural law theory will be incomplete if we ignore the common good argument as it marks the turning point in his contributions to natural law ethics. In this chapter, the common good argument shall be considered to see whether it can be used to reasonably justify the death penalty in Nyombweland. According to St. Thomas, the common good thesis justifies capital punishment in the sense that when the interests of the majority are at stake, because of the actions of one person, then that person deserves to be sacrificed. He applies this to capital cases when he argues that certain men must be put to death to ensure peace and

³⁷⁵ Aquinas, St. Thomas, in: Rice, Charles. (1993), *50 Questions on the Natural Law – What it is and why we need it*, Ignatius Press, San Francisco, pp.56-57

harmony in society.³⁷⁶ St. Thomas also identifies the essential elements of the common good as *respect for persons, social well-being and development* as well as *security and peace*. It is also in this chapter that a correlation is made between the common good and deterrence as well as the common good and retribution. In the final thread, the chapter looks at the relationship between the common good and Shona communalism. Please notice that among the *Korekore-Nyombwe*, the common good has its Shona equivalent *zviro zveruzhinji* or *gutsa ruzhinji*.

THE COMMON GOOD: UNCOVERING THE ASSUMPTION

Aristotle, Aquinas and Immanuel Kant took a great deal of their time grappling with the idea of the good life. For Aristotle, the good life was a life of happiness and happiness was the function of reason (*see Nichomachean Ethics*). For Kant, the categorical imperative was the basic formula used to guide and regulate human behaviour so as to realise the good life.

But what is happiness if it does not promote the common good? What is happiness if there is no law that regulates or directs people's actions so as to attain the common good? These questions did not have satisfactory answers from either Aristotle or Kant, but Aquinas and some other contemporary thinkers gave

³⁷⁶ Rice, Charles. (1993), *50 Questions on the Natural Law—What it is and why we need it*, Ignatius Press, San Francisco, p.57

reasonable accounts of the common good thesis. We will begin by defining the common good. According to Louis Dupre, the term “common good” has been used in so many ways that it would be difficult to find any political thinker, however individually oriented; who has not in one form or another embraced it.³⁷⁷ The classical definition formulated in the middle ages on the basis of Aristotelian principles referred to a good proper to and attainable only by the community yet individually shared by its members.³⁷⁸

As such, the common good is at once communal and individual. Still it does not coincide with the sum total of particular goods and exceeds the goals of inter-individual transactions.³⁷⁹ St. Thomas discusses the idea of the common good in his *Summa Contra Gentiles*. For Aquinas, law is not merely whatever legislative product results from the contentions of rival individuals and interests, rather there is a common good that is more than merely the total individual goods.³⁸⁰

St. Thomas quotes the statement of St. Isidore of Seville (c.570-636), “laws are enacted for no private profit, but for the common benefit of the citizens.”³⁸¹ For

³⁷⁷ Dupre, Louis. (1993), “The Common Good and the Open Society,” *The Review of Politics*, Vol. 55, No.4, pp.687-712

³⁷⁸ Ibid.

³⁷⁹ Ibid.

³⁸⁰ Rice, Charles. (1993), *50 Questions on the Natural law – What it is and why we need it*, Ignatius Press, San Francisco, p.57

³⁸¹ Ibid.

Isidore, the law belongs to that which is a principle of human acts because it is their rule and measure.³⁸² Now, as reason is a principle of human acts, so in reason itself there is something which is the principle in respect of all the rest; wherefore toward this principle chiefly and mainly law must tend; toward the end of human life is bliss, happiness.³⁸³ Law must also tend toward happiness. This theme also runs through St. Thomas' work.

St. Thomas' intentions are quite clear in this treatise, that is, to show that human beings need certain laws to guide them if the common good is to be realised. Human law cannot rightly be directed toward the merely private welfare of one or some of the members of the community, nor can the law be directed toward the benefit of the present generation to the undue detriment of generations to come or vice-versa.³⁸⁴

The common good, for St. Thomas, comprises many things. Wherefore laws should take account of many things as to persons, as to matters, and as to times.³⁸⁵ The community of the state is composed of many persons, and its good is procured by

³⁸² Rice, Charles. (1993), *50 Questions on the Natural law – What it is and why we need it*, Ignatius Press, San Francisco, p.57

³⁸³ Aquinas, St. Thomas, in: Baumgarth, W and Regan, R. J. (1988), *Saint Thomas: On Law, Morality and Politics*, Hackett Publishing Company, Indianapolis, p.14

³⁸⁴ Rice, op. cit. p.57

³⁸⁵ Rice, op. cit. p.57

many actions; it is not established to endure only for a short time, but to last for all time by the citizens succeeding one another.³⁸⁶ The common good is St. Thomas' basis for his justification of capital punishment:

Moreover, the common good is better than the particular good of one person. So, the particular good should be removed in order to preserve the common good. But the life of certain pestiferous men is an impediment to the common good, which is the concord of human society. Therefore, certain men must be removed by death from the society of men...Therefore; the ruler of a state executes pestiferous men justly and sinlessly in order that the peace of the state may not be disrupted.³⁸⁷

St. Thomas also finds support from the book of Corinthians, "If a man be dangerous and infectious to the community, on account of some sin, it is praiseworthy and advantageous that he be delivered to Satan...since 'a little leaven leavens the whole lump.'"³⁸⁸ Some Catholic teachers affirm the authority of the state to inflict the death penalty but regard it as a prudential question whether that authority should be exercised.³⁸⁹

Although St. Thomas analogises capital punishment to the situation where "the physician quite properly and beneficially cuts off a diseased organ if the corruption

³⁸⁶ Aquinas, St. Thomas, in: Rice, Charles. (1993), *50 Questions on Natural Law – What it is and why we need it*, Ignatius Press, San Francisco, pp.57-58

³⁸⁷ Ibid.

³⁸⁸ *The Holy Bible*. (1989), The New Revised Standard Version, 1 Corinthians 5V6, Oxford University Press, Oxford

³⁸⁹ Charles Rice, referring to St., Thomas Aquinas in his *Summa Contra Gentiles* as he uses the analogy of the physician and disease to support the death sentence if it can be used to promote the common good.

of the body is threatened because of it”,³⁹⁰ his emphasis here, as in other respects, on the limited power of human law shows that the authority of the state over the person cannot be wholly analogised to the authority one has over the members of one’s own body.³⁹¹ St. Thomas justifies capital punishment on the ground that the common good is better than the particular good of one person. In that context, the particular good of the life of a ‘pestiferous’ criminal may be required to yield to the common good... “Human law is an ordinance of reason for the common good.”³⁹² But the function and authority of human law and the state are limited.³⁹³

The state itself is part of God’s plan, which is oriented toward the salvation of human persons. It is fair to say, therefore, that the “ultimate purpose [of the state] is not the good, or seeming good, of the body politic, but that of the individual members that compose it.”³⁹⁴ What it means, therefore, is that the power of the state in giving a decree about the death penalty is limited as this is God’s prerogative as the author of law and sustainer of life. To this end, the social nature of man is not completely fulfilled by the state, but is realized in various intermediary groups, beginning with the family and including economic, social, political and cultural

³⁹⁰ Charles Rice, referring to St., Thomas Aquinas in his *Summa Contra Gentiles* as he uses the analogy of the physician and disease to support the death sentence if it can be used to promote the common good.

³⁹¹ Ibid.

³⁹² Ibid.

³⁹³ Ibid.

³⁹⁴ Cahill, R.E, in: LeBuffe, F.P and Hayes, J.V. (1953), *The American Philosophy of Law*, Jesuit Educational Research, New York, p. 406-407

groups which stem from human nature itself and have their own autonomy, always with a view to the common good.”³⁹⁵ St Thomas justified the use of the death penalty when employed for the sake of preserving the common good of society.³⁹⁶ At the same time, however, his endorsement of capital punishment was a qualified support; for he also argued that if a convicted criminal could be incarcerated, and does not pose any danger to society, it would not be justified to kill the criminal.³⁹⁷ While St. Thomas justified capital punishment as a way of preserving the common good of society, he likewise counseled against its use when incarceration of criminals would remove the threat to the common good.³⁹⁸

It should be pointed out, at this juncture, that St. Thomas does not only regard the death penalty as serving the purpose of preserving the common good, he also sees life imprisonment as serving a similar function. Perhaps he did not oppose the death penalty because during his time the prison system was not advanced enough to guarantee that prisoners would not escape. For St. Thomas, the common good consists of three essential elements; first, it presupposes *respect for the person* as such.

³⁹⁵ Charles Rice, referring to St., Thomas Aquinas in his *Summa Contra Gentiles* where he uses the analogy of the physician and disease to support the death sentence for the preservation of the common good.

³⁹⁶ Ibid.

³⁹⁷ Ibid.

³⁹⁸ Bishop’s statement. (1999), “The Gospel of life and Capital Punishment:” A Reflection Piece and Study Guide, prepared by the California Catholic Conference of Bishops, available at www.cacatholic.org/docs/LifeCapPunish.doc

In the name of the common good, public authorities are bound to respect the fundamental and inalienable rights of the human person. Society should permit each of its members to fulfill his vocation. In particular, the common good resides in the conditions for the exercise of the natural freedoms indispensable for the development of the human vocation, such as the right to act according to a sound norm of conscience and to safeguard...privacy and rightful freedom also in matters of religion.³⁹⁹ Second, the common good requires the *social well-being* and *development* of the group itself, and development is the epitome of all social duties.⁴⁰⁰

Certainly, it is the proper function of authority to arbitrate, in the name of the common good, between various particular interests; but it should make accessible to each what is needed to lead a truly human life: food, clothing, health, work, education and culture, suitable information, the right to establish a family among others.⁴⁰¹

Finally, the common good requires *peace*, that is, the stability and security of a just order; it presupposes that authority should ensure, by morally acceptable means, the security of society and its members. It is the basis of the right to legitimate personal

³⁹⁹ Aquinas, St. Thomas, in: Rice, Charles. (1993): *50 Questions on Natural Law –What it is and why we need it*, Ignatius Press, San Francisco, p.61

⁴⁰⁰ Ibid.

⁴⁰¹ Ibid.

and collective defense.⁴⁰² Social justice can be obtained only by or through respecting the dignity of the person. The person represents the ultimate end of society, which is ordered to him.⁴⁰³ Pope John Paul II, in a statement that could be applied to the US, noted:

There is a crisis within democracies themselves, which seem at times to have lost the ability to make decisions aimed at the common good. Certain demands, which arise within society, are sometimes not examined in accordance with criteria of justice and morality, but rather on the basis of the electoral or financial power of the groups prompting them. With time some distortions of political conduct create distrust and apathy, with a subsequent decline in the political participation and civic spirit of the general population, which feels abused and disillusioned. As a result, there is growing inability to situate particular interests within the framework of a coherent vision of the common good. The latter is not simply the sum total of particular interests; rather it involves an assessment and integration of those interests on the basis of a balanced hierarchy of values; ultimately, it demands a correct understanding of the dignity and the rights of the person. The church respects the legitimate autonomy of the democratic order and is not entitled to express preferences for this or that institutional or constitutional solution. Her contribution to the political order is precisely her vision of the dignity of the person revealed in all its fullness in the mystery of the incarnate word.⁴⁰⁴

From a critical reading of the above quotation, one can argue that the common good must not be sacrificed for certain selfish motives by the powerful but that it should be desired for its own sake. Disillusionment comes when the custodians of law fail to honour the common good by making decisions that are influenced by selfish reasons. As we have seen, the common good “can be defined only with

⁴⁰² Aquinas, St. Thomas, in: Rice, Charles. (1993): *50 Questions on Natural Law – What it is and why we need it*, Ignatius Press, San Francisco, p.61

⁴⁰³ Ibid.

⁴⁰⁴ The California Catholic Conference of Bishops (CCCCB) noted that the church respected the legitimate autonomy of the democratic order but sometimes the criteria of justice and morality was not followed, available at www.cacatholic.org/docs/LifeCapPunish.doc

reference to the human person...It presupposes *respect for the person* as such. In the name of the common good, the public authorities are bound to respect the fundamental and inalienable rights of the human person,”⁴⁰⁵ much as the individual person is also expected to respect the inalienable rights of other persons. In the next section, we look at some contemporary views of the common good to see whether this idea has been developed or has taken a new dimension since the time of St. Thomas or the Thomistic period.

SOME CONTEMPORARY VIEWS ON THE COMMON GOOD

It will be a narrow focus to restrict the common good argument to the ancient philosophers, to St. Thomas or to the Thomistic period as various other philosophers and ethicists particularly in contemporary society have also added their voices to this illuminating discourse. Using the United States as a relevant example, both the strength and the purpose of a liberal democracy have been seen to lie in the recognition of the primacy of individual rights.⁴⁰⁶ These rights are enshrined in every country’s constitution, which in essence signifies that their protection constitutes the *raison d’etre* of our political, economic, legal and social system.⁴⁰⁷ In this context, any endeavour to recognize, promote or defend any of these rights should resonate

⁴⁰⁵ Bishop’s statement. (1999), “The Gospel of life and Capital Punishment:” A Reflection Piece and Study Guide, prepared by the California Catholic Conference of Bishops, available at www.cacatholic.org/docs/LifeCapPunish.doc

⁴⁰⁶ Ibid.

⁴⁰⁷ Ibid.

strongly with every citizen. However, while the primacy of individual rights has, since Locke, superseded the focus on communal values, it has not stultified it.⁴⁰⁸ In fact, each citizen yearns for both the preservation of his personal, fundamental prerogatives and the sense of recognition that adherence to and participation in a social group provides.⁴⁰⁹ America, for all its emphasis on individuality, is a country founded on and driven by communal endeavours. Its genesis is in, “We the people...”⁴¹⁰

Taking cue from this argument, so also every state must strive to achieve the common good. Coming to capital cases, the common good in this understanding implies that any loss of life resulting from a violent act is seen as a frontal attack on the social fabric.⁴¹¹ A murder does not just eliminate life, nor does it simply and tragically affect the lives of those related to the victim.⁴¹² It shakes the very foundations of the community, disrupting neighborly ties and modifying social dynamics.⁴¹³ Truman Capote’s *In Cold Blood* offers a vivid illustration of how the loss of individual lives introduces tension and translates into a loss of innocence for

⁴⁰⁸ Ibid.

⁴⁰⁹ Ibid.

⁴¹⁰ Ibid.

⁴¹¹ Ibid.

⁴¹² Ibid.

⁴¹³ Ibid.

the community.⁴¹⁴ The people of Holcomb were never the same after November 14, 1959, when the four members of the Clutter family were brutally killed in their own house, “people [in Holcomb] were afraid,” wrote Capote. “It could also happen to them.”⁴¹⁵ Windows were closed, doors locked. People’s perceptions of one another changed.⁴¹⁶ The shocking or horrific murders and the fear they generated strained the local social fabric by introducing disorder where people once saw only harmony, and tension where people once felt solidarity. Since it was widely thought that someone from the community had killed the Clutters, how could one still believe that people shared common values, strove for common purposes?⁴¹⁷

Murder has both a direct individual impact and an indirect collective implication. When taking away the victim’s life, it also destroys essential elements of the communal identity to which the victim belongs.⁴¹⁸ The murderer is accused of both taking away a life and dishonouring the community.⁴¹⁹ Since the crime affects and “shames” the community, the response must also have a communal dimension.⁴²⁰ Communities struck by violent crime respond in different ways, some will seek

⁴¹⁴ Bishop’s statement. (1999), “The Gospel of life and Capital Punishment:” A Reflection Piece and Study Guide, prepared by the California Catholic Conference of Bishops, available at www.cacatholic.org/docs/LifeCapPunish.doc

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

⁴¹⁷ Ibid.

⁴¹⁸ Ibid.

⁴¹⁹ Ibid.

⁴²⁰ Ibid.

retribution. Others will choose to confront the initial act of violence by yearning for peace and reconciliation.⁴²¹ In any case, the response that is chosen is intended to restore the ties which the crime severed, and to buttress the value systems which it attacked.⁴²² It must heal the community as much as it must heal the individual.⁴²³ Furthermore, it must both adhere to and promote the common purposes and common ends around which a sense of belonging is built.⁴²⁴ In this context, abolition as a defense of an individual right is insufficient if it scuttles the common weal or the public good. Abolition must be presented, defended and argued for as a response to the crime perpetrated both against the victim and the community.⁴²⁵

To restore the sense of belonging, which individuals need and include as a core element of their identity, it must, therefore, be understood as a means to affirm communal values and strengthen the definition and quest for common purposes.⁴²⁶ In the next section, we look at the nexus of deterrence, retribution and the common good.

⁴²¹ Bishop's statement. (1999), "The Gospel of life and Capital Punishment:" A Reflection Piece and Study Guide, prepared by the California Catholic Conference of Bishops, available at www.cacatholic.org/docs/LifeCapPunish.doc

⁴²² Ibid.

⁴²³ Ibid.

⁴²⁴ Arthur, John. (1986), *Morality and Moral Controversies: Readings in Moral, Social and Political Philosophy*, Prentice-Hall, Englewood Cliffs, p.420

⁴²⁵ Ibid.

⁴²⁶ Ibid.

DETERRENCE, RETRIBUTION AND THE COMMON GOOD

As highlighted in chapter one, the death sentence has a three-tier function: namely social protection, retribution and deterrence. In part, the death sentence is an expression of society's moral outrage at particularly offensive conduct.⁴²⁷ This function is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrong:

The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy, of self-help, vigilante justice and lynch law.⁴²⁸

The punishment of a murderer gives others satisfaction that this is what murderers will get in return for their gruesome acts and they will desist from engaging in such acts. Despite Kant's insistence, in chapter one, that retributive justice does not serve any common good, it will be noted in this work that retributive justice is alleged to promote the common good in the sense that society is preserved or healed once undesirable elements are got rid of.

Members of society will know that crime does not pay and will try as much as is possible to avoid taking other people's lives for fear of the consequences that will

⁴²⁷ Ibid.

⁴²⁸ Ibid.

befall them. St. Thomas is, therefore, right in saying that the interests of the individuals must be sacrificed for the common good. One of the essential elements of the common good is that of the promotion of *peace*. The execution of the murderer promotes peace in society by deterring some potential murderers from engaging in such heinous acts. The law uses capital punishment for the purpose of preventing people from breaking it, thereby preserving the common good. According to the deterrence argument, the law is there to remind people of the serious repercussions of engaging in criminal acts.

In capital cases, murderers will be executed or their sentences will be commuted to life imprisonment. So, it is this fear of impending death or life imprisonment which will force people to *respect other persons* within their communities. This takes us back to St. Thomas' first essential element of the common good, which says that the fundamental and inalienable rights of persons must be respected by public authorities.

What is clear from this argument is that even the murderer has a fundamental and inalienable right to life just like other members of his own community, a right which is naturally his by virtue of creation and by virtue of being a member of the rational community. This obviously leads to some kind of confusion, that is, what is St. Thomas' argument here? What is he up to? Is he arguing for the retention or

abolition of the death sentence? By merely looking at the first part of his common good argument, it looks like he is advocating for the retention of capital punishment, "...certain men must be removed by death from the society of men...therefore, and the ruler of a state executes pestiferous men justly and sinlessly in order that the peace of the state may not be disrupted."⁴²⁹ But St. Thomas quickly vacillates by saying that public authorities need to respect the fundamental and inalienable rights of persons; this seems a contradiction to his former argument, because it seems he is now saying that even murderers preserve the right to live because of those fundamental and inalienable rights bestowed to them by God. But whatever the case, the deterrent argument cannot be understood without also alluding to the common good.

On retributive grounds, the common good is promoted in the sense that other members of the community will know that the scales of justice have been balanced once the murderer has received his dues. They will know that by committing acts of murder, one automatically forfeits his life as well. People will not kill not only because they are afraid of the consequences that will befall them but also because it is unjust to do so. As Barbara Mackinnon remarks:

Those who argue for the death penalty on retributive grounds must show that it is fitting punishment and the only fitting punishment for certain crimes and

⁴²⁹ Rice, Charles. (1993), *50 Questions on the Natural Law—What it is and why we need it*, Ignatius Press, San Francisco, p.57

criminals. This is not necessarily an argument based on revenge, that the punishment of the wrongdoer gives others satisfaction, it appeals rather to a sense of justice and an abstract righting of wrongs done.⁴³⁰

By way of interpretation, people begin to see sense in the reason for the punishment, once they become convinced that the scales of justice have been balanced. It is this realization by fellow members of the community that murder is unjust and this realization leads to the promotion of peace and social harmony, which in turn preserves the common good. As Mackinnon maintains and as noted in chapter one, there are two different versions of the retributive principle: egalitarian (or *lex talionis*) and proportional.

The egalitarian version says that the punishment should equal the crime, that is, the only fitting punishment for someone who takes life is that her own life be taken in return. The value of a life is not equivalent to anything else, thus even life in prison is not sufficient payment for taking life.⁴³¹ The proportional version of retribution holds that death is the only fitting punishment for certain crimes. Certain crimes are worse than all others, and these should receive the worst or most severe punishment. Surely, some say, death is a worse punishment than life imprisonment.⁴³² In Kant's view, the punishment must fit the crime according to the traditional principle of retaliation that says, "life for life", "eye for eye", and "tooth

⁴³⁰ Mackinnon, Barbara. (1998), *Ethics: Theory and Contemporary Issues*, Wardsworth Publishing Company, Washington, p.296

⁴³¹ Ibid.

⁴³² Ibid, p.297

for tooth.”⁴³³ Now what punishment fits the crime of murder using this principle? Kant insists that death, only death, is the proper punishment for murder; no other punishment will satisfy the requirements of legal justice.⁴³⁴ Again members of society will see the death sentence as justifiable if they are made, by the justice system, to realize that life is a valuable good that cannot be dispensed with at will and that anyone who takes away life disrespects life and does not deserve to live.

Members of a community will come to realize that the judicial system has a social duty to arbitrate in the name of the common good between the offending and the offended party in capital cases; this ensures the perpetuation or development of society. There will be *social-well being* and *development* in the community of men. This takes us back to St. Thomas’ second essential element of the common good.

THE COMMON GOOD: PROBLEMS OF APPLICATION

It is also vital to note that the deterrence and retributive arguments may not be compatible with the common good as we have it from St. Thomas and contemporary thinkers like Truman Capote. Members of a community may not learn anything from the sentencing and subsequent execution of a murderer for both deterrence and retributive reasons. They may only learn that violence counters

⁴³³ White, James E. (1994), *Contemporary Moral Problems*, West Publishing Company, New York, p.186

⁴³⁴ Ibid.

violence, because murder is a violent crime and execution is also organised violence by the state. This sounds antithetical to the common good which is premised on the idea of society's preservation of social well-being. Both murder and capital punishment are immoral. This point finds some support from Gomez-Lobo who remarks thus, "...abortion, infanticide, murder, suicide and active euthanasia, as well as the death penalty, killing in warfare are all morally wrong actions."⁴³⁵

Capital punishment is a direct violation of the value for life principle and it amounts to murder—social murder—directed by society against one of its members.⁴³⁶ If taking human life is wrong in other instances, then it is also wrong in this instance.⁴³⁷ Furthermore, it is difficult to argue that members of a community will be intrinsically motivated to avoid committing murder not because they value human life but because they are afraid of punishment.

The common good cannot be preserved by the mere fear of punishment as enshrined in the deterrence argument. While the murderer deserves to be punished, it is also in the interest of the common good that public authorities find a form of punishment that is befitting to human beings; they should not treat human beings as

⁴³⁵ Gomez-Lobo, Alfonso. (2002), *Morality and the Human goods: An Introduction to Natural Law Ethics*, Georgetown University Press, Washington D.C, p. 60-61

⁴³⁶ Thiroux, J.P. (1990), *Ethics: Theory and Practice*, Macmillan Publishing Company, New York, p.193

⁴³⁷ Ibid.

beasts that can be easily disposed of, and this is where this study will argue against St. Thomas when he says that certain men must be removed by death from the society of men when they become an impediment to the common good. A question that can be posed at this juncture is: What is the purpose of the common good if it fails to rehabilitate an offender and it resorts to violent solutions? Cannot the murderer be rehabilitated and become a useful member of the society by making him or her realise the bad side of his or her actions? If punishment is all about reformation, then the death penalty should be discarded to allow the person or murderer an opportunity to show remorse and regret his actions; executing murderers creates a vicious murder cycle. Remember Mahatma Gandhi's famous dictum, "an eye for an eye leaves the world blind."⁴³⁸ Life imprisonment breaks that murder cycle.

Since the time of St. Thomas, Catholic moral thinking has come to an even stronger sense that an individual is more than simply a member to the body, or a part to the whole. Every person retains an inviolable right to life because of human dignity.⁴³⁹

In Vatican Council II's 1965 document, *Gaudium et Spes* (The Church in the Modern World), this new consciousness is clearly stated; "there is an ever growing awareness

⁴³⁸ Dzvinamurungu, John. (2004), "The Death Penalty is a Violation of Human Rights,"—Proceedings of the Conference on the Launch of the Death Penalty Campaign organised by the Harare youth group of Amnesty International, held at the New Ambassador Hotel, on July 9, 2004, p.8

⁴³⁹ Ibid.

of the sublime dignity of the human person, which stands above all things and whose rights and duties are universal...”⁴⁴⁰ The social order and its developments must constantly yield to the good of the person, since the order of things must be subordinate to the order of persons and not the other way round. In expressing the mind of the church, *Gaudium et Spes* enunciates a clear universal norm about the lofty dignity of every person:

[T]his council lays stress on reverence for man; everyone must consider his every neighbour without exception as another self, taking into account first of all his life and the means necessary for living it with dignity...In our times, a special obligation binds us to make ourselves the neighbour of absolutely every person and of actively helping him when he comes across our path,...Furthermore, whatever is opposed to life itself...whatever violates the integrity of the human person,...Whatever insults human dignity...are infamies indeed...The teaching of Christ even requires that we forgive injustices and extend the law of love to include every enemy, according to the command of the new law.⁴⁴¹

The council affirms the basic principle that life is a fundamental natural right and must be protected from all violence.⁴⁴² It is this principle that has led many bishops and theologians in our time to repudiate the death penalty as it represents an assault to the dignity of human life and is not in conformity with the non-violent witness of Jesus.⁴⁴³ But what is this human dignity from a natural law and Christian perspective? Human dignity refers to the intrinsic worthiness of each and every

⁴⁴⁰ Abbott, Walter M. (1966), *The Documents of Vatican II*, Guild Press, New York, pp.226-227

⁴⁴¹ Ibid.

⁴⁴² Ibid.

⁴⁴³ Ibid.

human being.⁴⁴⁴ Human dignity stands in contrast to goods such as friendship, knowledge, or inner harmony, which we must strive to attain. These are *prakt`a*, “achievable by human action,” as Aristotle would say,⁴⁴⁵ whereas dignity is something humans are born with. As Gomez-Lobo would argue, “I would not wish to deny the validity of the statement that persons have an inborn dignity has theological origins, but the claim that human dignity should not be trampled upon by certain mean actions on the part of others is intelligible to anyone submitting it to rational consideration.”⁴⁴⁶

To borrow a Kantian cliché, dignity is an attribute of human persons, and as ends in themselves, human beings should be respected and allowed to live in pursuit of their own goods.⁴⁴⁷ The good of dignity then will set a limit to what we may do to human persons including oneself. Thus, capital punishment from this understanding goes against the very foundations of human dignity, which the murderer also possesses. It should be noted from the onset that this work is not there to dismiss capital punishment on the basis merely of its violation of human dignity but primarily because it disrespects life as a natural gift from God, a gift to which dignity is part. To this end, the common good thesis fails in its application to human societies

⁴⁴⁴ Gomez-Lobo, Alfonso. (2002), *Morality and the Human Goods: An Introduction to Natural Law Ethics*, Georgetown University Press, Washington D.C, p. 28

⁴⁴⁵ Aristotle in: Gomez-Lobo, Alfonso. (2002), *Morality and the Human Goods: An Introduction to Natural Law Ethics*, Georgetown University Press, Washington D.C, p. 28

⁴⁴⁶ Gomez-Lobo, op.cit.p.29

⁴⁴⁷ Ibid, p.29

today. It is the contention of this work that punishment by death may not be the best option if we want to make our punishment useful, not only to the other members of the community but also to the murderer. In the Christian bible we learn that Paul used to terrorise and persecute Christians before he was converted but now history records that he became a man of God who did great work for the Christian community. If we take this as an example, then we may also argue that dangerous criminals such as murderers can also be rehabilitated and become useful members of society. This statement is also echoed by a renowned Zimbabwean poet, Chenjerai Hove:

If the human race is to claim to be more civilised than other species, it is time our civilization were based not on how sophisticatedly we can kill our neighbours but rather on how efficiently we are able to ennoble human and other life around us; the death penalty is as abominable as crime itself. Our state laws must promote love, not hatred and victimization. Our penal code must be based on rehabilitation rather than annihilation.⁴⁴⁸

The whole concept of retributive justice is very difficult to qualify and justify especially when one considers the amount of suffering the murderer goes through prior to his or her execution. The mere thought of the prospect of death may give the murderer psychological instability or torture and he or she may see life as meaningless. As put by Dzvinamurungu, the condemned prisoner is often executed after a period of about three years in custody. In that scenario, the death penalty is exercised more than a million times upon a single person, since every time there is a

⁴⁴⁸ Amnesty International Report. (1989), "When the State Kills: The Death Penalty Versus Human Rights," Amnesty International Publications, London, p.77

knock on the condemned prisoner's cell, he or she thinks someone may have been sent to take him to the gallows.⁴⁴⁹ What is the purpose of the common good if it fails to see that the scales of justice are morally unbalanced when the condemned prisoner dies more than is anticipated by the justice system? The common good should regard life as sacrosanct and as a basic good that must be protected.

In its submission to the constitutional review commission in 1999, the Zimbabwean Catholic Bishops' Conference (Z.C.B.C.) said, "the first human right that the constitution should protect is the right to life, the right to life is God given and hence human life should be allowed to take its course from birth to natural death."⁴⁵⁰ This is clearly a natural law position that needs to be respected.

While acknowledging the common feelings of society that the punishment should be given relative to the crime committed, capital punishment is wrong because two wrongs do not make a right. Murdering the murderer is another act of murder.⁴⁵¹ In a presentation entitled, "The Gospel of Life: A Challenge to American Catholics," going under the theme - *On the Threshold of the Third Millennium*, Catholic Bishops at the United States Catholic Conference (U.S.C.C) reiterated that there was need now

⁴⁴⁹ Dzvinamurungu, John. (2004), "The Death Penalty is a violation of human rights,"- Proceedings of the Conference on the Launch of the Death Penalty Campaign organised by the Harare youth group of Amnesty International, held at the New Ambassador Hotel, on July 9, 2004, p.8

⁴⁵⁰ Ibid.

⁴⁵¹ Ibid.

to call for the prohibition of the death penalty in America.⁴⁵² Prohibition of the death penalty recognises that the traditional justification of society's right of self defense no longer has a tenable foundation and prohibition of the death penalty also represents a resistance to dehumanisation and the degradation of humanity.⁴⁵³ Capital punishment is a capitulation to human despair.⁴⁵⁴ Pope John Paul II, in his address to the United Nations General Assembly in 1995, remarked that Christian hope for the world "extended to every human person, including the offender."⁴⁵⁵ In his remarks, The Pope affirmed:

1. That all human life was sacred and every person's right to life was supposed to be respected. The sacredness of human life could never be forfeited by human misconduct.⁴⁵⁶
2. That while an offender was not innocent and free of guilt, his or her life remained sacred and deserved to be protected and respected.⁴⁵⁷
3. That the use of the death penalty dehumanised society by legitimating violence as a strategy to deal with human wrongdoing and thus contributes to a culture of death.⁴⁵⁸

⁴⁵² Bishop's statement. (1999), "The Gospel of Life and Capital Punishment:" A Reflection Piece and Study Guide, prepared by the California Catholic Conference of Bishops, available at www.cacatholic.org/docs/LifeCapPunish.doc

⁴⁵³ Ibid.

⁴⁵⁴ John Paul II, Pope. (1995), "Address to the UN General Assembly," *Origins* (25), 1995, p.299

⁴⁵⁵ Ibid.

⁴⁵⁶ Ibid.

⁴⁵⁷ Ibid.

⁴⁵⁸ Ibid.

4. That the use of the death penalty did not reflect the consistent biblical trajectory of forgiveness, hope and redemption preached by Jesus. It is important to insist that this option of forgiveness was not meant to coddle the offender, as justice demanded that the perpetrators of violent crimes received effective punishment by means of incarceration.⁴⁵⁹
5. That the prohibition of the death penalty communicated awareness that the cycle of violence could be broken and this belief supported a life- affirming ethic coherent with the church's stance on abortion, euthanasia and its support for the poor and vulnerable as well as those living in the margins of society.⁴⁶⁰
6. That the prohibition of the death penalty promoted the awareness that God alone was the sovereign of all life.⁴⁶¹

SHONA COMMUNALISM AND THE COMMON GOOD

While the common good argument is still embraced in the occident it is critical to note, at this juncture, that its force is no longer felt as it used to be in ancient times because the idea of community has lost its ontological ultimacy due to a host of factors such as modern rationalism, the call for individual rights and the

⁴⁵⁹ John Paul II, Pope. (1995), "Address to the UN General Assembly," *Origins* (25), 1995, p.299

⁴⁶⁰ Ibid.

⁴⁶¹ Ibid.

emergence of the self.⁴⁶² A struggle has originated between the traditional conception of the community as an end in itself and that of its function to protect the private interests of its members.⁴⁶³ Eventually, the latter theory has prevailed and the doctrine of individualism has been born.⁴⁶⁴ It is also clear from the above characterisation that retributive justice and the common good are based on the responsibilities of the individual person rather than the community in which he or she hails from. The murderer is punished as an individual and this form of punishment has nothing to do with his kith and kin.

This emphasis on individualism leaves us with a lot of problems as we try to understand and appreciate the responsibilities of the Shona person when it comes to crime and punishment. The Shona person, just like any other African, cannot be understood without attaching him or her to his or her community. We may borrow John S Mbiti's dictum, "the individual is conscious of himself in terms of 'I am because we are, and since we are, therefore I am.'"⁴⁶⁵ In Shona society, just as in any African setup, the community is still central to the individual; and this is why when a person commits an act of murder, he or she invites trouble not only to himself or herself but also to the members of his or

⁴⁶² Dupre, Louis (1993), "The Common Good and the Open Society", *The Review of Politics*, Vol. 55, No.4, pp.687-712

⁴⁶³ Ibid.

⁴⁶⁴ Ibid.

⁴⁶⁵ Mbiti, John S. (1970), *African Religions and Philosophy*, Doubleday and Company, New York, 1970, p. 282

her family. In Shona society we have “eyes for an eye” because the family is considered responsible for the act of murder committed by one of its members.

Blood ties are also very central to the Shona concept of existence and community. This idea also runs throughout the African continent. John Pobee talks of *cognatus ergo sum* in *Akan* tradition, which literally means, “I am related by blood, therefore, I exist, or I exist because I belong to a family.”⁴⁶⁶ This cannot be interpreted within the context of retributive justice, which looks mainly at the individual as responsible for a particular crime and hence punishable as an individual.

Retributive theories, on the other hand, are premised on Rene` Descartes’, “*cogito ergo sum*, that is, I think, therefore I am,”⁴⁶⁷ which put much emphasis on the individual and his or her responsibilities. But in Shona society, emphasis is on restorative justice and this is the context in which *ngozi* operates. Every family or community is responsible for the behaviour of its members. But what is the philosophy behind this communal aspect of life? The next section looks at the Philosophy of communalism in all discourses that have to do with crime, punishment and morality. The idea is to find out why there is this emphasis on

⁴⁶⁶ Pobee, John S. (1979), *Toward an African Theology*, Abingdon Press, Nashville, p.49

⁴⁶⁷ Stumpf, S.E. (1982), *Socrates to Sartre: A History of Philosophy*, McGraw-Hill Book Company, New York, pp.234-235

restoration instead of retribution in Shona societies in general and in Nyombweland in particular.

THE PHILOSOPHY OF COMMUNALISM IN NYOMBWELAND

The concept of communalism is well discussed by B.J Van der Walt in chapter two of his classic text, *Afrocentric or Eurocentric?—Our Task in a Multicultural South Africa*. This section will also be informed by this work. As Van der Walt postulates, the African has a communal self-concept rather than an individual self-concept; he or she contributes to the survival of the community rather than his or her own personal survival.⁴⁶⁸ Advancing a *hunhu or ubuntu* philosophy within the context of community, L Mbigi and J Maree argue that the cardinal belief of *ubuntu* is that man can only be man through others.⁴⁶⁹

The concept of duty towards the community is also central to the Shona man and woman. This view of the traditional African has enormous consequences. Menkiti mentions for example the interesting fact that, unlike in Western societies, which are organised on the basis of rights, for the traditional African

⁴⁶⁸ Van der Walt, B.J. (1997), *Afrocentric or Eurocentric?—Our Task in a Multicultural South Africa*, Potchefstroomse Universiteit, p.35

⁴⁶⁹ Mbigi, L and Maree, J. (1995), *Ubuntu: The Spirit of African Transformation Management*, Knowledge Resources, Randburg, p.2

the concept of duties predominates.⁴⁷⁰ In the African understanding priority is given to the duties, which individuals owe to community; and their rights, whatever these may be, are seen as secondary to the exercise of their duties.⁴⁷¹

This is also evident in *Korekore-Nyombwe* society especially during rites of passage such as marriage. The bride and bridegroom do not belong to their parents alone; they also belong to the whole community. It is common to hear statements like, *vana vedu vadoroorana* (our children have married each other). In African communities, the law is there to restore social harmony and restitution is very crucial but this law works in tandem with the framework of communalism.

Against this background, Van der Walt has this to say, “responsibility is easily shifted on to the community—and everybody’s responsibility easily becomes nobody’s.”⁴⁷² Shame plays a more important role than guilt in African ethics.⁴⁷³

Details on the concept of law and restoration shall be discussed in chapter 5. But it is important to note, in this chapter, that the idea of restoration features prominently in *Korekore-Nyombwe* society because that is the only form of justice that can be understood in the context of communalism. The death of one person

⁴⁷⁰ Menkiti, I.A. (1979) in: Van der Walt, B.J. (1997), *Afrocentric or Eurocentric?—Our Task in a Multicultural South Africa*, Potchefstroomse Universiteit, p.36

⁴⁷¹ Van der Walt, B.J. (1997), *Afro centric or Eurocentric?—Our Task in a Multicultural South Africa*, Potchefstroomse Universiteit, p.36

⁴⁷² Ibid, p.33

⁴⁷³ Ibid, p.33

in a family is interpreted as the death of the whole clan; this is why members of a family become emotional when one of their members is murdered and they rightfully demand compensation.

It is this communal attachment that breeds such emotions and gives birth to statements like *mumwe wedu haarove ba* (our relative will not sleep for ever). On the side of the guilty family, the members become restless when they hear that one of their members has murdered someone. They are also responsible for that crime and they will suffer the same consequences if no reparations are paid to the family of the murder victim.

Unlike in the occident where an individual is responsible for his or her crime before a court of law, a point which is reinforced by Van der Walt when he argues that in the West, the law has to determine which individual is guilty or innocent—punishment is important, even though it causes bitterness at times,⁴⁷⁴ in Shona society the family is responsible; and when it comes to restitution or compensation, all the family members contribute. This is not left to the murderer alone, because whatever will happen to the murderer and his immediate family

⁴⁷⁴ Van der Walt, B.J. (1997), *Afro centric or Eurocentric?—Our Task in a Multicultural South Africa*, Potchefstroomse Universiteit, p.32

will also happen to the other members of the clan. This explains why *ngozi* is the most feared spirit in *Korekore-Nyombwe* society, just as in any other Shona society. But how is communalism linked to the idea of the common good? The *Korekore-Nyombwe* people thrive for common goals and purposes and the preservation of human life is one of these goals. The *Korekore-Nyombwe* people believe that murder is the worst form of crime one can commit and punishment by the negative *ngozi* is the worst form of punishment one can endure. For purposes of preserving the common good, it is important that people shun evil acts like murder and fornication. The *Korekore-Nyombwe* society will be at peace without murderers and social well-being will be achieved. The idea of restoration is to preserve the common good by restoring or placating the spirit of the dead victim. This gives the whole community inner peace and harmony when people are reminded that life is not cheap. In the last chapter, this work looks at *ngozi* and restorative justice.

CONCLUSION

In this chapter, emphasis was on the common good thesis as discussed by St. Thomas and some contemporary thinkers. What was central in this chapter is that murderers were an impediment to the general flow of society, its common goals and aspirations as centred on respect for persons, social well-being and development as well as peace and harmony. It was, therefore, in the interest of

society to have them removed from society through death. The concepts of retribution and deterrence were also discussed in the context of the common good and that any loss of life resulting from a violent act was seen as a frontal attack on the social fabric. Murder shook the very foundations of the community, disrupting neighbourly ties and modifying social dynamics. But on the other hand, the common good was seen as scuttling individual rights and freedoms when it allowed violent solutions. Executing the murderer for the sake of preserving the common good will leave the world much poorer. In the final section, it was argued that the Shona person can only be understood within the context of communalism and the emphasis was on “we” rather than on “I”. Crime was seen, in this chapter, as a communal responsibility and so was punishment.

CHAPTER FIVE

RESTORATIVE JUSTICE IN NYOMBWELAND

In this chapter, it has been demonstrated that restorative justice is the only form of justice that is embraced in *Korekore-Nyombwe* society and in the Shona society in general. It was argued, in this chapter, that the word “retribution” has no application and meaning in Nyombweland because the *Korekore-Nyombwe* people believe in building bridges through restoration. It is only when the guilty family has failed to own up that there is “eyes for an eye.” Through processes analogous to Victim-Offender Mediation, Family Group Conferencing and Community Restorative Boards, this work has called for the abolition of capital punishment or the death penalty in Zimbabwe because it has a retributive instead of a restorative agenda. It is this retributive agenda that is alien to Shona law and morality; while it is granted that the common good can also be preserved in *Korekore-Nyombwe* society, it is not the function of the death penalty but that of *ngozi*. Any appeals to the common good argument could not help matters either. The death penalty was also seen as a gross violation of natural law ethics. It has also been argued, in this chapter, that the death penalty makes punishment excessive and meaningless.

INTRODUCTION

This chapter looks at the nature and scope of *hunhu* or *ubuntu* law with a view to see how restorative justice can be regarded as central to Shona society. African law, as shall be seen in this chapter, is about the “family atmosphere”; it is about a kind of philosophical affinity and kinship among and between the people of Africa. In this same chapter, the whole notion of retributive justice shall be dismissed on the grounds that it is alien to Shona culture, which is centred on communal relationships, peace and harmony as noted in chapter four. The Shona judicial systems shall be explored to find out which crimes are pre-dominant in Shona society and how judgements regarding them are presided over. In the final thread, it

shall be argued that the death penalty has no place in *Korekore-Nyombwe* society because of its emphasis on retribution instead of restoration. The common good argument shall also be invoked to see whether the death penalty can still be justified.

WHITHER THE DEATH PENALTY IN ZIMBABWE

As noted in chapters one and four, the death penalty has three key functions: namely the protective function, the retributive function and the deterrent function. These three key functions are the reasons why some countries today still hang on to the death penalty despite some of the moral difficulties associated with its administration. But those who have argued against its retention have done so, for example, on the grounds that the execution of innocent people cannot be ruled out or that the amount of stress that the family of the murderer endures prior to his or her execution is unbearable.

It has been argued in this work that while it is important to appreciate the strengths of retentionist arguments, it is also important to note that some of these arguments especially the retributive argument has no moral force when applied to the Zimbabwean situation as shall be seen later in this chapter. In order to appreciate whether or not we should hang on to the death penalty, it is imperative that we also look at the nature and scope of traditional Shona law, in terms of its provisions on crime and punishment and how it is enforced through the traditional Shona courts.

The Shona have evolved an elaborate and uniform system of punishment for bad behaviour through their traditional courts.⁴⁷⁵ But it is not only with a criminal offence, like stealing or assault, with which the traditional court is concerned but also with other moral misdemeanors.⁴⁷⁶

In the next section we look at the nature and scope of law in Shona society and the judicial structures therein. The idea is to establish whether Shona *bunbu* or *ubuntu* law has some retributive traces in it such that it would be very difficult to call for the abolition of the death sentence or to claim that the whole concept of retribution is absent in Shona society in which case, this work will be vindicated in calling for the repudiation of this form of punishment or sentence.

LAW AND THE JUDICIAL SYSTEM IN SHONA SOCIETY

It is vital to note that traditional Shona society had and still has a way of trying and punishing errant behaviour of its members. But what is the source or origin of traditional Shona law? Shona law comes from *bunbu* or *ubuntu* morality. Actually it is very difficult to distinguish between law and morality in Shona society. As such, *bunbu* or *ubuntu* law guides Shona traditional courts when they try and punish those who deviate from the laws of any given society. As Mogobe Ramose postulates,

⁴⁷⁵ Gelfand, Michael. (1973), *The Genuine Shona: Survival Values of an African Culture*, Mambo Press, Gweru, p.54

⁴⁷⁶ Ibid.

hunhu or *ubuntu* morality is the basis of African law.⁴⁷⁷ Even apart from linguistic analysis, a persuasive philosophical argument can be made that there is a “family atmosphere,” that is, a kind of philosophical affinity and kinship among many different indigenous people of Africa.⁴⁷⁸

Accordingly, for Ramose, African law or Bantu law is, in the first place, about the philosophical “family atmosphere” prevailing among the indigenous people of Africa.⁴⁷⁹ African law is also about the body of legal rules applicable to a particular Bantu grouping in a specific place at a particular time.⁴⁸⁰ It is not clear what Ramose meant by a “family atmosphere,” but probably he meant that the family was the first court and that disputes were solved behind closed doors; in Shona they say, *haikona kufukura hapwa panevanhu* (do not expose yourself in public).

The family atmosphere also implied that in traditional Shona society, the concept of *crime* was not well defined. This is well articulated by M.F.C Bourdillon, “the emphasis on the solution of conflict over the enforcement of law is reflected in the absence of a well developed concept of crime among the Shona, corresponding

⁴⁷⁷ Ramose, Mogobe B. (1999), *African Philosophy through Ubuntu*, Mond Books, Harare, p.102

⁴⁷⁸ Ibid.

⁴⁷⁹ Ibid.

⁴⁸⁰ Ibid.

perhaps with an absence of a well developed concept of state.”⁴⁸¹ As Ramose reiterates, the Africans themselves rarely raise the question of whether or not there is *hunhu* or *ubuntu* law; it continues to be raised by non-Africans.⁴⁸² But whatever the case, *hunhu* or *ubuntu* law is very much alive and is the basis upon which behaviour is regulated in Shona society, particularly in Nyombweland. As they say in Nyombwe dialect, *munhu anotsika dzidonyangara ha-asiyani nejeriba* (a bad person is always in jail). The jail that is referred to here is not the modern jail that we all know where criminals are put for correctional purposes, rather it refers to the society in which the person is found.

The society is the jail because once it has become public knowledge that person *A* has committed murder, it becomes very difficult for him or her to mix and mingle with other members of the society, as he or she is constantly being isolated and called by all sorts of bad names. He or she has diminished freedom and autonomy when it comes to association with others. So, *hunhu* or *ubuntu* law is “without exception, a combination of rules of behaviour which are contained in the flow of life.” In this understanding:

African law is positive and not negative. It does not say ‘Thou shalt not,’ but ‘Thou shalt.’ Law does not create offences, it does not create criminals; it directs how individuals and communities should behave towards each other. Its

⁴⁸¹ Bourdillon, Michael. (1976), *The Shona Peoples: An Ethnography of the Contemporary Shona, with Special Reference to their Religion*, Mambo Press, Gweru, p.136

⁴⁸² Ramose, Magobe B. (1999), *African Philosophy through Ubuntu*, Mond Books, Harare, p.110

whole object is to maintain equilibrium, and the penalties of African law are directed, not against specific infractions, but to the restoration of this equilibrium.⁴⁸³

The above quotation has a lot of meaning when applied to Shona society in general and to the *Korekore-Nyombwe* people in particular. *Munhu anoparika anoratidzwa gwara novamwe muNyombwe* (Anyone who deviates from the norms and values of his or her society is re-directed by others in Nyombweland). In Shona society, *hunhu* or *ubuntu* law is about restorative justice, which hinges on the payment of reparations or compensation in order that the victim is restored and pacified. As Ramose postulates, “a debt or a feud is never extinguished till the equilibrium has been restored.”⁴⁸⁴ For purposes of positioning our argument, it is also fundamental that we look at restorative justice and its force in Nyombweland. We will begin with some general conceptions of restorative justice in order to see how this form of justice is contained in *hunhu* or *ubuntu* law as discussed above.

In murder and punishment, restorative justice is largely about replacing or placating the life lost through murder and it is also about building relations severely strained by the actions of the murderer. It is not about equality or proportionality as in an “eye for an eye,” “a tooth for tooth,” “a wound for a wound” and “stripe for stripe.”

⁴⁸³ Ramose, Magobe B. (1999), *African Philosophy through Ubuntu*, Mond Books, Harare, p.118

⁴⁸⁴ Ibid.

SOME GENERAL CONCEPTIONS OF RESTORATIVE JUSTICE

By definition, restorative justice is a theory and practice of justice that emphasises repairing the harm caused or revealed by criminal behaviour.⁴⁸⁵ It is best achieved through co-operative processes that include all stakeholders from the guilty party's family to the offended party's family. In *Korekore-Nyombwe* society, the two families may be brought together through the work of the *ngozi* spirit as we saw in chapter two and as we shall see again later in this chapter. In restorative justice, the victim plays a major role in the process and may receive some type of restitution from the offender.⁴⁸⁶ Today, however:

Restorative justice is a broad term, which encompasses a growing social movement to institutionalize peaceful approaches to harm, problem solving and violations of legal and human rights. These range from international peace keeping tribunals such as the South Africa Truth and Reconciliation Commission to innovations within our criminal justice system, schools, social services and communities. Rather than privileging the law, professionals and the state, restorative resolutions engage those who are harmed, wrongdoers and their affected communities in search of solutions that promote repair, reconciliation and the rebuilding of relationships. Restorative justice seeks to build partnerships to re-establish mutual responsibility for constructive responses to wrongdoing within our communities. Restorative approaches seek a balanced approach to the needs of the victim, wrongdoer and community through processes that preserve the safety and dignity of all.⁴⁸⁷

What is central in this quotation is that restorative justice is not meant to benefit only the justice system, as retributive justice often does. Restorative justice benefits

⁴⁸⁵ [Wikipedia, the free encyclopedia, available at http://en.wikipedia.org/wiki/Restorative_justice,](http://en.wikipedia.org/wiki/Restorative_justice)
updated 21 August 2007

⁴⁸⁶ Ibid.

⁴⁸⁷ Ibid.

both the victim and the offender, ensuring that the two parties continue to live together. Besides, restorative justice allows for what is called forgiving and forgetting; that is, once necessary steps have been taken by the guilty family to compensate the family of the victim, the latter will forgive and forget and the relationship strained as a result of the crime, will be mended.

Restorative justice takes many different forms, but all systems have some aspects in common.⁴⁸⁸ In criminal cases, victims have an opportunity to express the full impact of the crime upon their lives, to receive answers to any lingering questions about the incident, and to participate in holding the offender accountable for his or her actions.⁴⁸⁹ Offenders can tell their story of why the crime occurred and how it has affected their lives, and they are given an opportunity to make things right with the victim to the degree possible through some form of compensation.⁴⁹⁰ In social justice cases, impoverished people such as foster children are given the opportunity to describe what they hope for their futures and make concrete plans for transitioning out of state custody in a group process with their supporters.⁴⁹¹

⁴⁸⁸ Wikipedia, the free encyclopedia, available at http://en.wikipedia.org/wiki/Restorative_justice, updated 21 August 2007

⁴⁸⁹ Ibid.

⁴⁹⁰ Ibid.

⁴⁹¹ Ibid.

In criminal cases, types of compensation include but are not limited to: money, community service in general, community service specific to the deed, education to prevent recidivism, and expression of remorse.⁴⁹² Restorative justice sometimes happens in the context of a courtroom, and sometimes within a community or non-profit organization.⁴⁹³ In the courtroom, the process might look like this: For petty or first time offenses, a case may be referred to restorative justice as a pre-trial diversion, with charges being dismissed after fulfillment of the agreement to make restitution; in more serious cases, restorative justice may be part of a sentence that includes prison time or other punishments.⁴⁹⁴ In the community, concerned individuals meet with all affected parties to determine what the experiences and impact of the crime were for all.⁴⁹⁵

Those called out for offenses listen to others' experiences first, preferably until they are able to reflect and feel what those experiences were for others.⁴⁹⁶ Then they speak to their experience: how it was for them to do what they did. A plan is made for the prevention of future occurrences, and for the offender to heal the damage to

⁴⁹² Ibid.

⁴⁹³ Ibid.

⁴⁹⁴ Ibid.

⁴⁹⁵ Ibid.

⁴⁹⁶ Ibid.

the injured parties. All agree.⁴⁹⁷ In the next section, we look at this aspect with a view to show how restorative justice is relevant to Shona society.

PROCESSES INVOLVED IN RESTORATIVE JUSTICE

There are various processes that are involved in restoring or compensating a victim and these processes involve the parties concerned, particularly the victim and the offender. The processes include Victim-Offender Mediation or reconciliation (V.O.M.), Family Group Conferencing (F.G.C.) and Community Restorative Boards (C.R.Bs). These processes involve dialogue between the victim and the offender, dialogue that is aimed at bringing things to normalcy. In capital cases, it is hoped that after the dialogue the family of the dead victim will feel to some extent restored.

This is the context in which we find *ngozi* in *Korekore-Nyombwe* society. The work will begin with V.O.M which is usually a face-to-face meeting between the victim of a crime and the person who committed that crime in the presence of a trained mediator.⁴⁹⁸ This system generally involves a smaller number of participants, and often is the only option available to incarcerated offenders, due to limits on visitors.⁴⁹⁹

⁴⁹⁷ Wikipedia, the free encyclopedia, available at http://en.wikipedia.org/wiki/Restorative_justice, updated 21 August 2007

⁴⁹⁸ Ibid.

⁴⁹⁹ Ibid.

One strong proponent of the use of mediation in restorative justice is Marshall Rosenberg, the creator of Nonviolent Communication (N.V.C.) and the founder of the Centre for Nonviolent Communication (<http://www.cnvc.org/>). His approach is to have the victim and offender meet, in the presence of a trained N.V.C mediator.⁵⁰⁰ The victim gets to explain how he or she feels and felt, and what needs were not met as a result of the action of the offender.⁵⁰¹ The offender is to repeat what he or she hears and continues to listen and repeat what the victim says.⁵⁰² Usually this requires substantial support from the trained N.V.C mediator to gain clarity about the feelings and needs and to request the offender to say these words back to the victim.⁵⁰³

Once the victim feels adequately heard, he or she is then ready to listen to what the offender feels and needs now and what he or she needed at the time of the crime; and the victim, if he or she has been heard adequately, will be ready to hear and reflect these feelings and needs back to the offender.⁵⁰⁴ Usually the session ends with a request from the victim to the offender, and from the offender back to the victim. The requests lead to a strategy for resolution.⁵⁰⁵ Rosenberg has mediated

⁵⁰⁰ Wikipedia, the free encyclopedia, available at http://en.wikipedia.org/wiki/Restorative_justice, updated 21 August 2007

⁵⁰¹ Ibid.

⁵⁰² Ibid.

⁵⁰³ Ibid.

⁵⁰⁴ Ibid.

⁵⁰⁵ Ibid.

such restorative sessions for victims of the violence in Palestine and Israel, as well as in countries such as Burundi, Rwanda, Sri Lanka, Columbia and Sierra Leone.⁵⁰⁶

F.G.C has a much wider circle of participants than V.O.M. In addition to the primary victim and the offender, participants may include people connected to the victim, the offender's family members and others connected to the offender.⁵⁰⁷

F.G.C is often the most appropriate system for juvenile cases, due to the important role of the family in a juvenile offender's life. This work will apply F.G.C to capital cases particularly in Shona society. Shona society also has something close to F.G.C which takes place between the families of the murdered victim and that of the murderer. In Nyombweland, the chief plays a central role in trying to initiate dialogue between the two families; this is so because blood was shed in his community. It is also crucial to note that the conferencing has a spiritual dimension brought about by the presence and force of *ngozi*.

The Western concept of F.G.C lacks this dimension. In the next section, we look at the C.R.Bs which is composed of a small group of citizens, prepared for this function by intensive training, who conduct face-to-face meetings with offenders

⁵⁰⁶ Ibid.

⁵⁰⁷ Ibid.

sentenced by the court to participate in the process.⁵⁰⁸ During a meeting, board members discuss with the offender the nature of the offense and its negative consequences.⁵⁰⁹ Then board members develop a set of proposed restorative measures which they discuss with the offender until they reach an agreement on the specific actions the offender will take within a given time period to make reparation for the crime.⁵¹⁰ Subsequently, the offender must document his or her progress in fulfilling the terms of the agreement.⁵¹¹ After a stipulated period of time has passed, the board submits a report to the court on the offender's compliance with the agreed upon measures.⁵¹² At this point, the board's involvement with the offender is ended.⁵¹³

From the foregoing, it can be seen that restorative processes are meant to mend relations between the offending and offended party. Restorative justice takes cognisance of the fact that relationships strained by certain criminal acts can be mended through dialogue. Hence, as alluded to earlier on, there is a family atmosphere especially in the case of family group conferencing. This atmosphere allows tempers to cool down and allow for dialogue to take place.

⁵⁰⁸ Ibid.

⁵⁰⁹ Ibid.

⁵¹⁰ Ibid.

⁵¹¹ Ibid.

⁵¹² Ibid.

⁵¹³ Ibid.

In Shona society, justice can only be conceptualised within the context of restoration and not retribution. In fact, the word retribution has no direct application in Shona society. Claude Mararike takes this point further by arguing that the term retribution or retributive justice does not exist at all in Shona society. It is a term that was superimposed in the Shona culture by the colonizers as they sought to enact draconian laws in Rhodesia (present day Zimbabwe). Details of this will be found in the next section.

***NGOZI* AND RESTORATIVE JUSTICE IN SHONA SOCIETY**

In Shona society, restorative justice normally takes the form of compensating the family of the deceased victim in the case of murder or paying some reparations in the case of an adulterous affair with a married woman. The husband is the beneficiary in this last case. It is also very critical to note that there are three principles that form the foundation for restorative justice in Nyombweland namely:

1. Justice requires that we work to restore those who have been injured or make reparation to the family of one who has been killed. This is done so as to lessen the family's grief and to ensure that the living—dead himself or herself would no longer be inclined to act as a negative *ngozi* but could act in a fully positive way.

2. The families of the offender and the victim should have the opportunity to participate fully in this restorative process.
3. The traditional chief plays a mediating role as the blood was shed in his or her own community.

Restoration or compensation is very central in Nyombweland, and this is done to bring about a state of equilibrium especially in cases involving first and second degree murder. Shona customary law has this principle that if a person commits an act with intent, he must compensate the aggrieved person, but if he or she does it without intent or accidentally, much will depend on the attitude of the man who has been injured or suffered a loss.⁵¹⁴ The victim of murder needs to be restored through propitiation in that regard. This is not to say that the murderer deserves to die because he murdered somebody (just deserts), but that he must die because he had an option to live, together with his kinsmen, by paying reparations but he or she knowingly or otherwise, failed to do so.

Ngozi does not look back and say, there is some crime of murder committed in the past that needs to be balanced or righted with the death of the murderer, as in the case of retribution. Rather it says, the victim of murder needs to be replaced by

⁵¹⁴ Gelfand, Michael. (1973), *The Genuine Shona: Survival Values of an African Culture*, Mambo Press, Gweru, p.54

compensation in the form of a head of cattle and a living person who, in most cases, is a girl if the murdered person is a man and vice versa. As Mararike would argue, human life is one of the most valuable assets in Shona society, and *ngozi* is an expression of disapproval when it comes to actions that result in the taking away of human life.⁵¹⁵

For Mararike, *ngozi* has a regulatory function, which is that of deterrence and not retribution.⁵¹⁶ This is especially true when one considers the fact that the guilty family is given the option to either pay reparations or suffer the consequences through a series of misfortunes, deaths and illnesses. It is only when the guilty family has failed to restore or placate the victim that *ngozi* will strike harshly and viciously in search of justice. This point finds support from Gelfand who remarks thus, “*ngozi* of the person who is murdered and of the one who has not been paid his dues is vicious and kills.”⁵¹⁷ Please note that a state of equilibrium, rather than retribution, is being sought here. There is no place for retributive justice in Shona society, as Mararike would argue. When it comes to the whole concept of law in Nyombweland, Euro-centric and Afro-centric approaches have laid claim on the academic territory trying to push each other out of the academic dance floor.

⁵¹⁵ Mararike, C.G. (2007), “The Shona Conceptions of Justice,” Interview held on 3 September 2007 at the University of Zimbabwe

⁵¹⁶ Ibid.

⁵¹⁷ Gelfand, Michael. (1973), *The Genuine Shona: Survival Values of an African Culture*, Mambo Press, Gweru, p.54

But it is the dominance of Euro-centrism which has necessitated this work to come into the academic dance floor and demonstrate that as Africans in general and Shona in particular we cannot allow a situation where defenders of Euro-centrism posit terms like *retribution* to analyse, interpret and prescribe some form of punishment for our behaviour – some form of punishment that suits their conceptions of punishment. The work maintains that this superimposition of terms is the last thing that our society needs. This work is less concerned with dismissing capital punishment from Nyombweland than it is to show that punishment should have a restorative rather than a retributive function; capital punishment does not have any restorative effect. This argument is reinforced by Desmond Tutu who remarks, thus:

Restorative justice...is characteristic of traditional African jurisprudence in that the central concern is not retribution or punishment. Thus, in the spirit of *ubuntu*, the central concern is the healing of breaches, the redressing of imbalances, the restoration of broken relationships, a seeking to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he has injured by his offence.⁵¹⁸

But what is the nature and scope of the *Korekore-Nyombwe* model of restorative justice? Restorative justice is brought about when the family of the murder victim and that of the offender sit down to discuss how restitution or compensation can be made. The positive *ngozi* spirit, as noted in chapter two, makes this meeting possible

⁵¹⁸ Tutu, Desmond. (1999), *No Future Without Forgiveness*, Doubleday, New York, pp.54-55

by making itself known through the *dunzvi*. The idea is to build bridges. So it can be seen that the *Korekore-Nyombwe* people have a built in legal system. There are no public courts that try murderers; instead everything is left to the dead victim to fight for justice, no public jails. The process of restitution or reparation comes in two phases: In the first phase, restitution is paid to the family of the dead victim usually in the form of a head of cattle and a girl.

As highlighted in chapter two of this work, the girl is sent to the family of the dead victim and there she is expected to bear a child who will replace or restore the dead victim in the offended family. Once that has happened, the processes of restoration and bridge-building will have begun. In the second phase, the family of the murdered victim acknowledges the compensation from the guilty family and marriage arrangements are made through paying the bride price for the girl to mend relations.

For Mararike, some retributive elements were there in Shona society in the olden days when such crimes as theft were punishable by chopping off the hands of the thief and adultery, which was punishable by removing the eyes of the adulterer who, in this case, was the man and not the woman.⁵¹⁹ But retribution was never extended

⁵¹⁹ Mararike, C.G. (2007), “The Shona Conceptions of Justice,” Interview held on 3 September 2007 at the University of Zimbabwe

to capital cases, hence the absence of the term in Nyombweland. *Hunbu* or *ubuntu* law guides the Shona system of justice. As Desmond Tutu observes, the vision of restorative justice is found in the word *ubuntu*.⁵²⁰ But who enforces these *hunbu* or *ubuntu* laws? In traditional Shona society, it is the traditional courts presided over by traditional chiefs. These chiefs pass judgments and pronounce punishments for any breaches in traditional law. What it boils down to is that there is a way in which disputes are resolved in Nyombweland and as Bourdillon observes:

When disputes arise within a Shona community, there are various levels at which people can attempt to solve them, correspondingly with a hierarchy of courts and courts of appeal. In the past, the hierarchy ranged from a family meeting, to meetings presided over by village or ward headman and finally the chief.⁵²¹

As Bourdillon noted, various administrative courts were added at the top of the hierarchy in the colonial period. In independent Zimbabwe, primary courts with elected presiding officers have since replaced the chief's courts, though chiefs and headmen may still sometimes preside over unofficial or informal meetings concerning disputes within their communities and community courts.⁵²²

In Nyombweland, this existence of community courts is quite evident with chiefs like Kandeya and Dotito playing pivotal roles in presiding over disputes within

⁵²⁰ Tutu, Desmond. (1999) in: Danaher, William (2007), "Towards a Paschal Theology of Restorative Justice", in: *The Anglican Theological Review*, Vol. 89, Number 3, 2007, p.361

⁵²¹ Bourdillon, Michael. (1976), *The Shona Peoples: An Ethnography of the Contemporary Shona, with Special Reference to their Religion*, Mambo Press, Gweru, p.127

⁵²² Ibid.

marriage such as divorce cases; interpersonal relations such as witchcraft accusations as well as adulterous affairs as in the case of married couples. Culprits are judged and ordered to pay fines in the form of compensation to the offended victims. What does it mean then for this work? It means that, as noted above, the punishments passed have a restorative purpose rather than a retributive purpose. The idea is to restore the victim by compensating him for the damages suffered. But it is important to note that in traditional Shona society, higher degree cases like murder are not a preserve of the traditional Shona courts although such cases are very common.

As this study established, the authority of law in Nyombweland, as in all Shona societies, comes from the spirit world above. This point finds support from Ramose who argues that, “the underlying metaphysics of being as an onto-triadic structure means that Bantu law has got a transcendental dimension.”⁵²³ The authority of law is justified by appeal to the living dead.”⁵²⁴ Man is not the ultimate judge of his deeds.⁵²⁵ He does not find the justification of his acts and omissions in himself.⁵²⁶ Transcending the free will of man is a higher force that knows, assesses and judges human acts.⁵²⁷

⁵²³ Tempels, Placide. (1969), *Bantu Philosophy*, Presence Africaine, Paris, p.120

⁵²⁴ Ibid.

⁵²⁵ Ibid.

⁵²⁶ Ibid.

⁵²⁷ Ibid.

The Bantu believe that natural law is the source of all human laws and they believe that life belongs to *Musikavanhu*, who is the author of the natural law.⁵²⁸ *Musikavanhu* summons life into being, strengthens and preserves it.⁵²⁹ *Musikavanhu's* great and holy gift to men is the gift of life; other creatures that, according to Bantu ideas, are lower or higher vital forces exist in the divine plan only to maintain and cherish the vital gift made to men.⁵³⁰ The strengthening of life, the preservation of and respect for life is by the very nature of creation the business of the ancestors and elders, living and dead.⁵³¹ Equally, inferior forces lie at the disposition of human beings for the strengthening, maintenance and protection of the life of *muntu* (the human being).⁵³² In Nyombweland, as explored in chapter two, this is seen when a nephew (*dunzvi*) goes to the grave of his murdered grandfather (*sekuru*) to awaken his spirit so that it can go and seek moral recourse or justice from the guilty family. As Ramose would argue, because the living dead must always be honoured and obeyed, law justified in their name also deserves respect and obedience.

While it is the living that lay down norms and rules as specific responses to particular experiences, and while the living being is the originator of law, it is the

⁵²⁸ Tempels, Placide. (1969), *Bantu Philosophy*, Presence Africaine, Paris, p.120

⁵²⁹ Ibid.

⁵³⁰ Ibid.

⁵³¹ Ramose, Mogobe B. (1999), *African Philosophy through Ubuntu*, Mond Books, Harare, p.119

⁵³² Ibid.

living dead who give such a law a nod of approval.⁵³³ The communication of the law to the living dead and their approval thereof is the basis for the authority of *bunhu* or *ubuntu* philosophy.⁵³⁴ This implies that the death sentence is not compatible with Shona society because it has no spiritual approval. Only *Musikavanhu*, through the help of the ancestors, has the power and authority to take away life. It is to *Musikavanhu* that the world and man owe their origin.⁵³⁵ Capital punishment is also a gross violation of natural law ethics as observed in chapters one and three of this work. Since every human being naturally has an inalienable right to life, no one is justified in taking away that life.

As highlighted in chapters three and four, “natural law, in its protective role, provides a shield against laws that violate it. It is antithetical to all criminal laws that do not respect the rights of a person to life as a natural gift from God; this role involves criticism of the human law...so as to ensure that the rights of people are protected.”⁵³⁶ This is also the basis upon which this work has tried to criticise the death penalty as a criminal law, for it does not protect this natural and inviolable gift. In the next section we will revisit the common good thesis to establish the extent to which it can be appealed to as justification for the administration of the death

⁵³³ Ramose, Mogobe B. (1999), *African Philosophy through Ubuntu*, Mond Books, Harare, p.119

⁵³⁴ Ibid, pp.119-120

⁵³⁵ Gelfand, Michael. (1973), *The Genuine Shona: Survival Values of an African Culture*, Mambo Press, Gweru, 1973, p.110

⁵³⁶ Rice, Charles. (1993), *50 Questions on the Natural Law—What it is and why we need it*, Ignatius Press, San Francisco, 1993, p.55

penalty in Shona society. Whether or not this shall be a last gasp attempt to redeem retributivism in Nyombweland is something this section will demonstrate.

RECONCILING RETRIBUTIVE AND RESTORATIVE PUNISHMENT IN NYOMBWELAND: A NEW VIEW?

The precepts of the common good, as discussed in chapter four, are very clear, that individual interests should not be promoted at the expense of the majority of society, it is less clear that murderers must be removed from society through death if the common good is to be preserved. The deterrence and retributive theses can also be invoked for the sake of preserving the common good. But how do we apply the common good argument to the *Korekore-Nyombwe* society? In chapter two, we argued that punishment in Shona society has a metaphysical justification, that is, it is enshrined in supernatural ethics. What does it mean then for this research? What it means is that, the spirit world intervenes when there are specific infractions of *bunhu* or *ubuntu* law.

In capital cases, it is the spirit of *ngozzi* that punishes and the punishment is meant to make the offender pay for the life lost. This work will constantly reiterate that there is no place for retributive justice in Nyombweland. This study is quite aware of the challenges that come with trying to summon the metaphysical or spiritual world to deal with existential matters, but there is need to emphasise the point that this is how the *Korekore-Nyombwe* people understand and conceptualise reality. The whole

concept of *ngozzi* may be elusive and meaningless to the occident but meaningful to the Shona, just as the whole concept of the “vampire” may be elusive to the African mind but meaningful to the Anglo-Saxon. We can only come to understand this concept if we put it into its own context and avoid making premature value judgments.

As can be noted here, the murderer in Shona society may deserve to die if he or she fails to replace or placate the life that he or she took away and by so doing he or she persists in disturbing the normal flow of society. To this end, *ngozzi* is aimed at bringing about restorative justice and not retributive justice. One difference between restorative justice and retributive justice is that the restorative principle need not be egalitarian. On the one hand, if the murderer and his or her family accept to make reparations, no additional life is lost. On the other hand, if they refuse to make reparations, they risk the loss of one or possibly more lives. If they refuse, they may first experience “an eye for an eye”; if they continue to refuse they may experience “eyes for an eye”. The punishment becomes brutal and excessive, as it does not only target the murderer but also his kith and kin. The scales of justice would remain unbalanced if reparations are not made.

What then might seem to justify the death sentence in Shona society except that it is driven by a selfish lust for revenge? As this study found out in Nyombweland, most

Korekore-Nyombwe people are against the idea of taking somebody's life because they are afraid of the wrath of *ngozi*. For many people, the fear of *ngozi* is deterring enough; this also leads to the preservation of the common good, since it urges people to respect each other, live in perpetual peace and promote social well-being.

From the foregoing, it can be argued that the common good reconciles the retributive and restorative notions of justice, a principal difference being that for the Shona man and woman, this common good is partly urged by a supernatural motivator (*ngozi*), while for the westerner, it is partly urged by conventional legal sanctions (the death sentence). The fear of *ngozi* (avenging spirit) can act as a sanction for ethical behaviour. During life, a person must never do anything that might provoke someone to return as an avenging spirit, and its sanction is particularly relevant in the payment of debts and in the distribution of property after death.⁵³⁷ The fear of making a spirit angry is also a sanction for performing funerary ceremonies carefully and correctly.⁵³⁸

While it is fundamental to note that the idea of the common good is present in *Korekore-Nyombwe* society, it is important also to note that it is not brought about by capital punishment, as we find in other societies. It is the submission of this work

⁵³⁷ Bourdillon, Michael. (1976), *The Shona Peoples: An Ethnography of the Contemporary Shona, with Special Reference to their Religion*, Mambo Press, Gweru, p.234

⁵³⁸ Ibid.

that the death sentence in Zimbabwe must be abolished not only because of the traditional abolitionist arguments discussed in chapter one and the criticisms offered in chapter four, but because it serves a retributive function which is alien to Shona culture. It is also against the stipulations of natural law ethics. But even when examined within the context of the traditional abolitionist arguments, the common good may be promoted by sparing the life of a murderer especially if his continual existence will be for the benefit of his or her community. For example, a medical practitioner who has administered a lethal dose to his or her patient is considered to have murdered his or her patient but he or she can still be useful for society, he or she can save many lives if he or she can be rehabilitated and be allowed to continue practicing.

CONCLUSION

This chapter looked at the place of *hunhu* or *ubvuntu* law and morality in *Korekore-Nyombwe* society. It was argued that *hunhu* or *ubuntu* law does not provide for the trial and subsequent punishment of murderers in traditional Shona courts; instead, this is seen as a prerogative of the supernatural world through the works of *ngozi*. It was also argued that the Shona conceptions of justice can only be understood within the context of restoration and not retribution as we find in the occident. To enhance understanding, some general conceptions of restorative justice were captured before looking at restorative justice in Shona society.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

This dissertation looked at the evolution and power of natural law ethics and retributive justice in moral theorising. The chapter applauded the efforts of Aristotle and St. Thomas Aquinas in postulating and popularising the natural law theory or tradition. The commentaries of John Finnis, Gomez-Lobo and Charles Rice about the influence of the natural law theory were also appreciated, especially as these three theoreticians gave shape to the project that was pioneered by the two great thinkers cited above. In particular, Finnis and Gomez-Lobo gave an enticing and heartrending treatise on human life as the grounding good.

Finnis argued that human life represented every aspect of vitality, that is, the full gamut of bodily health and freedom from pain. For Finnis, not only was human life central to natural law ethics, procreation was also important in natural law theories as it ensured the transmission of life. Procreation, for Finnis, was included in the pursuit of the good life. Gomez-Lobo on the other hand, noted that genetic formation was a pre-condition of human life.

He emphasised the bodily aspects of life more than its spiritual or creative force. For him, the end of bodily life marked the end of life. For Gomez-Lobo, human life was not the sole good as humans could possess other goods (such as

friendship, health and knowledge) beyond being alive, but human life was the very first one; without it humanity would not partake in any other goods. Human life was, therefore, the grounding good, as it was intrinsically valuable. Human life was sacrosanct to the extent that even the execution of a murderer was a terrible thing. After considering the evolution and power of natural law ethics, the work also looked at the death penalty (with its emphasis on retributive justice) from two schools of thought.

The retentionist school which emphasised the need to retain the death sentence for purposes of retribution, social protection and deterrence; and the contributions of celebrated philosophers such as Immanuel Kant, Igor Primoratz and Richard Brandt, offered a context relevant to this work. Kant in particular put much emphasis on the ‘just deserts’ argument premised on the idea of an “eye for an eye.” While the ‘just deserts’ argument was backward looking, the deterrent argument was forward-looking, that is, capital punishment served to remind would-be-offenders that crime does not pay.

The abolitionist school, on the other hand, emphasised the need to abolish the death sentence partly because, in their view, the chances of mistakenly executing an innocent man were high. Besides, they believed that life imprisonment was

enough deterrent. Jonathan Glover and Anthony G. Amsterdam are some of the well-known abolitionist theorists who were utilised by this work.

After considering the evolution and power of natural law ethics and retributive justice, the work looked at the Shona/Korekore concept of justice within the context of supernatural ethics. It was argued that the retributive argument is an old and irrelevant argument especially when applied to Shona society in general and to the *Korekore-Nyombwe* in particular. This work used the *Korekore-Nyombwe* society as a case study. In a bid to position our thesis, the work looked at the place of supernatural ethics vis-à-vis *bunhu* or *ubuntu* Philosophy among the *Korekore-Nyombwe* people, before a discussion on the manifestation and restoration of *ngozi* in Nyombweland. The central argument in this work was that *ngozi* underlies the legal and moral notions of murder and punishment in Shona society and that the death sentence was inconsistent with Shona culture.

To buttress the foregoing, the work also looked at criminal law and juxtaposed it with natural law ethics. In order to enhance understanding of the concepts discussed in this work, theories of crime were also considered in a bid to map the legal landscape on death penalty discourses and to position our argument. Three key theories were discussed; these included the consensus theory of crime, the conflict theory and the interactionist theory. The consensus theory hinged on the

functional aspects of those principles and values that govern the society, and according to this theory crime was a deviation from these principles and values.

The conflict theory depicted society as a collection of diverse groups who are in discord with one another about a number of issues. In that regard, the powerful used the law and the criminal justice system to satisfy their personal egos. Criminal laws were, therefore, viewed as acts created to maintain the existing power structures rather than to maintain peace and stability in society.

According to the interactionist perspective, crime was a relative term and its definition reflected the preferences of people who held social power in a particular legal jurisdiction and who used their influence to impose their definition of right and wrong on the rest of the population. Crime was, therefore, the product of labeling. Criminals were individuals whom society had chosen to label as deviants or outcasts because they had “violated” social rules. After the semantic discourse, the work looked at the convergence of criminal law with natural law ethics. It was noted that ideally, natural law ethics informs all criminal laws, including in Shona society.

Next, the work critically looked at the death penalty from the colonial period up to the present, and the underlying theme was that there was need to usher a new

dispensation and abolish the death sentence in Zimbabwe as it was incompatible with Shona culture. The common good thesis, as discussed by St. Thomas Aquinas and some contemporary thinkers, was also thrown into the ring. Central to this thesis was the idea that murderers were an impediment to the general progress of society, its common goals and aspirations as centred on respect for persons, social well-being and development as well as peace and harmony.

It was, therefore, in the interest of society to have them removed from society through death if life imprisonment could not serve such a purpose. The concepts of retribution and deterrence were also discussed together with the common good thesis and the claim that any loss of life resulting from a violent act was seen as a frontal attack on the social fabric. For example, murder shook the very foundations of the community, disrupting neighbourly ties and modifying social dynamics.

But on the other hand, alleging that the common good demanded capital punishment was seen to deny individual rights and freedoms. Executing the murderer for the sake of preserving the common good would leave the world much poorer; thus, as Mahatma Gandhi put it, “an eye for an eye” will leave the whole world blind.

In the final section, it was argued that the Shona person can only be understood within the context of communalism and the emphasis was on “we” rather than on “I”. Crime was seen in this work as a collective responsibility and so was punishment. Finally, the work looked at the place of *bunbu* or *ubuntu* law and morality in *Korekore-Nyombwe* society and it was argued that *bunbu* or *ubuntu* law did not provide for the trial and subsequent punishment of murderers in traditional Shona courts, instead, this was seen as a prerogative of the supernatural world through the work of *ngozi*.

It was also argued that the Shona conceptions of justice can only be understood within the context of restoration and not retribution as we find in occidental traditions. To clarify this point further, some general conceptions of restorative justice were captured before looking at restorative justice in Shona society. A number of cogent reasons, therefore, urged that the death penalty be abolished.

RECOMMENDATIONS

As part of its recommendations, this work calls on scholars, lawmakers and judges to look again at the basis upon which capital punishment is administered in Zimbabwe and its implications for the Shona. There is need to do introspection and consider the advantages and disadvantages of retaining the death sentence in Shona society in general and in Nyombweland in particular. To this end, this work calls for

a unity of purpose among all stakeholders, that is; academics, politicians, the church, civic organisations (like Amnesty International and other human rights groups) and moral philosophers. These must come together and debate the reasons for retaining or abolishing this form of punishment in Zimbabwe today. Conducting seminars and publicising the findings for the benefit of the general public can make this possible. Another approach could be to do a survey in a bid to establish what the public thinks about the death penalty in Zimbabwe. This can be very useful if we want to gauge the emotions of the people when it comes to the administration of the death penalty.

While it is important to engage traditional leaders and politicians on these debates it is also crucially important to hear the views of the general public because they are the ones who bear the brunt of this “cruel and unusual” form of punishment as described by the eighth amendment of the US constitution. It is the submission of this work that through television and radio talk shows and the press, the public can be made aware of the various theories that have been put forward to defend and dismiss capital punishment both in the occident and in Zimbabwe. At the same time, the Shona notions of justice need to be brought to the fore through media Lobbying as well.

Through serious advocacy, these programmes will enlighten the public and they will have a basis upon which to make their own decisions with regard to the morality and legality of capital punishment. When all have been said and done, this work recommends that the death penalty be abolished based on the reasons given in this work.

SELECTED BIBLIOGRAPHY

BOOKS, BOOK CHAPTERS, CONFERENCE PAPERS, JOURNALS, PERIODICALS, ORAL INTERVIEWS AND INTERNET SOURCES

Abbott, W.M. (1996), *The Documents of Vatican II*, Guild Press, New York

Amnesty International Report. (1979), "The Death Penalty," Amnesty International Publications, London

Amnesty International Report. (1989), "When the State Kills": *The Death Penalty Versus Human Rights*, Amnesty International Publications, London

Aquinas, St. Thomas in: Barcalow, E. (1994), *Moral Philosophy: Theory and Issues*, Cambridge University Press, Cambridge

Aquinas, St. Thomas, in: Baumgarth, W and Regan, R. J. (1988), *Saint Thomas: On Law, Morality and Politics*, Hackett Publishing Company, Indianapolis

Aquinas, St. Thomas in: Gomez-Lobo, Alfonso. (2002), *Morality and the Human Goods: An Introduction to Natural Law Ethics*, Georgetown University Press, Washington, D.C

Aquinas, St. Thomas, in: Rice, Charles. (1993), *50 Questions on the Natural Law –What it is and why we need it*, Ignatius Press, San Francisco

Aristotle in: Gomez-Lobo, Alfonso. (2002), *Morality and the human goods: An Introduction to Natural Law Ethics*, Georgetown University Press, Washington D.C

Arthur, J. (1986), *Morality and Moral Controversies: Readings in Moral, Social and Political Philosophy*, Prentice–Hall, Englewood Cliffs

Barcalow, E. (1994), *Moral Philosophy: Theory and Issues*, Wardsworth Publishing Company, Belmont

Becker, Howard. (1963), *Outsiders: Studies in the Sociology of Deviance*, Free Press New York

Bourdillon, M.F.C. (1976), *The Shona Peoples: Ethnography of the Contemporary Shona, with Special Reference to their Religion*, Mambo Press, Gweru

Cahill, R.E, in: LeBuffe, F.P and Hayes J.V. (1953), *The American Philosophy of Law*, Jesuit Educational Research, New York

Conklin, J.E. (1989), *Criminology*, Macmillan, New York

Crowe, M.B. (1977), *The Changing Profile of Natural Law*, Nijhoff, The Hague

Dupre, L. (1993), “The Common Good and the Open Society,” *The Review of Politics*. Vol.55. No.4. pp. 687-712

Dzvinamurungu, J. (2004), “The Death Penalty is a Violation of Human Rights.”– Proceedings of the Conference on the Launch of the Death Penalty Campaign, organised by the Harare Group of Amnesty International, held at the New Ambassador Hotel on July 9, 2004.

Feltoe, Geoffrey. (1993), “Should We Abolish the Death Penalty in Zimbabwe? – Proceedings of the Sentencing Workshop, held in Victoria Falls on September 1-5, 1993”

Finnis, J. (1980), *Natural Law and Natural Rights*, Oxford University Press, Oxford

Gelfand, M. (1962), *Shona Religion with Special Reference to the Makorekore*, Juta and Company Ltd, Cape Town, South Africa

Gelfand, M. (1968), *African Crucible: An Ethico-Religious Study with Special Reference to the Shona-speaking People*, Juta and Company Ltd, Cape Town, South Africa

Gelfand, M. (1973), *The Genuine Shona: Survival Values of an African Culture*, Mambo Press, Gweru

Gelfand, M. (1977), *The Spritual Beliefs of the Shona: A Study Based on Field Work among the East-central Shona*, Mambo Press, Gweru

Glover, Jonathan. (1977), *The Moral Problems of Abortion, Infanticide, Suicide, Euthanasia, Capital Punishment, War and Other Life or Death Choices: Causing Death and Saving Lives*, Pelican Books, New York

Gomez-Lobo, Alfonso. (2002), *Morality and the Human Goods: An Introduction to Natural Law Ethics*, Georgetown University Press, Washington D.C

Gonsalves, M.A. (1985), *Fagothey's Right and Reason: Ethics in Theory and Practice*, Times Mirror/Mosby Collerge Publishing, St. Louis, Missouri

Hart, H.L.A. (1968), *Punishment and Responsibility: Essays in the Philosophy of Law*, Oxford University Press, Oxford

Hospers, J. (1982), *Human Conduct*, Harcourt Brace Jovanovich, New York

John Paul II, Pope. (1965), in: An Address to the United Nations General Assembly, *Origins 25*, New York

Koestler, Arthur. (1956) in: Glover, Jonathan. (1977), *The Moral Problems of Abortion, Infanticide, Suicide, Euthanasia, Capital Punishment, War and Other Life or Death Choices: Causing Death and Saving Lives*, Pelican Books, New York

Lunde D.T. (1977), *Murder and Madness*, San Francisco Book Company, San Francisco

Mackinnon, B. (1998), *Ethics: Theory and Contemporary Issues*, Wardsworth Publishing Company, New York

Mappes, T.A and Zembaty, J.S. (1997), *Social Ethics: Morality and Social Policy*, The McGraw-Hill Companies, New York

Mararike, C.G. (2007), “The Shona Conceptions of Justice,” Interview held on the 3rd of September at the University of Zimbabwe

Masiya, G. (2005), “On the Restitution of *Ngozi* in Nyombweland,” Interview held in Harare on August 21, 2005

Menkiti, I.A. (1979) in: Van der Walt, B.J. (1997), *Afrocentric or Eurocentric?—Our Task in a Multicultural South Africa*, Potchefstroomse Universiteit

Mbigi, L and Maree, J. (1995), *Ubuntu: The Spirit of African Transformation Management*, Knowledge Resources, Randburg

Nyasani, J.M. (1995), *Legal Philosophy*, Consalata Institute of Philosophy Press

Orwell, G. (1931), "A Hanging at Adelphi," in: White, J.E. (1994), *Contemporary Moral Problems*, West Publishing Company, New York

Pasi, R. (2006), "On the Negative *Ngozi* in Nyombweland," Interview held in Pasi village near Chironga, on June 22, 2006

Pobee, J.S. (1979), *Toward an African Theology*, Abingdon Press, Nashville

Pojman, L.P. (2002), *Ethics: Discovering Right and Wrong*, Wadsworth Thomson Learning, Canada

Primoratz, Igor. (1989) in: Mappes, T.A and Zembaty, J.S. (1997), *Social Ethics: Morality and Social Policy*, The McGraw-Hill Companies, New York

Quinney, R. (1975), *Criminology*, Little-Brown, Boston

Rachels, J. (1999), *The Elements of Moral Philosophy*, McGraw-Hill Companies, Boston

Ramose, M. B. (1999), *African Philosophy through Ubuntu*, Mond Books, Harare

Rhonheimer, Martin. (2000), *Natural law and Practical Reason: A Thomistic View of Moral Autonomy*, Fordham University Press, New York

Rice, C. (1993), *Fifty Questions on Natural Law-What it is and why we need it*, Ignatius Press, San Francisco

Samkange, S and Samkange, Tommie. M. (1980), *Hunbuisism or Ubuntuism: A Zimbabwean Indigenous Political Philosophy*, Graham Publishing Company, Salisbury

Schockenhoff, E. (2003), *Natural Law and Human Dignity: Universal Ethics in an Historical World*, The Catholic University of America Press, Washington D.C, P.12

Schulhofer (1974) in: Simon, Thomas. (2001), *Law and Philosophy: An Introduction with Readings*, McGraw-Hill, New York

Shephard, J. (1981), *Sociology*, West Publishing Company, New York

Siegel, L. J. (1989), *Criminology*, West Publishing Company, New York

Simon, T. (2001), *Law and Philosophy: An Introduction with Readings*, McGraw-Hill, New York

Sutherland, E.H and Cressey, D.R. (1970), *Criminology*, Lippincot, Philadelphia

Stumpf, S. E. (1982), *Socrates to Sartre: A History of Philosophy*, McGraw-Hill, New York

Tempels, P. (1969), *Bantu Philosophy*, Presence Africaine, Paris

The Herald, July 25, 2007, A Zimpapers Publication, Harare

The Holy Bible. (1989), The New Revised Standard Version, Oxford University Press, Cambridge

Thiroux, J.P. (1990), *Ethics: Theory and Practice*, Macmillan Publishing Company, New York

Tutu, Desmond. (1999), *No Future without Forgiveness*, Doubleday, New York

Tutu, Desmond. (1999) in: Danaher, William. (2007), “Towards a Paschal Theology of Restorative Justice”, in: *The Anglican Theological Review*, Vol. 89, Number 3, 2007

White, J. E. (1994), *Contemporary Moral Problems*, West Publishing Company, New York

Wolfgang, M. (1958), in: Conklin, J.E. (1989), *Criminology*, Macmillan, New York

INTERNET SOURCES

Bishop's statement. (1999), “The Gospel of Life and Capital Punishment:” A Reflection Piece and Study Guide, prepared by the California Catholic Conference of Bishops, available at www.cacatholic.org/docs/LifeCapPunish.doc

Charles, D.J. (2001), “Thoughts on Revenge and Retribution,” available at <http://pewforum.org/deathpenalty/resources/reader/20.php3>

Finnis, John, available at <http://plato.stanford.edu/entries/natural-lawethics/>, updated on 23 September 2002

Martinson, R. (1974), available at <http://plato.stanford.edu/entries/punishment/> last updated on 8 July 2005

McCord, Geoff Sayre, available at <http://plato.stanford.edu/entries/natural-lawethics/> last updated on 23 September 2002

Murphy, J.G., available at <http://pewforum.org/deathpenalty/resources/reader/20.php3>

Punishment and Penology, available at <http://faculty.ncwc.edu/TOCCONOR/294/294lect02.htm>, last updated 26 June 2005

Sterling, John A. (2002), "Historical Development of Theories of Crime and Punishment," in: Concepts of Justice, Past and Present, available at <http://www.lawandliberty.org/justice.htm>, last updated on 15 October 2005

Veatch, Henry B. (1978) "Natural Law: Dead or Alive?" available at http://oii.liberty.org/index.php?option=com_content&task=view&id=168&itemid=259

Wikipedia, the free encyclopedia, available at http://en.wikipedia.org/wiki/natural_law, last updated in 2005

Wikipedia, the free encyclopedia, available at <http://en.wikipedia.org/wiki/justice>, updated 9 August 2007

Wikipedia, the free encyclopedia, available at http://en.wikipedia.org/wiki/Restorative_justice, updated 21 August 2007

Wilson, J.Q. (1975), available at <http://plato.stanford.edu/entries/punishment/> last updated on 8 July 2005

APPENDIX

MAJOR FINDINGS OF THE STUDY

The following are the major findings of the study that this researcher undertook in Nyombweland between 2004 and 2007. The research was necessitated by the following questions that kept cropping in the researcher's mind: How does capital punishment fit into the schema of both natural law ethics and the concept of retributive justice? Are there any notions of justice in Shona society? How does the natural law theory influence or affect human laws in the death penalty discourse? Is there any place for the common good in Shona society? How can it be promoted? Is Retributive Justice applicable to the Shona/Korekore culture and the Shona people in general? If not, what form of justice should the Shona embrace?

The following findings helped to put to rest some, if not all, the above questions:

1. The Shona/Korekore people do not have a well-developed concept of crime that can be compared to the Western concept because it is difficult to separate law from morality in Shona society.
2. The Shona/Korekore people settle their disputes through dialogue.
3. Shona ethics can be understood from two perspectives, that is, supernatural or transcendental ethics and secular ethics.
4. Retributive justice does not satisfy conditions for *hunhu* or *ubuntu* Philosophy premised on the idea of community.

5. Restorative justice is in keeping with the Shona/Korekore culture and has a supernatural motivator called *ngozi*.
 6. The Shona/Korekore culture does not try murderers through its traditional courts because *hunhu* or *ubuntu* law does not create offences and hence does not create criminals.
-