

# ABUSE OF STATE POWER: THE MANDATORY DEATH PENALTY FOR POLITICAL CRIMES IN SOUTHERN RHODESIA, 1963-1970

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## 1 Introduction

The criminal penal code was a tool of social control in the British colony of Southern Rhodesia (colonial Zimbabwe), treating transgressors harshly and reflecting social divisions and stereotypes in the Code's measures and methods of punishment.<sup>1</sup> Under late colonial rule and the period of white settler rule after the unilateral declaration of independence in 1965, the Penal Code's prohibitions became overtly political, and sharp constraints were placed on assembly, speech, movement, and other political activity. As the security situation deteriorated after the unilateral declaration of independence by the Rhodesian Front-led government under Prime Minister Ian Smith, comprehensive security legislation targeted African nationalist political activities and imposed harsh penalties.

As a criminal punishment, the mandatory death penalty for violent felonies passed from Great Britain to the Empire unreformed.<sup>2</sup> Unlike British colonial administrations generally, the white settler-ruled government of Rhodesia used the death penalty for political crimes to prevent or punish political dissent. As the prospect of guerrilla war with African nationalists increased, the government took increasingly desperate measures to punish and deter political crimes. Emblematic of this excess was the Rhodesian government's passage of legislation introducing a mandatory death penalty for throwing Molotov cocktails, or "petrol bombs" in Southern Rhodesian parlance, with no provision for judicial sentencing discretion, even where there was no personal injury or damage to property. Several years later, the legislature passed a mandatory death sentence for arms possession with the intent to disrupt law and order, again sparking international

1 See, generally, *Criminal Procedure and Evidence Act Statute Law of Southern Rhodesia* vol 1, title 5, ch 31 (Salisbury, 1963).

2 S Coldham "Criminal justice policies in Commonwealth Africa: Trends and prospects" (2000) 44 *J of African Law* 218-238 at 223.

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condemnation.<sup>3</sup> Although petrol bombing and aggravated arms possession were the only two political crimes to incur the death sentence without regard to mitigating factors, upon independence in 1980 Zimbabwe inherited a security framework that failed to comply with international human rights norms. The harshness of criminal penalties for political crimes is explored below in the context of the political realities of the 1960s.

## 2 Criminal law and social control in Southern Rhodesia

The Crown Charter obtained by the British South Africa Company in 1889 for administration of the territory of Southern Rhodesia referred to the rule of law in the territory, imploring that “careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively belong”.<sup>4</sup> The establishment of a dual legal system in the colony that would codify and apply customary law in certain family, probate and land disputes while recognising the supremacy of European-derived law dovetailed with the British preference for “indirect rule”, which was intended to conserve resources and allow subject populations some measure of self-governance.<sup>5</sup> The court system that then developed was more complex, with different forums and avenues of appeal based on a litigant’s race and residence and the amount of money involved in the dispute. Common-law courts governed high-value disputes and disputes involving white settlers.<sup>6</sup> Two separate court systems were set up to hear African civil disputes, one for urban areas and one for rural areas.<sup>7</sup> This separation was itself a means of social control, reinforcing the urban-rural divide.<sup>8</sup>

As in all British African colonies, the criminal law of Southern Rhodesia bore the strong imprint of English common law. In serious criminal matters, magistrate’s courts and the High Court had original jurisdiction. The distinction between tort and criminal law, as well as methods of criminal punishment such as incarceration, were unknown to the majority Shona population or even the more centralised Ndebele society prior to the

3 Law and Order (Maintenance) Amendment Act 50 of 1967.

4 Art 14 Crown Charter *The Statute Law of Southern Rhodesia from the Charter to 31 December 1910* (Salisbury, 1911) at 1. See, also, TW Bennett “Conflict of laws: The application of customary law and the common law in Zimbabwe” (1981) 30 *International and Comparative Law Quarterly* 59-103 at 68.

5 *Idem* at 59.

6 These disputes were first heard in a magistrate’s court and appeals were to the High Court and then to the Appellate Division in Salisbury. From there, an appeal could be taken to the Appellate Division in South Africa before 1955, the Federal Supreme Court of the Federation of Rhodesia and Nyasaland from 1955 until 1963, and the Rhodesian Supreme Court thereafter. Certain disputes could also be taken on appeal to the Privy Council in London. T Zimudzi “African women, violent crime and the criminal law in Zimbabwe, 1900-1952” (2004) 30 *J of Southern African Studies* 499-517 at 502; H Marshall “The Judicial Committee of the Privy Council: A waning jurisdiction” (1964) 13 *International and Comparative Law Quarterly* 697-712 at 697.

7 In urban areas, civil disputes typically arose in a district commissioner’s court, with appeals to the Native Appeal Court and later the Court of Appeal for African Civil Cases. In rural areas, appeals from the courts of chiefs and headmen were to the Tribal Appeals Court. A Ladley “Changing the courts in Zimbabwe: The Customary Law and Primary Courts Act” (1982) 26 *J of African Law* 95-114 at 96.

8 *Idem* at 99.

advent of colonialism.<sup>9</sup> Culturally British notions of arrest, detention, and trial largely replaced the traditional practice of providing compensation in livestock to the family of a victim in societies where resources were scarce and crime had devastating economic consequences. Shona customary law heavily emphasised compensation, distinguishing between justifiable and non-justifiable homicide (with certain forms of infanticide or spiritual killing considered “justifiable”), and did not generally invoke the death penalty. By the late nineteenth century, the Ndebele had developed a system of criminal fines payable to the king and they occasionally imposed the death penalty.<sup>10</sup>

Pre-colonial conceptions of law and order did not always accord with European-derived criminal law. One of the ways in which the two legal orders clashed was through the recognition of European legal supremacy, which limited customary practices that conflicted with European notions of acceptable conduct.<sup>11</sup> Another way in which English common law conflicted with traditional African legal concepts was in the realm of spiritual crimes. The Witchcraft Suppression Act of 1899 prohibited naming another as a “witch”, soliciting another to punish a witch, or providing the means and advice to do so.<sup>12</sup> However, the Act failed to distinguish “witchcraft” from other religious rituals such as divination or spirit possession, which were associated with traditional healing and used to diagnose and cure illness.<sup>13</sup> The Act also suppressed traditional means of enforcing bans on incest, rituals for the dead, and dispute resolution concerning succession and inheritance. The colonial regime failed to comprehend the basis of traditional spiritual beliefs and prompted significant resistance.

The gendered nature of criminal justice in colonial Southern Rhodesia was an additional means of social control. Criminal sentencing was “profoundly paternalistic” toward women accused of murder and did not view female defendants as rational agents. Women were very rarely accused of murder even when premeditated, because they were characterised as having a “dullness of intellect” and only a “childish awareness” of their crimes.<sup>14</sup> Only six women were executed between 1900 and 1952; all others had their sentences reduced because criminal law institutionalised gender stereotypes as to the level of women’s emotional maturity. As in Great Britain, traditionally “feminine” crimes such as infanticide, in which postpartum depression was presumed, were treated less harshly than ordinary murder.

In the same vein, criminal law reflected racial bias as well, as evidenced by “black peril” laws. “Black peril”, alleged sexual violence by black men against white women, “was at times a fully hysterical obsession within colonial Zimbabwe’s white settler

9 A Mittlebeeler *African Custom and Western Law The Development of the Rhodesian Criminal Law for Africans* (New York, 1976) at 163-164.

10 *Idem* at 164.

11 Art 3 Native Law and Courts Act 33 of 1937 (defining “native law and custom” to mean “the general law and custom of...[a] tribe, except in so far as such law or custom is repugnant to natural justice or morality or to the provisions of any statute law from time to time in force in the Colony”).

12 See §§4-6 Witchcraft Suppression Act 14 of 1899; G Chavunduka “Witchcraft and the law in Zimbabwe” (1980) 8 *Zambezia* 129-147 at 130; T Mafico “Belief in witchcraft” (1986) 13 *Zambezia* 119-130 at 120.

13 Chavunduka (n 12) at 131.

14 *Idem* at 505-507.

community".<sup>15</sup> Black peril laws were founded on stereotypes of female frailty and black male aggressiveness and introduced state control over sexual relationships. Rape and attempted rape were highly racialised crimes, and white female and black male sexual transgressions were punished far more harshly than transgressions between white males and black females or transgressions between partners of the same race.<sup>16</sup> "Black peril" laws were "the crystallization of the entire European community's sentiment that it was civilised, and Africans, however they might on the surface appear, were barbarians or beasts".<sup>17</sup> While "black peril" laws resulted in the executions of thirty black African men, no white man was ever executed for a sexual crime against a black woman.<sup>18</sup> Except in respect of petty crimes, a single criminal penal and procedure code applied, at least formally, to both black and white Rhodesians.<sup>19</sup> As Zimmerli notes, prosecutorial discretion in bringing charges, and prison regulations authorising the amount and quality of food, clothing, and other essentials that inmates might receive produced more overt patterns of racial discrimination than judicial sentencing did.<sup>20</sup>

### 3 The doctrine of extenuating circumstances in Rhodesian criminal law

Although the mandatory death penalty created enormous death rows in Southern Africa, political circumstances prevented large-scale judicial executions. In South Africa, a harsh criminal law regime led to bloated death rows and consequently, a high rate of clemency. According to Devenish, only 24% of death sentences were carried out in the decade before 1935.<sup>21</sup> The clemency rate included 93% of female prisoners during that period.<sup>22</sup> The Minister of Justice (later Prime Minister) Jan Smuts objected to this high rate of commutation, and he favoured returning a measure of sentencing discretion to the

15 J Pape "Black and white: The 'perils of sex' in colonial Zimbabwe" (1990) 16 *J of Southern African Studies* 699-720 at 700.

16 P Mason *The Birth of a Dilemma The Conquest and Settlement of Rhodesia* (London, 1962) at 246-247.

17 C Summers *From Civilization to Segregation Social Ideals and Social Control in Southern Rhodesia, 1890-1914* (Athens, Ohio, 1994) at 102.

18 Pape (n 15) at 720.

19 See, generally, Criminal Procedure and Evidence Act *Statute Law of Southern Rhodesia*, vol 1, title 5, ch 31 (Salisbury, 1963). However, criminal defendants of black African descent did not have recourse to a jury trial, on the basis of the theory that a jury, composed only of white men, would not be able to fully understand the accused's mentality. C Zimmerli "Human rights and the rule of law in Southern Rhodesia" (1971) 20 *International and Comparative Law Quarterly* 239-300 at 286.

20 *Idem* at 271.

21 G Devenish "The historical and jurisprudential evolution and background to the application of the death penalty in South Africa and its relationship with constitutional and political reform" (1992) 5 *South African J of Criminal Justice* 1-31 at 8; R Turrell *White Mercy A Study of the Death Penalty in South Africa* (New York, 2004) at 237.

22 E Kahn "How did we get our lopsided law on the imposition of the death penalty for common-law crimes? And what should we do about it" (1989) 2 *South African J of Criminal Justice* 137-163 at 146.

criminal trial judge. The result was a political compromise resulting in the doctrine of extenuating circumstances.

The doctrine of extenuating circumstances was passed in the Southern Rhodesian Legislative Assembly in 1949, introducing some judicial discretion to capital sentencing.<sup>23</sup> The historical definition of “extenuating circumstances” is any fact which tends to reduce the moral blameworthiness but not the legal culpability of the accused at the moment the crime was committed, including such common circumstances as provocation, duress, lack of intent to kill, youth, or intoxication when those defences failed at the trial stage of the proceeding and the accused was convicted of murder.<sup>24</sup> As Feltoe writes, adoption of the doctrine indicated that the legislature appreciated “that each case had to be considered on its own individual facts and no hard and fast rules could be established”.<sup>25</sup> Upon a conviction for murder, the accused had to show beyond a preponderance of the evidence (more likely than not) that extenuating circumstances existed and that he or she should not be executed, turning an automatic sentence into a rebuttable presumption in favour of death.<sup>26</sup> As the Minister of Justice Thomas Beadle told the Rhodesian legislature in 1949, “only half the death sentences which are passed in this Colony are ever carried out in fact”.<sup>27</sup> Where a judge found extenuating circumstances, the judge was able to pass an appropriate lesser sentence rather than draft a confidential mercy report to the Governor-General for his review.<sup>28</sup> The doctrine revolutionised the death penalty regime in Southern Rhodesia, drastically reducing the number of death sentences and, consequently, the number of clemency interventions of the Governor-General. The Criminal Procedure and Evidence Act of 1949 was passed with strong support from the members of the Legislative Assembly.<sup>29</sup> As Member of Parliament John Young noted, the doctrine allowed a more logical application of the law since the current regime created “a tendency to strain the law against the finding of murder”.<sup>30</sup> In cases where a defendant did not deserve death, a judge in a mandatory death regime would acquit the accused or convict him or her of manslaughter instead, effectively merging a guilt inquiry with a

23 Criminal Procedure and Evidence Amendment Act 52 of 1949.

24 G Feltoe “Extenuating circumstances: A life and death issue” (1986) 4 *Zimbabwe LR* 60-87 at 61. To receive the death penalty, the accused person must have been found guilty of murder, so defenses that would have reduced the crime to manslaughter (such as provocation, duress, or self-defense) must have failed at the trial stage. At the sentencing stage of the trial, failed defenses became relevant as possible extenuating circumstances to the extent that they reflect on moral blameworthiness and not legal culpability of the accused (if they affected legal culpability, the accused would have been found guilty of manslaughter and not murder).

25 *Idem* at 81.

26 The preponderance of the evidence typically means “more likely than not”, or fifty-one percent probability, a lower standard than reasonable doubt. On the shifting of the burden of proof, see A Novak “Guilty of murder with extenuating circumstances: Transparency and the mandatory death penalty in Botswana” (2009) 27 *Boston University International LJ* 173-204 at 181 (*in pari materia* with Zimbabwean law).

27 *Debates of the Legislative Assembly of Southern Rhodesia* (hereafter *Debates*) (18 Oct 1949) at 2643.

28 *Idem* at 2643-2644.

29 Act 52 of 1949.

30 *Debates* (n 27) at 2651.

sentencing one. Allowing the judge a measure of sentencing discretion would “enable the law to be administered more logically”.<sup>31</sup> The progressive nature of this debate contrasts sharply with the later parliamentary debates over the death penalty for political crimes.

#### 4 The origins of the mandatory death penalty for political crimes

The Federation of Rhodesia and Nyasaland, a political union of Southern Rhodesia, Northern Rhodesia (colonial Zambia), and Nyasaland (colonial Malawi), was formed in 1953 as Britain’s last hope of diluting the political power of the large white settler community and the influence of apartheid South Africa.<sup>32</sup> The Federation dissolved ten tumultuous years later.<sup>33</sup> With independence coming rapidly to colonies north of the Zambezi River and the reformist Prime Minister Garfield Todd moving toward majority rule in Southern Rhodesia, the white settler community turned to the political right.<sup>34</sup> The more moderate Edgar Whitehead replaced Todd in 1958 as leader of the United Federal Party (UFP) and as prime minister. Whitehead could not control the white electorate’s political shift to the right and would himself lose to Winston Field of the new opposition Rhodesian Front in December 1962.<sup>35</sup> Before he left office, however, Whitehead began a trend, accelerated in later years, towards increasingly draconian security legislation. While he faced some opposition to initial attempts to ban communist and African nationalist organisations and suspend *habeas corpus*, the UFP-led government succeeded in laying the early groundwork for a radically altered legal framework.<sup>36</sup>

Despite Whitehead’s professed commitment to eventual multiracial rule in Rhodesia and his opposition to racial segregation, his government passed several major pieces of security legislation early in his term. The first was the Vagrancy Act,<sup>37</sup> which was intended to restrict the entrance into urban areas of unemployed black men, a reservoir of support for African nationalists. The second was the Emergency Powers Act,<sup>38</sup> which allowed the Governor-General to declare a state of emergency and rule by decree for six months. The third and most important was the Law and Order (Maintenance) Act,<sup>39</sup> which would become the chief statutory weapon against nationalists, including the Zimbabwe African Peoples’ Union (ZAPU), founded in 1961. The law curbed public assembly and subversive statements, permitted arrest without warrant, limited the right to bail, and authorised harsh minimum sentences for a variety of crimes.<sup>40</sup> In defence of the Act,

31 *Ibid.*

32 D Denoon *Southern Africa Since 1800* (New York, 1973) at 180.

33 P O’Meara “Rhodesia/Zimbabwe: Guerrilla warfare or political settlement?” in G Carter & P O’Meara (eds) *Southern Africa The Continuing Crisis* (London, 1979) 18-56 at 22.

34 R Weiss *Sir Garfield Todd and the Making of Zimbabwe* (London, 1999) at 121.

35 *Idem* at 23-24, 26.

36 J Wood *So Far and No Further Rhodesia’s Bid for Independence During the Retreat from Empire, 1959-65* (Victoria, BC, 2004) at 17.

37 Act 40 of 1960.

38 Act 48 of 1960.

39 Act 53 of 1960.

40 J Barber *Rhodesia The Road to Rebellion* (Oxford, 1967) at 54-55.

Whitehead warned that the country was “on the brink of a major breakdown of law and order”.<sup>41</sup> Sir Robert Tredgold, the Chief Justice of the Federation, resigned in protest at the legislation’s violation of human rights and its unprecedented expansion of executive power. The independent Ahrn Palley, originally a member of the Dominion Party for the Greendale constituency before the party evolved into the right-leaning Rhodesian Front, launched a marathon solo battle against the Bill.<sup>42</sup> Palley’s filibuster lasted over twelve hours, forcing 165 divisions and a single twenty-two hour committee session. On each of the divisions, his was the only vote against the rest of the chamber.<sup>43</sup> After a third reading of the Bill on 25 November 1960, the Law and Order (Maintenance) Bill passed into law.

After the 1958 elections, in the assembly Whitehead’s UFP clung to a precarious majority of seventeen to thirteen over the Dominion Party, soon to become the Rhodesian Front. Garfield Todd’s United Rhodesia Party failed to win a single seat, a sharp blow to the white left.<sup>44</sup> In the 1962 elections, the Rhodesian Front won narrowly. With the impending breakup of the Federation of Rhodesia and Nyasaland and diminishing white support for the repeal of land laws that protected commercial farming and residential segregation, the UFP was in a weak position going into an election that it was widely expected to win.<sup>45</sup> Whitehead’s liberalising campaign against discriminatory laws and in favour of a new constitution alienated the right and his support of draconian security legislation alienated the left.<sup>46</sup>

The 1961 Constitution of Southern Rhodesia implemented under Whitehead satisfied no one, despite being passed by a vote of sixty-six to thirty-four percent in a referendum of the white electorate. African nationalists and white liberals such as Tredgold were strongly opposed to it, and right-wing leaders such as Dominion Party leader Field and UFP whip Ian Smith, who was soon to join the Rhodesian Front, were likewise dissatisfied.<sup>47</sup> The Rhodesian Front’s incomplete victory in 1962 was the product of an intentionally complex electoral system constructed by the 1961 Constitution, which divided the electorate into an “A” Roll and a “B” Roll, demarcated by property, education, and income thresholds in such a way that the “A” Roll was almost entirely white.<sup>48</sup> However, the size of the “B” Roll, which was almost entirely non-white, was less than a tenth the size of the “A” Roll and included less than one percent of the black Rhodesian population. The Constitution created fifty “A” Roll constituencies and fifteen “B” Roll electoral districts with overlapping boundaries and a system of vote devaluation

41 *Idem* at 56.

42 Weiss (n 34) at 140.

43 Wood (n 36) at 64.

44 Weiss (n 34) at 121.

45 E Windrich *Britain and the Politics of Rhodesian Independence* (New York, 1978) at 13-14; I Hancock *White Liberals, Moderates, and Radicals in Rhodesia* (London, 1984) at 100.

46 A Megahey *Humphrey Gibbs, Beleaguered Governor Southern Rhodesia, 1929-1969* (New York, 1998) at 78-79; Hancock (n 45) at 93.

47 Megahey (n 46) at 77.

48 A Lemon “Electoral machinery and voting patterns in Rhodesia, 1962-1977” (1978) 77 *African Affairs* 511-530 at 511.

so that the ratio of “A” Roll votes to “B” Roll votes, and *not* total vote tallies, determined the winner.<sup>49</sup>

As a consequence of this electoral scheme, the Rhodesian Front won in 1962 on the basis of overweighted rural constituencies and small majorities in a handful of seats. The final total was Rhodesian Front thirty-five, United Federal Party twenty-nine, and one independent, Ahrn Palley, who won a “B” Roll electoral district (Highfield) in a four-way race.<sup>50</sup> Of the UFP’s twenty-nine elected members, fourteen were black Rhodesians who had won “B” Roll constituencies; the other fifteen were white “A” Roll members. The “B” Roll members represented virtually no one, as most were elected with just a few hundred votes, and some with only a few dozen.<sup>51</sup> Although the Rhodesian Front’s victory in 1962 signalled a rightward shift in the political leanings of the white settler electorate as a whole, the complexities of the electoral system masked the extent of that shift.<sup>52</sup>

#### 4 1 The Rhodesian legislature and the death penalty for petrol bombing

Under the Rhodesian Front government led by Winston Field, which took office in 1962, there was a heightened legislative response to the deteriorating security situation in Rhodesia, including laws that imposed swift and severe criminal punishment for political crimes. Petrol or gasoline bombings had become more frequent in the low-level conflict of the early 1960s and were originally banned by the Whitehead government earlier that year.<sup>53</sup> In January 1963, the *Bulawayo Chronicle* reported that a petrol bombing attack on the home of a junior Rhodesian diplomat by four young members of ZAPU resulted in charges of attempted murder and attempted arson.<sup>54</sup> Two days later, newspapers reported that a defendant had appeared before a magistrate for a fatal petrol bombing attack in a Salisbury suburb, in which a woman had been killed in her bedroom when bottles were hurled through a window.<sup>55</sup> In February, Minister of Law and Order Clifford Dupont stated that there had been seventy-three petrol bombings since the beginning of 1962, for which there had been twenty arrests and three convictions.<sup>56</sup> Thirty of the bombings were against persons, and the remainder against property.<sup>57</sup>

One of the Rhodesian Front’s signature campaign promises was that the security legislation would be stepped up. In 1963, Field’s government proposed a mandatory

49 Barber (n 40) at 276-279.

50 Hancock (n 45) 98. For complete election results from the 1958 and 1962 elections, as well as the referendum on the 1961 Constitution, see F Wilson *Source Book of Parliamentary Elections and Referenda in Southern Rhodesia, 1898-1962* (Salisbury, 1963).

51 Barber (n 40) at 278: “They were the residue of a constitutional failure.”

52 A by-election for Matobo constituency in May 1963 confirmed the rightward shift, despite high UFP-leaning “B” Roll turnout. The Rhodesian Front won the seat, a pickup in Dec 1962, fairly handily: Barber (n 40) at 177.

53 Law and Order (Maintenance) Amendment Act 35 of 1962.

54 “Petrol bomb raid: Four face trial for murder bid” 8 Jan 1963 *Bulawayo Chronicle*.

55 “He poured petrol on the flames – Court told” 10 Jan 1963 *Bulawayo Chronicle*.

56 “73 petrol bomb cases reported, says Dupont” 16 Feb 1963 *Bulawayo Chronicle*.

57 *Debates* (n 27) (14 Aug 1962) at 1664, 1672; “73 petrol bomb cases reported, says Dupont” (n 56).

death sentence for the crime of throwing or attempting to throw a petrol bomb, even if there were no injury to life or damage to property. In introducing the Law and Order (Maintenance) Amendment Act of 1963, incoming Minister of Justice Clifford Dupont explained that the rationale for the new law was deterrence, noting that petrol bombs were “a far too common feature of life” with perpetrators “extremely difficult to detect”.<sup>58</sup> He told the Assembly that petrol bombing was always premeditated and never an act of self-defence.<sup>59</sup> Opposition members explained that they had no quarrel with the death penalty for petrol bombing; rather, they objected to the mandatory nature of the penalty without judicial consideration of extenuating circumstances.<sup>60</sup> Whitehead noted that many petrol bombings were actually carried out by youths pressured to do so by other persons, which would be an extenuating circumstance in an ordinary murder charge.<sup>61</sup> As prime minister, Whitehead had reviewed every clemency petition and recalled his firm belief that no person was better suited to assess the facts of a case, and therefore determine a sentence, than a trial judge.<sup>62</sup>

Ahrn Palley’s objections to the Bill were far more comprehensive than those of the UFP, although he likewise emphasised the disproportionate punishment of death and constraints on judicial sentencing: The Front “seeks to extend this death penalty to a degree and a scope which is hardly believable in the 20th century, even in Africa”, equating “human life, in this Bill, with property of a trivial nature, and in fact, extend[ing] the death penalty to destruction of property of an inconsequential nature”.<sup>63</sup> The *Bulawayo Chronicle* noted that “Dr. Palley (Ind., Highfield) is expected to be the principal opponent of the Bill” and he “may stage another marathon filibustering session”<sup>64</sup>

Among the opponents of the mandatory death penalty provision introduced in February 1963 were the African members of the Rhodesian legislature, representing the UFP in the new “B” Roll electoral districts. The mandatory death penalty debate was the first on a proposed major legislative measure in which any African Member of Parliament had ever participated. The “B” Roll Members of Parliament uniformly opposed the mandatory death provisions, even though some had actually experienced anti-UFP political violence in the townships. Opposition by the African UFP members focused on the failure of the harsh proposal to resolve the ultimate problem, which was political disenfranchisement of the popular majority.<sup>65</sup> By contrast, white UFP members phrased their opposition to the Bill in rule-of-law terms and emphasised damage to Rhodesia’s image abroad. At a time when Rhodesia should have attempted to portray itself as civilised and humane, the Bill provided fodder for Rhodesia’s enemies.<sup>66</sup> The

58 *Debates* (n 27) (19 Feb 1963) at 217. See, also, Law and Order (Maintenance) Amendment Act 12 of 1963.

59 *Debates* (n 27) (19 Feb 1963) at 218.

60 *Idem* at 462.

61 *Idem* at 477.

62 *Idem* at 479.

63 *Debates* (n 27) (22 Feb 1963) at 468.

64 “‘Hanging Bill’ is read” 15 Feb 1963 *Bulawayo Chronicle*.

65 *Debates* (n 27) (26 Feb 1963) at 618; (28 Feb 1963) at 781.

66 *Debates* (n 27) (28 Feb 1963) at 789.

UFP opposition demonstrated some paternalism as well: “Africans are subject to mental strains that we know little about” one member noted, referring to *inter alia* duress and witchcraft, ordinarily extenuating circumstances.<sup>67</sup>

The Rhodesian Front Members of Parliament responded vigorously. The Front warned that the African UFP members in particular were vulnerable to political petrol bombing attacks and any of them might be the next victims.<sup>68</sup> The Front emphasised the utilitarian aspects of the Bill: “If we have a mandatory death sentence possibly – only possibly – one or two people may – but I do not think it would happen – they may be sentenced to death unjustly. If on the other hand we do not have a mandatory death sentence we can take it that a lot more bombs are going to be thrown and many innocent people are going to die”.<sup>69</sup> The focus was on the white settler fear of lawlessness and disorder. One Member of Parliament insisted that the act of petrol bombing was part of a conspiracy to subvert civilisation in Rhodesia “emanating from that godless, Communist-dominated organisation, [the] United Nations Organization”. He warned that a “dangerous fifth column” existed in Rhodesia.<sup>70</sup>

Desmond Lardner-Burke, later Minister of Justice under Prime Minister Ian Smith, explained that the safeguard of executive clemency still existed for those sentenced to hang for petrol bombing.<sup>71</sup> Sentences perceived as overly lenient had eroded public confidence in the judiciary. Front members denied suggestions that the law specifically targeted the African population despite conceding that petrol bombing was “merely an expression of tribal patterns of bestiality” and noting that Europeans did not commit such crimes.<sup>72</sup> Perpetrators of petrol bombing were notoriously difficult to capture and merited strong punishment. A Rhodesian Front Member of Parliament revealed a great deal about supporters’ views in asserting that death was required because a future African nationalist government would free political prisoners, undermining the deterrent effects of any punishment other than death.<sup>73</sup>

Public reaction to what the press referred to as the “Hanging Bill” was swift.<sup>74</sup> Former Chief Justice Tredgold declared that the amendment was “bound to lead to injustice”, and an array of church leaders and the Rhodesian bar association condemned the prospect of depriving judges of sentencing discretion.<sup>75</sup> Church leaders issued a joint statement condemning the Bill.<sup>76</sup> South Africa itself permitted consideration of extenuating circumstances in security legislation, even for far more serious crimes.<sup>77</sup> Calling the Law and Order (Maintenance) Act “probably the most repressive legislation that has been

67 *Debates* (n 27) (26 Feb 1963) at 603, 788.

68 *Idem* at 805.

69 *Idem* at 631.

70 *Debates* (n 27) (1 Mar 1963) at 835.

71 *Debates* (n 27) (26 Feb 1963) at 526.

72 *Idem* at 583.

73 *Idem* at 603, 630.

74 “‘Hanging Bill’ under fire” 19 Feb 1963 *Bulawayo Chronicle*.

75 Wood (n 36) at 129.

76 “‘Hanging Bill’ under fire” (n 74).

77 C Palley *The Constitutional History and Law of Southern Rhodesia, 1888-1965* (Oxford, 1966) at 597.

entered on the statute books of this Colony”, Palley played a key role in opposing the mandatory death penalty for petrol bombing during the parliamentary debates in the spring of 1963.<sup>78</sup> Later statistics bore out his concern that the punishment proposed in the Bill was excessive: in February 1964, Dupont informed the Assembly that eighteen petrol bombing offences had been committed in 1963 and four in 1964 up to that time, none of which had resulted in death.<sup>79</sup> Of those twenty-two offences, sixteen had been against houses (fifteen occupied), and one against an occupied motor vehicle, and the remainder had involved other unoccupied buildings.<sup>80</sup>

The *Bulawayo Chronicle* noted the “furious opposition from the UFP benches and from Dr Ahrn Palley toward the Bill, and Palley’s repeated efforts to narrow the scope of both the capital and corporal punishment provisions in the Act”.<sup>81</sup> The death penalty for juveniles and pregnant women came in for particularly severe criticism, not only from Palley but also from UFP member Maureen Watson, the only woman in Parliament. The Government agreed to drop the death penalty for juveniles under the age of sixteen and for pregnant women, and to provide for a discretionary death sentence for youths aged fifteen to nineteen.<sup>82</sup> At the Committee stages, Palley moved a long series of amendments; each time, his amendment lost by a narrow margin.<sup>83</sup> After the third reading of the Bill, it was passed in final form by a vote of thirty-three in favour to twenty-eight opposed.<sup>84</sup> The twenty-eight included Palley and all voting UFP members.

More than once the lone dissenter on security legislation, Palley could not count on the UFP to join him in the voting. Ever the legalist, Palley objected strenuously but in vain to the sweeping power handed to the Minister of Justice to determine the legality of public gatherings and subversive statements and to impose house arrest and banishment.<sup>85</sup> In 1963, Palley was the only opponent of an amendment that sought to extend prohibitions of African nationalist parties, and of the Electoral Amendment Bill, which tinkered with the franchise.<sup>86</sup> Likewise, he was the only Member of Parliament to support lifting the ban on ZAPU.<sup>87</sup> Similarly, when the Unlawful Organizations Amendment Act sought to ban secondary, satellite, and successor organisations of previously banned nationalist parties, Palley denounced the legislation and predicted its failure because its purpose was “to still the political voice of the majority of the people”.<sup>88</sup> He predicted that banning

78 *Debates* (n 27) (7 Mar 1963) at 1077.

79 *Debates* (n 27) (28 Feb 1964) at 158.

80 *Idem* at 158-159.

81 “‘Never on Sunday’ clause held over after angry debate: Palley, UFP join to fight against ‘Hanging Bill’” 8 Mar 1963 *Bulawayo Chronicle*.

82 “Hanging, whipping, car search clauses passed in House” 9 Mar 1963 *Bulawayo Chronicle*.

83 *Debates* (n 27) (12 Mar 1963) at 1269ff.

84 *Debates* (n 27) (19 Mar 1963) at 1716.

85 *Debates* (n 27) (16 Aug 1962) at 1887-1888.

86 “Lone fight by Ahrn Palley against bill” 20 Mar 1963 *Bulawayo Chronicle*; “Dr Palley fails to block bill” 13 Mar 1963 *Bulawayo Chronicle*. See, also, Electoral Amendment Act 23 of 1963.

87 “Only Palley opposes renewing last year’s ban on ZAPU” 9 Mar 1963 *Bulawayo Chronicle*.

88 Unlawful Organizations Amendment Act 28 of 1962; *Debates* (n 27) (16 Aug 1962) at 1832.

African nationalist parties would have the effect of driving the parties underground.<sup>89</sup> Preventing any “members or associates” from starting another party or sharing even the most rudimentary networks had the consequence of prohibiting virtually any lawful political activity by African nationalists.<sup>90</sup> In the face of a UFP/Rhodesian Front alliance, Palley’s objections were ignored.

In the 1965 elections, the Rhodesian Front, now under Prime Minister Ian Smith, took all fifty “A” Roll seats. Of the fifteen “B” Roll seats, ten went to black African candidates of the centre-left Rhodesia Party, and four more to black Rhodesian independents. The white opposition, the remnants of the UFP, had been eliminated from the legislature. However, Palley took the fifteenth “B” Roll seat, leading him “to be the lone spokesman for the conscience of the European opposition” for the remainder of the 1960s.<sup>91</sup> The other “B” Roll Members of Parliament formed their own political party, the United People’s Party, and became the official opposition. They did not have Palley’s political and legal experience, however, and often followed his lead. Palley, “a short, rotund man with a fringe of gray hair”, with “penetrating, intelligent eyes” who had trained as both a lawyer and a doctor, is best remembered as the only white Member of Parliament who opposed the unilateral declaration of independence.<sup>92</sup> When the Assembly convened on 25 November 1965 after the unilateral declaration of independence, Dr Palley called on the Speaker to suspend the House, declaring the new Constitution illegal.<sup>93</sup> He vigorously denounced the act as treason to the Crown and refused to stop speaking until the sergeant-at-arms ejected him from the chamber as he sang “God Save the Queen”<sup>94</sup>

Palley remained an outspoken voice against capital punishment in Rhodesia’s legislature for the rest of his term. He badgered government ministers for updated statistics on executions until they refused to release the information at all. In 1965, Lardner-Burke explained that seventy-six persons had been charged under the Law and Order (Maintenance) Act and fifty-one convicted, nineteen under the petrol bombing clause.<sup>95</sup> In 1967, he reported that eighty-two persons were on death row, of whom forty-two had been convicted under the Law and Order (Maintenance) Act for political crimes.<sup>96</sup> In 1968, there were seventy-five persons who had been sentenced to death.<sup>97</sup> Not all of Palley’s abolitionist allies were on the political left. A more surprising critic of the death penalty was Member of Parliament Robin James, the conservative Rhodesian Front member representing Salisbury Centre, who would be expelled from the party in 1969 for

89 *Idem* at 1837.

90 *Idem* at 2114.

91 Windrich (n 45) at 37.

92 R Good *UDI International Politics of the Rhodesian Rebellion* (Princeton, 1973) at 79. See, also, J North *Freedom Rising* (New York, 1985) at 233.

93 Good (n 92) at 79.

94 North (n 92) at 234.

95 *Debates* (n 27) (17 Mar 1965) at 842.

96 *Debates* (n 27) (31 Aug 1967) at 1651-1652.

97 *Debates* (n 27) (31 July 1968) at 1254.

opposing the Front's "liberal" racial policies.<sup>98</sup> In 1967, when Lardner-Burke reported that the government was commuting three death sentences to life imprisonment, James responded that "the world at large will accept with relief the Minister's statement on humanitarian grounds".<sup>99</sup> In 1969, while grilling Lardner-Burke, James asked whether the government would "consider abolishing the death penalty and so conform with the civilized practice of Rhodesia's Portuguese neighbors".<sup>100</sup>

With the passage of the 1970 Constitution, Palley's Highfield "B" Roll seat was no longer available to him.<sup>101</sup> As an "A" Roll voter, he could no longer contest a "B" Roll seat. In the Salisbury City district, by far the most marginal Rhodesian Front seat in the country, the weak Front member, Edward Sutton-Pryce, had defeated independent Gaston Thornicroft by just over a percentage point in 1970, lagging nearly thirty-five points behind the Front's nationwide average.<sup>102</sup> Ahrn Palley contested the seat against Sutton-Pryce in 1974 and against Ivor Pitch in 1977. Although no Rhodesian Front candidate ever lost a seat during the entire fifteen-year period of Rhodesia's unilateral declaration of independence from Great Britain, in both the 1974 and 1977 elections Dr Palley came closer than anyone else to causing an upset. Only apathy from the South Asian and mixed-race electorate, and last-minute government patronage prevented Palley from toppling Sutton-Pryce in 1974.<sup>103</sup> With tears in his eyes, Palley attended the announcement of the election results; he had "campaigned on a shoestring and failed by just three votes" to become the only white settler voice in the Rhodesian parliament to oppose the death penalty during the decade of the 1970s.<sup>104</sup>

#### 4 2 Constitutional challenges to the mandatory death penalty for petrol bombing

The mandatory death penalty for petrol bombing had constitutional implications in terms of the clause relating to cruel, inhuman, and degrading punishment in the 1961 Constitution.<sup>105</sup> In a series of challenges before Rhodesian and Federation courts and eventually before the Privy Council in London, defendants argued that because the

98 P Harris "The failure of a 'constitution': The Whaley Report, Rhodesia, 1968" (1969) 45 *International Affairs* 234-245 at 240.

99 *Debates* (n 27) (31 Aug 1967) at 1651.

100 *Debates* (n 27) (18 April 1969) at 1177.

101 L Bowman *Politics in Rhodesia White Power in an African State* (Harvard, 1973) at 138.

102 Lemon (n 48) at 525 (1970 election), 527 (1974 election), 529 (1977 election). Gaston Thornicroft was a prominent "coloured" politician, born of a black Rhodesian mother and white Rhodesian father, and the former president of the Coloured Community Service League, a prominent political organisation of the 1930s and 1940s, and later the Rhodesian National Association in the 1950s. He was also a successful businessman. J Muzondidya *Walking A Tightrope Towards a Social History of the Coloured Community of Zimbabwe* (Lawrenceville, NJ, 2005), *passim*.

103 Hancock (n 45) at 187.

104 *Ibid.*

105 Constitution of Southern Rhodesia, 1961, s 60(1). "The Constitution of Southern Rhodesia, 1961, contained a Declaration of Rights modeled largely on the 1960 Nigerian Constitution and hence, ultimately, on the European Convention on Human Rights." J Crawford "The working of the Rhodesian Declaration of Rights" (1966) 83 *SALJ* 337-354 at 337.

mandatory death penalty for petrol bombing did not take account of mitigating or extenuating circumstances, the penalty could be too harsh for the crime and consequently cruel and inhuman.<sup>106</sup> These challenges were against the sentences of particularly sympathetic defendants, guilty only as accomplices, in cases where the petrol bombs had not ignited or had only caused minor damage to property. Each case ended in the same way, with the ruling that the prohibition of cruel, inhuman, and degrading punishment related only to kinds, types, or methods of punishment and not to severity, quantum, or appropriateness of punishment.<sup>107</sup> The 1961 Rhodesian Constitution possessed a limitations clause specifically excluding from constitutional challenge any form of punishment that had been lawful in Southern Rhodesia before the Constitution came into force.<sup>108</sup> In essence, because there had been a mandatory death penalty in 1961, although not for petrol bombing, the penalty was immune from challenge. The window was closing: a new Rhodesian constitution, ratified in 1969, prohibited courts from “inquir[ing] into or pronounc[ing] upon the validity of any new law on the ground that it is inconsistent with the Declaration of Rights”, making the fundamental rights provisions (including the prohibition on cruel, inhuman, or degrading punishment) non-justiciable.<sup>109</sup>

In the early hours of 2 September 1963, a small bottle of paraffin with a wick was thrown through the window of a house in suburban Harare, breaking glass and falling onto a baby’s cot. Two defendants were sentenced to death for petrol bombing under the Law and Order (Maintenance) Act and the third, a juvenile, was sentenced to seven years’ imprisonment, even though it was unlikely that any of the three had thrown the petrol bomb. The defendants appealed, arguing that the sentence was unconstitutionally cruel and inhuman. In the case of *Regina v Runyowa*, the Federal Supreme Court of Rhodesia and Nyasaland confirmed the convictions, holding that the mandatory death penalty was lawful.<sup>110</sup> The cases were taken on appeal to the Privy Council, which confirmed the judgments, ruling that the accomplices had had the same criminal intent as the principal thrower.<sup>111</sup> *Runyowa* was especially problematic because the defendant had not been present when the petrol bomb was thrown; he had simply purchased the paraffin for the bottle.<sup>112</sup> The victim was a supporter of Ndabaningi Sithole, an original founder of the Zimbabwe African National Union (ZANU), and the defendant and his accomplices were Sithole opponents. The Court made no findings on who had thrown the petrol bomb, and the person identified by Runyowa as the person who had done so served as a prosecution witness. Distinguishing American case law that held “cruel and unusual punishments” as prohibited by the United States Constitution incorporated principles of proportionality, the Privy Council ruled that the 1961 Rhodesian Constitution prohibited

106 *Regina v Runyowa* 1966 RLR 42 (PC); *Gundu v Sheriff of Southern Rhodesia* 1965 RLR 301 (AD); *Regina v Mapolisa* 1964 RLR 591 (PC).

107 Palley (n 77) at 598.

108 Constitution of Southern Rhodesia, 1961, s 60(3).

109 Constitution of Rhodesia, 1969, s 84.

110 *Regina v Runyowa* 1966 RLR 42 (PC) at 44.

111 *Idem* at 42.

112 *Idem* at 46-47.

certain penalties, not punishments for certain crimes, and that the court could not invalidate a law simply because a sentence was excessive.

In May 1965, shortly before the Privy Council issued the *Runyowa* ruling, the Appellate Division in Salisbury decided *Gundu v Sheriff of Southern Rhodesia*.<sup>113</sup> The case involved a defendant who had set fire to a residential building with petrol and explosives and a defendant who had been convicted of setting fire to a school dormitory with petrol.<sup>114</sup> In *Gundu*, the Appellate Division held that the Constitution did not prohibit disproportionate or excessive punishment under section 60(1) and that in any case, the death penalty itself could not be unconstitutional because it was preserved by the limitations clause upholding criminal punishments that had been lawful in 1961. It held that the constitutional clauses “must necessarily refer to the mode of punishment only and not to either the quantum of punishment or the court’s discretion in regard to punishment”.<sup>115</sup> In addition, the Court found, “a punishment not in itself inhuman or degrading cannot become so merely because it is mandatory”.<sup>116</sup> Like Gundu and Runyowa, a third defendant, Richard Mapolisa, would be executed for petrol bombing, despite being convicted as an accomplice to a crime that resulted in a small burned hole in a carpet.<sup>117</sup> With the help of legal aid, he appealed his conviction *in forma pauperis* to the Privy Council, which affirmed the conviction and constitutionality of the law on deterrence grounds. After his execution, the legal aid agency continued to support his four young children.<sup>118</sup>

Following the unilateral declaration of independence, the Rhodesian government introduced a new republican constitution, with substantially the same content as the 1961 one other than subordination to Britain. In response, the British government amended the 1961 Constitution to render void any Rhodesian law passed or executive function performed by the illegal regime.<sup>119</sup> However, after the Privy Council upheld the right of the British Parliament to exercise unfettered legislative power over Southern Rhodesia and to deprive the actions of the Smith regime of all legal validity, the Rhodesian judiciary acknowledged the Smith regime as the only lawful sovereign and the 1965

113 *Gundu v Sheriff of Southern Rhodesia* 1965 RLR 301 (AD).

114 *Idem* at 318.

115 *Idem* at 314.

116 *Idem* at 324; see, also, J Crawford “The working of the Rhodesian Declaration of Rights” (1966) 83 *SALJ* 337-354 at 347. The Appellate Division in Salisbury extended the holdings of *Runyowa* and *Gundu* in *Dhlamini v Carter* 1968 RLR 136 (AD), in which the Court found it had no jurisdiction to assess whether delay on death row, including the executive’s delay in considering a petition for clemency or pardon, was cruel, inhuman, and degrading punishment under s 60(1) of the Rhodesian Constitution (1961). *Dhlamini* was famously reversed by the Supreme Court of Zimbabwe in *Catholic Commission for Justice and Peace v Attorney General*, 1993 (4) SA 239 (ZS), which recognized the “death row syndrome” – the doctrine that delay or conditions on death row could make an otherwise constitutional sentence cruel, inhuman, and degrading.

117 *Regina v Mapolisa* 1964 RLR 591 (PC); see, also, “Cases: Judicial Committee of the Privy Council” (1965) 9 *J of African Law* 166-169 at 166.

118 D Herbstein *White Lies: Canon Collins and the Secret War Against Apartheid* (Oxford, 2004) at 254.

119 J Hatchard *Individual Freedoms and State Security in the African Context* (Athens, Ohio, 1993) at 11.

Constitution as the only one in force in the territory.<sup>120</sup> Constitutional challenges to the mandatory death penalty for petrol bombing had failed, and it fell to the legislature to remove the provision.

#### 4 3 Expansion and repeal of the mandatory death penalty for political crimes

In 1967, the Rhodesian legislature passed a bill imposing a mandatory death penalty for possession of arms of war with intent to endanger the maintenance of law and order, the only crime other than petrol bombing to incur the mandatory death sentence without possibility of mitigation.<sup>121</sup> This time, however, the law would pass without significant debate in Parliament. According to Lardner-Burke, the Minister of Justice, a mandatory death penalty for possession of arms of war would help curb politically motivated attacks on government installations and civilians, which had increased in frequency since 1962. Although several members, including Robin James, questioned the mandatory nature of the death penalty, the proposal earned wide support from all members except the African “B” Roll ones who condemned it as another instance of state-sanctioned violence by the white government.<sup>122</sup> As justification, Lardner-Burke pointed to the “successful” limitation of petrol bombing attacks through the mandatory death penalty, which had reduced the incidence of the crime from ninety-two in 1964 to just two in 1967.<sup>123</sup>

The new legislation that introduced a mandatory death penalty for possession of arms of war contained an even more dangerous provision: any person in possession of arms of war was presumed to be endangering the maintenance of law and order, which shifted the burden of proof: the defendant now having to show absence of intent. Soon after the Law and Order (Maintenance) Amendment Act of 1967 was passed, the Rhodesian Constitutional Council determined that the Act violated the presumption of innocence under the Declaration of Rights, a determination that could be overruled by two-thirds of the legislature according to the 1965 Constitution as amended by the Constitution Amendment Act of 1966.<sup>124</sup> The new law, by placing the burden of proof on the defendant, made it far more difficult to prove lack of intent. The change lasted less than a year. In the autumn of 1968, the Rhodesian Front government abolished the mandatory death penalty for both petrol bombing and arms possession.<sup>125</sup> According to Lardner-Burke, the death penalty had stamped out petrol bombing, and the arms possession provision was practically unenforceable. In lieu of a mandatory death penalty, he proposed a minimum sentence of ten years, with provision for a lesser sentence if “special circumstances” existed.<sup>126</sup> Palley strongly supported the change. However, although he did not call a division in Parliament on the issue, Palley nevertheless registered his opposition to

120 *Madzimbamuto v Lardner-Burke* 1968 RLR 192 (PC).

121 *Debates* (n 27) (24 Sept 1968) at 1570. See, generally, Law and Order (Maintenance) Amendment Act 41 of 1968.

122 *Debates* (n 27) (8 Sept 1967) at 244, 248-249, 251-252.

123 *Debates* (n 27) (7 Nov 1967) at 1067.

124 See Constitution Amendment Act 49 of 1966; R Hodder-Williams “Rhodesia’s search for a constitution: Or, whatever happened to Whaley?” (1970) 69 *African Affairs* 217-235 at 220.

125 Law and Order (Maintenance) Amendment Act 41 of 1968.

126 *Debates* (n 27) (24 Sept 1968) at 1573.

minimum sentences of imprisonment.<sup>127</sup> He was supported in this by Robin James, the arch-conservative independent Member of Parliament, who condemned both the “barbaric, uncivilized” death penalty and the retention of minimum sentences in the Law and Order (Maintenance) Act.<sup>128</sup> From opposite ends of the political spectrum, the two independents noted with amusement the closeness of their views on law and order issues.

With only weeks remaining of his twelve-year term in the Assembly, Palley finally triumphed. In early 1970, in a change that inspired little debate, Lardner-Burke introduced a bill abolishing all minimum sentences under the Law and Order (Maintenance) Act.<sup>129</sup> The change “will enable the judiciary to exercise full freedom in the imposition of sentences”, Lardner-Burke promised.<sup>130</sup> Robin James, who contested the April 1970 elections as an independent and lost his seat to the Rhodesian Front, used the occasion to encourage Lardner-Burke to abolish the death penalty, for the number of executions in the country had slowed to a trickle even as death row grew.<sup>131</sup> The Rhodesian Front would never again attempt to pass a mandatory death penalty statute. In November 1974, the government sought to impose the death penalty for terrorist recruitment and training, but this time with the proviso that a judge had the discretion to substitute a sentence of life imprisonment.<sup>132</sup> In explaining the new offence to the legislature, Lardner-Burke emphasised that “special circumstances” as defined under the Law and Order (Maintenance) Act, which allowed a judge to substitute life imprisonment, were not synonymous with “extenuating circumstances” and were based only on the mitigating factors spelled out in the proposed amendment to the Law and Order (Maintenance) Act.<sup>133</sup> The African “B” Roll Members of Parliament condemned the proposal that the death penalty be imposed for political crimes and encouraged Lardner-Burke to replace “special circumstances” with the broader “extenuating circumstances”.<sup>134</sup> Rhodesian Front member Hilary Squires defended the new Bill, arguing that recruitment of terrorists was tantamount to murder, and that the death penalty was “not completely mandatory” because the proposed amendment to the Law and Order (Maintenance) Act of 1960 provided “a basis upon which a court may impose a sentence other than death”.<sup>135</sup> The Bill passed with all white “A” Roll Members of Parliament in favour, and all black “B” Roll Members of Parliament opposed.<sup>136</sup> Without Palley in the legislature after 1970, the provision was to survive for the duration of white rule in Rhodesia.

127 *Idem* at 1575; *Debates* (n 27) (27 Sept 1968) at 1876.

128 *Debates* (n 27), (24 Sept 1968) at 1577-1578.

129 Law and Order (Maintenance) Amendment Act 12 of 1970. The 1970 amendment was determined not to be retroactive for crimes carried out before that date: *State v Ndhlovu* 1971 RLR 94 (HC).

130 *Debates* (n 27) (6 Feb 1970) at 1968-1969.

131 *Debates* (n 27) (10 Feb 1970) at 2026. James was an opponent of a multiracial settlement. Hodder-Williams (n 124) at 228.

132 *Debates* (n 27) (14 Nov 1974) at 914-915.

133 *Idem* at 951.

134 *Idem* at 935.

135 *Idem* at 941.

136 *Idem* at 952.

## 5 Conclusion

According to Amnesty International, the death penalty in Southern Rhodesia was “very widely used not only for criminal offences such as murder or rape, but also for those convicted of certain political offences under the Law and Order (Maintenance) Act”, including arms possession or harbouring terrorists.<sup>137</sup> More than sixty executions took place between 1968 and 1976, “over a storm of international protest” and condemnation by Queen Elizabeth, who attempted to use her royal prerogative of mercy to save three men executed in May 1968, including two convicted of a petrol bombing in which a white settler was killed.<sup>138</sup> The Rhodesian War escalated in 1972 when guerrillas infiltrated the north-eastern region of the country, widening the field of operation.<sup>139</sup> The death penalty was used extensively against guerrilla fighters and alleged accomplices, often after trials conducted in secret. After 1975, the government announced that the names of people sentenced to death or executed would no longer be released.<sup>140</sup> As Hatchard notes, at least 152 executions took place between 1975 and 1979, not including secret executions. The Rhodesian government implemented emergency regulations in 1976, creating “special courts” to try political crimes and terrorism.<sup>141</sup> These extra-constitutional courts, formed outside the judicial branch, had the power to impose death without appeal to the ordinary criminal courts. These special courts could try civilians and impose death sentences *in camera* in the regions of the country under martial law after 1978.<sup>142</sup>

Despite this controversial reliance on the death penalty for political crimes in Rhodesia, one offence stood out. The mandatory death penalty for petrol bombing, a crime that could result in nothing more than inconsequential property damage, was unusually extreme and disproportionate. The liberal independent Member of Parliament Ahrn Palley consistently condemned the mandatory death penalty as both a sweeping expansion of executive power at the expense of the judiciary and an attempt by the white settler state to punish violently the political aspirations of the African majority. He was joined in this opposition by the fourteen newly elected black African (and, when Bhana Govan was elected in 1965, South Asian) Members of Parliament whose seats were created by the 1961 Rhodesian Constitution to give at least a symbolic voice to the majority population, although in reality these Members represented few constituents. Arch-conservative apartheid supporter Robin James, a former Rhodesian Front Member of Parliament who went rogue, joined Palley’s quixotic campaign against the death penalty, thus underscoring the schismatic and at times ironic nature of white Rhodesian politics.

137 “Amnesty International briefing: Rhodesia/Zimbabwe” (1976) 6 *Issue A Journal of Opinion* 34-37 at 36.

138 *Idem* at 37. The two convicted of petrol bombing were James Ndhlamini and Victor Mlambo. Appeals to the Rhodesian High Court and the Appellate Division focused on whether the Smith regime had the authority to sentence persons to death: Windrich (n 45) at 123. Massive international condemnation followed the executions, including a unanimous vote by the UN Security Council: *idem* at 126-127.

139 T Kirk “Politics and violence in Rhodesia” (1975) 74 *African Affairs* 3-38 at 3.

140 Herbstein (n 118) at 268.

141 Hatchard (n 119) at 83.

142 Herbstein (n 118) at 269.

Lingering consequences of the constitutional challenges to the mandatory death sentence for petrol bombing, the negative court rulings of the Rhodesian Appellate Division, the Federal Supreme Court of Rhodesia and Nyasaland and the Privy Council, took decades to reverse. All had ruled that a ban on cruel, inhuman, and degrading punishment applied only to forms of punishment (here, death by hanging) and not to whether the punishment for a given crime was excessive. These judgments are no longer good law. The Privy Council overruled *Runyowa* through a series of challenges against the mandatory death penalty, launched from the Commonwealth Caribbean from 2002 onwards.<sup>143</sup> Upon independence, Zimbabwe inherited a system of security legislation that was irreconcilable with human rights norms. This legislation included at least four discretionary capital offences under the Law and Order (Maintenance) Act, including terrorist training, recruitment for terrorist training, aggravated arms possession, and acts of terrorism or sabotage, as well as two offences under the Rhodesia Railways Act, launching projectiles at trains and interfering with a track.<sup>144</sup> After independence no death sentences were imposed for such offences, which were notably wide-ranging and vague; yet they remained on the books.

Abuses under Rhodesian rule undoubtedly contributed to the erosion of public and elite support for the death penalty in modern Zimbabwe. On 16 March 2013, Zimbabwean voters overwhelmingly ratified a new constitution that reflected an emerging multiparty consensus that the death penalty should be retained solely for aggravated murder.<sup>145</sup> The death penalty was hotly contested in Zimbabwe's government of national unity, formed after the 2008 elections, until a breakthrough by constitutional negotiators in March 2012.<sup>146</sup> The new draft constitution abolishes the death penalty for extraordinary and political crimes, including treason, and sharply curtails the death penalty for murder. With ratification, the death penalty became a prohibited sentence for women and persons under age twenty-one or over age seventy.<sup>147</sup> By limiting the death penalty only to

143 See, eg, *Reyes v Queen* [2002] 2 AC 235 (PC) (Belize); *Queen v Hughes* [2002] 2 AC 259 (PC) (St Lucia/St Vincent and the Grenadines); *Fox v Queen* [2002] 2 AC 284 (PC) (St Kitts and Nevis).

144 Section 38(2) Act 41 of 1972 (providing for the death penalty or imprisonment up to twenty-one years). See, also, Hatchard (n 119) at 84-85; G Feltoe *A Guide to Sentencing in Zimbabwe* (Harare, 1990) at 26-27.

145 "Zimbabwe approves new constitution" BBC News 19 Mar 2013: <http://www.bbc.co.uk/news/world-africa-21845444>.

146 "Copac agrees to scrap death penalty" 27 Mar 2012 *The Herald*. The constitutional reform committee, composed of Zimbabwe's three major political parties, unanimously agreed that the death penalty should be abolished except for aggravated murder.

147 In full, s 48(2) of Zimbabwe's new constitution reads as follows:  
A law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances, and:

- a) the law must permit the court a discretion whether or not to impose the penalty;
- b) the penalty may be carried out only in accordance with a final judgment of a competent court;
- c) the penalty must not be imposed on a person:
  - i) who was less than twenty-one years old when the offence was committed; or
  - ii) who is more than seventy years old;
- d) the penalty must not be imposed or carried out on a woman; and
- e) the person sentenced must have a right to seek pardon or commutation of the penalty from the President.

aggravated murder, the Constitution in effect abolishes the doctrine of extenuating circumstances because the provision requires the prosecution to prove an aggravating factor that outweighs all mitigating factors.<sup>148</sup> Undoubtedly, restricting the scope of the death penalty so drastically in the new constitution aligns Zimbabwe more closely with a global trend toward the abolition of the death sentence and with prevailing international human rights norms on capital sentencing.

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## Abstract

Shortly before the unilateral secession of Southern Rhodesia (colonial Zimbabwe) from the British Empire under white minority rule, the Rhodesian legislature passed sweeping security legislation authorising more severe criminal punishments for political crimes, including the mandatory death penalty for petrol bombing. This legislation conflicted with Rhodesian criminal sentencing for ordinary crimes such as murder and robbery, which permitted some judicial discretion in capital sentencing. Petrol bombing and the later mandatory death penalty for aggravated arms possession were the only two crimes that did not permit judicial sentencing discretion, making them the two most disproportionate criminal punishments ever passed in wartime Rhodesia. These statutory changes were doggedly opposed on the floor of Parliament by the independent Member of Parliament Dr Ahrn Palley and a handful of liberal and progressive allies. The penalties withstood constitutional challenges that claimed that these disproportionate punishments were cruel, inhuman, and degrading. Although the mandatory death penalty for petrol bombing proved unenforceable and would be repealed, other security legislation survived in independent Zimbabwe, where it fell into disuse but remained on the books.

148 While the constitution does not explicitly mention the doctrine of extenuating circumstances, it in effect removes the most objectionable aspect of the doctrine: the shifting of the burden to the defendant to prove that he or she should not be executed. This is so for two reasons. First, “aggravating circumstances” is now an element of the crime that must be proven by the prosecution beyond a reasonable doubt. Second, because the constitution requires that a judge have discretion whether or not to impose the penalty, a judge cannot be required to dispense the death penalty if the defendant fails to show extenuating circumstances beyond a preponderance of the evidence. The doctrine of extenuating circumstances was essentially a rebuttable presumption in favor of death; the new constitution replaces this presumption with a true discretionary death penalty on the model of the United States or India. See *Woodson v North Carolina* 428 US 280 (1976); *Mithu v State of Punjab* 1983 SCR (2) 690 (India SC) (abolishing the mandatory death penalty and establishing a discretionary death penalty). In so doing, Zimbabwe’s new constitution more closely aligns with the emerging international consensus that not all murders are equally heinous and deserving of death.