

AFRICAN VALUES AND CAPITAL PUNISHMENT

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INTRODUCTION

What is the strongest argument grounded in African values for abolishing capital punishment? In this chapter, I defend a particular answer to this question, one that invokes an under-theorized conception of human dignity. Roughly, I maintain that the death penalty is nearly always morally unjustified, and should therefore be abolished, because it degrades people's special capacity for communal relationships. To defend this claim, I proceed by: first, clarifying what I aim to achieve in this essay; second, criticizing existing objections to the death penalty that ethicists, jurists and others have proffered on 'African' grounds; third, advancing a new, dignity-based objection with an African pedigree that I take to be the most promising; and, fourth, making some concluding remarks about related work that should be undertaken if my argumentation in this essay is sound.

CLARIFYING MY AIM

I have said that I aim to answer the question, 'What is the most promising way to object to the death penalty, when appealing to African values?'. This question is naturally understood to assume, for the sake of argument, *that* the death penalty is immoral, and seeks the best explanation of *why* it is. Many readers, however, might be initially unconvinced that the death penalty is immoral. Indeed, capital punishment is legal in more than two dozen states below the Sahara, and often majorities in sub-Saharan abolitionist states would like to see it legalized.¹ However, such readers will find good reason to change their minds, if, as I expect, they find the argument I make against capital punishment to be independently attractive.

I maintain, in fact, that many African readers will find my argument against capital punishment to be attractive for appealing to certain ideas implicit in views they already hold. I argue that characteristically African values provide good reason to reject the death penalty, regardless of whether that has been appreciated up to now. By 'African values', I mean ideas about good/bad and right/wrong that have been salient among the black peoples in the sub-Saharan region in a way they have tended not to be elsewhere in the world. Such a construal of the word 'African' implies neither that such values are held by *everyone*

below the Sahara, nor that *no one beyond the Sahara* does so. Instead, this word is meant to connote properties that have been recurrently exemplified in that region among those not of European, Arab or Asian descent and that have not been instantiated most other places on the globe. My claim is that there are ideas about the dignity of persons, the value of community, and the justifiability of violence that are common in the moral-philosophical worldviews of traditional black sub-Saharan societies and that, upon philosophical clarification and refinement, can be seen to entail that capital punishment should be abolished.

I use the terms 'death penalty' and 'capital punishment' interchangeably to indicate the state's intentional killing of a person that expresses disapproval of a crime that has been judged to have been committed. So stated, the death penalty, imposed by the judicial branch of government, must be distinguished from deadly force, employed by the executive branch. To use deadly force (or to do so justifiably) is for the police or army to employ coercion, which has a good chance of killing its target, in order to prevent harm to innocent parties. Deadly force is 'prospective', by which I mean that it is by definition deployed before a crime or other aggression has been committed, and is (justifiably) used to stop the harmful act from being done. The death penalty, in contrast, is 'retrospective' in that it is a response to harm or a wrong that has already been done (or has been perceived to have been). A second major difference between the two is that the death penalty is meant to censure certain wrongful behaviour, whereas deadly force need not be condemnatory, e.g., it may sometimes (rightfully!) be employed against 'innocent threats', i.e., persons who, for no fault of their own, would otherwise harm other persons. Below I argue that one major problem with the existing African arguments against the death penalty is that they counterintuitively entail that deadly force is unjustified in cases where it clearly is not.

In claiming that certain African values entail that the death penalty 'should be abolished', I mean to say that it is nearly always an injustice. Of course, 'nearly always' is not the same as 'always'. Below I admit that there are rare cases in which imposing the death penalty would be justified by the sub-Saharan rationale I provide. However, they would be so infrequently encountered, and it would be so difficult to prove that they meet the relevant criteria, that I suspect that the most reasonable course for a state to take would be to abolish the death penalty altogether, rather than to make allowance for the very odd exception.

CONSEQUENTIALIST ARGUMENTS

I have not encountered anyone appealing to African considerations who systematically argues that abolishing the death penalty would promote the general welfare more than retaining the death penalty. However, I have found those who have contended that retaining the death penalty would not promote the general welfare more than abolishing it.

That is, some African abolitionists have sought to object to a consequentialist argument for the death penalty by contending that the results of abolishing it, with regard to crime rates and the like, would be no worse than those of retaining it. Typically, the debate has focused on deterrence, with abolitionists, such as the important Nigerian philosopher Segun Gbadegesin, pointing out that, for decades, criminologists were unable to find real evidence that the death penalty deters more than, say, life in prison.²

The 'African' source of this consequentialist debate is straightforwardly understood to be the fact that sub-Saharanans characteristically prize community, and that punishment is justified insofar as it will prevent either members of the community from being harmed or communal norms from being violated. Some African philosophers have explicitly argued for stringent penalties such as the death penalty based on the idea that the end of protecting the community justifies the means (at least if the party being severely punished is guilty of a serious crime).³ African abolitionists have replied to this argument by contending that the community would be no less protected if the state no longer used the death penalty.

There is one serious problem with this rationale against the death penalty: there have been studies conducted in the past 10 years that purport to provide new, strong evidence that the death penalty can deter, and has indeed deterred, crime more than its absence.⁴ Of course, these studies have been questioned. However, while it was a truism in the 20th century that there was no good evidence for the deterrent capacity of the death penalty, in the 21st it is debatable whether there is. Insofar as the consequences of the retention of the death penalty relative to its abolition are unclear, one is not yet justified in rejecting the death penalty for consequentialist considerations.

EXTANT DIGNITY-BASED ARGUMENTS

The objection that capital punishment is degrading of human dignity neatly side-steps the problem facing a consequentialist criticism of it. A dignity-based objection does not appeal to the results of the death penalty, but rather maintains that there is something about it 'in itself' that is morally wrong. To have a dignity is, roughly, to have a superlative final value, i.e., to be a certain entity that is good for its own sake to a degree higher than anything else in the animal, vegetable and mineral kingdoms.⁵ I first present and reject two dignity-based objections to the death penalty that have been prominently made from an African perspective, before presenting a new one that I maintain is a clear improvement on them.

First, one encounters the argument that human beings have a dignity of a sort that would be degraded were an innocent person executed, an argument that Moses Òkè has made most thoroughly from an African standpoint.⁶ He points out that it has been common among traditional Yorubas, a people in Western Africa, to believe that all or most

human beings have a dignity. I add that the same is true of traditional African societies more generally, with many of them holding that human beings have a dignity in virtue of being a spiritual offshoot of God, the source of all vitality. Supposing that the state must above all not degrade people's dignity, that an innocent person's dignity would be degraded if he were executed, and that the state can never be certain that those it executes are guilty,⁷ it follows that the state should abolish the death penalty.

I mention a *prima facie* problem with this rationale, before presenting what I think is a decisive reason to reject it. One might point out that certainty is not expected anywhere else in our moral reasoning, and that a weaker, but still robust, standard of proof beyond a reasonable doubt both is more sensible and can sometimes be satisfied. If one has proof beyond a reasonable doubt that someone deserves to die for his misdeeds, then one arguably does not *degrade* him upon putting him to death, or does not do so in a way that warrants blame or guilt, even if he is in fact innocent and does not deserve execution.

While this problem with Òkè's argument is worth considering, I think the most damning consideration against it is that it oddly entails that the use of deadly force is unjustified in cases where it plainly is not. If 'respect for the dignity of all (is) not in sync with either the policy or the practice of judicially killing offenders or alleged offenders in the community, especially when it (is) granted that the judicial system (is) always vulnerable to error',⁸ then all intentional killing must be considered impermissibly disrespectful. However, that would mean that it is wrong ever to use deadly force in defence of oneself or of others. Elsewhere, I have maintained that the following case, 'Ethnic Cleansing', shows this implication to be deeply counterintuitive⁹:

You are a peacekeeper who sees two men chasing an innocent, elderly woman with machetes, trying to kill her merely because she has a different ethnicity. You have a machine gun. After firing a warning shot to deter the men (that you see they have recognized as a warning), they are not scared off and continue after the woman. You shoot the two aggressors, reasonably judging it to be necessary and sufficient to protect the one innocent. They die, and she lives.

I claim that the use of deadly force is morally justified in the case of 'Ethnic Cleansing', *despite the lack of certainty* that the men will continue aggressing or will succeed in seriously harming the woman. And most African readers will agree. Pacifism is far from the dominant approach to violence in sub-Saharan moral thinking, and it is instead widely accepted that violence in self- or other-defence can be justified. In sum, if certainty of guilt for serious harm were necessary for intentional killing to be

justified, then deadly force would always be unjustified, but it is not. Hence, Òkè's objection to the death penalty is fatally (so to speak) flawed.

The same problem applies to a second, somewhat more common African- and dignity-based argument against the death penalty. Members of the Constitutional Court of the Republic of South Africa, among others, have maintained that human life has an inherent dignity that confers an inalienable right to life on all of us. As the death penalty would violate a person's right to life, even if he were guilty, it would be an impermissible degradation. As one justice of the Court has said:

[There is a need to] recognise the right to and protection of human dignity as a right concomitant to life itself and inherent in all human beings, so that South Africans may also appreciate that even the vilest criminal remains a human being (*Furman v Georgia, supra*). In my view, life and dignity are like two sides of the same coin. The concept of *ubuntu* embodies them both.¹⁰

'*Ubuntu*' is the Nguni term for humanness that is understood by many in southern Africa to encapsulate morality. To have *ubuntu* is to live a genuinely human or ethical way of life, which one does, roughly, by prizing community with other persons.¹¹ The Court takes others to merit communal relationship by virtue of the dignity they have as human beings, and for such relating to include upholding everyone's right to life, regardless of what they have done.

However, the problem with this rationale against the death penalty is that it counterintuitively also rules out the use of any deadly force. If one's vile actions are not enough to forfeit one's right to life, then even the aggressors in Ethnic Cleansing retain theirs, making it prohibitively degrading for the peacekeeper to shoot them. However, I presume the reader agrees with me that deadly force would be justified in such a case, meaning that the present objection to the death penalty is not the right one to make.¹²

A NEW DIGNITY-BASED ARGUMENT

I now present a third, dignity-based argument against the death penalty that is grounded in African values, one that avoids both the problematic appeal to the consequences of its imposition and the counterintuitive implication that deadly force is invariably impermissible. Part of this new rationale includes the idea that human beings have a dignity just insofar as they are capable of communal relationships, where these are understood to be relationships in which one both shares a way of life with others and cares about their quality of life.¹³ To share a way of life with others and to care about their quality of life is more or less what English-speakers mean by 'friendship' or 'love' in a broad sense. By this account of dignity, then, if one had to choose between killing a cat or a

person, one should spare the latter because it has a capacity to love that makes it intrinsically worth more than the former.

Now, what would it mean to degrade someone who has a dignity in virtue of her capacity for communal or friendly relationships?¹⁴ On the face of it, unfriendly or unloving behaviour is what would treat others as incapable of community or as less than special for being so capable. More specifically, degradation often consists of unfriendly behaviour toward someone that is not meant to counteract her unfriendliness. Respect for the capacity for community or love means treating a person in accordance with the way she has exercised it. Roughly, those who have been friendly do not warrant unfriendly treatment, whereas those who have been unfriendly do warrant unfriendly treatment, if necessary to protect those threatened by their comparable unfriendliness. If one is unfriendly toward another because one must be in order to prevent his proportionate unfriendliness, then one is not disrespecting his capacity for friendliness, which he has misused.

This account of the way to degrade, and conversely to respect, individuals capable of friendship or community grounds a straightforward explanation of why the death penalty would be degrading but deadly force would not. Aggressors in (clearly justified) other-defence cases are, by virtue of being killed, *being forced to correct their own proportionately unfriendly relationships*, whereas killing offenders in the case of capital punishment would not serve this function.

This rationale against the death penalty is not vulnerable to purported counterexamples that one might be tempted to suggest. For instance, although capital punishment might, as above, serve the function of deterrence and hence prevent unfriendliness proportionate to what the offender has done, it would not be necessary to end any proportionate unfriendliness that the *offender* is engaging in or responsible for. The person on death row is no longer torturing, mutilating or killing, and so the death penalty would not help those threatened by *his* comparable unfriendliness. Furthermore, even if execution were to (m)end unfriendly relationships that the offender still has or harm that he has caused, e.g., with regard to the victim's family, this unfriendliness would not be *proportionate* to the grossly unfriendly action of execution.¹⁵

CONCLUSION

In this chapter I have critically discussed objections to the death penalty that have been made by appealing to values salient below the Sahara desert. I have argued that the most promising sub-Saharan rationale for abolishing capital punishment invokes the under-analyzed idea that human dignity inheres in our capacity for communal relationships, understood as the combination of sharing a way of life and caring for others' quality of life, or as friendliness. This capacity of an offender would be degraded, I argued, if the state put him to death, insofar as doing so would not be necessary to correct any proportionate misuse of

the capacity for community, viz., unfriendliness, on his part. However, I contended that the capacity of aggressors to enter into community with others would not be degraded if the state used deadly force against them, since doing so would be necessary to counteract a comparable unfriendliness on their part.

In other work, it would be worthwhile considering how this objection to capital punishment compares to other objections to it, ones that are not necessarily grounded in salient African ideas. In particular, if I have indeed identified the best way to criticize the death penalty by appeal to sub-Saharan values, it would be worth considering how this criticism weighs up against, say, one grounded on a more Western, and specifically Kantian, understanding of dignity. According to the Kantian, human beings have a dignity insofar as they are capable of autonomy. Which conception of dignity, one grounded on autonomy or community, is more likely to entail that the death penalty is unjust and to give the best explanation of why it is? And which conception of dignity is more plausible on the whole? Such questions deserve answers in future research.

NOTES

¹ See Dirk van Zyl Smit, 'The Death Penalty in Africa', *African Human Rights Law Journal* (2004) 4: 1-16. Cf. Lilian Chenwi, *Towards the Abolition of the Death Penalty in Africa: A Human Rights Perspective* (Pretoria: Pretoria University Law Press, 2007).

² Segun Gbadegesin, 'Can There Be an Adequate Justification for Capital Punishment?', in Jan Broekman *et al.* (eds.) *Social Justice and Individual Responsibility in the Welfare State* (Stuttgart: Frans Steiner Verlag, 1985), pp. 227-233 at 231-233; M. Adekunle Owoade, 'Capital Punishment: Philosophical Issues and Contemporary Problems in Nigeria', *Second Order* (New Series) (1988) 1: 41-61 at 47-57; Constitutional Court of the Republic of South Africa, *The State versus T Makwanyane and M Mchunu*, Case No. CCT/3/94 (1995), <http://www.saflii.org/>.

³ For two examples, see Egbeke Aja, 'Crime and Punishment: An Indigenous African Experience', *The Journal of Value Inquiry* (1997) 31: 353-368; and Oladele Abiodun Balogun, 'A Philosophical Defence of Punishment in Traditional African Legal Culture: The Yoruba Example', *The Journal of Pan African Studies* (2009) 3: 43-54.

⁴ For some of the key papers, see Hashem Dezhbakhsh *et al.*, 'Does Capital Punishment have a Deterrent Effect? New Evidence from Postmoratorium Panel Data', *American Law and Economics Review* (2003) 5: 344-376; H. Naci Mocan and R. Kaj Gittings, 'Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment', *Journal of Law and Economics* (2003) 46: 453-478; Joanna Shepherd, 'Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment', *Journal of Legal Studies* (2004) 33: 283-321.

⁵ I have spelled out the concept of dignity with much more care in Thaddeus Metz, 'African Conceptions of Human Dignity', *Human Rights Review* (2011) DOI: 10.1007/s12142-011-0200-4.

⁶ Moses Okè, 'An Indigenous Yoruba-African Philosophical Argument against Capital Punishment', *The Journal of Philosophy, Science and Law* (2007) 7, <http://www.miami.edu/ethics/jpsl>.⁷ And, furthermore, that the state cannot compensate someone (or at least not adequately!) if he has been wrongfully put to death.

⁸ Okè, (note 6).

⁹ See Thaddeus Metz, 'Human Dignity, Capital Punishment, and an African Moral Theory: Toward a New Philosophy of Human Rights', *Journal of Human Rights* (2010) 9: 81-99 at 86.

¹⁰ Constitutional Court of the Republic of South Africa, (note 2), para. 311; see also para. 313, 229, as well as Gbadegesin (note 2), p. 227, and P. M. Maduna, 'The Death Penalty and Human Rights', *South African Journal on Human Rights* (1996) 12: 193-213 at 207-213.

¹¹ For what I take to be the most philosophically appealing facets of *ubuntu*, see Thaddeus Metz, 'Toward an African Moral Theory', *Journal of Political Philosophy* (2007) 15: 321-341.

¹² I first made this argument in Metz, (note 9), pp. 86, 88-89. There are additional African-based arguments against the death penalty from the Court that are not as prominent, but there I argue that they all fall prey to the same problem of implying that deadly force is impermissible.

¹³ I have done the most to spell out this conception of dignity in Metz (notes 5, 9), but one can find related ideas in H. R. Botman, 'The OIKOS in a Global Economic Era', in J. R. Cochrane *et al.* (eds.) *Sameness and Difference* (Washington, D.C.: The Council for Research in Values and Philosophy, 2000), http://www.crvp.org/book/Series02/II-6/chapter_x.htm; and Bénézet Bujo, *Foundations of an African Ethic* (New York: Crossroad, 2001), p. 88.

¹⁴ The next few paragraphs borrow from Metz (note 9), pp. 92-93.

¹⁵ There are some unusual situations in which the death penalty would counteract the offender's proportionate unfriendliness, when, say, he is responsible for organizing terrorist activities and the only way to stop his followers from engaging in them would be to execute him. For more discussion see Metz, (note 9), p. 93.

PART III

AFRICAN IDENTITY

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