

THE DEATH PENALTY IN BOTSWANA IN THE LIGHT OF INTERNATIONAL LAW: THE CASE FOR ABOLITION

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It is almost trite to state that the imposition of the death penalty is a flagrant violation of the inalienable and immutable right to life. This right is recognised in various international human rights such as the Universal Declaration of Human Rights (UDHR), 1948; the International Covenant on Civil and Political Rights (ICCPR), 1966 and its Second Optional Protocol Aiming at the Abolition of the Death Penalty and the Africa Charter on Human and Peoples Rights (ACHPR), 1981. Also, at the national level, various constitutional instruments entrench the right to life including the Constitution of Botswana. Section 4 thereof unambiguously protects the individual right to life. Despite the protection of the right to life, the laws of Botswana also authorise the imposition of the death penalty thereby minimising the practical significance of the right to life.

In this presentation, it is intended to examine the law in relation to the death penalty in Botswana in order to find out whether or not international normative standards could be utilised to inform national legal norms and ultimately influence it in abolishing the death penalty. As a matter of fact, Botswana is signatory to most international human rights instruments that protect the right to life and is thus legally obliged to respect and protect this right. The presentation will also examine judicial practice in the country in relation to the imposition of the death penalty in order to find out the trend in country, that is, whether the courts are merely effectuating the law or whether there is observable evidence that they may ultimately render it unconstitutional. Finally, the presentation will put forward a case for change in the law arguing that in this modern era the death penalty is anachronistically unwarranted and should be abolished.

I. INTERNATIONAL LAW PERSPECTIVE: A GENERAL OVERVIEW

Discourses about the death penalty or capital punishment invariably bring into play the issue of the right to life. This right is recognized and protected in various international human rights instruments. The Universal Declaration on Human Rights, 1948 provides that ‘everyone has the right to life’¹. A more extensive protection is contained in the International Covenant on Civil and Political Rights, 1966 in which it is provided that ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life’.² At a regional level, the right to life is protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 1950 in the following terms ‘Everyone’s right to life shall be protected by law. No one shall be deprived of life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.’³ Analogous safeguards are embodied in the American Convention on Human Rights (AMR), 1969,⁴ and the ACHPR.⁵

It is clear that although phraseologically the protective clauses in these instruments are cast differently, they nonetheless recognize that the right to life as an inalienable right. It is the supreme right of the human being. It is a right from which all other rights emanate. As has been observed, ‘The inviolability or sanctity of life is, perhaps, the most basic value of modern civilization. In the final analysis, if there were no right to life, there would be no point in the other human rights.’⁶ This right is basic to all human rights and it constitutes the ‘irreducible core of human rights.’⁷ Importantly, the right to life is non-derogable even in time of public emergency, which threatens the life of the nation. It has even been suggested that this right has crystallized into customary international law.

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¹ art 3. For a discussion of this article see generally Jayawickrama, N. *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge 2002) pp239-95.

² art 6(i). See generally Jayawickrama, *ibid*.

³ art 2(1)

⁴ art 4(1)

⁵ art 4.

⁶ Dinstein, Y, ‘The Right to life, Physical Integrity and Liberty in Henkin, L. (ed) *The International Bill of Rights: the Covenant on Civil and Political Rights*, (Columbia University Press, New York 1981) 115.

⁷ See Judge Weeramantry, *Legality of the threat or use of Nuclear Weapons*, advisory opinion, ICJ Rep. 1996, 226 at 506.

It is worth observing that the ICCPR refers to the right to life as inherent to every human being. This presupposes that the right to life pre-existed in moral order and perhaps in an immutable *jus naturale*. It derives its validity from natural law and individuals enjoy this right qua human.

However, one point that emanates from the various protective clauses on the right to life is that they recognize that the right to life may be limited under certain circumstances or rather individuals' lives may be taken away from them. This is aptly captured by Section 6 of the ICCPR which states that 'no one shall be arbitrarily deprived of his life intentionally save in execution of a sentence of a court.' This means that the life of an individual may be taken away provided it is not arbitrary; this means when the taking of life is sanctioned by law.⁸ Under these circumstances the right to life may be limited. This raises the question of capital punishment.

II. CAPITAL PUNISHMENT IN INTERNATIONAL LAW

The question that arises here is whether international law generally and international human rights law prohibit capital punishment. It has to be noted that in its early development, international law generally did not expressly outlaw the death penalty.⁹ The issue was left to be dealt with by the national legal system of individual states particularly among European countries.¹⁰ The United Nations Charter (UN Charter) whilst recognizing and encouraging respect for human rights and fundamental freedoms for all without any discrimination whatsoever does not outlaw the death penalty¹¹; so too the UDHR and ICCPR. The latter instrument recognizes implicitly that the death penalty may be imposed but only where it is not arbitrary. This is similarly deducible from the regional instruments for the protection of human rights.¹² Thus for a considerable period of time international law did not ban capital punishment absolutely.

Attempts to outlaw the death penalty in international law were made in the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, 1989.¹³ In terms of the preamble to the Protocol, States Parties have taken an international commitment to abolish the death penalty. This is premised on the notion that the abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights. In terms of the Protocol, 'no one within the jurisdiction of a state party to the present protocol shall be executed.'¹⁴ It further obliges each state party to take all necessary measures to abolish the death penalty within its jurisdiction.'¹⁵

The Protocol marks an important milestone in the protection of human rights as it recognizes that the imposition of the death penalty is a flagrant violation of the right to human dignity. It sets the foundation for countries to abolish the penalty of death. However, what is striking about the Protocol is its lack of total outlawing of the death penalty in international law in positive terms. It only prohibits the execution of individuals within the jurisdiction of member states and calls upon them to take necessary measures to abolish the death penalty. These measures include inter alia, legislative, administrative and institutional means. Thus, the language of the Protocol is reflected in the voting of the General Assembly with 59 voting for the Protocol, 26 against and 48 absenting. The majority of states still do not want to abolish the death penalty. This notwithstanding, it is a positive step in the drive towards abolition of capital punishment.

III. THE RIGHT TO LIFE AND THE DEATH PENALTY IN BOTSWANA

A. Protective Clauses

⁸ Dinstein, *ibid*, 116.

⁹ Schabas, A. William, *The Death Penalty as Cruel Treatment and Torture: Capital Punishment Challenged in the World's Courts* (Northeastern University Press 1996) 13-15

¹⁰ UN Charter, arts 1(3) 13(1)(b) 55(c)

¹¹ art 1 (3)

¹² ECHR, ACHPR and AMR

¹³ The Protocol was adopted by the General Assembly of the United Nations on 15 December 1989 with 59 votes in favour, 26 against and 48 absenting. It entered into force on 11 July 1991. See Brownlie, *Basic Documents in International Law*, (5th edn Oxford University Press, 2002) pp302-6.

¹⁴ art 1 (1)

¹⁵ art 1(2)

The starting point here is to note that the right to life is recognized and protected under the domestic law of Botswana. According to Section 4(1) of the Constitution 'No person shall be deprived of his life intentionally save in the execution of the sentence of the court in respect of an offence under the law in force in Botswana of which he has been convicted.'¹⁶ This clause does not protect the right to life in positive terms. It protects this right in negative terms by merely preventing the intentional deprivation of life. This contrasts starkly with provisions in international human rights instruments especially the ACHPR and ECHR. Respective Articles 4 and 2 of both Conventions protect the right to life in positive terms.

As under the ACHPR and ECHR, the right to life in Botswana is recognised and protected subject to limitations. However, the ACHPR does not specify instances under which this right may be limited. It only prohibits arbitrary deprivation of the right to life. Section 4(a) to (d) of the Constitution of Botswana recognises that this right may be violated in the execution of a sentence of the court, in self-defence, to suppress a riot or prevent the commission of an offence. This clause corresponds to Article 2(2) (a) to (c) of the ECHR.¹⁷ These exceptional instances ensure legality when deprivation of life is contemplated. This means that these exceptions should be narrowly interpreted in order to protect life.

Despite phraseological technicalities, the Botswana right to life clause, in line with international law, firmly protects the right to life. It implicitly incorporates international standards for the protection of the right to life into the municipal law of Botswana. It further imposes a legal obligation on Botswana to protect this right. The practical importance of this clause is, however, minimised by the institution of the death penalty.

B. *The Death Penalty*

As indicated earlier on, attempts to outlaw the death penalty at an international level have been made by Article 1(1) of the Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty. However, in Botswana, as in many other countries, capital punishment is a legally permissible and competent sentence.

The Penal Code of Botswana explicitly and unambiguously declares that 'any person convicted of murder shall be sentenced to death.'¹⁸ Capital punishment is reserved only for most serious offences such as murder, treason¹⁹ and murder committed in the process of committing piracy.²⁰ In terms of Section 26(1) of the Penal Code, execution is by hanging. In order to limit circumstances under which it may be meted out, the death sentence cannot be imposed on persons below eighteen years²¹ and pregnant mothers.²² It also may not be imposed where there are extenuating circumstances such as provocation, intoxication, youthfulness and absence of actual intention to kill.²³

¹⁶ See Lindholt, *Universality of Human Rights*, (Dartmouth Publishing UK 1997) at 94-7; Maope, *Human Rights in Botswana, Lesotho and Swaziland: A survey of the Boswela Countries* (Institute of South African Studies 1986). The Right to life is also recognised along with other rights by the preambular s 3 of the Constitution of Botswana entitled 'Fundamental Rights and Freedoms of the Individual.'

¹⁷ Generally, see Harris, Mowbray and O'Boyle *Cases and materials on the European Convention on Human Rights* (Butterworth's 1999) 45-54. Also, see Barnett, *Constitutional law* (Cavendish Publishing Ltd, 2000) 381-2; Novak, *U.N. Covenant of Civil and Political Rights* (Kehl am Rhein: NP Engel, 1993) 105

¹⁸ Penal Code, Laws of Botswana, c 08:01, s 203 (1). See generally Nsereko, DDN 'Extenuating circumstances in capital offences in Botswana' (1991) 2 *Criminal Law Forum* 235 239-59. Lindholt, *Universality of Human Rights*, (Dartmouth Publishing UK 1997) 97-9

¹⁹ Penal Code, Laws of Botswana, c 08:01, s 34(1).

²⁰ *ibid*, s63 (2).

²¹ *ibid*, s 26(2).

²² *ibid*, s 26(3). See also Criminal Procedure and Evidence Act, Laws of Botswana, c 08:02, s 298(1).

²³ Other factors which the court can take into consideration are factors, not too remote or faintly or indirectly related to the commission of the crime, which bear upon the accused's moral blameworthiness in committing it. These factors include ill-treatment of an employee, ailments such as epilepsy and economic plight. See Nsereko, 'Capital Offences in Botswana' 244-60; *State v. Lathe*, Criminal Trial No. F2/1990 (1 March 1991) (unreported).

It is apposite to note that although international human rights standards have been invoked and relied on to challenge the constitutionality of the death penalty in Botswana, the judiciary has exercised extreme restraint to outlaw it. One of the cases in which it was challenged is *Molale v. The State*.²⁴ The appellant was convicted by the High Court of Botswana of murdering his girlfriend by inflicting fatal blows on her with an axe. He was sentenced to death. On appeal to the Court of appeal, he argued, amongst other things, that the death penalty imposed on him by the High Court violated his constitutional right to life and, anachronistically, it was an antediluvian and barbaric penalty. Although the Court of appeal reduced the sentence to fifteen years imprisonment on different grounds, it, however, failed to pronounce on the constitutionality of the death penalty. The Court, per Aguda, J.A., merely held that ‘following upon the conclusion to which I have arrived as regards the sentence of death, it is no longer necessary for me to consider either of the two grounds filed by Mr Morotsi as regards capital punishment.’ The pertinent ground read that ‘the method of execution of the appellant ordered by the learned judge as prescribed by Section 203(1) of the Penal Code was anachronistic, antediluvian and barbaric.’

On pure legal technicalities, the Court was justified in not considering the issue of capital punishment. However, capital punishment is an important and topical issue in Botswana on which the view of the highest court in the country is necessary and would influence public opinion. In fact, this case is one of the few cases where the issue was specifically raised. Moreover, the argument that the death penalty is antediluvian and barbaric was an implicit invitation to the Court to take into account international normative standards in determining its constitutionality. But the Court decided the issue mainly on the basis of national law and declined to adjudicate its constitutionality.

Capital punishment was also an issue in *Mosarwana v. State*.²⁵ The appellant, on substantial evidence, was convicted of murdering the deceased for calling him a thief. The High Court sentenced him to death in accordance with Section 203(1) of the Penal Code. It also found that there were no extenuating circumstances and in accordance with Section 26(1) of the Penal Code, ordered that the appellant be hanged. On appeal to the Court of Appeal, the appellant argued, inter alia, that Section 203(1) permitting the death penalty was ultra vires the Constitution since Section 4 thereof prohibits the intentional taking of life. The Court failed to analyse the general import and content, and the precise limits of Section 203(1). It merely held that, on proper construction, Section 203(1) prescribing the death penalty was not inconsistent with and thus not ultra vires, the Constitution. The Court noted that, while there was international sentiment, as reflected at the United Nations, to abolish the death penalty, it could not rewrite the Constitution in order to give effect to such sentiment. Its function in the interpretation of the Constitution was adjudicatory and not legislative. Relying strictly and narrowly on national law and jurisprudence, the Court confirmed the death sentence. It is submitted that this case presented an opportunity for the Court to utilise international human rights norms to determine the constitutionality of the death sentence. If it had adopted this approach, it would have found out that current thinking on the international plane is increasingly moving towards the abolition of the death penalty. Also, the approach would have influenced the Court to reach a different conclusion and if need be substitute the death sentence with a term of imprisonment.

The death penalty was also a contentious issue in *State v. Ntesang*.²⁶ The appellant was convicted of murder and sentenced to death by hanging. He appealed against the sentence on the grounds, inter alia, that the death penalty breached the constitutional right to life clause. The Court of Appeal dismissed the appeal and confirmed the death sentence imposed by the High Court. It thus refused to declare capital punishment unconstitutional. However, the Court took judicial notice of developments to abolish the death sentence at the international level and invited parliament to consider effecting appropriate changes at national level. It, nevertheless, refused to use these developments to determine the constitutionality of capital punishment and if need be outlaw it.

²⁴Criminal Appeal No. 56/1994 (CA) (unreported).

²⁵ [1985] B.L.R. 258.

²⁶ [1995] L.R.C. (Const) 338.

These pronouncements clearly demonstrate judicial restraint in Botswana to invoke and rely on international human rights standards to outlaw the death penalty. This form of restraint is an indirect judicial confirmation of the classical dualist theory that international and national law are distinct legal orders each governing a different legal sphere.

It is important to note that Botswana has not signed the Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty, or the ICCPR. It is, therefore, not legally obliged to outlaw the death sentence or submit reports under both Conventions to the Human Rights Committee.²⁷

Significantly, there is national debate about abolishing the death penalty. As will be discussed later in this presentation, this debate centres around two main approaches, abolitionism and retentionism.²⁸ Abolitionists such as human rights activists and defence lawyers contend that evidence is lacking that capital punishment deters crime and as such it should be abolished. Retentionists especially members of the public and a few politicians, on the other hand, defend capital punishment as a deterrent. They argue that although capital punishment does not prevent crime, it has a deterrent effect.

There seems, however, to be no easy solution to this debate. Seemingly, capital punishment in Botswana will continue to be lawful and permissible for some time. This is because the debate is both emotionally and politically charged, and the greater part of the public does not appear to be ready to endorse its abolition. It is submitted that the gradualist approach is the only preferable approach, at least, at the present time. Significantly, capital punishment has been sparingly imposed. According to an Amnesty International Report, in 1995 only one man whose death sentence was confirmed by the Court of Appeal was awaiting execution, two men convicted of murder and sentenced to death had their death sentences set aside by the Court of Appeal and another man's death sentence, Boiki Mokholo, was commuted to a fifteen-year prison term.²⁹

IV. DISCOURSES ON THE DEATH PENALTY: EXTRA-LEGAL CONSIDERATIONS

There is worldwide debate on the desirability of the death penalty.³⁰ The debate has also taken place in Botswana. The discourse on the imposition of the death penalty has centred mainly on deterrence, retribution and errors in murder trials.

A. *Deterrence Role*

The death penalty has been defended as being a deterrent. Its proponents have argued that the death sentence deters would-be offenders from committing murder. This fundamental assumption of the criminal justice system contends that punishing criminals discourages other potential offenders from committing crime.³¹ It therefore seeks to be preventative of crime commission. Supporters of capital punishment contend that the notion of deterrence is based on the fear that since death is feared most, the imposition of this form of penalty will deter potential offenders. However, the counter proposition to deterrence has been that murder is often an impulsive act and that people who commit murder never think about punishment before committing crime. Consequently, opponents of the death penalty argue that those who engage in murder are singularly unlikely to be deterred by the threat of execution and as

²⁷ arts 3 and 40 of the Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty and the ICCPR respectively oblige states parties to submit reports to the Human Rights Committee on the measures they have adopted to give effect to both Conventions.

²⁸ See generally Nsereko, (n 18) 'Capital Offences in Botswana,' at 235-68; Barry and Williams, 'Russia's Death Penalty Dilemmas,' 8 *Crim. L. Forum* 231 (1997). 248-58. The mid-way approach to capital punishment is gradualism. This approach advocates the gradual and step by step elimination of the death penalty. Its rationale is based on the reduction of the number of crimes in respect of which the death penalty may be imposed. See Barry and Williams, *ibid*, at 256.

²⁹ Amnesty International 1997 Report, 'Botswana' at 95-6. See also Takirambudde, 'Botswana,' in Baehr et al, *Human Rights in Developing Countries* (Kluwer Law International The Hague 1996)139; Granberg and Parkinson, *Botswana Country Study and Norwegian Aid Review*, (Chr. Michelson Institute Bergen 1988) at 333.

³⁰ See generally Latzer, B., *Death Penalty Cases: Leading US Supreme Court Cases on Capital Punishment* (Butterworth-Heinemann 1997) 12-18.

³¹ Latzer, *ibid*, p.12; Nsereko, D.D.N, 'Extenuating Circumstances in Capital Offences in Botswana,' (1991) *Criminal Law Reform*, Vol.2, No.1, 235 239.

such it should be abolished. The abolitionists contend that instead of execution, other alternative forms of punishment such as life imprisonment should be employed. It is submitted that whatever the merits of each of these opposing assertions, the factual situation in Botswana is that despite the existence of the death penalty in the statute books, murder cases are on the increase. In fact, this notwithstanding, in the past few years a number of people have been executed including in the famous Marietta Bosch case. It would therefore appear that the deterrence function of the death penalty is not altogether working or is rather ineffective.

B. Retribution

It has also been suggested that the death penalty should be viewed from the point of view of retribution. The essence of the retributivist argument for the penalty is that some crimes are so heinous, so revolting and so profoundly reprehensible that only the severest constitutionally acceptable penalty for the perpetrator should be used.³² However, the opponents of capital punishment argue that life without parole is more than sufficient to the task. It is contended by this camp that execution is an act of violence and that violence tends to beget violence. Moreover, execution brutalises those involved in imposing the death penalty and carrying it out.³³ Therefore, in order to avoid this situation, the penalty should not be sanctioned by law and thus be imposed on offenders.

C. Erroneous Execution

Capital punishment has also been attacked based on the argument that there is always a possibility that mistakes in murder proceedings may occur resulting in innocent people being executed and as such the penalty should be abandoned. As Nsereko has poignantly noted, 'Opponents of the penalty also point out that death, an irrevocable penalty, may be imposed on the innocent...the penalty of death cannot be imposed, given the limitations of our minds and institutions, without considerable measures of arbitrariness and of mistake.'³⁴ The retentionists have rebutted this argument in two ways. First, contemporary murder trials have many safeguards that minimise chances of wrongful executions. It should be immediately pointed out here that these safeguards cannot be absolutely guaranteed in all murder trials, not only in Africa but also elsewhere. Legal systems, for a variety of reasons, may not make these safeguards readily available. Second, even if there is a risk that some innocents may be executed, the risk is outweighed by the many advantages of maintaining the death penalty such as deterrence. It is contended that in any criminal proceedings mistakes are bound to happen. Thus no criminal trial is immune from imperfections, which lends credence to the assertion by the opponents of the death penalty that its imposition may result in innocent individuals being executed especially in view of the irrevocability of the penalty.

V. PUBLIC PERCEPTION: THE ROLE OF CONSERVATISM

In Botswana, as in many other jurisdictions, the issue of the death penalty can be approached from another angle: conservatism/traditionalism. Generally speaking, the great majority of people in the country have an imbedded and deep-rooted traditional belief that capital punishment is an appropriate penalty for murderers or killers. There is strong feeling amongst the people that a person who kills must also be killed. There is no other way of explaining this belief other than saying it is conservatism. The belief became apparent recently with the hanging of Marietta Bosch. Despite attempts by Botswana Centre for Human Rights (Ditshwanelo) that the appellant should not be hanged, the public was very clear that she should be hanged. This attitude was echoed or even reinforced by the President in his BBC Hardtalk Interview with Tim Sebastian after the execution of Marietta Bosch where he asserted that there was nothing that he could do in terms of granting clemency since the law and the people are in favour of the death penalty. Unless and until these conservative attitudes are changed calls for the abolition of the death penalty will go unheeded.

VI. LACK OF LEGAL AID SERVICES

³² Latzer (n 30) p.13.

³³ Nsereko (n 31) p.239.

³⁴ Ibid, at p.240.

There are a number of problems associated with the murder trials in the country. These problems not only affect the conduct of trials and their outcomes but they may have a bearing on whether or not to abolish the death penalty. One such problem is that there is no general scheme of legal aid in Botswana to assist individuals to pay the high fees charged by lawyers. This means that for those who cannot afford the fees of a lawyer in murder cases, consequently they do not adequately defend their cases in court. There is the Legal Clinic which is part of the Law Department of the University of Botswana. The aim of the Legal Clinic is assist those individuals who cannot afford a lawyer to take their cases to court and represent them. However, the Clinic suffers from severe financial constraints.

It should be noted that for murder cases, the Registrar of the High Court instructs lawyers to represent indigent accused and pays them a token fee. The problem with this arrangement is that the money given to these lawyers is very small and most experienced lawyers instead of representing the accused pass on the cases to junior attorneys with little or no experience. The result is that the accused do not get adequate legal representation especially where the case is very complicated and involves technical and substantial evidence.

VII. CONCLUSION

The death penalty is the severest of the sentences imaginable. In fact, it is the ultimate penalty that can be meted out by any court. Moreover, it is irreversible. It is therefore crucially important that attempts should be made at the international level to completely abolish it. Whilst the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty is an attempt to ultimately abolish this penalty in international law, the Protocol does not go far enough. It does not declare it illegal or unlawful in international law. This probably explains why so many countries such as Botswana have not seen the need to outlaw it in municipal law. If and when it is completely outlawed in international law, it is submitted countries could be influenced to abolish it in their national legal systems. It is worth-noting that defending the penalty based on such arguments of deterrence and retribution has been an exercise in futility because murder cases worldwide continue to increase. Certainly in Botswana, the death penalty has not deterred criminals. Its retention is based more on the traditional if not conservative belief that those who kill must also be killed. This approach serves no practical purpose. It has not worked. It therefore makes it all the more necessary to completely abolish the penalty in Botswana national law. In modern times especially now that Botswana has been crowned as a bastion of democracy and human rights protection, it is submitted that the death penalty is anachronistically unwarranted and should be completely abolished in national law.