

THE DEATH PENALTY IN BOTSWANA: TIME FOR A RE-THINK?¹

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An Introduction to the Death Penalty in Botswana

Current statistics show that by the end of 2015, 102 countries had abolished the death penalty. This represents more than half of all nations. Out of 55 countries in Africa, 36 retain the death penalty in their books but the majority of these are abolitionist in practice, only 11 nations continue to execute prisoners. Most of Botswana's neighbours are abolitionists: South Africa and Namibia by law, Zambia in practice. Zimbabwe, Lesotho and Swaziland are the only other countries to retain the use of the death penalty in Southern Africa.

There were 39 executions for capital crimes in Botswana from its independence in 1966 until 2006.³ A further seven executions occurred from 2007 to 2011, bringing the total number of persons executed to 46 at the end of 2011.⁴ With 2 executions reported in 2012, one in 2013, and the execution of Patrick Gabaakanye in May 2016, the number of executions since independence is 50, one for every year of independence.⁵

The death sentence has been a part of Botswana's legal culture since time immemorial. Prior to the colonial era, customary law, *ngwao ya Setswana* or *mekgwa le melao ya Setswana* (customs and usages of Setswana), applied to the Tswana tribes living in the territory.⁶ The Chief could impose the death penalty as punishment for murder, sorcery, incest, bestiality and conspiracy.⁷

Botswana became a British protectorate in 1885.⁸ With the creation of a protectorate came the reception of Roman-Dutch common law in 1891, the law in force in the Cape of Good Hope.⁹ The common law and statutes applicable in the Bechuanaland Protectorate became those in force in the Cape of Good Hope as at 10 June 1891. There was no written criminal code in the Cape of Good Hope at the material time.¹⁰ The general criminal law received into the Bechuanaland Protectorate

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- 3 See <http://www.ditshwanelo.org.bw> and <http://www.handsoffcain.info> (last accessed: 217 November 2016).
- 4 "Death penalty statistics, country by country" *The Guardian* (2012) <http://www.theguardian.com/news/datablog/2011/mar/29/death-penalty-countries-world> (last accessed: 17 November 2016).
- 5 Cornell Centre on the Death Penalty Worldwide *Death Penalty Database* (last updated: 15 November 2016) <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Botswana> (last accessed: 17 November 2016).
- 6 A Molokomme "Customary Law in Botswana: past present and Future" in S Brothers, J Hermans and D Nteta (eds) *Botswana in the 21st Century: proceedings of a symposium* (1994) 347, 348.
- 7 I Schapera *A handbook of Tswana law and custom* 2nd ed (1994) 49.
- 8 Proclamation No. 1, British Bechuanaland (30 September 1885).
- 9 General Administration Proclamation by the British High Commissioner in the Cape of Good Hope (10 June 1891) section 19.
- 10 DDN Nsereko "Extenuating circumstances in capital offences in Botswana" (1991) 2(2) *Criminal Law Forum* 235, 236 to 237.

was in the form of unwritten Roman-Dutch common law rules, also referred to as Cape colonial law.¹¹ The criminal law offences recognised in the new protectorate were those recognised at the Cape prior to 10 June 1891. The death penalty was received into the Protectorate as part its general criminal law. The Cape colonial law remained in force until a Penal Code was promulgated for Botswana in 1964.¹² Section 2 of the Penal Code stated that "...after the commencement of this law, the unwritten substantive criminal law in force in the Cape Colony of Good Hope of 10 June 1891 shall no longer be of force in the territory."¹³ This provision effectively abolished the common law crimes in Botswana.¹⁴ However, the death penalty survived this abolition and was retained as a method of punishment under the Penal Code. The sole method of execution prescribed in Botswana is hanging.¹⁵

Between 1891 and 1934, Roman-Dutch common law existed side by side with the customary law. Initially, this was not problematic as the received law was intended to apply only to the European population since the High Commissioner had been enjoined to respect native law and custom.¹⁶ As time went on native matters increasingly came under the jurisdiction of the new common law courts of the territory and aspects of the Roman-Dutch common law began to apply to the indigenous population.¹⁷ By the turn of the century, the British administration was beginning to make inroads into the chief's jurisdiction in criminal matters.¹⁸

In 1934, the High Commissioner issued Proclamation 75 of 1934 wherein he curtailed the chief's powers to try treason, sedition, murder or attempted murder, culpable homicide, rape or attempted rape, currency offences, perjury, subversion of the chief or sub-chief and any offences created by statute in the territory in native tribunals.¹⁹ The offences of murder and the offence of challenging the chief's authority²⁰ had always attracted the death penalty. With this proclamation, the chiefs were stripped of their power to impose the death penalty and the punishment was imposed solely by common law courts. *Kgosi* Tshekedi and *Kgosi* Bathoen II challenged Proclamation 75 of 1934, as well as Proclamation 74 of 1934 which also severely limited the powers of chiefs at the Privy Council without success.²¹

11 B Forster "Introduction to the History of the Administration of Justice of the Republic of Botswana" (1981) 13 *Botswana Notes and Records* 89, 91.

12 B Othogile *A history of the higher courts of Botswana* (1994) 4.

13 Republic of Botswana Penal Code (2 of 1964) section 2 (This section was omitted beginning with the 2002 version of the Penal Code, being replaced by the current section 3 "...no person shall be liable to punishment by the common law for any act.")

14 *Id* section 4, abolishes the reign of Roman-Dutch common law by specifically providing that the Penal Code be interpreted in accordance with English legal principles.

15 Republic of Botswana Penal Code (Cap. 08:01) section 26; but see, Botswana Defence Force Act (13 of 1977) section 128(a) (allows the president to determine the manner of execution). Other methods of execution that have been used in other countries include electrocution, the administration of a lethal injection, death by firing squad and the gas chamber. See Death Penalty Information Centre "Methods of execution" (2016) available at <http://www.deathpenaltyinfo.org/methods-execution> (last accessed: 18 November 2016).

16 B Othogile *A history of the higher courts of Botswana* (1994) 3 – 4.

17 A Molokomme "The reception and development of Roman-Dutch law in Botswana" (1985) 1(1) *Lesotho Law Journal* 121, 124.

18 A Molokomme and B Othogile "Legal Developments in Botswana since independence" (1989) 6 *Pula - Botswana Journal of African Studies* 17, 18.

19 Bechuanaland Protectorate Proclamation No. 75 of 1934, section 8(1).

20 This offence is characterised by serious insubordination, rebelliousness, disobedience or defiance to the chief.

21 *Khama and Another v High Commissioner* (1926-1953) HCTLR 9. For a full discussion of the decision see B Othogile "Tshekedi Khama and Another v High Commissioner: The making of the court" (1993) 25 *Botswana Notes and Records* 29.

Public attitudes towards the death penalty in Botswana remain largely sympathetic and supportive.²² This may be because the views of many are formed by traditional or customary attitudes towards crime and punishment and many see nothing objectionable with the imposition of the death penalty.²³ The death penalty has, after all, been part of Botswana's legal history for over a 100 years. Public attitudes in support of the death penalty have strengthened in the wake of the perception that Botswana's neighbour, South Africa, suffers a high rate of serious crimes like murder and armed robbery partly because criminal elements do not face the possibility of capital punishment.²⁴ For instance, a series of *Kgotla* meetings conducted by the Botswana National Assembly Parliamentary Law Reform Committee in 1996 and 1997 found that the majority of citizens expressed support for the retention of the death penalty.²⁵ The government often relies on the reports of the Parliamentary Law Reform Committee to explain its retentionist stance.

The Death Penalty Preserved in the Constitution

Section 7(1) of the Constitution outlaws torture, and cruel and inhuman punishment; however, section 7(2) of the Constitution makes an exception with regard to punishments that were lawful in the country prior to promulgation of the Constitution. Section 7(2) of the Constitution provides:

“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was lawful in the country immediately before the coming into operation of this Constitution.”

The framers of the Botswana Constitution anticipated that its legality may be challenged on the basis of section 7(1) and had the foresight to include a savings clause to preserve the death penalty.

The death penalty in Botswana is the punishment prescribed for murder without extenuating circumstances,²⁶ treason,²⁷ piracy,²⁸ grave breaches of the Geneva Conventions,²⁹ and certain military offences.³⁰

The only other place where similar constitutional arrangements exist preserving the death penalty in a country's Constitution is in the commonwealth Caribbean.³¹ The unique challenge that this presents is that it becomes virtually impossible to use constitutional litigation to strike down the death penalty.

22 See K Frimpong “The death penalty in Botswana” *BIICL* (2004) 4, available at http://www.biicl.org/files/2193_country_report_botswana_frimpong.pdf (last accessed: 27 November 2016); “The Botswana Centre for Human Rights Benchmark Report on Death Penalty within selected SALAN Member States (Malawi, South Africa, Zimbabwe and Botswana)” *Ditshwanelo* (2015) 17, available at <http://www.ditshwanelo.org/bw/publications.html> (last accessed: 27 November 2016).

23 OB Tshosa “The death penalty in Botswana in the light of international law: The case for abolition” *BIICL* (2004) 6 available at http://www.biicl.org/files/2216_tshosa_death_penalty_botswana.pdf (last accessed: 20 January 2016).

24 Botswana National Assembly Law Reform Committee “Minutes of the Law Reform Committee on Capital Punishment, Public Service Act and Cohabitation January 1996 – September 1997 Annex II” 1997.

25 *Id.*

26 Penal Code of Botswana (2 of 1964) sections 202 and 203.

27 *Id.* sections 34(1) and 35.

28 *Id.* section 63.

29 Geneva Conventions Act, Cap 39:03 of the Laws of Botswana, section 3(1)(d)(ii).

30 Botswana Defence Force Act, Cap 21:05 of the Laws of Botswana, sections 27 - 29.

31 Q Whitaker “Challenging the death penalty in the Caribbean: Litigation at the Privy Council” *Against the death penalty: International initiatives and implications* (2008) 104.

Attempts to Challenge the Constitutionality of the Death Penalty

The constitutionality of the death penalty has been challenged in several decisions in Botswana. In *Molale v State*,³² the first case raising a constitutional challenge to the death penalty, the Court of Appeal was also asked to consider whether hanging was anachronistic, primitive and barbaric and, whether the death penalty was inhuman, degrading and unconstitutional. The Court did not deal with the constitutional questions as it overturned the capital sentence on other grounds.

In the same sitting of the Court of Appeal in 1995, the same justices of appeal³³ heard the decisive case of *Ntesang v State*.³⁴ The Court of Appeal had to decide whether the imposition of the death sentence for murder without extenuating circumstances was *ultra vires* the Constitution. First, the appellant argued that the death penalty is anachronistic, antediluvian and barbaric. Second, that hanging as a form of carrying out the death penalty constitutes torture, and inhuman and degrading treatment and third, that provisions of the Penal Code permitting the death penalty were unconstitutional and therefore null and void.

With respect to the first issue, the Court of Appeal accepted that many countries, including some African States regarded the death penalty as anachronistic, antediluvian and barbaric. However, the Court of Appeal pointed out that there were many other nations, like Botswana, that had yet to abolish the death penalty. The Court of Appeal took the view that the first point was not decisive of the issue before the Court. The Court considered that the question of amending Botswana's laws to be in step with the international community was not a matter for it but for the legislature stating:

“Of course this Court, as well as other institutions of government of this country cannot and should not close its ears and eyes to happenings in other parts of the world and among the international community to which we belong. But this Court must keep within the role assigned to us as a purely adjudicatory and not legislative body under the Constitution which is the basic law of this country; and it is the interpretation of that basic law that we are called upon to decide in these proceedings.”³⁵

On the issue of whether the death penalty amounts to cruel and inhuman punishment contrary to section 7(1) of the Constitution, the Court of Appeal held that in the absence of very compelling reasons, it could not hold that one provision of the Constitution is contradictory and opposed to another, and hence refuse to give effect to the one in favour of the other. The Court of Appeal had no power to re-write the Constitution in order to give effect to progressive movements taking place world-wide.³⁶

On the issue of whether the provisions of the Penal Code prescribing the death penalty were beyond the powers granted by the Constitution, the Court of Appeal took issue with the appellant's position that the provisions of the Penal Code prescribing the death sentence contradicted sections 3 and 4 of the Constitution that guarantee the right to life. The Court noted the exception to

32 1995 BLR 146 (CA).

33 Aguda JA, Lord Wylie JA, Steyn JA, Tebbutt JA and Lord Cowie JA.

34 1995 BLR 151 (CA).

35 *Id.*

36 *Id.*

section 4(1) of the Constitution that clearly sanctioned the death penalty.³⁷

The question of legality of the death penalty was raised again in *Ditshwanelo and Others v Attorney General and Another*,³⁸ a case filed by Ditshwanelo on behalf of two death row inmates. The case was filed against the Attorney General, seeking a stay in execution. The Court of Appeal reaffirmed the decision in *Ntesang* but left the door open for Ditshwanelo to approach the Court on the question should new constitutional matters arise.³⁹

Constitutionality of the death penalty was challenged once again in *Kobedi v State (2)*.⁴⁰ Citing the *Ntesang* decision with approval, the Court of Appeal stated it had, in a full bench decision, pronounced on the constitutionality of the death penalty and held that it is not unconstitutional and that the method of execution, hanging, was not *ultra vires* the Constitution. This challenge also failed.

However in 2004, almost ten years after *Ntesang*, the High Court was presented with a new constitutional question when it was asked in *State v Masoko*⁴¹ to rule on the constitutionality of the mandatory death penalty. After finding the accused guilty of murder without extenuating circumstances, the only sentence available to the Court was a mandatory death sentence.⁴² The Court considered that its judicial discretion to determine a suitable penalty to fit the crime was entirely circumscribed and restricted by the Penal Code which precluded the consideration of mitigating factors.⁴³

The Court found this sentencing scheme for murder without extenuating circumstances to be arbitrary.⁴⁴ Motswagole J held that section 203 of the Penal Code was unconstitutional.⁴⁵ The effect of *Masoko* was to outlaw the mandatory death sentence in Botswana where an accused is convicted of murder without extenuating circumstances. The *Masoko* matter was taken on appeal by the State. The Court of Appeal overturned the High Court decision on the constitutionality of the mandatory death penalty, reaffirming that even mandatory capital sentences are constitutional in Botswana.⁴⁶ *Ntesang* remains binding precedent on the constitutionality of the death penalty in Botswana.

Challenges to Abolition of the Death Penalty

The abolition of the death penalty in Botswana continues to be a subject of debate. Current hurdles towards this goal include the constitutional savings clause, public opinion in support of the death penalty, inadequate legal representation of accused persons in capital cases, the clemency process, and secret executions. Each of these issues is examined in more detail below.

37 Constitution of Botswana, 1966, section 4(1).

38 1999 (2) BLR 56 (HC).

39 *Id* 62.

40 2005 (2) BLR 76 (CA).

41 CTHFT 000008–07 (unreported, cyclostyled judgment).

42 Penal Code, section 203(1).

43 *State v Masoko* CTHFT 000008–07 (unreported, cyclostyled judgment), 74 to 75.

44 *Id* 123.

45 *Id* 174 to 175.

46 *State v Masoko* CLCGB 058-14 (unreported).

The constitutional savings clause

The text of the Constitution makes it very difficult to bring a successful constitutional claim to abolish the death penalty in the courts of Botswana. The courts have clearly indicated that they are not empowered to re-write the Constitution and declare the death penalty unconstitutional. There may have been some headway made in finding the mandatory death penalty unconstitutional in the *Masoko* High Court decision, however, this decision has been overturned on appeal thus retaining the mandatory death penalty for murder without extenuating circumstances.

Public opinion

Public perceptions in Botswana are in favour of retaining the death penalty.⁴⁷ Public consultation of the nation with regard to the death penalty in the spirit of *therisanyo*⁴⁸ was conducted between January 1996 and September 1997 by the Parliamentary Law Reform Committee.⁴⁹ The minutes of the results of the consultation from *Kgotla* meetings country wide indicated overwhelming support for the death penalty.⁵⁰ Abolition of the death penalty would likely result in considerable public disquiet.

Adequacy of representations

The right to legal representation in Botswana is not absolute.⁵¹ An accused person has a right to legal representation of his choice at his own cost. The sole exception in criminal matters is capital cases. Where the accused faces the death penalty, he is entitled to legal representation. If he cannot afford a lawyer, the Registrar of the High Court appoints a *pro deo* attorney for the accused. The adequacy of *pro deo* counsel was raised as an issue in the *Kobedi (2)*⁵² case and the *Maauwe* and *Motswetla* cases.⁵³ The issue of adequacy of legal representation is one of concern in capital cases in Botswana. A report filed by the International Federation for Human Rights (FIDH) in conjunction

47 “Botswana unmoved on death penalty” *GabzFM* (30 January 2013).

48 PC Moumakwa “The Botswana *Kgotla* system: a mechanism for traditional conflict resolution in modern Botswana case study of the Kanye *Kgotla*” University of Tromsø Master Thesis (2010) 77 (“*Therisanyo* is very important in Botswana as a means of communication between the communities and the government. The government of Botswana usually consults people through *Kgotla* meetings organised by the chief. The chief is the ex-officio on government issues... Since independence, BDP [the ruling party] has been in power until now; the party leaders have adopted this way of discussing government policies and initiatives, developments etc... The president and the cabinet ministers usually go around each village addressing people at the *Kgotla* on any issue the public needs to know or to get the public opinion.”) available at <http://munin.uit.no/bitstream/handle/10037/3211/thesis.pdf> (last accessed: 20 January 2016).

49 Botswana National Assembly Law Reform Committee “Minutes of the Law Reform Committee on Capital Punishment, Public Service Act and Cohabitation January 1996 – September 1997 Annex II” 1997.

50 For instance, at the *Kgotla* meeting in the Lobatse Customary Court, the public indicated their support for the death penalty and urged government to minimise delays in execution and wasting public funds feeding condemned prisoners. Members of the public also lamented the South African experience with the abolition of the death penalty. At the Kanye *Kgotla*, The majority supported capital punishment as a deterrent with only one individual speaking against it. At the Tlokweneng *Kgotla*, the death penalty received support. It was proposed that capital trials be sped up and the death penalty be extended to rapists. At the Moshupa *Kgotla* meeting, one person spoke against the death penalty urging that it be replaced with life imprisonment. At the Jwaneng Customary Court, support for the death penalty was indicated with a request that it be extended to persons committing abortions. In Gaborone Babusi Ward *Kgotla* meeting, the death penalty received support with one person calling for a referendum on the matter.

51 See *Mathiba v State* 2010 1 BLR 711 (HC); *Makhura and Another v State* [1991] B.L.R. 104 (HC) 110 D-H.

52 2005 (2) BLR 76 (CA).

53 1999 (2) BLR 56 (HC).

with Ditshwanelo found that capital cases in Botswana were argued by inexperienced attorneys who lacked the necessary skills to defend persons facing the death penalty. Another concern raised was the low fees paid to attorneys in *pro deo* cases; there was little incentive to zealously represent clients and fully prepare for the time consuming cases. Attorneys in *pro deo* cases lacked the necessary resources to prepare for capital cases.⁵⁴

The clemency process

The clemency process in Botswana has been criticised as opaque and not transparent.⁵⁵ Ditshwanelo has taken issue with the process, as did the South African High Court in the *Tsebe* case.⁵⁶ One issue raised with the clemency process is the fact that the Attorney General is a member of the clemency committee; this creates a conflict of interest. Further, campaigners against the death penalty are dissatisfied with the provision of the law that allows the clemency committee to sit even with one of its members absent. The committee regulates its own procedure, which contributes to the opaqueness of the process.⁵⁷ Another area of concern is that there is no possibility of making oral submissions to the clemency committee. The clemency committee does not provide a written “decision” but merely makes a pronouncement that the application has been denied. The system has been criticised as broadly inadequate and in need of more transparency and independence.

Secret executions

Executions in Botswana have been carried out without notice to the condemned prisoners’ family, friends or attorneys. An example is the condemned prisoner Mr Ping. Ditshwanelo reported that Mr Ping’s family was not informed of his execution although there was opportunity to do so. Ditshwanelo maintained that the failure to inform the family of the date of the execution and the refusal to give the family access to the prisoner resulted in inhuman and degrading treatment and punishment for both the prisoner and his family.⁵⁸ In the case of *Interights application on behalf of Mariette Bosch*, the African Commission stated that the justice system must have a human face and allow the condemned prisoner to arrange his affairs and receive family and visits prior to his execution.⁵⁹

The Case for Abolition of the Death Penalty

The death penalty should be abolished for many reasons. This paper focuses on those most relevant for the Botswana legal and cultural context, which could benefit from a strengthening of its human rights culture.

54 FIDH and Ditshwanelo *The death penalty in Botswana: Hasty and secretive hangings: International fact finding mission* (2007) 21.
55 *Id* 26.

56 *Minister of Home Affairs and Others v Tsebe and Others and Amnesty International* (2012) ZACC 16.

57 In April 2016, the Botswana Guardian reported that a case was filed by Patrick Gabaakanye, who was on death row at the time, interdicting the President from signing his warrant of execution and seeking clarity on the procedure for clemency. “Death row inmate interdicts Khama – to stop him signing warrant of execution” *Botswana Guardian* (1 April 2016).

58 FIDH and Ditshwanelo *The death penalty in Botswana: Hasty and secretive hangings: International fact finding mission* (2007), 27.

59 *Interights et al (on behalf of Mariette Sonjaleen Bosch) / Botswana* ACHPR 240/01 (2003) para. 41 available at <http://caselaw.ihra.org/doc/240.01/> (last accessed: 28 November 2016).

The death penalty is no deterrent

There is a popularly held belief that the death penalty is an individual and general deterrent. However, empirical evidence does not support this argument. The death penalty is not an individual deterrent. Since the death penalty permanently incapacitates the prisoner, it cannot be proven that such a prisoner would have repeated the offence for which he was convicted had he not been executed.⁶⁰ In fact, evidence supports the view that the deterrent effect of the death penalty is no more effective than the deterrent effect of life imprisonment.⁶¹ This is because imprisonment also incapacitates the offender making it impossible for him to repeat the crime for so long as he remains in custody.⁶² The death penalty therefore runs the risk of being “nothing more than a purposeless and needless imposition of pain and suffering”.⁶³

With regard to general deterrence, Ancel notes that the abolition of the death penalty is never followed by a notable decrease in the incidence of the crime punishable by death.⁶⁴ In fact, crime rates are not lower in countries that have the death penalty.⁶⁵ This position is reiterated by Amnesty International which has stated that the death penalty has never been empirically proved to be a deterrent to crime.⁶⁶

The death penalty brutalises all those involved in the process

Amnesty International reports that the cruelty of the death penalty is suffered by the prisoner from the moment of conviction with some prisoners abandoning the appeals process resigning themselves to execution “as if it were some form of suicide”.⁶⁷ This is because the prisoner convicted to death is often treated differently from other prisoners. The ritual leading up to the execution is itself dehumanising to the prisoner. Preceding the death penalty, the prisoner may be placed in solitary confinement, the death warrant may be read out aloud, the prisoner may be placed under constant observation, and his property may be removed. The prisoner may be measured for clothing to be worn during the execution, the death certificate may be prepared with his knowledge and the prisoner offered a last meal.⁶⁸

In *Soering v United Kingdom and Germany*,⁶⁹ the European Court held that the death row phenomenon was contrary to the European Convention on Human Rights. In *Pratt and Morgan v Attorney General for Jamaica*⁷⁰ the Privy Council considered long post-trial detention and held that no one should be subjected to execution after waiting more than five years on death row. The

60 RJ Simon and DA Blaskovich *A comparative analysis of capital punishment: Statutes, policies, frequencies and public attitudes the world over* (2002) 41; “When the State kills: The death penalty v human rights” Amnesty International (1989) 5.

61 R Hood *The death penalty – a worldwide perspective* (2002) 209; V Streib *Death penalty in a nutshell* (2008) 17.

62 V Streib *Death penalty in a nutshell* (2008) 15.

63 *Coker v Georgia* (1977) 433 U.S. 584.

64 WA Schabas “The United Nations and the abolition of the death penalty” *Against the death penalty: International initiatives and implications* (2008) 14.

65 “When the State kills: The death penalty v human rights” *Amnesty International* (1989) 10.

66 *Id* 5.

67 *Id* 61.

68 *Id* 65.

69 (1989) 11 EHRR 439.

70 (1993) 4 All ER 769.

Court considered this to be cruel and inhuman treatment, contrary to the Jamaican Constitution.

Advocates against the death penalty state that capital punishment causes the State to be viewed as the perpetrator of violence against its citizens.⁷¹ The guards, chaplains, jurors, lawyers, judges, prosecutors, doctors and police officers that are required to participate in the execution often find it to be a traumatic and disturbing experience.⁷² Indeed, repaying death with death may not always be a fair punishment as society, in executing a prisoner, descends to the same moral depravity as the offender.⁷³

Hodgkinson states that victim's families are often ignored.⁷⁴ The death penalty perpetuates the pain and anger of the victim's family.⁷⁵ Victims' families suffer the extended process of the trial, conviction and execution of the offender for a capital offence. In capital cases, the victims' families report that they experience a shift of attention from the victim of the crime to the prisoner who perpetrated the offence often resulting in frustration and a feeling of disillusionment with the law.⁷⁶ On the other hand, the family and friends of the prisoner often suffer when a loved one is convicted, sentenced and executed. Often they are not afforded a chance to say goodbye. They are sometimes denied advance notice of the execution. They suffer grief at the death of the prisoner. They suffer humiliation at the manner of death of their loved one. They are also dejected as they have no way of preventing the execution.⁷⁷

The death penalty is imposed arbitrarily and may result in the execution of the innocent

The death penalty has been criticised as being too arbitrary and subject to error.⁷⁸ Amnesty International notes that it is not possible to achieve fairness, consistency and infallibility in any criminal justice process that determines who should live and who should die. The possibility of error is ever present due to the human frailty of judges, prosecutors and defence attorneys. Public opinion on particular cases may influence the decision-makers from arrest to clemency. Expediency and discretion also affect the mind of the decision-maker.⁷⁹

The death penalty should be abolished due to the risk of errors that could have affected the process of investigation, trial, conviction and clemency, which could then result in the execution of the innocent. Innocent persons have been convicted to death and subjected to the death penalty.⁸⁰ Abolition of the death penalty is the most effective way to avoid wrongful executions.⁸¹

71 "When the State kills: The death penalty v human rights" *Amnesty International* (1989) 67.

72 *Id* 67.

73 V Streib *Death penalty in a nutshell* (2008) 12 to 13.

74 P Hodgkinson "Capital punishment: meeting the needs of the families of the homicide victim and the condemned" *Capital punishment: Strategies for abolition* (2004) 332.

75 P Hodgkinson "Capital punishment: improve it or remove it?" *Capital punishment: Strategies for abolition* (2004) 1.

76 "When the State kills: The death penalty v human rights" *Amnesty International* (1989) 68.

77 *Id*.

78 RJ Simon and DA Blaskovich *A comparative analysis of capital punishment: statutes, policies, frequencies and public attitudes the word over* (2002) 47.

79 "When the State kills: The death penalty v human rights" *Amnesty International* (1989) 7, 9–10.

80 V Streib *Death penalty in a nutshell* (2008) 19.

81 "When the State kills: The death penalty v human rights" *Amnesty International* (1989) 31.

The death penalty is a violation of the fundamental human rights of prisoners

There is an increase in the number of international agreements, both binding and non-binding, that have seen the international community move steadily towards abolition.⁸² Hodgkinson notes that political pressure and the desire to reject injustices propagated in some nations by totalitarian regimes has driven the steady march towards abolition.⁸³ The question of the death penalty cannot be separated from the question of human rights.⁸⁴ The death penalty is a violation of a person's right to life. Beccaria states that no person has the right to take another's life.⁸⁵ The death penalty is an extreme physical and mental assault on the prisoner. The pain caused by the act of killing the prisoner cannot be quantified.⁸⁶ The death penalty violates a person's right to be free from torture, cruel, inhuman or degrading punishment.⁸⁷

In response to the argument that capital punishment is justifiable as retribution for crime, Amnesty International argues that human rights are inalienable and should not be taken away despite the heinousness of a crime.⁸⁸ Whilst the desire for vengeance is understandable, the law serves to restrict personal vengeance in favour of public policy and legal codes to mete out justice.⁸⁹

The argument that the public would not support the abolition of the death penalty can also be refuted on the basis of human rights. The mere fact that the public would support some form of punishment does not give credence to the punishment. Public support for the death penalty is often based on an incomplete understanding of the facts surrounding the death penalty from arrest to execution.⁹⁰ Persons who are informed about the cruelty of the death penalty and the risks of error inherent in the process of condemning a person to death are less likely to continue to offer their support for the punishment. Attitudes often change when the public is well-informed about what States do on their behalf.⁹¹

The cost of incarceration of a prisoner is not a convincing argument in support of capital punishment. It was held in *Tsebe* that the question of cost should not deter any criminal justice system from protecting the human rights.⁹² Amnesty International states that an inordinate amount of resources is concentrated on capital cases; these resources could be reallocated to other areas of law enforcement if the death penalty was abolished.⁹³

82 P Hodgkinson "Capital punishment: improve it or remove it?" *Capital punishment: Strategies for abolition* (2004) 3.

83 *Id* 3.

84 "When the State kills: The death penalty v human rights" *Amnesty International* (1989) 1.

85 C. Beccaria "The death penalty will not discourage crime" (1764) available in *The death penalty: opposing viewpoints* 3rd ed (1997) 22.

86 "When the State kills: The death penalty v human rights" *Amnesty International* (1989) 2.

87 *Id* 2.

88 *Id* 6.

89 *Id* 7.

90 *Id* 22.

91 *Id*.

92 *Minister of Home Affairs and Others v Tsebe and Others and Amnesty International* (2012) ZACC 16.

93 "When the State kills: The death penalty v human rights" *Amnesty International* (1989) 24.

Ineffective clemency process vitiates the rights of the prisoner

Clemency is an administrative decision to commute the death penalty after all appeals have been exhausted in the court process.⁹⁴ It is also referred to as mercy, pardon or reprieve. Traditionally exercised by the monarch, it is now usually exercised by the head of the executive arm of government.⁹⁵

In terms of article 6 of the ICCPR, the right of the prisoner sentenced to death to seek clemency is preserved. The right to clemency exists in many countries, but Amnesty International notes that it is often exercised arbitrarily or entirely overlooked.⁹⁶ In some countries the decision is made in a few short hours or days by an executive fully engaged with other government matters creating a real risk of error where decisions must be made under pressure.⁹⁷

The death penalty and public opinion

The argument that public support for the death penalty is insurmountable is a fallacy. Many people erroneously believe that the death penalty is an effective general deterrent.⁹⁸ Hood states that there is no connection between public support for the death penalty and the incidence of homicide.⁹⁹ It has been argued that once the public are properly educated about what it takes to execute a human being, public support for the death penalty would wane.

Hodgkinson states that strong public support for the death penalty is better challenged through raising public awareness and understanding of the death penalty.¹⁰⁰ In the Royal Commission Report on Capital Punishment (1949 – 1953), the UK Attorney General cautioned against reliance on public opinion stating that in his view, any reliance placed on public opinion had to be founded on the confidence that the public was “well informed and instructed.”¹⁰¹ In fact, legislative abolition of the death penalty in the United Kingdom occurred in the face of public opinion polls in favour of the death penalty.¹⁰² Similar views were expressed by Justice Thurgood Marshall from the US Supreme Court in his dissent in *Gregg v Georgia*¹⁰³ where he stated that “the American people, fully informed as to the purposes of the death penalty and its liabilities, would in my view reject it as morally unacceptable.”¹⁰⁴

In another decision of the US Supreme Court in *Furman v Georgia*¹⁰⁵ the Court noted that public opinion “lies at the periphery-not the core-of the judicial process in constitutional cases.”¹⁰⁶ According to the US Supreme Court, the assessment of public opinion was a matter for the

94 *Id* 33.

95 *Id*.

96 *Id* 34.

97 *Id*.

98 WA Schabas “Public Opinion and the death penalty” *Capital punishment: Strategies for abolition* (2004) 312.

99 R Hood *The death penalty – a worldwide perspective* (2002) 243.

100 P Hodgkinson “Capital punishment: improve it or remove it?” *Capital punishment: Strategies for abolition* (2004) 18.

101 *Id* 19.

102 WA Schabas “Public Opinion and the death penalty” *Capital punishment: Strategies for abolition* (2004) 309.

103 (1976) 428 US 153.

104 *Id* 233 (dissent).

105 (1972) 408 US 238.

106 *Id* 443.

legislature and not a judicial function.¹⁰⁷ Similarly, in South Africa, the death penalty was abolished by the Constitutional Court in *State v Makwanyane*¹⁰⁸ in the face of strong public support for the death penalty.¹⁰⁹

Abolition of the Death Penalty within the Framework of the UN Sustainable Development Goals 2016-2030

Goal 16 of the UN Sustainable Development Goals encourages States to provide access to justice for all and to build accountable and inclusive institutions at all levels. As illustrated above, the death penalty infringes on the human rights of the offender. Where the death penalty exists, the legal system may appear, to those whose rights are limited by it, as ineffective and vindictive. The legal system may adopt a rudimentary posture towards punishment seeking justice for the victim without the balance provided by the protection of the human rights of the offender. Instead, an effective judiciary as a national institution should have the protection of the human rights of all at its core: both victims and offenders. All States should move away from punishments that do not meet the criteria of fairness and equality. A judicial system that carries out executions secretly without the safeguards of transparency from trial stage to clemency stage lacks accountability. Improvements can be made to ensure that the offender, their representatives and family interact with the State in capital cases at all stages with transparency. In order to meet goal 16 in the specific area of the death penalty, the Government of Botswana should consider setting up a commission of inquiry to study the continued usefulness of the death penalty in Botswana along the lines of the Lansdown Inquiry in South Africa, the Royal Commission of Inquiry in the United Kingdom as well as the Barnett and Fraser Commissions in Jamaica. The proposed commission should be charged with considering whether or not the death penalty should be abolished, and if so, to make recommendations for alternative sentencing arrangements.

In the interim, the Government of Botswana should consider a review of the Constitution with a view to securing greater protection of the right to life and human dignity by abolishing the death penalty. A two-stage process which would involve a moratorium on the death penalty and commutation of all death sentences to life imprisonment is proposed. Moratoria have been used by numerous nations as the first tier in the ladder of abolition. A moratorium would give the Government of Botswana a window to engage in public education and develop an alternative sentencing scheme suitable for commutation of all death sentences to life imprisonment with or without the possibility of parole. This proposed scheme would propel Botswana's criminal justice system into the 21st century. Abolition of the death penalty in Botswana would be a landmark moment for the protection of human rights in Botswana.

107 *Id.*

108 (1995) ZACC 3.

109 WA Schabas "Public Opinion and the death penalty" *Capital punishment: Strategies for abolition* (2004) 311.