

**A LEGAL ANALYSIS OF SOUTH AFRICA'S STANCE ON CAPITAL PUNISHMENT IN
RELATION TO BOTSWANA, NIGERIA, AND INTERNATIONAL CONVENTIONS.**

by
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Table of Contents

1.1 Introduction.....	Page 6
1.2 Research objectives	Page 6
1.3 Research question.....	Page 7
1.4 Problem statement.....	Page 7
1.5 Premise, assumption, hypothesis.....	Page 7
1.6 Research methods.....	Page 7
1.7 Chapter outline.....	Page 8
1.8 Bibliography.....	Page 9
• Legislation.....	Page 9
• Case law.....	Page 10
• Books/Journals.....	Page 11
• Web sources.....	Page 12

Working title

A LEGAL ANALYSIS OF SOUTH AFRICA'S STANCE ON CAPITAL PUNISHMENT IN RELATION TO BOTSWANA, NIGERIA, AND INTERNATIONAL CONVENTIONS.

1.1 Introduction

In the beginning of 2022, the Police Minister, Bheki Cele addressed the nation on the crime statistics that were collected during 2021/2022 financial year. In his presentation, he disclosed figures that would send chills down the spines of the South Africans. Regarding murder, it was exclaimed that in a period between July 2021 and September 2021, the number of murders committed in the Republic was more than 6000 which represents an increase over the same time frame of the previous year¹. A similar trend can be observed for rape whereby 9556 rapes were reported within the same July to September 2021 period which reflected an increase over the same time frame of the previous year.² This trend is followed by other classes of offences which illustrate a general increase of unlawfulness in the country. This realisation sparks the thought of whether we have adopted inadequate measures to prevent crimes out of the dream of upholding constitutional values which may not be ideal for the well-being of the citizens of the Republic in the modern day. The call for the reinstatement of the death penalty can be heard throughout various facets of South African society. Political parties such as the IFP have called on more hardline measures on dealing with crime which includes the reinstatement of capital punishment.³ Ordinary citizens have also taken a stance to see its reinstatement following the rape and murder of Uyinene Mrwetyana and other high-profile murders.⁴ "Should and/or can capital punishment be reinstated in modern day South Africa"? and if so "under what circumstances would it work"? That is what will be discussed and debated throughout this paper.

1.2 Research objectives

The objective of this paper is to determine whether the decision to repeal the use of capital punishment as a form of retribution remains as the correct action in the Constitutional era taking into consideration modern crime statistics. The paper will also answer the question of whether it may be possible for capital punishment to be re-adopted as a form of retribution for a specific class or classes of wrongful conduct. These objectives will be met through observing the State's position regarding capital punishment through identifying the position prior to the landmark case of *S v Makwanyane*⁵ and the adoption of the Constitution. Attention will also be given to the rights that come into effect when applying capital punishment and in turn,

¹ South African Government Minister Bheki Cele: Quarter Two Crime Statistics 2021/2022 (19/11/2021) <https://www.gov.za/speeches/speaking-notes-delivered-police-minister-general%C2%A0bheki-cele-mp-occasion-release-%C2%A0quarter> (Accessed 14/04/2021).

² South African Government Minister Bheki Cele: Quarter Two Crime Statistics 2021/2022 (19/11/2021) <https://www.gov.za/speeches/speaking-notes-delivered-police-minister-general%C2%A0bheki-cele-mp-occasion-release-%C2%A0quarter> (Accessed 14/04/2021).

³ Business Tech South Africans Are Calling for the Death Penalty to be Reinstated (03/11/2019) <https://businesstech.co.za/news/government/338473/south-africans-are-calling-for-the-death-penalty-to-be-reinstated-heres-what-government-says/> (Accessed 14/04/2022).

⁴ Business Tech South Africans Are Calling for the Death Penalty to be Reinstated (03/11/2019) <https://businesstech.co.za/news/government/338473/south-africans-are-calling-for-the-death-penalty-to-be-reinstated-heres-what-government-says/> (Accessed 14/04/2022).

⁵ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

whether such rights may be limited to give effect to the punishment. Lastly, the paper will provide a study of the position taken by other nations in its application of capital punishment.

1.3 Research questions

Main research question

Can South Africa adopt approaches in use in other countries in respect of capital punishment?

1.4 Research problem

This paper will analyse the Constitutional rights to life, dignity and not to be subjected to cruel, degrading punishment and how they formed the basis for the abolition of capital punishment. It will then level arguments for instances where such rights could possibly be limited in order to reinstate capital punishment as a form of retribution in respect of specific classifications of crimes by illustrating standpoints taken by other jurisdictions and whether those opposing standpoints will be justifiable in the Constitutional era.

1.5 Premise, assumptions, and hypotheses

The premise of this study is to determine whether the departure from the use of capital punishment continues to serve the purpose of achieving the needs of South Africans in the Constitutional dispensation or whether consideration needs to be paid to instances where it may be beneficial to reinstate capital punishment as a form of retribution into the State.

The hypothesis of the study is there may be instances whereby the State may find it equitable to impose capital punishment with guidance from other jurisdictions.

This paper assumes that there may be instances whereby the rights that influence the abolition of capital punishment may be justifiably limited to give effect to the punishment, and these instances may be found by taking lessons from other jurisdictions.

1.6 Research Methods

This paper will use the black letter, doctoral method which will involve the analysis of legal rules through primary legal sources such as local and international legislation and case law. Secondary sources will also be used and will include writings by legal academics, textbooks, newspaper articles and information provided through governmental organisations. A comparative method will so be applied to determine how different legal systems answer these questions in law.

1.7 Chapter outline**Chapter 1**

This chapter will introduce the background of the study as well as the significance of the topic. This chapter will detail the objectives of the study, the research questions and problem statement.

Chapter 2

This chapter will contain an extended, detailed summary of the resources to be utilised for the literature review as well as their relevance to the topic being discussed.

Chapter 3

This chapter will discuss the mix of local, foreign, and international statutes, which have been identified in the bibliography and how they find relevance in the study being undertaken.

Chapter 4

This chapter will explore case law that has been developed that can assist in understanding the current position of the state to questions of law as well as case law that may assist in bridging gaps in the law that exist.

Chapter 5

This chapter will contain an analysis of the authoritative sources that have been introduced in chapters three and four. This chapter will use the finding of these sources to determine whether they can be applied to the legal questions.

Chapter 6

This chapter will conclude the research by evaluating the arguments levelled in the chapters with perspective given by other jurisdictions to determine whether the position taken by the State is still functional.

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Chapter 1: Introduction

Working title

A legal analysis of South Africa's stance on capital punishment in relation to Botswana, Nigeria, and international conventions.

Introduction

In the beginning of 2022, Bheki Cele, the Minister of Police for the Republic, referred to as the Minister henceforth debriefed the nation regarding updates involving crime statistics that occurred through the 2021/2022 financial year. In his address, he unpacked figures that raised a cause for concern for many South Africans. The Minister announced that in the reporting period, an increase of 20.7% in murder cases.⁶ Practically speaking, what this proposed increase means is that between July and September 2021 there were 6163 killings within the Republic which increased by 1056 from the same period in the 2020/2021 financial year.⁷ A similar trend can be observed for the number of rape cases, whereby in the same reporting period as murder cases, there were 9556 cases of rape in the Republic.⁸ This reflects an increase of 634 rape cases as opposed to the previous year's reporting period.⁹ These statements can be applied to contact crimes, cash-in-transit heists, and kidnappings.¹⁰ In essence, these figures paint a grim picture for the Republic as far as crime figures are concerned.

The crime rates that are reflected in the Minister's statements stem from a multitude of factors such as domestic disputes, interpersonal violence, conflict over land resources, gang-related violence, and killings by armed groups.¹¹ As a general trend that has been observed between 2016 and 2020 can be broken down as follows, the murder rate for 2020 stood at 33.34 which marked a decline from 2019 where the murder rate was 36.42. In 2018 the murder rate was at 36.40 which was marked as an increase from 2017 where the figure stood at 35.67 which is a 5.44% increase of the rate recorded in 2016.¹²

To gain a more holistic view of the murder rates of the Republic, one can observe the trends recorded between 1995 and 2022. In 1995, the Republic recorded a murder rate of

⁶ South African Government Minister Bheki Cele: Quarter two Crime Statistics 2021/2022 November 2021 Website at <https://www.gov.za/speeches/speaking-notes-delivered-police-minister-general%C2%A0bheki-cele-mp-occasion-release-%C2%A0quarter> [Accessed 29/07/2022]

⁷ South African Government Minister Bheki Cele: Quarter two Crime Statistics 2021/2022 November 2021 Website at <https://www.gov.za/speeches/speaking-notes-delivered-police-minister-general%C2%A0bheki-cele-mp-occasion-release-%C2%A0quarter> [Accessed 29/07/2022]

⁸ South African Government Minister Bheki Cele: Quarter two Crime Statistics 2021/2022 November 2021 Website at <https://www.gov.za/speeches/speaking-notes-delivered-police-minister-general%C2%A0bheki-cele-mp-occasion-release-%C2%A0quarter> [Accessed 29/07/2022]

⁹ South African Government Minister Bheki Cele: Quarter two Crime Statistics 2021/2022 November 2021 Website at <https://www.gov.za/speeches/speaking-notes-delivered-police-minister-general%C2%A0bheki-cele-mp-occasion-release-%C2%A0quarter> [Accessed 29/07/2022]

¹⁰ South African Government Minister Bheki Cele: Quarter two Crime Statistics 2021/2022 November 2021 Website at <https://www.gov.za/speeches/speaking-notes-delivered-police-minister-general%C2%A0bheki-cele-mp-occasion-release-%C2%A0quarter> [Accessed 29/07/2022]

¹¹ South African Government Minister Bheki Cele: Quarter two Crime Statistics 2021/2022 November 2021 Website at <https://www.gov.za/speeches/speaking-notes-delivered-police-minister-general%C2%A0bheki-cele-mp-occasion-release-%C2%A0quarter> [Accessed 29/07/2022]

¹² Macrotrends South Africa Murder/Homicide Rate 1995-2022 Website at <https://www.macrotrends.net/countries/ZAF/south-africa/murder-homicide-rate> [Accessed 29/07/2022].

approximately 65 murders per 100000 population.¹³ Observing this after a lapsing of five years, we can see that in 2000 the murder rate was at 48.38.¹⁴ After a further five years, one can see that the murder rate was 38.70.¹⁵ In 2010, the murder rate was at 31.03 per 100000 population and reached its lowest in 2011 where it rested at 29.91 per 100000 population.¹⁶ From this point however, the murder rate began to steadily increase from this point.¹⁷ Once 2015 is observed, we see that the murder rate had increased to 33.71 and continued to climb to 36.42 in 2019, from then it showed signs of decline into 2020.¹⁸ However, if the statistics released by the Minister are anything to go by then there are indications of a resurgence.

The resurgence of murder in the Republic has raised many to enquire as to whether it may be possible for death sentencing to be reinstated for crimes such as murder, rape and other capital crimes.¹⁹ In 2009, approximately 300000 people within the Republic signed a petition with the intention of expressing interest in the reinstatement of capital sentencing after a number of high profile murder cases.²⁰ The Republic's stance on the death penalty is formed by the landmark case of *S v Makwanyane* (CCT/94) [1995] ZACC 3. This case declared the use of the death penalty as a form of punishment for certain classes of crimes to be unconstitutional as is served as an infringement of one's rights to life, dignity, and to not be subjected to cruel and degrading punishment.

Research objectives

The objective of this paper is to assess whether the repealing of capital punishment in 1995 remains the correct choice for the Republic taking the prevalence of violent crimes in the country in the modern day. This paper will also assess whether capital punishment can be re-introduced into modern South Africa and whether our constitutional principles can allow for its reinstatement by assessing clauses such as the limitation of rights and weighing the limitation against the associated rights, landmark cases such *S v Makwanyane*, the rights to life, dignity

¹³ Macrotrends South Africa Murder/Homicide Rate 1995-2022 Website at <https://www.macrotrends.net/countries/ZAF/south-africa/murder-homicide-rate> [Accessed 29/07/2022].

¹⁴ Macrotrends South Africa Murder/Homicide Rate 1995-2022 Website at <https://www.macrotrends.net/countries/ZAF/south-africa/murder-homicide-rate> [Accessed 29/07/2022].

¹⁵ Macrotrends South Africa Murder/Homicide Rate 1995-2022 Website at <https://www.macrotrends.net/countries/ZAF/south-africa/murder-homicide-rate> [Accessed 29/07/2022].

¹⁶ Macrotrends South Africa Murder/Homicide Rate 1995-2022 Website at <https://www.macrotrends.net/countries/ZAF/south-africa/murder-homicide-rate> [Accessed 29/07/2022].

¹⁷ Macrotrends South Africa Murder/Homicide Rate 1995-2022 Website at <https://www.macrotrends.net/countries/ZAF/south-africa/murder-homicide-rate> [Accessed 29/07/2022].

¹⁸ Macrotrends South Africa Murder/Homicide Rate 1995-2022 Website at <https://www.macrotrends.net/countries/ZAF/south-africa/murder-homicide-rate> [Accessed 29/07/2022].

¹⁹ BusinessTech South Africans Are Calling For the Death Penalty to be Reinstated – Here's What the Government Says September 2019 <https://businesstech.co.za/news/government/338473/south-africans-are-calling-for-the-death-penalty-to-be-reinstated-heres-what-government-says/> [Accessed 29/07/2022].

²⁰ BusinessTech South Africans Are Calling For the Death Penalty to be Reinstated – Here's What the Government Says September 2019 <https://businesstech.co.za/news/government/338473/south-africans-are-calling-for-the-death-penalty-to-be-reinstated-heres-what-government-says/> [Accessed 29/07/2022].

and not to be subjected to cruel and degrading punishment. The paper will then consider all the sources introduced to determine whether it would be possible to reinstate death sentencing in the modern, constitutional dispensation.

Research question

Can death sentencing be reintroduced in a constitutional and democratic South Africa?

Research objective

This paper will assess the constitutional rights to life dignity, and not to be subjected to cruel and degrading punishment and how they form the basis of the abolition of capital punishment within the Republic. After careful analysis of the rights and cases, this paper will level the arguments made in respect of these rights to ascertain whether the rights can be limited in accordance with the limitations clause housed in section 36 of the Constitution of the Republic of South Africa, 1996. This will be done to determine whether death sentencing can be reinstated in respect for certain classes of crimes such as murder, rape, burglary, and treason. Examples will be drawn from legislation in Botswana and Nigeria which enables death sentencing.

Assumption

This paper assumes that the collection of sources used may provide some grounds of reasoning to support the reinstatement of capital punishment as form of retribution for a particular class of crimes and have its applicability justifiable in terms of the Constitution.

Research method

The method used in this paper will be the black letter and doctoral method. This will involve an analysis of legal rules using a mix of primary and secondary sources such as municipal, foreign, and international legislation. Secondary sources that will be used will include writings by experts and scholars, textbooks, newspaper articles and information provided for by government agencies. A comparative method will also be adopted to draw comparisons and differences between legislation and writings in as much as they differ in respect of the topic.

Chapter outline

Chapter 2

This chapter will provide an in-depth analysis of the various literature that will be used throughout this paper. It examines the viewpoints of various authors such as Snyman who provides the factors to be considered when someone acts in necessity or private defense. Amnesty International's view on the continued use of death sentencing in Nigeria will be explained. The legislation and reasoning behind death sentencing will be discussed by multiple authors and the context it is exercised in Southern Africa with special focus on Botswana and Nigeria. The use of force will also be discussed and under what circumstances an arresting officer may use lethal force.

Chapter 3

This chapter will explore the legislation that forms the basis of the arguments raised within this paper. The relevant legislation will include the Constitution of the Republic of South Africa, 1996. The Criminal Procedure Act 51 of 1977 contains several punishments that can be imposed in respect of capital crimes housed in section 276. The International Covenant on

Civil and Political Rights provides an international perspective on the expulsion of capital punishment in Article 6 and 7. The Penal Code of Botswana in sections 25, 26, and 28 which provide for multiple forms of punishment, including death sentencing and what circumstances it can be imposed. The Criminal Procedure Act – CAP C38 L.F.N. 2004 (Nigeria) provides for death sentencing in respect of treachery.

Chapter 4

This chapter will provide cases relevant to capital punishment and sentencing. The cases that will be explored will include the landmark judgment of *S v Makwanyane* which formed the basis of the repealing of the death sentencing in the Republic on the basis that the practice was seen as unconstitutional against the newly implemented Bill of Rights. *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) will be observed to ascertain how a right that has been enshrined in the Bill of Rights, namely the right to religious practices can be limited in terms of the limitations clause housed in section 36 of the Constitution. *S v Goliath* will provide an illustration when the killing of a person out of private defense or necessity can be used as a ground of justification. *S v Williams* will be discussed in reference to the State's obligation to ensuring that punishment is not cruel, inhuman, and degrading. Lastly, *S v Dodo* will be discussed to illustrate how the right to dignity informs the sentencing procedure.

Chapter 5

This chapter will evaluate all the books/journal articles, legislation and case law that have provided in the preceding chapters to reach a finding. This chapter will illustrate findings based on the conclusions provided by the books, articles, legislation, and case law that have been featured throughout the paper. It will also point out any inconsistencies in the law, if any, that became apparent through the comparison and contrasting of sources.

Chapter 6

This chapter will draw a conclusion on whether capital punishment can theoretically be reinstated or whether it's a matter that has become moot.

Chapter 2: Literature Review

Amnesty International – The Death Penalty in Nigeria

Amnesty International makes a clear standpoint to oppose the death penalty being practiced in all countries around the world on the basis that it is a violation of fundamental human rights, namely the rights to life, dignity and to not be subjected to cruel and degrading punishment.²¹ According to the International Covenant on Civil and Political Rights provides that the right to life should be regarded as a fundamental human right which cannot be suspended.²² Former President Olusegun Obasanjo of Nigeria stood as an opponent of the death penalty however the practice continued to be applied and continued to be provided for by the Constitution of the Federation of Nigeria, 1999 in which section 33(1) provides for the derogation of the right to life.²³ The Penal Code and the Criminal Code of Nigeria prescribe the death penalty as adequate punishment for a range of crimes that include; robbery, treason, murder, culpable homicide, and sodomy.²⁴ Amnesty International is calling for the death penalty to be abolished in the state of Nigeria, to ratify international conventions that oppose the death penalty, and to respect and promote the standards of a fair trial and due process.²⁵

Bruce, D – Killing and the Constitution

In 2001 and 2002, the South African courts gave a judgement of s49 of the Criminal Procedure Act 51 of 1977 which allowed for the use of lethal force in certain circumstances to be justified in relation to said circumstances but not for property offences not involving violence or threats of violence.²⁶

Section 49 (2) of the Act referred to situations when lethal force could be exercised by an arresting officer. It states, “the person authorized under this Act to arrest or to assist in arresting him cannot arrest him or prevent him from fleeing by other means than by killing him, the killing shall be deemed to be justifiable homicide.”²⁷

An amendment to this position was created in 1998.²⁸ The amendment stated that the arrestor is enabled to use lethal force if they believe, on reasonable grounds that the force is necessary to protect the arrestor from imminent death or great bodily harm, there is risk of imminent bodily harm if action is not taken, and the offence involved uses life threatening actions.²⁹

Cronje, F – Capital Punishment in Southern Africa

There is noticeable support from the South African for the retention of the death penalty, however judges have stated that its retention is not based on public opinion but rather if the Constitution can allow it.³⁰

²¹ Amnesty International “The Death Penalty in Nigeria.”

²² Amnesty International “The Death Penalty in Nigeria.”

²³ Amnesty International “The Death Penalty in Nigeria.”

²⁴ Amnesty International “The Death Penalty in Nigeria.”

²⁵ Amnesty International “The Death Penalty in Nigeria.”

²⁶ Bruce, D “Killing and the Constitution - Arrest and the Use of Lethal Force” 2003 SAJHR (Vol. 19) 2.

²⁷ Bruce, D 2003 SAJHR (Vol. 19) 4.

²⁸ Bruce, D 2003 SAJHR (Vol. 19) 5.

Bruce, D 2003 SAJHR (Vol. 19) 6.

³⁰ Cronje, F “Capital Punishment in South Africa: Was Abolition the Right Decision?” (2016) SAIRR 3.

Statistics show that there is a race disparity in death sentencing. Poorer persons, who are mostly black may be placed at a disadvantage in murder trials.³¹ In the period between 1910 and 1975, 2740 people were sentenced to death and of that amount fewer than 100 were white.³² In a period between 1947 and 1966, 288 white people had been convicted for rape but none were executed whereas 844 black people were convicted of raping white people and 122 of them were sentenced to death.³³

Regarding deterring crime, the death penalty was found to not be uniquely more capable of deterring crime than other methods of crime control and thus hinder its justification, other countries have come to this finding.³⁴ The courts have found that the greatest deterrent is the likelihood of being apprehended.³⁵

Currie, I & De Waal, J – The Bill of Rights Handbook

In terms of s1 of the Constitution, South Africa is founded on the values of human dignity, equality and human rights and freedoms.³⁶ The right to dignity is held as the source the rights to physical integrity and freedom which act as the starting points for a number of other rights, which can include the right to not be subjected to slavery and the right to bodily integrity.³⁷ The centrality of the right to dignity in the Interim Constitution prompted the Constitutional Court to hold the right to dignity and the right to life to be among the most important human rights.³⁸ Besides the right to dignity being a foundation for civil rights, its innate value also forms the basis for political rights such as those that are related to democratic governance.³⁹ In *S v Makwanyane*, the court held that the right to dignity must be seen as one of the relevant factors to consider when determining whether a punishment is cruel, inhumane or degrading.⁴⁰ Furthermore, even though imprisonment hinders a person's dignity, the state undoubtedly holds the power to impose this as punishment.⁴¹ However, the prisoners do not lose their rights upon being imprisoned, they actually retain all the rights contained in the Bill of Rights but will have to tolerate a greater limitation of these rights.

Regarding the importance of the right to life, *S v Makwanyane* reaffirmed that the state should act as a role model for society and demonstrate regard for human life and dignity by refusing to disregard these rights.⁴² Regarding the right to life, this right is not absolute and may be limited in terms of s36 and the clearest case of limitation of the right to life is the permitted killing of someone in self-defence and necessity.⁴³ Furthermore, lethal force may be applied to kill a hostage killer to save the lives of people in danger.⁴⁴

³¹ Cronje, F 2016 SAIRR 7.

³² Cronje, F 2016 SAIRR 7.

³³ Cronje, F 2016 SAIRR 7.

³⁴ Cronje, F 2016 SAIRR 9.

³⁵ Cronje, F 2016 SAIRR 9.

³⁶ Currie, I & De Wall, J *The Bill of Rights Handbook* Sixth Edition (2013) 250.

³⁷ Currie *The Bill of Rights Handbook* 251 – 252.

³⁸ Currie *The Bill of Rights Handbook* Sixth Edition 252.

³⁹ Currie *The Bill of Rights Handbook* 253.

⁴⁰ Currie *The Bill of Rights Handbook* 254.

⁴¹ Currie *The Bill of Rights Handbook* 254.

⁴² Currie *The Bill of Rights Handbook* 258 – 259.

⁴³ Currie *The Bill of Rights Handbook* 260.

⁴⁴ Currie *The Bill of Rights Handbook* 260 - 261.

Joubert, J Ally, D, Kemp, G Mokoena, M Swanepoel J Terblanche, S & van der Merwe, S Criminal Procedure Handbook

The sentencing court had to find the death sentence as the only proper sentence relating to a particular crime, while paying attention to certain aggravating and mitigating factors.⁴⁵ Most persons that were facing the death penalty did not have the funds to pay for an effective defence and thus were more likely to face death than those who had the funds to do so.⁴⁶ The practice of capital punishment has been repealed in many states across Africa, including Namibia, Mozambique and Angola.⁴⁷ Even though it has not been repealed in multiple countries, its application has been drastically reduced, such as in the United States of America where its application has been left to the individual states' discretion.⁴⁸

The next question posed could be whether the death penalty could be justifiable in terms of the limitations clause, despite being cruel, degrading and inhuman punishment.⁴⁹ The respect for the rights to life and dignity are the highest form of fundamental rights that are contained within the Constitution.⁵⁰ The application of the death penalty would destroy these rights and all the other rights that the inmate has.⁵¹ The main argument that has been raised is that the death penalty deters crime better than other forms of punishment.⁵² There was no proof put forward that suggests that the death penalty had more of a deterrent than imprisonment.⁵³ As far as prevention was concerned, the courts ruled that imprisonment can serve as an adequate deterring factor.⁵⁴

Novak, A Capital Sentencing Discretion in Southern Africa: A Human Rights Perspective on the Doctrine of Extenuating Circumstances in Death Penalty Cases

Botswana's Penal Code provides for the death penalty for crimes including murder, treason, and piracy with the intent to commit murder.⁵⁵ According to the Penal Code, if the court is of the belief that there are extenuating circumstances at play, then the court may in convicting a person for murder, may opt for any other sentence other than death.⁵⁶ The court must consider factors such as the social background of the accused in accordance with the background of the society and judge the accused according to their own pitfalls and beliefs.⁵⁷ In the case of *Kelaletswe v State* it is said that the burden of raising these extenuating circumstances no longer rested on the accused, this responsibility rested on the judge and counsel themselves.⁵⁸

⁴⁵ Joubert, J Ally, D, Kemp, G Mokoena, M Swanepoel J Terblanche, S & van der Merwe, S *Criminal Procedure Handbook* Thirteenth Edition (2020) 417.

⁴⁶ Joubert *et al* *Criminal Procedure Handbook* 417.

⁴⁷ Joubert *et al* *Criminal Procedure Handbook* 417 – 418.

⁴⁸ Joubert *et al* *Criminal Procedure Handbook* 418.

⁴⁹ Joubert *et al* *Criminal Procedure Handbook* 418.

⁵⁰ Joubert *et al* *Criminal Procedure Handbook* 418.

⁵¹ Joubert *et al* *Criminal Procedure Handbook* 418.

⁵² Joubert *et al* *Criminal Procedure Handbook* 419.

⁵³ Joubert *et al* *Criminal Procedure Handbook* 419.

⁵⁴ Joubert *et al* *Criminal Procedure Handbook* 419.

⁵⁵ Novak, A "Capital Sentencing Discretion in Southern Africa: A Human Rights Perspective on the Doctrine of Extenuating Circumstances in Death Penalty Cases" (2014) AHRLJ 34.

⁵⁶ Novak, A 2014 AHRLJ 34.

⁵⁷ Novak, A 2014 AHRLJ 34.

⁵⁸ Novak, A 2014 AHRLJ 34.

Snyman, C Criminal Law

A person will act in private defence if they use force to repel an unlawful attack which has already commenced or that has imminent danger upon somebody else's life, bodily integrity, property or other legally recognised interest which is deserving of protection, provided that the defensive act was necessary to protect the threatened interests, is directed to the attacker, and is reasonably proportionate to the attack.⁵⁹ There are two rationales for the existence of private defence, firstly, the *projection theory* emphasises each person's right to defend themselves or another against unlawful attack and secondly, *upholding-of-justice* theory which states that people who act in private defence assist in upholding the law.⁶⁰

The first requirement for a defence based on private defence is that the attack must have been unlawful, meaning, a person cannot act in private defence against lawful conduct. For example, a person cannot act in private defence if they attack a police officer.⁶¹ Secondly, the attack must be directed at an interest which deserves legal protection.⁶² The courts have recognised that private defence in protection of property, dignity, freedom of movement, the use of one's property, and sexual integrity are interests that are worthy of legal protection.⁶³ Lastly, the attack must be imminent but not yet completed.⁶⁴ This provides that private defence cannot be used as a tool for exercising vengeance or a form of punishment.⁶⁵

A requirement of the defence is that it must be directed at the attacker, meaning a person cannot act in private defence against anyone that isn't the actor of the unlawful act.⁶⁶ Secondly, the defensive act must be necessary to prevent the threatened interest, meaning, the execution of the defence must be the only way to prevent the threat to their interest.⁶⁷ Thirdly, a relationship between the attack and the defensive act must exist, this requires a balance between the attack and the defence.⁶⁸ Lastly, the attacked person must be aware that they are acting in private defence, this is to prevent private defence being abused in situations whereby a person is provoking someone to act against them and to exclude private defence in cases where it is purely coincidental that the act of defence is directed at an unlawful attack.⁶⁹

A person acts in necessity, , if they act in a manner to protect their life or the life of someone else, bodily integrity, property or any other legally protected interest which has become endangered by a threat of harm which has commenced and cannot be averted in any other way, on condition that the person is not obliged to endure the harm and the protective act is not disproportionate to the interest infringed by the act.⁷⁰

⁵⁹ Snyman, C *Criminal Law* Sixth Edition (2014) 419.

⁶⁰ Snyman *Criminal Law* 102.

⁶¹ Snyman *Criminal Law* 103.

⁶² Snyman *Criminal Law* 103.

⁶³ Snyman *Criminal Law* 103.

⁶⁴ Snyman *Criminal Law* 103.

⁶⁵ Snyman *Criminal Law* 103.

⁶⁶ Snyman *Criminal Law* 106.

⁶⁷ Snyman *Criminal Law* 106.

⁶⁸ Snyman *Criminal Law* 108.

⁶⁹ Snyman *Criminal Law* 111-112.

⁷⁰ Snyman *Criminal Law* 114.

Necessity applies when a person finds themselves in an emergency and must weigh conflicting interests and then opts to infringe a lesser important interest according to the legal convictions of the community to protect an interest of greater importance.⁷¹ If however, the person infringes a greater interest to protect a lesser interest then it can be said that they acted unlawfully.⁷²

There are requirements to comply with in order to rely on a necessity plea; some legal interest must be threatened, one can act in necessity to protect another's legal interest, the emergency must be immanent but not yet terminated, one cannot rely on necessity if they are compelled to endure the danger, the person must be aware that an emergency exists, the person's act must be necessary to avoid the danger, and the harm caused by the defence must not be disproportionate to the threatened interest.⁷³ Thus, one person may kill another out of necessity, *S v Goliath* held that necessity could be a complete defence for a situation where one person kills another.⁷⁴ Acts that are committed in the name of necessity operate as a ground that excludes culpability not just a ground of justification.⁷⁵

Uche, O & Udezo, B Implications of Capital Punishment in the Nigerian Society

In Nigeria, there are legislative sources that provide for the use of capital punishment and what constitutes as a capital offence.⁷⁶ Among these, the most prominent capital offences include drug peddling, robbery, treason, terrorism, murder, and armed robbery.⁷⁷ The practice of the death penalty in Nigeria has prompted multiple human rights groups and organisations to rally against its use as a form of punishment.⁷⁸ Capital punishment is enforced by multiple sectors such as the police, courts and military officers.⁷⁹ It has been treated as a last resort when other forms of punishment have failed.⁸⁰ In Nigerian legislation, the death penalty is mandatory for murder, drug trafficking and crimes committed with firearms.⁸¹ A major feature of the death penalty is the limitation that it poses to the right to life of the individual.⁸² The government justifies this by stating that it is necessary to deprive certain persons of the right to life to protect that right for others.⁸³

Arguments for capital punishment

It is accepted that Nigerians have the right to defend themselves or other legally protected interests against an attacker and may find it appropriate to kill the attacker to protect said

⁷¹ *Snyman Criminal Law* 116.

⁷² *Snyman Criminal Law* 117.

⁷³ *Snyman Criminal Law* 118-119.

⁷⁴ *Snyman Criminal Law* 120-121.

⁷⁵ *Snyman Criminal Law* 121.

⁷⁶ Uche, O & Udezo, B *Implications of Capital Punishment in the Nigerian Society* 2011 *AFRREV* (Vol. 5) 424.

⁷⁷ Uche, O & Udezo, B 2011 *AFRREV* (Vol.5) 424.

⁷⁸ Uche, O & Udezo, B 2011 *AFRREV* (Vol.5) 426.

⁷⁹ Uche, O & Udezo, B 2011 *AFRREV* (Vol.5) 426.

⁸⁰ Uche, O & Udezo, B 2011 *AFRREV* (Vol.5) 426.

⁸¹ Uche, O & Udezo, B 2011 *AFRREV* (Vol.5) 427.

⁸² Uche, O & Udezo, B 2011 *AFRREV* (Vol.5) 427.

⁸³ Uche, O & Udezo, B 2011 *AFRREV* (Vol.5) 427.

legally protected interest.⁸⁴ This suggests that the right to life can be limited in instances where a person is threatened with death.⁸⁵

The government is required to deprive certain persons of their rights to protect the rights of the community or the vast majority of the population.⁸⁶ A classic retributive argument raised by Kant states that the state should put murderers to death because they deserve it, the exercise of justice requires a balance between the crime and the punishment and thus only death is equal to death.⁸⁷

Argument against capital punishment

An argument has been raised that those Nigerians who pass a judgement of capital punishment are equally as guilty as depriving some one of the right to life as the murderer in different ways.⁸⁸

The prevalence of large-scale unemployment, environmental degradation, pollution, total neglect of oil producing communities may lead to cases of violent protest which may result in protestors being charged with capital offenses.⁸⁹

The death penalty is unjust, vindictive, and not efficient in deterring crime in Nigeria.⁹⁰ Furthermore, the history of dictatorships in Nigeria have shown that capital punishment has been used for political reasons as opposed to justice.⁹¹

The right to life is sacred and must be based in human rights that guarantee human dignity, responsibility, and equality and thus, the government has an obligation to protect these rights.⁹²

Yeo, S "Compulsion and Necessity in African Criminal Law"

Regarding formulation of compulsion, the Criminal Code of both Southern Nigeria and Gambia concur in that they state that a person cannot be held criminally liable for an offence that they had committed under the compulsion of another being secreting some form of external influence, or some form of threat to their overall well-being or legally protected interests.⁹³

⁸⁴ Uche, O & Udezo, B 2011 *AFFREV* (Vol.5) 428.

⁸⁵ Uche, O & Udezo, B 2011 *AFFREV* (Vol.5) 428.

⁸⁶ Uche, O & Udezo, B 2011 *AFFREV* (Vol.5) 428.

⁸⁷ Uche, O & Udezo, B 2011 *AFFREV* (Vol.5) 428-429.

⁸⁸ Uche, O & Udezo, B 2011 *AFFREV* (Vol.5) 429.

⁸⁹ Uche, O & Udezo, B 2011 *AFFREV* (Vol.5) 429.

⁹⁰ Uche, O & Udezo, B 2011 *AFFREV* (Vol.5) 429.

⁹¹ Uche, O & Udezo, B 2011 *AFFREV* (Vol.5) 429.

⁹² Uche, O & Udezo, B 2011 *AFFREV* (Vol.5) 430.

⁹³ Yeo, S "Compulsion and Necessity in African Criminal Law" 2009 *J.Afr.Law* (Vol. 53) 92.

Chapter 3: Legislation

This chapter will provide an explanation on the numerous legislative sources that are relevant to the topic of death sentencing by observing the local legislation that was referred to in the case of *S v Makwanyane* such constitutional provisions and the Criminal Procedure Act. This chapter will also illustrate what legislative sources inform death sentencing in Botswana and Nigeria as well as international covenants.

Constitution of the Republic of South Africa, 1996

Section 9: The right to equality

This section provides that everybody is equal in the eyes of the law and is equally protected by the law.⁹⁴ The right to equality encompasses the equal enjoyment of rights.⁹⁵ This places an obligation on government to promote the achievement of equality through legislative and other means curated to protect and advance the rights of persons who have been disadvantaged by unfair discrimination.⁹⁶ The State is disallowed to directly or indirectly discriminate against anybody on grounds including race, gender, sex, pregnancy, marital status, ethnic origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.⁹⁷ National legislation must prohibit unfair discrimination.⁹⁸ Discrimination on any of these grounds is unfair unless it can be established that the discrimination is fair

Section 10: The right to human dignity

This section provides that all persons have the inherent right to dignity and to have this right protected.⁹⁹ This is underpinned by section 1 which provides that South Africa is founded on human dignity and the advancement of equality.¹⁰⁰ This affirmation of the inherent nature of human dignity as foundational constitutional principle positions our legal order in line with constitutional development in the aftermath of the second world war.¹⁰¹ It is recognised as the source of a person's innate rights to freedom and bodily integrity, which is the source of other rights which may include the right to not be subjected to slavery and the right to bodily integrity.¹⁰² The right to dignity is a core factor to consider in determining whether punishment is cruel, inhuman or degrading.¹⁰³ *Makwanyane* recognises that although imprisonment constitutes an impairment of a person's right to dignity, the state undoubtedly has the power to impose this restriction.¹⁰⁴ Notably, a person does not forfeit their rights upon imprisonment, rather the prisoner retains all of their fundamental rights but must endure limitations on said rights to the extent that the limitation is justifiable in terms of the limitations clause.¹⁰⁵

⁹⁴ Section 9(1) of the Constitution of the Republic of South Africa, 1996.

⁹⁵ Section 9(2) of the Constitution of the Republic of South Africa, 1996.

⁹⁶ Section 9(2) of the Constitution of the Republic of South Africa, 1996.

⁹⁷ Section 9(3) of the Constitution of the Republic of South Africa, 1996.

⁹⁸ Section 9(4) of the Constitution of the Republic of South Africa, 1996.

⁹⁹ Section 10 of the Constitution of the Republic of South Africa, 1996.

¹⁰⁰ Section 1 of the Constitution of the Republic of South Africa, 1996.

¹⁰¹ Goolam, N "Human Dignity – Our Supreme Constitutional Value" 2001 *PELJ* (Vol.4) 4.

¹⁰² Currie, I & De Waal, J *The Bill of Rights Handbook* Sixth Edition (2013) 251.

¹⁰³ Currie *The Bill of Rights Handbook* 254.

¹⁰⁴ Currie *The Bill of Rights Handbook* 254.

¹⁰⁵ Currie *The Bill of Rights Handbook* 254.

Section 11: The right to life

The Constitution provides that everybody is entitled to enjoy the right to life.¹⁰⁶ According to Langa J, the State should be a role model for how society must treat regard for human life and dignity by not depriving this right to destroy the life and dignity of criminals.¹⁰⁷ Provisions of the Bill of Rights can only be limited in terms of the limitations clause housed in section 36 of the Constitution.¹⁰⁸ However, multiple judges concur that the right to life is unqualified, this characterisation supported the argument that the right is worthy of stronger protection by the Constitution when compared to other human rights instruments.¹⁰⁹ The right to life was a central feature in *S v Makwanyane* in which the court rejected the argument that those guilty of murder have forfeited their right to life.¹¹⁰ This case will be discussed in the next chapter.¹¹¹ In relation to the death penalty, Chaskalson P in *Makwanyane* wrote that death sentencing was not invalidated by the right to life, but rather because it qualified as cruel, inhuman and degrading punishment, however a majority of the quorum agreed that it was a deprivation of the right to life.¹¹² Although there was no comprehensive definition of the right to life in the Interim Constitution, a majority judges concurred that the right must encapsulate the right not be deliberately put to death by the State.¹¹³ This right may be limited in terms of the limitations clause to give effect to self-defence and necessity and using lethal force to save the lives of others.¹¹⁴

Section 12: Freedom and security of the person

The Constitution, 1996 provides that everyone has the right to not be arbitrarily deprived of the right to freedom without a just cause, not to be detained without trial, to be free of all forms of violence, not to be tortured in any way, and not to be treated or punished in a cruel, inhumane, or degrading way.¹¹⁵ It goes further to state that everyone has the right to bodily and physical integrity which includes the right to make decisions regarding reproduction, to control over their body, and not to be subjected to experiments without their consent.¹¹⁶ This right is particularly prominent because it offers protection in the limited area which applies which is in cases of restraint and detention.¹¹⁷ It was this right, in section 12(1)(e) that made the biggest contribution to the outlawing of death sentencing.¹¹⁸ In *Makwanyane*, a majority of judges concurred that death sentencing constituted as cruel, inhuman and degrading punishment based on four grounds; it fails to treat sentenced individuals as a human being worthy of respect, the irremediable nature of the punishment, the cruelty of subjecting convicts to the delays in carrying out the sentencing, and the nature of the executions.¹¹⁹

¹⁰⁶ Section 11 of the Constitution of the Republic of South Africa, 1996.

¹⁰⁷ Currie *The Bill of Rights Handbook* 259.

¹⁰⁸ Currie *The Bill of Rights Handbook* 259.

¹⁰⁹ Currie *The Bill of Rights Handbook* 259.

¹¹⁰ Currie *The Bill of Rights Handbook* 259.

¹¹¹ Section 9(5) of the Constitution of the Republic of South Africa, 1996.

¹¹² Currie *The Bill of Rights Handbook* 260.

¹¹³ Currie *The Bill of Rights Handbook* 260.

¹¹⁴ Currie *The Bill of Rights Handbook* 260-261.

¹¹⁵ Section 12(1)(a) -(e) of the Constitution of the Republic of South Africa, 1996.

¹¹⁶ Section 11(2)(a) -(c) of the Constitution of the Republic of South Africa, 1996.

¹¹⁷ Currie *The Bill of Rights Handbook* 270.

¹¹⁸ Currie *The Bill of Rights Handbook* 284.

¹¹⁹ Currie *The Bill of Rights Handbook* 284.

Section 36: Limitation of rights

This section provides that fundamental rights may only be limited in terms of general application, to the extent that the limitation can be justifiable in an open and democratic society based on human dignity, equality, freedom, while taking into account factors including; the nature of the right, the importance of the limitation, the relation between the limitation and the purpose, and if there are less restrictive means to achieve the achieve this purpose.¹²⁰ This provision exclaims that an infringement of a right will not be unconstitutional if it takes place in what is considered as a justified infringement in an open and democratic society based on human dignity, equality and freedom.¹²¹ Where an infringement takes place in accordance with the factors listed in section 36 will be held as constitutionally valid.¹²²

Criminal Procedure Act 51 of 1977

The purpose of the Act is to create provision for procedures to be applied in matters related to criminal proceedings.¹²³

Section 276: Nature of Punishment

This section lists several appropriate sentences that a court can impose. These include imprisonment which includes imprisonment for life or for an indefinite period, periodical imprisonment, declaration as a habitual criminal, committal to a treatment centre, a fine, and correctional supervision.¹²⁴

The forms of sentences besides imprisonment can be described as alternatives to imprisonment and are commonly seen as a kind of leniency.¹²⁵ The decision to impose imprisonment is a drastic outcome of depriving a person's liberty.¹²⁶ The court may observe any aggravating factors, for example, previous convictions or brutality of the crime, may be used in the argument supporting imprisonment.¹²⁷ There are also mitigating factors that the court can consider, such as the fact that juveniles are not readily imprisoned and that first offenders might not be imprisoned.¹²⁸

To be declared as a habitual criminal then the court must be satisfied that the person habitually commits a crime, and that the community should be protected against their conduct.¹²⁹ It is important that both requirements must be met. This statutory framework removes imprisonment from the court's discretion if the offender is below 18 years of age, and if the court is satisfied that the offender deserves imprisonment for a period exceeding 15 years.¹³⁰

¹²⁰ Section 36(1)(a) -(e) of the Constitution of the Republic of South Africa, 1996.

¹²¹ Currie *The Bill of Rights Handbook* 151.

¹²² Currie *The Bill of Rights Handbook* 151.

¹²³ Criminal Procedure Act 51 of 1977.

¹²⁴ Section 276(1)(a) -(l) of the Criminal Procedure Act 51 of 1977.

¹²⁵ Joubert, J Ally, D, Kemp, G Mokoena, M Swanepoel J Terblanche, S & van der Merwe, S *Criminal Procedure Handbook* Thirteenth Edition (2020) 420.

¹²⁶ Joubert *et al Criminal Procedure Handbook* 420.

¹²⁷ Joubert *et al Criminal Procedure Handbook* 420.

¹²⁸ Joubert *et al Criminal Procedure Handbook* 420.

¹²⁹ Joubert *et al Criminal Procedure Handbook* 424.

¹³⁰ Joubert *et al Criminal Procedure Handbook* 424.

Fines are the most common sentence imposed in South African courts.¹³¹ Fines are commonly imposed for less serious offences and consists of the offender paying a certain amount of money to the State as punishment.¹³² There are three general factors that must be considered when imposing fines; the crime should not be serious enough to call for imprisonment, the offender must have the financial means to pay it, and in cases where crimes for financial gain are committed then a fine must be imposed to show the offender that crime does not pay.¹³³

Lastly, with committal to a treatment centre, this involves an offender being sentenced to these centres as an alternative to imprisonment in terms of section 296 of the Act.¹³⁴ This sentence may be imposed on a person who is dependent on substances and as a result affects his own or the welfare of his family.¹³⁵ This also includes persons who commit crimes to support a drug dependence.¹³⁶

International Covenant on Civil and Political Rights

The aim of the Covenant is to provide the international recognition of the inherent dignity and of equal and inseparable rights of all humans to form the foundation for freedom, justice, and peace.¹³⁷ The Covenant places an obligation on partner States under the United Nations to promote universal respect for human rights and freedoms.¹³⁸

Article 6

1. Every human being has the inherent right to life and this right must be protected by law.¹³⁹
2. In countries that still practice death sentencing, the death sentence should be reserved for only the most heinous of crimes in accordance with the law in force at the time and not contrary to the provisions of the current Covenant and the Convention on the Prevention and Punishment of the Crime of Genocide, and this sentence must only be carried out by a final judgment rendered by a competent court.¹⁴⁰
3. Anybody that is sentenced to death should have the right to seek a pardon or commutation of the sentence. Amnesty, pardon, or commutation of the sentence may be granted in all cases.¹⁴¹
4. Persons below the age of 18 and pregnant women shall not be subjected to a sentence of death.¹⁴²

¹³¹ Joubert *et al Criminal Procedure Handbook* 427.

¹³² Joubert *et al Criminal Procedure Handbook* 427.

¹³³ Joubert *et al Criminal Procedure Handbook* 427.

¹³⁴ Joubert *et al Criminal Procedure Handbook* 433.

¹³⁵ Joubert *et al Criminal Procedure Handbook* 434.

¹³⁶ Joubert *et al Criminal Procedure Handbook* 434.

¹³⁷ International Covenant on Civil and Political Rights.

¹³⁸ International Covenant on Civil and Political Rights.

¹³⁹ Article 6(1) of the International Covenant on Civil and Political Rights.

¹⁴⁰ Article 6(2) of the International Covenant on Civil and Political Rights.

¹⁴¹ Article 6(4) of the International Covenant on Civil and Political Rights.

¹⁴² Article 6(5) of the International Covenant on Civil and Political Rights.

Article 6 of the Covenant may facilitate inequality regarding death sentencing and cannot ensure the universal protection of the right to life.¹⁴³ In 6(2), it states that the death penalty must only be initiated for “the most serious crimes”, which is a vague statement and allows States to exercise significant discretion as to what serious crimes would be.¹⁴⁴

Botswana

Penal Code of Botswana

Section 25

This section provides list of prescribed punishments which include death, imprisonment, corporal punishment, fine, forfeiture, finding security to maintain peace and be of good behaviour or to come up for judgement or any other punishment provided for in the Penal Code.¹⁴⁵

Section 26

This section provides the methodology used to execute a death sentence. When a person is sentenced to death, they will be hung by the neck until they are dead.¹⁴⁶ A death sentence will not be pronounced to anyone below the age of 18 years when the offence was committed but may be imprisoned.¹⁴⁷ If a woman commits an offence punishable by death and is pregnant at the time of sentencing then she will not be sentenced to death but to life imprisonment instead.¹⁴⁸

Nigeria

Criminal Procedure Act – CAP C38 L.F.N. 2004. (Nigeria)

Section 367

Provides for enactment of death sentencing. It states that a death sentenced will be executed using hanging by the neck until the offender is dead.¹⁴⁹

Section 368

Provides that if a pregnant woman is convicted of a crime punishable by death, then the death sentence will not be pronounced onto her, rather she will be sentenced to life imprisonment.¹⁵⁰ The provision goes further to state that if a crime is committed by a person that is below the age of 17 at the time the crime commenced, then such person will not be subjected to a death sentence then another sentence may be pronounced.¹⁵¹

¹⁴³ Holmes, B “Non-universal human rights? How article 6(2) of the International Covenant on Civil and Political Rights Undermines Human Rights” 2020 *HRLR* (Vol. 9) 99.

¹⁴⁴ Holmes 2020 *HRLR* 99.

¹⁴⁵ Section 25 of the Penal Code of Botswana.

¹⁴⁶ Section 26(1) of the Penal Code of Botswana.

¹⁴⁷ Section 26(2) of the Penal Code of Botswana.

¹⁴⁸ Section 26(3) of the Penal Code of Botswana.

¹⁴⁹ Section 367(1) of the Criminal Procedure Act – CAP C38 L.F.N. 2004.

¹⁵⁰ Section 368(2) of the Criminal Procedure Act – CAP C38 L.F.N. 2004.

¹⁵¹ Section 368(2) of the Criminal Procedure Act – CAP C38 L.F.N. 2004.

Chapter 4: Case law

This chapter will house a detailed explanation of the judicial precedent that is relevant considering the discussion of death sentencing by providing how the landmark case of *S v Makwanyane* changed the landscape of sentencing discretion within South Africa's modern constitutional dispensation. It will also house a discussion how rights in the Bill of Rights can successfully be limited through the example of *Christian Education South Africa v Minister of Education*. Lastly it will indicate how the right to life can be limited to give effect to the right to self-defence and necessity through the case of *S v Goliath*.

S v Makwanyane and Another (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995)

This stands as the landmark case regarding the practice of death sentencing within the Republic. This case concerned two people accused of four counts of murder and one count of robbery under aggravated circumstances and were thus sentenced to death.¹⁵²

The appeal court in this matter had to determine the constitutionality of section 277(1)(a) of the Criminal Procedure Act 51 of 1977 which proposed that death was a competent sentence for murder.¹⁵³ The counsel for the accused contended that this provision conflicts with sections 9 and 11(2) of the Interim Constitution which govern the right to life and freedom and security of the person, specifically the right to not be subjected to cruel and inhumane punishment respectively.¹⁵⁴ Section 277 of the Act prescribed the death penalty as adequate punishment for crimes including murder, treason, robbery or attempted robbery, kidnapping, child-stealing, and rape.¹⁵⁵

Regarding the right to not be subjected to cruel and inhumane punishment, the court held that death is the most extreme form of punishment that a criminal can be subjected to.¹⁵⁶ Its execution cannot be undone.¹⁵⁷ Its continued practice puts an end to the right to life and all the other personal rights that are enshrined in the Bill of Rights.¹⁵⁸ After sentencing, the convicted placed on death row await their time not being certain as to whether their sentence will be reprieved or whether their sentence will be executed.¹⁵⁹ The death penalty and its legal

¹⁵² *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) para 1.

¹⁵³ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) para 2.

¹⁵⁴ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) para 2.

¹⁵⁵ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) para 44.

¹⁵⁶ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) para 26.

¹⁵⁷ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) para 26.

¹⁵⁸ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) para 26.

¹⁵⁹ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) para 26.

process creates much uncertainty which emphasises its cruelty.¹⁶⁰ The court also held that the punishment is inhumane because by its very nature, it denies a person's humanity and is degrading because it strips the convict of dignity and treats him as an object that is to be destroyed by the state.¹⁶¹

Regarding the right to life, the court drew lessons from a Hungarian court which had also declared death sentencing unconstitutional.¹⁶² The Hungarian court relied on section 54 of their constitution which provides that everybody within Hungary has the inherent right to life and human dignity and persons cannot be arbitrarily deprived of these rights and that nobody should be subjected to cruel, inhumane, or degrading punishment.¹⁶³ A point of difference between the Interim Constitution and the Hungarian Constitution is that the latter provides that the right to life may not be "arbitrarily" deprived whereas the former does not allow for the right to be deprived, even arbitrarily and thus extends greater protection of the right to life than its Hungarian counterpart and thus could not be limited by the death penalty.¹⁶⁴

Christian Education South Africa v Minister of Education (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000)

This case, contrary to *S v Makwanyane* illustrates how a fundamental right can be limited. The central issue of this case was whether Parliament violated the religious rights of parents of children in independent schools when it passed laws outlawing the use of corporal punishment.¹⁶⁵ This application was triggered by the implementation of the South African Schools Act 84 of 1996 which provides that no teacher shall administer corporal punishment to a student and that anyone who contravenes this is guilty of an offence and liable for conviction.¹⁶⁶

Christian Education South Africa, referred to as CESA contended that the Schools Act contravened their rights to privacy, freedom of religion, belief and opinion, education, language and culture, and cultural, religious, and linguistic communities.¹⁶⁷ The Minister, in opposition provided that CESA will contravene numerous rights which include the right to equality which provides that all have equal protection under the law, human dignity in the sense that everyone has the right to have their dignity protected, the right of freedom and security of the person which includes to be free from all forms of violence, to not be tortured, and not to be treated

¹⁶⁰ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) para 26.

¹⁶¹ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) para 26.

¹⁶² *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) para 83.

¹⁶³ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) para 83.

¹⁶⁴ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) para 85.

¹⁶⁵ *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000) para 1.

¹⁶⁶ *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000) para 2.

¹⁶⁷ *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000) para 7.

in a cruel and degrading manner, and lastly the rights of children which provide that children have the right to be protected from maltreatment.¹⁶⁸

The court then had to consider whether the right to religious freedom in this instance could be limited in terms of section 36 of the Constitution, 1996 this is because the court recognised that there is a balancing of rights that needs to be done.¹⁶⁹ The nature of the right was that of religious freedom.¹⁷⁰ The shift then moved to establishing the purpose and effect of the limitation and if less restrictive means can be adopted. The court observed global trends that have shown a greater need for the protection of children from potentially harmful religious practices.¹⁷¹ It was view that in any matter that concerns children the interests of the child must take priority.¹⁷²

As a result, CESA's claim that the laws outlawing corporal punishment infringed on their rights to religious freedoms was dismissed in favour of upholding the rights of the child.

S v Goliath 1972 3 SA 1 (A)

South African courts have ruled for grounds of justification that may be relied on when an individual infringes on the right to life of another by murder. The case of *S v Goliath* is the landmark case on the matter of killing another out of compulsion.¹⁷³ It is accepted from the application of our criminal law regarding circumstances whereby objective standards are needed to judge the actions of an accused, it is accepted that no accused person can be expected to meet high and unreasonable demands that are expected from an ordinary citizen in their respective circumstances.¹⁷⁴ It has become generally accepted that the life of an ordinary citizen is more important to himself than the life of another and cannot be expected that he would give up his own life for another.¹⁷⁵ Due to this feature of criminal law, it would be unreasonable for necessity or compulsion to not be available to the actor as a ground of defence for murder and a failure to recognise this would mean subjecting the ordinary citizen to more onerous conditions than the ordinary citizen.¹⁷⁶

¹⁶⁸ Christian Education South Africa v Minister of Education (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000) para 7.

¹⁶⁹ Christian Education South Africa v Minister of Education (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000) para 26.

¹⁷⁰ Christian Education South Africa v Minister of Education (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000) para 36.

¹⁷¹ Christian Education South Africa v Minister of Education (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000) para 41.

¹⁷² Christian Education South Africa v Minister of Education (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000) para 41.

¹⁷³ Memani and Another v S (A75/2015) [2015] ZAWCHC 156 (26 October 2015) para 28.

¹⁷⁴ Memani and Another v S (A75/2015) [2015] ZAWCHC 156 (26 October 2015) para 29.

¹⁷⁵ Memani and Another v S (A75/2015) [2015] ZAWCHC 156 (26 October 2015) para 29.

¹⁷⁶ Memani and Another v S (A75/2015) [2015] ZAWCHC 156 (26 October 2015) para 29.

S v Williams 1995 (3) SA 632 (CC)

The Constitution ensures that sentencing must confirm with the standards of decency as recognised in the civilised world.¹⁷⁷ This creates no room for brutal and dehumanising treatment thus ensuring the dignity and self-esteem of an individual.¹⁷⁸ The Constitution imposes a duty on the State to be the guarantors of those rights and ensure that they are exercisable by all.¹⁷⁹ This causes the state to act as a role model in detaching society from its violent past and requires it to recognised that even the worst criminals is person worthy of common human dignity.¹⁸⁰

S v Dodo 2001 (3) SA 382 (CC)

When imposing a sentence, the factors considered must not be limited to the time served but also the conditions that the sentence is served under.¹⁸¹ However, there is a tendency to focus on the former than the latter which consequently draws a big question as to whether human dignity is being upheld.¹⁸² The proportionality of crime and the sentence duration will inform whether punishment is cruel, inhuman or degrading.¹⁸³ If one tries to justify the period of incarceration without considering the offence and the imprisonment duration then one ignores the very essence of the right to human dignity.¹⁸⁴ Humans are not to be treated as an end in themselves and not as a means to an end, thus if a sentence is being imposed as way to deter others and not in relation to the seriousness of an offence then the offender is being used as a means to an end and his dignity and humanity is thus ignored.¹⁸⁵

¹⁷⁷ *S v Williams* 1995 (3) SA 632 (CC) para 77.

¹⁷⁸ *S v Williams* 1995 (3) SA 632 (CC) para 77.

¹⁷⁹ *S v Williams* 1995 (3) SA 632 (CC) para 77.

¹⁸⁰ *S v Williams* 1995 (3) SA 632 (CC) para 77.

¹⁸¹ *S v Dodo* 2001 (3) SA 382 (CC) para 36.

¹⁸² *S v Dodo* 2001 (3) SA 382 (CC) para 36.

¹⁸³ *S v Dodo* 2001 (3) SA 382 (CC) para 37.

¹⁸⁴ *S v Dodo* 2001 (3) SA 382 (CC) para 38.

¹⁸⁵ *S v Dodo* 2001 (3) SA 382 (CC) para 38.

Chapter 5: Findings

In this chapter, this paper will encompass the legislation and judicial precedent that have been explained in the preceding chapters. In doing so it will provide contrasting views on death sentencing based on the legislation observed from the jurisdictions observed. It will also provide a concise summary of the principles of the cases mentioned with the intent of providing context for the final conclusions to be reached as to whether death sentencing can be reinstated.

Findings based on legislation

The Constitution, as the supreme law of the land provides that all conduct that is not in line with its provisions is deemed as unconstitutional.¹⁸⁶ It also states that all within the Republic are entitled to enjoy equal protection of the law.¹⁸⁷ This provision is of importance to this paper, due to the fact that it leaves no room for inference as to whether anybody can be deprived of the protection awarded by the provisions of the Constitution. This can lead one to conclude that even those who are guilty of crimes deserve this equality from the law as there is no exception made for them by the Constitution or any other Act of Parliament. The Constitution also provides that South Africa as a state is founded on the right to human dignity.¹⁸⁸ The effect of this is that it raises the right to dignity above other fundamental rights. This right provides that everybody will have the right to dignity as well as the right to have their dignity respected and protected.¹⁸⁹ Through this language, one can conclude that, similarly to the right to equality, one cannot be arbitrarily deprived of this right through any other act of Parliament, even those who are convicted of a crime. Section 12 of the Constitution houses right to freedom and security of the person which includes the right to be free from all forms of violence, not to be tortured, and to be subjected to cruel, inhumane, or degrading treatment.¹⁹⁰ This provision speaks directly to those who have been sentenced and sets out a standard to be met regarding the safeguarding of their bodily integrity and well-being.

The standards imposed by the Constitution informed the current forms of sentencing set by the Criminal Procedure Act 51 of 1977.¹⁹¹ The Act provides the following as appropriate forms of sentencing, imprisonment, declaration as a habitual criminal, committal to an institution, fine, or correctional supervision.¹⁹² Due to the Constitution, death sentencing is no longer seen as a suitable form of punishment and this finding is underpinned by its omission from the list of punishments.

The International Convention on Civil and Political Rights provides some guidance on how to approach death sentencing. In Article 6, it is provided that if death sentencing is still in use, then it must be reserved for the most heinous crimes.¹⁹³ This provision is of particular importance because the Constitution does allow for courts to observe foreign and international legislation and apply it insofar as it is compatible with the constitutional provisions.¹⁹⁴ However,

¹⁸⁶ Section 2 of the Constitution of the Republic of South Africa, 1996.

¹⁸⁷ Preamble of the Constitution of the Republic of South Africa, 1996.

¹⁸⁸ Section 1(a) of the Constitution of the Republic of South Africa, 1996.

¹⁸⁹ Section 10 of the Constitution of the Republic of South Africa, 1996.

¹⁹⁰ Section 12 of the Constitution of the Republic of South Africa, 1996.

¹⁹¹ Section 277 of the Criminal Procedure Act 51 of 1977.

¹⁹² Section 274(1)(a) -(h) of the Criminal Procedure Act 51 of 1977.

¹⁹³ Article 6(2) of the International Covenant on Civil and Political Rights.

¹⁹⁴ Section 39(2) of the Constitution of the Republic of South Africa, 1996.

as established, the fundamental rights to equality, life, dignity, and freedom and security of the person may hinder the application of this principle of the International Covenant due to the fact that death sentencing effectively denies a person of such rights.

South Africa's stance on death sentencing can be contrasted by the Penal Code of Botswana, the Constitution of the Federation of Nigeria, and the Nigerian Criminal Procedure Act. These foreign statutes concur in that they provide for the application of death sentencing in their respective nations.¹⁹⁵¹⁹⁶ Another point that these statutes agree on is that the death sentence will not be pronounced on a person below the age of majority or a pregnant woman, in the case of a pregnant person, the courts will rather impose a life sentence to be carried out.¹⁹⁷¹⁹⁸ The Constitution of Nigeria proclaims that the right to life can be suspended if depriving a person of that right would prevent an unlawful attack, creating unrest, suppressing a riot, insurrection, or mutiny.¹⁹⁹ This clearly sets an exception for the enjoyment of the right to life which allows for death sentencing in that State. This principle is in stark contrast with the Constitution which states that the right to life, as well as other fundamental rights are to be enjoyed by all and does not create such an exception to the enjoyment of rights.

Findings based on case law

S v Makwanyane held that the death penalty is unconstitutional on the grounds that it arbitrarily deprived a person of their rights to equal protection by the law, dignity, life, and to not be subjected to cruel and degrading forms of punishment.²⁰⁰ This ruling is in line with the constitutional principles on which it is based due to the fact that the language used in those rights effectively mean that those rights cannot be infringed on by the State, which solidifies the current standpoint on the matter.

Although the case of *Christian Education South Africa v Minister of Education* illustrates how a right in the Bill of Rights can be limited, for instance, the right to religious freedom,²⁰¹ the same limitation may not be placed on the rights impacted by capital sentencing namely, the rights to equal protection by the law, dignity, life, and to not be subjected to cruel and degrading punishment. A limitation of these rights is may not be possible due the fact that there is no provision for these right to be limited as opposed to other rights contained within the Bill of Rights which house provisions akin to the limitations clause stipulated in section 36 of the Constitution.

There is seemingly a void in the law regarding the guarantee of the right to life. In the case of *S v Goliath* 1972 3 SA 1 (A), the court ruled that there are instances when the killing of another may be held as a ground of justification when raising the defence of necessity or private defence.²⁰² The difference between *Makwanyane* and *Goliath* is that the former takes power

¹⁹⁵ Section 25 of the Penal Code of Botswana.

¹⁹⁶ Section 368 of the Criminal Procedure Act – CAP C38 L.F.N. 2004. (Nigeria).

¹⁹⁷ Section 26 of the Penal Code of Botswana.

¹⁹⁸ Section 368 of the Criminal Procedure Act – CAP C38 L.F.N. 2004. (Nigeria).

¹⁹⁹ Section 33 of the Constitution of the Federation of Nigeria 1999.

²⁰⁰ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

²⁰¹ *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000).

²⁰² *Memani and Another v S* (A75/2015) [2015] ZAWCHC 156 (26 October 2015) para 29.

away from the State to execute individuals whereas the latter case permits individuals, including the police to use lethal force in order to protect some legal interest that are worthy of protection.

Chapter 6: Conclusion

To refer to the research objective, this paper originally set out to determine the adequacy of South Africa's stance on death sentencing and whether it could be reinstated in the current constitutional dispensation. This paper also set out to answer provide a legal analysis of South Africa's standpoint on death sentencing in comparison to Botswana, Nigeria, and International Conventions.

Based on the resources consulted throughout this research paper, there appears to be no basis for the retention of the death penalty in modern South Africa. The reason for its inability to be applied can be owed to a myriad of factors, chief among which, the absolute nature of the rights which are triggered by death sentencing, namely the rights to be equally protected by the law, dignity, life, and to not be subjected to any forms of violence, or cruel, inhumane, and degrading treatment. These rights are absolute in the sense that they are still attached to those who are convicted as opposed to Botswana and Nigeria, which allows the courts to exercise some discretion.²⁰³

Its inapplicability is also determined by numerous societal factors, such as the fact that there have been some races that have been disproportionately sentenced to death more than others, and the fact that evidence shows that it is not any more a deterrent than other forms of crime control, such as the increased likelihood of being apprehended for illegal activities.²⁰⁴ The very existence of other forms of punishment leads death sentencing to be less justifiable in a constitutional dispensation.²⁰⁵ Closely tied to the racial disparities, statistics have shown that those who were subjected to death were individuals that could not afford an effective defence.²⁰⁶ South Africa's violent past necessitated a shift from violent forms of punishment to a more rehabilitation-focused approach. This is evident through interpretations of section 11 of the Constitution which imply that the State must be a role model for demonstrating the regard for human life.²⁰⁷²⁰⁸ In sentencing, it is important to be cognisant that person's humanity and dignity should still be upheld and not used as means to an end as this may lead to a sentence that is disproportionate to the offence committed.²⁰⁹

In short, South Africa can no longer reinstate the death penalty, due to its inconsistency with the Constitution. As such, the court in *S v Makwanyane* stands correct in its ruling declaring the practice as unconstitutional. Worldwide trends also indicate a distain for the death sentence and are moving away from it as a result, even nations where death sentencing remains in effect it remains unused in favour of other forms of punishment.

²⁰³ Novak, A "Capital Sentencing Discretion in Southern Africa: A Human Rights Perspective on the Doctrine of Extenuating Circumstances in Death Penalty Cases" (2014) AHRLJ 34.

²⁰⁴ Cronje, F "Capital Punishment in South Africa: Was Abolition the Right Decision?" (2016) SAIRR 3.

²⁰⁵ Joubert, J Ally, D, Kemp, G Mokoena, M Swanepoel J Terblanche, S & van der Merwe, S *Criminal Procedure Handbook* Thirteenth Edition (2020) 419.

²⁰⁶ Joubert *et al* *Criminal Procedure Handbook* 417.

²⁰⁷ Currie, I & De Waal, J *The Bill of Rights Handbook* Sixth Edition (2013) 259.

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