

CHAPTER FOUR

THE RIGHT TO LIFE AND THE DEATH PENALTY IN AFRICA

- 4.1 Introduction
- 4.2 The right to life under the United Nations human rights system
 - 4.2.1 The Universal Declaration of Human Rights
 - 4.2.2 The International Covenant on Civil and Political Rights
 - 4.2.3 The United Nations Human Rights Committee
- 4.3 The right to life in the African human rights system
 - 4.3.1 The African Charter on Human and Peoples' Rights
 - 4.3.2 The African Commission on Human and Peoples' Rights
- 4.4 The right to life in African national constitutions
- 4.5 Jurisprudence of African national courts
 - 4.5.1 The Court of Appeal of Botswana
 - 4.5.2 The Supreme Court of Nigeria
 - 4.5.3 The High Court and Court of Appeal of Tanzania
 - 4.5.4 The Constitutional Court of South Africa
- 4.6 Jurisprudence of other national courts and their relevance to Africa
 - 4.6.1 The Canadian Supreme Court
 - 4.6.2 The Hungarian Constitutional Court
- 4.7 Conclusion

4.1 Introduction

Although in the horizontal legal system of international law,¹ discussion of which rights take priority over others remains unsettled,² the right to life has been described as “[t]he most fundamental of all human rights”.³ All human rights are of no significance without the right to life as “life” is a prerequisite for the enjoyment of any other human rights. Accordingly, “the right to life has been properly characterised as the supreme human right, since without effective guarantee of this right, all other rights of a human being would be devoid of meaning”.⁴

As stated in a number of human rights treaties, there are some rights that states may derogate from in time of emergency, but there are also others that states may not derogate from, as these rights are deemed indispensable for a human rights regime. Among the non-derogable rights is the right to life.⁵ The United Nations (UN) Human Rights Committee, established under the ICCPR, has observed that the right to life is the supreme right from which no derogation is permitted even in time of public emergency that threatens the life of a nation.⁶ The Committee further noted that all measures of abolition should be considered as progress in the enjoyment of the right to life.⁷ In support of the conclusion of the Human Rights Committee, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions has emphasised that

¹ The horizontal legal system of international law places all norms on the same plane, their interrelations ungoverned by any hierarchy. However, the ranking of rights is significant in determining states’ obligations to respect and protect certain rights under a variety of circumstances (see Orlin (2000) 73).

² As above. The Inter-American Commission on Human Rights also regards the right to life as fundamental and pre-eminent (See Davidson (1997) 261).

³ Lord Bridge in *R v Home Secretary, Ex parte Bugdaycay* [1987] AC 514, [1987] 1 All ER 940 (HL) at 5314 (AC).

⁴ M Norwak, “U.N. Covenant on Civil and Political Rights: CCPR Commentary”, referred to in Orlin (2000) 74. See also Carlson & Gisvold (2003) 67.

⁵ Other non-derogable rights include fair trial rights, and prohibition of torture, slavery and retroactive measures.

⁶ UN Human Rights Committee, General Comment No. 6: The right to life (article 6 of the ICCPR), 27 July 1982, para 1, (UN Doc. HRI\GEN\1\Rev.1 at 6 (1994)), hereinafter referred to as CCPR General Comment No. 6.

⁷ CCPR General Comment No. 6, para 6.

abolition of capital punishment is most desirable in order fully to respect the right to life.⁸

Furthermore, absolute abolitionists hold the firm view that the right to life is absolute as it prevails over every other moral consideration that might be thought to compete with it or override it. In support of this, Bedau has rightly pointed out that this is true only when we are referring to the right to life of the innocent.⁹ It should be noted that characterising the right to life as the supreme right does not mean that it is absolute. At the international or national level, the right to life is not accorded the status of an absolute right,¹⁰ as self-defence, from a moral and ethical point of view, justifies the taking of life by an individual or even the state under certain circumstances.¹¹ On the other hand, the death penalty cannot be construed as an act of self-defence against an immediate threat to life.

Although the right to life is not absolute, it is still the “supreme right” and the “most fundamental” of all human rights. Wennergren has stressed the importance of the right to life in a dissent in *Kindler v Canada*,¹² in which he stated:

The value of life is immeasurable for any human being and the right to life enshrined in article 6 of the Covenant is the supreme human right. It is an obligation of State parties to the Covenant to protect the lives of all human beings on their territory and under their jurisdiction. If issues arise in respect of the protection of the right to life, priority must not be accorded to the domestic laws of other countries or to (bilateral) treaty articles. Discretion of any nature permitted under an extradition treaty cannot apply, as there is no room for it under Covenant obligations. It is worth repeating that no derogation from a State’s obligations under article 6, paragraph 1, is permitted ...

⁸ Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. E/CN.4/1997/60, 24 December 1996, para 79.

⁹ Bedau (1999) 43.

¹⁰ Boyle (1985) 221, 222-223.

¹¹ Devenish (1990) 17.

¹² See dissenting opinion of Mr Bertil Wennergren in *Kindler v Canada*, Communication 470/1991, UN Doc. CCPR/C/48/D/470/1991, 30 July 1993 (Human Rights Committee).

Therefore, for the purposes of punishment under law, everyone's life is valuable and lives have equal value. Human life has infinite value or worth and so must be respected and protected accordingly, which therefore follows that even murderers have to be treated in light of the value of their lives, a value not erased by the harm or injustice their lethal violence has caused the innocent.¹³ Thus, sentencing to death and executing a person violates that person's right to life since even a murderer has an indisputable right to life, which has to be respected and protected in the same way as the right to life of a non-murderer is respected and protected. In addition, Sane has argued that "deliberately killing someone violates the most basic of all human rights – the right to life – and has no place in today's world".¹⁴ Thus, the core of the case against capital punishment is the notion that there is something inexcusable about taking the life even of a person guilty of an atrocious crime.¹⁵

Some defenders of the death penalty have, however, argued that a murderer forfeits his life, and hence putting him to death does not violate his right to life but merely infringes it.¹⁶ It is not disputed that under appropriate conditions, persons can forfeit their rights.¹⁷ But the question to be asked is: What about the other rights of the murderer that can only be enjoyed if he is alive or his rights to due process of law and to equal protection of the law? As seen below, where the death penalty is provided as an exception to the right to life, procedural safeguards must be adhered to. If

¹³ Bedau (1999) 40.

¹⁴ Amnesty International, "Towards a world without executions" AI Index: POL10/004/1999, 16 June 1999.

¹⁵ Devine (2000) 235. Although not discussed in this thesis, it is worth noting that the victim also has a right to life, which has to be defended. Accordingly, defenders of the death penalty have argued that capital punishment defends the right to life of the victim, it means the greatest mark from the state that it defends the ordinary citizen's "right to life" (see Anderson (2001) chapter 2). But the concept of punishment itself is recognition that the victim's right to life has been violated. Opposition to capital punishment is to ensure that the punishment inflicted does not lead to further violations, for example in this case, a violation of the right to life of the offender.

¹⁶ John Locke is in support of the argument that a murderer forfeits his life. See J Locke, *Second treatise of government* (1690), sec. 23.

¹⁷ For example, everyone's "right to liberty" is recognised in international and regional human rights instruments. However, it does not follow from this right that it is always wrong to deliberately deprive a person of liberty, as in the case of imprisonment of a convicted offender. Therefore, under appropriate conditions, persons can forfeit their right to liberty.

procedural safeguards are not respected, the imposition of the death penalty will amount to a violation of the right to life.

This chapter examines the right to life and its relation to the death penalty in Africa in the light of the protection afforded by various human rights instruments at the international and national levels. The chapter begins by discussing the right to life in the UN human rights system and makes reference to the jurisprudence of the UN Human Rights Committee on the death penalty as a violation of the right to life. Discussion of the UN system is relevant as African states are parties to major UN human rights instruments, such as the ICCPR.¹⁸ Further, the decisions of the African Commission on Human and Peoples' Rights on the right to life and the death penalty is also examined. Reference is also made to the right to life in the European and Inter-American human rights systems, when examining the right to life under the UN and African human rights systems. Subsequently, the chapter examines the right to life in African national constitutions and how African national courts have interpreted these provisions. Reference is also made to the judgments of other (non-African) national courts on the death penalty as a violation of the right to life, as courts in Africa draw inspiration from such judgments.

4.2 The right to life under the United Nations human rights system

4.2.1 The Universal Declaration of Human Rights

The UDHR is seen as the cornerstone of contemporary human rights.¹⁹ It is important to examine the UDHR with regard to the death penalty because of its continuing significance as a benchmark for human rights standards. In addition, the World Conference on Human Rights declared in June 1993 that

the Universal Declaration of Human Rights, which constitutes a common standard of achievement for all peoples and all nations, is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing

¹⁸ Moreover, all African states are member states of the UN. For a list of member states, see website <<http://www.un.org/Overview/unmember.html>> (accessed 21 March 2005).

¹⁹ Schabas (2002) 23.

international human rights instruments, in particular the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.²⁰

Therefore, an examination of the UDHR is important as it serves as a source of inspiration not only to the UN bodies but also to other bodies (including courts) at the regional and national levels, irrespective of whether a state has consented to be bound by it, because it forms part of customary international law.²¹

Article 3 of the UDHR provides, “Everyone has the right to life, liberty and security of person”. This article, similar to article I of the American Declaration on the Rights and Duties of Man (American Declaration),²² makes no mention of the death penalty. Looking at the *travaux préparatoires* and subsequent interpretations of article 3 of the UDHR by the UN General Assembly and the Economic and Social Council resolutions, it is clear that the death penalty was considered to be incompatible with the right to life.²³ For example, during the drafting process, the *Comite Permanente de Relaciones Espiritualistas* submitted a letter on 8 February 1947 to the UN Secretary General requesting that capital punishment be outlawed “as any form of violent death is unChristian”.²⁴ Also, during the consideration of the Secretariat of the UNCHR’s draft article 3 at the second plenary session of the Drafting Committee in

²⁰ Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993.

²¹ The UDHR now forms part of customary international law, as it has inspired the adoption of other human rights treaties, it has served as a model for national bill of rights, and the organs of the UN have used it as a standard setting by which to measure the conduct of states (see Dugard (2000) 240-241).

²² Organization of American States (OAS) resolution XXX, adopted by the Ninth International Conference of American states, 1948 (reprinted in *Basic documents pertaining to human rights in the Inter-American system*, OEA/Ser.L/V/I.4 Rev.9, 31 January 2003 at 17). Although the American Declaration was originally intended as a non-binding declaration, similar to the UDHR, The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have held that it is today a source of international obligation for the OAS member states (see Inter-American Court of Human Rights, Advisory Opinion OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man within the framework of article 64 of the American Convention on Human Rights, 14 July 1989, Series A, No. 10 (1989)). Member states of the OAS are now legally bound to respect the provisions of the American Declaration. Article I of the American Declaration guarantees the right to life in similar terms with the UDHR, providing that “every human being has the right to life, liberty and security of his person.

²³ The *travaux préparatoires* shows that “the death penalty was viewed virtually unanimously as a necessary evil, one whose existence could not be justified on philosophical or scientific grounds” (Schabas (2002) 42. For subsequent interpretations of the UDHR, see UN General Assembly resolutions 2393 (XXIII), 2857 (XXVI) & 44/128, and ECOSOC resolution 1930 (LVIII).

²⁴ Schabas (2002) 29.

June 1947, Roosevelt suggested that it might be better not to use the term “death penalty” as there was a movement underway in some states to abolish the death penalty.²⁵ Subsequently, any reference to the death penalty was removed in the UDHR.

Although there was no real consensus that the UDHR should take an abolitionist stance, Schabas has rightly concluded that article 3 of the UDHR is abolitionist in outlook for the reason that by its silence on the death penalty, it directly envisages its abolition and implicitly admits its existence as a necessary evil.²⁶ Bearing the aforesaid in mind, the application of the death penalty in Africa is, therefore, a violation of the right to life, guaranteed under article 3 of the UDHR, which is binding on states as it constitutes customary international law.

4.2.2 The International Covenant on Civil and Political Rights

The ICCPR is considered because, as noted in chapter two, it has been ratified by 48 African states, signed by three and two are still to sign and ratify it. Unlike the UDHR, the ICCPR is a binding treaty and is not silent on the death penalty. Article 6 of the ICCPR, which derives from article 3 of the UDHR, prohibits the arbitrary deprivation of life. It further acknowledges the death penalty as an exception to the right to life while listing safeguards and restrictions on its implementation.²⁷ For the imposition of the death penalty to be seen an exception to the right to life, it has to be imposed for the most serious crimes,²⁸ procedural rules have to be respected, which include the right of anyone sentenced to death to seek pardon or commutation of the sentence, it must not be imposed on anyone one below the age of eighteen or be

²⁵ Schabas (2002) 30.

²⁶ Schabas (2002) 42-43. Schabas based his conclusion on the fact that several UN General Assembly and ECOSOC resolutions dealing with the limitation and ultimate abolition of the death penalty refer to article 3 of the UDHR in their preambles, implying that article 3 is favourable to abolition. To support his conclusion, he also cites the UN Secretary-General’s report of 1973 (UN Doc. E/5242, para 11), which asserted that article 3 of the UDHR implies limitation and abolition of the death penalty.

²⁷ The American Convention is similar to the ICCPR in that it recognises the death penalty as an exception to the right to life, laying down similar restrictions on its imposition (article 4). However, the CRC guarantees the right to life in its article 6 and does not recognise the death penalty.

²⁸ Article 6(2) of the ICCPR.

carried out on pregnant women.²⁹ Thus, the imposition of the death penalty will not amount to a violation of the right to life if the above conditions are met.

However, as discussed in chapter six, it should be noted that even if the above conditions are met, but the death penalty is imposed after an unfair trial, it would still amount to a violation of article 6 of the ICCPR. Furthermore, although the death penalty is provided for in article 6 of the ICCPR as an exception to the right to life, the *travaux préparatoires* and subsequent interpretations of article 6 provide strong evidence of a growing trend in favour of abolition of the death penalty.³⁰ The exceptions to the right to life under article 6 have therefore gradually developed, under international human rights treaty law, towards abolition.³¹

4.2.3 The United Nations Human Rights Committee

An examination of the jurisprudence of the UN Human Rights Committee is relevant, as 32 African states have ratified the Optional Protocol to the ICCPR, thus recognising the competence of the Human Rights Committee to receive and consider communications from individuals who claim to be victims of a violation by a state party.³² The decisions of the Human Rights Committee are not legally binding *stricto sensu*.³³ Nevertheless, they represent highly authoritative decisions which state parties are expected to implement.

²⁹ Article 6(4) & (5) of the ICCPR.

³⁰ See Schabas (2002) 45-77 & 93. Unlike the ICCPR (and the UDHR), the *travaux préparatoires* to the European Convention is of little assistance in the interpretation of article 2, guaranteeing the right to life. Thus, in interpreting article 2 of the Convention, one relies on the PACE opinions, other treaties on the abolition of the death penalty in Europe and the decisions of the European Court on Human Rights (see chapter 3 of this thesis).

³¹ See Schabas (1996) 20.

³² See article 1 of the Optional Protocol. The Protocol was adopted by the UN General Assembly in resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976 (UN Doc. A/6316 (1966), 999 U.N.T.S. 302). It has been signed by two African states and 19 are yet to sign and ratify the Protocol. See “Status of ratifications of the principal international human rights treaties” <<http://www.unhchr.ch/pdf/report.pdf>> (accessed 31 March 2005).

³³ The decisions of the Human Rights Committee are not legally binding *stricto sensu* because they do not confer an enforceable title upon the complainant in the event of a favourable decision by the Committee. See Schmidt (2000) 48.

The Human Rights Committee has elaborated on the right to life enunciated in article 6 of the ICCPR in its General Comment No. 6 and in some death penalty cases. This section focuses on the above General Comment and some of the Committee's cases, which show a change in views (progress towards abolition) based on evolving standards. In General Comment No. 6,³⁴ the Committee viewed the right to life as the supreme right from which no derogation is permitted even in time of emergency which threatens the life of the nation.³⁵ With regard to the death penalty, the Committee stated:

While it follows from article 6 (2) to (6) that State parties are not obliged to abolish the death penalty totally they are obliged to limit its use and, in particular, to abolish it for other than the "most serious crimes". Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the application of the death penalty to the "most serious crimes". *The article also refers generally to abolition in terms which strongly suggest (paras. 2 (2) and (6)) that abolition is desirable ... [A]ll measures of abolition should be considered as progress in the enjoyment of the right to life.*³⁶

Thus, article 6 points to abolition of the death penalty as a human rights objective and as seen above, the Human Rights Committee encourages abolition. In addition, as seen in chapter two, the Committee's jurisprudence is that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6(1) of the ICCPR, in circumstances where it is imposed without any possibility of taking into account the defendant's circumstances or the circumstances of the particular case.³⁷

Further, under article 6(2) of the ICCPR, the death penalty is permissible as an exception to life if it is imposed only "for the most serious crimes". Therefore, if it is imposed for a less serious crime, it cannot be seen as a valid limitation of the right to life. In *Lubuto v Zambia*, the Human Rights Committee had to address the issue of

³⁴ CCPR General Comment No. 6, para 7.

³⁵ CCPR General Comment No. 6, para 1. Article 4 of the ICCPR prohibits derogations from article 6 even in time of public emergency.

³⁶ CCPR General Comment No. 6, para 6 (emphasis added).

³⁷ See for example, *Rolando v Philippines*, Communication 1110/2002, UN Doc. CCPR/C/82/D/1110/2002, 8 December 2004, para 5.2.

whether Lubuto's rights under the ICCPR have been violated.³⁸ One of the issues to be determined was whether the sentence in the instant case (the death sentence) was compatible with article 6(2) of the ICCPR.³⁹ The Committee was of the view that the crime could not be considered as the "most serious crime", as the use of firearms "did not produce the death or wounding of any person".⁴⁰ The Committee, therefore, held that the mandatory imposition of the death penalty under the circumstances violated article 6(2) of the ICCPR, and that Lubuto was entitled, under article 2(3)(a) to an appropriate and effective remedy entailing the commutation of sentence.⁴¹

With regard to extradition, in *Kindler v Canada*, the Human Rights Committee had to address the issue of whether by extraditing Mr Kindler to the United States without seeking assurances that the death sentence would not be imposed, Canada exposed him to a real risk of a violation of his rights under the ICCPR.⁴² Human Rights Committee member, Wennergren, in his individual dissenting opinion in *Kindler v Canada*, was of the opinion that it would appear logical for article 6(1) to be interpreted widely, while article 6(2), which addresses the death penalty, be interpreted narrowly.⁴³ Wennergren based his opinion on the fact that in the *travaux préparatoires* to the ICCPR, many delegates and bodies participating in the drafting process saw the death penalty as an "anomaly" or a "necessary evil".⁴⁴ He went further to state that article 6 does not permit states that have abolished the death penalty to reintroduce it at a later stage, and that the right to life in article 6 of the ICCPR is the supreme human right that has to be protected without according priority

³⁸ *Lubuto v Zambia*, Communication 390/1990, UN Doc. CCPR/C/55/D/390/1990/Rev.1, 31 October 1995.

³⁹ As above, para 7.2

⁴⁰ As above.

⁴¹ As above, para 7.2 & para 9.

⁴² *Kindler v Canada*, Communication 470/1991, UN Doc. CCPR/C/48/D/470/1991, 30 July 1993, para 13.1. This case concerned the extradition of Joseph Kindler to the USA, where he will face the death penalty (para 2.1). The Committee found that the extradition did not violate Canada's obligations under article 6 of the ICCPR (para 14.6).

⁴³ Dissenting opinion of Mr Bertil Wennergren (*Kindler v Canada*).

⁴⁴ As above.

to the domestic laws of other countries.⁴⁵ Accordingly, he was of the view that Canada violated article 6(1) by consenting to extradite Mr Kindler to the United States, without having secured assurances that he would not be subjected to the execution of a death sentence.⁴⁶

In *Judge v Canada*, the Human Rights Committee had the opportunity to reconsider its position in *Kindler v Canada* above.⁴⁷ The Committee noted that its decision in *Kindler v Canada* was established ten years ago, and that since that time there has been a broadening international consensus in favour of the abolition of the death penalty, and in states which have retained the death penalty, a broadening consensus not to carry it out.⁴⁸ The Committee stated as follows:

For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.⁴⁹

Accordingly, the Human Rights Committee found Canada in violation of Judge's right to life under article 6(1) by deporting him to the United States, where he is under sentence of death, without ensuring that the death penalty would not be carried out.⁵⁰

⁴⁵ As above. However, it should be noted that the HRC is yet to take the view that article 6(2) of the ICCPR prevents the reintroduction of the death penalty (See Schabas (2002) 102).

⁴⁶ As above. HRC member Rajsoomer Lallah was also of the opinion that there was a case before the Committee to find a violation by Canada of article 6 of the ICCPR, as the right to life is fully respected and protected within Canada's territory but Canada abrogates that level of respect and protection by extraditing Mr Kindler to face the real risk of the death sentence. This inconsistency constituted a real risk of "arbitrary" deprivation of life within the terms of article 6(1), as unequal treatment is in effect meted out to different individuals (, those that are extradited and those that are not) within the same jurisdiction (see dissenting opinion of Mr Rajsoomer Lallah, paras 3.4 - 3.5).

⁴⁷ *Judge v Canada*, Communication 829/1998, UN Doc. CCPR/C/78/D/829/1998, 20 October 2003. This case concerned the deportation of Roger Judge to the United States to face capital punishment (paras 2.1 – 2.8)

⁴⁸ As above, para 10.3.

⁴⁹ As above, para 10.4.

⁵⁰ As above, para 10.6. Similarly, the South African Constitutional Court, as seen below, has found an extradition without seeking assurances that the death sentence would not be imposed to be in violation of the right to life.

4.3 The right to life in the African human rights system

4.3.1 African Charter on Human and Peoples' Rights

The African Charter provides for the right to life in article 4, which states: “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. *No one may be arbitrarily deprived of this right*”.⁵¹ The language of article 4, by its reference to arbitrary deprivation of life, is similar to that of article 6(1) of the ICCPR, indicating a prohibition of the arbitrary use of the death penalty. In view of that, Mbaya has pointed out that it permits the death penalty, which is widespread in Africa, provided it is imposed in accordance with the law.⁵²

However, an objective and not subjective analysis of article 4 points towards abolition as a goal. Such an interpretation has to be done in good faith and in accordance with the ordinary meaning to be given to the terms of the African Charter in their context and in the light of its object and purpose.⁵³

Although there is little interpretative material to assist in construing article 4 of the African Charter, this article has to be interpreted in the light of

international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights, as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the Parties to the present Charter are members.⁵⁴

⁵¹ Emphasis added. In addition, see article 5 of the African Children's Charter, which guarantees every child the inherent right to life.

⁵² E Mbaya, “A la recherche du noyau intangible dans la Charte africaine” in Fribourg, *Le noyau intangible des Droits de l'homme* (1991) 221, referred to in Schabas (2002) 355.

⁵³ See article 31 (general rule of interpretation of treaties) of the Vienna Convention on the Law of Treaties, adopted on 22 May 1969, entered into force on 27 January 1980 (1155 U.N.T.S. 331).

⁵⁴ See article 60 of the African Charter.

Therefore, based on the above, the analysis of the death penalty in international and national human rights instruments may be useful for the purposes of interpreting article 4 of the African Charter.

First, the interpretation of article 3 (right to life) of the UDHR, which points towards abolition as a goal, relying in part upon the drafting history and also on subsequent developments in state practice including “soft law” principles adopted by the UN organs, can be very useful in interpreting article 4 of the African Charter.⁵⁵ Although the problem with drawing inspiration from the UDHR is that the right to life in article 3 is provided for in clearly unqualified terms while that of article 4 of the African Charter is provided for in somewhat qualified terms, it should be noted that both instruments do not explicitly mention the death penalty.

Second, the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, may be useful for the purposes of interpreting article 4 of the African Charter. As noted in the introduction chapter, it has been ratified by six African countries and signed by two who are also parties to the African Charter. This Protocol abolishes the death penalty in peacetime.⁵⁶ Thus, drawing inspiration from this instrument implies that the death penalty should be quite an exceptional measure, and be applied only in wartime, while having in mind the ultimate goal of abolition, as the Protocol aims at abolition of the death penalty.

Third, article 4 of the African Charter has to be interpreted in the light of articles 5(3) and 30(e) of the African Children’s Charter and article 4(2)(j) of the African Women’s Protocol, which place restrictions on the application of the death penalty. In this light, it cannot be said that article 4 permits the death penalty in all circumstances.

Furthermore, the interpretation of other human rights norms and standards, such as resolutions on the death penalty, adopted by the UN and other bodies has to be incorporated in the interpretation of article 4 of the African Charter. Inspiration has to

⁵⁵ Schabas (2002) 356.

⁵⁶ See articles 1 and 2 of the Second Optional Protocol to the ICCPR.

be drawn from the 1999 resolution of the African Commission,⁵⁷ which was adopted because Non-Governmental Organisations (NGOs) had expressed concerns about recent death sentences carried out in Africa.

Overall, article 4 of the African Charter allows for the death penalty only if substantive and procedural safeguards, and the restrictions on its imposition, are respected. Otherwise, its imposition will be in violation of article 4 of the Charter.⁵⁸ But considering the fact that article 4 makes no mention of the death penalty, and adopting an objectively broad and creative manner of interpretation, it is my view that article 4 could be interpreted in such a way as to imply that it does not allow for the death penalty. Such reading can be arrived at by drawing inspiration from the interpretation of section 54(1) of the Constitution of the Republic of Hungary, which also prohibits the arbitrary deprivation of life. The Hungarian Constitutional Court,⁵⁹ in interpreting section 54(1), found the death penalty in Hungary to be an arbitrary deprivation of life. Considering the above decision, an interpretation of article 4 of the African Charter in like manner will mean that it does not permit the death penalty, as it will be considered an arbitrary deprivation of life.

Some scholars have gone further to seek guidance from the interpretation of the right to life provisions in national constitutions in interpreting article 4 of the African Charter. For example, Nowak rightly points out that the interpretation of the right to life provision of the South African Interim Constitution Act 200 of 1993 might serve as precedent for the interpretation of the African Charter as an abolitionist text.⁶⁰ This is because the African Charter, similar to the then Interim Constitution, does not explicitly mention the death penalty as an exception to the right to life.

⁵⁷ “Resolution Urging the State to Envisage a Moratorium on the Death Penalty” *Thirteenth Annual Activity Report: 1999-2000*, Annex IV (ACHPR). This resolution urged states to envisage a moratorium on the death penalty, to limit the imposition of the death penalty and to reflect on the possibility of abolishing it.

⁵⁸ See the jurisprudence of the African Commission discussed below.

⁵⁹ Decision 23/1990 of 24 October 1990 (Hungarian Constitutional Court).

⁶⁰ Nowak (2000) 42-43.

Although a direct parallel cannot be drawn between article 4 of the African Charter and the South African Interim Constitution, as the right to life provision in the latter is unqualified, the death penalty could still be seen as an arbitrary deprivation of life. As seen above, despite the qualified nature of the Hungarian Constitution, which is similar to the African Charter, the death penalty was found to be an arbitrary deprivation of life. Further, in *S v Makwanyane*, Ackermann J noted that the imposition of the death penalty is inherently arbitrary.⁶¹ Thus, the fact that the death penalty is inherently arbitrary implies that there is no guarantee that the right to equality before the law, for example, which is essential for the respect of due process rights, can be respected due to the arbitrary application of the death penalty. Thus, the death penalty cannot be saved by article 4 of the African Charter, as imposition of the death penalty without respect for due process rights constitutes a violation of the right to life.

It should be noted that the African Commission on Human and Peoples' Rights, a supervisory body of the African Charter, is yet to adopt such a broad and creative manner of interpretation. It should also be borne in mind that, in interpreting human rights treaties, objective criteria of interpretation that look to the text themselves are more appropriate than subjective criteria that seek to ascertain only the intent of the parties, because the object of such treaties is to protect the basic rights of individual human beings.⁶² It is hoped that the African Commission and the future African Court on Human and Peoples' Rights will adopt such an interpretation, drawing inspiration from the jurisprudence in other jurisdictions and international human rights instruments abolishing the death penalty.

⁶¹ *S v Makwanyane* 1995 (3) SA 391 (CC), para 153 (hereinafter referred to as *Makwanyane* (1995)). The South African Constitutional Court held in this case that the death penalty was inconsistent with the country's Constitution, as it constitutes cruel, inhuman and degrading punishment within the meaning of section 11(2) of the Interim Constitution. See 4.5.4 below for further discussion of the case.

⁶² This was noted by the Inter-American Court of Human Rights, and could serve as persuasive authority in the interpretation of article 4 of the African Charter. See Inter-American Court of Human Rights, Advisory Opinion OC-3/83 of 8 September 1983, Restrictions to the death penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Series A, No. 3, para 50.

4.3.2 The African Commission on Human and Peoples' Rights

Although, as seen in the introduction chapter, the Commission's position with regard to the death penalty remains unclear, it has been faced with the issue of the death penalty. The African Commission has emphasised the importance of the right to life in the following words: "The right to life is the fulcrum of all other rights. It is the fountain through which other rights flow, and any violation of this right without due process amounts to arbitrary deprivation of life".⁶³ Thus, the African Commission has found a violation of article 4 of the African Charter in most cases in which the issue of the death penalty was raised, not only in the context of fair trial rights, but also in the context of the right to life.

In *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, the African Commission found a violation of article 4 on the ground that the executions, after a trial that violated article 7 of the African Charter rendered the deprivation of life arbitrary.⁶⁴ The Commission noted that

[g]iven that the trial which ordered the executions itself violates Article 7, and subsequent implementation of sentences renders the resulting deprivation of life arbitrary and in violation of Article 4.⁶⁵

⁶³ *Forum of Conscience v Sierra Leone*, Communication 223/98, *Fourteenth Annual Activity Report: 2000-2001*; (2000) AHRLR 293 (ACHPR 2000), para 20. This case concerned the execution of 24 soldiers after trials that were allegedly flawed and in violation of Sierra Leone's obligation under the African Charter, as they had no right to appeal to a higher tribunal (paras 1-5).

⁶⁴ *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, Communications 137/94, 139/94, 154/96 and 161/97, *Twelfth Annual Activity Report: 1998-1999*; (2000) AHRLR 212 (ACHPR 1998). The communications concerned the detention and trial of Mr Saro-Wiwa and the human rights violations suffered by him. During detention, he was denied access to a lawyer. His trial, and that of others, took place before a tribunal established under the Civil Disturbances Act. He was later sentenced to death together with his co-defendants. Although the African Commission requested a stay of execution, he was executed together with the others in secret (see paras 1-10).

⁶⁵ As above, para 103. See chapter six of this thesis for a discussion of the death penalty in relation to article 7 of the African Charter.

The violation was compounded by the fact that the executions were carried out despite the Commission's request for a stay of execution, and while the case was pending. Likewise, in *Amnesty International and Others v Sudan*,⁶⁶ the Commission found the execution of prisoners after summary and arbitrary trials to be in violation of article 4 of the African Charter.

Also, in *Forum of Conscience v Sierra Leone*,⁶⁷ the Commission found that an execution after a trial that is in breach of due process of law (right to appeal) as guaranteed under article 7(1)(a) constitutes an arbitrary deprivation under article 4 of the African Charter.

Considering the above decisions, one would think that the Commission would, in subsequent cases, go further to find a violation of article 4, independent of article 7 of the African Charter. Unfortunately, this has not been the case. In *Interights et al (on behalf of Bosch) v Botswana*, the issue of the death penalty was raised in the context of, *inter alia*, the right to life.⁶⁸ Two of the issues raised related to alleged violations of article 4 of the African Charter: First, did the president, in exercising his clemency, arbitrarily deprive Bosch of her right to life? Second, was the execution of Bosch pending the consideration of her communication by the African Commission in violation of articles 1, 4 and 7(1) of the African Charter?⁶⁹

⁶⁶ *Amnesty International and Others v Sudan*, Communications 48/90, 50/91, 52/91, 89/93, *Thirteenth Annual Activity Report: 1999-2000*; (2000) AHRLR 297 (ACHPR 1999), paras 47-52. These were a series of four cases against Sudan regarding the imposition of the death penalty after unfair trials and the carrying out of executions after summary and arbitrary trials (paras 1-20).

⁶⁷ *Forum of Conscience v Sierra Leone*, Communication 223/98, *14th Annual Activity Report: 2000-2001*; (2000) AHRLR 293 (ACHPR 2000), para 20.

⁶⁸ *Interights et al (on behalf of Bosch) v Botswana*, Communication 240/2001, *Seventeenth Annual Activity Report: 2003-2004* (African Commission), hereinafter referred to as *Bosch* (African Commission). The High Court of Botswana convicted Mariette Bosch of murder on 13 December 1999 and sentenced her to death. An appeal to the Court of Appeal of Botswana in 2001 was unsuccessful (para 2). A petition was submitted on her behalf to the Commission alleging violations of her rights in the African Charter. The Chairman of the African Commission, after receiving the petition, wrote to the President of Botswana on 27 March 2001, appealing for a stay of execution pending consideration of the communication by the Commission (paras 7-10) The President did not respond to the appeal, and Bosch was executed by hanging on 31 March 2001 (para 11).

⁶⁹ Article 1 obliges a state party to comply with the requests of the African Commission.

With regard to the first issue on the clemency process, the Commission found that the clemency process did not fall under article 4 of the African Charter. The Commission noted that the process that can be challenged as arbitrary is that which includes the holding of a trial so that an accused is given an opportunity to defend his cause; further stating that the intervention of the president does not affect the non-arbitrariness of the process.⁷⁰ The Commission's finding was based on the fact that the president does not sit as a court to hear submissions on clemency and the attendance of the applicant and her lawyers at the hearing was impractical.

The Commission found the latter to be impractical as the clemency process in African states is shrouded in secrecy and could result in undermining the office and "dignity" of the president.⁷¹ What about the dignity of the applicant or defendant? The Commission's omission of the dignity of the defendant, guaranteed under article 5 of the African Charter, and placing more emphasis on the dignity of the president, is problematic. The Commission should have focussed on setting precedence, with regard to a fair clemency process, which eliminates totally or to some extent the secrecy in the whole process.

The Commission further noted in its decision that "a person must be given reasonable time in which to assemble the relevant information and to prepare and put forward his representations".⁷² Thus, implying that if the issue related to Bosch not being afforded adequate time to assemble the relevant information, and to prepare and put forward her representations with regard to the clemency process, then the finding of a violation would have been possible.

The African Commission avoided dealing with the issue on whether Bosch's execution pending the consideration of her communication by the African Commission was in violation of, amongst others, article 4 of the African Charter. The Commission's evasion of the issue was on the basis that it was not in possession of any proof that the president of Botswana did receive the written letter seeking a stay

⁷⁰ *Bosch* (African Commission), para 43.

⁷¹ *Bosch* (African Commission), para 46.

⁷² *Bosch* (African Commission), para 48

of execution.⁷³ The onus of proof should not be on the Commission. Once the letter was faxed, it was for the government of Botswana to ensure that the appropriate channels are in place to ensure that the president receives the letter. Therefore, in my opinion, the approach adopted in the *Bosch* case opens a door for future abuse, since states can use this as an excuse not to comply with the Commission's provisional measures.

Notwithstanding, in *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*⁷⁴ (as seen above), the Commission found a violation of article 4 of the African Charter, as the applicants were executed despite the Commission's request for a stay of execution and while their communications were still pending. Moreover, although the African Commission avoided dealing with the above issue, it acknowledged the evolution of international law and the trend towards the abolition of the death penalty. The Commission further encouraged all states party to the African Charter to take all measures to refrain from exercising the death penalty.⁷⁵

It is clear from the above decisions, with the exception of the *Bosch* decision, that the Commission has taken an approach similar to that of the UN Human Rights Committee, with regard to the relation between the right to life and fair trial rights (discussed above and in chapter six). The Human Rights Committee is of the view that imposition of the death penalty following an unfair trial is a breach not only of procedural standards but also of the right to life.⁷⁶ Similarly, the Commission, as seen above, is of the opinion that an execution after an unfair trial also constitutes a breach of article 4 of the African Charter.

⁷³ *Bosch* (African Commission), para 50.

⁷⁴ *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, Communications 137/94, 139/94, 154/96 and 161/97, *Twelfth Annual Activity Report: 1998-1999*; (2000) AHRLR 212 (ACHPR 1998), para 103.

⁷⁵ *Bosch* (African Commission), para 52. In terms of article 62 of the African Charter, the measures taken have to be reported back to the Commission. States would, hereafter, have to include such measures in their periodic reports to the Commission.

⁷⁶ Schabas (2002) 112-113.

The African Commission's position is also similar to that of the Inter-American Commission on Human Rights (Inter-American Commission) and Inter-American Court of Human Rights (Inter-American Court). The Inter-American Commission has found the imposition of the death penalty without respect for due process rights to be in violation of the right to life.⁷⁷

Generally, the jurisprudence of the Inter-American Commission shows that executions are arbitrary and therefore contrary to article I of the American Declaration and article 4 of the American Convention in the following circumstances: First, when a state fails to limit the death penalty to the "most serious crimes"; second, when it denies an accused person the judicial guarantees of a fair trial; and third, when there is a disreputable and apparent diversity of practice within a member state resulting in inconsistency in the application of the death penalty for the same crimes.⁷⁸

Similarly, the Inter-American Court, in interpreting article 4 of the American Convention, guaranteeing the right to life, has considered the imposition of capital punishment without respect for due process to constitute an arbitrary deprivation of life. In Advisory Opinion OC-16/99, the Inter-American Court stated as follows:

Failure to observe a detained foreign national's right to information, recognized in Article 36(1)(b) of the Vienna Convention on Consular relations, is prejudicial to the due process of law and, in such circumstances, imposition of the death penalty is a violation of the right not to be deprived of life "arbitrarily", as stipulated in the relevant provisions of human rights treaties (e.g. American Convention on Human Rights, Article 4; International Covenant on

⁷⁷ See *Andrews v United States*, Case 11.139, Report No. 57/96, 6 December 1996, OEA/Ser.L/V/II.98 doc. 6 rev. 13 April 1998 (Inter-American Commission). This case concerned William Andrews who had been sentenced to death, and was executed despite a precautionary measures request. The Commission noted that inherent in the construction of article I (American Declaration), is a requirement that before the death penalty can be imposed and before the death sentence can be executed, the accused must be given all the guarantees established by pre-existing laws, including guarantees both at the national and international levels (para 177). Consequently, the Commission found a violation of article I because Mr Andrews was tried by an impartial and incompetent court that did not provide him with equal treatment at law (paras 175-177 & 184).

⁷⁸ In addition to the above case, see, for example, *Graham v United States*, Case 11.193, Report No. 97/03, 29 December 2003; *Domingues v United States*, Case 12.285, Report No. 62/02, *Annual Report of the Inter-American Commission on Human Rights* (2001); *Thomas v United States*, Case 12.240, Report No. 100/03, 29 December 2003; *Beazley v United States*, Case 12.412, Report No. 101/03, 29 December 2003; *Aitken v Jamaica*, Case 12.275, Report No. 58/02, 21 October 2002; and *Sewell v Jamaica*, Case 12.347, Report No. 76/02, 27 December 2002.

Civil and Political Rights, Article 6), with the juridical consequences that a violation of this nature carries, in other words, those pertaining to the State's international responsibility and the duty to make reparation.⁷⁹

The Inter-American Court has identified three limitations, applicable to retentionist state parties, which could be of relevance to African states:

First, the imposition or application of this sanction is subject to certain procedural requirements whose compliance must be strictly observed and reviewed. Second, the application of the death penalty must be limited to the most serious common crimes not related to political offenses. Finally, certain considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into account.⁸⁰

Imposition of the death penalty without respect for the above limitations constitutes a violation of the right to life. It can be deduced from the above that mandatory death sentences are clearly inconsistent with article 4 of the American Convention. Further, it is clear that in respecting restrictions on the application of the death penalty, states have to envisage abolition of the death penalty as the ultimate goal. The Inter-American Court, in support of this, stated that the restrictions in article 4 are designed to delimit strictly the application and scope of the death penalty, in order to reduce its application "to bring about its gradual disappearance".⁸¹ Also, it follows from the Inter-American Court's opinion that reservations to a non-derogable right would be incompatible with the object and purpose of the human rights treaty guaranteeing that right.⁸²

⁷⁹ Inter-American Court of Human Rights, Advisory Opinion OC-16/99 of 1 October 1999, The right to information on Consular assistance in the framework of the guarantees of the due process of law., para 141(7). The right to information on consular assistance is guaranteed under article 36(1)(b) of the Vienna Convention on Consular Relations of 24 April 1963. It should be noted that Advisory Opinion OC-16/99 was endorsed by the UN General Assembly in December 1999 in the preamble of the resolution on "Protection of migrants" (UN Doc. A/RES/54/166).

⁸⁰ Advisory Opinion OC-3/83, para 55.

⁸¹ Advisory Opinion OC-3/83, para 57.

⁸² Advisory Opinion OC-3/83, paras 60-74.

Considering that the death penalty is being imposed in African states without respect for due process,⁸³ and the continuous application of mandatory death sentences in some African states,⁸⁴ the advisory opinions of the Inter-American Court could be very relevant to Africa. Imposition of the death penalty under such circumstances would amount to a violation of the right to life, as guaranteed under the African Charter.

4.4 The right to life in African national constitutions

The constitution is the supreme law of the land in most legal systems. It can be seen as “the legal embodiment of a country’s highest values, extending human rights guarantees to everyone in the country’s jurisdiction”.⁸⁵ As seen below, the right to life is guaranteed in the national constitutions of most African states.⁸⁶ Constitutional protection of the right to life falls under two categories: qualified and unqualified right to life provisions. This section examines the different categories, with the view of identifying what causes obstruction to (constitutional) challenges to the death penalty in Africa.

As it is usually more cumbersome to amend the constitution than other laws, an explicit constitutional provision on the death penalty or a qualified right to life provision, makes it difficult to challenge the constitutionality of the death penalty. Where the qualification is not clear, the possibility of relying on the provision to challenge the constitutionality of the death penalty would depend on the interpretation given to such a provision by the courts. The right to life is qualified, either by providing that it may not be deprived arbitrarily or other than in accordance with a sentence of a court of law, as seen in the examples below; or expressly stating the

⁸³ See chapter six of this thesis.

⁸⁴ See chapter two of this thesis.

⁸⁵ Amnesty International “Constitutional prohibitions of the death penalty” AI Index: ACT50/05/99, 1 September 1999 <<http://web.amnesty.org/rmp/dplibrary.nsf/other?openview>> (accessed 1 October 2003).

⁸⁶ A few constitutions do not have a right to life provision. These are the Constitutions of Gabon (1997), Egypt (1980), Libya (1977), Madagascar (1998) and Morocco (1996). Also, there are no constitutional provisions on the right to life in Somalia, as the Constitution was suspended on 27 January 1991 (see Heyns (2004) 1505) and in Swaziland, as the country presently has no constitution.

legality of the death penalty under the right to life provision.⁸⁷ Examples of qualified right to life provisions include:⁸⁸

Article 15 of the Constitution of the Federal Democratic Republic of Ethiopia 1995:

Every person has the right to life. No person may be deprived of his life except as a punishment for a serious criminal offence determined by law.

Article 16(1) of the Constitution of Sierra Leone 1996:

No person shall be deprived of his life intentionally except in execution of the sentence of a court in respect of a criminal offence under the laws of Sierra Leone, of which he has been convicted.

Article 33(1) of the Constitution of the Federal Republic of Nigeria 1999:

Every person has the right to life, and no one shall be deprived intentionally of his life, save in the execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.

Article 22(1) of the Constitution of the Republic of Uganda 1995:

No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda ...

Article 12(1) of the Constitution of Zambia 1996:

⁸⁷ For example, article 13(a) of the Constitution of Equatorial Guinea 1999.

⁸⁸ In addition to the examples listed below, the right to life is qualified in the Constitutions of the following African states: Botswana (1999, article 4); Eritrea (1997, article 15(1)), Ethiopia (1995, article 15); The Gambia (2001, article 18(1)); Ghana (1996, article 13(1)); Kenya (1999, article 17(1)); Lesotho (2001, article 4 and 5); Liberia (1984, article 11); Malawi (2001, article 16); Mauritius (2001, article 4(1)); Niger (1999, article 33(1)); Rwanda (1991, article 12); Sudan (1998, article 20); Tanzania (1995, article 14); Togo (1992, article 13); Tunisia (1991, article 5); and Zimbabwe (2000, article 12(1)).

No person shall be deprived of his life intentionally except in execution of the sentence of a court in respect of a criminal offence under the law in force in Zambia of which he has been convicted.

Some judges have taken the view that it is difficult to rely on clearly qualified right to life provisions to challenge the constitutionality of the death penalty. For example, in *Kalu v The State* (discussed below), Iguh J pointed out that one of the fundamental basis upon which the South African Constitutional Court pronounced the death penalty unconstitutional is “on account of the vital fact that the right to life in the relevant Constitution was unqualified”.⁸⁹ He therefore implied that it is difficult to challenge the constitutionality of the death penalty in Nigeria as the right to life in section 30(1) of the Constitution of the Federal Republic of Nigeria 1979 was provided for in clearly qualified terms.

Also, in the case of *S v Ntesang* (discussed below), an attempt to have the death penalty declared unconstitutional was not successful because of the qualification in the Botswana Constitution.⁹⁰ Therefore, challenging the constitutionality of the death penalty is problematic in African states in which the right to life is qualified in their constitutions.

Furthermore, in countries where the death penalty is explicitly provided for in the constitution under the right to life provision, relying on the right to life to challenge the death penalty would be impossible, unless the constitution is amended or the provision on cruel, inhuman and degrading treatment, if not qualified, is used (see chapter five). As seen in the provisions below, it is clear that in Equatorial Guinea, The Gambia, Lesotho, Malawi and Sudan, for example, it would be difficult for the death penalty to be challenged based on their right to life provisions. Article 13 of the Constitution of Equatorial Guinea provides:

⁸⁹ *Kalu v The State* (1998) 13 NWLR 531, 590 (hereinafter referred to as *Kalu* (1998)). See 4.5.4 below for a discussion of the South African Constitutional Court case, which confirms that the unqualified nature of the right to life provision partly justified the finding of the death penalty to be unconstitutional.

⁹⁰ *S v Ntesang* 1995 (4) BCLR 426, hereinafter referred to as *Ntesang* (1995).

All citizens shall enjoy the following rights and liberties:

(a) Respect for the person, life, integrity, dignity, and full national and moral development.

The death penalty may be imposed only for crimes established by law...

Article 18(1) of the Constitution of The Gambia 2001 guarantees the right to life in qualified terms. Article 18(2) goes further to state that

[a]s from the coming into force of this Constitution, no court in The Gambia shall be competent to impose a sentence of death for any offence unless the sentence is prescribed by law and the offence involves violence, or the administration of any toxic substance, resulting in the death of another person.⁹¹

Article 5(1) of the Constitution of Lesotho 2001 guarantees the inherent right to life, and prohibits arbitrary deprivation of life. Article 5(2) provides:

[A] person shall not be regarded as having been deprived of his life in contravention of this section if he dies ... in execution of the sentence of death imposed by a court in respect of a criminal offence under the law of Lesotho of which he has been convicted.

Article 16 of the Constitution of Malawi 2001 states:

Every person has the right to life and no person shall be arbitrarily deprived of his or her life. Provided that the execution of the death sentence imposed by a competent court on a person in respect of a criminal offence under the laws of Malawi of which he or she has been convicted shall not be regarded as arbitrary deprivation of his or her right to life.

Also, article 33 of the Constitution of the Republic of Sudan 1998 states as follows:

(1) No death penalty shall be inflicted, save as retribution or punishment for extremely serious offences by law.

(2) No death penalty shall be inflicted for offences committed by a person under eighteen years of age; and such penalty shall be executed upon neither pregnant nor succulent women,

⁹¹ This implies that as long as the death sentence is provided for in the law as a valid sentence, it is constitutional. Thus, this provision can be relied on to challenge the death sentence only if laws providing for it are repealed.

save after two years of lactation; nor shall the same be inflicted upon a person who has passed seventy years of age other than in retribution and prescribed penalties (hudud).⁹²

While it is difficult to rely on qualified right to life provisions to challenge the death penalty, on the other hand, there is possibility to challenge the constitutionality of the death penalty in countries where the right to life is provided for in clearly unqualified terms.⁹³ This was the situation in South Africa. In both the Interim Constitution Act 200 of 1993 and the final Constitution Act 108 of 1996, the right to life is textually unqualified.⁹⁴ In *S v Makwanyane* (discussed below), which addressed the question of the constitutionality of the death penalty, the unqualified nature of the right to life was referred to by several judges and was used to support an argument that the right to life is given stronger protection in the South African Constitution.⁹⁵ The Court went further to use the qualifications of the right to life in other jurisdictions to explain why challenges to the death sentence have failed in those jurisdictions.⁹⁶

From the aforesaid, it is clear that in African states like Cameroon,⁹⁷ in which the constitutionality of the death penalty has not yet been challenged and the right to life has no qualification, they can follow the South African example. This is because the absence of qualification indicates that the drafters of the constitution in question

⁹² It should be noted that article 33 does not deal with the right to life, but with security from death save in justice. Thus, the death penalty is permissible here in the interest of justice. The right to life is guaranteed in qualified terms under article 20 of the Constitution.

⁹³ The right to life is unqualified in the constitutions of the following African states: Algeria (1996, article 34); Benin (1990, article 15); Burkina Faso (2000, article 2); Burundi (2001, article 21); Cameroon (1996, Preamble); Chad (1996, article 17); Congo (2001, article 7); Guinea (1990, article 6); Mali (1993, article 1); Mauritania (1991, article 13); and Senegal (2001, article 7).

⁹⁴ Section 9 of the Interim Constitution provided for the right to life in the following words: “Every person shall have the right to life”. Section 11 of the final Constitution provides: “Everyone has the right to life”.

⁹⁵ *Makwanyane* (1995) para 85.

⁹⁶ *Makwanyane* (1995) para 38.

⁹⁷ The Preamble of the Constitution of the Republic of Cameroon (1996) provides: “Everyone has the right to life, to physical and moral integrity and to humane treatment in all circumstances ...” However, it is unfortunate that at present, the Constitution has no justiciable Bill of Rights, and the Constitutional Council, which has jurisdiction in matters pertaining to the Constitution, is yet to be established.

intended the court, and not parliament, to decide whether or not the death penalty should be retained.⁹⁸

Whether or not a constitution has a limitation clause would affect the possibility of relying on the right to life provision in that constitution, qualified or unqualified, to challenge the constitutionality of the death penalty. This is because the death penalty could be saved by the limitation clause. For example, this was the situation in Tanzania when the constitutionality of the death penalty was challenged. In *Mbushuu and Another v Republic* (discussed below), the derogation from the qualified right to life provision (including the provision prohibiting inhuman and degrading punishment) in the Tanzanian Constitution, with regard to the use of the death penalty, was saved by article 30(2) of the Constitution.⁹⁹ Article 30(2) allows derogations from basic rights of the individual in public interest. It states:

It is hereby declared that no provision contained in this Part of this Constitution, which stipulates the basic human rights, freedoms and duties, shall be construed as invalidating any existing law or prohibiting the enactment of any law or the doing of any lawful act under such law, making provision for –

- (a) ensuring that the right and freedoms of others or the public interest are not prejudiced by the misuse of the individual rights and freedoms;
- (b) ensuring the interests of defence, public safety, public order, public morality, public health ...
- (c) ensuring the execution of the judgment or order of a court given or made in any civil or criminal proceedings ...
- (d) enabling any other thing to be done which promotes, enhances or protects the national interest generally.¹⁰⁰

⁹⁸ This was the interpretation adopted in *Makwanyane* (1995) para 25 and footnote 33. See also the judgment of O'Regan J, para 324.

⁹⁹ *Mbushuu and Another v Republic* (1995) 1 LRC 216, 232, hereinafter referred to as *Mbushuu* (1995).

¹⁰⁰ Cited in *Mbushuu* (1995) 228; and also in *Republic v Mbushuu and Another* (1994) 2 LRC 335, 337-338, hereinafter referred to as *Mbushuu* (1994).

In the light of the above provision, the Tanzanian Court of Appeal found the death penalty to be in the public's interest, as it was reasonably necessary to protect the right to life.¹⁰¹ However, the fact that the Tanzanian High Court, in interpreting the above provision, arrived at a different conclusion implies that the success of such challenges would depend on how a court interprets the relevant provision. For example, although the Interim Constitution of South Africa had a limitation clause, the death penalty was not saved by that clause because the requirements for limitation of rights provided under the limitation clause were not satisfied.¹⁰²

Nevertheless, it should be noted that the appropriate approach to the interpretation of a limitation clause, as pointed out by Justice Chaskalson, must be found in the language of the text itself, construed in the context of the constitution as a whole.¹⁰³ This echoes the Inter-American Court's opinion,¹⁰⁴ which is to the effect that objective criteria of interpretation that look to the text themselves are more appropriate than subjective criteria that seek to ascertain only the intent of the parties. If courts adopt such an approach to interpretation of limitation clauses, the basic rights of individual human beings would be protected. Accordingly, the death penalty would not be saved by limitation clauses, as it violates the most important of all human rights, the right to life.

The same as it is difficult to challenge the death penalty in cases in which it is explicitly provided for in the constitution, enshrining the abolition of the death penalty in a constitution fortifies abolition by establishing an additional legal basis that can serve as barrier to any hasty attempt to reinstate the death penalty. For example, seven of the twelve African states that have abolished the death penalty prohibit it on human rights grounds in their constitutions, thus providing no chance for any hasty attempt to reinstate the death penalty. The following are the respective provisions in the constitutions of the seven African states.

¹⁰¹ *Mbushuu* (1995) 232. See 4.5.3 below for further discussion of the case.

¹⁰² *Makwanyane* (1995) para 146. See 4.5.4 below for further discussion of this case.

¹⁰³ *Makwanayane* (1995) para 115.

¹⁰⁴ Advisory Opinion OC-3/83, para 50.

Article 22 of the Constitutional Law of the Republic of Angola 1992:

- (1) The State shall respect and protect the life of the human person.
- (2) The death penalty is prohibited.

Article 27 of the Constitutional Law of the Republic of Cape Verde 1999:

- (1) Human life and the physical and spiritual integrity of people shall be inviolable.
- (2) No one may be subjected to torture, or cruel, degrading or inhuman punishment or treatment, and in no case shall there be the death penalty.

Article 2 of the Constitution of Côte d'Ivoire 2000:

The individual is sacred. All human beings are born free and equal before the law. They enjoy inalienable rights, namely the right to life, freedom, the development of their personality and respect for their dignity. The rights of the individual are inviolable. Public authorities have the obligation to respect, protect and promote the individual. *Any sanction leading to the deprivation of human life is forbidden.*¹⁰⁵

Article 36(1) of the Constitution of the Republic of Guinea-Bissau 1996:¹⁰⁶

In the Republic of Guinea-Bissau in no circumstances shall there be the death penalty.

Article 70 of the Constitution of the People's Republic of Mozambique 1990:

- (1) All citizens shall have the right to life. All shall have the right to physical integrity and may not be subjected to torture or to cruel or inhuman treatment.
- (2) In the Republic of Mozambique there shall be no death penalty.

Article 6 of the Constitution of the Republic of Namibia 1990:

The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia.

¹⁰⁵ Emphasis added.

¹⁰⁶ Article 36 is included under Part II (Fundamental Rights and Duties) of the Constitution.

Article 21 of the Political Constitution of São Tomé and Príncipe 1990:

- (1) Human life is inviolable.
- (2) In no case shall there be the death penalty.

Article 15 of the Constitution of the Republic of Seychelles 1996:

- (1) Everyone has the right to life and no one shall be deprived of life intentionally.
- (2) A law shall not provide for a sentence of death to be imposed by any court.

As seen in the provisions above, it would be difficult to reintroduce the death penalty, as it would require that the constitutions be amended. Therefore, it is imperative that African states that abolish the death penalty should enshrine such abolition in their constitutions, since as noted above, it fortifies the abolition, thus establishing an additional legal basis that can serve as a barrier to any hasty attempts to reinstate the death penalty.

4.5 Jurisprudence of African national courts

This section examines the jurisprudence of African national courts on the death penalty in relation to the right to life. The section does not only focus on cases in which the challenge to the death penalty, in relation to the right to life, was successful, but also those in which the challenge was not successful. The unsuccessful cases are examined, with the aim of identifying what caused obstruction to these challenges, so that the shortcomings would be taken into consideration when bringing future challenges.

4.5.1 The Court of Appeal of Botswana

The constitutionality of the death penalty was challenged in Botswana in the case of *S v Ntesang*.¹⁰⁷ In this case, the High Court had convicted the appellant of murder and,

¹⁰⁷ *Ntesang* (1995).

after finding that there were no extenuating circumstances, sentenced the appellant to death in accordance with section 203(1) of the Penal Code of Botswana.¹⁰⁸

The appellant appealed against the sentence, contending that the provisions of the Penal Code, which permitted the state to intentionally take away the life of an individual, were *ultra vires* the Constitution since the right to life was enshrined by section 3 thereof.¹⁰⁹ The Court found the death penalty to be constitutional as it is preserved by section 7(2) of the Constitution that saves any law, which “authorises the infliction of any description of punishment that was lawful in the country immediately before the coming into operation” of the Constitution.¹¹⁰

The Court of Appeal focussed mainly on the right to life provision in section 4(1) of the Constitution, which is qualified, giving little or no attention to the right to life provision in section 3, which is unqualified. Section 3 of the Constitution of Botswana enshrines the fundamental right to life of the individual in unqualified terms. However, section 4(1) provides: “No person shall be deprived of his life intentionally save in the execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he has been convicted.” To substantiate the fact that it cannot sever all the words beginning with “save” to the end of the provision in section 4(1) above as submitted by counsel for the appellant, the Court cited White J of the Supreme Court of the United States in *South Dakota v North Carolina*, in which he stated the following:

I take it to be an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from all others, and to be considered alone, *but that all the*

¹⁰⁸ *Ntesang* (1995) 338 & 341-342. Section 203(1) of the Penal Code states that “[s]ubject to the provisions of subsection (2), any person convicted of murder shall be sentenced to death”.

¹⁰⁹ *Ntesang* (1995) 338. The appellant further submitted that hanging as a method of execution contravened section 7(1) of the Constitution in that it was subjection “to torture or to inhuman or degrading punishment”. However, the Court of Appeal did not address the constitutionality of hanging as a method of execution in itself, but noted that what has to be answered is whether or not the provisions of the Penal Code that prescribe the death penalty by hanging is *ultra vires* the Constitution (*Ntesang* (1995) 346).

¹¹⁰ *Ntesang* (1995) 347.

*provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument.*¹¹¹

It is my view that the Court could not agree with the submission of counsel for the appellant that the words beginning with “save” to the end of the provision should not be given effect because the Court ignored section 3 of the Constitution. The above statement by White J states that “all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument”. From my understanding, the statement implies that the Court of Appeal should have considered section 3 together with section 4(1) in deciding whether or not the words beginning with “save” to the end of the provision should be given effect. This is because sections 3 and 4(1) both have a bearing on the subject in question (the constitutionality of the death penalty). Unfortunately, less attention was given to section 3, which guarantees the right to life in unqualified terms.¹¹² However, because of the presence of a limitation clause in the Constitution (section 7(2)), arriving at a different result is challenging.

Furthermore, in this case, the appellant drew the attention of the Court to the practices in a number of other countries as well as the views and opinions of some writers and some international organisations and bodies concerning the death penalty in general.¹¹³ The Court of Appeal was of the view that this was not one of the matters that must be decisive of the issue before the Court.¹¹⁴ Nevertheless, the Court took judicial notice of developments at the international level to abolish the death penalty and hoped that it will engage the attention of parliament, which has responsibility of effecting changes to the statutes.¹¹⁵

¹¹¹ Emphasis added. *South Dakota v North Carolina* (1904) 192 US 268, 328; 48 L Ed 448, 465. See also *Ntesang* (1995) 347.

¹¹² The problems with this challenge were, first, section 4(1) was qualified. But, its effect would have been minimised if the Court considered section 4(1) together with section 3 of the Constitution in its interpretation, as both provisions relate to the subject in question. Second, the prohibition of cruel, inhuman and degrading punishment or treatment was also qualified, thus saving the provisions in the Penal Code that provided for the death penalty.

¹¹³ *Ntesang* (1995) 346.

¹¹⁴ *Ntesang* (1995) 346.

¹¹⁵ *Ntesang* (1995) 348.

It would appear from the Court's decision not to attach much importance to worldwide progressive movements or practices towards abolition, and its opinion that it has no power to rewrite the Constitution, that the Court was delegating its duty to interpret the constitution and to uphold its provisions without fear or favour to parliament. This case illustrates the difficulties with relying on qualified right to life provisions to challenge the death penalty. In other words, what caused obstruction to the above challenge were the qualified nature of the right to life provision and the existence of a limitation clause in the Constitution.

4.5.2 The Supreme Court of Nigeria

The death penalty has also been challenged in Nigeria in *Kalu v The State*.¹¹⁶ The appellant in this case was convicted of murder by the High Court of Justice, Lagos State, and sentenced to death pursuant to the mandatory provision of section 319(1) of the Criminal Code Law of Lagos.¹¹⁷ After an unsuccessful appeal to the Court of Appeal, the appellant further appealed to the Supreme Court.¹¹⁸ In the Supreme Court, the appellant raised the constitutionality of the death penalty as a mandatory punishment for the offence of murder in Nigeria. The question raised was whether the provisions of section 319(1) of the Criminal Code which prescribe the death penalty in relation to the offence of murder are not contrary to and inconsistent with section 31(1)(a) of the Constitution of the Federal Republic of Nigeria 1979, and therefore unconstitutional.¹¹⁹

Although, section 31(1)(a) prohibits torture, inhuman or degrading treatment, the Supreme Court was of the opinion that the right to life provision (section 30(1)) is a relevant provision in determining whether the death penalty is a constitutionally valid and recognised form of punishment in Nigeria.¹²⁰ Section 30(1) provides that “Every

¹¹⁶ *Kalu* (1998).

¹¹⁷ *Kalu* (1998) 533-534.

¹¹⁸ *Kalu* (1998) 534.

¹¹⁹ *Kalu* (1998) 575 & 585.

¹²⁰ *Kalu* (1998) 587.

person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria”. Thus, the right to life provision is qualified.

The Supreme Court used the qualified word “save” as the key to construing the right to life provision. The Court noted that although the right to life is fully guaranteed, it is nevertheless subject to the execution of a death sentence of a court of law in respect of a criminal offence of which one has been found guilty in Nigeria.¹²¹ The Court looked at jurisprudence from other jurisdictions on the question of the death penalty, in relation to the right to life, which showed that if the right to life provision is qualified, the death penalty was, in most of the decisions, held to be constitutional; if unqualified, the death penalty was declared to be unconstitutional.¹²² The Court concluded that the right to life under section 30(1) is clearly a qualified right, thus, the death penalty could not be said to be inconsistent with the Constitution.¹²³

Similar to the Botswana case above, what caused obstruction to this challenge was, the qualified nature of the right to life provision. The Supreme Court relied heavily on authorities that show that where the right to life is qualified, the constitutionality of the death sentence is affirmed. However, the decision of the Hungarian Constitutional Court (discussed below) reviewed by the Supreme Court of Nigeria showed that the death penalty could be found to be unconstitutional where the right to life is qualified. However, little weight was attached to this decision. Since the right to life is the most fundamental of all human rights, recognising the death penalty would be denying the essence of this right. Therefore, courts have to be bold enough, like the Hungarian Constitutional Court, to find their way round obstacles to the abolition of the death

¹²¹ *Kalu* (1998) 537 & 587.

¹²² *Kalu* (1998) 538 & 590. The Court looked at, amongst others, cases in India (*Bacan Singh v State of Punjab* (1983) 2 SCR 583), Tanzania (*Mbushuu* (1994) and *Mbushuu* (1995)), and South Africa (*Makwanyane* (1995)).

¹²³ *Kalu* (1998) 544, 551 & 593. It should be noted that the question of whether the execution of the appellant would infringe his constitutional rights not to be subjected to torture or to inhuman or degrading treatment was seen by the Court to be a matter for determination by the High Court in a separate action or proceeding instituted by the appellant for that purpose (*Kalu* (1998) 596)). This was because the case concerned the sentence itself and not the manner of carrying out the death sentence.

penalty, such as qualified right to life provisions, as abolition is most desirable in order fully to respect the right to life.

4.5.3 The High Court and Court of Appeal of Tanzania

The Tanzanian High Court and Court of Appeal have been faced with the issue of the constitutionality of the death penalty, in the context of infringement of the rights to life, to dignity in the execution of the sentence, and to protection against cruel, inhuman or degrading treatment. This section examines the part of the judgments dealing with the right to life. In *Republic v Mbushuu and Another*, the two accused had been convicted of murder and sentenced to death.¹²⁴ The defence counsel then raised the question whether the death penalty was unconstitutional. It was argued that the death penalty infringed the provisions of the Constitution guaranteeing, amongst others, the right to life provided for in article 14 of the Tanzanian Constitution.¹²⁵ Article 14 provides that “[e]very person has the right to live and subject to the law, to protection of his life by society”.

The defence counsel submitted that the first part “every person has the right to life” is absolute and not governed by the qualification (claw-back clause) “subject to law”; and went further to state that what is subject to law is the right of an individual to the protection of his life by society.¹²⁶ The High Court held that the right to life is not absolute as both the right to life and the right to protection of one’s life by society are subject to the claw-back clause.¹²⁷ Nevertheless, Mwalusanya J stated:

The petitioners have only an evidentiary burden to show that the right to life has been infringed. And that much they have succeeded to show. What remains then is for the Republic to prove on a balance of probabilities that the law prescribing the death penalty (the Penal Code) is ‘lawful’ and that it is saved under article 30(2) of our Constitution.¹²⁸

¹²⁴ *Mbushuu* (1994) 335.

¹²⁵ *Mbushuu* (1994) 335.

¹²⁶ *Mbushuu* (1994) 351.

¹²⁷ *Mbushuu* (1994) 352.

¹²⁸ *Mbushuu* (1994) 352.

The Court held that the death penalty was not in the public interest and not a punishment that is prescribed by a lawful law, and therefore unconstitutional, as it is not saved by article 30(2) of the Constitution (quoted above).¹²⁹ Although the English version of the right to life provision is unqualified,¹³⁰ the Court in its judgment relied on the Swahili version of the right to life provision, which is qualified. Thus, if the Court had relied on the unqualified English version, the death penalty would have been inconsistent with the right to life provision. The language of the Constitution, therefore, influenced the Court's interpretation of the right to life provision. However, it is clear that the High Court, adopting a generous and purposive interpretation, found a way round article 30(2), in finding the death penalty to be unconstitutional.

The High Court, after finding the death sentence to be unconstitutional, replaced the death sentences of the two accused with life imprisonment.¹³¹ They then appealed to the Court of Appeal against their conviction for murder in the High Court.¹³² The Court of Appeal, after quashing the sentences, raised the question of whether the sentence of life imprisonment for murder was proper (in other words, whether the death sentence was unconstitutional).¹³³

With regard to the right to life, the Court of Appeal also relied on the Swahili version of the Constitution, noting that the translation in English is misleading.¹³⁴ Although the Court noted that article 14 does not expressly provide for the deprivation of life, it

¹²⁹ *Mbushuu* (1994) 358. The High Court also found the death penalty to be cruel, inhuman and degrading both inherently and in the manner of its execution, and also that it offends the right to dignity of man in the process of execution of the sentence.

¹³⁰ The English version read: "Every person has the right to live and subject to law, to protection of his life by the society" (*Mbushuu* (1994) 337). Accordingly, it was submitted that it merely prescribed the right to life and enjoins the law to protect that right, and does not expressly provide for the deprivation of life. (*Mbushuu* (1995) 225) The Court of Appeal noted that the English version was misleading, and proposed another translation - "Every person has a right to life and to receive from the society the protection of his life, in accordance with law" (*Mbushuu* (1995) 225), which has now been retained in the Tanzanian Constitution, 1995. Article 14 now reads: "Every person has the right to live and to the protection of his life by the society in accordance with law" (see Heyns (2004) 1599).

¹³¹ *Mbushuu* (1994) 358.

¹³² *Mbushuu* (1995).

¹³³ *Mbushuu* (1995) 222.

¹³⁴ *Mbushuu* (1995) 225.

went further to state that the right to life is not absolute but qualified, meaning that it can be denied by due process of law.¹³⁵ The Court of Appeal then had to decide whether the death penalty was one of such instances where the due process of law will deny a person his right to life and its protection.¹³⁶ Since the Constitution allows derogations from basic rights for legitimate purposes, the legitimate purpose to which the death sentence was directed, as noted by the Court, was a constitutional requirement that everyone's right to life shall be protected by law.¹³⁷ The Court found the death penalty to be reasonably necessary in order to protect life by stating that

we have already made a finding that the death penalty is cruel, inhuman and degrading... But the crucial question is whether or not the death penalty is reasonably necessary to protect the right to life. For this we say it is the society which decides. The trial judge acknowledges that presently the society deems the death penalty as reasonably necessary. So, we find that although the death penalty as provided by s 197 of the Penal Code offends art 13(6)(a) of the Constitution it is not arbitrary, hence a lawful law, and it is reasonably necessary and it is thus saved by art 30(2). Therefore, it is not unconstitutional.¹³⁸

As seen from the above judgment, and as Justice Chaskalson rightly stated in *S v Makwanyane*, the issues concerning the limitation of basic rights in the above case appears to have been influenced by the language of the Constitution and the rules of interpretation developed by the courts to deal with the language.¹³⁹

The Court also seems to have relied heavily on the protection of the right to life of everyone, with the exclusion of that of murderers. As noted above, human life has infinite value or worth and so must be respected and protected accordingly, which therefore follows that even murderers have to be treated in light of the value of their lives, a value not erased by the harm or injustice their lethal violence has caused the

¹³⁵ *Mbushuu* (1995) 226.

¹³⁶ *Mbushuu* (1995) 226. In its determination, the Court considered whether the death penalty was cruel, inhuman and degrading, and agreed with the trial judge that it is inherently inhuman, cruel and degrading punishment. But the crucial matter was whether it was saved by the limitation clause (*Mbushuu* (1995) 228)).

¹³⁷ *Mbushuu* (1995) 231.

¹³⁸ *Mbushuu* (1995) 232.

¹³⁹ See *Makwanyane* (1995) para 115.

innocent.¹⁴⁰ Thus, the right to life of a murderer has to be respected and protected in the same way as the right to life of a non-murderer is respected and protected. But the Court of Appeal seems to have given less weight to the right to life of murderers, in interpreting and applying the limitation clause.

In addition, since the court's duty is to interpret the constitution and uphold its values, it is for the court and not society or parliament to decide whether the death penalty is justifiable under a limitation clause or whether it is reasonably necessary in order to protect life. Justice Chaskalson has expressed his disagreement with the decision of the Tanzanian Court of Appeal, in so far as it is inconsistent with the above.¹⁴¹ Thus, it would have been proper for the Court of Appeal to decide what was reasonably necessary to protect the right to life, and not subject such a decision to the society, whose opinion is usually uninformed and fluctuates.

4.5.4 The Constitutional Court of South Africa

The South African Constitutional Court addressed the issue of the constitutionality of the death penalty in the landmark judgment of *S v Makwanyane*, in which it declared the death penalty unconstitutional.¹⁴² The two accused in the case were convicted on four counts of murder, one count of attempted murder and one count of robbery with aggravating circumstances, and sentenced to death on each of the counts of murder and to long terms of imprisonment on the other counts.¹⁴³ The case before the Constitutional Court dealt with the constitutionality of section 277(1)(a) of the Criminal Procedure Act 51 of 1977, prescribing the death penalty as a competent sentence for murder.¹⁴⁴ The Constitutional Court had to decide whether the death

¹⁴⁰ Bedau (1999) 40.

¹⁴¹ *Makwanyane* (1995) para 115.

¹⁴² *Makwanyane* (1995).

¹⁴³ *Makwanyane* (1995) para 1. The two accused appealed against the convictions and sentences to the Appellate Division of the Supreme Court, which dismissed the appeals against the convictions and concluded that the circumstances of the murderers were such that the accused should receive the heaviest sentence permissible according to law.

¹⁴⁴ *Makwanyane* (1995) para 2.

penalty was cruel, inhuman and degrading within the meaning of section 11(2) of the Interim Constitution Act 200 of 1993.¹⁴⁵

One of the contentions of the counsel of the accused in support of the argument that the death penalty was cruel, inhuman or degrading punishment, was that the death penalty was inconsistent with the unqualified right to life entrenched in the South African Interim Constitution, and that it negates the essential content of the right to life and other rights that flow from it.¹⁴⁶ Eight of the eleven judges considered the death penalty as a violation of the right to life. The subsequent paragraphs discuss the views of some of the judges.

Justice Chaskalson stated that the unqualified right to life vested in every person by section 9 of the Interim Constitution is another factor crucially relevant to the question whether the death sentence is cruel, inhuman or degrading punishment within the meaning of section 11(2) of the Interim Constitution.¹⁴⁷ According to the finding of the Constitutional Court, capital punishment imposed a limitation on the essential content of the fundamental rights to life and dignity, contrary to section 33 of the Interim Constitution, which provides that laws shall not impose any limitations on the essential content of fundamental rights.¹⁴⁸ Therefore, the fact that the person sentenced to death is denied his or her right to life is of great importance.¹⁴⁹

¹⁴⁵ *Makwanyane* (1995) para 26. It was argued that section 277(1)(a) infringed sections 8 (right to equality), 9 (right to life), 10 (right to dignity) and 11 (prohibition of cruel, inhuman or degrading treatment or punishment) of the Interim Constitution. The Court focussed on section 11(2) prohibiting cruel, inhuman or degrading punishment. However, the rights to life and dignity were relevant in determining whether section 11(2) had been infringed.

¹⁴⁶ *Makwanyane* (1995) para 27. The drafters of the South African Interim Constitution opted for the “Solomnic solution”, entrenching a simple right to life provision, leaving it to the judiciary to pronounce on the constitutionality of capital punishment (see Du Plessis & Corder (1994) 146-147. See also Du Plessis (1994) 95).

¹⁴⁷ *Makwanyane* (1995) para 80.

¹⁴⁸ The Constitutional Court’s judgement emphasises the relationship between the rights to life and dignity and the importance of these rights taken together. The Court stated that the rights to life and dignity taken together are the source of all other rights. They are the essential contents of all other rights under the Constitution, as the ultimate limit of all other rights is to be found in the preservation of the twin rights of life and dignity. Take them away and all other rights cease (see *Makwanyane* (1995) para 84). Therefore, the right to life is conceptually interrelated, and mutually reinforcing to the constitutional protection of human dignity.

¹⁴⁹ *Makwanyane* (1995) para 140.

Though Justice Chaskalson based his conclusions on the prohibition of cruel, inhuman and degrading punishment, he stated in his conclusion concerning the right to life that

[t]he rights to life and dignity are the most important of all human rights, and a source of all other personal rights ... By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the state in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby.¹⁵⁰

The above conclusion emphasises that the right to life is supreme and, therefore, should be valued above all others. Didcott J agrees with Justice Chaskalson and states as one of his grounds for believing the death penalty to be unconstitutional, the fact that “capital punishment violates the right to life of every person” that is protected by the South African Constitution.¹⁵¹ He concludes as follows:

South Africa has experienced too much savagery. The wanton killing must stop before it makes a mockery of the civilised, humane and compassionate society to which the nation aspires and has constitutionally pledged itself. *And the state must set the example by demonstrating the priceless value it places on the lives of all its subjects, even the worst.*¹⁵²

Some public commentators on the question before the Constitutional Court stated that any doubts about the constitutionality of the death penalty was foreclosed by section 9 of the Constitution, which proclaims the right to life in unqualified terms, read with section 33(1)(b) of the limitation clause, which provides that no limitation shall negate the essential content of the right in question.¹⁵³ Langa J also agreed with Justice Chaskalson’s conclusions, including the conclusion that the death sentence, in terms of the provisions of section 277 of the Criminal Procedure Act, is unconstitutional,

¹⁵⁰ *Makwanyane* (1995) 144.

¹⁵¹ *Makwanyane* (1995) para 174.

¹⁵² Emphasis added. *Makwanyane* (1995) para 190.

¹⁵³ *Makwanyane* (1995) para 193.

violating as it thus, the right to life, which is guaranteed to every person by section 9 of the Interim Constitution.¹⁵⁴ He stated the following:

The emphasis I place on the right to life is, in part, influenced by recent experiences of our people in this country. The history of the past decades has been such that the value of life and human dignity have been demeaned. Political, social and other factors created a climate of violence, resulting in a culture of retaliation and vengeance. In the process, respect for life and for the inherent dignity of every person became the main casualties. The State has been part of this degeneration, not only because of its role in the conflicts of the past, but also by retaining punishments which did not testify to a high regard for the dignity of the person and the value of every human life. The primacy of the right to life and its relationship to punishment needs to be emphasised ...¹⁵⁵

He goes further to note that the concept of *ubuntu* adds value on life and dignity, implying that the life of another person is at least as valuable as one's own.¹⁵⁶ It therefore follows that, as a "punishment" the death penalty is a violation of the right to life,¹⁵⁷ as the death penalty rejects the value of the convicted person's life.

Mohamed J adopted a different approach in determining whether the death penalty is a violation of the right to life. He approaches the constitutionality of the death sentence with a sharper and narrower focus, by asking the following question:

Does the right to life, guaranteed under s 9, include the right of every person not to be deliberately killed by the State through a systematically planned act of execution sanctioned by the State as a mode of punishment and performed by an executioner remunerated for this purpose from public funds?¹⁵⁸

He answers this question in the affirmative, stating the following:

¹⁵⁴ *Makwanyane* (1995) para 215-216.

¹⁵⁵ *Makwanyane* (1995) paras 218-219.

¹⁵⁶ *Makwanyane* (1995) para 225.

¹⁵⁷ *Makwanyane* (1995) para 234.

¹⁵⁸ *Makwanyane* (1995) para 269.

The deliberate annihilation of the life of a person, systematically planned by the State as a mode of punishment, is wholly and qualitatively different. It is not like the act of killing in self-defence, an act justifiable in the defence of the clear right of the victim to the preservation of his life. It is not performed in a state of sudden emergency, or under the extraordinary pressures which operate when insurrections are confronted or when the State defends itself during war. It is systematically planned long after – sometimes years after – the offender has committed the offence for which he is to be punished, and whilst he waits impotently in custody for his date with the hangman. *In its obvious and awesome finality it makes every other right, so vigorously and eloquently guaranteed by chap 3 of the Constitution, permanently impossible to enjoy ... [It does not permit] the slightest possibility that [the offender] might one day successfully and deservedly be able to pursue and to enjoy the great rights of dignity and security and the fundamental freedoms in chap 3 of the Constitution, the exercise of which is possible only if the 'right to life' is not destroyed ...*¹⁵⁹

Mohamed J provides a clear distinction between taking life in the act of self-defence, which is justifiable, and taking life by the imposition of the death penalty, which is not justifiable. As seen above, he was of the view that the death penalty destroys the right to life, thus destroying other rights that can only be enjoyed if the right to life is protected. This emphasises the imperative nature of the right to life.

Mokgoro J and O'Regan J also found the death penalty to constitute a violation of the right to life. Mokgoro J was of the opinion that the death penalty violates the essential content of the right to life embodied in the South African Constitution in that it extinguishes life itself.¹⁶⁰

O'Regan J emphasised the relationship between the right to life and dignity, noting that the right to life is antecedent to all other rights, since without life, in the sense of existence, it would be impossible to exercise rights or to be the bearer of them.¹⁶¹ Further, O'Regan J in answering the question whether the right to life and dignity are breached by the death penalty, states:

¹⁵⁹ Emphasis added. *Makwanyane* (1995) paras 270-271.

¹⁶⁰ *Makwanyane* (1995) paras 313 & 317.

¹⁶¹ *Makwanyane* (1995) paras 326 & 327.

The purpose of the death penalty is to kill convicted criminals. Its very purpose lies in the deprivation of existence. Its inevitable result is denial of human life. It is hard to see how this methodical and deliberate destruction of life by the Government can be anything other than a breach of the right to life. The implementation of the death penalty is also a denial of the individual's right to dignity ...¹⁶²

As seen under the ICCPR and other regional human rights instruments, and the jurisprudence of the Human Rights Committee (discussed above), the right to life cannot be derogated from. Thus, the above conclusion could be insightful for jurisdictions in which the right to life is qualified or could be derogated from.

Overall, the above decision of the South African Constitutional Court is very significant because it could act as persuasive authority for national courts in Africa that still uphold the death penalty, especially those with similarly framed right to life provision. The decision indicates that the Constitutional Court is committed to both the persuasive authority of international sources and the specific requirements of South Africa and its Constitution.¹⁶³ Therefore, the interplay between the international and domestic jurisprudence could be useful for African lawyers and courts in dealing with the death penalty.

Also, as stated above and as Nowak rightly points out, it might serve as precedent for the interpretation of the African Charter.¹⁶⁴ This is because the African Charter, similar to the then Interim Constitution, does not explicitly mention the death penalty as an exception to the right to life. In addition, the evolution of human rights law has continuously moved to the direction that every instance in which the death penalty is applied should be regarded as a violation of human rights (including the right to life) as it is inhuman, which has also been portrayed by the decision of the South African Constitutional Court in *Makwanyane*.

¹⁶² *Makwanyane* (1995) para 334-335. He then concluded that “life by its very nature cannot be restricted, qualified or abridged, limited or derogated from” as you are either alive or dead (para 353).

¹⁶³ Keightley (1995) 400.

¹⁶⁴ Nowak (2000) 42-43.

Furthermore, as seen above, a state has been held to infringe the right to life of an accused where the state extradites an accused without obtaining an assurance that the accused will not be subjected to the death penalty. Similarly, the South African Constitutional Court has found a violation of the right to life in relation to the death penalty, in the context of international judicial extradition.

In *Mohamed v President of the Republic of South Africa and Others*, the first applicant, Mohamed (a Tanzanian national), who had been sought by the United States as a suspect on capital charges, was handed over to American authorities by South African immigration authorities without seeking an assurance that the death sentence would not be imposed on him.¹⁶⁵ One of the issues the Constitutional Court had to decide was whether the handing over of Mohamed for removal to the United States, as well as the subsequent removal, breached his constitutional right to life. The Court had to decide this issue as it was contended that Mohamed's constitutional right to life, to dignity and not to be subjected to cruel, inhuman or degrading punishment has allegedly been infringed.¹⁶⁶

After finding that the South African authorities were not empowered to deport Mohamed to the United States,¹⁶⁷ the Court went further to consider the practice of different countries, for example Canada and Germany, with regard to deportation or extradition and the death penalty. The practice followed by countries that have abolished the death penalty is that, the governments seek and secure an assurance from the requesting state that the death sentence would not be imposed on the person being deported or extradited.¹⁶⁸ The Court then held that in handing Mohamed over to the United States without securing an assurance that he would not be sentenced to death, *the immigration authorities failed to give value to Mohamed's right to life*, his

¹⁶⁵ *Mohamed v President of the Republic of South Africa and Others* 2001 (7) BCLR 685 (CC) para 2, hereinafter referred to as *Mohamed* (2001).

¹⁶⁶ *Mohamed* (2001) para 3 & 23. In addition, the Court had to decide whether the above was also in breach of the Aliens Control Act 96 of 1991.

¹⁶⁷ *Mohamed* (2001) para 36.

¹⁶⁸ *Mohamed* (2001) para 44.

right to have his dignity respected and protected.¹⁶⁹ In arriving at this conclusion, the Court also took into account the statement of Justice Chaskalson in *Makwanyane* that, by committing ourselves to a society founded on the recognition of human rights we are required to value the rights to life and dignity, and that this must be demonstrated by the state in everything that it does.¹⁷⁰

It is worth noting that in the above case, the Constitutional Court, adopting an approach similar to that of the European courts, made it clear that whether Mohamed was deported or extradited is of no relevance, as deportation or extradition of a person to face an unacceptable form of punishment (the death penalty) is prohibited.¹⁷¹ It should also be noted that in due course, Mohamed was convicted of a capital offence, but the jury in New York did not impose the death penalty.¹⁷²

4.6 Jurisprudence of other national courts

The jurisprudence of other national courts is examined as African courts, as seen above, make reference to the case law of these courts. Some constitutions allow expressly for courts' consideration of foreign case law.¹⁷³ The jurisprudence of two national courts are discussed under this section, that of the Canadian Supreme Court in *Canada (Minister of Justice) v Burns and Another* and the Hungarian Constitutional Court Decision 23/1990.¹⁷⁴ The decision of the Canadian Supreme Court is important, as it is an example of changing views, furthering the course of abolition, on the question of extradition of persons to countries with the death penalty to face capital charges. It has been a source of reference to some African national courts, for example the South African Constitutional Court, and it could serve as

¹⁶⁹ *Mohamed* (2001) para 48. See also, para 73. The Constitutional Court also found the handing over of Mohamed to be in violation of his right not to be subjected to cruel, inhuman or degrading punishment.

¹⁷⁰ As above.

¹⁷¹ *Mohamed* (2001) para 59. European courts draw no distinction between deportation and extradition in the application of article 3 of the European Convention on Human Rights.

¹⁷² Hood (2002) 22, footnote 47.

¹⁷³ See, for example, section 39(1) of the Constitution of South Africa Act 108 of 1996.

¹⁷⁴ See 4.6.1 and 4.6.2 below.

persuasive authority in cases alleging a violation of the right to life in relation to the death penalty, in the context of international judicial extradition.

The Hungarian Constitutional Court's decision is discussed because, as noted above, it can serve as precedent for the interpretation of the African Charter. Both the Hungarian Constitution and the African Charter guarantee the right to life in similar terms, as they both prohibit the arbitrary deprivation of life.

4.6.1 The Supreme Court of Canada

The Canadian Supreme Court has also dealt with the death penalty as a violation of the right to life. In *Canada (Minister of Justice) v Burns and Another*,¹⁷⁵ the Supreme Court had occasion to reconsider its position with regard to the extradition of fugitives to a country where they would face the death penalty. In this case, the respondents (Burns and Rafay), whose extradition was sought, were wanted for murder in Washington State, where they will, if found guilty, face either life imprisonment without parole or the death penalty.¹⁷⁶ After evaluating the respondents' particular circumstances, the Minister of Justice of Canada ordered their extradition without seeking or obtaining assurances from the United States, as required under article 6 of the Extradition Treaty between the two countries that the death penalty would not be imposed, or if imposed, would not be carried out.¹⁷⁷ The respondents appealed against

¹⁷⁵ *Canada (Minister of Justice) v Burns and Another* (2001) SCC 7; (2001) 5 LRC 19, hereinafter referred to as *Burns* (2001). See also (2001) 2 *Amicus Journal* 16 & (2002) 3 *Commonwealth Human Rights Law Digest* 324. Ten years earlier, the majority of the Court held, in *Kindler v Canada (Minister of Justice)*, that it was not unconstitutional for the Canadian government to extradite a person accused of capital murder to the state of Pennsylvania, without an assurance that the death penalty would not be imposed (*Kindler v Canada (Minister of Justice)* (1993) 4 LRC 85, 130-132). However, it should be noted that the minority in this case found the extradition to be in violation of the Canadian Charter, as the death penalty did constitute cruel and unusual punishment. See also, *Reference re Ng Extradition (Canada)* (1993) 4 LRC 133.

¹⁷⁶ *Burns* (2001) paras 9-13.

¹⁷⁷ *Burns* (2001) paras 14-19. Article 6 of the Extradition Treaty provides as follows: "When the offense for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offense, extradition may be refused unless the requesting state provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be carried out."

the Minister's decision and the Court of Appeal set aside the extradition order on the ground that it was unconstitutional.¹⁷⁸

The Minister then appealed to the Supreme Court contending that he was not required to seek the relevant assurances as a condition of extradition.¹⁷⁹ The outcome of the appeal was governed by section 7 of the Canadian Charter of Rights and Freedoms 1982 (Canadian Charter), which states as follows: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Since, as noted by the Court, the extradition puts the lives of the respondents at risk, it had to decide whether the threatened deprivation was in accordance with the principles of fundamental justice.¹⁸⁰

The Supreme Court, after weighing the factors for and against extradition without assurances, held unanimously that the unconditional extradition of the respondents to the State of Washington for the crime of murders, without an assurance that the death penalty will not be imposed, would violate their rights (right to life, liberty and security of the person) under section 7 of the Canadian Charter.¹⁸¹

The Court then had to decide whether the violation of the respondents' section 7 rights, that would occur if they were extradited to face the death penalty, was reasonable and demonstrably justifiable in a free and democratic society under section 1 of the Canadian Charter.¹⁸² Section 1 provides:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society...

¹⁷⁸ *Burns* (2001) para 20.

¹⁷⁹ *Burns* (2001) para 32.

¹⁸⁰ *Burns* (2001) para 59.

¹⁸¹ *Burns* (2001) paras 130-132.

¹⁸² *Burns* (2001) para 133.

As the Minister's refusal to ask for assurances serves no pressing and substantial purpose, the Court held that the infringement of the respondent's rights cannot be justified under section 1 of the Canadian Charter.¹⁸³ Thus, the Supreme Court found a way round the qualification or limitation in article 1 in finding the extradition without assurances that the death penalty would not be imposed to be unconstitutional, by applying the principles of fundamental justice to factual developments, many of which are of far-reaching importance in death penalty cases. The balancing of these tilted against the constitutionality of extradition without assurances. Consequently, once the State of Washington, which had sought the extradition, had given assurances, Burns and his associate were surrendered to face trial in the United States.¹⁸⁴

4.6.2 The Constitutional Court of Hungary

As noted above, the Hungarian Constitutional Court has addressed the issue of the death penalty, in relation to the right to life, which could be instructive in interpreting article 4 of the African Charter. The Hungarian Constitutional Court has found the death penalty to be in violation of the right to life, when it had to decide on the constitutionality of the death penalty within the right to life provision of the Hungarian Constitution.¹⁸⁵

Section 54(1) of the Hungarian Constitution states that "every one has the right to life and to human dignity and no one shall arbitrarily be deprived of this right". In interpreting this provision, the Court found the death penalty to be an arbitrary deprivation of life, by holding that the death penalty was unconstitutional on the ground that it is inconsistent with the right to life and dignity under section 54 of the Constitution.¹⁸⁶

¹⁸³ *Burns* (2001) para 143.

¹⁸⁴ *Hood* (2002) 22, footnote 46.

¹⁸⁵ Decision 23/1990 of 24 October 1990 (Hungarian Constitutional Court). Also referred to in *Kalu* (1998) 592 & *Makwanyane* (1995) paras 38 & 327.

¹⁸⁶ Decision referred to in *Kalu* (1998) 592. One of the limitations of this study, with regard to this case, is the difficulty in obtaining an English version of the above decision. The author therefore had to rely on secondary sources, which explains the case is not discussed in detail.

As seen above, although the right to life provision in section 54 is qualified, the Court still found the death penalty to be unconstitutional, as it constituted a violation of the above section. Similar to section 54, the African Charter prohibits arbitrary deprivation of life. Thus, if the African Commission and the future African Court on Human and People's Rights adopt a similar approach, the death penalty would certainly be an arbitrary deprivation of life under the African Charter, especially bearing in mind the fact that the African Charter does not have a derogation clause. Moreover, the death penalty would be an arbitrary deprivation of life under similar provisions in African national constitutions. The Hungarian Constitutional Court's decision can, therefore, serve as precedent for the interpretation of the African Charter and some African national constitutions, considering the fact that the evolution of human rights law has continuously moved to the direction that every instance in which the death penalty is applied should be regarded as a violation of human rights as it is inhuman, as has been pointed out by the South African Constitutional Court in *S v Makwanyane* (discussed above).

4.7 Conclusion

In human rights law, it is unquestionable that the right to life is highly respected and viewed as a fundamental and non-derogable right. Also, the right to life is not accorded the status of an absolute right, as self-defence, for example, justifies the taking of life, and some human rights treaties, such as the ICCPR, make provision for the death penalty as a limitation to the right to life. However, as seen above, certain safeguards or conditions have to be met if the death penalty has to be imposed as an exception to the right to life. Under international human rights law, these conditions, as seen in the previous chapter and this chapter, have slowly but surely assisted the evolution towards the abolition of the death penalty.

This chapter has examined the death penalty in relation to the right to life, which has shown that the death penalty (in Africa) is a violation of the right to life. As seen in this chapter, some human rights treaties are silent on the death penalty while others provide it as an exception to the right to life. The silence of some instruments has been seen to imply that they envisage abolition. In instruments where it is provided as an exception to the right to life, the *travaux préparatoires* and subsequent

interpretations of these instruments provide a strong evidence of a growing trend in favour of abolition of the death penalty. In addition, the move towards abolition of the death penalty is even more evident with the universal growing practice by countries not to extradite an accused person to a state that still has the death penalty without seeking an assurance that it would not be imposed. The contrary would amount to a violation of the right to life of the accused person.

The African Charter does not express the death penalty as an exception to the right to life, but prohibits arbitrary deprivation of life in article 4. As mentioned earlier, some have seen this as allowing for the death penalty as long as it is not arbitrary. But an objective interpretation of article 4 of the African Charter, in the light of international human rights law and jurisprudence on the death penalty as a violation of the right to life, could point towards abolition. Moreover, the inherently arbitrary nature of the death penalty implies that respect for rights, such as the right to equality before the law, relevant to the exercise of due process rights, cannot be guaranteed. The death penalty can, therefore, not be saved by article 4 of the African Charter, if interpreted objectively, bearing in mind the above.

When dealing with the death penalty as a violation of the right to life in Africa, as seen in this chapter, certain difficulties arise. These include the fact that the right to life provisions in most jurisdictions are qualified, and in addition, some constitutions have limitations clauses, allowing for the limitation of basic rights. These cause obstruction to constitutional challenges to the death penalty. In some African states with qualified right to life provisions or limitation clauses as seen above, it has been difficult to rely on the right to life to challenge the constitutionality of the death penalty. As seen in the decisions of African national courts discussed above, the success of such challenges would depend on the approach to the interpretation of the limitation clauses or qualified right to life provisions. To find a way round the qualified right to life provision and limitation clauses, in finding the death penalty to be unconstitutional, African Courts have to adopt a bold approach, like that adopted by the Hungarian Constitutional Court.

The jurisprudence of African national courts with regard to challenges to the death penalty examined in this chapter, illustrate that the death penalty is a violation of the

right to life. The South African Constitutional Court found the death penalty to constitute a violation of the right to life. Though the challenges to the death penalty were unsuccessful in Nigeria, Botswana and Tanzania, the decisions of the courts did not dispute the fact that the death penalty was a violation of the right to life. The High Court of Tanzania, as seen above, explicitly stated that the right to life has been infringed by the death penalty. The main problem with the challenges was that the right to life was qualified or that its violation was saved by the limitation clause in their constitutions.

Therefore, it is not disputable that the death penalty in Africa violates the right to life. As seen in this chapter, even the African Commission, which has not pronounced on the death penalty as such, has found a violation of the right to life (and fair trial rights) in the majority of the cases in which the issue of the death penalty was raised in relation to the right to life or in the context of the deprivation of due process rights. It is thus clear from the aforementioned that that the application of the death penalty in Africa violates the right to life, even more so as the very purpose of the death penalty lies in the deprivation of life.

African states with qualified right to life provisions or limitation clauses in their constitutions, should, therefore, consider changing their constitutions, to exclude the right to life provision from the limitation clauses, having in mind the goal of abolition. This will ensure compatibility of their constitutions with human rights treaties, such as the UDHR. States with unqualified right to life provisions should reconsider their application of the death penalty, since the right to life cannot be limited or derogated from as one is either alive or death, and it is the most fundamental of all human rights, the deprivation of which makes it permanently impossible to enjoy other rights.