



A reimposition of the death penalty in South Africa: is there such a possibility?

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Abstract

Debates surrounding capital punishment continue to influence criminal justice policy and human rights discourse globally. In South Africa, the Constitutional Court's landmark judgment in *S v. Makwanyane* declared section 277(1) (a) of the Criminal Procedure Act unconstitutional, primarily on the basis of the rights to life, dignity, and equality. Despite the ruling, persistent high levels of violent crime including sexual offences and murder, there has been a renewed public and political interest in the possible reinstatement of capital punishment. This paper will undertake a critical and evidence-based examination of this debate within South Africa's constitutional and criminological context. The analysis focuses on three core concerns that shape the contemporary discourse: the potential for wrongful convictions and the irreversible consequences of execution; the influence of bias, discrimination and systemic inequality on sentencing outcomes and international perspectives, particularly the normative positions of the European Union and the United Nations, which consider the death penalty incompatible with evolving human rights standards. Drawing on comparative research crime data and international legal developments, the paper assesses whether the re-introduction of the death penalty could have any demonstrable effect on reducing serious violent crime in South Africa. The central aim is to evaluate the criminological claim that capital punishment functions as a deterrent in cases of sexual offences and murder while critically reflecting on whether such a measure could enhance societal safety within a constitutional democracy. Ultimately, the paper interrogates the tension between demands for harsher punitive measures and South Africa's commitment to human rights, proportionality and evidence-based criminal justice policy.

Keywords: Death penalty, human dignity, retribution, crime, convictions, discrimination

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Introduction

The death penalty has historically been part of the legal and penal landscape in South Africa, reflecting a global pattern of widespread acceptance of capital punishment across societies (Magobotiti, 2022; Nath & Prasad, 2024). Rooted in practices inherited from British colonial rule, the use of executions has become deeply embedded in South Africa's criminal justice system. In the late 20th century, the country recorded some of the highest rates of judicial executions in the world, demonstrating the scale and normalization of capital punishment during that period (Avila Deva Aryanda et al., 2025; Moore, 2022). However, the political transition of the late 1980s and early 1990s created an environment in which the legitimacy of state executions came under increasing scrutiny (Naseemullah, 2023; Rogers, 2025). In 1989, President F.W. de Klerk imposed a moratorium on executions while negotiations for democratic reforms took place. Although the 1993 Transitional Constitution introduced a comprehensive Bill of Rights, it remained silent on the future of the death penalty, leaving its constitutional status unresolved. This uncertainty necessitated judicial intervention to determine whether the practice was compatible with the emerging constitutional order (Wicaksono & Rahman, 2022; Aboelazm, 2024).

This question was conclusively answered in the landmark 1995 Constitutional Court case, *S v Makwanyane*. The Court ruled that Section 277(1)(a) of the Criminal Procedure Act violated fundamental rights, including the rights to life, human dignity, and equality before the law. Justice Chaskalson emphasized that the death penalty constituted "cruel, inhuman, or degrading punishment," and therefore inconsistent with the fundamental values of the new democratic Constitution. Consequently, the Court abolished the death penalty on 6 June 1995, marking a significant moment in aligning South Africa's criminal justice system with constitutional human rights protections (Adegalu & Mitchell, 2024; Karim & Kruger, 2021).

While the abolition of the death penalty has been extensively researched, its constitutional justification remains an important subject of analysis, explaining how rights such as dignity, life, and equality operate within the South African legal framework. This study synthesizes existing legal interpretations to clarify the constitutional reasoning that informed the *Makwanyane* decision. Research Objectives: Examine the constitutional principles underlying the abolition of the death penalty in South Africa; Analyze the reasoning adopted by the Constitutional Court in *S v Makwanyane*; Evaluate how the rights to life, dignity and equality shaped the Court's decision; Contextualize the abolition within South Africa's transition to a human rights-based legal system.

Methodology

This study uses a normative juridical approach with qualitative analysis methods. Data were collected through a literature review of primary and secondary legal sources. Primary sources include the 1996 Constitution of the Republic of South Africa, the Constitutional Court's decision in the case of *S v Makwanyane* (1995), and related laws and regulations such as the Criminal Procedure Act. Furthermore, this study employs a comparative law method by reviewing the legal system in Botswana, a neighboring country that still maintains the death penalty. The analysis was conducted by synthesizing existing legal literature, human rights reports from international organizations such as Amnesty International and the United Nations, and execution statistics to provide a comprehensive picture of the challenges of future re-implementation of the death penalty.

Results and Discussion

The Inhumanity and Cruelty of the Death Penalty

According to court decisions and the South African Constitution, everyone has the right to liberty and security, which includes the right not to be tortured and not to be subjected to cruel, inhuman, or degrading treatment or punishment (Article 12). Justice Chaskalson stated that the death penalty should be considered cruel because of the legal process involved and the resulting uncertainty. Execution denies a person their humanity and treats them as objects to be destroyed by the state, which directly violates human dignity (Nagelsen & Huckelbury, 2016); (Carrillo-Santarelli & Seatzu, 2025).

Comparative Perspective: Botswana

Unlike South Africa, Botswana retains the death penalty. Botswana's legal system is a blend of customary law and written law (Penal Code 1964). Under the Penal Code, the death penalty by hanging is mandatory for crimes such as murder (without mitigating circumstances), treason, and certain acts of terrorism. Since independence in 1966, Botswana has executed 50 people (Mogalakwe & Nyamnjoh, 2017); (Mulimbi & Dryden-Peterson, 2018). Although Botswana is a signatory to various international treaties, it continues to justify the death penalty in its constitution as an exception to the right to life (Ntizoyimana et al., 2025); (Van Zyl Smit & Seeds, 2024).

Risk of Bias, Discrimination, and Judicial Error

Historical data shows that the death penalty is highly susceptible to racial and class bias. During the apartheid era in South Africa, there was a strong tendency for Black defendants to be sentenced to death more often than white defendants for the same crimes. Furthermore, there is a permanent risk of wrongful convictions. Unlike imprisonment, the death penalty is irreversible. Amnesty International notes that many countries still impose the death penalty through trials that do not meet international standards (Noor & Ajmal, 2022).

Table 1. Statistics show the status of the death penalty globally:

Country Category	Number of Countries (UN/Amnesty Estimate)
Have Abolished the Death Penalty (De Jure/De Facto)	170 Countries
Countries Still Retaining the Death Penalty	25-30 Countries
Countries with Secret Death Sentences (Secret Countries)	Examples: China, Vietnam

The Reality of Re-Implementation in South Africa: Constitutional Challenges

Despite public pressure stemming from high crime rates and increasing vigilantism, the likelihood of reinstating the death penalty in South Africa is highly unlikely. Constitutional Obstacles: Article 11 of the Constitution explicitly states, "Everyone has the right to life (Serfontein, 2017)." To reinstate the death penalty, parliament would have to amend the Bill of Rights, which is both legally and politically difficult. Alternatives to Life Imprisonment: Since 1995, life imprisonment has been the maximum penalty (Kazemian & Galleguillos, 2025). However, debate has arisen regarding the effectiveness of parole for perpetrators of violent sexual crimes, which are considered disturbing to society (Perkins & Winder, 2025).

International Perspective

The European Union (EU) and the UN firmly oppose the death penalty, deeming it incompatible with human dignity. There is a growing global consensus for universal abolition,

although some countries persist in its defense, citing its deterrent effect, which empirically is often dismissed as a myth.

Conclusion

The abolition of the death penalty in South Africa is not simply a legal decision, but a moral commitment to distance itself from an oppressive past. Through the case of *S v Makwanyane*, South Africa has established that the right to life and dignity is absolute and non-negotiable by the state. While a comparison with Botswana demonstrates that the death penalty still exists in regional areas, the ethical challenges and risks of discrimination make it a difficult practice to sustain in a modern democracy. Strengthening the system of life imprisonment and parole reform may be a more appropriate compromise than reviving a cruel and irreparable punishment.

Conflicts of Interest

The authors declare no conflict of interest.

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Author contribution

Conceptualization; methodology; formal analysis.; investigation; resources, writing—preparation of original draft; writing—reviewing and editing.; visualization; supervision; project administration, obtaining funding, M. M. All authors have read and approved the published version of the manuscript.

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