

The Constitutionality/Constitutionalisation of the Death Penalty in Cameroon and Ghana: An Appraisal on the Right to Life

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ABSTRACT: Since the introduction of democratic reforms by states, the practice of death penalty is perceived by many, especially the developing states as a means to fight criminality and to minimise the number of crimes committed in the society. This sanction imposed by states seems to contradict most constitutional principles and the rights promised within it. The right to life, like any other fundamental right is most precious from which all other rights derived their validity. This right is promised by almost all states to their nationals within their respective constitutional order. The entrenchment of the right to life within the constitution, and the ratification of international human rights treaties, imposes a direct obligation on state parties to respect and to protect all its nationals during the process of implementation. However, this right promised by the states to all its citizens, alongside those found guilty of committing crimes, has been subjected to serious violations following the incorporation and practice of the death penalty within national laws. The pressing question arising at this juncture is whether the said penalty is constitutional and in favour of the right to life enshrined in the Constitution. This paper aims to unravel the contentious debate surrounding the constitutionality/constitutionalisation of the death penalty as an appraisal on the right to life with lessons from Cameroon and Ghana, in contrast with other states like the United States. It reveals that despite the obligations imposed on states to take effective and necessary steps, in accordance with their constitutional processes, the right to life is still under threat without effective constitutional protection. The paper also argues that despite several recommendations on the abolition of the death penalty around the globe, particularly in Africa, the practice is still ongoing, posing a great challenge on its constitutionality status.

KEYWORDS: Right to life, death penalty, constitution, constitutionality, international law

1. Introduction

Ever since the introduction of democratic reforms and constitutional changes by many post-independence states, the aspiration to protect human rights and to ensure the constitutionality of laws has been one of the imperative agendas of these states. Constitutional changes or amendments are obliged to take into consideration human rights, in line with the obligations undertaken by states, following the ratification of international human rights treaties. However, most states have taken effective measures to ensure that constitutional changes must abide by the rule of law, human rights and democracy. These constitutional principles have been described as a trinity that forms an inextricable whole (Tomuschat 2014, 91-94). To guarantee the constitutionality of laws, most states have also been advised to ensure that sanctions imposed against human rights violations or offenders,

must be in line with international law and domestic constitutional order. However, following the introduction or practice of the death penalty by most states, for instance, the developing states, the death penalty row has set a massive blow on the right to life guaranteed in several domestic constitutions around the globe. This form of sanction, practiced by several states before the 19th century, is viewed by many as a means to cut down on the number of crimes committed in every community.

Recently, with the advent of international treaties and the domestication of international human rights, the death penalty is considered contradictory to the right to life entrenched in almost all international treaties and states constitutions. This leaves the doubting question regarding the constitutionality/constitutionalisation of the death penalty practice by most states particularly the developing states. Although some states have already abolished or repealed the death penalty within their national laws, others have reintroduced the practice as a means to fight against serious crimes, such as secessionist, espionage, treason, terrorism, aggravated theft and premeditated murder. Some states that consider the death penalty as a means to lessen crimes have been subject to questioning regarding the constitutionality of their status. This paper will examine the right to life as a fundamental human right in the context of the death penalty. It will further illustrate the international and national legal framework in place for its protection, and the obligations imposed on states arising from the ratification of international human rights treaties. The paper also seeks to evaluate the constitutionality/constitutionalisation of the death penalty in Cameroon and Ghana and its impact on the right to life. It will also be important to address the challenges faced by states for the abolition of the death penalty as a means to foster human rights.

2. Right to Life as a Fundamental Right

The right to life, like any other substantive right, is a fundamental human right and a prerequisite for the enjoyment of other rights and freedoms. This precious right is accorded to every human being from birth. Without its existence, other human rights and freedoms would be devoid of meaning. Its importance has gained considerable recognition in law and in different jurisprudential practices by various states (Art. 2 ECHR, Art. 4 AChPR, *S v Makwanyane*, para.83). Although the right to life appears to be very basic, it is intangible in its scope and vexingly difficult to define (Schabas 2014, 117). Generally, it implies the right to live and not to be arbitrarily deprived of one's life by any act or omission (Art. 6 ICCPR).

According to Fombad (2012, 224), this right encompasses two important elements, which include a passive and an active element. The first is that the state must not kill; what can be referred to as the passive element, while the second is that the state must prevent others from killing, what can be termed an active element. The right to life has been characterised as the supreme human right. Without it, it is impossible for other human rights to exist (Nowak 2005, 121-122; Carl 2016, 103-104; Schabas 2014, 117-118; *Camargo v Columbia*, para.13.1). It is also described as one of the rights which constitute 'the irreducible core of human rights' (Njayawickrama 2002, 243). It is one of the major or crucial rights, not subject to derogation in situations of armed conflict and other public emergencies threatening the life of the nation (Art.4(2) ICCPR; UN General Comment No.6, para.1). The HRC Committee further notes that the right to life should not be interpreted narrowly because it concerns individuals entitlement to be free from acts and omissions intended or expected to cause their unnatural or premature death as well as to enjoy a life with dignity (UN General Comment No. 36 on Art. 6, para.3, 2017; Michael

2012, 5). Its fundamental nature has repeatedly gained momentum following its recognition by the comity of states, in international treaties and in domestic constitutional orders.

3. International and Domestic Legal Framework on the Right to life

Since the birth of the United Nations, the protection of fundamental human rights has been the core element of the organisation's agenda. The realisation of this promising task could only be achieved through the ratification of international treaties and the recognition of basic rights by each of the states within their domestic legislation. It is through this means that the right to life has gained considerable recognition, making it the most fundamental rights, of its kind.

3.1. International Framework on the Right to Life

The right to life, similar to most fundamental human rights and freedoms, is given equal protection in several international and regional human rights treaties and conventions. Due to the interdependence and indivisibility of human rights, the right to freedom of expression and even liberty, by way of example, depends on the right to life for their survival; implying that the unlawful restriction of right to life deprives individuals of the right to liberty or freedom of expression. This important right has gained international recognition under law and in practice. The first human rights instrument in unequivocal language, following the birth of the United Nations, states that 'everyone has the right to life, liberty and security of person and that; no one shall be subject to torture or cruel, inhuman or degrading treatment or punishment'(Arts. 3 & 5 UDHR 1945). Although the Universal Declaration of Human Rights (UDHR) is not legally binding, it set the foundation for a universal enforcement standard, which was subsequently echoed in other human rights treaties.

In addition to this declaration, Article 6 of the International Covenant on Civil and Political Rights (ICCPR), which forms part of the 'International Bill of Rights' further guarantees the special nature of the right to life as an 'inherent' right accorded to every human by birth. In a similar provision such as the ICCPR, the Convention on the Rights of the Child (CRC), which is the most widely recognised international treaty ratified by all states, ensures the inherent right to life to all children by virtue of their birth (Art. 6 UNCRC). The use of the term 'inherent' is an intended action expressed by the drafters to emphasise the supreme character of the right to life. This is because the right to life is neither conferred on the individual by the state, nor by society but by the fact that he or she is born and is alive. In addition to international instruments, regional bodies have also been very influential in keeping the process of realisation and enforcement active at the domestic level among states.

The European Convention on Human Rights (ECHR), the African Charter on Fundamental Rights and Freedoms (AChPR), and the American Convention on Human Rights (ACHR), also guarantees equal protection to the right to life (Art.2 ECHR 1950, Art.4 AChPR 1981, Art.4 ACHR 1969). These instruments, in one way or the other, require all state parties to ensure that the right to life is effectively protected and enjoyed by everyone, within their respective jurisdictions in law and practice. The universal recognition of the inherent nature of the right to life has been proven beyond doubt that it is fundamental in nature and forms a foundation for the existence of other rights and freedoms. State parties who have ratified these treaties are also bound to ensure the effective enjoyment of this right, within their respective domestic constitutional order, during the process of enforcement.

3.2. Domestic Legal Framework on the Right to Life

The desire to protect human rights especially the right to life, was one of the major agendas of democratic reforms during the drafting of new constitutions and amendments by most states around the globe particularly, developing states, following the introduction of multi-party politics [For clarity of doubt, it should be noted that the year 1990 marked the beginning of democratic reforms in most part of Africa following the introduction of multi-party politics as opposed to dictatorship under the reign of one party system]. After the ratification of international human rights instruments, states are bound to follow their legal order or practice, based on monism or dualism, to align their national laws and practices in accordance with international human rights standards. States which practice monism, such as Cameroon and Germany unlike the UK (dualism) for instance, were obliged to reform their national laws to abide by international practices. The process of reformation provided room for a direct recognition of human rights by all member states within their national constitutions. The right to life was first established in the Constitution of the United States through the 14th amendment which reads in part, ‘*nor shall any state deprive any person of life, liberty, or property without due process of law*’ (Amendment 14 to the US Constitution 9 July 1868).

While the British incorporated fundamental rights and freedoms contained in the ECHR into the Human Rights Act (Art. 2 British *Human Rights Act*. 1998), states such as Cameroon, Ghana, South Africa, Kenya, and Germany, among others, gave way for the constitutional recognition of basic rights and freedoms. Unlike in Article 13 of the 1992 Ghanaian Constitution, the right to life in Cameroon is promised to every person in the preamble to the Constitution (Recital 12, Preamble to the Constitution of the Republic of Cameroon, 1996). The preamble further adds that every person has a right to physical and moral integrity and to humane treatment under all circumstances. The Cameroon Constitution seems to promise the right to life in absolute and unqualified terms and, like many other rights and freedoms, there are also qualifications and exceptions to it, some of which are quite controversial. Although the Cameroon Constitution does not clearly outline the limitations on the right to life in Cameroon as it is the case in Ghana [sections 13(2)(a–d) of the Ghanaian Constitution states that a person shall not be held in breach of the right to life for the defence of any person from violence or for the defence of property; or in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or for the purposes of suppressing a riot, insurrection or mutiny; or in order to prevent the commission of a crime by that person], the limitations are contained in statutory laws. The main statutory exception is contained in the Penal Code (PC) and the anti-terrorism law, which guarantees the death penalty for every serious crime committed (Sections 18, 22, 23 & 320 of Law No. 2016/007 Governing the Cameroon Penal Code; Sections 2(1)(d) of Law No. 2014 on the Suppression of Acts of Terrorism). Even though Cameroonian judges have been very reluctant to impose the said penalty in practice, it is evident that the death penalty in most instances is replaced by life imprisonment (Law No. 2005/182 & 183 to Commit death Sentences to life Imprisonment). Whether the constitution imposes a mandatory obligation on states to avoid such practices is a question of great concern that must be scrutinised.

4. Obligations of States to Ensure the Right to Life

The ratification of international human rights treaties imposed a mandatory obligation on all state parties to ensure the right to life. Like Article 2 of the ECHR and Article 4 of the ACHR, Article 6(1) of the ICCPR also expressly obliges all state parties to the Covenant to shield the right to life by law. The second sentence of the Covenant states *inter alia* that the

right shall be protected by law. By way of interpretation, this provision(s) imposes a positive duty on all states to ensure that the right to life is given due consideration and protection, during the process of fulfilling their respective duties, without discrimination. Although Article 6 of the Covenant is comprehensible, it is also extremely broad in its definition regarding the scope of its protection accorded to the right to life – leaving specific groups with excessive discretion to breach it, as a matter of self-defence. As noted by Nowak(2005, 123), this provision may be violated by the broad definition of the right to self-defence since police officers are granted a general statutory presumption of justification for combating certain offences.

The broad nature and interpretation of the right to life was applauded by the Indian Supreme Court in the *Francis Coralie Mullin v The Administrator, Union Territory of Delhi and Others* case ((1981) SCR (2) 516, para.4). Here the court added that ‘the right to life which is the most precious human right and which forms the ark of all other rights must be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person’. However, other serious crimes, such as genocide, war and nuclear weapons and the prevention of armed conflicts, still pose a great threat to human life since states are bound to kill during periods of war to maintain peace; the most serious of which is the death penalty practice among states. This has made the constitutionality/constitutionalisation of the death penalty a pressing question to be addressed immediately.

5. The Death Penalty and its Impact on the Right to Life

Since the ratification of international human rights treaties, the death penalty has been a subject of controversy among states. Generally, the death penalty is a serious criminal sanction incorporated by states, within national laws, to narrow down on groups of criminals and offenders (Borra 2005, 712). Although several states like Cameroon and Ghana, for instance, are parties to the ICCPR, the death penalty is still enshrined within their applicable criminal laws (Sections 46(ii), 49(iii), 49(A)(iv) and 180(v) of the Ghanaian Criminal Code Act 29 of 1960; Art. 3(3) of the Ghanaian Constitution, 1992). It is described as a medieval punishment that is inhuman and degrading, and must be absolutely prohibited (Nowak 2005, 135; Art.7 ICCPR). The method of execution is usually by decapitation, firing squad/shooting, hanging, lethal injection, stoning and the electric chair. Some prominent scholars speaking against capital punishment have also described it as a devastating problem which has no place in the 21st century (Joseph 2016, 277-278; Ban-Ki-Moon 2014). The ICCPR recognises the death penalty without any reservation. It further reiterates that nothing shall prevent states from abolishing the death penalty (Art.6 (2) (6) ICCPR). The Covenant appears to leave state parties with the discretion to abolish the death penalty because it has a negative impact on the right to life and many other fundamental freedoms. It is an invasion of human dignity and the inherent right to life accorded to everyone by virtue of their birth. In the locus classicus of *S v Makwanyane and Another*, the Constitutional Court of South Africa attempted to investigate whether the death penalty, practiced by states constitutes cruel, inhuman or degrading punishment that deprived individuals of enjoying the right to life. The court after a comparative judicial analysis from various states and in very strong terms notes that,

'It is the supreme indignity to the individual, the ultimate corporal punishment, the final and complete lobotomy and the absolute and irrevocable castration. [It is] the ultimate desecration of human dignity' (Chaskalson P. in *S v Makwanyane*, para.60).

According to the Court's interpretation, the death penalty is the worst form of sanction that is practiced, depriving humans of their rights and dignity. To further buttress this point, the right to life is one of the most important elements that uphold human existence; since all humans are born free and equal, they too must live to die a natural death and not by any other means or the imposition of a death penalty. While some scholars may see it as constitutional, I stand by the argument that it is the worst form of practice in the 21st century, infringing on the right to life, thereby inflicting serious pains on other rights and freedoms which rely on it for survival. Although several states have abolished the death penalty, subsequent to the ratification of international human rights treaties [for instance, Burkina Faso abolished the death penalty in 2018, Benin in 2016, Senegal in 2004, Rwanda in 2007, Togo in 2009, Madagascar in 2015 Guinea in 2017, Ivory Coast in 2000 etc], it is evident that some, if not all, still cherished the practice as the best form of punishment. Others who have abolished the death penalty have reintroduced it within their criminal law systems. For instance, Chad abolished the death penalty in 2014 but reintroduced it for acts of terrorism in 2015. Turkey, likewise, abolishes the death penalty in 2004 but threatened to reintroduce the practice as a punishment for those who plotted a *coup d'etat* against the incumbent president in 2017.

According to Amnesty International report on the global use of the death penalty, at least 1,032 people were executed in 23 countries in 2016, excluding China, which executed more people than the rest of the world combined. 87% of all the executions taking place in Saudi Arabia, Iran, Iraq and Pakistan (Olowatosin, 2017). In sub-Saharan Africa, the beacon of hope and positive progress on the abolition of the death penalty is gradually gaining momentum, though with a mixed blessing. This is because some states in the continent have decided to abolish the death penalty within their national laws. Although some states are repealing the death penalty, Cameroon and Ghana are still to make a positive move towards this direction. The introduction of the death penalty as a sanction for the act of terrorism and murder in Cameroon shows the conflicting nature of this practice with the right to life purportedly entrenched in the Constitution. While Ghana has not executed anyone on death row since 1993, the death penalty remains in the statute book with some seven people sentenced to death in 2017 (Tankebe et al. 2015,1; GhanaWeb General News Report, 12 April 2018). This implies that the mere existence or incorporation of the death penalty within national law poses a threat to the right to life. This is because authorities may be tempted to apply it, even in cases of the most serious crimes, as stated in Article 6 of the Covenant. The willingness of states, particularly developing ones, to abolish the death penalty is yet to gain a universal order in line with the constitutional practice.

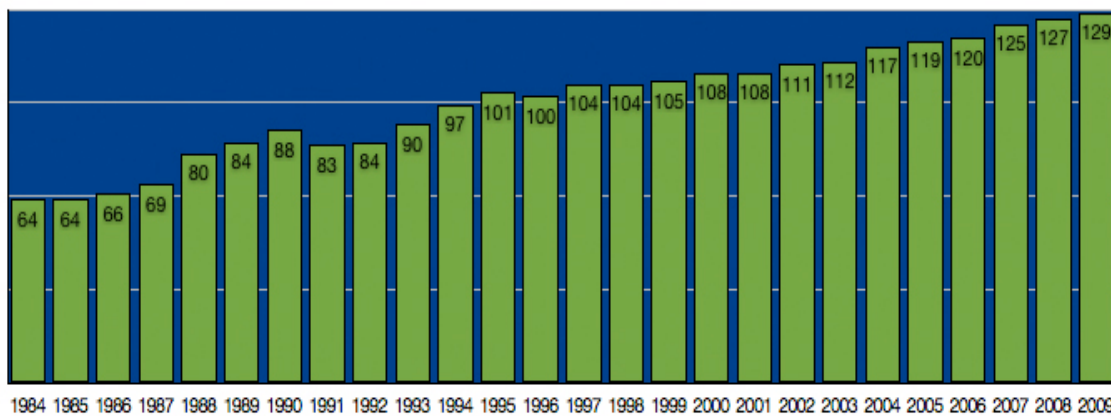
6. Challenges in the Abolition of the Death Penalty

The death penalty is yet to gain a universal accord for its abolition. Despite the obligations imposed on states, following the ratification of international human instruments and recommendations on the abolition of the death penalty; the practice is still cherished by most states as a deterrent (Bedau 1997, 85; John 1995, 194). According to the Second Optional Protocol (OPII) to the ICCPR on the abolition of the death penalty (Art.1 OP II

ICCPR1989) and the EU Guidelines on the death penalty (2013; Art.1 Protocol to the EU Convention on Abolition of Death Penalty 1983), state parties should take all the necessary measures to abolish the death penalty within their respective jurisdiction. The phrase ‘all necessary measures’, couched in the OPII and the EU Guidelines, implies the taking of constitutional and legislative measures that will open the floor for the abolition of this practice. The UN Moratorium (2013, paras. 4 & 9), on the use of the death penalty, also cautions state parties to abolish the death penalty, and that those who have already abolished it should not reintroduce the practice as a means to improve the effective enjoyment of human rights and fundamental freedoms [It should be noted that when the USA was persuaded to ratify the UN Moratorium on the abolition of the death penalty, the state ignores and voted against-*emphasis added*]. Despite repeated efforts against the application of the death penalty, some states have resisted, remaining silent against its abolition. For instance, Cameroon, Ghana, USA, Algeria, Chad, Egypt, China, are few among several states still practicing it. The overall statistics from 1984 to 2009, on the abolition of the death penalty, can also be illustrated diagrammatically.

Diagram: 1

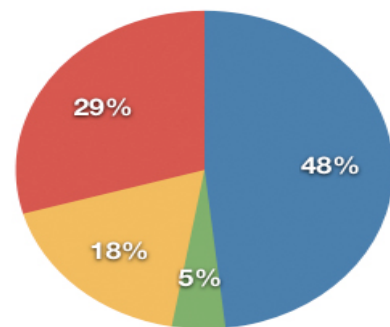
Countries that have abolished the death penalty (in law or practice) by year



Source : Amnesty International

Diagram: 2

Abolitionist and Retentionist Countries



- Abolitionist for All Crimes : 95
- Abolitionist for Ordinary Crimes : 9
- Abolitionist in Practice : 35
- Retentionist Countries : 58

Source: Amnesty International

The above statistics in the two diagrams (DI & D2) obtained from Amnesty International (Amnesty International Report(2010) quoted by Death Penalty Information Center, 2011-2014), illustrates a great number of countries that have abolished the death penalty in law and practice from the year 1984 to 2009 (D.1) as well as those which still retain it (D.2). Diagram 1 shows a growing and a progressive rate regarding abolition by states or countries, despite a fall in 1991 and 1992. This implies that after the adoption of the ICCPR, several states were willing to put an end to the practice. However, Diagram 2 shows the percentage of countries (58%) still retaining the practice revealing that several states are yet to put an end to the death penalty practice.

Unlike Turkey [ratified the ICCPR in March 20, 2006], Cameroon, Ghana, USA and many others are yet to ratify the OP II on the abolition of the death penalty. Although the United States issued a reservation regarding the use of the death penalty before its ratification of the ICCPR, Cameroon and Ghana appears to have fully agreed to comply with the rules of the treaty without any reservations. Therefore, does this give them the upper hand in practicing the death penalty? I do not think so unless I am misleading. This has further raised contentious debate as to the constitutionality of the death penalty in Cameroon and Ghana. While the Constitution is seen as the *grundnorm* from which all other laws derived their validity, it is trite to argue that any existing law which contravenes it, should be considered unconstitutional. Since our Constitution guarantees the right to life to everyone, any subsequent legislation on the same right, automatically gains legitimacy from the constitution. Because the PC and the anti-terrorism law imposes the death penalty as a sanction for murder, aggravated theft and terrorism; even without their enforceability, infringes on the right to life as guaranteed by the constitution because they derived their validity from it. Therefore, promising the death penalty as a sanction for any crime automatically renders the PC and the anti-terror law unconstitutional. This has questioned the constitutionality of the death penalty in many states. However, though I hesitate to argue blindly considering the diversity of legal systems and cultural practices and values between states, it goes without saying that a mere incorporation of the death penalty within national law automatically renders the law unconstitutional.

Another important challenge regarding the universal abolition of the death penalty is the problem of state sovereignty and the lack of unity among states. The United Nations has made it extremely clear that the organisation is not concerned with or how national laws are defined by individual member states. Its concern is to know whether state parties are meeting up with their affirmative legal or treaty obligations in the realisation of the respective rights in the Covenant. This implied clause, as per Article 2 of the Covenant, leaves state parties with much leeway regarding the management of national laws. Since the organisation can only act through recommendation without any binding force, it is difficult for states to unanimously abolish the practice. Most states, particularly dictatorial regimes, view the death penalty as a means to enforce their political stability in power or agendas. Such regimes with lifelong Presidents who have decided to rule for life than to give way for a peaceful political transition of power, perceive the death penalty as a means to crack down on those who stand against them for fear of a *coup d'état* [See the case of Turkey in 2016 whereby the incumbent president after a failed coup attempt to oust him from power threatens to reintroduce the death penalty as a means to fight against his future opponents. See also the introduction of the death penalty as a sanction for terrorism in Cameroon in 2014 by the incumbent regime to crack down on those who stand against the government]. A collective effort, alongside the willingness of states to abolish the death penalty, will be a great move towards ensuring a proper guarantee on the right to life, and the attainment of

the constitutional agenda of democratic reforms as promised by most states, particularly post-independent Africa.

7. Conclusion

This study has attempted to analyse the constitutionality/constitutionalisation of the death penalty and its appraisal on the right to life with lessons from Cameroon and Ghana. It also takes into consideration other states with similar practices to demonstrate the gravity of the death penalty on the right to life. This paper argues without any fear of contradiction that the death penalty is a disproportionate sanction that infringes on the right to life and human dignity, no matter the gravity of the offence for which it may be imposed. It is clearly in conflict with the Cameroonian and the Ghanaian constitutions and above all, does not belong to the society envisaged by most liberal democratic constitutions. It further argues that, even though some states have abolished the death penalty, the practice is still being implemented by several others, particularly, in sub-Saharan Africa. In practice, the evolving standards of decency tests may invite inquiries into the causes and effects of the crimes, the nature of it and the rationale behind the various criminal punishments, the reliability of the state criminal justice systems and the moral views of contemporary political societies. These questions when answered will treat the death penalty as cruel, inhumane, and an outdated punishment.

However, the paper suggests that state parties to the Covenant should work more efficiently towards the maintenance of unity and in the abolition of the death penalty. This is because the mere existence of the word ‘death penalty’ in national law immediately renders the law unconstitutional. Although Cameroonian judges have adopted a liberal interpretation that enables them to avoid imposing the death penalty in practice, the loose wording of this provision paves the way for extreme discretion to the authorities in power. As a consequence, it may even be imposed in circumstances where the sanction is unwarranted. To ensure effective human rights protection, states which are still practicing or have reintroduced the death penalty must rethink alternative ways towards the complete abolition of the practice, as a means to attain the Sustainable Development Agenda, a necessary condition for the effective enjoyment of the right to life and human dignity for all.

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