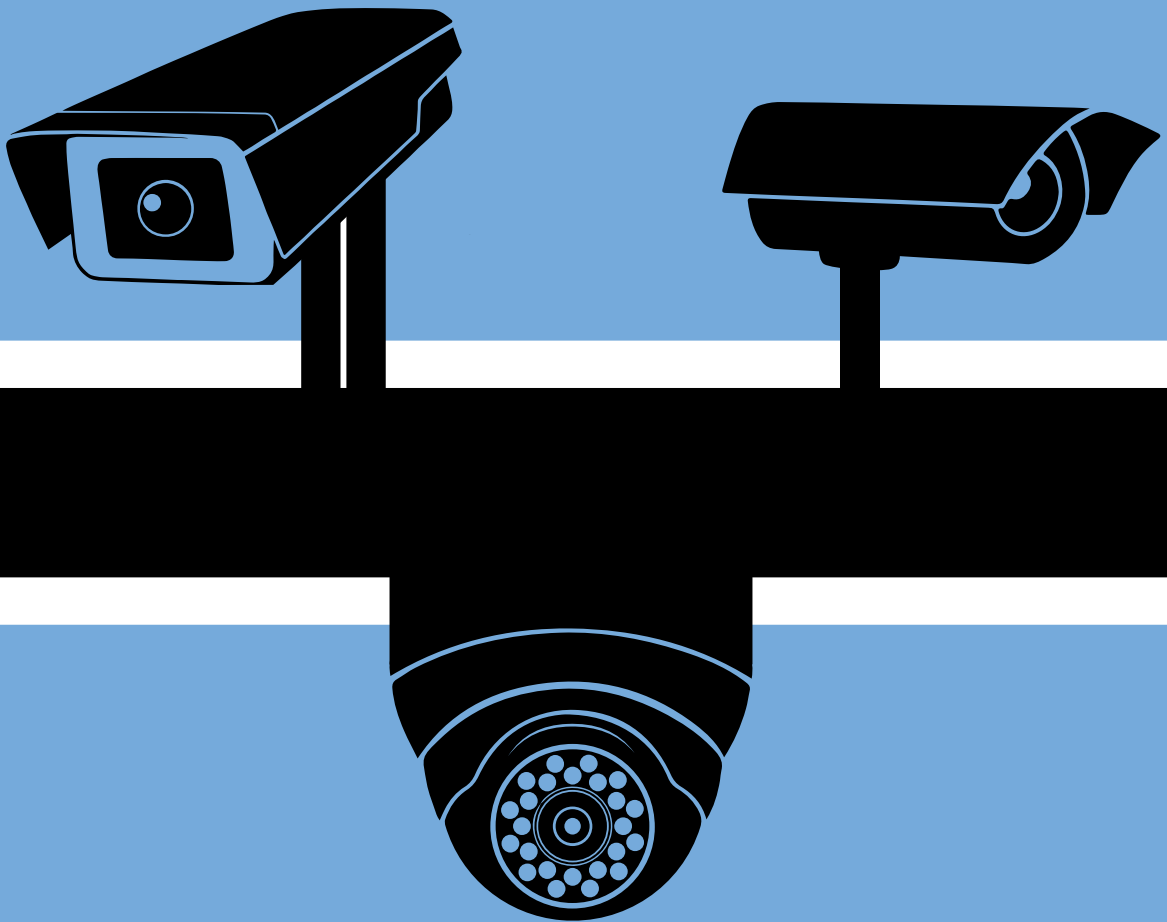


Public Space Surveillance and Protection of Privacy: The Case of Botswana



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Abstract

The use of video surveillance in public space in Botswana, especially by public entities, is slowly gaining footing. It has several benefits such as investigating incidents that may involve criminal behaviour. While public space surveillance has several benefits, it also poses a risk of interfering with individuals' daily lives by violating their fundamental rights and freedoms. One of the rights at risk due to the widespread routine use of video surveillance is privacy. There is a zone of interaction of a person with others, even in a public context, which fall within the scope of private life. Thus, even when in a public space, a person has a reasonable expectation of some privacy. This paper critically assesses the use of video surveillance in public space in Botswana to determine whether it is used within a framework that adequately balances the right to privacy and competing interests served by surveillance.

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Introduction

The use of video surveillance in public space is now being extensively used by government agencies and private entities for various purposes. In this paper, the term video surveillance is used to refer to technical and electronic systems that enable the remote monitoring of property and people using video cameras.¹ Surveillance video cameras discussed in the paper will include the traditional closed-circuit television (CCTV) and those using digital technology, smart cameras. Public space is used to refer to any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.² Public space, according to this definition, will include, streets and parks, government or privately owned public places such as shopping centres when they are open to the general, as well as libraries and sporting arenas.³

The use of video surveillance in public space has several benefits. One of the main benefits is its use in investigating incidents that may involve criminal behaviour. Video surveillance is used to obtain evidence of criminal activity and to enhance the ability of law enforcement agencies to investigate offences and other forms of crime that are covert, sophisticated and difficult to detect through conventional methods.⁴ Video surveillance is also used for asset protection and deterrence of crime. Both public and private entities around the globe have installed video surveillance cameras to protect their property against criminal activities such as theft.⁵ A further

benefit of video surveillance of public space is the promotion of community safety. Many countries around the world have adopted the concept of safe cities where video surveillance is used by law enforcement bodies and other public or private entities to observe events in real time in order to ensure the safety of residents.⁶ It must be noted that there are those who argue that use of video surveillance is not effective in the fight against crime.⁷ The debate on this issue requires detailed discussion, which will be outside the scope of this paper. The paper, thus, proceeds on the assumption that the use of video surveillance does help in the fight against crime.

While public space surveillance has several benefits, it also poses a risk of interfering with individuals' daily lives by violating their fundamental rights and freedoms. One of the rights at risk due to the widespread routine use of video surveillance is privacy. The critical question that arises is whether an individual's right to privacy is protected when she/he is in a public space. It has been observed that when a person enters a public space, this implies that one is conscious that they will be seen or recognised, and that one's behaviour may be scrutinised on that particular space.⁸ Therefore, in that case, if an individual has nothing to hide, they have nothing to worry about being under surveillance in a public space. The argument is premised on the view

1 See Council of Europe Parliamentary Assembly, *Video surveillance of public areas* (Doc. 11478, 2008) para 4.
 2 Victorian Law Reform Commission, *Surveillance in Public Places* (Final Report 18, 2010) 22.
 3 Ibid.
 4 Ibid, 22.
 5 Mahmood, R.Q. and Jensen, C.D. 'Video Surveillance: Privacy Issues and Legal Compliance', in V. Kumar and J. Svensson (Eds), *Promoting Social Change and Democracy through Information Technology* (IGI Global, 2015) 2.

6 Swart, H, 'Video Surveillance in South Africa: Case studies of Internet-based security camera systems in the region' (A Report of the Media Policy and Democracy Project, 2020) 39.
 7 See, Norris, C, 'There's no success like failure and failure's no success at all: Some critical reflections on understanding the global growth of CCTV surveillance' in K. Doyle *et al* (eds) *Eyes Everywhere: The Global Growth of Camera Surveillance* (Routledge, 2011) 23–45.
 8 European Commission for Democracy Through Law (Venice Commission), *Opinion on Video Surveillance in Public Places by Public Authorities and the Protection of Human Rights* (CDL-AD (2007) 014, 2007) para 24.

that privacy is only violated if something illegal or embarrassing is revealed about an individual.⁹ It is contended that this argument is based on a false premise that one loses her/his right to privacy when in a public space. The European Court of Human Rights (ECtHR) has opined that there is a zone of interaction of a person with others, even in a public context, which fall within the scope of private life.¹⁰ This means that even when in a public space, people have a reasonable expectation of some privacy. The nature and extent of the reasonable expectation of privacy will depend on a number of factors such as the public space involved and the capabilities of the equipment used. Privacy issues arise where systematic or permanent records come into existence in the form of information collected from the public domain.¹¹ It has been argued that most people would reasonably expect that a conversation on a secluded park bench or a quiet beach would not be overheard or recorded or that a brief intimate moment, such as a kiss, in a secluded public space would not be observed.¹² The use of video surveillance cameras in such places, especially those with equipment that creates systematic or permanent records, may thus infringe upon an individual's right to privacy.

The need to protect one's right to privacy in public space may also arise in the context of the need to keep particular information private. The information may relate to medical issues, such as attendance at a drug or alcohol treatment centre or social matters, for example, attendance at a gay club.¹³ International human rights law now recognises a right to anonymity as an aspect of the right to

privacy.¹⁴ The right to anonymity is essentially about hiding the identity of an individual from the public. The use of video surveillance cameras with facial recognition technologies in public space surveillance may negate an individual's ability to have anonymity when moving and behaving in public space.¹⁵ The United Nations Special Rapporteur on freedom of opinion and expression has noted that anonymity creates a zone of privacy to protect opinion and belief which is crucial in hostile political, social, religious and legal environments.¹⁶ The Special Rapporteur concluded that state interference with anonymity should be subject to the test of legality, necessity and proportionality. Many systems used in video surveillance have recording devices where all images or those selected by persons monitoring the system can be recorded and stored. The recording of the data and its processing may result in unlawful interference with the right to privacy. The ECtHR has held that the publication or disclosure of data obtained by video surveillance cameras constitutes an intrusion into privacy even if the conduct to which public attention was drawn was performed in public.¹⁷

There is no doubt that video surveillance in public space serves a number of legitimate goals, but, at the same time, it may constitute intrusion into privacy. It has been argued that video surveillance in public space must be regulated in order to attempt to balance the risks and benefits associated with its use.¹⁸ In the context of Botswana, privacy is guaranteed in the Constitution. The use of video surveillance in the country must be compatible with the guarantee of privacy and other fundamental

9 Mahmood, R.Q. and Jensen, C.D. 'Video Surveillance: Privacy Issues and Legal Compliance, in V. Kumar and J. Svensson (Eds), *Promoting Social Change and Democracy through Information Technology*, (note 5) 9.

10 *P.G. and J.H. V United Kingdom*, Application No. 44787/98 (judgment of 6 February 2001) para 56.

11 Ibid.

12 Victorian Law Reform Commission, *Surveillance in Public Places* (n 2) 64.

13 Ibid.

14 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, David Kaye, (UN Doc. A/HRC/29/32, 22 May 2015) paras 14–18.

15 Ibid.

16 Ibid.

17 *Peck v The United Kingdom*, Application No. 44647/98 (judgment of 22 January 2003) paras 15–16.

18 Council of Europe Parliamentary Assembly, *Video surveillance of public areas* (Resolution 1604, 2008) para 6.

rights in the Constitution. The aim of this paper is to critically assess the use of video surveillance in public space in the country to determine whether it is used within a framework that adequately balances the right to privacy and competing interests served by surveillance. In addressing this question, the paper starts with an overview of the use of video surveillance in public space in the country. This will be followed by a discussion on the nature of privacy and its protection in the Botswana Constitution in order to determine whether the guarantee of the right embraces aspects of privacy in public space recognised under international human rights law. The paper will then examine the regulatory framework (if any) of the use of video surveillance in public space to assess its consistency with the Constitution. If the regulatory framework is found wanting, the paper will conclude with recommendations on the way forward.

Video surveillance in public space in Botswana

The use of video surveillance in public space in Botswana, especially by public entities, is slowly gaining footing. In 2017, the Botswana Police Service (BPS) launched a safe city project that covers the country's two main cities, Gaborone and Francistown. The project involved the installation of 500 surveillance cameras across the two cities.¹⁹ The aim of the project is to monitor streets and residential areas as well as commercial buildings.²⁰ The goals of the project, according to the BPS, is 'to secure residents' lives and property in the two cities as well as to counter terrorist activities effectively and efficiently'.²¹ The video surveillance infrastructure was installed by China's Huawei Botswana Technologies, and consists of high-definition cameras and intelligent lenses aimed at capturing criminal activity at intersections and traffic lights along busy roads and highways. Some of the cameras have facial recognition capabilities and the surveillance system is said to include software packages and monitoring computers with secured databases.²² The exact technical specifications of the infrastructure are not known. A request by the writer to the BPS to share the information was declined, with the BPS saying the information pertaining to their surveillance cameras is highly sensitive and confidential.

Even though the exact specifications of the surveillance cameras are not known, from the available information, it is clear that the surveillance cameras have the capability of locating an individual in a crowd, determine their identity, record their conversations and even share the information instantaneously. The use of these video surveillance cameras in public space by the

BPS give rise to concerns about the protection of privacy and personal data. Given the possibility of the use of the surveillance cameras interfering with the right to privacy, there is need for an appropriate legislative framework that balances the risks and benefits associated with their use. There is currently no law that specifically regulates the use by the BPS of surveillance cameras in public spaces to ensure that they are not misused or overused thereby undermining the fundamental rights and freedoms of the individual. It would appear the BPS is justifying the use of the cameras under section 16 (5) of the Police Act.²³ This provision places a duty on police officers to protect, prevent and detect crime, repress internal disturbances, maintain security and public tranquillity, apprehend offenders, bring offenders to justice, enforce written laws and generally maintain the peace. The use of surveillance cameras in public spaces aids police officers in executing their duties as spelt out in the above provision. However, it is contended that in doing so, police officers must act in accordance with the law as the manner in which they carry out their duties may conflict with the rights and freedoms of the individual.

The Ministry of Transport and Public Works is another public entity which has installed surveillance cameras in the city of Gaborone to enable it execute some of its responsibilities. The Ministry has recently rolled out an integrated transport project. The goal of the project is to build capacity for transport management and introduce new infrastructure in the city. It also deals with traffic management through the use of existing infrastructure more efficiently with the use of new technology. This has led to the Ministry establishing a Traffic Control Centre in Gaborone whose primary role is to monitor and control traffic flow in the city to ease congestion. The Ministry engaged SICE Southern Africa to install the infrastructure for the project. The Traffic Control Centre manages

¹⁹ <https://yourbotswana.com/2020/02/23/botswana-safe-city-project-in-gaborone-francistown-now-operational/> (accessed 26 September 2022).

²⁰ Ibid.

²¹ Ibid.

²² Swart, H, 'Video Surveillance in Southern Africa: Case studies of security camera systems in the region', (n 6) 39.

²³ [Cap. 21:01], Laws of Botswana.

140 road intersections in Gaborone via a SICE MFU 300 Traffic Controller. The controller is fed with information relayed by detectors and cameras installed around the city consisting of 175 video detector cameras, 11 speed cameras with automatic number plates recognition capabilities, 30 red light violation cameras, 14 incident detection cameras and 20 CCTV cameras. The equipment is integrated into the SICE ADIMOT and SIDERA software for processing the data. Of the cited equipment, the ones raising privacy concerns are the CCTV cameras, which not only have the capability to monitor individuals, but can also record activities of individuals. The project is not yet fully operational and the Ministry is working on regulations on use of the surveillance cameras. This is rather anomalous as the regulatory framework should have preceded the installation of the infrastructure.

The nature of the right to privacy and its protection under the Constitution

Nature of the right to privacy

The capabilities of video surveillance cameras to capture, store and process information about individuals and their activities raises questions about individuals' right to privacy in their use. The High Court of the Republic of Botswana has observed that the right to privacy is multifaceted and multi-pronged, hence difficult to define.²⁴ The court, however, opined that privacy is the right of the individual, to have a life of seclusion, to be free from unwanted publicity, and to live without unwarranted interference by the publication in matters with which the public is not necessarily concerned.²⁵ Privacy may relate to individual choices such as religious faith, political affiliation, intimacy, secrecy and control of personal information. The High Court made an important observation that privacy must be interpreted in light of the current era and context and that the content of the right will differ according to the prevailing societal characteristics, economic and cultural environment.²⁶

Although the High Court of Botswana has cautioned that privacy is difficult to define, it has been argued that the right has two facets, substantive privacy and informational autonomy.²⁷ The substantive privacy dimension is the presumption that a person should have a private sphere with or without interaction with others, free from unsolicited intervention by other uninvited

individuals to make choices about personal life.²⁸ Aspects of substantive privacy that run the risk of intrusion due to the use of video surveillance include the right to private life, the right to anonymity, and the right not to be tracked.²⁹ The right to private life is a legitimate expectation of individuals for everyone else to respect their private life without any scrutiny and intrusion without legitimate cause.³⁰ Anonymity involves the right of an individual to conceal or reveal their identity whenever they choose. Video surveillance cameras used for surveillance in public spaces may have software that cross-match data from multiple sources and trace certain individuals. The right to privacy entails the right not to be tracked. Therefore, the tracking of an individual using surveillance cameras may intrude into their privacy.³¹

The informational autonomy dimension relates to an individual's interest in controlling the flow of personal information about them and how it is used.³² Elements of informational autonomy that are at risk of intrusion due to the use of video surveillance in public spaces include the right to control information about self and the right to secrecy. The right to privacy includes the right to limit access by others to their personal information and also control others' use of information about themselves.³³ The aspect of the right to secrecy is about concealing personal information from others.³⁴

²⁴ *Motshidiemang v Attorney General and Another*, MAHGB-000591-16 (High Court, unreported, 11 June 2019) para 114.

²⁵ *Ibid*, para 112.

²⁶ *Ibid*.

²⁷ Fenwick, H and Phillipson, G, *Media Freedom under the Human Rights Act* (Oxford University Press 2006) 662.

²⁸ *Ibid*

²⁹ Dolu, O, 'Individual Rights in Video Surveillance Areas: A European Perspective' (Global Policy and Strategy Report 5, 2016) 27.

³⁰ *Ibid*.

³¹ *Ibid*, 33.

³² Fenwick, H and Phillipson, G, *Media Freedom under the Human Rights Act* (n 27) 663.

³³ Dolu, O, 'Individual Rights in Video Surveillance Areas: A European Perspective' (n 29) 30.

³⁴ *Ibid*.

Protection of privacy in Botswana

The discussion above highlights the different facets of the right to privacy and how these can be intruded into by the use of surveillance cameras in public spaces. This part of the paper interrogates the protection the right is accorded under the Constitution of Botswana. The discussion examines whether the right as guaranteed under the Constitution embraces the different facets of the right discussed above.

Section 9 (1) of the Constitution guarantees the right to privacy in the following terms:

“Except with his or her own consent, no person shall be subjected to the search of his or her person or his or her property or the entry by others on his or her premises”.

Compared with other provisions that guarantee the right to privacy such as, the International Covenant on Civil and Political Rights (ICCPR)³⁵ and the European Convention of Human Rights (ECHR)³⁶, the above provision seems to guarantee a limited right to privacy. Of concern is the failure of the provision to expressly mention the term privacy or private life. However, when dealing with the scope of the right to privacy guaranteed under section 9 (1) of the Constitution, the High Court of Botswana held that:

“At face value, one may be tempted to postulate that the right to privacy underscored by Section 9 above only relates to protection against the search of his or her person, property, or entry by others on his/her premises. Such a linear and face value interpretation runs foul to our cherished generous, purposive and context-oriented mode of constitutional interpretation. Furthermore, such a narrower construction will thus whittle down fundamental rights.”³⁷

³⁵ See Article 17 (1).

³⁶ See Article 8 (1).

³⁷ *Motshidiemang v Attorney General and Another*, (n 24) para 116.

The High Court concluded that section 9 (1) protects a multifaceted and multi-pronged right to privacy.³⁸ In another case that came before the High Court of Botswana, which also addressed the interpretation of section 9 (1) of the Constitution, the court held that ‘a broad, generous and purposive approach is required in interpreting the provision.’³⁹ It has been argued that such an approach demands that when interpreting a constitutional provision, it is not just possible, but imperative that judges investigate how similar issues have been resolved in other jurisdictions due to the fact that many constitutions around the world have been inspired by the same philosophy.⁴⁰ A generous construction of a constitutional provision also means that when interpreting a provision, courts should not whittle down any rights and freedoms unless by very clear and unambiguous words, such interpretation is compelling.⁴¹ It further requires that when interpreting the provisions of the Constitution guaranteeing rights, a court must breathe life into the Constitution by having regard to its liberal values, and where necessary, use international human rights treaties that Botswana has subscribed to as an aid of interpretation.⁴² Adopting a generous construction of section 9 (1) in the *Ketlhaotswe and Others v Debswana Diamond Company (Pty) Ltd* case, the court concluded that the provision recognises the right to privacy of the person, his or her home and other property. It is submitted that section 9 (1) of the Constitution embraces both the substantive privacy and informational autonomy dimensions discussed above, which are likely to be intruded by the use of video surveillance in public spaces.

³⁸ *Ibid*, para 117.

³⁹ *Ketlhaotswe and Others v Debswana Diamond Company (Pty) Ltd*, CVHGB-001160-07 (High Court, unreported, 27 September 2012) para 34.

⁴⁰ Fombad, CM, ‘Enhancing the Judicial Role in Human Rights Protection in Botswana’ in E Quansah and W Binchy, *The Judicial Protection of Human Rights in Botswana* (Clarus Press, 2009) 133 at 150.

⁴¹ *Attorney General of Botswana v Dow* [1992] BLR (CA) 119 at 165.

⁴² *Ibid*, 166 and *Ramantele v Mmusi and Others* [2013] 2 BLR 658 at para 69.

The protection of the right to privacy under the Constitution imposes both negative and positive obligations on the State.⁴³ The negative obligation obligates the State to avoid interfering with the right to privacy unless conditions for justifying the interference are satisfied.⁴⁴ This means, that for any interference with the right to privacy by the State and its organs to be lawful, it must satisfy the conditions set in the Constitution. The positive obligation, on the other hand, requires the State to take positive steps to protect the right to privacy, especially, against interference by others.⁴⁵ Surveillance of public space by private entities will interfere with the right to privacy, and this will oblige the State to put in place a legislative framework that ensures that such surveillance does not unjustifiably intrude into others' right of privacy. Public space surveillance through video cameras by public entities raises the issue of the State's negative obligation not to interfere with the right to privacy unless the conditions for interference are satisfied.

The right to privacy protected under the Constitution is not absolute. Interference with the right is permissible under section 9 (2). The provision reads:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-

- (a) *that is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilization of mineral resources, for the purpose of any census or in order to secure the*

development or utilization of any property for a purpose beneficial to the community;

- (b) *that is reasonably required for the purpose of protecting the rights or freedoms of other persons;*
- (c) *that authorizes an officer or agent of the Government of Botswana, a local government authority or a body corporate established by law for a public purpose to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or duty or in order to carry out work connected with any property that is lawfully on those premises and that belongs to that Government, authority or body corporate, as the case may be; or*
- (d) *that authorizes, for the purpose of enforcing the judgment or order of a court in any civil proceedings, the search of any person or property by order of a court or entry upon any premises by such order, and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.*

The provision lays down a stringent three-part test with which any interference with the right to privacy must comply with for it to be legitimate.⁴⁶

The test requires that the interference must comply with all of the following conditions:

- a) It must be contained in or done under the authority of the law;
- b) The interference must be shown to be for the purpose of protecting any of the interests listed in the provision; and
- c) It must be shown to be reasonably justifiable in a democratic society.

⁴³ UN Human Rights Committee, *General Comment No. 31: The Nature of the General Obligations Imposed on States Parties to the Covenant*, (CCPR/C/21/Rev.1/Add.13, 2004) para 6.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Motshidiemang v Attorney General and Another* (n 37) para 119.

The limitations test is intended to ensure that any derogations from the right to privacy are given a strict and narrow construction. Courts of law in Botswana are yet to elaborate on what each of the three components of the test entail. While the provision may appear to be broadly framed, courts have shown that they will adopt a narrow and strict approach when dealing with limitations.⁴⁷ A purposive interpretation of section 9 (2) demands that we seek guidance on what it entails from international human rights law and foreign comparative law. This approach requires that we should investigate how similar issues have been resolved in other jurisdictions. Both the ICCPR and ECHR have similar tests on limitations on the right to privacy guaranteed under the two human rights instruments. The ECHR provides that for an interference with the right to privacy to be lawful, it must meet the following three conditions: (i) it must be in accordance with the law; (ii) pursue one of the several legitimate aims identified under Article 8 (2); and (iii) be necessary in a democratic society.⁴⁸ Article 17 of the ICCPR, which guarantees the right to privacy, does not contain a limitation clause. Despite the absence of a limitation clause, it is generally understood that the guarantee of the right should be interpreted as containing elements of a permissible limitations test similar to the other rights and freedoms guaranteed in the ICCPR such as freedom of expression (Article 19 (3)); freedom to manifest one's religion or beliefs (Article 18 (3)); and the right of peaceful assembly (Article 21).⁴⁹ The limitation clauses in these Articles set forth three conditions that a limitation on the guaranteed rights must conform to. The conditions are that the limitation must, be provided by law, serve a legitimate interest, and be reasonably justifiable in a democratic society. The Human Rights Committee (HRC) and

ECtHR have developed extensive jurisprudence on the requirements of the limitation tests in the respective treaties which can be used as a guide in the interpretation of the right to privacy under the Constitution of Botswana.

The first part of the test is that the interference must be 'contained in or done under the authority of the law'. The wording used in the ICCPR is that an interference with the right to privacy must be 'provided by law' while the ECHR uses the phrase 'in accordance with the law'. It has been observed that, although worded differently from the phrases used in international human rights treaties, the phrase 'contained in or done under the authority of the law' carries essentially the same meaning.⁵⁰ Elaborating on the meaning of the phrase 'in accordance with the law', the ECtHR has held that it has two aspects. First, that the impugned measure should have some basis in the domestic law.⁵¹ Secondly, the law must be accessible to the person concerned and foreseeable as to its effects.⁵² The second aspect requires that the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances under which public authorities are empowered to resort to surveillance measures.⁵³ The ECtHR has further held that the second aspect of 'in accordance with the law' is also about the quality of the law. A law authorising surveillance must provide adequate and effective safeguards and guarantees against abuse.⁵⁴

The second limb of the constitutionality test interrogates whether the interference pursues any of the several legitimate aims stated in section 9 (2) of the Constitution. Public space surveillance is generally used for the protection of defence,

⁵⁰ *Chavunduka and Another v Minister of Home Affairs* 2000 (1) ZLR 552 at 560.

⁵¹ *Szabo and Vissy v Hungary*, Application no. 37138/14 (ECtHR, unreported, 12 January 2016) para 59

⁵² *Big Brother Watch and Others v United Kingdom*, Applications nos. 58170/13 and 24960/15 (ECtHR, unreported, 25 May 2021) para 332.

⁵³ *Liberty and Others v United Kingdom*, Application no. 58243/00 (ECtHR, unreported, 01 July 2008) para 59.

⁵⁴ *Szabo and Vissy v Hungary* (n 51) para 59.

⁴⁷ *Ibid*, para 119.

⁴⁸ Article 8 (2) ECHR.

⁴⁹ See UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, (A/HRC/23/40, 2013) para 29.

public safety and public order, legitimate interests recognised under the provision. Law enforcement agencies, such as the BPS, should find this limb of the test easy to satisfy in light of the broad terms in which the legitimate purposes are framed.

The third part of the constitutionality test is that an interference with the right to privacy must be reasonably justifiable in a democratic society. The ECtHR has opined that this requires a state which is seeking to interfere with the right to privacy to establish two things. First that the impugned measure in question is responding to a pressing social need.⁵⁵ The inquiry here is not whether surveillance is desirable or convenient, but whether, given the circumstances of the case, there is a pressing need to conduct surveillance in order to protect a legitimate interest.⁵⁶ Secondly, the interference should be no greater than is necessary to address the pressing social need. This means that the terms and conditions of surveillance should be proportionate in the sense that they should not subject the public to surveillance whose nature, extent, and scope is more than what is necessary to achieve the purpose for which the surveillance was authorised.⁵⁷

The High Court of Botswana in the case of *Motshidiemang v Attorney General and Another* held that in terms of the limitation clause to the right to privacy, any interference with the right must be done under the aegis of some law, must be for the purposes of protecting the specified interests and be reasonably justifiable in a democratic society. The court concluded that any limitation not covered by this triad of limitations will not pass constitutional muster.⁵⁸ Public space surveillance through video cameras constitutes an interference with the right to privacy even if their use may be serving a legitimate purpose. The use of video surveillance cameras must therefore be in full compliance with the protection of privacy under the Constitution.

55 *Silver v United Kingdom* (1983) 5 EHRR 737 para 48.

56 Mavedzenge, J.A. 'The Right to Privacy v National Security in Africa: Towards a Legislative Framework Which Guarantee Proportionality in Communications Surveillance' 2020 (2) *African Journal of Legal Studies* 360 at 365.

57 *Ibid.*

58 *Motshidiemang v Attorney General and Another* (n37) para 119.

A balanced approach to video surveillance in Botswana

Public space surveillance plays an important role in modern societies. On the other hand, it is also a sad reality that the use of public space surveillance poses threats to violation and or actual violation of certain fundamental rights and freedoms of the individual. Public space surveillance must endeavour to balance the many risks and benefits associated with its use. The Constitution of Botswana provides a framework for balancing rights. In balancing competing rights, the Constitution is clear that no right is absolute and may be limited in certain circumstances provided that some conditions are met. The conditions that have to be met in the operation of public space surveillance in Botswana in order to balance it with the protection of the right to privacy are found in section 9 (2) of the Constitution as already referenced above.

The first condition is that the surveillance must be done under the aegis of some law that is accessible to the public. The law authorising the interference need not be an Act emanating from the legislature in the formal sense, even regulations may be considered a sufficient basis.⁵⁹ The public space surveillance conducted under the BPS' safe city project is not done under any specific legislation. Consequently, given that the use of surveillance cameras interferes with the right to privacy, the absence of a law permitting their use means it is in violation of the right to privacy protected under the Constitution. The BPS alludes to a code of conduct that binds officers that monitor the surveillance cameras. What is not clear is whether the code specifically authorises the use of surveillance cameras or is just dealing with the processing of data from the surveillance cameras. Even if the code

authorises the use of cameras, it would still fail the first limb of the constitutionality test because it has not been made public and thus not accessible to the persons concerned and therefore not foreseeable as to its effects. A related issue is whether it is desirable to provide for limitations on the right to privacy through subordinate legislation. It is submitted that derogations to the right must be sanctioned by primary law which has been fully debated in the legislature. Subordinate legislation does not go through a similar rigorous process.

In the absence of a law that permits the use of public space video surveillance by the BPS, it is not possible to discuss the other conditions, whether their use serves a legitimate purpose and reasonably justifiable in a democratic society. The interrogation of these two conditions is dependent on there being in place a law authorising the use of public space video surveillance.

Video surveillance systems have recording devices where images can be recorded and stored. One way to protect privacy in the era of video surveillance technologies is to enforce strict data protection rules.⁶⁰ Data protection is about regulating information, including its collection, retention and processing. Data protection is connected to surveillance because it regulates the collection and processing of information about individuals. With public space video surveillance cameras gathering information about individuals in public spaces, data protection and its processing are crucial for legal analyses of public surveillance practices.⁶¹

⁵⁹ See *De Wilde, Ooms and Versyp v Belgium*, Application 2832/66; 2835/66; 2899/66 (ECtHR, unreported, 18 June 1971) para 93.

⁶⁰ Kremer, J, 'The End of Freedom in Public Places? Privacy problems arising from surveillance of the European public space' (PhD Dissertation, University of Helsinki, 2017) 85.

⁶¹ Ibid.

Data protection principles generally seek to ensure that data collected and processed must be:

- a) Fairly and lawfully used;
- b) Used for limited, specifically stated purposes in compliance with the law;
- c) Used in a way that is adequate, relevant and not excessive;
- d) Accurate and up to date;
- e) Kept safe and secure; and
- f) Kept for no longer than is absolutely necessary.⁶²

Botswana has in place a Data Protection Act, 2018.⁶³ The Act, inter alia, regulates the protection of personal data and ensures that the privacy of individuals in relation to their personal data is maintained. The Act's scope of application is addressed in section 3 which reads:

- (1) This Act shall apply to the processing of personal data entered in a file by or for a data controller –*
- a) in Botswana; or*
 - b) where the data controller is not in Botswana, by using automated or non-automated means situated in Botswana, unless those means are used only to transmit personal data:*

Provided that when the recorded personal data is processed by non-automated means, it forms part of a filing system or is intended to form part of a filing system.

- (2) This Act shall not apply to the processing of data –*
- a) in the course of a purely personal or household activity; and*

- b) by or on behalf of the State where the processing –*
 - (i) involves national security, defence or public safety;*
 - (ii) is for the prevention, investigation or proof of offences, the prosecution of offenders or the execution of sentences or security measures;*
 - (iii) is for economic or financial interest, including monetary, budgetary and taxation matters, and*
 - (iv) is for a monitoring, inspection or regulatory function connected with the exercise of functions under subparagraphs (i), (ii) and (iii).*

- (3) This Act is exempt from application to the processing of personal data specified under subsection (2) (b), to the extent that adequate security safeguards have been established in specific legislation for the protection of such personal data.*

The provision pertinent to the discussion is section 3 (3) that exempts from the provisions of the Act, regulation of data collected by or on behalf of the State. The BPS's public space surveillance would fall under the exemption. The exemption, however, is subject to there being adequate security safeguards established in any specific legislation for the protection of such personal data. There is no legislation in place that regulates the operation of public space surveillance cameras by the BPS, including provision of any adequate security safeguards for the protection of personal data collected. In the absence of any such legislation, the Data Protection Act, 2018 will apply to data collected by the BPS through its surveillance cameras. The Act contains elaborate safeguards for processing and protection of personal data under Part IV. The principles articulated in the Act on the collection, processing and protection of personal data are consistent with the general

⁶² Dolu, O, 'Individual Rights in Video Surveillance Areas: A European Perspective' (n 29) 15.

⁶³ Act No. 32 of 2018, Laws of Botswana.

principles on data protection alluded to above. The safeguards in the Data Protection Act, 2018 mainly protect the informational autonomy aspect of the right to privacy. The safeguards ensure that personal data acquired by a data controller such as the BPS is not misused to the detriment of the privacy of individuals.

The substantive aspects of the right to privacy that are at risk of violation from the use of public space video surveillance are not adequately protected in the Botswana. The law in the country has not kept pace with the evolution of the substance of the right to privacy guaranteed under the Constitution. The High Court of Botswana has opined that the law has to evolve to create new rights in order to meet the demands of the society and ensure full protection of the person and the property.⁶⁴ The right to privacy has been evolving due to the changing societal characteristics and cultural environment. In terms of the traditional common law, there is no reasonable expectation of privacy in public spaces.⁶⁵ It has been observed in this paper that emerging human rights stands recognise that a person may have a reasonable expectation of some privacy in a public space, especially, where systematic or permanent records are created from information collected from the public domain.⁶⁶

Several countries around the world have put in place legal, procedural and technical guarantees to ensure that public space video surveillance is carried out in full compliance with human rights.

⁶⁴ *Motshidiemang v Attorney General and Another* (n 37) para 111.

⁶⁵ See, Basimanyane, D. and Gandhi, D., 'Striking a balance between CCTV surveillance and the digital right to privacy in South Africa: Considerations for the Information Regulator' (African Policing Civilian Oversight Forum Research Series Paper 27, 2019) 6. Although the paper is discussing the law in South Africa, the common law of Botswana is the same as South Africa's on the right to privacy and therefore the observation is equally valid for Botswana.

⁶⁶ European Commission for Democracy Through Law (Venice Commission), *Opinion on Video Surveillance in Public Places by Public Authorities and the Protection of Human Rights* (n 8) para 27.

Two notable jurisdictions that have done this are Australia and England and Wales. The Victorian Law Reform Commission in Australia has produced a report in which it made recommendations for the promotion, through regulation, of responsible surveillance practices to ensure that users of surveillance devices do not infringe the rights of the people.⁶⁷ The report puts forward six principles that should underpin the regulation of the use of surveillance cameras in public space.⁶⁸ In England and Wales, the Protection of Freedoms Act, 2012 provides for the adoption of a code of practice that guides on the appropriate and effective use of surveillance cameras.⁶⁹ A code has been put in place whose aim is to try and strike the most appropriate balance between public protection and individual human rights.⁷⁰ The Code sets out twelve guiding principles that apply to all surveillance camera systems in public places. An analysis of the principles developed by the Victorian Law Reform Commission and the England and Wales Surveillance Camera Code of Practice shows an overlap. It is submitted that the principles in the two documents can be adapted in Botswana to form the basis of a regulatory framework for the use of video surveillance in public space. Below, follows a summary of five principles, which in the view of the writer, should form the core of the regulatory framework:

- a) The use of a surveillance camera system operated in a public space must be authorised by law and have a clearly defined purpose, and be in pursuit of a legitimate aim and be necessary to addressing a pressing need.⁷¹ This will ensure that video surveillance in public space is done lawfully and used for

⁶⁷ Victorian Law Reform Commission, *Surveillance in Public Places* (n 2).

⁶⁸ *Ibid*, at 85.

⁶⁹ Sections 29 – 31, Protection of Freedoms Act, 2012.

⁷⁰ Home Office, *Surveillance Camera Code of Practice* (Crown Copyright, 2021). Available at: www.gov.uk/official-documents.

⁷¹ See Victorian Law Reform Commission, *Surveillance in Public Places* (n 2) 85 and Home Office, *Surveillance Camera Code of Practice* (n70) principle 1.

the specific purpose it was established to address and not for any other unjustified purpose.

- b) The operators of video surveillance in public space should act responsibly and consider the reasonable expectations of the privacy of individuals.⁷² The use of surveillance camera systems in public space where there is a high expectation of privacy should only be done to address a serious problem that cannot be addressed by less intrusive means.
- c) Public places surveillance should be proportional to its legitimate aim and purpose.⁷³ In terms of this principle, excessively intrusive surveillance should only be used for important purposes.
- d) There must be transparency in the use of surveillance cameras.⁷⁴ People in public spaces should be made aware that they are being monitored through surveillance cameras. This will reduce the potential for harm as it will allow individuals to adjust their behaviour in response to being monitored.
- e) Measures must be in place to protect information gathered through public space surveillance from misuse or inappropriate disclosure.⁷⁵ The sharing of information obtained from a surveillance camera system must be controlled and consistent with the stated purpose for which the system was established.

Since there is no legal regulatory framework for the use of video surveillance in public space in Botswana, it is recommended that there is an urgent need to pass such a law. The legal framework should be based on the principles discussed above which are drawn from both the Victorian Law Reform Commission's report on Surveillance in Public Places and the England and Wales' Surveillance Camera Code of Practice. These principles seek to promote a human rights compliant approach to the use of video surveillance in public space. In addition, it is argued that there is need to have in place adequate safeguards where data is subject to automatic processing and where there is a significant risk of unlawful access to data.⁷⁶

⁷² Victorian Law Reform Commission, *Surveillance in Public Places* (n 2) 86 and Home Office, *Surveillance Camera Code of Practice* (n70) principle 2.

⁷³ Victorian Law Reform Commission, *Surveillance in Public Places* (n 2) 87.

⁷⁴ See Victorian Law Reform Commission, *Surveillance in Public Places* (n 2) 86 and Home Office, *Surveillance Camera Code of Practice* (n70) principle 3.

⁷⁵ Victorian Law Reform Commission, *Surveillance in Public Places* (n 2) 86 and Home Office, *Surveillance Camera Code of Practice* (n70) principle 3.

⁷⁶ *M.K. V France*, Application No. 19522/09 (judgment of 18 April 2013) para 35.

Conclusion

The paper demonstrates that the right to privacy is guaranteed under the Constitution of Botswana. Any act which interferes with the right must be shown to be in compliance with the conditions laid down in the Constitution. The paper also highlights that the public space video surveillance conducted by the BPS under its safe city project is not authorised under any law, hence unlawful and unconstitutional as it interferes with the right to privacy. There is no denying that public space video surveillance has several public interest benefits. However, these public interest benefits are not above the rights of individuals protected under the Constitution. Where there is a clash between the public interests and the rights of the

individual, an attempt must be made to reconcile them, and not substitute one for the other. The benefits of using public space video surveillance cannot justify a blanket interference with the right to privacy of individuals in public space. Botswana must urgently enact a law that will regulate the use of public space video surveillance. The law will provide a framework for balancing the risks and benefits associated with the use of video surveillance in public space. The law will also ensure that other public entities which wish to use video surveillance in public space, like the Ministry of Transport and Public Works under its Traffic Control Centre, do so lawfully.

References

Case law

- Attorney General of Botswana v Dow* [1992] BLR (CA) 119.
- Big Brother Watch and Others v United Kingdom*, Applications nos. 58170/13 and 24960/15 (ECtHR, unreported, 25 May 2021).
- Chavunduka and Another v Minister of Home Affairs* 2000 (1) ZLR 552.
- Ketlhaotswe and Others v Debswana Diamond Company (Pty) Ltd*, CVHGB-001160-07 (High Court, unreported, 27 September 2012).
- De Wilde, Ooms and Versyp v Belgium*, Application 2832/66; 2835/66; 2899/66 (ECtHR, unreported, 18 June 1971).
- Liberty and Others v United Kingdom*, Application no. 58243/00 (ECtHR, unreported, 01 July 2008).
- Motshidiemang v Attorney General and Another*, MAHGB-000591-16 (High Court, unreported, 11 June 2019).
- P.G. and J.H. V United Kingdom*, Application No. 44787/98 (ECtHR, judgment of 6 February 2001).
- Peck v The United Kingdom*, Application No. 44647/98 (ECtHR, judgment of 22 January 2003).
- Ramantele v Mmusi and Others* [2013] 2 BLR 658.
- Szabo and Vissy v Hungary*, Application no. 37138/14 (ECtHR, unreported, 12 January 2016).
- Silver v United Kingdom* (1983) 5 EHRR 737.

Other Sources

- Basimanyane, D. and Gandhi, D., 'Striking a balance between CCTV surveillance and the digital right to privacy in South Africa: Considerations for the Information Regulator' (African Policing Civilian Oversight Forum Research Series Paper 27, 2019).
- Council of Europe Parliamentary Assembly, *Video surveillance of public areas* (Doc. 11478, 2008).
- Dolu, O., 'Individual Rights in Video Surveillance Areas: A European Perspective' (Global Policy and Strategy Report 5, 2016).
- European Commission for Democracy through Law (Venice Commission), *Opinion on Video Surveillance in Public Places by Public Authorities and the Protection of Human Rights* (CDL-AD (2007) 014, 2007).
- Fenwick, H and Phillipson, G., *Media Freedom under the Human Rights Act* (Oxford University Press 2006).
- Fombad, CM, 'Enhancing the Judicial Role in Human Rights Protection in Botswana' in E Quansah and W Binchy, *The Judicial Protection of Human Rights in Botswana* (Clarus Press, 2009).
- Kremer, J., 'The End of Freedom in Public Places? Privacy problems arising from surveillance of the European public space' (PhD Dissertation, University of Helsinki, 2017).
- Mavedzenge, J.A. 'The Right to Privacy v National Security in Africa: Towards a Legislative Framework Which Guarantee Proportionality in Communications Surveillance' 2020 (2) *African Journal of Legal Studies* 360.
- Mahmood, R.Q. and Jensen, C.D. 'Video Surveillance: Privacy Issues and Legal Compliance', in V. Kumar and J. Svensson (Eds), *Promoting Social Change and Democracy through Information Technology* (IGI Global, 2015).
- Victorian Law Reform Commission, *Surveillance in Public Places* (Final Report 18, 2010).
- Swart, H., 'Video Surveillance in South Africa: Case studies of Internet-based security camera systems in the region' (A Report of the Media Policy and Democracy Project, 2020).
- UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, David Kaye, (UN Doc. A/HRC/29/32, 22 May 2015).
- UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, (A/HRC/23/40, 2013).
- UN Human Rights Committee, General Comment No. 31: *The Nature of the General Obligations Imposed on States Parties to the Covenant*, (CCPR/C/21/Rev.1/Add.13, 2004).

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