A COMMENTARY ON RECENT CONSTITUTIONAL CHALLENGES TO THE DEATH PENALTY IN BOTSWANA•

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I. INTRODUCTION

The death penalty is by no means of modern origin. Indeed the earliest recorded public debate on the desirability of the death penalty in Greece was in 427 BC.[1] Yet, to date the debate continues unabated. And although there is a gradual movement towards abolition of the death penalty, a considerable number of states still maintain the death penalty.[2] In Africa, for example, only eleven states have abolished the death penalty.[3] In Botswana, although there is a growing movement for the abolition of the death penalty there is still great public support for it. In fact the government has utilised this public support as a trump card in their argument for retaining the death penalty.[4] It does not appear likely, therefore, that the death penalty will be abolished in Botswana, at least not in the immediate future. Thus those who are opposed to the death penalty would have better prospects of success if they located their challenges within the constitutional framework in Botswana. The main aim of this paper is to examine and comment on some of the recent constitutional challenges to the death penalty in Botswana. The paper commences with a synopsis of the legal basis for and the application of the death penalty in Botswana. It then descends into a discussion of some of the major and recent cases that dealt with the constitutionality of the death penalty in Botswana. The paper will conclude by emphasising the importance of challenging, not the constitutionality of the death penalty itself, but rather the constitutionality of its execution as a strategy that is more likely to reduce the rigours of its application.

II. LEGAL BASIS OF THE DEATH PENALTY IN BOTSWANA

The right to life is recognised and protected in Botswana. Section 3 of the Constitution of Botswana protects fundamental rights and freedoms of the individual, including the right to life. The right to life is further and specifically encapsulated in section 4(1) of the Constitution which provides as follows:

> No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he has been convicted.

It appears from section 4(1) that the right to life in Botswana is subject to the right of the state to deprive a person of his life in certain recognised instances. The section has been criticised for diminishing the practical importance of the right to life.[5] Nevertheless, section 4(1) would appear to be similar to other constitutional provisions in other countries that retain the death penalty. In India[6] and Jamaica[7] for

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[1] E. Devenish *The Application of the Death Penalty in South Africa* (1990) 1

[2] Presently seventy-eight states retain the death penalty including the United States of America and China, which are some of the most influential countries in World politics <http://web-amnesty.org/pages/deathpenalty-countries-eng > (22 April 2004)

[3] ibid

[4] Ditshwanelo (Botswana Centre for Human Rights) *Death Penalty in Botswana* <http//www.ditshwanelo.org.bw/index/Current_Issues/Death_Penalty.htm> (22 April 2004)

[5] O. Tshosa , *National Law and International Human Rights law, Cases of Botswana Namibia and Zimbabwe* (2001) 153

[6] *Bachan Singh v State of Punjab* A. I. R. 1980 S.C. 898

[7] *Riley v Attorney General of Jamaica* [1983] 1 A.C. 719

example, it has been held that similar provisions bring out the implication that the founding fathers recognised the right of the state to deprive an individual of his life. Similarly, various international human rights instruments which provide for the right to life expressly address the death penalty.[8] That has provided the impetus for the view that the death penalty *per se* cannot be deemed to be cruel, inhuman and degrading precisely because it is authorised as an exception to the right to life.[9] The same sentiment has also found expression at the domestic level to quell attacks on the death penalty on the premise that the relevant Constitutions recognise the death penalty as a limitation or exception to the right to life.[10]

III. THE APPLICATION OF THE DEATH PENALTY IN BOTSWANA

The death penalty is normally prescribed for heinous offences and in Botswana it is only reserved for offences of murder[11], treason[12] and murder committed in the process of committing piracy.[13] While only a few people will doubt the seriousness, gravity and relevance of the offences of murder and treason, the same can hardly be said about the relevance of the offence of piracy with intent to murder. This is because piracy can only be committed on the high seas. This is interesting because Botswana is a landlocked country. However the offence has been eloquently justified as follows:

> Nevertheless, it should be noted that the high seas are a *res communes*. All nations of the world, including the landlocked, enjoy the freedom of the high seas. This freedom includes the rights of navigation and of the exploitation of marine resources. For that reason, all nations have a right and indeed a duty to proscribe and punish acts of piracy committed on the high seas, not only for the protection of their shipping interests but also because piracy is *hostis humanis*- an international crime that is a menace to navigation, commerce, and intercourse between nations. Botswana, then, not only has the right to have ships flying its flag navigate on the high seas but also has the power under international law to protect its shipping interests by enacting and enforcing laws that proscribe piratical acts committed aboard such ships.[14]

The above notwithstanding, the practical relevance of the offence of piracy with intent to murder remains limited and it is perhaps hardly surprising that there is yet to be a prosecution and conviction for that offence in Botswana.

The method of execution is by hanging.[15] However, the rigours of the death penalty in Botswana have been reduced by limiting the circumstances under which the death penalty may be imposed. For example, it cannot be imposed on persons below the age of eighteen[16] and pregnant women[17]. Furthermore, where a court after convicting a person of murder is of the view that there are extenuating circumstances, it has discretion to impose any sentence other than death.[18] In the exercise of this discretion 'the court shall take

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[8] For example Article 6 of the International Covenant on Civil and Political Rights (ICCR); United Nations Economic and Social Council, Safeguards Guaranteeing Protection of Rights of those Facing the Death Penalty, ECOSOC Res. 1984/50,UN Doc E/1984/150(1984);United Nations Economic and Social Council, Safeguards Guaranteeing Protection of Rights of those Facing the Death Penalty, ECOSOC Res. 1996/15, UN Doc E/CN.15/1996(1996)

[9] See for example the General Comment of the Human Rights Committee 20(44), U.N. Doc. CCPR/ C/21/Rev/1/Add.3

[10] See also the Botswana case of *State v Ntesang* [1995] B. L. R. 151; [1995] L.R.C (Const.) 338 and also the Tanzanian Case of *Mbushu (Alias Dominique Mnyaroje) and Another v Republic* Criminal Appeal No. 142/1994

[11] Penal Code, Laws of Botswana, c 08:01 s203(1)

[12] ibid, s34(1)

[13] ibid, s63 (2).

[14] D.D.N. Nsereko 'Extenuating Circumstances in Capital Offences in Botswana' Vol. 2 (2) (1991) *Criminal Law Forum* 242

[15] s26(1) of the Penal Code

[16] ibid, s26 (2) In terms of this section, the court shall sentence such person to be detained during the President's pleasure in such place and under such conditions as the President may direct.

[17] ibid, s26(3) and s298 of the Criminal Procedure and Evidence Act, Laws of Botswana c 08.02 Pregnant woman shall be sentenced to imprisonment for life

[18] s203 (2) of the Penal Code

into consideration the standards of behaviour of an ordinary person of the class of community to which the convicted person belongs.'[19]

It must be noted that the courts have held that section 203 (2) imposes an obligation on the courts, after conviction, to consider all the circumstances and facts of the case and determine whether there were extenuating circumstances.[20] It has been further held that the section does not cast any onus on an accused person to show that such circumstances existed and that a decision could be reached independently of whether or not the accused gave any evidence in that regard.[21] There is no closed list of what would constitute an extenuating circumstance and it has been held that it is any circumstance, bearing on the commission of the offence that would reduce an accused person's moral blameworthiness.[22] It is heartwarming to note that the courts in Botswana have been liberal in the interpretation of Section 203(2) and have held a wide range of circumstances as extenuating circumstances. These include provocation,[23] intoxication,[24] youthfulness[25] and absence of actual intention to kill.[26] In practice the courts in Botswana have substituted the death penalty for a custodial sentence of an average of seven years.[27]

It is important to note that in relation to treason, if there are extenuating circumstances the court can only impose a prison sentence of not less than fifteen years and not exceeding twenty five years.[28] This is an indication that the law considers treason to be more serious than murder and therefore warranting severe punishment.[29] Interestingly, in relation to piracy with intent to murder the Penal Code makes no express provision for consideration of extenuating circumstances.[30] The reason for this is a mystery. The section raises the difficult question of whether the death penalty is mandatory for this offence. It has been argued that this could never have been the intention of Parliament and that the omission of reference to extenuating circumstances is attributable to a lapse on the part of the drafters.[31] A case can therefore be made for the argument that the concept of extenuating circumstances has significantly lessened the rigours of the death penalty.

Another factor which ought to mitigate the rigours of the death penalty is the President's power of Prerogative of Mercy. Section 53 of the Constitution provides as follows:

> The President may-
> (a) grant to any person convicted of any offence a pardon, either free or subject to lawful conditions;
> (b) grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for any offence;
> (c) substitute a less severe form of punishment for any punishment imposed on any person for any offence;
> and
> (b) remit the whole or part of any punishment imposed on any person for any offence or of any penalty or forfeiture otherwise due to the Government on account of any offence.

In terms of this section therefore, the President has discretionary powers to pardon a condemned prisoner and substitute a sentence of death for any other sentence. In the exercise of his discretionary powers the

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[19] ibid, s203(3)
[20] See *Mosarwana v The State* [1985] B.L.R 258; *State v Manyoke* [1978] B.L.R and *Ntesang* (n 10)
[21] ibid
[22] See for example *R v Fundakubi 1945* (3); *State v Letsolo* 1970 (3) S 476
[23] *Mashaba v The State* [1977] B.L.R. 10
[24] *Chisoma v The State* Criminal Appeal No. 48 of 1984 (Court of Appeal)
[25] *Lowani v The State* Criminal Appeal No. 2 of 1984 (Court of Appeal)
[26] *The State v Manyake* [1978] B.L.R. 10
[27] Nsereko (n 14) 244
[28] s40 of the Penal Code
[29] Nsereko (n 14) 244.
[30] s 63(2)
[31] Nsereko (n 14)

President is advised by the Committee on the Prerogative of Mercy (the Committee).[32] In terms of section 54 of the Constitution, the Committee shall consist of the Vice President or a Minister appointed by the President, the Attorney General and a person qualified to practice in Botswana as a medical practitioner. Save for the Attorney General, the other members of the Committee are appointed by the President by instrument in writing. Whereas the membership of the Vice President and a medical practitioner to the Committee are less problematic, the same cannot be said about the membership of the Attorney General. This is because the Attorney General is responsible for prosecutions and would therefore have been involved in the prosecution of the condemned prisoner. There would be merit in an argument that his objectivity in advising the President is likely to be compromised.

The effectiveness and utility of the Presidential Prerogative of Mercy is severely compromised in practice. The whole procedure is shrouded in secrecy and lack of transparency. Condemned prisoners have been known to be executed without being informed of the decision of the President in relation to their application for clemency. For example, on 31 March 2001 a national of South Africa, Marriette Sonjaleen Bosch, was executed despite the fact that her legal representatives had notified the President that they were in the process of seeking post-judicial redress on her behalf.[33] In fact Bosch had filed a Communication with The African Commission on Human and Peoples' Rights[34] challenging the death penalty and the procedure for clemency in Botswana.

Another example of secret executions also involves a national of South Africa, Lehlohonolo Bernard Kobedi who was executed on 18 July 2003. Although the Court of Appeal had expressly recommended that he be considered for clemency, he was executed without the knowledge of his legal representatives.[35] In both cases the condemned prisoners were not informed that their applications for clemency had been unsuccessful.

There are glaring problems with this emerging trend of secretive and arbitrary executions. Firstly, secret executions render the Presidential Prerogative of Mercy useless. The Constitution clearly confers discretionary powers on the President to grant or refuse to grant clemency. Now, there are two axioms governing the exercise of discretionary power. The first is that discretionary power should be wielded only by those to whom it is given and that they should remain unhampered by improper constraints or restrictions. The second is that discretionary power must be exercised reasonably and in good faith and on proper grounds. In other words it must not be abused and must not be exercised for an improper purpose.[36] Furthermore, irrelevant factors must not inform the exercise of discretionary power.[37] It is important to note that the provisions of the Constitution regarding the exercise of the Prerogative of Mercy and the composition of the Committee are mandatory. This means that if they are not strictly complied with there would be a procedural irregularity. Where, therefore, executions are carried out in secret and the condemned prisoner is not furnished with any information regarding the reasons that informed the President's decision and the composition of the Committee then it becomes impossible to know whether the provisions of the Constitution had been followed and whether there was a proper exercise of the discretionary powers conferred upon the President by the Constitution. It would, for example become impossible to know whether the Committee was properly constituted or whether the President was not influenced by irrelevant considerations in the exercise of his discretionary powers. The Presidential Prerogative of Mercy is therefore rendered almost nugatory by the secrecy and arbitrariness surrounding it. It is hardly surprising that since Independence on 30 September 1966, thirty-eight people have been

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[32] s55(1) of the Constitution

[33] See Ditshwanelo (Centre for Human Rights) Press Statement, *Botswana Execution Update 2001* <http://www.ditshwanelo.org.bw/index/currentissues/death_penalty>(23 April 2004)

[34] ibid. The African Commission on Human and Peoples' Rights is a non-judicial body created under the African Charter on Human and Peoples' Rights charged with, among other things, the mandate to investigate and make non-binding recommendations about individual communications or complaints against states which are parties to the Charter. For a detailed discussion of the African Commission on Human and Peoples' Rights, see F. Viljoen 'Overview of the African Regional Human Rights System' in C. Heyns (ed) *Human Rights Law in Africa* (1998) 128-226

[35] *Secret Executions in Botswana Questioned*< http://www.afrol.com/News2003/bot007_executions> (22 April 2004)

[36] *Padfield v Minister of Agriculture* 1968 AC 997

[37] *Associated Provincial Picture Houses v Wednesbury Corporation* 1948 (1) KB 223

executed and there are no recorded cases where a sentence of death was commuted as a result of the exercise of the Prerogative of Mercy.[38]

The second problem with secret executions is that it violates the requirement that a person under a sentence of death must be given adequate notice of his execution. It has been said that:

> Justice and humanity require that a man under a sentence of death should be given reasonable notice of the time of execution. Such notice is required to enable a man to arrange his affairs, to be visited by members of his intimate family before he dies, and to receive spiritual advice and comfort to enable him to compose himself, as best as he can, to face his ultimate ordeal.[39]

Adequate notice is also necessary to afford the prisoner time to institute legal proceedings, if need be, to challenge execution. In Botswana, a prisoner under a sentence of death is entitled to be given reasonable notice of his execution, which should not under any circumstances be less than twenty four hours.[40] Whether twenty-four hours would be adequate is debatable.

IV. CONSITUTIONAL CHALLENGES TO THE DEATH PENALTY IN BOTSWANA: SELECTED CASES

In the past, there have been very few cases in which the death penalty has been attacked as being unconstitutional. Reliance was largely placed on extenuating circumstances to evade the penalty of death. However, in recent years particularly in the last decade, there has been a surge of cases which have prompted the courts of Botswana to make pronouncements on the constitutionality of the death penalty. The attacks on the death penalty may be classified under two main headings. Firstly, that the death penalty *per se* is unconstitutional and secondly that the mode of carrying it out is unconstitutional. What follows below is a critical commentary on some of the cases that have come before both the High Court and the Court of Appeal of Botswana.

A. The Death Penalty as Unconstitutional per se

One of the first cases in the last decade challenging the constitutionality of the death penalty is *Molale v The State*.[41] In that case the Appellant was convicted by the High Court of Botswana for the murder of his girlfriend, by inflicting fatal blows on her with an axe. The trial judge found no extenuating circumstances to bring the case within the scope of section 203(2) and accordingly pronounced the penalty of death on the Appellant. On appeal to the Court of Appeal, the Appellant contended *inter alia* that the death penalty imposed on him was anachronistic, antediluvian and barbaric. The Court of Appeal, found the existence of extenuating circumstances and reduced the sentence to fifteen years imprisonment. The court held that its finding on extenuating circumstances rendered a ruling on the constitutionality of the death penalty unnecessary.

The Court of Appeal has been criticised for failing to embrace that opportunity to pronounce on the constitutionality of the death penalty.[42] However, it was not long before the Court was called upon to make a pronouncement on the constitutionality of the death penalty in Botswana.

The constitutionally of the death penalty was challenged in *Ntesang v The State*.[43] In that case, the deceased had taken his motor vehicle to the Appellant for repairs. A dispute ensued over parts which went missing. The Deceased resorted to litigation and the courts found in his favour. The Appellant aggrieved by the decision of the court, planned the killing of the deceased. In this regard he procured an accomplice who subsequently testified against him. The trial judge found the Appellant guilty of murder and convicted him

[38] For a list of executions since independence see<http://www.ditshwanelo.org.bw>(20 April 2004)
[39] *Guerra v Baptiste* [1995] 4 ALL ER 583 at 596
[40] Prisons Act, Laws of Botswana, c1:03, s18
[41] Criminal Appeal No. 56/1994 (CA)
[42] Tshosa (n 5) 401-3
[43] *Ntesang* (n 10)

accordingly. Thereafter the Court afforded the appellant an opportunity to give evidence to show that there were extenuating circumstances in his case which would operate to bring the case within the ambit of Section 203(2) of the Penal Code. Having found that the case of the appellant did not fall within section 203(2) of the Penal Code, the learned trial judge pronounced the sentence of death by hanging on the Appellant.

The Appellant was dissatisfied with the decision of the Court *a quo* and he accordingly appealed to the Court of Appeal, the highest appellate Court in Botswana. The Appellant's grounds of appeal were, inter alia, that the death penalty is anachronistic, antediluvian and barbaric. He further contended that hanging as a form of carrying out the death penalty constitutes torture as well as inhuman and/or degrading treatment. In support of his case, the Appellant drew the attention of the court to practices in a number of other countries and views of some writers and some international organisations and bodies concerning the death penalty in general.[44] He also pointed out to the Court that a number of countries, which, like Botswana were members of the United Nations, had abolished the death penalty. The Court was therefore directly confronted by the difficult question of interpretation, being whether it may hold that the development of international human rights law creates a conflict within the Constitution. Put it another way whether 'while one provision apparently allows the death penalty, the other provision forbids it?'[45]

The Court took judicial notice of the developments to abolish the death penalty at international level, but held that developments at international level could not and were not decisive. It then concluded that:

> Of course this Court … cannot and should not close its eyes to the happenings in other parts of the world and among the international community to which we belong. But this Court must keep within the role assigned to us as a purely adjudicating and not legislative body under the Constitution which is the basic law of this country; and it is the interpretation of that basic law that we are called upon to decide in this proceedings.[46]

It has been said that the decision of the Court of Appeal in *Ntesang v The State* demonstrates judicial restraint in Botswana to invoke international human rights standards to outlaw the death penalty.[47] It has been said that the '. . . form of restraint is an indirect judicial confirmation of the classical theory that international and national law are distinct legal orders each governing a different legal sphere.'[48] Be that as it may, reliance on international law and developments, at least in relation to the death penalty, is unlikely to find favour with the courts in Botswana. This point will be revisited later in the paper.

The appellant further contended that since section 3 of the Constitution enshrined the right to life and that such an individual cannot be deprived of such life intentionally[49] the provisions of the Penal Code which permit the state to intentionally take away the life of any individual must be in violation of these constitutional provisions. He contended that the Court ought not to give effect to the words in Section 4(1) that appeared to provide for the death penalty. The court observed that:

> In this case the appellant is not only asking us to segregate one provision and interpret it in isolation but indeed to segregate it and cut it into two, and there after refuse to give effect to one of the two parts into which we should have cut the provision. In my view we cannot do this; and all the words of section 4(1) of the Constitution must be given full effect.[50]

It accordingly held that the death penalty was specifically provided for in the Constitution and therefore could not be in violation of it.

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[44] ibid p158
[45] The phraseology is borrowed from W.A. Schabas *The Death Penalty as Cruel Treatment and Torture* (1996) 54
[46] *Ntesang* (n 10) 159
[47] Tshosa (n 5) 157
[48] ibid
[49] s4 (1) of the Constitution
[50] *Ntesang* (n 10)

B. The Method of carrying out the Death Penalty as Unconstitutional

The judicial orthodoxy that rejects challenges to the death penalty on the basis that it is an exception to the right to life has necessitated the adoption of alternative challenges to the death penalty. One alternative attack on the death penalty has been, not that the death penalty itself is unconstitutional, but that the manner of carrying it out violates the letter and spirit of the Constitution. The attacks on the method of carrying out the death penalty in Botswana have been double-pronged. Firstly, it has been contended that hanging as a mode of execution is unconstitutional. Secondly, that hanging after a prolonged detention on death row is unconstitutional.

1. Hanging as a mode of execution is unconstitutional

In *Ntesang v the State*[51] one of the grounds of appeal was that the death penalty by hanging violates the prohibition against torture or inhuman and degrading punishment or treatment. The Appellant relied on Section 7 (1) of the Constitution which provides that 'no person shall be subjected to torture or to inhuman or degrading punishment or other treatment.' The Court held that to accede to the Appellant's contention would in effect render nugatory the provisions of Subsection 2 of the same section which provides that:

> 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 authorises the infliction of any description of punishment that was lawful in the former Protectorate of Bechuanaland immediately before the coming unto operation of this Constitution.

It then concluded that:

> the result, of course, is that despite that the death penalty may be considered, as it apparently has been elsewhere, to be torture, inhuman or degrading punishment or treatment, that form of punishment is preserved by subsection (2) of Section 7 of the Constitution.[52]

2. Hanging after prolonged detention on death row is unconstitutional

A more recent case of *Lehlohonolo Bernard Kobedi v The State*[53] raised a number of contentious constitutional issues. The decisions of both the High Court and the Court of Appeal will be discussed here because of the important constitutional issues examined therein.

(i) The decision of the High Court

The Applicant, a national of South Africa, had been convicted of *inter alia*, murder and sentenced to death. His appeal to the Court of Appeal against both the conviction and sentence was dismissed. Ten months later he made an application by Notice of Motion to the High Court for an order declaring, among other things and in the alternative that the execution of the death sentence in his matter would be in violation of the provisions of section 7 of the Constitution by reason of delay. The Notice of Motion enjoined the State to file a Notice of Opposition and opposing affidavits. A period of sixteen months lapsed before the State filed the requisite documents.

The State opposed the application on multiple grounds. However germane to this paper, is the preliminary objection that the application was incompetent as it was in the nature of a review, and that it was beyond the competence of the High Court judge to review the decisions of another High Court judge. The State further argued that if a High Court Judge cannot review the decision of another High Court Judge, then a *fortiore* he cannot review a decision of the Court of Appeal. The matter came before Kirby J who held that the Applicant's alternative ground, namely the delay in execution of the sentence, was a new event which occurred after the Court of Appeal had already concluded the case. Consequently, he held that he had the jurisdiction to hear the Applicant on the alternative ground.

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[51] ibid
[52] ibid. p161
[53] Miscellaneous Criminal Appeal No. 76 of 1999 (Unreported)

The Applicant, in essence, relied on the so-called death row phenomenon which has been defined as 'the inhumane treatment resulting from special conditions on death row and often prolonged wait for executions, or where the execution is carried out in a way that inflicts gratuitous suffering.'[54] Literature is replete with authority describing the suffering endured by prisoners under the sentence of death.[55] It is beyond the scope of this paper to discuss the death row phenomenon in any more detail. Suffice it to say that there appears to be general consensus on the existence of the death row phenomenon, being the psychological trauma that prisoners under the sentence of death are subjected to. What is unclear, as will be seen shortly, is what its precise contours are and under what circumstances a prisoner under the sentence of death could successfully rely on it to escape the noose.

The issue that fell for determination was therefore whether the period of nine months and eighteen days that he spent on death row violated the provisions of Section7 of the Constitution prohibiting torture and inhuman and degrading treatment or punishment. It is submitted that the Applicant's counsel made two fundamental errors that proved fatal to the Applicant's case. Firstly, the Applicant's counsel restricted his argument to the periods between 22 January 1999 when the Court of Appeal dismissed the Applicant's appeal and 9 November 1999, the date upon which the present application was registered in the High Court. He raised no issue on the period spent by the Applicant awaiting appeal, or on the almost two years spent waiting the hearing of the present application. Secondly, although the Applicant averred in his affidavit that the period spent on death row was 'a strenuous exercise', he made no averments whatsoever on conditions on death row or on the treatment to which he was subjected.

The Applicant relied on a number of cases from other commonwealth jurisdictions more particularly from the Supreme Court of Zimbabwe[56] and the Privy Council.[57] The Court then proceeded to dismiss the Applicant's alternative ground for three reasons. Firstly, the Court held that in the cases referred to by the Applicant, delays on death row ranged from three to twelve years. Secondly, in each of those cases, detailed and graphic evidence was adduced of the particular conditions on death row which were said to be cruel and unusual in the concerned countries. Thirdly, that the Attorney General gave a plausible and acceptable explanation for the delay of nine months complained of.

The Court noted that the period of delay complained of by the Applicant fell short of the period in the cases referred to. Furthermore, it noted that the Applicant failed to adduce evidence of the particular conditions on death row to which he was subjected to. It is apposite to note that the jurisprudence on the so-called 'death row phenomenon' which was discussed in the cases referred to is far from settled. The jurisprudence is divided on at least three crucial issues.

Firstly, there is a divergence of views on the question whether or not delay on its own, not coupled with ill-treatment and horrific conditions on death row, would entitle an applicant to commutation of the death sentence. For example in the *Catholic Commission of Justice and Peace in Zimbabwe v Attorney General and others case*,[58] the Supreme Court of Zimbabwe set aside death sentences of four men who had spent a period ranging from four to six years on death row. The Court noted in that case that prolonged delay before carrying out the death sentences could on its own violate section 15(1) of the Constitution of Zimbabwe.[59] Put it another way, it is not necessary to adduce evidence of the conditions on death row. Although the decision has been criticised for putting too much emphasis on the appalling conditions on

[54] W.A Schabas *The Abolition of the Death Penalty in International Law* (1993) 127
[55] See for example R. Johnson 'Under the Sentence of Death: The Psychology of Death Row Confinement'(1979) 5 *Law and Psychology Review* 141; L. Madhuku 'Delay Before Execution: More on it being inhuman and Degrading'(1994) 10 *South African Journal of Human Rights* 278 and R.B. Lillich 'The Soering Case' (1991) 85 *American Journal of International Law* 145
[56] *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General* 1993 (4) SA 239
[57] For example *De Freitas v Benny and Others* 1976 AC 239 (P.C.); *Riley and Others v AG of Jamaica and Another* (1982) 3 A.E.R. 469; *Reckley v Minister of Public Safety and Immigration and Others* (1995) A.E.R. 8 and *Guerra v Baptiste and Others* 1995 (4) A.E.R 583
[58] *Catholic Commission for Justice and Peace in Zimbabwe* (n 56)
[59] s15 (1) provides as that 'No person shall be subjected to torture or to inhuman and degrading punishment or other such treatment.'

death row in Zimbabwe,[60] it nevertheless represents one view on the death row phenomenon namely that prolonged delay may on its own amount to torture and inhuman and degrading treatment. Following this case it would appear that Kirby J in *Kobedi Bernard v the State* erred in dismissing the Applicant's case merely because he failed to adduce evidence of the conditions on death row.[61] Needless to say, the High Court of Botswana is not bound by foreign decisions. However, decisions from other jurisdictions particularly from English and Roman-Dutch jurisdictions have persuasive authority in Botswana. In fact, the High Court of Botswana relies heavily on decisions from other jurisdictions because of the law reporting system which is still lagging behind.

The second issue on which the jurisprudence of the death row phenomenon is sharply divided is the period of time that would amount to unreasonable delay. Some cases suggest that the period of delay, in order to be unreasonable and thus violate the prohibition against torture and inhumane and degrading treatment, must be measured in years.[62] Yet others suggest that the period may be calculated in months, even weeks.[63] The latter case tends to suggest that Kirby J was wrong in concluding that the delay was not unreasonable because it was only for a period of nine months. It is not suggested here that Kirby J ought to have followed this line but rather that the issue is far from settled and, faced with sharply divided views, it is submitted that Kirby J ought to have made a pronouncement as to which view he preferred and proffered reasons for the decision. Instead, he was content with a finding that the period of nine months complained of fell short of the period complained of in the cases he was referred to. It is submitted, that a rare opportunity was missed for the court to make an authoritative pronouncement on one of the contentious issues surrounding the death row phenomenon debate.

The third issue on which the jurisprudence of the death row phenomenon is sharply divided is the question whether or not the delay caused by the prisoner's use of various judicial reviews, remedies and processes could be invoked as evidence of inhumanity and or unreasonableness of delay. In *Abbot v Attorney General of Trinidad and Tobago*[64], the Privy Council held that such time could never be invoked. However, in the later case of *Pratt and Morgan v Attorney General of Jamaica*,[65] although the Privy Council found that some of the responsibility for the serious delay was attributed to the respondents, it held that the responsibility had no bearing on whether or not the overall detention on death row can be described as cruel and unusual punishment under Section 17(1) of the Constitution. Furthermore in the *Catholic Commission for Justice and Peace in Zimbabwe* case, Gubbay CJ said:

> It seems to me highly artificial and unrealistic to discount the mental agony and torment experienced on death row on the basis that, by not making maximum use of the judicial process available, the condemned prisoner would have shortened and not lengthened his suffering.[66]

As mentioned above, the third ground on which Kirby J dismissed the Applicant's case was that the state had proffered an acceptable explanation as to why there was a delay of nine months between the dismissal of the Applicant's appeal and the launching of the present application. The explanation was that the Applicant had indicated that he needed an attorney to make an application for Clemency on his behalf.[67]

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[60] Schabas (n 45) 147

[61] Similarly the Constitutional Court of South Africa held in *The State v Makwanyane and Mchunu* 1995 (3) SA 39 (CC) that if long delays are not in themselves considered cruel, inhuman, or degrading punishment, then this would entail gratuitous suffering which is inevitable in any system which retains the death penalty. See also *Pratt and Morgan v AG for Jamaica*[1993] 4 ALL E.R. 769 which expressly indorsed the *Catholic Commission for Justice and Peace in Zimbabwe Case* and also makes no mention of neither the personal factors concerning the two applicants nor the prison conditions.

[62] See for example *Abbot v AG of Trinidad and Tobago and Others* W.L.R 1342 (PC)

[63] *The State v Makwanyane* (n 61) where Kentridge AJ noted that 'the mental agony of the criminal, in its alteration of fear, hope and despair must be present even when the time between sentence and execution is measured in months or weeks rather than years'.

[64] *Abbot* (n 62). See also ***Riley*** (n 7)

[65] *Pratt and Morgan* (n 61)

[66] *Catholic Commission for Justice and Peace in Zimbabwe* (n 56) 265 D-E

[67] See a Savingram from the Attorney General to the Registrar reproduced at page 2 of the judgment

The state therefore needed time to instruct a *pro deo* counsel for him. What is not immediately apparent from the judgment is an explanation why it took the state nine months to request the Registrar of the High Court to assign a *pro deo* Counsel for the Applicant. It would appear that the Court took it for granted that since the delay was occasioned by the Applicant's request it could not be held to be unreasonable. It is submitted that the Court ought to have motivated its decision with reasons, regard being had to the fact that there are other cases which suggest that a condemned prisoner's responsibility should not be decisive in determining whether or not there was unreasonable delay.

It appears that the Applicant's counsel also adopted the view that the delay caused by the condemned person's use of judicial processes could never be invoked as evidence of inhumanity. Otherwise it is difficult to fathom the reason why the Applicant's counsel did not complain about the thirteen months the Applicant spent on death row pending the determination of his appeal and the other seventeen months he spent on death row pending the finalisation of the present application.

(ii) The decision of the Court of Appeal
The Applicant (hereinafter the Appellant) being dissatisfied with the decision of Kirby J, appealed to the Court of Appeal.[68] He appealed on multiple grounds, but germane to this are the following:

a) That sections 203(1) (2) and (3) of the Penal Code, which prescribed an obligatory sentence of death if no extenuating circumstances are present are unconstitutional in that they contravene the provisions of Section 3, Section 4 (1), Section 7(1) and Section 10(1)[69] of the Constitution.
b) That section 26(1) of the Penal Code, which provides for the method of execution of the death sentence by hanging, is unconstitutional in that it contravenes Sections 7(1) of the Constitution which prohibits the imposition of inhuman and degrading punishment.
c) That his execution by hanging would be inhuman and degrading having regard to his physical health and mental state and the delay since the death sentence was imposed in October 1998.

It would be immediately apparent from the above that the appellant travelled beyond the grounds raised before the Court *a quo* and effectively widened the grounds of his original application. The Court noted that this was not permissible, but 'as this is a death sentence case, the court adopted a more liberal stance in the matter'.[70] The approach adopted by the Court is commendable for it sacrificed legal technicism in favour of affording a condemned prisoner an opportunity to exhaust all legal arguments available to him.

The Court commenced by posing the question whether it was not *functus officio* having previously dismissed the Appellant's appeal against his conviction and sentence in the High Court. It held that the Appellant was precluded from raising the Constitutional issues which he raised. This was because the appellant had the opportunity to raise them before the Court *a quo* and the Court of Appeal but failed to do so. It noted that:

> The principle of finality in litigation is also one of the cornerstones of our legal system. It is to be preserved and cherished and not eroded. And it would be eroded if there were to be recognised a collateral right of attack on the final judgments of out courts, and particularly those of the Court of Appeal, based on constitutional grounds by litigants, who, dissatisfied with those judgments, thereafter, sought to circumvent or overthrow them by claiming that their constitutional rights had been infringed.[71]

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[68] Court of Appeal Criminal Appeal No. 25 of 2001 (Unreported)
[69] s10(1) provides as follows: 'If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established or recognized by law.'
[70] p 8 of the judgement
[71] p 29

The Court said that the appellant could only be allowed to deal with the various grounds he sought to rely on if he could demonstrate the existence of special and exceptional circumstances. The question that fell for determination therefore was whether such special and exceptional circumstances existed. Put it another way, whether any of the grounds relied on by the appellant warranted the court's interference with its judgment. The Court proceeded to deal with them *seriatim*. It will be noted that the first two grounds do not deal with the constitutionality of execution after a prolonged delay on death row and they should strictly speaking not be discussed under this subheading. However, to avoid discussing the decision of the Court of Appeal piece-meal, they will be discussed here briefly before discussing the main issue of executions after an inordinate delay.

(a) The Constitutionality of the Death Sentence

The Court commenced by reciting the provisions of Section 3 and Section 4(1) of the Constitution. It also recited the provisions of Section 203 and Section 26(1) of the Penal Code and concluded 'that the death sentence and its method of carrying it out are part of, and are enshrined in, the Constitution by Section4 (1) and therefore cannot be said to be *ultra vires* it.'[72] It accordingly endorsed its decision in *Ntesang v The State*.[73]

Interestingly, the Court had been urged to revisit its decision in *Ntesang v the State*. In so doing the appellant relied on the views of international organisations and the fact that there has been a steady progression towards abolition of the death penalty. The Court echoed the sentiment that it expressed in *Ntesang v The State* that whereas it should not be oblivious to global developments, yet its function remained to merely interpret the Constitution and not to rewrite it. This finding was hardly unexpected. It is submitted that reliance on international developments is unlikely to find favour with the courts in Botswana for two reasons. Firstly, a considerable number of states worldwide still maintain the death penalty.[74] And although there have been suggestions that the death penalty is prohibited at international law,[75] such assertions are not sustainable and it appears axiomatic that the death penalty does not as yet violate any norm of customary international law.[76] Secondly, it is important to note that Botswana has not signed the Optional protocol to the ICCPR aiming at the Abolition of the Death Penalty. This may be viewed, at the very minimum, as an implicit rejection of the abolition of the death penalty.

The Appellant further contended that the mandatory nature of the death penalty renders it unconstitutional. Reliance was placed on the Privy Council Decision in *Patrick Reyes v The Queen,* which was an appeal from the Court of Appeal of Belize.[77] The Appellant in that case had shot and killed two people and the penalty of death was pronounced on him. In terms of section 102(1) of the Belize Criminal Code,[78] the Court was obliged to sentence him to death and was precluded from considering whether there was the existence of extenuating circumstances. This was because murder by shooting was a 'Class A murder' as defined by section 102(3) (b) of the Criminal Code and the Court could only determine the existence of extenuating circumstances in relation to 'Class B murders' as defined in section 102(3) of the Criminal Code.

It was contended in that case that murders differ greatly from each other, from the brutal and cold blooded to those which are human and understandable, calling more for pity than grave censure. Therefore, went the argument, a law which denies the defendant the opportunity, after conviction, to seek to avoid capital

[72] ibid. 33
[73] *Ntesang* (n 10)
[74] n 2
[75] For example Secretary-General of Amnesty International when introducing the 1999 Amnesty International Annual Report which dealt with the death penalty posited that 'deliberately killing someone violates the most basic of all human rights-the right to life and has no place in today's world'. See Amnesty International News Release, *Towards a World without Executions*, 6 June 1999. The statement has been construed as considering the death penalty as a violation of international law. See R. Rich 'Death Penalty: An Abolitionist's Perspective' *12th Commonwealth Law Conference Papers* Volume 1 27
[76] W.A. Schabas 'International Legal Aspects' in Hodgkinson, P and Rutherford, A (eds) *Capital Punishment : Global Issues and Prospects* 23
[77] (2002) AC 235 (Privy Council)
[78] Laws of Belize, c84

punishment, which he may not deserve, was incompatible with Section 7 of the Constitution of Belize.[79] The Privy Council found the argument attractive. It held that as the death penalty had to be mandatorily imposed for a murder by shooting without affording the offender the opportunity to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate, it would be offensive to Section 7.[80]

It is submitted that it is difficult to apply that decision in Botswana. In terms of the Criminal Code of Belize, a distinction was made between 'Class A' and 'Class B' murders. The crux of the Privy Council's decision was simply that the provision that precluded the Court from considering the existence of extenuating circumstances in relation to 'Class A murders' was unconstitutional. It therefore treated murder by shooting as a 'Class B murder'. Section 203 of the Penal Code of Botswana makes no distinctions between classes of Murder. Indeed as noted above it enjoins the Court, after a conviction of murder, to make a determination as to the existence of extenuating circumstances. This is in fact what the Court of Appeal held. It noted that Section 203 did not make the death penalty mandatory and was in fact more liberal in that it imposed no limitations upon the Court in relation to the nature of sentence to be substituted for the death penalty. The Belize Criminal Code provides that for a 'Class B murder', a sentence of life imprisonment is mandatory. The Court therefore found no reason to revisit its decision in *Ntesang v The State* and the law stated therein still stands.

In relation to the method of execution, the Court reaffirmed its decision in *Ntesang v The State* and held that the sentence of death by hanging was saved by section 7(2) of the Constitution.

(b) Delay in carrying out the death penalty

The Appellant further contended that the execution of the death sentence on him personally would violate the provisions of section 7 of the Constitution. He submitted that the Court should order that the death sentence imposed on him should not be carried out but should be set aside and another sentence substituted for it due to what he contended was inordinate delay in carrying it out. In the Court of Appeal the appellant rectified the mistake he committed in the High Court in relation to the period of time complained of. He calculated the period of time spent from 14 October 1998, when he was first convicted and sentenced, to the time of hearing of the present appeal. The period complained of therefore was more than four and half years.

The appellant placed great reliance on the *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General and Others* case. The Court had to decide whether the period of delay caused by the exercise of the condemned prisoner of his right to pursue an appeal should be taken into account or excluded in deciding whether there had been an inordinate delay in the carrying out of the death sentence. As noted above the Supreme Court of Zimbabwe decision is to the effect that it should. The Court however noted that there are other decisions to the contrary. It specifically referred to the Privy Council decisions of *Abbot v Attorney General of Trinidad and Tobago and Others* and *Riley and Others v The Attorney General of Jamaica and Another. The* Court then had to decide whether to follow the Zimbabwean case or the Privy Council decisions.

In so deciding the Court found it necessary to make certain observations. Firstly, it noted that the death penalty and the method of carrying it out by hanging have been sanctioned by the Constitution of Botswana and therefore its imposition could not be regarded as inhuman or degrading. It was however argued that although the death penalty appears to be contemplated by the Constitution, nevertheless its execution was inhuman and degrading. In response the Court relied on its decision in *Ntesang v The State* and held that the argument overlooked the provisions of section 7 (2) of the Constitution, which saved any law which 'authorises the infliction of any description of punishment that was lawful in the country immediately before the coming into operation of this Constitution.'

[79] ibid c4

[80] s7 of the Constitution of Belize provides that: 'No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.'

It is important to note that section 17(2) of the Constitution of Jamaica is similar to section 7 (2) of the Constitution of Botswana. However in the *Pratt and Morgan* case the Privy Council held that while the death penalty by hanging may have been lawful and therefore not subject to constitutional attack, a prolonged wait for it was not and could never be protected by the provision. It further held that section 17 (2) was confined to authorising descriptions of punishment for which the court may pass judgement but it did not prevent the condemned prisoner from arguing that the circumstances in which the executive intends to carry out a sentence are in breach of section 17(1). Unfortunately, it appears that the Court of Appeal was not referred to the *Pratt and Morgan* case. As a result it heavily relied on the *Abbott* and *Riley* cases which have since been overturned by the *Pratt and Morgan* decision.

It is submitted that the same reasoning is applicable in the interpretation of section 7 (2) of the Constitution of Botswana. Indeed the Court of Appeal has had occasion to deal with section 7(2) in an earlier case of *Clover Petrus and Others v The State*,[81] albeit not in the context of the death penalty. In a powerful dissenting opinion, Aguda JA noted that section 7(1) was designed for the absolute prohibition of torture, inhuman, degrading and other treatment. He further noted that section 7(2) was only added to prevent a complete break from the position of punishment as it existed at Independence, based upon common knowledge of the people at the time. He concluded that:

> In my view "any description of punishment" must bear its ordinary meaning…it will be referable to a species or kind of punishment, not to the details of such punishment. This approach appears…the only reasonable approach possible if the Court was not to open floodgates to variations of punishments which the makers of the Constitution never had in mind nor could have contemplated.[82]

He therefore held that although corporal punishment in terms of section 301(3) of the Criminal Procedure and Evidence Act was a lawful punishment before the coming into effect of the Constitution and therefore protected by section 7(2) of the Constitution, repeated and delayed infliction of corporal punishment was not. Applying this reasoning to the death penalty, it is submitted that although the death sentence by hanging was clearly shielded by section 7(1), its execution after a prolonged detention on death row was not.

Reverting to the *Kobedi* case*,* the second observation that the Court made was that some form of mental strain and suffering was inherent in the death penalty. The Court relied on the dissenting opinions of Lords Scarman and Brighton in the *Riley*[83] case. Yet what the law Lords simply meant was that since mental strain and suffering are an inevitable consequence of the death penalty, it should not matter who caused the delay on death row. They did not mean, as the Court of Appeal appears to hold, that since the suffering is an inevitable consequence of the death penalty, one cannot rely on the suffering to quash the execution.

The third observation the Court made was that a person sentenced to death will almost invariably pursue his right of appeal and as a result prolong his mental stress and anguish. The Court then held that it could not agree with Gubbay CJ in the *Catholic Commission for Justice and Peace in Zimbabwe* case that the period involved in pursuing his right of appeal, or other judicial process available, should not be excluded from the consideration of whether there has been an inordinate delay in the carrying out of the death sentence from the time of its imposition. The approach adopted by the Court of Appeal has been criticised for, among other things, penalising the claimant of the right to appeal by holding that the exercise of that right prevents the defendant from contending that his treatment violates the prohibition against torture and inhuman and degrading treatment.[84]

Furthermore, the Court relied religiously, on the *Abbott* and *Riley* cases which, as noted, have since been overturned. The Court also relied on the United States cases of *Chessman v Dickson*[85] and *Richmond v*

[81] [1985] L.R.C. (Const.) 699; [1984] B.L.R. 14
[82] ibid p46
[83] n 7
[84] D. Pannick *Judicial Review of the Death Penalty* (1982) 85
[85] 275 F. 2d. 604, (1960)

Lewis[86] in which stay of execution was denied because delays in those cases were largely due to the skilful manner in which the prisoners' lawyers managed to exhaust all available avenues. What the Court failed to appreciate is that the United States courts are sharply divided on the issue, as there is yet to be a decisive Supreme Court decision. Further as one commentator observed, it should always be remembered that United States decisions mostly deal with applications for *habeas corpus* and not appeals *per se* and that it would be 'extravagant to punish an accused person for exercising his constitutional rights.'[87]

The Court concluded that the delay had been largely caused by the Appellant's own actions .This appears to be a gratuitous finding in favour of the State in view of the fact that there was a delay of sixteen months as a result of the State failing to file opposing affidavits in the application that came before Kirby J. The Court also seemed to exclude the nine months that that the state wasted before appointing a *pro deo* counsel for the Appellant. It further held that no evidence had been placed before it to show the conditions on death row in Botswana. In fact the Court used this as an attempt to distinguish the present case from the *Catholic Commission* case. However, as noted above, the actual conditions on death row were not decisive in that case.

Lastly the Court considered the question whether it would be inhuman and degrading to execute the appellant in view of his physical health and mental condition. The Court dealt with the issue in a rather dismissive fashion. It held that 'this however, is not a matter for the Court's decision. They are factors which should properly be put before the Executive in considering any application by the appellant for clemency in terms of sections 53, 54 and 55 of the Constitution.'[88] It is difficult to understand how a contention that a fundamental constitutional right has been violated can be held by the Court to be a matter for the decision of the Executive.

V. CONCLUSION

A great number of national Constitutions and International Human Rights Instruments provide for the right to life, the primordial of all rights. However, a substantial number of states still retain the death penalty as an exception to the death penalty. In other countries, like Botswana, over and above the constitutional recognition of the death penalty there is also an overwhelming public support for it. These factors render an abolitionist's task almost insurmountable. Challenges to the death penalty on the basis that it violates the right to life in Botswana have been met by the defence that the death penalty is recognised by the Constitution itself. Thus there is a need for a departure from this orthodox challenge to the death penalty. Challenges on the application of the death penalty, like a reliance on the death row phenomenon, are likely to be more successful. Firstly, they are not prone to the defence that the death penalty is recognised by the Constitution itself and secondly, they dispense with the thorny and rather tired philosophical debate on the utility of the death penalty. The task is on the courts to interpret the Constitution in a manner that maximizes protection of the rights enshrined therein.

[86] 948 F. 2d 1473 (1991)
[87] Schabas (n 45) 142
[88] p 62