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**GUILTY OF MURDER WITH EXTENUATING  
CIRCUMSTANCES: TRANSPARENCY AND THE  
MANDATORY DEATH PENALTY IN BOTSWANA**

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ABSTRACT

*The Southern African nation of Botswana retains a mandatory death sentence for the crime of murder, against the modern trend toward discretionary death penalty regimes. Since mandatory death sentences failed to control sentencing discretion, Southern African nations, including Botswana, introduced the doctrine of extenuating circumstances by which defendants may prove they lack moral blameworthiness because of a factor that influenced their mind when committing the crime. The doctrine, however, lacks many of the more transparent features of a discretionary death penalty regime; namely, it shifts the burden to the defendant, it does not apply objective guidelines or standards outside of judicial precedent, and its application is subject to low scrutiny on appeal. The mandatory nature of Botswana's death penalty regime is not constitutionally required, and a discretionary death penalty would be more transparent and thus would better prevent arbitrary application and the possibility of mistake.*

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## I. INTRODUCTION

Shortly after dawn on August 26, 1995, guards led five men from their isolated cells in Gaborone Central Prison.<sup>1</sup> One of the men was badly wounded, covered in blood and bandages after attacking two prison guards the night before.<sup>2</sup> As authorized by the Botswana Penal Code §26,<sup>3</sup> the guards bound the hands and shackled the feet of each man and placed a black cotton hood over their heads.<sup>4</sup> One by one, the prisoners mounted the scaffold and the state executioner placed a rope five centimeters in diameter around each man's neck.<sup>5</sup> The executioner pulled the lever and the bodies of the five men fell through a trap door.<sup>6</sup> When their bodies stilled, they had become statistics: the twenty-eighth through thirty-second prisoners executed since Botswana's independence in 1966.<sup>7</sup>

The executions of these five men, Tekoetsile Tsiane and his two co-conspirators David Kelaletswe and David Bogatsu, along with convicted murderers Obusitswe Tshabang and Patrick Ntesang, abruptly ended almost a decade of a de facto moratorium on the death penalty in Botswana.<sup>8</sup> Executions were once simple, uncontroversial exercises. By 1995, that complacency had ended, not least because of the sweeping changes in Southern Africa over the previous decade. Botswana had been, more or less, "Africa's most successful example of an open, transparent, and democratic government," free from the poverty, civil unrest, and white minority rule that characterized its neighbors.<sup>9</sup> A growing civil

<sup>1</sup> *Beaten, Shot, and then Hanged*, BOTS. GAZETTE, Aug. 30, 1995, at 2.

<sup>2</sup> *Id. Prisoners Hanged: Tekoetsile Fights to the Bitter End*, MIDWEEK SUN (Bots.), Aug. 30, 1995.

<sup>3</sup> Bots. Penal Code § 26.

<sup>4</sup> *Executed!*, BOTS. GAZETTE, Sept. 6, 1995.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> FÉDÉRATION INTERNATIONALE DES LINGUES DES DROITS DE L'HOMME & DITSHWANELO – BOTSWANA CENTER FOR HUMAN RIGHTS, *THE DEATH PENALTY IN BOTSWANA: HASTY AND SECRETIVE HANGINGS* 18 (2007), available at <http://www.fidh.org/IMG/pdf/Botswana473angconjointpdmjuin2007.pdf> [hereinafter FIDH & DITSHWANELO] (erroneously omitting the name of Patrick Ntesang). Given the secretive nature of the death penalty in Botswana, the list may be incomplete.

<sup>8</sup> The last person previously executed appears to have been Olibile Rankhibibu, on Oct. 10, 1987. *Id.* at 34.

<sup>9</sup> Charles Manga Fombad, *The Separation of Powers and Constitutionalism in Africa: The Case of Botswana*, 25 B.C. THIRD WORLD L.J. 301, 302-03 (2005).

society began demanding stays of executions and Batswana<sup>10</sup> society, for the first time, publicly debated the merits of the death penalty.<sup>11</sup>

The Botswana Court of Appeal upheld the five death sentences in January 1995.<sup>12</sup> Because the death penalty in Botswana is mandatory for the crime of murder, the death penalty is the presumed sentence unless the defendant can show beyond a fair preponderance of the evidence that extenuating circumstances weigh against imposition of the death penalty.<sup>13</sup> The doctrine of extenuating circumstances softens the rigidity of a mandatory death sentence. In theory, the doctrine allows a judge to consider circumstances that impacted a defendant's mind at the moment of the crime. Extenuating circumstances are those factors reflecting on the moral blameworthiness, as opposed to the legal culpability of the defendant.<sup>14</sup> In practice, scrutiny may be more searching and broad, considering both policy and personal factors.<sup>15</sup> This scrutiny depends on the judge alone, without recourse to legislative guidelines or standards.<sup>16</sup> This lack of transparency is an obstacle to a rational death sentencing process.

For the five men, the Court found extenuating circumstances insufficient and sustained the sentences. The appeal by Ntesang rested on a claim of emotional distress.<sup>17</sup> Tshabang argued that his youth—twenty-

<sup>10</sup> "Batswana" refers to the members of Botswana society (singular: Motswana), or alternatively the members of the Tswana ethnic group. Daniel D. Ntanda Nsereko, *Extenuating Circumstances in Capital Offenses in Botswana*, 2 CRIM. L.F. 235, 235 n.1 (1991).

<sup>11</sup> *Ditshwanelo Urges President to Abolish Death Penalty, Grant Clemency to Five Men*, BOTS. DAILY NEWS, May 29, 1995; *Ditshwanelo Calls on Government to Abolish Death Penalty*, BOTS. DAILY NEWS, Aug. 22, 1995. The newspapers also were divided: *The Voice* and *The Botswana Gazette* advocated abolition of the death penalty, while *Mmegi* supported retention. See generally Editorial, *Death Sentence*, MMEGI, Sept. 1-7, 1995, at 6; Comment, *The Ultimate Penalty*, THE VOICE, Aug. 25 - Sept. 7, 1995, at 6; Comment, BOTS. GAZETTE, Nov. 1, 1995, at 10.

<sup>12</sup> *Tshabang v. State*, [1995] B.L.R. 132 (Bots. Ct. App.); *Ntesang v. State*, [1995] B.L.R. 151 (Bots. Ct. App.); *Kelaletswe v. State*, [1995] B.L.R. 100 (Bots. Ct. App.).

<sup>13</sup> Nsereko, *supra* note 10, at 235, 264.

<sup>14</sup> *Id.* (citing *State v Letsolo* 1970 (3) SA (A) at 476 (S. Afr.)).

<sup>15</sup> *Id.* at 260 (describing how courts have recognized as extenuating circumstances the ill treatment of the accused by an employer; the presence of an ailment such as epilepsy; the health of the victim, who would not have died but for his condition; and economic plight of the accused).

<sup>16</sup> ELIZABETH MAXWELL & ALICE MOGWE, *IN THE SHADOW OF THE NOOSE* 20-21 (2006) (noting that the list of extenuating circumstances has been left open and judges have wide discretion).

<sup>17</sup> Ntesang, an automobile mechanic, was convicted of the murder of customer David Lubinda late in 1991. The murder was premeditated, as Ntesang and another accomplice tracked down the victim some time later. Ntesang made out a claim of extenuating circumstances resting on emotional distress over legal action Lubinda brought for stolen car parts. Even if he were under some stress, the judge found, his reaction was not spontaneous. *Ntesang*, [1995] B.L.R. at 3-6.

one at the time of the crime—lessened his moral blameworthiness.<sup>18</sup> The “Motokwe three” claimed an absence of premeditation during a felony murder robbery, and the fact that, among them, only one bullet was fired.<sup>19</sup> Ntesang also brought a constitutional challenge, claiming that the death penalty was barbaric, inhuman, and degrading.<sup>20</sup> But § 4(1) of the Constitution of Botswana is explicit: “No person shall be deprived of his life intentionally save in execution of the sentence of a court” for a capital crime.<sup>21</sup> The Court in *Ntesang* accepted that the death penalty may well be anachronistic, but upheld the death penalty in light of the death penalty savings clause in § 4(1).<sup>22</sup> Such clauses are commonplace in the developing world.<sup>23</sup>

After the Court confirmed the five death sentences, the last reprieve was commutation or pardon by the President of Botswana,<sup>24</sup> then Ketumile Masire.<sup>25</sup> Pressure continued to mount from the press, religious leaders, and diplomats, as well as a growing sector of Botswana soci-

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<sup>18</sup> Tshabang was convicted of murdering David Thurabi and throwing his body down a wall near a cattle post. He also stole the victim’s car. He claimed his age and the lack of premeditation qualified as extenuating circumstances. *Tshabang v. State*, [1995] B.L.R. 132, 1-2, 14 (Bots. Ct. App.).

<sup>19</sup> Kelaletswe, Bogatsu, and Tsiane were convicted for the murder of Phillipus Wilhem Bruwer. The three men burglarized the store owned by Bruwer and his wife and killed him in an altercation. In the felony murder, only one bullet was fired. The three men also claimed their immaturity and lack of previous convictions weighed against the death sentence. *Kelaletswe*, [1995] B.L.R. 100, 1,3, 5-6, 32 (Bots. Ct. App.).

<sup>20</sup> *Ntesang*, [1995] B.L.R. at 3.

<sup>21</sup> BOTS. CONST. ch. 2, § 4(1).

<sup>22</sup> *Ntesang*, [1995] B.L.R. at 15-16.

<sup>23</sup> See, e.g., INDIA CONST. pt. 3, art. 21 (“No person shall be deprived of his life. . . except according to procedure established by law.”); ZIMB. CONST. ch. 3, art. 12(1) (“No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.”); BELIZE CONST. ch. 4, pt. II, § 4(1) (“A person shall not be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under any law of which he has been convicted.”); NIGERIA CONST. art. 33(1) (“Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.”).

<sup>24</sup> The President has a constitutional duty to review every death sentence. BOTS. CONST. ch. 4, § 55(1).

<sup>25</sup> Botswana has had four presidents since independence: Seretse Khama (1966-1980), Ketumile Masire (1980-1998), Festus Mogae (1998-2008), and Ian Khama (2008 - ). JAMES DENBOW & PHENYO C. THEBE, *CULTURE AND CUSTOMS OF BOTSWANA* xviii-xxi (2006). In 2008, President Mogae retired and Vice President Ian Khama, the son of the first president, succeeded to the presidency. *African Voices: Ian Khama*, CNN WORLD, March 6, 2009, <http://edition.cnn.com/2009/WORLD/africa/03/05/av.iankhama/>.

ety.<sup>26</sup> The President stalled. For six months, the prisoners lingered on death row, in constitutional limbo.

On June 6, 1995, in the midst of the civil society debate on the death penalty in Botswana, the Constitutional Court of South Africa unanimously struck down the death penalty as a cruel, inhuman, and degrading punishment.<sup>27</sup> The decision was one of the most visible and comprehensive in the history of the modern anti-death penalty movement. The gallows at Pretoria Central Prison took 2,173 lives between 1967 and 1989, as many as seven at one time.<sup>28</sup> For South Africa, the decision ended an era of arbitrariness and racism in the apartheid regime's criminal law.<sup>29</sup> Botswana continues to look to South African law for much of its legal precedent and borrows extensively from South Africa's legal traditions.<sup>30</sup> South Africa was the birthplace of Botswana's legal system, a product of the English common law and the Roman-Dutch law of the white Afrikaner nations, superimposed onto African customary laws and legal

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<sup>26</sup> For a discussion of public opinion, see *The Death Penalty. . . What People Say*, BOTS. GUARDIAN, Aug. 11, 1995 at 13, and Joseph Balise, *Should Killers Be Killed? Divergent Views on Death Penalty*, SUNDAY TRIB., Sept. 3 1995, at 1. In addition, residents addressed chiefs (*kgosi*) and expressed views on the death penalty at traditional Batswana community gatherings (*kgotla*). Philbert Kebihetswe, *Tutume, Sebina Residents Urge Gov't to "Uphold Death Penalty,"* BOTS. DAILY NEWS, June 2, 1995. For NGO activism, see Cynthia Nkemelang, *Participants Call for Abolishment of Death Penalty*, BOTS. DAILY NEWS, May 1, 1995, which describes a lecture panel organized by Ditshwanelo. For statements opposing execution of the five men by Anglican Archbishop of Central and Southern Africa and Catholic Bishop of Gaborone, see Pamela Dube and Mesh Moeti, *Death Penalty: Is It Necessary?*, MMEGI, Feb. 10-16, 1995, at 15.

<sup>27</sup> *State v Makwanyane & Mchunu* 1995 (3) SA 391 (CC) (S. Afr.)

<sup>28</sup> Photo Caption, MAIL & GUARDIAN (Johannesburg), Oct. 20-26, 1995.

<sup>29</sup> George Devenish, *The Historical and Jurisprudential Evolution and Background to the Application of the Death Penalty in South Africa and Its Relationship with Constitutional and Political Reform*, 5 S. AFR. J. CRIM. JUST. 1, 23-27 (1992) (summarizing available evidence on race and South Africa's death penalty).

<sup>30</sup> Nsereko, *supra* note 10, at 237 (explaining that most judges and lawyers were trained in South African law schools and that many Botswana statutes are replicas of South African statutes). For example, courts in both Botswana and Zimbabwe weighed South African precedent on the disputed criminality of sodomy—although neither ultimately followed South Africa's lead. See, e.g., E.K. Quansah, *Same-Sex Relationships in Botswana: Current Perspectives and Future Prospects*, 4 AFR. HUM. RTS. L.J. 201 (2004) (describing how the *Utjiwa Kanane* case ultimately weighed and rejected South African precedent); Oliver Phillips, *Zimbabwe*, in SOCIOLEGAL CONTROL OF HOMOSEXUALITY: A MULTI-NATION COMPARISON 43, 48 (Donald J. West & Richard Green eds., 1997) (describing how Zimbabwe's jurisprudence on homosexuality would have to account for South Africa's new constitutional protections for gays and lesbians).

traditions.<sup>31</sup> Colonial officials applied this hybrid regime to the vast desert land between the Limpopo and the Zambezi Rivers in 1891, land that became independent Botswana seventy-five years later.<sup>32</sup>

For the five prisoners, however, the South African decision had no impact. The President eventually declined to exercise his constitutional prerogative of mercy.<sup>33</sup> Once awoken from hibernation, the scaffold in Gaborone continued its work in fits and starts.<sup>34</sup> At the same time, judicial scrutiny of the death penalty has increased alongside the rise of a nascent domestic human rights movement in Botswana. In late 1995, the State charged two indigenous San<sup>35</sup> defendants Gwara Motswetla and Tlhabologang Maaue with murder.<sup>36</sup> A confluence of irregularities in their trial, however, spared their lives. The Court, for the first time, granted a stay of execution after the President had confirmed the death sentences.<sup>37</sup> In weighing extenuating circumstances, the Court consid-

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<sup>31</sup> See E.K. QUANSAH, INTRODUCTION TO THE BOTSWANA LEGAL SYSTEM 14-16 (2nd ed. 1998).

<sup>32</sup> *Id.* at 9-11.

<sup>33</sup> Presidents have rarely commuted sentences or pardoned prisoners on death row. Nsereko, *supra* note 10 (noting that, in the previous ten years, the president commuted three death sentences). For President Masire's views, see *Death Penalty Is Here to Stay Says President Masire*, BOTS. GAZETTE, Nov. 8, 1995.

<sup>34</sup> Shortly before the five men were executed, the Court of Appeals reversed the death sentence of a South African national, Anthony Ndlovu, finding extenuating circumstances in intoxication, provocation, and absence of premeditation. The Court admonished the prisoner's poor counsel and reduced the sentence to fifteen years. *Ndlovu v. State*, [1995] B.L.R. 432 (Bots. Ct. App.). See also Marcos Matebele, *Court Saves Man from Noose*, MIDWEEK SUN (Bots.), July 19, 1995, at 1. On February 2, 1996, the Court struck down the death sentence for Joseph Kgaodi because the judge had considered inadmissible evidence in weighing extenuating circumstances. *Kgaodi v. State*, [1996] B.L.R. 23 (Bots. Ct. App.). On February 11, the Court and upheld the death sentence of Gaolatlhe Kwae. on Feb. 11, *Kwae v. State*, [1996] B.L.R. 159 (Bots. Ct. App.).

<sup>35</sup> The San peoples are the descendants of the aboriginal population of Southern Africa and are chiefly, but not exclusively, characterized by a hunter-gatherer tradition. In Botswana, the San are known as the Basarwa, and historically the population has been referred to as "bushmen." Sidsel Saugestad, *The Indigenous Peoples of Southern Africa: An Overview*, in INDIGENOUS PEOPLES' RIGHTS IN SOUTHERN AFRICA 22 (Robert Hitchcock & Diana Vinding eds., 2004). See also Nicholas Olmsted, *Indigenous Rights in Botswana: Development, Democracy and Dispossession*, 3 WASH. U. GLOBAL STUD. L. REV. 799, 802 (2004) ("Many San in Botswana continue to be poor, with high unemployment rates, high infant mortality, high incarceration rates, low literacy levels, and few assets.").

<sup>36</sup> MAXWELL & MOGWE, *supra* note 16, at 27.

<sup>37</sup> Fombad, *supra* note 9 at 331 n. 174, quoting *Ditshwanelo & Others v. Attorney Gen. & Another*, [1999] 2 B.L.R. 59. The Ditshwanelo Botswana Centre for Human Rights in Gaborone became the first non-governmental organization to intervene on behalf of a criminal defendant and receive standing as a full party in the case.

ered sociological factors, in this case the marginalization of the indigenous San people.<sup>38</sup> Eventually, the Court ordered a permanent stay of prosecution because of inadequate legal representation, a language barrier, and the unconstitutional delay between sentencing and punishment.<sup>39</sup>

As these varying results make clear, mandatory death penalty regimes do not remove the discretion inherent in a sentencing decision. Such regimes only make this discretion less transparent: prosecutors will not prosecute; jurors will not convict; executives will grant clemency. The doctrine of extenuating circumstances does not properly guide this discretion. If a judge finds that extenuating circumstances exist, he makes a largely unreviewable determination that the convicted defendant should not die. As Hood writes, legislation “fail[s] . . . to give any guidance as to what can constitute an extenuating circumstance.”<sup>40</sup> This system is not as rational and consistent as a guided discretionary death penalty regime in which a judge must articulate a specific aggravating factor in order to warrant the death penalty.<sup>41</sup> A lack of transparency in sentencing contributes to arbitrariness or the possibility of mistake.<sup>42</sup> Furthermore, the mandatory nature of Botswana’s death penalty is not constitutionally required according to § 4(1) of the Constitution.<sup>43</sup> Constrained by prior precedent upholding the validity of Botswana’s death sentence, a transition from a mandatory to a discretionary death penalty regime would be a major step forward for human rights protections as it increases the transparency and the rationality of the sentencing process.

## II. DISCRETION AND THE MANDATORY DEATH PENALTY

At English common law, the death sentence was mandatory for the crime of homicide.<sup>44</sup> By the 1960s, all jurisdictions in the United King-

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Maxwell & Mogwe, *supra* note 16 at 53-55. In addition, the High Court found the actions of prison guards listening in on consultations between defendants and their lawyer unconstitutional. The Court also ruled that defendants did not have a fair trial due to ineffective legal representation and lack of language interpretation. *Id.* at 55-61.

<sup>38</sup> *Id.* at 66-67.

<sup>39</sup> *Id.* at 60-63, 100. See also Ryder Gabathuse, *Murder Suspects Seek Stay of Prosecution*, MMEGI (Bots.), Aug. 17, 2004.

<sup>40</sup> ROGER HOOD, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 174 (3d ed. 2002).

<sup>41</sup> In other words, where a judge must specifically articulate in writing the factors that place a crime in a special category of seriousness, distinct from ordinary crimes, the result is more transparent and provides a better guide for later judges to follow.

<sup>42</sup> Arbitrariness and mistake are closely related. See CHARLES L. BLACK, JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* 14-22 (1974).

<sup>43</sup> BOTS. CONST., ch. 2, § 4(1).

<sup>44</sup> Case Comment, *Mandatory Death Penalty Declared Unconstitutional for Failure to Permit Consideration of Any Mitigating Circumstances*—*State v. Cline*, 397 A.2d

dom and the United States had either abolished capital punishment or replaced the mandatory death sentence with a discretionary one.<sup>45</sup> In the United States, this abruptly changed after 1972 when the U.S. Supreme Court struck down Georgia's death penalty in *Furman v. Georgia*,<sup>46</sup> finding that unchecked and unguided sentencing discretion led to arbitrary and discriminatory results in violation of the Eighth and Fourteenth Amendments.<sup>47</sup> The states responded to *Furman v. Georgia* by removing all discretion from the jury. The U.S. Supreme Court struck down this approach, too, as an unconstitutional violation of the Eighth Amendment in *Woodson v. North Carolina*.<sup>48</sup> A courtroom may not treat individual defendants as "members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."<sup>49</sup> The Court held that the mandatory death penalty only "papered over" the arbitrariness problem; states needed, instead, "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death."<sup>50</sup>

Mandatory death penalty regimes constrain only a small part of the discretion inherent in the criminal process: namely, in sentencing. So long as unbridled discretion exists at other stages of the criminal justice process, eliminating sentencing discretion will not remove all arbitrariness from the final decision of which criminals should die.<sup>51</sup> Since the hands of the factfinder are tied once she finds guilt, the discretion of the prosecutor in bringing the charge, appellate judges in reviewing the charge, or the executive in ratifying the charge become magnified in close cases.

As a result, the mandatory death penalty simply constrains discretion at one point in the process and aggravates the discretion at other points. "[Mandatory] death penalty statutes do not eliminate the potential for arbitrariness with which *Furman* was concerned, but only alter the stages in the criminal process in which arbitrariness can arise."<sup>52</sup> Prosecutors may be more likely to bring a charge of manslaughter, defendants may be

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1309 (R.I. 1979), 14 SUFFOLK U. L. REV. 578, 579 n.13 (1980) (presenting overview of case law on the mandatory death penalty in the United States).

<sup>45</sup> *Id.* at 580 (describing the state of the law in the United States); John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 187-188 (1986) (describing the state of the law in the United Kingdom).

<sup>46</sup> *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

<sup>47</sup> See generally, *Id.* Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1692 (1974).

<sup>48</sup> *Woodson v. North Carolina*, 428 U.S. 280 (1976).

<sup>49</sup> *Id.* at 304.

<sup>50</sup> *Id.* at 303.

<sup>51</sup> *Discretion and the Constitutionality of the New Death Penalty Statutes*, *supra* note 47, at 1712.

<sup>52</sup> *Id.* at 1713.



less willing to plead guilty, and pardoners may review sentences more intensively if the punishment of death is automatic. “[T]he impulse to individualize treatment in nonsentencing stages becomes particularly powerful when a major source of flexibility elsewhere in the criminal process has been confined,” the *Harvard Law Review* editors concluded.<sup>53</sup> As Berns notes, a mandatory sentence does not eliminate discretion, and a jury, of the opinion that an offender does not deserve death, simply will not convict him of the offense.<sup>54</sup> This intertwines a guilt inquiry with a sentencing one and results in jury nullification.

### III. EXTENUATING CIRCUMSTANCES IN SOUTHERN AFRICA IN COMPARATIVE PERSPECTIVE

In Southern Africa, a sentence of death is mandatory upon a conviction of murder, unless the defendant can show beyond a preponderance of the evidence that extenuating circumstances exist. The effect of this doctrine is to create a new class of crime, “guilty of murder with extenuating circumstances.”<sup>55</sup> This doctrine is one method of reducing the harshness of a mandatory death penalty. Although court decision in South Africa, legislative action in Namibia,<sup>56</sup> and gradual disuse in Lesotho<sup>57</sup> and Swaziland<sup>58</sup> have ended mandatory death penalty regimes with doctrines of extenuating circumstances, the doctrine survives in robust form in Botswana and Zimbabwe. In 1990, the Zambian legislature confronted two alternatives to the mandatory sentence: establishing a doctrine of extenuating circumstances, or implementing a discretionary death penalty.<sup>59</sup> The legislature chose the former, although a presidential moratorium on

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<sup>53</sup> *Id.* at 1715.

<sup>54</sup> WALTER BERNs, *FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY*, 181 (1979). See Poulos, *supra* note 45, at 151-52 (“By the summer of 1972, all thirty-five states that enacted death-penalty legislation granted unfettered discretion to the jury or judge to impose or withhold capital punishment for most capital offenses in their state. . . .”). Jury nullification may not have been the primary motivation for the disuse of mandatory sentencing up to the point of the *Furman* decision, but it was certainly one factor.

<sup>55</sup> This formulation is mentioned in *Ndlovu*, in which the Court found that extenuating circumstances existed and reduced the sentence to fifteen years. *Ndlovu v. State*, [1995] B.L.R. 432 (Bots. Ct. App.).

<sup>56</sup> Hood, *supra* note 40, at 250 (noting that Namibia abolished the death penalty in 1990, with the last execution occurring in 1988).

<sup>57</sup> Lesotho has not executed anyone since 1995. Country Status on the Death Penalty, Hands Off Cain, <http://english.nessunotocchicaino.it/bancadati/index.php?tipotema=arg&idtema=10000532> (last visited April 8, 2008).

<sup>58</sup> Hood, *supra* note 40, at 248 (noting Swaziland last carried out an execution in 1989 and is considered *de facto* abolitionist).

<sup>59</sup> John Hatchard, *Developing the Criminal Law in Zambia: The Penal Code (Amendment) Act, 1990*, 36 J. AFR. L. 103, 103 (1992).

executions is currently in place.<sup>60</sup> The doctrine of extenuating circumstances may become more widespread as the mandatory death penalty regime declines in Africa.<sup>61</sup>

From a transparency perspective, however, the doctrine of extenuating circumstances is not as successful at protecting the rights of prisoners as a discretionary death penalty with clear judicial sentencing guidelines. Defense advocates may be ill-equipped to carry the burden of proof given the poor pay, short notice, and lack of experience that characterizes *pro deo* representation.<sup>62</sup> Artificially separating a legal culpability inquiry from a moral blameworthiness one distorts the judicial role in a trial, places the onus on a defendant to introduce new evidence or reinterpret old evidence after his conviction, judges this evidence according to a vague and ill-defined standard, and leaves the final decision, largely unreviewable, to a single finder of fact.<sup>63</sup> Former Chief Justice Dumbetshena of Zimbabwe admitted that the “common practice among judges” is to “lean towards a finding of manslaughter or finding extenuating circumstances. Judges are reluctant to sentence people to death.”<sup>64</sup>

Most importantly, the doctrine has one further disadvantage. In a discretionary regime, a judge bears the “onerous and lonely task of literally deciding between life and death,” Lund notes, which forces the judge to understand the gravity of his task.<sup>65</sup> In a pure mandatory regime, it is the law and the law alone that sentences a convicted murder to death. A mandatory death sentence with a doctrine of extenuating circumstances

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<sup>60</sup> Newton Sibanda, *Zambia Not Delivering on Execution Ban*, INDEPENDENT ONLINE, June 26, 2007, [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=68&art\\_id=nw20070626092100903C334951](http://www.iol.co.za/index.php?set_id=1&click_id=68&art_id=nw20070626092100903C334951) (describing President Levy Mwanawasa’s moratorium on the death penalty since 2004, ensuring no execution will take place during his term, which runs through 2011).

<sup>61</sup> Malawi struck down the mandatory death penalty as unconstitutional in 2007. See *infra* note 218. Uganda struck it down in 2005. See *infra* note 223. Both established discretionary death penalty regimes. For a comparison among African nations, see RITA J. SIMON & DAGNY A. BLASKOVICH, *A COMPARATIVE ANALYSIS OF CAPITAL PUNISHMENT: STATUTES, POLICIES, FREQUENCIES, AND PUBLIC ATTITUDES THE WORLD OVER 23-25* (2002) (comparing the death penalties of four common law nations: Ghana, Kenya, Nigeria, and South Africa).

<sup>62</sup> For the challenges of *pro deo* representation in Botswana, see *infra* Part IV.B.

<sup>63</sup> For more on these criticisms, see D. M. Davis, *Extenuation: An Unnecessary Halfway House on the Road to a Rational Sentencing Policy*, 2 S. AFR. J. CRIM. JUST. 205, 218 (1989) (on the distortion of the judicial role at trial); Nsereko, *supra* note 10, at 264 (on the defendant’s burden); MAXWELL & MOGWE, *supra* note 16, at 20-21 (on amount of discretion given to judges); and G. Feltoe, *Extenuating Circumstances: A Life and Death Issue*, 4 ZIMB. L. REV. 60 (1986) (on the inability to review the sentence).

<sup>64</sup> E. Dumbutshena, *The Death Penalty in Zimbabwe*, 58 REVUE INTERNATIONALE DE DROIT PÉNAL 521, 523-24 (1987).

<sup>65</sup> James Lund, *The Decision to Kill: Discretionary Death Sentences Purposes, Principles and the Courts*, 2 S. AFR. J. CRIM. JUST. 189, 189 (1989).

leaves discretion in the hands of the judge to determine life and death, and then allows the judge to hide behind the law when the death sentence is imposed.<sup>66</sup> This is “an obstacle in the way of a rational decision-making process,” according to Angus and Grant.<sup>67</sup> This is, in short, a problem of transparency. A discretionary regime that forces judges to articulate aggravating factors meriting the unusual penalty of death, along with a system of automatic appellate review, would mitigate the risk of mistake, ensure the sentence is rational and legitimate, and avoid arbitrary and discriminatory results. By demolishing this “unnecessary halfway house” between mandatory and discretionary death penalties, Davis adds, “the law would allow the courts greater freedom to deal legally with conviction and penologically with sentence.”<sup>68</sup>

South Africa established a statutory mandatory death penalty in 1917, codifying common law practice. Due to criticism over the Governor-General’s frequent use of commutation, reprieve, and pardon, the doctrine of extenuating circumstances arose as a political compromise in 1935, allowing judges to carry some of the discretion placed on the executive.<sup>69</sup> In 1990, a waning apartheid regime ended the mandatory death penalty and adopted an American-style discretionary system with automatic appellate review.<sup>70</sup> The South African Constitutional Court found this discretionary regime unconstitutional in 1995.<sup>71</sup>

Prior to South Africa’s codification of the mandatory death penalty, the law had long developed exceptions for infanticide by new mothers and murders committed by those under age 16.<sup>72</sup> As codified in 1917,

<sup>66</sup> Davis, *supra* note 63, at 218.

<sup>67</sup> Laurel Angus & Evadne Grant, *Sentencing in Capital Cases in the Transvaal Provincial Division and Witwatersrand Local Division: 1987-1989*, 7 S. AFR. J. ON HUM. RTS. 50, 52 (1991); *see also* Davis, *supra* note 63, at 217.

<sup>68</sup> Davis, *supra* note 63, at 212.

<sup>69</sup> ROBERT TURRELL, *WHITE MERCY: A STUDY OF THE DEATH PENALTY IN SOUTH AFRICA* 233-37 (2004). For a historical analysis of the political compromise resulting in the creation of the doctrine of extenuating circumstances, including a detailed portrait of the pre-1935 regime, *see* Ellison Kahn, *How Did We Get Our Lopsided Law on the Imposition of the Death Penalty for Common-Law Crimes?*, 2 S. AFR. J. CRIM. JUST. 137 (1989).

<sup>70</sup> Ursula Bentele, *The False Promise of Discretionary Imposition of the Death Penalty in South Africa*, 9 S. AFR. J. ON HUM. RTS. 255, 256 (1993).

<sup>71</sup> *State v. Makwanyane & Mchunu* 1995 (3) SA 391 (CC) (S. Afr.) (finding that the death sentence violated the rights to life and human dignity due to arbitrariness and possibility of error, and that the state interest in retribution did not outweigh these factors since other alternatives, such as life imprisonment, existed.) For an analysis, *see* Ursula Bentele, *Back to an International Perspective on the Death Penalty as a Cruel Punishment: The Example of South Africa*, 73 TUL. L. REV. 251 (1998).

<sup>72</sup> Devenish, *supra* note 29, at 7-8. *See also* Angus & Grant, *supra* note 67, at 51 (“In case of murder [in pre-1917 South Africa], there was some dispute as to whether

these two exceptions,<sup>73</sup> along with the crimes of treason and rape,<sup>74</sup> merited a discretionary death sentence. After a jury would convict, Turrell writes, the judge would write a confidential report recommending whether he believed the sentence should be carried out.<sup>75</sup> The Governor-General reviewed these reports, along with one written by the Department of Justice, in his clemency deliberations.<sup>76</sup> In effect, the doctrine of extenuating circumstances delegated some of this discretion to the judge. Van Niekerk wrote later that the system of reprieve in South Africa was opaque and unaccountable: "methods of investigation are, for all practical purposes, unknown to the outside world."<sup>77</sup> In addition, executive clemency review "only contribute[d] very marginally to exclude all risk of judicial error."<sup>78</sup>

In the decade before 1935, only twenty-four percent of capital sentences were actually carried out, since executive clemency was so common.<sup>79</sup> In this period, Devenish writes, "only in theory did the mandatory death sentence for murder apply in South Africa."<sup>80</sup> After the establishment of the doctrine of extenuating circumstances in 1935,<sup>81</sup> the number of murder convictions enormously increased, doubling in the next decade; juries, hesitant to return a death sentence, found it easier to convict for murder.<sup>82</sup> Executive clemency only assumed importance in hard cases.<sup>83</sup> The doctrine of extenuating circumstances incorporated many of the grounds on which executive clemency rested; murders by new mothers, youths under eighteen, women, and political criminals usually qualified.<sup>84</sup> Though less universal, murders involving witchcraft,

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the sentence was mandatory at common law. However, there are a number of cases in which the court took the view that it was discretionary.").

<sup>73</sup> P.M.A. HUNT & J.R.L. MILTON, 2 SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE: COMMON-LAW CRIMES 377 (2d ed. 1982) (citing Criminal Procedure and Evidence Act 31 of 1917 § 338).

<sup>74</sup> Angus & Grant, *supra* note 67, at 51.

<sup>75</sup> TURRELL, *supra* note 69, at 247. The judge would include facts, defense, and grounds for mitigation, including inadmissible evidence. This system was not "standardless." Indeed, judges were often faithful to common law guidelines. But it was not transparent. *Id.*

<sup>76</sup> *Id.* at 248.

<sup>77</sup> B. v. D. van Niekerk, . . . *Hanged by the Neck Until You Are Dead: Some Thoughts on the Application of the Death Penalty in South Africa*, 86 S. AFR. L.J. 457, 460 (1969).

<sup>78</sup> *Id.* at 461.

<sup>79</sup> Devenish, *supra* note 29, at 8.

<sup>80</sup> *Id.*

<sup>81</sup> HUNT & MILTON, *supra* note 73, at 377 (citing General Law Amendment Act 46 of 1935 § 61(a)).

<sup>82</sup> TURRELL, *supra* note 69, at 233, 236.

<sup>83</sup> *Id.* at 234.

<sup>84</sup> *Id.*

provocation, intoxication, and mental disorder also were common grounds for avoiding a death sentence.<sup>85</sup> Over the course of the 1930s, emotional disturbance, insanity, accomplice liability, and murder without actual intention to kill also became common extenuating circumstances.<sup>86</sup>

The law, however, was not blind. Before the 1930s, the death penalty fell heavily on poor whites and those of Indian or mixed-race descent.<sup>87</sup> In the years before World War Two, the death sentence became an overtly racist one, inflicted on the black majority by the white state.<sup>88</sup> Extenuating circumstances “could not, and did not, even out the racist biases embedded in the system.”<sup>89</sup>

South African President F.W. de Klerk ordered a moratorium on the death penalty in 1990, one of the preconditions for entering negotiations set by the African National Congress (ANC).<sup>90</sup> The Criminal Law Amendment Act of July 1990 replaced the mandatory death penalty with a discretionary one and ensured the automatic right of appeal, compulsory judicial review where a prisoner did not appeal, and compulsory executive review where a prisoner did not apply for mercy.<sup>91</sup> The higher courts had wider discretion in imposing lesser sentences. The law replaced the doctrine of extenuating circumstances with broader-ranging mitigating and aggravating factors, to be weighed by a judge before conviction.<sup>92</sup> In *Makwanyane*, the Constitutional Court struck down this discretionary regime as unconstitutional: arbitrariness and the lack of transparency haunt every death penalty regime, discretionary or not.<sup>93</sup> These defects violated South Africa’s constitutional ban on cruel and inhuman punishment and the right to life.<sup>94</sup>

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<sup>85</sup> *Id.* at 235.

<sup>86</sup> *Id.* at 236.

<sup>87</sup> *Id.* at 236-37. Before 1930, whites were generally not hanged for murder of blacks; however, for crimes of passion or domestic murders, poor whites, as members of the “civilized” race, were treated more harshly. Blacks, because of their “violent tendencies,” were not executed for murdering other blacks nearly as often as poor whites were for murdering other whites. Turrell posits that this may also have been based on eugenics, since blacks were considered degenerates. *Id.*

<sup>88</sup> *Id.* at 231-32.

<sup>89</sup> *Id.* at 237.

<sup>90</sup> Jeremy Sarkin, *Problems and Challenges Facing South Africa’s Constitutional Court: An Evaluation of Its Decisions on Capital and Corporal Punishment*, 113 S. AFR. L.J. 71, 74 (1996).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *State v Makwanyane & Mchunu* 1995 (3) SA 391 (CC) (S. Afr.).

<sup>94</sup> S. AFR. (Interim) CONST. 1993 ch. 2, § 11(2).

While colonial Zimbabwe likely had a mandatory death sentence for murder since 1898,<sup>95</sup> the white legislature of the British colony of Southern Rhodesia codified the doctrine of extenuating circumstances in 1949,<sup>96</sup> and in 1960 in its modern form.<sup>97</sup> In addition, a discretionary death penalty also exists for infanticide, treason, rape, attempted murder, aggravated robbery, and felony murder, or where the criminal is under age sixteen.<sup>98</sup> In addition, the white government of Rhodesia relied extensively on its use for crimes of a political nature, such as sabotage, sedition, arson, and terrorism.<sup>99</sup> After independence in 1980, these laws fell into disuse but remain on the books, according to former Chief Justice Dumbutshena.<sup>100</sup>

Although the judge is only concerned with moral blameworthiness, any failed defenses at trial are relevant to finding extenuating circumstances.<sup>101</sup> “[S]uch a vital matter as extenuation . . . depend[s] on the exercise of subjective moral judgment based on rather nebulous factors.”<sup>102</sup> The doctrine of extenuating circumstances does not give judges guidance on how to weigh mitigating factors when aggravating factors also exist.<sup>103</sup> The Supreme Court requires lower courts to fully articulate

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<sup>95</sup> This was the year Zimbabwe adopted South Africa’s hybrid civil-common law. W.J. HOSTEN, ET AL., INTRODUCTION TO SOUTH AFRICAN LAW AND LEGAL THEORY 204 (1977).

<sup>96</sup> Dumbutshena, *supra* note 64, at 522 (citing Criminal Procedure and Evidence Act 52 of 1949 § 16.)

<sup>97</sup> Law and Order (Maintenance) Act of 1960 § 33(A).

<sup>98</sup> Dumbutshena, *supra* note 64, at 527-8 (citing Criminal Procedure and Evidence Act of 1949 § 314)

<sup>99</sup> Law and Order (Maintenance) Act of 1960 ch. 65, § 24.

<sup>100</sup> Dumbutshena, *supra* note 64, at 527.

<sup>101</sup> *Id.* at 528.

<sup>102</sup> Feltoe, *supra* note 63, at 61.

<sup>103</sup> In a number of cases, the Supreme Court allowed judges to use either of two similar tests to determine whether extenuating circumstances weigh against the death penalty. In *S. v. Phineas*, the court laid out the two approaches: first, to consider all those factors which reduce the moral blameworthiness of the accused and if the facts warrant, to return a finding of extenuating circumstances. *S. v. Phineas*, [1973] 1 R.L.R. 260 (Rhodesia). Then, in a separate step, to decide on sentence, and at this stage consider all aggravating features; if the aggravating features so warrant, the court may sentence the defendant to death. *Id.* The alternative approach is to combine the two stages into one, weighing mitigating against aggravating factors and, if mitigating factors are greater, to reduce the sentence. “The end result in whichever approach is adopted should, however, always be the same.” *Id.* at 263 (upholding sentence due to harmless error where it was unclear which of the two tests the judge used). As Beadle, C.J. wrote, “I have mentioned this question at some length because I think judges should make it clear which approach they are adopting, as if they confuse one approach with the other, this may in certain cases cause difficulty, though I do not think it does so in the instant case.” *Id.* at 264. These differing approaches,

the reasons for a decision on extenuation.<sup>104</sup> A virtually automatic right of appeal exists, but not automatic review: the Supreme Court can only interfere in the event of an irregularity or misdirection by the judge, or if a finding that no extenuating circumstances existed was one at which no reasonable court could have arrived.<sup>105</sup> Feltoe believes this standard is too high; although trial judge verdicts are authoritative since judges hear evidence and witness testimony in person, extenuating circumstances rest on judicial reasoning.<sup>106</sup>

The "Supreme Court should be relieved of what is an unnecessary constraint to overturning the impositions of the death penalty," Feltoe adds.<sup>107</sup> "[It] is more likely that this policy would be consistently applied if the decision-making process in all capital murder cases was more carefully structured."<sup>108</sup> He proposed a regime whereby the court would identify all aggravating factors, which must be present for imposition of the death penalty, before mitigating factors.<sup>109</sup> Aggravating factors place the crime in a special category of seriousness. Judges could refer to a comprehensive list, or even an informal checklist, of aggravating factors in making final life-and-death decisions.<sup>110</sup> Guided sentencing schemes may be one check on potentially arbitrary judicial discretion.

#### IV. TRANSPARENCY AND THE DOCTRINE OF EXTENUATING CIRCUMSTANCES IN BOTSWANA

A series of high profile death penalty cases in Botswana have brought international scrutiny to the country's capital punishment regime. On March 31, 2001, a white South African woman, Mariette Sonjaleen Bosch, was executed for murdering the wife of a man she later married. The fact that Bosch never admitted guilt before a divided tribunal contributed to a public relations disaster.<sup>111</sup> State officials dismissed the international protest as racially charged due to the fact that the defendant was white.<sup>112</sup> Observers pointed to numerous irregularities; Bosch's trial judge had shifted the burden of proof from the prosecution to her, writing in his opinion that "[t]he rule of evidence is that he who asserts a fact

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both described as valid in *Phineas* illustrate the wide level of discretion left to judges in determining extenuating circumstances. See Feltoe, *supra* note 63, at 62-63.

<sup>104</sup> S v. Mateketa, [1985] 2 Z.L.R. 248 (Zimb.), cited in Feltoe, *supra* note 63, at 62.

<sup>105</sup> Feltoe, *supra* note 63, at 64.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 65.

<sup>108</sup> *Id.* at 82.

<sup>109</sup> *Id.* at 83.

<sup>110</sup> *Id.*

<sup>111</sup> Bester Gabotlale, *Death Penalty: Five Years After Bosch, Nothing Changed in Botswana*, INTER PRESS SERVICE NEWS AGENCY, May 17, 2006, <http://ipsnews.net/africa/nota.asp?idnews=33275>.

<sup>112</sup> *Id.*

must prove it. In the instant case . . . the onus was on the accused . . .”<sup>113</sup> Three judges on appeal wrote separately to find that the trial judge acted improperly but without prejudicial error.<sup>114</sup> She immediately made an application for clemency. In late March, Bosch’s husband, her lawyer, and human rights observers tried to visit her in prison one weekend.<sup>115</sup> After they were turned away, she was quietly executed, writing in a final letter to her husband, “They did not want me to see you.”<sup>116</sup> Bosch’s family and lawyer learned of her execution in the Monday lunch news bulletin.<sup>117</sup> The President never responded to her application for mercy, and Bosch was executed while she was petitioning the African Commission on Human and Peoples’ Rights, an advisory body of the African Union.<sup>118</sup>

Also on death row was another South African, Lehlohonolo Kobedi. While Bosch was executed shortly after her appeal, Kobedi lingered for a decade. Convicted of a murder in 1993, Kobedi was sentenced to death in 1998 and not executed until 2003.<sup>119</sup> Kobedi was represented by four sets of lawyers and twice appealed his case to the Court of Appeal challenging irregularities in his trial. Represented by inexperienced *pro deo* counsel and lacking interpreters in his native language of Sesotho,<sup>120</sup> Kobedi challenged two of the most serious problems with the operation of Botswana’s death penalty. First, he argued the doctrine of extenuating circumstances was too restrictive since it barred consideration of mitigating factors *before* conviction, and second, that the long period of time he spent on death row made a constitutional sentence unconstitutional.<sup>121</sup> This is the so-called “death row phenomenon,” the theory that poor prison conditions, excessive delay, and restrictions on health or spiritual care would make a routine case one of cruel, inhuman, or degrading punishment.<sup>122</sup> The Court of Appeal refused to reduce Kobedi’s sentence,

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<sup>113</sup> Bosch v. State, [2001] BWCA 4, 11 (Bots. Ct. App.).

<sup>114</sup> *Id.* at 20, 110.

<sup>115</sup> Gabotlale, *supra* note 111; Press Release, Ditshwanelo Botswana Ctr. for Human Rights, Execution of Mariette Sonjaleen Bosch (April 2, 2001), <http://www.ditshwanelo.org.bw/april2pres.html>.

<sup>116</sup> Gabotlale, *supra* note 111.

<sup>117</sup> *Id.*

<sup>118</sup> Tim Curry, *Cutting the Hangman’s Noose: African Initiatives to Abolish the Death Penalty*, 13 HUM. RTS. BRIEF 40, 43 (2006).

<sup>119</sup> *SA Man Executed in Botswana*, S. AFR. PRESS ASS’N (SAPA), July, 19 2003, [http://www.news24.com/News24/AnanziArticle/0,6935,2-7-1442\\_1389683,00.html](http://www.news24.com/News24/AnanziArticle/0,6935,2-7-1442_1389683,00.html).

<sup>120</sup> Press Release, Ditshwanelo Botswana Ctr. for Human Rights, Letlhlohonolo [sic] Kobedi Executed on Friday, 18 July 2003 (July 18, 2003), <http://www.ditshwanelo.org.bw/july18pres.html> (last visited March 23, 2008) [hereinafter Press Release, Letlhlohonolo [sic] Kobedi Executed].

<sup>121</sup> See Kobedi v. State, [2003] BWCA 22 at 3 (Bots. Ct. App.).

<sup>122</sup> For a theoretical explanation of the so-called death penalty phenomenon, see also Kealeboga N. Bojosi, *The Death Row Phenomenon and the Prohibition Against*



though it indicated he might have a strong case before the clemency committee.<sup>123</sup> Since the workings of the clemency committee are secret, “[w]e may never know whether the Clemency Committee considered the Court’s recommendation, or the advocacy of Mr. Kobedi’s lawyers,” the Ditshwanelo Botswana Centre for Human Rights admitted.<sup>124</sup>

This section will consider three major criticisms of Botswana’s sentencing process: first, the doctrine of extenuating circumstances is too inflexible to properly consider all relevant factors; second, the doctrine shifts the burden to the defendant, placing the onus on often inexperienced defense attorneys; and third, the inconsistencies of the doctrine are not saved by secret executive clemency proceedings. A large, sparsely populated country, Botswana is one of the most economically successful and well-governed countries on the African continent. Though limited by the scourge of HIV/AIDS, Botswana retains a strong democratic tradition and independent judiciary.<sup>125</sup> This lack of transparency is partially a product of Botswana’s comparatively low crime rate and exceptionally unusual use of the death penalty as punishment.<sup>126</sup> There are few opportunities for challenge, and the incentive to create firm guidelines for judges is minimal.

Botswana’s legal system is an amalgamation of two distinct legal traditions: a European-derived hybrid regime of dual Roman-Dutch and English common law ancestry, and an African customary law derived from that traditionally administered by tribal chiefs.<sup>127</sup> While an estimated eighty-five percent of criminal cases are tried in the customary courts, serious crimes such as murder are tried exclusively in the European-derived law courts.<sup>128</sup> The British applied the criminal law in force at the Cape of Good Hope to the recently-created Bechuanaland Protectorate in 1891.<sup>129</sup> The Cape did not then have a penal code, so Botswana

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*Torture and Cruel, Inhuman or Degrading Treatment*, 4 AFR. HUM. RTS. L.J. 303 (2004) (describing how conditions on death row and delay can make an otherwise constitutional death sentence into impermissible cruel and unusual punishment).

<sup>123</sup> *Kobedi*, [2003] BWCA at 62.

<sup>124</sup> Press Release, Letlhlohonolo [sic] Kobedi Executed, *supra* note 120.

<sup>125</sup> DENBOW & THEBE, *supra* note 25 at 1-2, 26.

<sup>126</sup> “Despite the existence of the death penalty, it is not used very often in Botswana.” Alice Mogwe, *Will Basic Human Rights and Individual Freedoms Continue to be Protected, Promoted and Respected?* in BOTSWANA IN THE 21ST CENTURY 49, 60 (Sue Brothers, et al. eds., 1994). For Botswana’s crime rate, see *infra* note 229 and accompanying text.

<sup>127</sup> See Bojosi Otlhogile, *Criminal Justice and the Problems of a Dual Legal System in Botswana*, 4 CRIM. L.F. 521, 521-22 (1993) (describing the interaction between received European-derived law and indigenous customary law).

<sup>128</sup> MAXWELL & MOGWE, *supra* note 16, at 20.

<sup>129</sup> Only those laws, both statutory and common, in force on June 10, 1891, are applicable to Bechuanaland. See Nsereko, *supra* note 10, at 236.

received a largely traditional body of common law, with inherent problems of uncertainty and unpredictability.<sup>130</sup>

In 1964, shortly before independence, Botswana promulgated its first statutory penal code.<sup>131</sup> This penal code, similar to the ones enacted in British East Africa, is largely derived from English common law and not from South African law.<sup>132</sup> Where the law is unclear, English precedent rather than South African precedent governs, a provision installed by British authorities to protect Botswana from the influence of the apartheid regime. However, since the majority of Botswana's legal professionals were trained in South Africa, and since Roman-Dutch common law governs much of the legal sphere outside of criminal law, Botswana judges cite and apply South African legal authorities.<sup>133</sup> The doctrine of extenuating circumstances survived the transplantation of English criminal law. As the Botswana Court of Appeal has written, "on the question of extenuating circumstances the decisions of the courts of South Africa have . . . [strong] persuasive force because the concept of 'extenuating circumstances' in sentences for murder as introduced into the Penal Code was plainly derived . . . from and based on legislation in South Africa."<sup>134</sup>

The most important courts in Botswana are the two High Courts, which have original jurisdiction over capital cases and other serious civil and criminal legal matters, and appellate jurisdiction from the magistrates' courts over less serious legal disputes.<sup>135</sup> The Court of Appeal reviews cases from the two High Courts.<sup>136</sup> While the Court of Appeal generally overturns High Court criminal sentences only if they are "so manifestly disproportionate to the offence committed that no reasonable trial court would have imposed it . . .,"<sup>137</sup> in practice, the Court of Appeal's review of death penalty decisions is much more searching.<sup>138</sup> An accused can appeal as of right, but the state can only appeal questions of law, not

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<sup>130</sup> *Id.*

<sup>131</sup> See I.G. Brewer, *Sources of the Criminal Law of Botswana*, 18 J. AFR. L. 24, 28 (1974).

<sup>132</sup> *Id.*

<sup>133</sup> See Nsereko, *supra* note 10, at 237 ("No wonder, then, that decisions of the South African courts have had such an impact on Botswana's jurisprudence in matters relating to the death penalty.").

<sup>134</sup> Gofhamodimo v. State, [1984] B.L.R. 119, 41 (Bots. Ct. App.).

<sup>135</sup> Quansah, *supra* note 31, at 91.

<sup>136</sup> *Id.* at 82.

<sup>137</sup> Mudangule v. State, [1986] B.L.R. 265, 3 (Bots. Ct. App.), *quoted in* Nsereko, *supra* note 10 at 239 n.7.

<sup>138</sup> "[M]any convicts sentenced to death by the High Court have had their sentences reduced to custodial ones by the Court of Appeal." Nsereko, *supra* note 10, at 266.

fact.<sup>139</sup> As a result, if the High Court decides not to impose the death penalty for a crime, the state cannot appeal.<sup>140</sup>

The death penalty existed at Tswana customary law, particularly for conspiracy against a chief, and executions were often secret and sudden without trial.<sup>141</sup> With the establishment of the protectorate, this right passed from the chiefs to the state. As was the case during the days of the protectorate up to the present time, authorized by Botswana Penal Code §26, “any person sentenced to death was ordered to be hanged by the neck until dead.”<sup>142</sup> Under the Penal Code, the death penalty may be imposed for murder, treason, and piracy with intent to murder,<sup>143</sup> although the latter two have never been tried.<sup>144</sup> The death penalty is mandatory for murder and treason except where extenuating circumstances exist. According to §203(2) of the Penal Code, “Where a Court in convicting a person of murder is of the opinion that there are extenuating circumstances, the Court may impose any sentence other than death.”<sup>145</sup> Despite the text of the Code, it is settled law that the sentencing court *must* impose a sentence other than death in the presence of extenuating circumstances.<sup>146</sup>

Courts have recognized a number of extenuating circumstances:

*Belief in witchcraft:* Belief that the victim practiced witchcraft on the accused or members of his or her family may be considered an extenuating circumstance.<sup>147</sup> In Botswana, a witch, or *moloi*, was not human and not fit to live; thus a perceived victim may seek to take the law into her own hands.<sup>148</sup> The Court of Appeal explained the rationale for the witchcraft exception: “It is the state of the accused’s mind which is relevant and the fact that the accused’s mind may be affected by irrational considerations . . . cannot operate to disqualify an otherwise extenuating circumstance from being put into balance in favour of the accused.”<sup>149</sup>

*Provocation:* Disproportionate provocation, insufficient to reduce a crime to manslaughter, may be an extenuating circumstance. As long as

<sup>139</sup> Nsereko, *supra* note 10, at 238.

<sup>140</sup> *Id.*

<sup>141</sup> I. SCHAPER, A HANDBOOK OF TSWANA LAW AND CUSTOM 260-61 (1970).

<sup>142</sup> Nsereko, *supra* note 10, at 241.

<sup>143</sup> Bots. Penal Code §34(1) (treason); §63(1) (piracy with intent to murder), *quoted in* Nsereko, *supra* note 10 at 241.

<sup>144</sup> Nsereko, *supra* note 10 at 267 (“To date the death penalty has been imposed in murder cases only”). Two people, both South Africans, have been tried for treason, but they were never convicted. *Id.*

<sup>145</sup> *See* Bots. Penal Code § 203(2).

<sup>146</sup> Nsereko, *supra* note 10, at 246.

<sup>147</sup> *S. v. Mphapho*, 1980 B.L.R. 232 (Bots. High Ct.).

<sup>148</sup> Nsereko, *supra* note 10, at 247.

<sup>149</sup> *S. v. Nkani*, [1979] B.L.R. 195 (Bots. Ct. App.).

the provocation influenced the accused's state of mind at the moment the offense was committed, it is relevant to weighing her moral guilt.<sup>150</sup>

*Absence of actual intent to kill:* Malice aforethought, whether actual or constructive, is required for a murder conviction.<sup>151</sup> Therefore, the absence of *actual* intent to kill may be an extenuating circumstance. This is not an automatic result; for felony murder, constructive intent to kill—that is, intent to commit the crime that resulted in death—may be sufficient, as was the case with the “Motokwe three” in 1995.<sup>152</sup>

*Intoxication:* Intoxication is generally not a defense unless the intoxication is so severe that the accused could not control her acts or appreciate their wrongness. Less serious intoxication, however, may be an extenuating circumstance, usually if coupled with some other factor.<sup>153</sup>

*Youth:* The youth and immaturity of the accused may constitute an extenuating circumstance.<sup>154</sup> “Courts are loath to . . . sentence young offenders to death, which leaves no opportunity to reform.”<sup>155</sup> Youthfulness may require another factor such as poor upbringing, emotional instability, provocation, or intoxication, and may be outweighed by aggravating factors.

*Other factors:* The scope of extenuating circumstances is broad and searching: “no factor, not too remote or too faintly or indirectly related to the commission of a crime, which bears upon the accused's moral blameworthiness in committing it, can be ruled out from consideration.”<sup>156</sup> Thus, judges have found economic plight, state of health, abuse or mistreatment, and other factors to be extenuating circumstances. Indeed, in the case of Maauwe and Motswetla, the Court found sociological factors such as the plight of the marginalized indigenous San people to be relevant.<sup>157</sup>

As Nsereko explains, in determining whether extenuating circumstances exist, the court must determine whether any factors existed that might have influenced the accused's state of mind *at the time of his*

<sup>150</sup> Lowani v. State, [1984] BWCA 10 (Bots. Ct. App.) (where deceased called accused a “Kalanga,” a member of a minority tribe, extenuating circumstances found). See also Jonathan v. State, Crim. App. No. 36 of 1984 (Bots. Ct. App.) (where a female taunted defendant with being a child, a weakling, and a bore, extenuating circumstances found).

<sup>151</sup> Bots. Penal Code § 202.

<sup>152</sup> Nsereko, *supra* note 10, at 256. See also *S. v Sebeko* 1968 1 SA 496 (AD) at 497 (S. Afr.); *S. v de Bruyn en 'n Ander* 1968 4 SA 498 (AD) at 512 (S. Afr.). See also Kelaletswe and Others v. State, [1995] B.L.R. 100 (Bots. Ct. App.).

<sup>153</sup> Nsereko, *supra* note 10, at 258. *Chisoma v. State*, Crim. App. No. 48 of 1984 (Bots. Ct. App.) (defendant had been drinking prior to being provoked).

<sup>154</sup> See Lowani v. State, [1984] BWCA 10 (Bots. Ct. App.).

<sup>155</sup> Nsereko, *supra* note 10, at 259.

<sup>156</sup> *Rex v Fundakubi* 1948 3 SA 810 (AD) at 818 (S. Afr.). This case is often cited in Botswana opinions, such as *Losang v. State*, [1985] B.L.R. 281 (Bots. Ct. App.).

<sup>157</sup> MAXWELL & MOGWE, *supra* note 16, at 66-67.

offense.<sup>158</sup> This influence on the defendant's mind must make the defendant's actions less morally reprehensible. According to the Penal Code, in weighing extenuating circumstances the court must consider the "behavior of an ordinary person of the class of the community to which the convicted person belongs."<sup>159</sup> This indicates a subjective approach, judging behavior according to one's own peculiar circumstances.<sup>160</sup> A judge should consider the totality of the circumstances, mitigating with aggravating factors, excluding prior convictions.<sup>161</sup>

A. *The Doctrine of Extenuating Circumstances Fails to Adequately Guide Judicial Discretion in the Sentencing Process*

Death row defendant Lehlohonolo Kobedi raised a novel challenge on appeal, namely that the lower court was precluded from considering mitigating factors at trial, which could include a broader range of factors than the doctrine of extenuating circumstances. Specifically, in Kobedi's case, those factors would have included evidence of his close family life and his good academic record. The Court dismissed this suggestion: "there is nothing to preclude any mitigating factor being put before the court at the stage when extenuating circumstances are being considered."<sup>162</sup> Extenuating circumstances, however, are limited to those factors which could have impacted the moral blameworthiness of the defendant *at the time he committed the offense*.<sup>163</sup> Indeed, important public policy reasons may exist for not putting a defendant to death for reasons unrelated to his crime. Some of these reasons may be if a defendant apologizes or feels remorse, if she undergoes religious conversion, if she has significant familial obligations, or if she becomes seriously ill or requires medical assistance while in prison.<sup>164</sup> Indeed, even a defendant's status as a first-time offender is a mitigating factor, not an extenuating circumstance.<sup>165</sup>

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<sup>158</sup> Nsereko, *supra* note 10, at 262.

<sup>159</sup> Bots. Penal Code § 206(3).

<sup>160</sup> Nsereko, *supra* note 10, at 263 ("The question to ask is not whether the belief that influenced the accused to act the way she did was reasonable. Nor whether what he did was reasonable. It is, rather, whether the accused genuinely and honestly held the belief and whether it did in fact influence him to commit the offense.").

<sup>161</sup> *Losang*, [1985] B.L.R. at 2-3 ("In considering the question as to whether there are or are not extenuating circumstances [the judge] took into account a serious previous conviction of the appellant. This he can only do . . . after a finding that extenuating circumstances exist, in determining the appropriate punishment.").

<sup>162</sup> *Kobedi v State*, [2003] BWCA 22, 43 (Bots. Ct. App.).

<sup>163</sup> See *Masina v. State*, [1990] ZASCA 90 at 28 (S. Afr. Sup. Ct. App.).

<sup>164</sup> Nsereko, *supra* note 10, at 260.

<sup>165</sup> A judge may not consider previous convictions or the lack thereof as an extenuating circumstance. She may only consider these factors after she finds extenuating circumstances, when deciding on another appropriate sentence. Nsereko, *supra* note 10, at 264.

These factors are outside the scope of the doctrine and are generally not grounds on which a judge can reduce a sentence of death.

The fate of a defendant may rest on the personality of an individual judge. Judges have personal and strongly-held views on the death penalty, but little empirical evidence exists in Botswana to show whether these views are correlated to death penalty determinations. However, empirical evidence from South Africa is voluminous. "Judicial attitudes towards the death penalty play a material role," Angus and Grant conclude from their research on judicial determinations of capital guilt in the Transvaal region.<sup>166</sup> One example from Botswana will suffice: famed South African human rights lawyer, the Greek-born George Bizos, was a judge of the Botswana Court of Appeal from 1985 to 1993.<sup>167</sup> Bizos presided over only a handful of capital appeals in his time on the bench, but all of them avoided an eventual death sentence.<sup>168</sup> Having served on the *Makwanyane* legal team, he remains one of the foremost anti-death penalty advocates in modern Botswana, recently demanding justice for the indigenous San defendants Maauwe and Motswetla.<sup>169</sup>

#### B. *The Doctrine Improperly Shifts the Burden to the Defendant*

The burden is on the accused to prove the existence of extenuating circumstances beyond a fair preponderance of the evidence, either by introducing new evidence or by presenting evidence rejected at trial in a new light.<sup>170</sup> In *Sibanda v. State*, the judge noted that "the appellant's mental state during the attack on the deceased was left very much in the dark" because the defendant's attorney failed to make a proper showing of extenuating circumstances.<sup>171</sup> "[W]e know virtually nothing about appellant's personality, his motive, his mentality, his past history, experience and upbringing."<sup>172</sup> The fault, however, was on the defendant: "The onus was on the Defence to provide the trial court with evidence from

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<sup>166</sup> Angus and Grant, *supra* note 67, at 69 (finding judicial determinations on the death penalty to vary considerably among individual judges in the Transvaal Provincial Division and the Witwatersrand Local Division). See also Christina Murray, Julia Sloth-Nielsen & Colin Tredoux, *The Death Penalty in the Cape Provincial Division: 1986-1988*, 5 S. AFR. J. ON HUM. RTS. 154 (1989) (confirming similar findings in Cape Province).

<sup>167</sup> Bizos, famous for his anti-apartheid activities, has represented clients like South African President Nelson Mandela and Zimbabwean opposition leader Morgan Tsvangirai.

<sup>168</sup> See *Mhlanga v. State*, [1986] BWCA 23 (Bots. Ct. App.) (reducing sentence for eighteen-year-old defendant to ten years); *Molefi v. State*, [1986] B.L.R. 452 (Bots. Ct. App.) (reversing conviction of murder in favor of manslaughter).

<sup>169</sup> George Bizos, *Preface One: The Death Penalty Should Be Abolished*, in MAXWELL & MOGWE, *supra* note 16, at 7, 7-8.

<sup>170</sup> Nsereko, *supra* note 10, at 264.

<sup>171</sup> *Sibanda v. State*, [1984] BWCA 13 at 6 (Bots. Ct. App.).

<sup>172</sup> *Id.*

which extenuating circumstances might be inferred . . . . Appellant did not do so and his motivation remains unexplained.”<sup>173</sup> As a result of the Court’s decision, Zimbabwean national Lovemore Sibanda was hanged on January 9, 1984.<sup>174</sup> However, the case of *Molale v. State* may soften the rule. The *Molale* court held that if the defendant does not show extenuating circumstances, the judge may find them on his own.<sup>175</sup> “[T]he law has not put any onus on an accused to prove even on balance of probabilities that extenuating circumstances exist in his case.”<sup>176</sup> Rather, the trial court has the responsibility and duty to examine the evidence after conviction, regardless of any presentation by the defendant. The Court appeared to find extenuating circumstances not brought forth by counsel.<sup>177</sup> If followed, this decision may lighten the defendant’s burden. It does not solve the fundamental transparency problem, as it leaves even more discretion to the trial judge alone, opaque and unreviewable.

Passing the burden to the defendant makes the defendant’s choice of counsel especially relevant. The Constitution of Botswana guarantees the right of a defendant “to defend himself before the court in person or, at his own expense, by a legal representative of his own choice.”<sup>178</sup> While the state generally does not provide representation to indigent defendants, as attorney Duma Boko explains, “[i]t has now become standard practice to assign counsel, at nominal cost to the state, to an accused facing murder charges.”<sup>179</sup> But, as Boko notes, because the state pays essentially nominal fees, “the quality of such representation mostly leaves a lot to be desired.”<sup>180</sup> Indeed, a *pro deo* attorney receives, in total, one-tenth of the average amount of an attorney in private practice for a single court

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<sup>173</sup> *Id.* at 7.

<sup>174</sup> FIDH AND DITSHWANELO, *supra* note 7, at 34.

<sup>175</sup> *Molale v. State*, [1995] B.L.R. 146 at 4 (Bots. Ct. App.).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> BOTS. CONST., ch. II, § 10(d). The provision is sweeping, and guarantees innocence until proven guilty, notification of the offense, adequate time for preparing a defense, right to confront witnesses and present evidence, and the right to an interpreter. *Id.* § 10.

<sup>179</sup> Duma Gideon Boko, *Fair Trial and the Customary Courts in Botswana: Questions on Legal Representation*, 11 CRIM. L.F. 445, 454 (2000). Although “standard practice,” this requirement of affording capital defendants a lawyer is not enshrined in the Constitution. *Id.*

<sup>180</sup> *Id.* As Boko notes, the South African Constitutional Court discussed the pitfalls of *pro deo* counsel in the *Makwanyane* case: “Pro Deo Counsel are paid only a nominal fee for the defence, and generally lack the financial resources and the infrastructural support to undertake the necessary investigations and research, to employ expert witnesses to give advice, including advice on matters relevant to sentence, to assemble witnesses, to bargain with the prosecution, and generally to conduct an effective defence.” *Id.* at 454 n.40.

attendance.<sup>181</sup> The state also only pays these fees after the conclusion of a case.<sup>182</sup> Devenish, writing in the South African context, notes that *pro deo* counsel and the frequent use of interpreters aggravate the possibility of judicial error in a trial.<sup>183</sup> In fact, the South African Constitutional Court in *Makwanyane* cited the shortcomings of *pro deo* counsel in striking down South Africa's death penalty.<sup>184</sup>

In a number of cases, defendants have challenged their sentences based on ineffective legal representation. For the indigenous San defendants Maauwe and Motswetla, acquitted after years on death row, the disastrous performance of defense counsel precipitated Ditshwanelo's intervention in the case, the first NGO to receive *locus standi* in a criminal proceeding.<sup>185</sup> Maauwe and Motswetla's *pro deo* attorneys did not properly prepare for or participate in courtroom proceedings.<sup>186</sup> Had the attorneys read their clients' files, they would have known the defendants' confessions were recorded in Kalanga, a language neither defendant understood.<sup>187</sup> The attorneys did not challenge the possibly coerced confession or other questionable evidence at trial.<sup>188</sup> Indeed, affidavits from prison officials show that the attorneys never visited the defendants a single time.<sup>189</sup> Like attorneys, the Constitution guarantees the presence of interpreters in all court proceedings.<sup>190</sup>

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<sup>181</sup> FIDH AND DITSHWANELO, *supra* note 7, at 21.

<sup>182</sup> JO OLIVIER, *KNOW YOUR LAW: A GUIDE TO CONDUCTING DEATH PENALTY CASES* 1 (Ditshwanelo, 2005).

<sup>183</sup> Devenish, *supra* note 29, at 18.

<sup>184</sup> *State v Makwanyane & Mchunu* 1995 (3) SA 391 (CC) ¶ 50 (S. Afr.) (“[T]here are limits to the available financial and human resources . . . which will continue to place poor accused at a significant disadvantage in defending themselves in capital cases.”).

<sup>185</sup> Ditshwanelo, *Death Penalty Project Progress Report - 1999*, <http://www.ditshwanelo.org.bw/images/Death%20Penalty%20Project%201999%20-%20full%20report.pdf> (last visited March 27, 2008).

<sup>186</sup> MAXWELL & MOGWE, *supra* note 16, at 63-65.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> BOTS. CONST., ch. II, § 10(2)(f). In *Mmesetse v. State*, the Court described the presence of interpreters as imperative to a constitutionally fair trial: “In order to give content to the right of an accused person in terms of Section 10(2)(f) of the Constitution to be assisted by an interpreter if he cannot understand the language in which the trial is being conducted, there is an obligation on the presiding judicial officer to apply his mind and to satisfy himself that the interpreter provided for the accused’s assistance possesses the necessary competence.” MAXWELL & MOGWE, *supra* note 16, at 64, quoting *Mmesetse & Moloi v. State*, Court of Appeal Criminal Appeal 15/98 (unreported). In the case of Maauwe and Motswetla, the two indigenous San men acquitted after years on death row, the Court found that the confession statement supposedly verified by the defendants to have been written in iKalanga, a language neither of the two men spoke. Authorities made no attempt to



The burden of proving extenuating circumstances thus falls on the party least able to bear that burden. In *Kobedi v. State*, the defendant challenged his death sentence on the grounds of ineffective *pro deo* representation. In a press release, Ditshwanelo expressed concern that a lawyer unfamiliar with trying death penalty cases represented Kobedi at his original hearing, failing to raise important legal and factual issues.<sup>191</sup> The Court was not persuaded: "It is not for this Court to criticise the Botswana *pro deo* system," as the "country has a large number of competent and skilled legal practitioners" who adequately represent most indigent capital defendants.<sup>192</sup> Kobedi's lawyer, the Court found, adequately represented him, finding that the cross-examination of witnesses to be "searching and vigorous. The appellant . . . was well led and the submissions to the trial court were full and detailed."<sup>193</sup> However, criminal cases are costly and time-consuming to prepare and earn little; *pro deo* lawyers often only receive briefs shortly before the trial date.<sup>194</sup> This explains the reluctance of senior attorneys to take *pro deo* cases even when designated by a court to do so. "The result is that most *pro deo* cases are handled by inexperienced lawyers who lack the skills, resources, and commitment to handle such serious matters [affecting] the rights of the accused," one NGO network reported.<sup>195</sup> A discretionary death sentence would force the prosecutor to prove both guilt and sentence beyond a reasonable doubt without shifting the burden to the defendant. To help fill the void in legal representation, Ditshwanelo published a booklet entitled "A Guide to Conducting Death Penalty Cases" in 2005, the first specific guide for *pro deo* capital counsel in Botswana.<sup>196</sup>

### C. *Secrecy in the Death Penalty Appeals Process Aggravates the Lack of Transparency in Judicial Sentencing*

After upholding his capital sentence, the Botswana Court of Appeal accepted Kobedi's request that execution be postponed until the Advisory Committee on the Prerogative of Mercy, the body that advises the president on pardoning and commuting death sentences, could hear an appeal. The Court "shift[ed] moral responsibility for Mr. Kobedi's life to the Clemency Committee and the President," wrote the Ditshwanelo

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translate it into their Sesarwa dialect of Secherechere, and court officials did not question whether the defendants understood the confession statement even though the defendants stated they needed the assistance of a Sesarwa interpreter. MAXWELL & MOGWE, *supra* note 16, at 63-65.

<sup>191</sup> Press Release, Letlhlohonolo [sic] Kobedi Executed, *supra* note 120.

<sup>192</sup> *Kobedi v. State*, [2003] BWCA 22 at 42 (Bots. Ct. App.).

<sup>193</sup> The lawyer only represented Kobedi for five months out of the ten years since Kobedi committed the crime. *Id.*

<sup>194</sup> Olivier, *supra* note 182, at 1.

<sup>195</sup> FIDH AND DITSHWANELO, *supra* note 7, at 21.

<sup>196</sup> Olivier, *supra* note 182, at 7.

Botswana Centre for Human Rights.<sup>197</sup> According to Section 53 of the Botswana Constitution, the president has full discretion to substitute, reduce, or lift a criminal sentence, including the right to reduce a death sentence to life imprisonment.<sup>198</sup> Section 54 provides for an Advisory Committee on the Prerogative of Mercy, consisting of the Attorney General and a Cabinet Minister and medical practitioner to be appointed by the president.<sup>199</sup> This Committee, the Constitution states, “may regulate its own procedure.”<sup>200</sup>

The minimal procedures for the Committee are outlined in Sec. 55 of the Constitution: “Where any person has been sentenced to death . . . the President shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case . . . to be considered at a meeting of the Advisory Committee on the Prerogative of Mercy.”<sup>201</sup> The Committee’s proceedings are secret. The little available evidence indicates that the president invokes the power to commute or pardon a death sentence extremely rarely, if ever.<sup>202</sup> This is understandable: “to overinvoke this power might give rise to accusations of executive interference in the affairs of the judiciary.”<sup>203</sup> Furthermore, “[t]he president is not . . . obliged to follow the Committee’s advice,” Fombad explains.<sup>204</sup> But should the president decline, he personally must sign the death warrant ordering the execution. “The exercise of the prerogative of mercy constitutes a serious interference with the judicial process, and is exercised only for good cause,” Fombad adds.<sup>205</sup> The president will likely intervene in “only the most exceptional and unusual situation” to reverse a judicial determination favoring the death sentence.<sup>206</sup>

The lack of transparency in the Clemency Committee’s operations directly impacts the way judges hand down sentences. This is precisely what happened in Kobedi’s case. The Court of Appeal refused to reopen Kobedi’s trial when Kobedi produced expert medical opinion showing

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<sup>197</sup> Press Release, Letlhlohonolo [sic] Kobedi Executed, *supra* note 120.

<sup>198</sup> BOTS. CONST. § 53.

<sup>199</sup> *Id.* § 54.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* § 55.

<sup>202</sup> MAXWELL & MOGWE, *supra* note 16, at 105 (“[I]t is not clear whether a President of Botswana has ever exercised his clemency power in a death penalty case.”). According to Prof. Nsereko, the president commuted three death sentences in the 1980s. Nsereko, *supra* note 10, at 266. According to attorney Kgafela Kgafela, there has only been one case of clemency, and this was “many years ago.” SOUTHERN AFRICAN LEGAL ASSISTANCE NETWORK, SOUTHERN AFRICAN REGIONAL DEATH PENALTY WORKSHOP REPORT: “DEATH TO DEATH PENALTY” (Nov. 16, 2005).

<sup>203</sup> Nsereko, *supra* note 10, at 266-67.

<sup>204</sup> Fombad, *supra* note 9, at 331.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

that the deceased could not have been killed by his pistol, and it refused to commute his sentence after the defendant had spent years on death row.<sup>207</sup> Instead, the Court shifted its responsibility. "The execution of the sentence of death is stayed pending the appellant's full exercise of his rights to a petition for clemency to the State President," the Court held, noting that the Court's own decision as well as the trial judge's report should be given to the President. "For the assistance of the Advisory Committee, the Court also respectfully draws the attention of the Committee to the submissions made on behalf of the appellant to this Court as to his state of physical and mental health and in regard to" the five-year period the defendant spent on death row.<sup>208</sup>

The order staying Kobedi's execution until he could apply for clemency was wholly unnecessary. According to Nsereko, people sentenced to death in Botswana need not apply for pardon or commutation; "The Constitution obligates the president to consider exercising his powers of prerogative of mercy in respect of all convicts who have been sentenced to death."<sup>209</sup> The shadowy workings of the Committee allowed the Court to avoid passing judgment on the more troublesome aspects of Kobedi's case. As Bojosi writes, the Court found that the defendant had not suffered unconstitutional delay while languishing on death row because the delay was a result of the defendant's own actions. The Court ignored the sixteen months the state took to file affidavits and the nine months the state wasted before appointing counsel for the defendant.<sup>210</sup> The "prisoner's counsel made errors which proved fatal to the prisoner's cause. He failed to adduce evidence of the conditions on death row that the defendant was subjected to . . . [and] evidence of the prisoner's special circumstances, like his mental and physical health."<sup>211</sup>

Human rights observers have long criticized the Clemency Committee's lack of transparency. "The Clemency Committee regulates its own procedure and its regulations are not available to the public, thus preventing not only the lawyer of the prisoner but also the population from knowing the criteria and legal basis of the recommendations made by the Committee," one NGO wrote in a critical report.<sup>212</sup> To be meaningful, clemency procedures should be clearly defined and rigorously fol-

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<sup>207</sup> See *Kobedi v. State*, [2003] BWCA 22, 46-47 (Bots. Ct. App.).

<sup>208</sup> *Id.* at 63.

<sup>209</sup> Nsereko, *supra* note 108, at 266.

<sup>210</sup> Kealeboga Bojosi, *The Death Row Phenomenon Comes to Botswana: Lehlohonolo Bernard Kobedi v. The State*, 38 COMP. & INT'L L.J. S. AFR. 304, 312 (2005).

<sup>211</sup> *Id.*

<sup>212</sup> FIDH AND DITSHWANELO, *supra* note 7, at 26. "Ideally, lawyers should be able to make oral submissions before the Advisory Committee on the Prerogative of Mercy in order to draw attention to the crucial aspects of a condemned prisoner's clemency petition." MAXWELL & MOGWE, *supra* note 16, at 106.

lowed in every case. Ditshwanelo's guide for *pro deo* lawyers encourages lawyers to represent the client during clemency proceedings and even seek a stay of execution after clemency has been denied.<sup>213</sup> The High Court granted a request to review the case of Maauwe and Motswetla, the two indigenous San defendants eventually acquitted of murder, even after the president signed their death warrants.<sup>214</sup>

Finally, the opaque nature of clemency proceedings and the rapid, secretive way executions take place make it difficult for defendants to even have a final chance for review before the African Commission on Human and Peoples' Rights, an advisory body of the African Union.<sup>215</sup> The state does not notify family members, lawyers, or human rights monitoring organizations are not notified of pending executions.<sup>216</sup> This secrecy stymies the one avenue of appeal remaining. Lawyers for Mariette Bosch argued before the Commission that failing to give reasonable notice to her family and attorneys prior to her execution constituted a violation of the African Charter. The Commission did not address this point, but noted the criminal justice system "must have a human face in matters of execution,"<sup>217</sup> including the right to organize her affairs, to visit with her most intimate family members, to receive spiritual advice, and to have a proper burial.

## V. CONCLUSION

In 2007, the High Court of Malawi declared the mandatory death penalty unconstitutional and ordered the resentencing of all prisoners on death row with the death penalty as a possible, but not an automatic, option.<sup>218</sup> The Court relied heavily on the South African *Makwanyane* decision and on a long line of Caribbean jurisprudence in determining that the automatic death sentence<sup>219</sup> conflicted with the constitutional

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<sup>213</sup> Olivier, *supra* note 182, at 7.

<sup>214</sup> Curry, *supra* note 118, at 43.

<sup>215</sup> For an overview of the structure and scope of the African Commission, see EVELYN A. ANKUMAH, *THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: PRACTICE AND PROCEDURES* 13 (1996). The secrecy of executions and burial practices of death row inmates in Botswana is documented elsewhere. FIDH AND DITSHWANELO, *supra* note 7, at 27; MAXWELL & MOGWE, *supra* note 16, at 106-07.

<sup>216</sup> The mother of Oteng Modisane Ping, executed on April 1, 2006, was denied access to her son the day before his execution; she was told to return the following week after he had already been hanged. MAXWELL & MOGWE, *supra* note 16, at 106-07.

<sup>217</sup> *Interights (on Behalf of Bosch) v. Botswana*, Comm. No. 240/2001 2003 AHRLR 55 (ACHPR 2003).

<sup>218</sup> *Kafantayeni v. Attorney Gen.*, [2007] MWHC 1 (Malawi High Ct.); Frank Phiri, *Malawi: High Court Nullifies Mandatory Death Penalty Rule*, INTERPRESS SERVICE/GLOBAL INFO. NETWORK (IPS/GIN), June 20, 2007.

<sup>219</sup> *Kafantayeni*, [2007] MWHC 1 at 5-6 (Malawi Penal Code § 210, which prohibits courts from considering individual circumstances of the offense or the offender).

ban on cruel, inhuman, and degrading punishment.<sup>220</sup> Since guilt and sentence are determined simultaneously, higher courts are powerless to reduce the sentence of a guilty defendant, violating the right to fair trial<sup>221</sup> and the right of access to courts.<sup>222</sup> Two years later, the Supreme Court of Uganda struck down the mandatory death penalty for murder.<sup>223</sup> The Court ordered the resentencing of all recent prisoners with the death penalty as a discretionary option and the commutation to life imprisonment of all death sentences more than three years old.<sup>224</sup> Courts in Uganda and Malawi, unlike the Zambian legislature, chose a discretionary death penalty over the doctrine of extenuating circumstances as a way of reducing the harshness of a mandatory death penalty regime. Although their constitutions specifically authorized the death penalty, these courts reasoned, the constitutions did not necessarily require the death penalty be *mandatory*.<sup>225</sup>

While the doctrine of extenuating circumstances successfully channels some of the discretion inherent in any death penalty case, recognizing that no death sentence is truly “mandatory,” the doctrine ultimately misplaces that discretion. The doctrine is both too flexible and too rigid. It is too flexible because a judge may consider literally any factor that affected the mind of the accused at the moment of the crime, even if the evidence

<sup>220</sup> *Id.* (citing MALAWI CONST. ch. IV, §§ 19(1), (2), and (3)).

<sup>221</sup> MALAWI CONST. ch. IV, § 42(1)(f).

<sup>222</sup> See International Covenant on Civil and Political Rights art. 15, para. 5, Dec. 19, 1966, 99 U.N.T.S. 17 [hereinafter ICCPR]. Malawi is a party to the ICCPR, and according to the Malawian constitution, courts must interpret domestic laws in accordance with Malawi’s international obligations. MALAWI CONST., art. 11(2) (“In interpreting the provisions of this Constitution a court of law shall . . . have regard to current norms of public international law and comparable foreign case law.”). In *Kafantayeni*, the Court found that Malawi must “have regard” to the ICCPR’s provisions. *Kafantayeni*, [2007] MWHC 1 at 12-13.

<sup>223</sup> *Attorney General v. Kigula*, [2009] UGSC 6 (Uganda Sup. Ct.). For more on the Ugandan and Malawian decisions striking down the mandatory death penalty, see Andrew Novak, *The Decline of the Mandatory Death Penalty in Common Law Africa: Constitutional Challenges and Comparative Jurisprudence in Malawi and Uganda*, 11 LOY. J. PUB. INT. L. (forthcoming Dec. 2009).

<sup>224</sup> Solomon Muyita, *Death Penalty Challenge Extended to Supreme Court*, THE MONITOR (Uganda), July 4, 2005, [www.monitor.co.ug/artman/publish/news/Death\\_penalty\\_challenge\\_extended\\_to\\_supreme\\_court\\_54552.shtml](http://www.monitor.co.ug/artman/publish/news/Death_penalty_challenge_extended_to_supreme_court_54552.shtml). At least 377 people had been executed in Uganda since 1938, 51 of them by President Yoweri Museveni’s government since 1986. This appeal was brought by 417 death row inmates. *Id.*

<sup>225</sup> See *Kafantayeni*, [2007] MWHC 1; *Kigula*, [2009] UGSC 6. In both cases, the courts found that the constitutions prohibited cruel and inhuman punishment, and the death penalty savings clauses did not specifically save the mandatory death sentences. These cases are in accord with *Reyes v. The Queen*, [2002] UKPC 11, [2002] 2 A.C. 235 (appeal taken from Belize), in which the Judicial Committee of the Privy Council struck down the mandatory death sentence in Belize.

was inadmissible at trial. The judge's discretion is largely unreviewable and unguided, save for a complicated mass of case law, much of it imported from legal system of apartheid-era South Africa. The doctrine is too rigid because it constrains the judge to consider only those factors affecting the accused *at the moment the crime was committed*, excluding important policy reasons—religious conversion, familial obligations, health considerations, and most importantly irregularities in the arrest, trial, and sentencing of the accused—from the judge's calculus. *The doctrine fails to allow a judge to save a defendant's life even where her trial was not fair*—the ultimate extenuating circumstance. The extent to which a judge does consider these factors only underscores the lack of guided discretion in the determination of a sentence.

In addition, by shifting the burden to the defendant to prove extenuating circumstances, the state stresses the weakest link in the chain: the often inexperienced and always underpaid *pro deo* counsel of an indigent defendant. The doctrine, compounded by the secret workings of the Clemency Committee, allows a judge full discretion to make a life-and-death determination and then absolves that judge from taking responsibility for that decision. Extenuating circumstances are for the judge and the judge alone to weigh; but if he or she cannot find them, the law and not the judge sentences the defendant to death. In hard cases, a judge may even pass responsibility for his or her failure to find extenuating circumstances to the Clemency Committee, a committee notorious for its secrecy and one that has almost literally never commuted a death sentence.<sup>226</sup> A guided discretionary death penalty regime places full moral responsibility on the sentencing authority to make the final life-and-death determination, forcing a judge to articulate his or her choice without hiding behind the law. A discretionary system operates more smoothly since it requires the presence of an aggravating factor before death may be imposed and keeps the burden of proof in the hands of the state, and it is more transparent since the factors a judge may consider are ascertainable and specifically enumerated.

The most fundamental and damning criticism of this perspective favoring a discretionary death sentence over consideration of extenuating circumstances is, as Bentele writes, that the death penalty is arbitrary and discriminatory in any form. Critical of South Africa's 1990 legislation that ended the doctrine of extenuating circumstances, Bentele writes, "the assumption that discretion can indeed be 'guided' so as to avoid arbitrary and discriminatory imposition of death sentences appears to be false."<sup>227</sup> No death penalty regime is ever compatible with human rights norms, as every sentence, in the end, is a gamble. The death penalty is

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<sup>226</sup> See *supra* note 202 and accompanying text.

<sup>227</sup> Bentele, *supra* note 70, at 260.

inconsistently applied, falling most heavily on the poor and racial minorities.<sup>228</sup>

Botswana's courts have made clear that a constitutional change is necessary to abolish the death penalty outright, an unlikely outcome in the current political environment. Important policy reasons, however, support a transition from a mandatory to a discretionary death penalty. First, while an automatic death sentence may be favorable in underdeveloped legal systems since judicial discretion may be influenced by corruption or political influence, this consideration is inapplicable to Botswana with its mature judicial tradition. Second, with a rising crime rate in the country,<sup>229</sup> more transparent guided sentencing will greatly assist judges in making consistent and well-reasoned decisions since the number of death penalty cases is likely to increase. Third, given the secrecy surrounding commutation proceedings, the execution itself, and burial, forcing a judge to specifically articulate why the defendant's crime is so grave that it deserves the special and unique punishment of death will not only make judicial reasoning stronger, but it will make the death penalty process appear more legitimate to observers. Secrecy breeds distrust, and government secrecy breeds distrust of the state.

The time may be right to challenge the weakest aspect of Botswana's capital punishment regime: the mandatory nature of the death sentence, which is not required by Sec. 4(1) of the Constitution, the death penalty savings provision. Botswana should follow the lead of Malawi and Uganda. Despite the traditional conservatism of Botswana's judges, "the courts in Botswana have demonstrated that they are willing and able to place some limits on the unfettered use of the death penalty," Curry writes.<sup>230</sup> Although the courts cannot eliminate the practice, "they can

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<sup>228</sup> *Id.*

<sup>229</sup> "Botswana is experiencing an increase in the number of firearm-related crimes, including firearm theft, armed robberies, murder, domestic violence, cattle rustling and poaching." Mpho Molomo, et. al., *Botswana Country Study*, in HIDE AND SEEK: TAKING ACCOUNT OF SMALL ARMS IN AFRICA 22, 30-31 (2004), <http://www.iss.co.za/pubs/Books/Hide+Seek/Botswana.pdf> (last visited: April 8, 2008). For an older study, see Christine Love & Roy Love, *Some Observations on Crime in Botswana, 1980-1992*, 11 J. SOC. DEV. IN AFR. 33 (1996). For an analysis of the relationship between gender and crime, see Tirelo Modie-Moroka, *Vulnerability Across a Life Course: An Empirical Study, Women and Criminality in Botswana Prisons*, 18 J. SOC. DEV. IN AFR. 145, 147-49 (2003) (showing an increase in crime committed by women). For a survey of perceptions in Botswana toward the link between crime rates and the Zimbabwean economic migration, see Wazha G. Morapedi, *Post-Liberation Xenophobia in Southern Africa: The Case of the Influx of Undocumented Zimbabwean Immigrants into Botswana, c. 1995-2004*, 25 J. CONTEMP. AFR. STUD. 229, 236, 237, 239 (2007) (describing the link between the rising crime rate, levels of xenophobia, and increasing numbers of Zimbabwean economic migrants to Botswana).

<sup>230</sup> Curry, *supra* note 118, at 43.

ensure that capital crimes are tried under the strictest of scrutiny . . . .”<sup>231</sup> The legislature should authorize a commission to specifically enumerate mitigating and aggravating factors for the benefit of judges and require at least one aggravating factor to be present in order to merit the death sentence. This simple change would help restore the waning public confidence in Botswana’s death penalty system by removing discretion from the minds of judges and placing it on paper. Transparency breeds legitimacy.

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<sup>231</sup> *Id.*