

# fidh

Fédération internationale des ligues des droits de l'Homme  
International Federation for Human Rights  
Federación internacional de los derechos humanos  
الفدرالية الدولية لحقوق الانسان



DITSHWANELO - The Botswana Centre for Human Rights

# THE DEATH PENALTY IN BOTSWANA HASTY AND SECRETIVE HANGINGS

International Fact-finding Mission



This photo is of one prisoner's grave, dug in the prison graveyard just before his planned execution in 1999. From *The Botswana Guardian*, 26 February 1999. FIDH acknowledges *The Botswana Guardian*, for the use of this picture.

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**THE DEATH PENALTY IN BOTSWANA  
HASTY AND SECRETIVE HANGINGS**

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## Foreword: Why Mobilise against the Death Penalty?

FIDH is strongly opposed to the death penalty. FIDH considers it to be contrary to the very notions of human dignity and liberty. Furthermore, the death penalty has been proved to be entirely ineffective as a deterrent. Consequently, neither principles nor utilitarian considerations can justify the use of capital punishment.

### 1. The death penalty is inconsistent with notions of human dignity and liberty

Human rights and human dignity are universally acknowledged as fundamental norms that form the basis of politically organised society. The death penalty directly contradicts this premise and is based on a misconception of justice.

Justice is based on freedom and dignity: a criminal can and should be punished only when he or she freely committed an act that disrupts the legal order. It is for this reason that minors and insane persons cannot be held responsible for their actions in a criminal justice system.

Because it is irreversible, the death penalty presents a contradiction between the premise of its imposition-freedom and conscience in acting-and the fundamental values of human dignity and liberty, which make human and social change possible.

Human freedom is indeed defined as the possibility to change and transcend a given life situation. In the case of the criminal justice system, this means there must be the redemptive opportunity for rehabilitation and re-socialisation. The irreversibility of the death penalty undermines this fundamental notion of freedom and dignity.

The irreversibility of the death penalty presents another serious threat to justice and human dignity. Even in the most sophisticated legal system, with the strongest framework of judicial safeguards and guarantees of due process, the possibility of miscarriages of justice remains. Capital punishment can result in the execution of innocent people. It was for this reason that Governor Ryan of the state of Illinois in the United States, decided to impose a moratorium on death penalty, after having discovered that thirteen detainees awaiting execution were innocent of the crimes of which they had been convicted. In January 2003, Governor Ryan decided to commute 167 death sentences to life

imprisonment. The report of the Illinois Commission on Capital Punishment stressed that: 'no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death'.

When innocent people are executed, "society as a whole - i.e. all of us - in whose name the verdict was reached, becomes collectively guilty because its justice system has made the supreme injustice possible" said Robert Badinter, French Minister of Justice, in 1981. For society as a whole, accepting the possibility of condemning innocent people to death is entirely contrary to the fundamental principles of human dignity and justice.

Justice is based on human rights guarantees: The existence of human rights guarantees is the distinctive character of a reliable and legitimate judicial system; notably, the right to a fair trial - including, for example, the rejection of evidence obtained through torture or other inhuman and degrading treatment. From this perspective, FIDH is convinced that the full respect of these human rights and the rejection of legally sanctioned violence are at the core of the legitimacy of any criminal justice system. Justice, particularly when it concerns the most serious crimes and the life of the accused is at stake, should not rely on chance and fortune. The life of an individual should not depend on contingent factors such as jury selection, media pressure and the competence of a defence attorney. The rejection of inhumane sentences, first and foremost the death penalty, clearly contributes to the building of a judicial system based on universally accepted principles, in which vengeance has no place and in which the population as a whole can trust.

The death row phenomenon refers to the conditions of detention of a person condemned to capital punishment while awaiting the execution of the sentence. The usual conditions of detention - notably its long duration, the total isolation in individual cells, uncertainty in relation to the moment of execution and deprivation of contact with the outside world, sometimes including family members and legal counsel - in many cases amount to cruel, inhuman and degrading treatment.

Furthermore, FIDH emphasises that the death penalty is often applied in a discriminatory manner, for example, in the USA, where it is applied disproportionately to people



from ethnic minorities, or impecunious defendants, or in Saudi Arabia where foreigners are more likely to be sentenced to the death penalty. Such practices violate the universal principle of non-discrimination, which at its base addresses the fundamental equality and human dignity of all persons, regardless of their background and personal attributes.

Justice is fundamentally different from vengeance. The death penalty is a remnant of an outmoded system of criminal justice based on vengeance: that he or she who has taken a life should suffer the same fate. If applied consistently, this would mean stealing from the stealer, torturing the torturer and raping the rapist. Justice has risen above such a traditional notion of punishment by adopting a principle of a symbolic, yet proportional sanction for the harm done, including fines, imprisonment and other disposals, which preserve the dignity of both victim and perpetrator.

Furthermore, FIDH does not believe in the supposed necessity of the death penalty as a means to vindicate victims and their relatives. FIDH reaffirms that the victim's right to justice and compensation is fundamental in a balanced and fair justice system. A solemn and public recognition by a criminal court of the suffering of the victim plays an important role in meeting the need for vengeance (through the pronouncement of 'judicial truth'). FIDH maintains that answering the call for justice by the death penalty serves only to relieve the basest emotional need for vengeance and does not serve the cause of justice and dignity (even that of the victims) as a whole. Paradoxically, the victims' dignity is itself better served by rising above vengeance. The recognition of the victim in the criminal procedure responds to his or her need to be acknowledged as an actor for whom the process has a particular and personal significance. Providing psychological support and financial compensation to victims also contributes to their feeling that justice has been done and that private vengeance is unnecessary and would result in no meaningful gain to the victim. If these issues are addressed, the argument that the death penalty is necessary to satisfy the victim's need for vengeance becomes largely irrelevant.

## **2. The death penalty is ineffective**

Among the most common arguments in favour of the death penalty is that it reduces crime. The death penalty supposedly protects society from its most dangerous elements and acts as a deterrent for future criminals. These arguments have been empirically proven to be fallacious.

Does the death penalty protect a society from crime? It does not appear so: societies which apply capital punishment are

no less protected from crime than societies which do not, where other sanctions are available in order to protect society, notably imprisonment. Protection of society does not require the physical elimination of criminals. In addition, it can be argued that the precautions taken to avoid suicide by death row inmates demonstrate that the physical elimination of the criminal is not the main aim of imposition of the death penalty: what seems to matter is that the sanction is executed against the will of the prisoner.

The ineffectiveness of the death penalty and other cruel punishments has been substantiated by a number of studies. Systematic studies undertaken in a number of different countries show that adoption and imposition of the death penalty does not contribute to a reduction in the crime rate. In Canada, for example, the homicide rate per 100,000 people fell from a peak of 3.09 in 1975, the year before the abolition of the death penalty for murder, to 2.41 in 1980. In 2000, whereas in the United States there were 5.5 homicides per 100,000 people, in Canada there were 1.8 per 100,000 people.

The most recent survey of research on this subject, conducted by Roger Hood for the United Nations (UN) in 1988 and updated in 2002, concluded that 'the fact that the statistics... continue to point in the same direction is persuasive evidence that countries need not fear sudden and serious changes in the curve of crime if they reduce their reliance upon the death penalty'<sup>1</sup>.

This conclusion should not be unexpected: a criminal does not commit a crime by calculating the possible sanction, and by thinking that he will get a life sentence rather than the death penalty. Furthermore, as Cesare Beccaria noted in the 18th century, 'it seems absurd that the laws, which are the expression of the public will, and which hate and punish murder, should themselves commit one, and that to deter citizens from murder, they should decree a public murder'<sup>1</sup>.

Finally, FIDH notes that the application of the death penalty is very often an important indicator of the lack of respect for human rights in the country concerned, including the situation of human rights defenders.

## **3. Arguments from international human rights law**

The development of international law has tended towards the abolition of the death penalty: the Rome Statute of the International Criminal Court and the UN Security Council

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resolutions establishing the International Criminal Tribunals for the Former Yugoslavia and for Rwanda do not provide for the death penalty in the range of possible sanctions even though those jurisdictions have been established to try the most serious crimes.

Specific international and regional instruments have been adopted which seek the abolition of the capital punishment: the UN Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), the Protocol on the Abolition of the Death Penalty (Organization of American States), Protocol 6 and the new Protocol 13 to the European Convention on Human Rights (Council of Europe) require the abolition of the death penalty. The Guidelines to the European Union (EU) Policy towards Third Countries on the Death Penalty, adopted by the EU on 29 June 1998, stress that one objective of the EU is 'to work towards the universal abolition of the death penalty as a strongly held policy view agreed by all EU member States'. Moreover, 'the objectives of the European Union are, where the death penalty still exists, to call for its use to be progressively restricted and to insist that it be carried out according to minimum standards (...). The EU will make these objectives known as an integral part of its human rights policy'<sup>2</sup>. The EU Charter of Fundamental Rights also states that 'no one shall be condemned to the death penalty, or executed'.

At the international level, even if the ICCPR expressly provides for the death penalty as an exception to the right to life surrounded by a number of specific safeguards, the

General Comment adopted by the Human Rights Committee clearly states that Article 6 on the right to life 'refers generally to abolition in terms which strongly suggest that abolition is desirable... all measures of abolition should be considered as progress in the enjoyment of the right to life'<sup>3</sup>.

Moreover, Resolution 1745 of 16 May 1973 of the United Nations Economic and Social Council (ECOSOC) invited the Secretary General to submit, at five-year intervals, periodic updated and analytical reports on capital punishment. In its Resolution 1995/57 of 28 July 1995, the Council recommended that the quinquennial reports of the Secretary-General should also deal with the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty<sup>4</sup>.

On 8 December 1977, the UN General Assembly also adopted a resolution on capital punishment stating, 'The main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing this punishment'<sup>5</sup>.

Each year since 1997, the UN Commission on Human Rights has called upon all States that still maintain the death penalty to 'abolish the death penalty completely and, in the meantime, to establish a moratorium on executions'<sup>6</sup>.

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1. Roger Hood *The Death Penalty: A Worldwide Perspective* 3rd ed (Oxford University Press: London, 2002) 214.

2. <http://www.eurunion.org/legislat/DeathPenalty/Guidelines.htm>.

3. UN Human Rights Committee General Comment 6 on the right to life (art. 6), 30/04/1982, paragraph 6.

4. ECOSOC Resolution 1984/50 of 25 May 1984.

5. UN General Assembly Resolution 32/61, 8 December 1977, paragraph 1.

6. UN Human Rights Commission Resolution 2005/59, UN Doc. E/CN.4/2005/L.77, 15 April 2005, paragraph 5(a).

## I. Introduction

### 1.1 Rationale of the mission

Alerted by DITSHWANELO - The Botswana Centre for Human Rights, about the secrecy surrounding the executions of death row prisoners, the International Federation for Human Rights (*Fédération internationale des ligues des droits de l'Homme-FIDH*) decided to send an international fact finding mission to Botswana. The objectives of this mission were to document the administration of criminal justice and the obstacles, if any, to the abolition of the death penalty in this country.

The delegation comprised three delegates, Mr Clarence Kipobota, Programme officer at the Legal and Human Rights Centre (LHRC, FIDH member organisation in Tanzania), Mr Etienne Antheunissens, lawyer, (Belgium) and Ms Seynabou Benga, FIDH Programme officer on Africa (Senegal/France). This mission was organised and conducted with the help of DITSHWANELO - The Botswana Centre for Human Rights. The FIDH delegation would like to take this opportunity to thank DITSHWANELO for its help and cooperation along the mission.

The mission took place from 6 to 14 April 2006 in Gaborone, capital city of Botswana. Only a few days before the arrival of the FIDH delegation, on April 1st, 2006, Mr Oteng Modisane Ping, convicted for two murders, was executed in the utmost secrecy<sup>7</sup>. This recent execution witnessed once again the total lack of transparency concerning the administration of the death penalty in Botswana and confirmed the added value of an international fact-finding mission on this issue. In addition, no execution had been carried out since 2003. The April 2006 hanging so clearly constituted a step backward in that framework.

The delegation was able to meet several authorities, as well as law professors, lawyers and representatives of human rights organisations. FIDH and DITSHWANELO would like to thank all the persons they met for their cooperation and the information given.

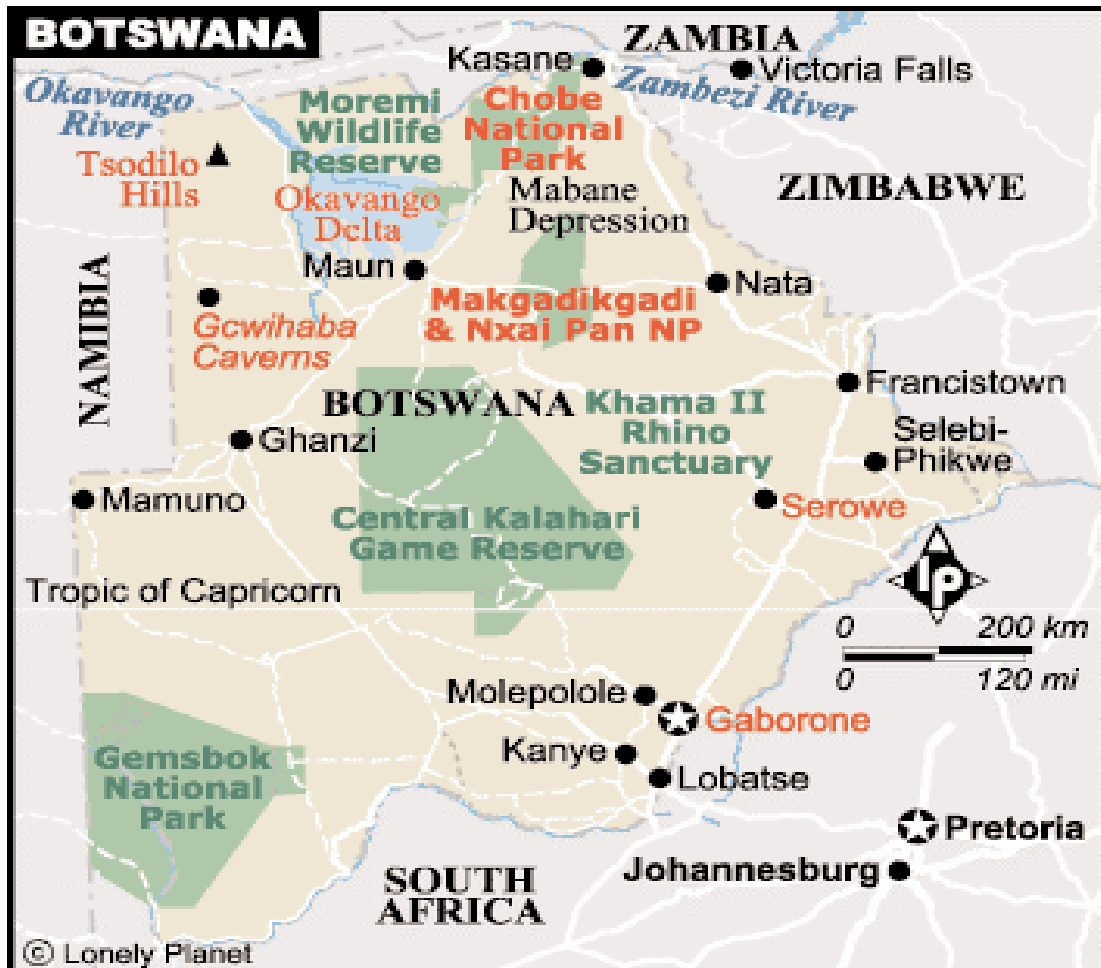
Unfortunately, FIDH was refused access to visit prisons and to meet prisoners and persons awaiting trial. The delegation asked to visit Lobatse and Gaborone prisons (in presence of a prison officer); prisoners including those on death row and detainees awaiting trials generally (which include those charged with capital offences). The purpose was to document the conditions of detention of all detainees and prisoners and to interview prison staff, notably medical staff, prison officers

and the hangman, to gather information about their role and tasks.

The first request for a permit to visit Lobatse and Gaborone prisons was rejected on the basis that at the time of the mission, there were no prisoners on death row in Botswana<sup>8</sup>. By letter, Mr Palai, Permanent Secretary of the Ministry of Labour and Home Affairs, subsequently authorized FIDH to submit another request detailing the reasons and purpose of seeking to visit prisons in regard to the mandate of the mission. FIDH renewed its request underlining the fact that *"our representatives had wanted not only to see death row prisoners, but also to visit Gaborone Maximum prison and Lobatse prison. We note that you do not currently have anyone on death row. However, the mandate of this mission is also to document the administration of criminal justice in Botswana which includes the conditions of detention of prisoners as well as those awaiting trial with regard to several United Nations instruments [...]*<sup>3</sup>.

No response has been received by FIDH or DITSHWANELO. This suggests a lack of cooperation by the authorities. Consequently, since the delegates were not able to gather first-hand information from prisoners, the section relating to the conditions of detention is based on indirect sources, including documentation gathered by the delegates.

## 1.2 Botswana in a nutshell



*Conventional long form:* Republic of Botswana

*Conventional short form:* Botswana

*Former:* British Bechuanaland Protectorate

Botswana is a landlocked country in southern Africa, bordered by Namibia, South Africa and Zimbabwe. Its population (1,639,833)<sup>9</sup> is concentrated in the eastern part of the country.

*Capital:* Gaborone

*Administrative divisions:*

The local government consists of four structures: the District Administration, the District Councils (and Town and City Councils), Land Boards and Tribal Administration.

The country is divided into nine (9) administrative districts, headed by District Commissioners with delegated authority

from the central government. In each of these districts, there are nine (9) District Councils. In urban areas there are two (2) City Councils and two (4) Town Councils. The Town and District Councils are statutory bodies and their members, the councillors, are elected every five years through parliamentary elections. Their mandate includes administration of primary education, health services and social welfare.

The Land Boards hold Tribal Land in trust and allocate it for residential, commercial, agricultural, industrial and general development purposes. They are constituted every five years. Half of the members of Land Boards are elected at the Kgotla (traditional village assembly) while the other half are appointed by the Minister responsible for management of land.



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Chiefs head the Tribal Administration. They notably ensure the maintenance of the customs and traditions of their communities, and preside over the customary courts and the Kgotla.

*Language:* English is the official language of Botswana while Setswana is the national language.

*Ethnic groups:* Tswana (or Setswana) 79%, Kalanga 11%, Basarwa 3%, other, including Kgalagadi and White 7%<sup>10</sup>.

*Government type:* Parliamentary Republic

*President:* Mr Festus G. MOGAE (since April 1st, 1998). He is both the Head of State and the Head of Government. He is indirectly elected for a five-year term (eligible for a second term); the last election was held in October 2004 (next to be held in 2009).

Since the change of Constitution in 1972, the President is nominated by virtue of his position as leader of the dominant political party. Other amendments were adopted in 1998 under President Masire, introducing some positive reforms such as the lowering of the voting age and the creation of the Independent Electoral Commission. They also allowed the Vice-President to automatically succeed a President who is retiring or unable to govern.

Main political parties: After independence in 1966, Botswana adopted a multiparty system. Elections on universal adult suffrage are held every five years for the Parliament and the urban and rural councils. The next elections are due in 2009.

There are fourteen (14) registered political parties but only four are represented in Parliament. The dominant party is the Botswana Democratic Party (BDP). It has been in power since independence in 1966.

The main opposition parties are Botswana National Front (BNF), Botswana Congress Party (BCP), Botswana Alliance Movement (BAM), Botswana People's Party (BPP), Movement of Botswana (MELS) and New Democratic Front (NDF).

### History - Key Dates

The first Tswana people (the largest ethnic group in Botswana) settled in the south east of Botswana in approximately the 15th century. They probably originated from the south. In 1820, various clans began to form into a string of nations along what is now the border between Botswana and South Africa, because

the clans felt the need to defend themselves against the people fleeing from the Transvaal and Natal between 1820 and 1840 as a result of Zulu militancy and Boer expansionism.

**March 1885:** Botswana was declared a British Protectorate by Royal Decree. Extensive territories belonging to Botswana's southern chiefdoms were incorporated into the then British colony of South Africa under the name of British Bechuanaland. At first most Botswana chiefs, except Khama III of the Ngwato who had asked for British protection in 1870, resisted and were suspicious of British protection.

**1950's:** it became clear that Bechuanaland could no longer be handed over to South Africa, and should be developed towards political and economic self-sufficiency. The supporters of Seretse Khama began to organize political movements from 1952 onwards, and there was a nationalist spirit even among older 'tribal' leaders. Ngwato 'tribal' negotiations for the start of copper mining reached agreement in 1959. A Legislative Council was eventually set up in 1961 after limited national elections.

**1960:** the Bechuanaland People's Party (BPP) was founded.

**1962:** the Bechuanaland Democratic Party (later Botswana Democratic Party, BDP), led by Seretse Khama, was founded.

**1965:** the Botswana National Front (BNF) was founded.

**1965:** the first general elections were held. Bechuanaland became self-governing, under an elected BDP government with Seretse Khama as Prime Minister.

**September 1966:** the country became the independent Republic of Botswana, with Seretse Khama as its first president; he was re-elected three times. He died while in office.

**September 30, 1966:** The Constitution was adopted. It provides for a republican form of government headed by the President, with three main organs of government, namely; the legislature, the executive and the judiciary. The legislature, which comprises the National Assembly and the President, acting in consultation on tribal matters with the House of Chiefs, is the supreme authority in the Republic.

During the first five years following independence, Botswana remained financially dependent on Britain to cover the costs of administration and development. The planning and execution of economic development took off in 1967-71 after the

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discovery of diamonds at Orapa. The essential precondition of this financial autonomy was a renegotiation of the Customs Union with South Africa, so that state revenue would benefit from rising capital imports and mineral exports - rather than remaining a fixed percentage of total customs union income. This renegotiation was achieved in 1969.

**From 1969:** Botswana began to play a more significant role in international politics, putting itself forward as a non-racial, liberal democratic alternative to South African apartheid.

**July 1980:** Seretse Khama died and was succeeded as President by his, Vice-President Quett (later referred to as Sir Ketumile) Masire. He had been his Vice-President since 1966.

**Between 1984 and 1990:** Botswana suffered from effects upheavals in South Africa when South African troops raided the 'Front Line States'. Two raids on Gaborone by the South African army in 1985 and 1986 killed 15 civilians. A new era in regional relations began with the independence of Namibia in 1990, and continued with internal changes in South Africa culminating in the free elections of 1994.

**April 1998:** Quett (Sir Ketumile) Masire retired as President, and was succeeded by his Vice-President Festus Mogae. Since then the main opposition party, the BNF, which had begun to approach parity with the ruling BDP in the elections of 1994, has been split by a leadership dispute.

**1999 and 2004:** Festus Mogae was re-elected as President.

The Republic of Botswana is a member of the Southern African Development Community (SADC), the United Nations, the African Union (formerly the Organization of African Unity (OAU)), the Non-Aligned Movement, and the Commonwealth. Botswana is also a member (with Lesotho, Namibia, South Africa, and Swaziland) of the Southern African Customs Union (SACU).

### 1.3 Human rights instruments ratified by Botswana

Chapter II of the Constitution of Botswana (1966, amended in 2002) incorporates a Bill of Rights. The rights enshrined in the latter notably include the rights to life, liberty, security of the person and the protection of law, the freedoms of conscience, of expression, of assembly and association, and the prohibition of discrimination<sup>11</sup>.

The right to life, which is a fundamental tenet of the abolitionist movement, is provided for in Section 4 (1) : "*No person shall be*

*deprived of his life intentionally save in execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he has been convicted [...]*".

Section 5 deals with the right to personal liberty. The right not to be subjected to torture, inhuman or degrading punishment or treatment is enshrined in Section 7 of the Constitution. Section 10 provides for the right to a fair trial including the presumption of innocence, the right to be informed of the nature of the charges, the rules *non bis in idem* and *nullem crimen sine lege*. However, the Constitution does not provide for free legal assistance. Free legal representation is only granted for persons charged with offences carrying the death penalty<sup>12</sup>.

International and regional conventions are only applicable in the country after being incorporated into the domestic law<sup>13</sup>. Yet, the Interpretation Act requires the courts of Botswana to rely on any relevant international conventions in the interpretation of the national law<sup>14</sup>.

The ratification of the main regional and international human rights instruments by Botswana is as follows:

- The International Covenant on Civil and Political Rights (ICCPR, 1966) was ratified by Botswana in 2000. However, Botswana has not ratified any of the Optional Protocols to the ICCPR.

The first Optional Protocol to the ICCPR (ICCPR-OP, 1966) provides for the possibility for individuals to submit complaints to the Human Rights Committee (HRC)<sup>15</sup>, the body in charge of monitoring the implementation of the ICCPR by States parties<sup>16</sup>.

The Second Optional Protocol to the ICCPR (ICCPR-OP2, 1989) which aims at the abolition of the death penalty has also not been ratified by Botswana. The States parties to this Protocol commit themselves to not execute any person within their jurisdiction (Article 1(1)) and to take all necessary measures to abolish the death penalty within their jurisdiction (Article 1(2)). The only admissible reservation is the one providing for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime (Article 2).

- The Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT) was ratified in 2000. The Optional Protocol to the CAT (CAT-OP) (adopted in 2002 and entered into force in 2006), sets out a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or

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degrading treatment or punishment, has neither been signed nor ratified by Botswana.

- Botswana is also a State Party to the African Charter on Human and Peoples' Rights (ACHPR) since 1986<sup>17</sup>. The Charter does not expressly require States parties to abolish the death penalty but the jurisprudence of the African Commission on Human and Peoples' Rights, which examines periodic reports as well as inter-state and individuals complaints, recommends to States parties to the Charter to adopt a moratorium on executions as a first step towards abolition. As of today, Botswana has never submitted any periodic report and thus has 10 overdue reports<sup>18</sup>.

Botswana has also ratified the following instruments:

- CEDAW-Convention on the Elimination of All Forms of Discrimination against Women (Accession in 1996),  
- CERD-International Convention on the Elimination of All Forms of Racial Discrimination (Accession in 1974),  
- CRC-Convention on the Rights of the Child (Accession in 1995),  
- CRC-OP-AC-Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (Ratification in 2003),  
- CRC-OP-SC-Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography (Accession in 2003).

As a Member State of the Commonwealth, Botswana is also bound by the following key Declarations:

- the Singapore Declaration of Commonwealth Principles, 1971,  
- the Harare Commonwealth Declaration, 1991,  
- And the Millbrook Commonwealth Action Programme on the Harare Declaration, 1995<sup>19</sup>.

These declarations are morally binding for the Commonwealth's members; they share a commitment to certain fundamental principles and notably "*the protection and promotion of the fundamental political values of the Commonwealth:*

- *democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government,*  
- *fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief*<sup>20</sup>."

It should be further noted that Botswana does not have a national human rights institution in charge of the promotion and protection of human rights, as required under the UN Principles relating to the Status of National Institutions (The Paris Principles, 1993).

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7. See DITSHWANELO press statement on the recent execution in Botswana, 7 April 2006, the hanging of Mr Modisane Ping, accessed at [http://www.ditshwanelo.org/bw/index/Current\\_Issues/Death\\_Penalty/Death%20Penalty%20Press%20Statement%20-%207%20April%202006.htm](http://www.ditshwanelo.org/bw/index/Current_Issues/Death_Penalty/Death%20Penalty%20Press%20Statement%20-%207%20April%202006.htm)

8. The first request to visit the named prisons was faxed to Mr H.R Kau, Commissioner of Prisons and Rehabilitation, from Paris, FIDH International Secretariat, on March 24, 2006.

9. Source: the CIA World Fact book, 22 August, 2006.

10. CIA Factbook.

11. Section 3 guarantees equality and Section 3 (a) the equal protection of the law to every person "*whatever his race, place of origin, political opinion, colour, creed or sex*". Section 15 proscribes discrimination on the grounds of "*race, tribe, and place of origin, political opinions, colour or creed*".

12. See *infra*, crimes retaining mandatory death sentences.

13. Dr. Onkemetse Tshosa (University of Botswana), "Death Penalty in Botswana in the Light of International Law", paper presented at the Conference on the Application of the Death Penalty in Commonwealth (Uganda, 10-11 May, 2004). Page 11 says that "Botswana is dualist country. This means that international human rights treaties do not have automatic application in domestic law".

14. Section 24 of the Interpretation Act, Cap.01:01, Vol.1 of the Laws of Botswana.

15. The United Nations Human Rights Committee is a body of 18 independent experts that monitors implementation of the ICCPR by its State parties. It is one of the seven treaty bodies that monitor the main international human rights instruments.

16. Botswana submitted its initial State report under the ICCPR to the UN Human Rights Committee in October 2006 (it was due in 2001). No date has been set yet for its examination by the Committee.

17. The ACHPR was adopted by the Eighteenth Ordinary Session of the Assembly of Heads of Government, in Nairobi, Kenya, in June 1981. It came into force on October 21st, 1981.

18. Pursuant to Article 62 of the ACHPR, "*Each State Party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter*". These periodic reports are to be submitted to the African Commission for Human and Peoples' Rights, hereinafter called the Commission.

19. Accessed at [http://www.thecommonwealth.org/Internal/20723/key\\_declarations/](http://www.thecommonwealth.org/Internal/20723/key_declarations/)

20. Article 9 of the Harare Commonwealth Declaration, 1991.

## II. The Judicial System

Botswana applies a dual system in which both customary<sup>21</sup> and codified (English-based) laws are applicable at the same time but in different circumstances and before different courts in the country.

At first, before the country started to use and apply English law, its criminal law system was based on the Roman-Dutch common law which was later replaced in 1964. The Penal Code, based on English law, has been applicable in the country since then.

### 2.1 The Court System and Procedure

There are three types of courts in the country. There are Customary Law Courts<sup>22</sup>, Common Law Courts and a Military Tribunal called a Court Martial. They are established under different laws but pursuant to the Constitution of Botswana<sup>23</sup>. The customary courts and common law courts are listed in order of priority as follows:

- Court of Appeal
- High Court
- Magistrate's Court
- Customary Court of Appeal
- Customary Court

#### 2.1.1 Customary Law Courts

They are established and governed by the Customary Courts Act<sup>24</sup>. They have both civil and criminal competence. Matters to be adjudicated in these courts are all selected minor criminal offences under the Penal Code<sup>25</sup> and all civil matters between tribesmen unless they choose to bring the case under a different system. When customary law is applied, it is the customary law which is applicable in the particular area concerned. In practice, these courts handle 90 % per cent of civil and criminal cases in the country.

These courts have different structures. In rural areas, they have three sub-divisions. The lowest division is called the Customary Court. An appeal from these Customary Courts goes to the Customary Court of Appeal. The next Customary Court in the hierarchy is the Customary Court of the Commissioner<sup>26</sup>. Appeals from this point go to the High Court and the Court of Appeal of Botswana. The urban structure has the urban customary court as the court of first instance.

The law limits the jurisdiction of these courts in terms of

monetary punishments to be imposed and the geographical competence (*ratione loci*). For criminal matters, the customary courts have jurisdiction only for cases in which the accused is the tribesman or for offences committed either wholly or partially within the vicinity of the court.

The sentence can only be imprisonment not exceeding 6 months for lower courts and one year for upper customary courts<sup>27</sup>. The fine to be imposed should not exceed P4000 (approximately 800 USD). These courts cannot handle capital offence cases.

Because matters adjudicated in these courts are purely customary issues and minor offences, no legal representation is allowed. Advocates and Attorneys have no right of audience in any customary court and magistrate court in which the law applied is the customary law<sup>28</sup>. Questioned about the necessity to provide for legal aid to indigents in order to ensure equal access to justice for all, the members of the Law Reform Committee of Parliament acknowledged the need to improve the system in customary courts as "*the Presiding officer is not always legally skilled.*"

#### 2.1.2 Magistrate Courts

The Magistrate Courts are established and governed by the Magistrates' Courts Act<sup>29</sup>. Like Customary Courts, they have both civil and criminal jurisdictions. They are also of different levels classified according to the grade of judicial officers. The lowest grade is Grade Two, followed by Grade One, Senior Magistrate and Chief Magistrate.

Chief Justice Nganunu explained that the location of Magistrates' Courts depends on the size of the population. This is the reason why there is an uneven distribution of Magistrates' Courts in the country.

In civil matters, a Magistrate is required by law to sit with one or two Assessors, who only sit in an advisory capacity. This is not the case in criminal matters where the Magistrate is competent to adjudicate. The criminal jurisdiction is also limited in terms of the nature of offences and punishment to be imposed. All criminal offences except capital offences are adjudicated in these courts.

Juvenile Courts are embodied in the Magistrates Courts. The same buildings are used for juvenile matters. What changes

is the sitting of magistrates and procedures to be followed<sup>30</sup>. Capital offences in which a child is involved can not be adjudicated in these courts because they may only be tried in the High Court.

Moreover, these courts can not impose an imprisonment longer than 21 years<sup>31</sup>. However, all criminal offences begin with a committal trial at the Magistrates' Courts<sup>32</sup>.

Unlike in the Customary Courts, in these courts legal representation of parties is allowed. The law provides that a party to a case may institute or defend legal proceedings either in person or through a legal practitioner<sup>33</sup>.

According to the Chief Justice of Botswana, Honourable Julian Nganunu, the country has a lack of local lawyers to act as magistrates. Consequently, more than 30% of present magistrates are lawyers from the neighbouring country Zimbabwe. They are employed by the government<sup>34</sup> on a contractual basis.

### **2.1.3 The High Court**

Above all these subordinate courts, there is the High Court of Botswana. It is established under Chapter VI of the Constitution of Botswana.

It is headed by the Chief Justice who is appointed by the President of Botswana<sup>35</sup>. Other Judges of the High Court are also appointed by the President after consultation with the Judicial Service Commission. According to the Chief Justice, the number of High Court Judges has been steadily increasing over the years<sup>36</sup>.

The High Court has unlimited original jurisdiction to hear and determine both civil and criminal proceedings under any law that is applicable in the country<sup>37</sup>. It has also appellate jurisdiction for all cases originating from subordinate courts.

At present, there are two High Courts in Botswana, one in Lobatse (southern Botswana), a town approximately sixty (60) kilometres from Gaborone and the other in Francistown (northern Botswana). However, depending on the number of cases to be dealt with by the High Court according to the Chief Justice, the High Court can move to other large centres. Circuit courts tend to use the buildings of Town Councils to conduct the hearing of cases in that area. This situation could threaten the independence of the Judiciary, especially when one of the parties to the case is actually the Town Council or government department affiliated to that Town Council.

### **2.1.4 The Court of Appeal of Botswana**

This is the highest judicial organ of the country established under the Constitution of Botswana and it is headed by the President of the Court of Appeal, who is appointed by the President of Botswana under Section 100 of the Constitution<sup>38</sup>.

The composition of the Court of Appeal is: the President of the Court of Appeal, the Chief Justice of the High Court and other Judges of the High Court. Therefore a High Court Judge can also sit as a Justice of Court of Appeal. Practically however, according to the Deputy Registrar of the High Court, Mr. G.A Rwelengera, a Judge of the High Court who has sat for a particular case referred to the Court of Appeal is not allowed to sit again as a Justice of Court of Appeal for the same case originating from the High Court. However, instead of being a random practice, this rule of impartiality which seems to arise from the composition of the Court of Appeal, should become more explicit and more systematic in practice.

The Court of Appeal is situated in Lobatse. It meets twice a year, in January and July. However, as the Chief Justice explained, it can sit for proceedings more than two times per year when there are urgent cases which require the immediate attention of the court.

Most of Justices who sit for this court are contract-judges from neighbouring countries<sup>39</sup>.

### **2.1.5 Court Martial**

Court Martial is established under the provisions of the Botswana Defence Act<sup>40</sup>. Pursuant to Section 79 of this Act, "this court shall have power to try any person subject to this Act for any offence which under this Act is triable by court-martial". The military offences triable by the Court Martial notably include treachery, cowardice, mutiny, insubordination, desertion, offences relating to property and to billeting. The Court Martial has the jurisdiction to award any punishment authorized under the law including cashiering, dismissal from The Botswana Defence Force, reduction in rank, reprimand, imprisonment and death .

The presiding officers of this court are commanders whose ranks should not be below the field rank. The Presiding officer is required under law to sit with not less than two other members<sup>41</sup>. However, when the maximum punishment is death, then the presiding officer sits with four other members<sup>42</sup>. The court can sit anywhere, within or outside Botswana for the purposes of convenience<sup>43</sup>.



It has the discretion of sitting in open court or hearing the matter in camera<sup>44</sup>. The basic guiding principle for the exercise of that discretion is when the presiding officer considers that it is necessary to do so in the interest of the administration of justice<sup>45</sup>. There seems to be a risk that this wide discretion can be misused because the criterion is excessively vague.

## **2.2 Criminal investigation and prosecution procedures**

They are done under the supervision of the Attorney-General's Chambers (AG Chambers). The AG Chambers is an extra ministerial department under the Office of The President. It is headed by the Attorney-General. The role of the Attorney-General is defined by the Constitution of Botswana<sup>46</sup> as the Principal legal adviser to the government. The Attorney-General is also an *ex-officio* Member of Cabinet, and serves on various policy level committees and councils.

The functions of the Attorney-General's Chambers are carried out under various divisions namely, the International and Commercial Division (ICD), the Civil Litigation Division, the Directorate of Public Prosecutions Division (DPP), the Legislative Drafting Division and the Departmental Management Division. In terms of the law, all legal actions for and against the Government are instituted by or against the Attorney-General in his/her representative capacity<sup>47</sup>.

### **2.2.1 Investigation**

All prosecutions of criminal cases are coordinated by the Prosecution Division placed under the Attorney-General's Office as indicated above<sup>48</sup>. They are mainly conducted by the police. In other cases, investigation can also be conducted by the Directorate on Corruption and Economic Crime. The Prosecutions Division can give direction to the investigating authority as to which information needs to be followed up.

The criminal cases commence after a complaint has been filed with the police. The police can then summon an accused person by way of arresting him/her with<sup>49</sup> or without<sup>50</sup> a warrant of arrest<sup>51</sup>. The police, in the process of investigation of the crime, can also search for and seize any property suspected to have been stolen or involved in the commission of the crime<sup>52</sup>.

The accused person is then brought before the magistrate by the police. The magistrate then reads and explains the charge to the accused<sup>53</sup>. Further investigation can then be carried

out. There is no time limit stipulated in the law within which the investigation is required to be completed<sup>54</sup> but the law requires the magistrate to adjourn examination of witnesses from time to time for periods not exceeding 15 days if the accused is remanded in custody and not exceeding one month if the accused is not remanded in custody<sup>55</sup>.

### **2.2.2 Prosecution under both legal systems**

Prosecution is coordinated by the Attorney General (AG). The AG is appointed by the President of Botswana and empowered under the Constitution and the Criminal Procedure and Evidence Act to direct all criminal prosecutions<sup>56</sup>. The Botswana Police and the Directorate of Corruption and Economic Crime are also empowered to prosecute for and on behalf of the Attorney General. They normally prosecute minor offences and refer the more serious or complex cases to the Prosecution Division for direction and/or advice.

Criminal cases are prosecuted before Customary Courts, Magistrates Courts, the High Court and the Court of Appeal. According to official government sources, 85% of all criminal cases are prosecuted in the Customary Court<sup>57</sup>.

Capital offences such as murder and other similar offences are tried before the High Court only in the first instance. The accused person can be represented by an attorney at the level of Magistrates Courts and above.

Apart from the AG and persons appointed by him/her, other private people can also prosecute when it appears that the AG has declined to do so. But that private person must show substantial and peculiar interest in the issue of the trial arising out of some injury which he/she has suffered individually by the commission of the offence<sup>58</sup>. It means that private prosecution can not be done by a person on behalf of another person. This right does not cover the situation when a person injured is incapacitated from prosecuting himself/herself and the AG has decided not to prosecute either<sup>59</sup>.

## **2.3 Pre trial phase and judgement**

### **2.3.1 Persons awaiting trials**

According to Section 36 of the Criminal Procedure and Evidence Act, unless a warrant has been obtained for a further detention upon a charge of an offence, no person arrested without warrant shall be detained in custody for more than 48 hours without being brought before the

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Magistrate's Court having jurisdiction in the matter.

Depending on the nature of the alleged offence, the accused person may be released on bail or kept in custody for non-bailable offences such as murder and treason. The accused person can apply verbally to the judicial officer to be granted the warrant of commitment in order to be freed on bail<sup>60</sup>. But verbal application is allowed only when the accused person is doing so prior to the time of commitment. Otherwise he has to make it in writing<sup>61</sup>.

The magistrate shall then determine the bail application within five days. He shall either fix the amount of the bail to be given (that amount is not provided for by the law<sup>62</sup>) or refuse to grant it.

The granting or refusal of bail is at the discretion of the presiding magistrate. The law does not provide for the possible grounds for refusal, the magistrate is therefore not compelled to give an explanation of how s/he reached his/her decision.

In accordance with section 104 of the Criminal Procedure and Evidence Act, CAP 08:02 of the Laws of Botswana:

'Every person committed for trial or sentence in respect of any offence except treason or murder may be admitted to bail in the discretion of magistrate provided that:

- i) the refusal by the magistrate who has committed any person for trial, to grant such person bail shall be without prejudice to such person's rights under section 113, and*
- ii) the magistrate may admit to bail a person under the age of 18 committed for trial on a charge of murder*

In accordance with section 113 of Criminal and Procedure and Evidence Act:

*'Whenever an accused person considers himself aggrieved by the refusal of any magistrate to admit him to bail or by such magistrate having required excessive bail, he may apply in writing to the judge of the High Court who shall make such order thereon as to him if the circumstances of the case seems just'.*

In other words, the accused person has the right to appeal to the High Court against the refusal to grant him/her bail..

Trial is normally preceded by a preparatory examination conducted under the provisions of the Criminal Procedure and

Evidence Act<sup>63</sup>. This examination is instituted by the Prosecutor before the magistrate adjudicating the case. At the end of this examination, the magistrate decides whether or not to commit an accused person for trial.

For criminal cases of the competence of the High Court, the trial is normally preceded by the committal proceeding<sup>64</sup> whereby if the magistrate considers that the evidence is sufficient, he commits the accused person for trial to the High Court<sup>65</sup>.

### 2.3.2 Trial phase

#### *Fair trial and rights of the defence*

Fair trial is guaranteed in the Constitution under Section 10(1) which provides that "*if a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established or recognized by law*". As emphasized above, in order to be really efficient, this rule of impartiality should become more explicit and systematic.

The said provision is in line with Article 14(1) of the ICCPR, ratified by Botswana. The said article provides that individuals have the right to equality before courts and tribunals, and to fair and public hearing by a competent, independent and impartial tribunal. As demonstrated below, this right is not adequately exercised in practice because of the uncertainty of legal representation for those who can not afford to hire a lawyer.

The accused is supposed to be brought for the trial at the first session of the High Court thirty one (31) days after the date of commitment. He shall be released if he is not brought to Court for the first instance trial before six months<sup>66</sup>. In practice, this deadline does not seem to be respected.

According to Section 10(2) (d) of the Constitution, an accused person is allowed to defend him/herself before the Court in person. The accused may, at his/her own expense, hire a legal representative of his/her own choice. However, before customary courts, legal representation is not allowed<sup>67</sup> because those courts are meant to adjudicate minor offences which occurred within the territorial competence of the court or between members of a tribe (see above). In case of offences carrying the death penalty, the State is obliged to appoint a *pro deo* attorney for the accused person if he/she can not afford to hire an attorney<sup>68</sup>.

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The fair trial guarantees include the right of everyone, in the determination of any criminal charge against him, "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it" (Article 14 of the ICCPR).

In Botswana, the pro deo system only applies to capital offences. According to DITSHWANELO, poor persons do not have access to legal assistance if they are not charged with murder<sup>69</sup>. In practice, illiterate suspects do not have the choice but to have their statements written by police officers who already have a prejudice against them. This results in a social prejudice as the poorest are likely to be charged with more serious offence.

In that regard, the United Nations Committee on the Elimination of Racial Discrimination noted in March 2006 the reported difficulties experienced by poor people, many of whom belong to San/Basarwa groups and other non-Tswana tribes, in accessing common law courts, due in particular to high fees, the absence of legal aid in most cases, as well as difficulties in accessing adequate interpretation services. It therefore recommended to Botswana to "*provide adequate legal aid and interpretation services, especially to persons belonging to the most disadvantaged ethnic groups, to ensure their full access to justice*"<sup>70</sup>.

### Evidence

Evidence is governed by the Criminal Procedure and Evidence Act<sup>71</sup>. The law states that everyone not expressly excluded by such legislation is a competent and compellable witness<sup>72</sup>. One of the reasons which may exclude a person to give

evidence is if he is insane or intoxicated. Section 216 provides that no person appearing or proved to be afflicted with idiocy, lunacy or insanity shall be competent to give evidence while under the influence of any such malady or disability.

The Court can lawfully convict a person based on the single evidence of a witness who is credible and competent<sup>73</sup>. This is dubious especially for serious offences like murder which need sophisticated investigation mechanisms in order to find the accused guilty of the offence beyond reasonable doubts. As stressed by the 1984 UN Safeguards guaranteeing the rights of those facing the death penalty, "capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts" (Safeguard 4). The competence or incompetence and compellability of the witness are determined by the magistrate, exercising his/her discretion..

Section 10(7) of the Constitution provides that no person tried for a criminal offence shall be compelled to give evidence at the trial. However, the confession of the accused person himself can be admitted as evidence under the law if it was freely and voluntarily obtained from him by the police<sup>74</sup>.

A failure to tender good evidence or delay of evidence is actually a ground for appeal or reversal of the decision reached as in the case of *Maauwe and Motswetla*<sup>75</sup>.

Facts can also be proved through documentary evidence. For instance under the provisions of Section 222 (4) of the Criminal Procedure and Evidence Act, any fact ascertained by any examination or process requiring skill in bacteriology, biology, chemistry, pathology, toxicology and so on may be admitted in court through an affidavit<sup>76</sup>.

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21. According to Professor Kwame Frimpong of the University of Botswana, the criminal justice system prior to the independence of Botswana (1966) was based on the customary law practices of the people. They were tried in the Chief's Courts. And crimes punishable by death under the customary law included murder, sorcery, incest, bestiality and conspiracy against the Chief.

22. Established under the Customary Courts Act, Cap. 04: 05.

23. Judiciary under Chapter VI of the Constitution of Botswana, Cap. 1 of the Laws of Botswana of 2002 (Printed by the Government Printer, Gaborone 2002).

24. Chapter 04:05 of the Laws of Botswana.

25. Chapter 08:04 of the Laws of Botswana

26. There are only two Customary Courts of Appeal in the country. These two are found in Gaborone and Francistown cities.

27. Section 11 of the Customary Court Act, Chapter 04:05 of the Laws of Botswana.

28. Section 31 *ibid* .

29. Chapter 04:04 of the Laws of Botswana.

30. The Chief Justice, Honorable J. Nganunu narrated that, at the moment there is rehabilitation of Magistrates' Courts Buildings whereby Juvenile shall have their separate court rooms.

31. Section 60 of the Magistrates Courts Act, Chapter 04:04.

32. The Criminal Procedure and Evidence Act, Chapter 08:02, (Section 82), stipulates that; "*Where it appears to the Magistrate that sufficient case has been made out against the accused to justified his committal for trial for any offence, the magistrates shall commit the accused for trial to the High Court on a charge to be specified in his Record of the Proceeding and shall either released him on bail. Where authorized by law, or commit him to gao!*".

33. Rule 1 of the "Rules of the Magistrates' Courts" made under the Magistrates Courts Act.

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34. They are selected and recommended for employment by the Judicial Commission.
35. Section 96 of the Constitution of Botswana.
36. In 1997 there were about 7 Judges but in 2006 there are about 40 Judges of the High Court of Botswana.
37. Section 95(1) of the Constitution of Botswana.
38. Section 99 of the Constitution of Botswana .
39. They are proposed by the Judicial Service Commission and then appointed by the President of the country. However, it is also possible for an interested individual to apply for the post in response to an advertisement. Normally, their contract lasts for two or three years subject to renewal. Currently the pensions of Judges are under discussion in Parliament.
40. Chapter 21: 05 of the Laws of Botswana.
41. Sections 80 and 81 of the Botswana Defense Act.
42. Section 81.
43. Section 83.
44. When it is a closed court (*in Camera*), according to Section 86(5) of Botswana Defense Act, no person is allowed to attend the court except the members of the court and other members that the court may prescribe.
45. Section 86.
46. Section 51 of the Constitution.
47. According to Dr. Molokomme, the Attorney General also see [www.agc.gov.bw](http://www.agc.gov.bw)
48. It can give directions to the investigating machinery on what information needs to be followed up.
49. Warrant is issued by any judicial officer or justice for an arrest of a person. It can be applied verbally. (Sections 27 and 37 of the Criminal Procedure and Evidence Act, Chapter 08:02).
50. Especially by the Piece Officer for any offences committed in his presence (Section 28 of the Criminal Procedure and Evidence Act, Chapter 08:02).
51. Part VI (Sections 27 to 50) of the Criminal Procedure and Evidence Act, Chapter 08:02.
52. Sections 51 to 59 of the Criminal Procedure and Evidence Act, Chapter 08:02.
53. Section 63 of the Criminal Procedural and Evidence Act, Chapter 08: 02.
54. In Tanzania, the Criminal Procedure Act of 1985 (According to the FIDH Report on the Administration of Justice and Death Penalty in Tanzania of 2004), there is 60 days rule whereby all criminal investigation, except murder and treason, are supposed to be accomplished within 60 days without which the charge against him is quashed for want of prosecution.
55. Section 86 of the Criminal Procedure and Evidence Act, Chapter 08:02.
56. Section 7 of the Criminal Procedure and Evidence Act, provides that; "*The Attorney-General is vested with the right and entrusted with the duty of prosecuting in the name and on behalf of the State in respect of the offence committed in Botswana*". The Attorney can appear personally or through a person appointed by him (also refer to Section 9 and 13 of the Criminal Procedure and Evidence Act of Botswana). He can as well enter a nolle prosequere (stop prosecutions) at any time before conviction under section 10 of the Criminal Procedure and Evidence Act.
57. [www.gov.bw](http://www.gov.bw).
58. Section 14 of the Criminal Procedure and Evidence Act, Chapter 08:02 of the Laws of Botswana.
59. Section 15 of the same law provides for limited number of other person who can prosecute as Private Prosecutors. It covers the situation only when the victim is the husband (not the wife) in respect of offences committed against the wife and legal guardians or curators of minors or lunatics in respect of offences committed against their wards.
60. Section 105 of the Criminal Procedure and Evidence Act.
61. Section 106 of the Criminal Procedure and Evidence Act.
62. Section 112 says that the amount of bail to be taken in any case shall be in the discretion of the judicial officer to whom the application to be admitted to bail is made.
63. Section 63 of the Criminal Procedure and Evidence Act.
64. According to Section 97 no offence shall be triable in the High Court unless he has been previously committed for trial by a Magistrate.
65. Section 78 of the Criminal Procedure and Evidence Act. The accused person, according to Section 83 is not required to state anything at the level of the magistrate court if the offences alleged to have been committed are murder and treason.
66. Section 133 (2) of the Criminal Procedure and Evidence Act.
67. Section 10 (12) (b) of the Constitution.
68. Rule 48 made under the Court of Appeal Act, Cap. 04:01 of the Laws of Botswana requires the Registrar, after consultation with the President of the Court of Appeal, to assign a Legal Practitioner to an appellant who is otherwise unable to brief one.
69. In terms of *in forma pauperis* an indigent person with assets not more than P50 may be assisted by the court. However, even a poor person would have such assets to such a value, so this form of assistance does not really assist the poor.
70. See the Concluding Observations of the Committee on the Elimination of Racial Discrimination CERD/C/BWA/CO/16, §14. See also DITSHWANELO Shadow Report June 2006, accessed at [http://www.fidh.org/article.php?id\\_article=3114](http://www.fidh.org/article.php?id_article=3114)
71. Chapter 08:02 of the Laws of Botswana.
72. Section 214 of the Criminal Procedure and Evidence Act.
73. Section 239 of the Criminal Procedure and Evidence Act provides that it shall be lawful for the court by which the person is prosecuted for any offence is tried to convict such a person of any offence alleged against him in the indictment on the single evidence of any competent and credible witness.
74. Section 228 of the Criminal Procedure and Evidence Act - the confession which is obtained without undue influence.
75. DITSHWANELO - The Botswana Centre for Human Rights, Tlhabologang Maaue and Gwara Brown Motswetla v. Attorney General of Botswana and see *infra*, Section 3.4.3 below, *the pro deo system in question*.
76. An affidavit is a written declaration made under oath, a written statement sworn to be true before someone legally authorized to administer an oath.

## III. The death penalty in Botswana

### 3.1 Some Statistics

According to a list obtained from DITSHWANELO from the files of the former Commissioner of Prisons J. Orebotse in 1999, 32 persons were executed between 1966 and 1998. According to DITSHWANELO, 6 additional prisoners have been executed since 2001. The last execution took place on April 1st, 2006, just a few days before the FIDH mission took place.

However, there are no official statistics about the annual number of condemned prisoners and executions in Botswana. It is consequently difficult to assess whether the said list is exhaustive. There is no information available either concerning the death sentences handled down by military courts.

In its resolution 1989/64 intended to ensure the implementation of the UN Safeguards guaranteeing the protection of the rights of those facing the death penalty, the United Nations Economic and Social Council urged Member States *"to publish, for each category of offence for which the death penalty is authorized, and if possible on an annual basis, information about the use of the death penalty, including the number of persons sentenced to death, the number of executions actually carried out, the number of persons under sentence of death, the number of death sentences reversed or commuted on appeal and the number of instances in which clemency has been granted, and to include information on the extent to which the safeguards referred to above are incorporated in national law"*.

In addition, the UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions stated that *"In a considerable number of countries, information relating to the death penalty is cloaked in secrecy. No statistics are available as to executions, or as to the numbers or identities of those detained on death row (...) The countries that have maintained the death penalty are not prohibited by international law from making that choice, but they have a clear obligation to disclose the details of their application of the penalty"*<sup>77</sup>.

### 3.2 The public opinion in Botswana

Botswana is amongst the retentionist countries in Southern Africa, together with Zimbabwe, Swaziland, and Zambia<sup>78</sup>. The President of the Republic of Botswana, Mr Festus Mogae, is himself a confessed retributionist, and according to then Press Secretary to the President, Mr Andrew Sesinyi: *"only one*

*person has been granted clemency after being sentenced to death in Botswana since the country attained independence in 1966"*<sup>79</sup>.

This statement contradicts the information gathered by Ms Alice Mogwe, Director of DITSHWANELO, who stated that even though she had heard that there had been clemency granted at some time, she was not aware of any concrete example of this. As we will discuss below, this uncertainty witnesses once more the lack of transparency with regard to the death penalty in Botswana.

According to several retentionist Members of Parliament (MPs) and others, the people generally support the death penalty. As Mr Bahiti Temane, Member of Parliament for Maun/Chobe said in 2001: *"we have gone around the country addressing meetings and consulted people and they have argued that it should stay"*<sup>80</sup>. This argument, which is quite common when it comes to the imposition of the death penalty, is contradicted by the fact that no study has ever been carried out on that question. Moreover, the lack of information and transparency about the number of death sentences and executions prevents any informed public debate on the death penalty.

According to the words of several persons met by the FIDH delegation, the collective opinion in favour of the death penalty has been encouraged by the recent increase of the so called "passion killings" in Botswana. This sentence had been repeatedly heard by the FIDH delegates in the course of their mission, as an argument for maintaining the capital punishment. The delegation did understand the particular brutality of this type of killing. However, the "deterrent effect" of the death penalty on would-be murderers has not yet been proven, all the more since the persons met by the delegation thought that the rate of the "passion killings" (or crimes of passion) had grown over the past years.

In 2001, calls for the abolition of the death penalty in Botswana became louder in Botswana, South Africa and Europe, with the rejection of the appeal of Marietta Bosch, a white South African national, convicted for the murder of her friend. At the sub regional level, the South African community including the civil society such as the South African Human Rights Commission (SAHRC) and the South African communist party (SACP) requested the Government of South Africa to intervene in her case and ask for clemency<sup>81</sup>. The South African government did



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not intervene and President Mogae said in a radio interview: "We respect the views of our neighbours, the British and international organisations, but we are doing the right thing for our country<sup>82</sup>." Some said that it was only because it was a white woman that some voices were raised about the necessity to abolish the death penalty in Botswana. The Minister of Foreign Affairs at the time, Mr Mompoti Merafhe, said that one's stance on the death penalty was influenced by race. Some MPs criticised certain countries and human rights groups for attempting to influence the President's decision on the issue. Emphasising the colour of the skin of the person condemned to death was clearly a way to divert attention from the issue of the death penalty itself.

In spite of the national and international debate on the death penalty provoked by this execution, President Mogae as well as several MPs continue to consider that capital punishment should be retained. Botswana therefore continues to pass death sentences and to execute. The hanging of Mr Ping on April 1st, 2006 brought the number of executions in Botswana since the independence in 1966 to 38 people, including four women<sup>83</sup>.

### 3.3 Offences carrying the death penalty

According to the Botswana Penal Code, four crimes carry mandatory death sentences<sup>84</sup> :

- murder (Section 203 (1)) : "*Subject to the provisions of subsection (2), any person convicted of murder shall be sentenced to death*",
- treason (Section 34),
- instigating a foreigner to invade Botswana (Section 36),
- and committing assault with intent to kill in the course of piracy (Section 63 (2)): "*A person who, with intent to commit or at the time of or immediately before or immediately after committing an act of piracy in respect of any ship, assaults, with intent to murder, any person being on board, or belonging to, the ship or injures any such person or unlawfully does any act by which the life of any such person may be endangered shall be guilty of an offence and shall be liable to suffer death.*"

As of today, there are no reported cases of death sentences for treason, piracy and instigation to invade Botswana.

Furthermore, pursuant to the Botswana Defence Force Act, 1997, officers and soldiers who commit the following military offences shall be liable to suffer death or any other punishment provided by the Act:

- aiding the enemy (Section 27),
- communication with the enemy (Section 28),
- cowardly behaviour (Section 29),

- mutiny (Section 34),
- failure to suppress mutiny with intent to assist the enemy (Section 35),
- civil offence if it is treason or murder (Section 66 (3) (a)).

#### *Vulnerable groups*

According to the UN Safeguards guaranteeing protection of the rights of those facing the death penalty, "Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane." (Safeguard 3).

According to Section 26 (2) of the Penal Code, sentences of death shall not be pronounced on or recorded against persons under the age of 18 years at the time of the commission of the crime. The Court shall sentence such person to be detained during the President's pleasure. This is in conformity with international standards, and in particular Article 37 of the Convention on the Rights of the Child.

Sections 26 (3) of the Penal Code provides for life imprisonment in lieu of the death sentence for pregnant women convicted of an offence punishable with death, while Section 298 of the Criminal Procedure and Evidence Act deals with the determination of the pregnancy by the Court. The decision of the Court of Appeal about the determination of pregnancy is final. This is in conformity with the ICCPR, which provides that "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." (Article 6 para. 5).

Section 11 of the Penal Code provides for the irresponsibility of a person committing a crime if at the time of doing the act or making the omission, he is suffering from any disease affecting his mind making him incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission. However, there is no specific provision concerning the imposition of the death penalty to persons with any mental or intellectual deficiency.

### 3.4 The Trial

#### 3.4.1 Jurisdiction

##### *Civil offences*

Capital offences found in the Penal Code begin with a committal trial at Magistrates' Courts<sup>85</sup>. The High Court is

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then the competent court of law to try those crimes. The Court of appeal deals with the appeals lodged against the High Court's judgements and death sentences. Once the conviction and sentence have been confirmed by the Court of Appeal, the death row prisoner may apply for a stay of execution in the High Court, whose decisions might be appealed before the Court of appeal<sup>86</sup>.

Once the death sentence is confirmed, the last avenue is the clemency of the President. He is advised by the Committee on the Prerogative of Mercy (the Clemency Committee) pursuant to Section 55 of the Constitution.

### *Military offences*

Capital military offences are adjudicated by the Court Martial. Pursuant to Section 88 of the Botswana Defence Force Act, the death sentence can only be imposed with the agreement of all the members of the court, and where there is no such agreement, the court shall be dissolved and the accused may be tried by another court.

Pursuant to Section 129 of the Botswana Defence Force Act, a person convicted by a court-martial may appeal against his conviction to the High Court in accordance with the rules made under section 95(6)<sup>87</sup> of the Constitution and section 28 of the High Court rules. Besides, pursuant to sections 130, an appeal shall lie to the Court of Appeal from a decision of the High Court in accordance with rules made under section 16 of the High Court rules. In accordance with section 131, a person found guilty of a charge dealt with summarily under sections 74 and 75 may appeal to the Defence Council.

A sentence of death, both under the Penal Code and for military offences, can not be carried out until it has been approved by the President.

### **3.4.2 The right to a fair trial: The *pro deo* system in question**

The right to a fair trial is enshrined in Article 14 of the ICCPR, Article 7 of the African Charter on Human and Peoples' Rights - both ratified by Botswana - as well as the 2003 Directives and Principles on the Right to a Fair Trial and Legal Aid in Africa adopted by the African Commission on Human and Peoples' Rights. The strict observance of these provisions - which notably provide for a fair and public hearing by an independent and impartial court established by law, the rights to legal assistance and to a proper defence - is of utmost importance, especially when the sentence is irreversible as is

the case with capital offences.

The other rights enshrined in the ICCPR and the ACHPR have been reiterated in several other regional and international instruments with a particular emphasis on the crimes entailing the death penalty. Resolution 2993 (XXIII) of the United Nations General Assembly of 26 November 1968 invited States retaining the death penalty to ensure that persons accused of capital crimes are given the benefit of the most careful legal procedures and the greatest possible safeguards. The General Assembly also adopted resolution 35/172 of 15 December 1980 urging States:

- To respect as a minimum standard the content of the provisions of article 6, 14 and 15 of the International Covenant on Civil and Political Rights and, where necessary, to review their legal rules and practices so as to guarantee the most careful legal procedures and the greatest possible safeguards for the accused in capital cases;

- To examine the possibility of making automatic the appeal procedure, where it exists, in cases of death sentences, as well as the consideration of an amnesty, pardon or commutation in these cases;

- To provide that no death sentence shall be carried out until the procedures of appeal and pardon have been terminated and, in any case, not until a reasonable time after the passing of the sentence in the court of first instance.

The 1984 UN Safeguards guaranteeing the rights of those facing the death penalty specify that "capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the ICCPR" (Safeguard 5).

The proceedings before a Court Martial raise serious concerns because of the extensive powers of the Commander to revise or confirm the findings. In addition, court martials often do not appear to be independent and impartial, notably because of their composition. In Constitutional Rights Project (in respect of Akamu and Others) vs Nigeria, the African Commission on Human and Peoples' Rights concluded that, regardless of the character of the individual members of such tribunals (in this case essentially composed of persons belonging to a government department), its composition alone creates the appearance, if not actual lack, of impartiality<sup>88</sup>.

But the main issue of concern regarding the fair trial

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guarantees in Botswana is the *pro deo* system (free legal assistance).

The *pro deo* system in Botswana raises several questions related to access to justice and the rights of the defence. As stated above, legal representation is only mandatory when an accused is charged with an offence carrying the death penalty. The law is silent about the procedure of appointment of *pro deo* counsel. However, in practice, the presiding Judge usually appoints any qualified lawyer from the list of the Registrar of the High Court. According to Attorney Luke's own experience, the accused person can suggest to the State the name of the attorney whom s/he prefers<sup>89</sup>. The appointed Attorney is allowed to consult his client in prison.

The first problem with this particular system as most of the people who were interviewed by the FIDH delegates said is that the fees paid to such lawyers are minimal compared to average fees paid to private lawyers. The average fee paid to lawyers is P450 per hour and P 3000 per court attendance, compared to the P300 per court attendance paid to the *pro deo* counsel<sup>90</sup>. Also *pro deo* counsel is not paid by hour.

Furthermore, according to several lawyers met by the mission, it is time-consuming to prepare a criminal case. For instance, being a *pro deo* counsel for Kobedi's case, an attorney spent more than two months to prepare the case despite the fact that he was an experienced lawyer. According to another attorney's experience as a *pro deo* counsel for the case of Bosch (1999 - 2001), criminal cases such as murder cases require from lawyers a lot of time and energy. This is why incentives for *pro deo* work are needed.

The low fees and the time needed to handle such cases explain the reluctance of a number of experienced senior attorneys to take capital cases even when designated to do so by the Registrar. 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 and this really affects the rights of the accused.

Furthermore, not all the stages of the procedure are covered by the *pro deo* system. As an example, Mr Kobedi's 3rd lawyer, Mr Joina, has not been paid legal fees for the whole procedure. In that case, the Attorney General office refused to pay for his fees. The argument was that the government *pro deo* service only covers three stages of the procedure that is: original hearing, appeal and application for presidential pardon. Mr Joina, who applied for a retrial on behalf of the defendant before submitting an application for clemency, was

therefore not paid by the State.

All these factors result in a lack of ability and commitment of defence lawyers which can result in miscarriage of justice. In certain death penalty cases, the poor level of legal representation can indeed lead to an unfair trial when young lawyers do not know how to handle death penalty cases, do not have sufficient funds to locate potential witnesses and travel in order to take their statements. This situation obviously violates the right to a fair trial enshrined in Articles 14 of the ICCPR and 7 of the ACHPR.

According to DITSHWANELO, "*Kobedi was represented in his original hearing by a... lawyer who was unfamiliar with trying death penalty cases, who failed to raise important legal and factual issues on his behalf*<sup>91</sup>."

The same conclusion was reached in the Maauwe and Motswetla death penalty case<sup>92</sup>. Tlhabologang Maauwe and Gwara Brown Motswetla were convicted for murder in 1995. Their convictions were upheld by the Court of Appeal and their requests for clemency to the President were refused in 1998. The day before their execution, DITSHWANELO applied for a stay of execution before the High Court arguing that the long period of time spent on death row was inhumane and degrading and therefore unconstitutional. It further contended that the condemned prisoners had not benefited from a fair trial.

The High Court ordered a temporary stay of execution and eventually concluded that the trial of the offenders had violated Section 10 of Constitution as the appellants did not benefit from a fair trial. Judge Reynolds presiding over the case found that: "*There was evidence in the DITSHWANELO/Maauwe/Motswetla case which revealed that the pro deo counsel did not consult with the accused persons, nor did they do the necessary research commensurate with the gravity of the matter, i.e. the accused persons' life or death.*"

Two important issues were raised by the lawyer of the applicants, that the *pro deo* counsel assigned did not represent them adequately or properly and that a letter, which was written by Mr Maauwe and Mr Motswetla to the Registrar of the High Court stating their dissatisfaction with their Counsel and asking that their Counsel be replaced, was not acted upon at all. Consequently, their letter was never placed before the Court of Appeal and the same counsel represented them at the Court of Appeal. Judge Reynolds concluded that the letter should undoubtedly have been placed before the Court of Appeal. Failure to do so amounted to a breach of the

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fundamental rights of the accused provided for in Sections 10 and 30 of the Constitution. Solely on this basis, the appellants' request for a new trial succeeded. The two men were eventually to have been re-tried on the same charges following the decision in 2004. They were finally acquitted by the Court of Appeal of Botswana in 2006.

### 3.4.3 Extenuating circumstances and mandatory death sentences

According to the laws of Botswana, certain capital offences may be mitigated or reduced by reason of the facts leading up to or attending the commission of the offence. In case of murder (Section 203 (2) of the Penal Code) and Piracy (Section 40 of the Penal Code), evidence of extenuating circumstances by the Defence, which are assessed after conviction, can lead to a reduction of the sentence to life sentence or term imprisonment.

Section 203(2) of the Penal Code) reads as follows:

- "1. Subject to the provisions of subsection (2), any person convicted of murder shall be sentenced to death.
2. Where the 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.
3. In deciding whether or not there are any extenuating circumstances the Court shall take into consideration the standards of behaviour of an ordinary person of the class of the community to which the convicted person belongs."

In relation to treason, the Court, when extenuating circumstances indeed exist, shall impose a prison sentence ranging from a minimum of 15 years and a maximum of 25 years<sup>93</sup>.

As for other crimes carrying the death penalty (instigating a foreigner to invade Botswana, as well as military offences), the law does not provide for any extenuating circumstances that the accused can use to mitigate the sentence. As stated above, for those crimes, the imposition of the death sentence is mandatory.

The mandatory nature of the death sentence under the Penal Code in Botswana is in contradiction with Section 7 (f) of the Resolution 2005/59 of the United Nations Commission on Human Rights which urges all States maintaining the death penalty to "ensure that [...] the death penalty is not imposed [...] as a mandatory sentence".

In addition, the United Nations Special Rapporteur on

Extrajudicial, Summary or Arbitrary Executions, Mr Philip Alston, considers that mandatory death sentences are contrary to international legal standards. His last report to the United Nations Commission on Human Rights notably concluded that "*the mandatory death penalty which precludes the possibility of a lesser sentence being imposed regardless of the circumstances is inconsistent with the prohibition of cruel, inhuman or degrading treatment or punishment*<sup>94</sup>."

Various human rights mechanisms and national courts have also concluded that mandatory death sentences violate international human rights standards. In that regard, the United Nations Human Rights Committee<sup>95</sup> has developed a consistent jurisprudence when the mandatory death sentence is pronounced and the personal situation of the accused and the circumstantial evidence surrounding the crime have not been taken into account by the tribunal. In that case, the mandatory death sentence can amount to an arbitrary deprivation of life and therefore violates Article 6.1 of the ICCPR<sup>96</sup>.

In *Edwards v. The Bahamas*, the Inter-American Commission decided that the mandatory death penalty for murder was inconsistent with the American Declaration of Human Rights<sup>97</sup>. In *Bowe v The Queen and Simmons & Anor v R*, the Judicial Committee of the Privy Council, the highest Court of Appeal for most of the countries in the English-speaking Caribbean region before the establishment of the Caribbean Court of Justice, concluded that mandatory death sentence should not be imposed<sup>98</sup>.

On June 10, 2005, the Constitutional Court of Uganda found that Ugandan laws that mandate the death penalty as punishment for certain serious crimes were unconstitutional and had to be amended by the Parliament<sup>99</sup>. It indeed considered that denying "the court opportunity to inform itself of any mitigating factors regarding sentence of death, deprives the court the chance to exercise its discretion to determine the appropriateness of the sentence. It compels the court to impose the sentence of death merely because the law directs it to do so. This is an intrusion by the legislature into the realm of the Judiciary. There is clearly a violation of the principle of separation of powers"<sup>100</sup>.

In Botswana, extenuating circumstances are not clearly defined by law. An indication was given in *Lekolwane v State*, when the Court of Appeal held that when a judge is deciding the issue of extenuating circumstances, that judge must consider and weigh all the relevant features of the case both extenuating and aggravating<sup>101</sup>. In *The State vs Ntesang*, the Court of Appeal held that "*the emotional distress that the appellant might have suffered as a result of all the facts and circumstances cannot,*

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*in view of the intentional murder carefully planned and executed as set down above, be held to be extenuating circumstances as contemplated by s 203(2) of the Penal Code.<sup>102</sup>*

In the case of *Interights et al (on behalf of Mariette Sonjaleen Bosch) vs Botswana*, a communication received by the African Commission on Human and Peoples' Rights, the complainant notably alleged a violation of her right to life (i.e. Article 4 of the African Charter) by the imposition of the death penalty in circumstances where there were clearly extenuating circumstances. While concluding that Article 4 was not violated in that case, the Commission defined the extenuating circumstances as *"facts bearing on the commission of the crime, which reduce the moral blameworthiness of the accused as distinct from his/her legal culpability. First, the facts or circumstances must be directly related to or connected with the criminal conduct in question. The court is only concerned with facts which lessen the seriousness or culpability of that particular criminal conduct. Second, extenuation relates to moral blameworthiness. It is the state of mind of the offender at the time of the commission of the offence that is a relevant consideration otherwise offenders would use any personal circumstance totally unrelated to the conduct complained of to escape punishment."*

The Commission then gave the legal test to determine whether or not extenuating circumstances exist as follows:

- a) *Whether there were at the time of the commission of the crime facts or circumstances which could have influenced the accused state of mind or mental faculties and could serve to constitute extenuation,*
- b) *Whether such facts or circumstances, in their cumulative effect, probably did influence the accused state of mind in doing what s/he did; and*
- c) *Whether this influence was of such a nature as to reduce what he did.*

In any case, Botswana should remove the mandatory aspect from the sentencing for all capital offences. This withdrawal would notably allow the judges to exercise fully their power to take into account extenuating circumstances.

### **3.5 the conditions of detention**

#### **3.5.1 Preliminary remarks**

As stated in the introduction, one of the objectives of the mission was to document the conditions of detention of prisoners accused of capital offences and of death row

prisoners in Botswana to assess their conformity with international legal standards. Unfortunately, in spite of requests by FIDH to visit prisons and meet persons awaiting trial, prisoners as well as prison staff, the authorities of Botswana refused access to the FIDH delegation. One should note that DITSHWANELO has never been authorized to visit prisoners in their cells. However, DITSHWANELO were able to visit Maauwe and Motswetla once they had requested such a visit. In spite of a request from Kobedi, the Commission of Prisons refused DITSHWANELO access to Kobedi. He was subsequently executed in 2003.

The delegation was able to meet Mr Herman R. Kau, the Commissioner of Prisons and Rehabilitation. During this interview, Mr Kau explicitly refused to answer questions about the conditions of detention. He said to the delegation *"that everything was in the Prisons Act"*. The mission was therefore unable to collect substantive information about this issue.

FIDH strongly regrets the lack of cooperation of the authorities in that regard.

Section 134 of the Prisons Act establishes a Visiting Committee for each prison, which consists of of such persons as the Minister shall appoint, by notice published in the Gazette. It shall visit every part of the prison and see every prisoner including any in confinement. The Committee shall from time to time make recommendations to the Commissioner on any matters relating to the good order and discipline, the management of the prison and the treatment of prisoners. The law does not prescribe for these recommendations to be public and does not include guarantees for the independence, expertise and competence of the members of the Committee. This results in a total lack of information about the conditions of detention in Botswana and raises the important issue of transparency.

In addition, Botswana has not ratified the Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which establishes a system of regular visits by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

#### **3.5.2 The Prisons Act**

Pursuant to Section 74 of the Prisons Act, male and female prisoners are detained in separate prisons or in a separate section of the prison. Every prisoner sentenced to death shall



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be confined and kept apart from other prisoners (section 116 Prisons Act).

Section 117 provides for such prisoner to be visited by his legal advisers, relatives, friends and a minister of religion, subject to any reasonable conditions the Commissioner may impose. He can appeal any decision or condition imposed by the Commissioner to the Minister whose decision is final.

Pursuant to Section 60 of the Prisons Act, a medical officer shall, every time he visits a prison, visit every prisoner under a death sentence or charged with a capital offence or in solitary confinement. He shall also ensure that every such prisoner is examined at least once a week.

Training and Rehabilitation of Prisoners are dealt in Sections 90 and 91. Every prisoner, other than prisoners in solitary confinement, shall be allowed religious services held in prison.

Corporal punishment is provided for in Sections 114 and 115 and Article 28 of the Penal Code. 'The sentence shall specify the number of strokes, which shall not exceed 12, nor in the case of a person under the age of 18 years, six'<sup>103</sup>. Corporal punishment is prohibited for females, males sentenced to death and males considered by the Court to be more than 40 years of age.

The FIDH recalls that corporal punishment clearly violates international human rights standards. It contradicts Article 1 of the UN Convention Against Torture and Article 7 of the ICCPR, as a form of cruel, inhuman or degrading treatment. The UN Special Rapporteur on Torture considers corporal punishment to be inconsistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment enshrined, inter alia, in the Universal Declaration of Human Rights, the ICCPR, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>104</sup>.

In its 2005 report to the UN Commission on Human Rights, "On the basis of the review of jurisprudence of international and regional human rights mechanisms, the Special Rapporteur [on torture] concludes that any form of corporal punishment is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Moreover, States cannot invoke provisions of domestic law to justify the violation of their human rights obligations under international law, including the prohibition of corporal punishment. He therefore calls upon States to abolish all forms of judicial and

administrative corporal punishment without delay<sup>105</sup>.

In addition, the UN Human Rights Committee has affirmed on at least two occasions that the prohibition on torture and cruel, inhuman or degrading treatment or punishment contained in Article 7 of the International Covenant on Civil and Political Rights extends to corporal punishment<sup>106</sup>.

Article 5 of the African Charter on Human and Peoples' Rights prohibits torture and other cruel, inhuman or degrading treatment<sup>107</sup>, and the African Commission on Human and Peoples' Rights has clearly stated that "there is no right for individuals, and particularly the government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning state sponsored torture under the Charter and contrary to the very nature of this human rights treaty" and thus requested the Government of Sudan to immediately amend its Criminal Law of 1991 to conform with its obligations under the African Charter and other relevant international human rights instruments, and to abolish the penalty of lashes, regardless of the crime<sup>108</sup>.

Similar provisions have also been declared unconstitutional in other countries, such as Zimbabwe, where the Supreme Court observed that, "the manner in which it is administered is reminiscent of floggings at the whipping post, a barbaric occurrence particularly prevalent in the past. It is a punishment, not only brutal and cruel, for its infliction is attended by acute pain and much physical suffering, but one, which strips the recipient of all dignity and self-respect... It causes the executioner, and through him society, to stoop to the level of the criminal"<sup>109</sup>.

FIDH consequently calls upon the authorities of Botswana to bring the domestic legislation into conformity with international human rights standards and abolish corporal punishment in all circumstances.

Statistics about the Prison population in Botswana (as from December 2004) have been collected by the International Centre for Prison Studies of the King's College in London and are as follows<sup>110</sup> :

- prison population (including pre trial detainees and remand prisoners): 6,105
- prison population rate: 339 per 100,000
- pre trial detainees and remand prisoners: 25.1%
- female prisoners: 5%
- number of establishments including the Centre for Illegal immigrants: 23
- official capacity of prison system: 3,870

- occupancy level: 157.8%.

The table annexed to this report is indicative on the overcrowding situation in the Prisons in Botswana. As from January to October 2005, they indicate that the monthly average was of 6059 for a capacity of 3910. The excess was of 55%<sup>111</sup>.

The Law Reform Committee of the Parliament of Botswana acknowledged this excess over capacity and told FIDH that prisons in Botswana were congested and that conditions were inhumane. They added that despite the fact that they were allowed to visit any place of detention including the prisons, they never did so. They said they should do so in order to suggest measures to improve the situation or to make Parliament aware of the conditions of detention.

### **3.6 Challenging the death penalty in Courts**

The constitutionality of the death penalty has been unsuccessfully challenged in courts in a number of cases. As indicated below, national and international debates on the death penalty took place as a result of the execution of Marietta Bosch, a South African national, on March 31, 2001. Yet, it was not the first time that the question of the abolition was tackled. In 1985, when adjudicating the case of *Mosarwa vs. the State*, the Court of Appeal said that, while there was international sentiment, as reflected at the United Nations, to abolish the death penalty, it could not rewrite the Constitution in order to give effect to such sentiment. Its function in the interpretation of the Constitution was adjudicatory and not legislative<sup>112</sup>.

In 1995, in the *State vs. Ntesang*, the appellant notably contended that the provisions of the Penal Code prescribing the death penalty by hanging were unconstitutional, that the death penalty was anachronistic, antediluvian and barbaric and that the method of execution by hanging violated Section 7(1) of the Constitution as it amounted to torture and inhuman and/or degrading punishment<sup>113</sup>. The Court of Appeal found that the capital sentence and the execution by hanging were constitutional and confirmed the death sentence. The judgment, delivered on 30th January 1995, stated that the Court must give effect to all the words of Section 4(1) of the Constitution, including the exception which allows deprivation of life in execution of a sentence.

However, the reasoning of the Court ought to be quoted for two reasons: the first one is that the judge acknowledged that

death by hanging may be considered as torture, inhuman or degrading punishment or treatment. It also clearly took note of the international trend towards the abolition of the death penalty and invited the State to consider outlawing it: "*despite that the death penalty may be considered, as it apparently has been elsewhere, to be torture, inhuman or degrading punishment or treatment, that form of punishment is preserved by sub-s (2) of s 7 of the Constitution. I have no doubt in my mind that the court has no power to rewrite the Constitution in order to give effect to what the appellant has described as progressive movements taking place all over the world, and to give effect to the resolutions of the United Nations as to the abolition of the death penalty. I, however, express the hope that before long the matter will engage the attention of that arm of the government which has responsibility of effecting changes to the statutes for its consideration and changes which it may consider necessary to further establish the claim of this country as one of the great liberal democracies of the world.*"

In another case, *Lehlohonolo Kobedi vs. State*, the method of execution was challenged<sup>114</sup>. By the time he reached his final appeal, the appellant had been on death row for 56 months. He notably contended that the death penalty was unconstitutional as it contravened Section 7 of the Constitution (prohibition of inhuman treatments) and that his execution by hanging after a long detention on death row would amount to an inhuman and degrading punishment. The Court rejected his appeal because of procedural technicalities, shifting moral responsibility for Mr. Kobedi's life to the Clemency Committee and the President. In its opinion of March 2003, the Court of Appeal asked the President to consider clemency: "*[We] respectfully draw the attention of the [Clemency] Committee to the submissions made on behalf of the appellant to this Court as to his state of physical and mental health ... and that he has been incarcerated on death row [for 56 months].*"

In the last two cases, the imposition of the death penalty was challenged not only as unconstitutional *per se*. The applicants went further and contended that the execution by hanging was an inhuman and degrading punishment which contravenes with Section 7 of the Constitution. Both grounds of appeal were rejected by the Court and found constitutional but it was acknowledged that the method of execution in Botswana may amount to inhuman and degrading treatment. This might leave a room for the execution by hanging to be declared unconstitutional as a violation of Article 7 of the Constitution.

Dr. Onkemetse Tshosa, a lecturer of Law at the University of Botswana, is of the view that although international human rights standards have been invoked and relied upon in order to challenge the constitutionality of the death penalty in Botswana, the judiciary has exercised extreme restraint to outlaw capital punishment. He is convinced that these judgements contravene Section 24 of the Interpretation Act which requires the courts of Botswana to rely on any relevant international convention in the interpretation of domestic legislation.

### **3.7 Post-conviction phase: hasty and secret executions**

#### **3.7.1 The Clemency Committee: an opaque process**

Pursuant to Section 53 of the Constitution, the President of Botswana may grant to any person convicted of any offence a pardon, either free or subject to lawful conditions; grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for any offence; substitute a less severe form of punishment for any punishment imposed on any person for any offence; and remit the whole or part of any punishment imposed on any person for any offence or of any penalty or forfeiture otherwise due to the Government on account of any offence.

Section 54 of the Constitution establishes an Advisory Committee on Prerogative of Mercy. It is composed of the Vice-President or a Minister appointed by the President, the Attorney-General and a person qualified to practise in Botswana as a medical practitioner, also appointed by the President.

Section 55 of the Constitution further deals with the functions of the Committee:

*"(1) Where any person has been sentenced to death for any offence, 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 or elsewhere as he may require, to be considered at a meeting of the Advisory Committee on the Prerogative of Mercy; and after obtaining the advice of the Committee he shall decide whether to exercise any of his powers under section 53 of this Constitution.*

*(2) The President may consult with the Committee before deciding whether to exercise any of his powers under the said section 53 in any case not falling within subsection (1) of this section."*

The wording of Sections 54 and 55 of the Constitution raises certain questions, which to date, remain unanswered because of the secrecy surrounding the whole process.

It is important to note that the Attorney General is a member of the Committee. This might clearly impede on his capacity to fairly deal with a request for clemency. In his capacity of Director of Public Prosecutions, he/she is indeed involved in the prosecution of the condemned prisoner. When asked about a possible conflict of interest and his/her objectivity to advise the President, the Attorney General, Dr Athaliah L. Molokomme, insisted that her role was only to gather the different judgements and decisions in order to advise the President. She added that the Committee was an executive advisory body and certainly not a quasi judicial one.

More alarming is the fact that pursuant to Section 54 (4), the Committee may act notwithstanding any vacancy in its membership. Then, for example, the absence of the medical practitioner who might be the only member of the Committee able to reconsider the mental state of the prisoner at the time of the commission of the crime or after a long period of detention shall not invalidate the Committee's recommendations. Also, the Committee proceedings shall not be invalidated by the presence or participation of any person not entitled to be present at or to participate in those proceedings.

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. The Chief Justice and the Attorney General explained to the delegates that in practice, several documents are examined by the Committee in order to assess the request of the condemned prisoner. They notably consist of briefs of the judgements which led to the death conviction. Also, the judges are allowed to send their views but can not attend the Committee's proceedings.

In practice, neither the lawyers representing the prisoner on death row nor the prisoner are permitted to appear before the Committee. It is also not permissible for the prisoner or his lawyer to present arguments in writing. The Law is silent about the possibility of challenging the death sentence through the Clemency Committee and the Chief Justice told the delegates that he did not think it was possible. He added that it was *"difficult to argue and challenge the Committee procedure because it was a cloudy one" and that its procedure "has to be clarified by provisions of the law."*

## THE DEATH PENALTY IN BOTSWANA HASTY AND SECRETIVE HANGINGS

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The lack of information about the Clemency Committee's procedure makes it difficult to be certain that it is indeed the President who grants mercy or not. The government has never communicated that the plea has been refused until after the execution.

In February 1999 and June 2003, DITSHWANELO made formal requests to the Office of the President for basic information regarding the workings of the Clemency Committee. To date, it has not received a response.

This complete opaqueness is a serious threat to due process and the administration of justice, and violates the right to seek pardon or commutation of the sentence enshrined in Article 6, paragraph 4, of the ICCPR.

### **3.7.2 Speedy executions: the issue of transparency**

Section 26(1) of the Penal Code states that "*When any person is sentenced to death, the sentence shall direct that he shall be hanged by the neck until he is dead. The sentence of death is not carried out into effect unless it has been approved by the President*".

The death warrant is signed after the Clemency Committee's recommendations to the President. Pursuant to Section 18 of the Prisons Act, the condemned prisoner is given notice of his execution at least 24 hours before the hanging. In practice, again, the secrecy of the post-conviction procedure does not allow for any public knowledge of the exact time of this notice to the prisoner. According to several persons met by the FIDH delegation, the death warrant is transmitted to the condemned prisoner only a few hours before his execution. This procedure may in itself amount to a violation of Articles 7 and 10.1 of the ICCPR as it may cause psychological or mental torture.

Consequently, the lawyers and the prisoner's family are neither informed of the decision on Clemency nor of the imminence of the execution. In practice, the family and the lawyer are never authorized to see the prisoner before his execution. Ms Alice Mogwe, the Director of DITSHWANELO, explained to the delegation that, on Friday 31 March 2006, the day before the execution of Mr Ping, she accompanied his mother to visit him. The prison authorities denied them access to the prisoner and asked his mother to return on Monday as it was not possible for her to see him at the time. At that time however, the prison officers they met were aware of the death warrant and failed to tell his mother that the

execution had been scheduled for the following day. Mr Ping's family and Mrs Mogwe eventually heard about the execution of Mr Ping over the radio. The same happened to his lawyer, Mr Tiro Mothusi, who said he "*had expected to be formally informed about the sitting of the board and finally about the decision to execute the condemned prisoner, but that never happened*<sup>115</sup>."

The failure to inform the family of the date of execution and the refusal to give the family access to the prisoner may result in inhuman and degrading treatment or punishment for both the prisoner and his/her the family which is not authorized to see the grave, the burial being held inside the prison.

As the United Nations Human Rights Committee has repeatedly concluded, failure to inform the family of the date, the hour, the place of the execution of the prisoner as well as the exact place of the burial violate Article 7 of the ICCPR. In *Mariya Staselovich v. Belarus*, the Committee noted that "*The complete secrecy surrounding the date of execution, and the place of burial and the refusal to hand over the body for burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress. The Committee considers that the authorities' initial failure to notify the author of the scheduled date for the execution of her son, and their subsequent persistent failure to notify her of the location of her son's grave amounts to inhuman treatment of the author, in violation of article 7 of the Covenant*<sup>116</sup>."

The Committee added that "*In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including information on the location where her son is buried, and compensation for the anguish suffered*<sup>117</sup>."

Nevertheless, on occasion, executions have been carried out while petitions on behalf of the condemned prisoner were still pending before the African Commission on Human and Peoples' Rights. This was the case for Mrs Mariette Sonjaleen Bosch, who was condemned for murder in 1999 and sentenced to death by the High Court of Botswana. The Court of Appeal of Botswana dismissed her appeal on 30th January 2001. She then requested clemency from the President. At the same time, her lawyers submitted a petition before the ACHPR about violations of Articles 1, 4, 5 and 7(1) of the African Charter on Human and Peoples' Rights<sup>118</sup>. On March 27, 2001, the Commission ordered a stay of execution pending consideration of the communication. She was eventually executed on March 31, 2001. Her family were

## THE DEATH PENALTY IN BOTSWANA HASTY AND SECRETIVE HANGINGS

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informed of her death by prison officials after they had been called to the prison following her execution. Botswana government officials claimed at the time of the execution they were not aware of the ACHPR's request for stay of execution.

Such an execution is contrary to the UN safeguards guaranteeing the rights of those facing the death penalty, which state that "Capital punishment shall not be carried out pending any appeal or other recourse procedure or other

proceeding relating to pardon or commutation of sentence" (Safeguard 8).

Section 7 (j) of the 2005 Resolution of the United Nations Commission on Human Rights on the question of the death penalty also urges all States maintaining the death penalty "Not to execute any person as long as any related legal procedure, at the international or at the national level, is pending".

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77. E/CN.4/2005/7, para. 57.

78. Between 1996 and 1998, Angola, Mauritius and South Africa abolished the death penalty joining Namibia and Mozambique which had abolished it as of 1991.

79. See Botswana Press Agency (BOPA) Daily news archives (governmental press agency): *Only one person granted clemency since independence*, 22 November, 1999. Accessed at <http://www.gov.bw/cgi-bin/news.cgi?d=19991122>.

80. See "Some MPs support death penalty", Daily News online, 22 March 2001.

81. "SACP condemns execution of Marietta Bosch", Monday, 02 April 2001, accessed at [http://www.sacp.org.za/index.php?option=com\\_content&task=view&id=836&Itemid=100](http://www.sacp.org.za/index.php?option=com_content&task=view&id=836&Itemid=100)

82. *The Times*, London, 19/02/01

83. See Annex 1 for the complete list of executed people.

84. For more precision on mandatory death sentences, see section 3.4.3 below: Extenuating circumstances and mandatory death sentences.

85. The Criminal Procedure and Evidence Act, Chapter 08:02, (Section 74 and 82), stipulates that; "Where it appears to the Magistrate that sufficient case has been made out against the accused to justified his committal for trial for any offence, the magistrates shall commit the accused for trial to the High Court on a charge to be specified in his Record of the Proceeding and shall either released him on bail. Where authorized by law, or commit him to *gao*". Section 83 further provides that for murder and treason person is not required to state anything at the magistrate court. This is because it has no jurisdiction to hear those kinds of cases. Note also that, Capital offences are strictly not bailable offences, unless you are under the age of 18 years..

86. See *infra* Section 3.4: *The pro deo system in question* for the case of Maauwe and Motswetla, where the High Court granted a stay of execution after all appeals have been exhausted.

87. In accordance with section 95 (5) of the Constitution of Botswana, the High Court shall have jurisdiction to supervise any civil or criminal proceedings before any subordinate court or any court-martial and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by any such court. Pursuant to section 95 (6), the Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by subsection (5) of this section.

88. Communication no. 60/91, § 14.

89. Attorney Edward Luke II, was the private lawyer for Ms. Bosch who was eventually executed in 2001

90. 600 Botswana Pula is approximately equal to 10 USD. See Laws of Botswana CAP 61:01 for detailed range of charges dated 30 October 2004.

91. "Letlhohonolo Kobedi executed on Friday, 18 July 2003", 18 July 2003 accessed at [http://www.ditshwanele.org/bw/index/current\\_issues/death\\_penalty/death%20penalty%20press%20statement%20-%2018%20july%202003.htm](http://www.ditshwanele.org/bw/index/current_issues/death_penalty/death%20penalty%20press%20statement%20-%2018%20july%202003.htm)

92. DITSHWANELO - The Botswana Centre for Human Rights, Tlhabologang Maauwe and Gwara Brown Motswetla v. Attorney General of Botswana. For a complete overview of this case, see DITSHWANELO book *"In the Shadow of the Noose"* November 2006, ISBN 99912-598-2-1; for more about death penalty issues in Botswana see the DITSHWANELO Death Penalty Folder 2004.

93. Section 40 of the Penal Code.

94. See E/CN.4/2005/7, 22 December 2004: civil and political rights, including the questions of disappearances and summary executions. Extrajudicial, summary or arbitrary executions. Report of the Special Rapporteur, Philip Alston. Accessed at <http://www.ohchr.org/english/issues/executions/annual.htm>

95. The Human Rights Committee is a body of independent experts that monitors implementation of the ICCPR by its State parties.

96. See notably for the jurisprudence of the Human Rights Committee on the mandatory death sentences, Mr Eversley Thompson vs Saint-Vincent-et-les Grenadines, Communication No. 806/1998, U.N. Doc. CCPR/C/70/D/806/1998 (2000); and Kennedy v Trinidad and Tobago (2002) CCPR/C/67/D/845/1999.

97. See *Edwards v The Bahamas*, Report No. 48/01, 4 April 2001.

98. See *Bowe (Junior) & Anor v. R. Rev 1 (Bahamas)* [2006] UKPC 10 (8 March 2006) - Privy Council Appeal No 44 of 2005, *Simmons & Anor v. R. Rev 1 (Bahamas)* [2006] UKPC 19 (3 April 2006) - Privy Council Appeal No 33 of 2005.

99. See "Uganda: challenging the death penalty", joint report of FIDH and the Foundation for Human Rights Initiative (FHRI), 10/10/2005. Accessed at [http://www.fidh.org/article.php3?id\\_article=2741](http://www.fidh.org/article.php3?id_article=2741)

100. *Ibid.*

101. *Lekolwane v State* [1985] BLR 245.

102. *State v Ntesang*, Court of Appeal, 30 January 1995, [1995] 2 LRC 338. See also *Mosarwana v State* [1985] BLR 258.

103. Section 28 (2) of The Penal Code

104. Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1995/37, E/CN.4/1997/7, 10 January 1997.

105. A/60/316, 30 August 2005, para. 28.



## THE DEATH PENALTY IN BOTSWANA HASTY AND SECRETIVE HANGINGS

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106. General Comments 7 (16) and 20 (44).
107. Article 5 of the African Charter reads: "every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited".
108. Communication 236/2000, Curtis Francis Doebbler v. Sudan, 15-29 May 2003, Sixteenth annual activity report of the African Commission for Human and People rights, 2002-2003, p 56-61.
109. Supreme Court of Zimbabwe, Judgement no. S.C. 156/87 of 1987.
110. See Prison Brief for Botswana, accessed at [www.kcl.ac.uk](http://www.kcl.ac.uk)
111. See Annex 2, the overcrowding situation as from January to October 2005, Botswana Prison Newsletter, December 2005, Volume N° 35.
112. Mosarwa vs. the State [1985] B.L.R. 258.
113. The State vs. Ntesang, [1995] L.R.C (Const) 338.
114. *Lehlohonolo Kobedi V. State* (2001) Criminal Appeal No. 25/01.
115. Quoted from "Execution shrouded in secrecy", Botswana Guardian, 14 April 2006, page 2.
116. See Human Rights Committee, Communication Nos. 887/1999, Lyashkevich v. Belarus, para.9.2. See also Communication 886/1999, *Bondarenko v. Belarus*.
117. For an exhaustive analysis of the obligation to make public information on the use of the death penalty, see report of the Special Rapporteur, Philip Alston: "transparency and the imposition of the death penalty" E/CN.4/2006/53/Add.3, 24 March 2006.
118. *Interights et al. v. Botswana*, African Commission on Human and Peoples' Rights, Comm. No. 240/2001 (2004).

## IV. Conclusion and Recommendations

### Conclusion

The death penalty remains a sensitive and secret issue and Botswana seems far from the road to its abolition. As of today, the number of death sentences passed by civil and military courts remains unknown. The only official information available was obtained by DITSHWANELO from the Commission of Prisons in 1999 (see Annex 2).

FIDH strongly believe that the authorities are doing nothing to favour the emergence of an informed public debate about the death penalty and its possible abolition. The so-called strong public support for capital punishment has not been demonstrated on the one hand, and seems an easy pretext to retain that penalty in domestic legislation.

The total lack of transparency on the imposition of the death sentence and the hasty way in which it is carried out seem to bear witness to the lack of political will to introduce serious debate on the issue. Indeed, the fact that the death warrant is transmitted to the condemned person 'not less than 24 hours'<sup>119</sup> before the execution, and that he/she is not able to see his or her family before the execution, constitutes an inhuman and degrading treatment. This procedure together with the failure to inform the family of the condemned of the execution clearly fails to respect the human dignity of both the family and the prisoner, and violates Articles 7 and 10.1 of the ICCPR.

In addition, because of the lack of access to NGOs or to specialised independent bodies, it is not possible to ascertain whether the conditions of detention of death row inmates comply with international and regional standards.

The secrecy of the post conviction phase renders the process even more opaque. The cloudy regulations and procedure of the Clemency Committee do not permit public scrutiny and violate the right to seek pardon or commutation of the sentence enshrined in Article 6 of the ICCPR.

Botswana maintains in its domestic legislation mandatory death sentences for the four capital crimes enshrined in the Penal Code, in violation of international standards. In addition, the right to a fair trial is not guaranteed because of the inadequacies of the system of pro deo - free legal assistance for persons convicted of capital offences.

Nevertheless, in spite of the unsuccessful judicial challenges to the death penalty, as stated by the Attorney General, "*this Court of Appeal is not really in favour of the death penalty*". The Court's judicial notice of the international trend for abolition and the invitation for Parliament to consider its outlaw are encouraging moves. The Court of Appeal has also repeatedly acknowledged the cruel, inhuman and degrading nature of this punishment. One can hope that the Courts of Botswana and especially the Court of appeal may have a leading role towards the abolition of the capital sentence as an inhumane, degrading and cruel treatment, as it has been the case in other countries like Uganda and South Africa.

### Recommendations

#### 1. To the government of Botswana

*Recommendations related to the imposition of the death penalty*

- To adopt a moratorium on the death penalty as a first step towards its abolition,
- To remove mandatory death sentences,
- To refrain from adopting new crimes punishable with the death penalty,
- To clearly exclude the imposition of the death penalty for persons with any mental or intellectual disability, in conformity with international standards,
- to make public statistics on the number of death sentences and executions in order to allow for informed public debate on the death penalty in Botswana,
- To raise the *pro deo* lawyers fees, and to make sure that these cover the re-trial phase,
- To set up legal training for judges and lawyers, in particular on human rights, with a special focus on capital punishment and the regional and international standards relating to the fair trial guarantees,
- To reform the composition of the Clemency Committee by prohibiting the participation of the Attorney General to avoid any conflict of interest, and to make its regulations available

## THE DEATH PENALTY IN BOTSWANA HASTY AND SECRETIVE HANGINGS

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to the public in order to ensure transparency of its proceedings,

- To allow the accused to present further evidence to the Clemency Committee,

- To reform the procedure of revision against death sentences pronounced by the Court Martial, in order to guarantee an effective right of appeal to the accused,

- To provide an explicit and systematic rule of impartiality in the Courts,

- To ensure respect of the suspending effect of petitions by the condemned prisoner against his sentence, including at regional (ACHPR) and international levels,

- To give to prisoners sufficient notice about the death warrant and the date of execution, to inform the family of the prisoner of the exact date of the execution and to allow it to visit the prisoner,

- To allow for a burial outside the prison in order for the family to have access to the grave,

- to set up campaigns of sensitization on the death penalty in order to allow the population to debate on the necessity to abolish it,

- To ratify the first and second Optional Protocols to the ICCPR,

- To invite the Special Rapporteur on Prisons and condition of detention in Africa of the African Commission for Human and Peoples' Rights to visit places of detention in Botswana,

- To provide a standing invitation to the United Nations Special Rapporteurs,

- To support any initiative of the African Commission for Human and Peoples' Rights for the adoption of a Protocol to the African Charter on Human and Peoples' Rights abolishing the death penalty

- *To the Law Reform Committee of Botswana:* to visit all places in detention in Botswana and re-engage the Parliament in a dialogue about the abolition of the death penalty,

- *To the Judiciary:* to make full use of the Interpretation Act in order to refer to international standards when adjudicating on the death penalty, in order to restrict its scope in the

maximum extent possible,

*General recommendations related to the administration of justice*

- To extend the *pro deo* system to all crimes, and make sure that it is available to persons belonging to the most disadvantaged ethnic groups,

- To abolish corporal punishment,

- To make statistics on the conditions of detention as well as reports of the visiting committee of Prisons available to the public,

- To allow visits to places of detention to non governmental organisations as provided for by Section D. 42 of the Robben Island guidelines (2002),

- To adopt urgent measures to reduce overcrowding in prisons,

- To create a national independent and impartial Human Rights Institution in charge of the promotion, the respect and the implementation of Human Rights in Botswana. Civil society representatives should be a part of this institution and its statutes be in conformity with the UN Paris Principles,

- To incorporate all ratified conventions into domestic law,

- To ratify and transpose into domestic law the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 2002, which establishes a system of regular visits by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment,

- To ensure full respect of international and regional standards regarding the conditions of detention,

- To submit all overdue reports to the ACHPR.

### **2. To civil society organisations**

- To continue their advocacy work in favour of the abolition of the death penalty,

- To strengthen their public awareness programmes on the death penalty.

**3. To the international community, including the European Union, the Commonwealth and Joint ACP-UE Parliamentary Assembly**

- To systematically condemn the death sentences and the executions carried out in Botswana,
- To systematically address the issue of the death penalty in all meetings with the authorities of Botswana,
- To strongly support civil society initiatives, including financially, in favour of the abolition of the death penalty in Botswana.

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119. Section 118 The Prisons Act.

## **Annex 1: Persons met by the mission**

- Mr Julian Nganunu, Honourable Chief justice
- Dr Athaliah L. Molokomme, Attorney General
- Ms Daphne Matlakala, Secretary of the Legislative drafting division
- Mrs. Monica Pambianco, First Secretary, Delegation of the European Commission in Botswana
- Mr. Paul Malin, Ambassador, Head of Delegation, Delegation of the European Commission in Botswana,
- Mr. Unoda Mack, Attorney-at-law
- Mr. Edward W. Fasholé-Luke II, Attorney-at-law
- DITSHWANELO - The Botswana Centre for Human Rights: Ms Alice Mogwe, Director and all the staff members
- Mr Gabriel A. Rwelengera, Deputy Registrar of the High Court of Lobatse,
- Mr David J. Modiega, General Secretary of the Botswana Council of Churches
- His Excellency Ambassador Courtois, French Ambassador
- His Excellency High Commissioner Francis James Martin, British High Commissioner
- M Herman R. Kau, Commissioner of Prisons and Rehabilitation
- Mr. Khan, Board member of DITSHWANELO
- Professor Kwane Frimpong, Professor of Law at the University of Botswana
- Law Reform Committee of Parliament:
  - Patrick Masimolole, Chairperson, Member of Parliament
  - Lizo Ncgonco, Parliamentary Counsel
  - Robert Molefhabangwe, Member of Parliament
  - Nonofo Molefhi, Member of Parliament
  - Filbert Nagafela, Member of Parliament
  - Boyce Sebetela, Member of Parliament
- Mr Kevin Collins, Peace Corps Volunteer, The Botswana Network of AIDS Service Organizations (BONASO)
- Ms Tummie Tsebe, Information Officer, Botswana Council of Non-Governmental Organisations (BOCONGO)
- Mr Neo Pheko, Training Officer, Cooperation for Research, Development and Education (CORDE)
- Mrs Caroline Phiri-Lubwika, Information and Research Officer, Media Institute of Southern Africa- Botswana (MISA BOTSWANA)
- Mr Modise Maphanyane, National Director, Media Institute of Southern Africa- Botswana (MISA BOTSWANA)



## Annex 2: list of the persons executed since independence<sup>120</sup>

The list of executed people from independence to 1999 was obtained by DITSHWANELO from the Commissioner of Prisons in 1999 during the case of Mr. Maauwe and Mr Motswetla (*Files of Commissioner of Prisons J. Orebotse, obtained in affidavit in Maauwe and Motswetla case*).

<u>Name</u>	<u>Date of Execution</u>
David Sejamu	12/11/1966
Lemmenyane Digogwana	12/11/1966
Kelano Masasa	5/8/1967
Magwasa Marumo	5/8/1967
Gabanaope Jamare	29/5/1969
Chidupe Bayani	29/5/1969
Koos Ochkuizen	8/8/1970
Willie Banda	8/8/1970
Mmalekoto Kegodile	24/4/1971
Seloko Mmamalebe	24/4/1971
William Masebe	26/8/1972
Gasebewe Puleng	1/11/1973
Chite Chokwe	29/1/1977
Keapile Chibide	29/1/1977
Motsamai Chite	7/4/1979
Nthola Lesolelope	7/4/1979
Malope Motale	7/4/1979
Serto Kealeboga	13/2/1981
Moseleng Sekutshwane	24/7/1981
Moses Semphaphi	15/4/1982
Benja Kembi Dube	16/10/1982
Pilate Masasa Seleka	25/2/1983
Lovemore Sibanda	1/9/1984
Lesenyo Kerese	1/9/1984
David Nwako	15/8/1985
Clement Gofhamodimo	27/10/1984
Olibile Rankhibibu	10/10/1987
Obusitswe Tshabang	26/8/1995
David Bogatsu	26/8/1995
Tekoetsile Tsiane	26/8/1995
David Kelaletswe	26/8/1995
Gaolatlhe Khwai	24/1/1998

### Executions Subsequent to 1999

<u>Name</u>	<u>Date of Execution</u>
Marietta Bosch	31/3/2001
Lehlohonolo Kobedi	18/7/2003
Douglas Simon	19/9/2003
Gouwane Tsae	19/9/2003
Joseph Mokhobo	19/9/2003
Oteng Modisane Ping	1/04/2006

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120. See DITSHWANELO website: [http://www.ditshwane.org.bw/index/Current\\_Issues/Death\\_Penalty/Execution%20List.htm](http://www.ditshwane.org.bw/index/Current_Issues/Death_Penalty/Execution%20List.htm)

**Annex 3: Overcrowding situation from January to October 2005,  
Botswana Prison Newsletter, December 2005, Volume N° 35**

**BOTSWANA PRISON**

Bainesdrift	44	43	63	60	64	83
Machaneng	121	104	115	115	129	121
Francistown	507	519	485	511	514	493
Boro	212	244	217	227	204	239
Maun	138	169	161	160	160	160
Kasane	164	162	167	175	171	173
Lobatse	254	236	250	246	250	245
Kanye	294	277	270	265	266	288
Tsabong	181	196	196	204	200	192
Gantsi	167	173	163	163	165	175
Tshane	58	48	46	51	72	83
Serowe New	473	444	450	456	416	424
Lethakane	175	167	166	166	163	152
Serowe Women	32	41	33	27	38	33
F.C.I.J	261	222	160	246	125	248
<b>Total</b>	<b>6072</b>	<b>6108</b>	<b>5956</b>	<b>6093</b>	<b>5928</b>	<b>6093</b>

The **International Federation for Human Rights (FIDH)** is an international non-governmental organisation for the defence of human rights as enshrined in the Universal Declaration of Human Rights of 1948. Created in 1922, FIDH brings together 155 human rights organisations from 120 countries. FIDH has undertaken over a thousand missions of investigation, trial observations, and trainings in more than one hundred countries. It provides its members with an unparalleled network of expertise and solidarity, as well as guidance to the procedures of international organisations. FIDH works to:

- a) Mobilise the international community
- b) Prevent violations, and support civil society
- c) Observe and alert
- d) Inform, denounce, and protect

FIDH is historically the first international human rights organisation with a universal mandate to defend all human rights.

FIDH has observer or consultative status with the United Nations Economic and Social Council (ECOSOC), the United Nations Educational, Scientific and Cultural Organisation (UNESCO), the Steering Committee for Human Rights of the Council of Europe, the International Labour Organisation (ILO), the Commonwealth, the African Commission on Human and Peoples' Rights, the Organisation of American States (OAS) and the Organisation Internationale de la Francophonie (OIF).

FIDH is represented at the United Nations and the European Union through its permanent delegations in Geneva, New York and Brussels. FIDH also has an office in the Hague, with permanent representation before the International Criminal Court.



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**DITSHWANELO - The Botswana Centre for Human Rights**, is a locally based advocacy organisation, which was founded in 1993 and which plays a key role in the protection and promotion of human rights in the Botswana society. Ditshwanelo means "rights" in Setswana, the national language of Botswana. DITSHWANELO has been an FIDH member since 2007.

The centre seeks to affirm human dignity and equality irrespective of gender, ethnicity, religion, sexual orientation, social status, or political convictions. In pursuit of this mission, it seeks to educate, research, counsel, and mediate on issues of human rights, with specific reference to the marginalised and disempowered.

DITSHWANELO has particular areas of focus on indigenous people, refugees and asylum seekers among others. Besides, DITSHWANELO strongly condemns all forms of murder whether perpetrated by individuals or by the state under the pretext of punishment. In this regard, it works and campaigns vigorously for the abolition of the death penalty in Botswana.

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