

THE DEATH PENALTY IN BOTSWANA  
PROFESSOR KWAME FRIMPONG\*\*

I. INTRODUCTION

For many years the death penalty has not been a controversial issue in Botswana. The country was therefore spared the debate over the issue. However, of late it has come to the forefront, as the death penalty is now seriously debated in the country. Two high profile executions in 2001 and 2003 of Marietta Bosch and Lehlohonolo Kobedi, respectively, aroused the current interest in the death penalty debate. It is also partly due to an awareness campaign waged by DITSHWANELO -The Botswana Centre for Human Rights. This paper looks at the application of the death penalty issue in Botswana.

II. HISTORY

Prior to the colonial era, the present-day Botswana was known as Bechuanaland, which was a corruption of the name "Botswana", as the new settlers mispronounced the name "Botswana". During this period of pre-colonial rule, Bechuanaland consisted of fragments of different ethnic groups and the dominant ones were commonly known as the "Tswana" people. The criminal justice system was based on the customary law practices of the people. The Chief's court tried all cases that fell within the prohibited customs of the people and also imposed the appropriate sanctions. The most common forms of punishment for offences were capital sentence, corporal punishment and banishment. Imprisonment, for instance, was unknown under the indigenous Tswana legal system<sup>1</sup>. Crimes punishable by death included murder, sorcery, incest, bestiality, and conspiracy against the Chief<sup>2</sup>.

In 1885 the British declared a Protectorate over Bechuanaland to counteract the Boers expansion northwards. When Botswana became a Protectorate the power to impose capital punishment was transferred from the Chiefs to the protectorate administration. Execution was carried out by hanging, which is still the method of execution used in Botswana<sup>3</sup>. With the establishment of protectorate status, the protectorate administration imported into Botswana the Roman-Dutch common law then in force in the Colony of the Cape of Good Hope. Criminal Law at that time was therefore based on the Roman-Dutch common law. To some extent the local chiefs were allowed to operate criminal law under the local custom for offences committed within their ethnic territories. This practice permitted a dual system of the administration of criminal justice. In 1964 a written Penal Code based on English law replaced the existing system of criminal law based on the Roman-Dutch common law.<sup>4</sup>

III. THE LEGAL SYSTEM

In 1966 Botswana became independent from Britain with a written Constitution. The judicial system is made up of two sets of courts: the regular courts and the customary law courts. The regular courts are modelled along the received European system of courts and consist of superior courts and inferior courts. The superior courts have unlimited jurisdiction and are made up of the Court of Appeal and the High Court. The inferior courts are limited by jurisdiction and comprise mainly the magistrate courts. The status of a newly created Industrial Court is not clear, but it is believed to be an inferior court. A Court Martial also falls under inferior courts. The other set of courts is made up of customary courts, established under the Customary Courts Act (Chapter04:05)<sup>5</sup>.

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\*\*National Coordinator, BIICL Death Penalty Project, Botswana. Professor Kwame Frimpong is a Professor of law at the University of Botswana and a qualified barrister in Ghana. With the assistance of Ms Elizabeth Maxwell, a Fulbright Grantee in Botswana on human rights issues.

<sup>1</sup> Ramokua, L (1987). 'The History of Imprisonment in Botswana'. in Frimpong, K (ed) *The Law the Convict and the Prisons* (University of Botswana, Gabarone 1986) 'Some Observations on Botswana's Prison System' *Zimbabwe Law Review* 4, 136-148.

<sup>2</sup> Nsereko, D.D.N (1991). 'Extenuating Circumstances in Capital Offences in Botswana'. *Criminal Law Forum* (1991) 2(2) 240.  
<sup>3</sup> s 26(1) of the Penal Code, c 08:01

<sup>4</sup> Nsereko (n2) 236-237, 241.

<sup>5</sup> For a detailed discussion of the Botswanian legal system see Quansah, E.K *Introduction to the Botswana Legal System*. (Pula Press Gabarone 2003)

Even though the superior courts have unlimited jurisdiction, this is limited to domestic issues. The jurisdiction of the High Court as well as the Court of Appeal, with a few exceptions<sup>6</sup>, is territorial<sup>7</sup>. Jurisdiction in murder does not extend beyond the territorial jurisdiction of the courts. In the case of *The State v. Mtshwaeli*<sup>8</sup>, the High Court, presided over by the then Chief Justice, Hayfron-Benjamin, came to the conclusion that the Court had jurisdiction in the case for the simple fact that the killings had taken place within Botswana territory. The case involved the abduction of an elderly couple from Zimbabwe. Their dead bodies with severe wounds were subsequently found within Botswana territory. On the basis of strong and compelling circumstantial evidence the Court came to the conclusion that the killings had taken place in Botswana. In his judgment, the then Chief Justice stressed that if the killings had taken place in Zimbabwe the Court would not have had jurisdiction in the case. In *State v. Jacobs*<sup>9</sup> a High Court Judge quashed an earlier conviction of the accused, who had raped a woman at the South African side of the border, on the ground that the Botswana courts did not have jurisdiction in the case.

The Constitution in section 10(8) abolished the operation of any unwritten system of criminal law, and by necessary implication, in support of the 1964 Penal Code, ended the reign of the criminal law based on the Roman-Dutch common law. However, section 10(12) (e) also saved offences arising out of customary criminal law (even though unwritten). This presupposes that customary law offences exist in Botswana. However, the status of customary criminal law offences in Botswana remains uncertain<sup>10</sup>, as the Constitution requires some conditions to be met before customary law offences can be recognised. First, there must be the existence of a customary criminal law. Second, such law must be applicable to a person who is subject to such a customary law. Third, a court should be empowered by law to apply such customary criminal law.

One might argue that the Constitution has paved the way for the recognition of customary law offences. However, not all the conditions for their recognition have been met. For instance, the procedures for recognising such offences have not been put in place. The Customary Courts Act (Cap.04:05) that would have recognised such offences has in effect blocked their recognition. For instance, in section 11(3) it provides that customary law courts shall be guided by the Penal Code. Furthermore, in section 11(6) it specifically states that the customary law courts shall apply only to the offences that exist under the Penal Code. The result is that customary law offences that are unwritten and are not in the Penal Code are not recognised in Botswana<sup>11</sup>. Post-independence Criminal Law in Botswana is therefore based either on the Penal Code or on any written law.

#### A. Capital Offences

The 1964 Penal Code has made a provision for capital punishment by hanging (s202 (3)). The Constitution of Botswana, which came into force on 30 September 1966, specifically includes an exception to the right to life for the death penalty imposed by a court of competent jurisdiction<sup>12</sup>. Currently, the following crimes are punishable by death under the Penal Code (Chapter 08:01):

- (i) Murder, (ss202, 203(1)),
- (ii) Treason (s34),
- (iii) Instigating a foreigner to invade Botswana (s35), and
- (iv) Committing assault with intent to murder in the course of the commission of piracy (s63 (2)).

Three offences under the Botswana Defence Force Act (Cap. 21:05), tried by a court martial, are also punishable by death. These are:

- (i) Aiding the enemy (ss27-28),

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<sup>6</sup> There are a few instances where extra-territorial jurisdiction is recognised. For instance, extra-territorial jurisdiction is found in ss 34(3) and 65 of the Penal Code, treason and hijacking, respectively.

<sup>7</sup> S95(1) of the Constitution of Botswana, (c01:01), ss 4 & 5 of the Penal Code (c08: 01, and s4 of the Criminal Procedure and Evidence Act (c08:02).

<sup>8</sup> [1981] BLR 232

<sup>9</sup> [1974]2 BLR 48

<sup>10</sup> Frimpong, K 'The Status of Customary Law Offences in Botswana' *the Law Departmental Seminar Paper* (University of Botswana Gaborone 1991, unpublished).

<sup>11</sup> *ibid.* A High Court case, *Bimbo v. The State* (1984), unpublished, has confirmed this position. A Customary Court had convicted and fined a man P500.00 (about US\$100.00) for committing adultery. On a review, the High Court quashed the conviction and sentence on the ground that adultery is not an offence recognised by the Penal Code or any other written law.

<sup>12</sup> The Constitution of Botswana, c01:01, in s4(1) states, '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.'

- (ii) Cowardly behaviour (s29), and
- (iii) Mutiny (ss34-35).

#### *B. The Trial*

For capital offences found in the Penal Code, persons are tried in the High Court by indictment. If a case that requires the imposition of the death penalty originates at a subordinate court, (that is a magistrate court) then it is only for committal to the High Court. From the High Court a convicted person has a right of appeal to the Court of Appeal, which is the Highest Court in Botswana (section 10 of the Court of Appeal Act, Cap.04:01). Thereafter, if the conviction is confirmed, then it is left to the clemency of the President who has power under the Constitution to grant clemency to death row prisoners (sections 54 and 55). The appeal actually goes to the Advisory Committee on the Prerogative of Mercy, which, in turn advises the President whether to grant clemency or not. It, however, appears that clemency has never been granted.

The whole process of arrest and trial is protected under the Constitution. For instance, section 10(2)(b) provides: Every person who is charged with a criminal offence shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged. Under section 10(10) of the Constitution an accused person is guaranteed a right to trial in court. The Constitution also in section 10(1) guarantees a fair trial to all accused persons: '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'. On legal representation, the accused has a right to be represented by an attorney of his own choice (s.10 (2) (d) of the Constitution). However, in the case of offences carrying the death penalty, such as murder, if the accused cannot afford an attorney of his own choice the state shall appoint one for him/her. This is the basis for the Pro Deo counsel for the accused.

#### *C. Post Trial*

A trial of capital offences may result in either conviction or acquittal. If it is acquittal then the accused is set free. A conviction may carry either the death penalty or a prison sentence. If the convicting court finds extenuating circumstances then it may impose a prison sentence other than the death penalty<sup>13</sup>. But if there are no extenuating circumstances then the court is obliged to impose the death penalty.

Imprisonment is handled by the Department of Prisons and Rehabilitation, which falls under the Ministry of Labour and Home Affairs. The Department operates under the Prisons Act (Cap.21:03), which regulates the general conditions in the prisons, the welfare of inmates, and the prison staff and their relationship with the inmates. The Prisons Act protects and guarantees the human rights of the inmates, to the extent that they are to be subjected to humane treatment<sup>14</sup>. An innovative aspect of the Botswana prison system is the adoption of extra-mural labour. Under this system, a convicted person who is sentenced to a prison term of not more than 12 months may be subjected to supervisory work (extra mural labour) outside the prison instead of going into prison. Similarly, the Commissioner of Prisons is empowered to release for extra mural labour, an inmate who is serving a term of imprisonment, which does not exceed 12 months<sup>15</sup>.

#### *D. Executions*

Under the Penal Code, the death penalty is mandatory in cases of murder unless extenuating circumstances, which reduce the offender's moral blameworthiness, are found.<sup>16</sup> In many cases, the courts find that extenuating circumstances exist and refrain from imposing the death penalty. It is therefore widely believed that in Botswana, because of the extenuating circumstances, the courts rarely impose the death penalty.

The death penalty cannot be carried out upon individuals less than 18 years of age at the time of the commission of the offence. Section 26(2) of the Penal Code provides that such persons 'shall be liable to be detained

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<sup>13</sup> s 203(2) of the Penal Code.

<sup>14</sup> See Frimpong, K's chapter on Botswana in Duenkel, F., & Van Zyl Smit, D. (eds) *Imprisonment Today and Tomorrow* (2<sup>nd</sup> edn Kluwer Law International The Netherlands 2000), Frimpong (n 2)

<sup>15</sup> For a detailed discussion on Botswana's extra-mural labour, see, Frimpong, K. 'Searching for Alternatives to Imprisonment: An African Experiment', (1992) *South African Journal of Criminal Justice*. 5(3) 233-253.

<sup>16</sup> c08:01, ss 202 & 203(1).

in such place and under such conditions as the President may direct'. Similarly, the death penalty shall not be imposed upon pregnant women. When the issue of pregnancy arises where a woman has been convicted of murder, it must be ascertained in court whether in fact the woman is pregnant. The determination at the High Court can be appealed to the Court of Appeal whose decision is final. If the Court of Appeal confirms that she is indeed pregnant then she will be sentenced to life imprisonment<sup>17</sup>.

Since independence in 1966, 38 people have been executed in Botswana.<sup>18</sup> In most (if not all) cases, the death penalty has been imposed upon the conviction for murder without extenuating circumstances.

The Penal Code requires that the death penalty shall be carried out by hanging<sup>19</sup>. It is debatable whether death by hanging contravenes the United Nations safeguard that states that 'where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering'<sup>20</sup>.

### III. ATTEMPTS TO CHALLENGE THE DEATH PENALTY<sup>21</sup>

In Botswana, the public generally supports the maintenance of the death penalty. However, the administration of the death penalty has been challenged through public education campaigns, in court and at the African Commission on Human and People's Rights. Most of the advocacy calling for the abolition of the death penalty has emanated from DITSHWANELO-The Botswana Centre for Human Rights, a local human rights NGO established in 1993.

#### A. Public Education Campaigns

In 1999, DITSHWANELO initiated a public education campaign on the death penalty. The purpose was to sensitise the general public on the issue. For this campaign, the NGO produced a pamphlet discussing why the death penalty should be abolished, bumper stickers with the "Who Has the Right to Kill?" slogan, newspaper inserts dealing with the death penalty, and t-shirts. In addition, DITSHWANELO organised a panel discussion on the death penalty at the University of Botswana and sponsored a street drama and a presentation at a local school. Since this campaign in 1999, DITSHWANELO continues to issue press statements related to death penalty cases in which it has been involved.

#### B. The Courts and the Death Penalty

The constitutionality of the death penalty and hanging as a method of execution was first challenged in *Patrick Ntesang and Others v. The State*<sup>22</sup>. In this case, the Court of Appeal found that both the death penalty and hanging as a method of execution were constitutional. The Court noted that the Constitution in Section 4(1) specifically excludes the death penalty as imposed by a court of competent jurisdiction from the right to life. Moreover, the Court found that Section 7(2) of the Constitution saved the death penalty from the prohibition on inhuman and degrading treatment provided in Section 7(1) of the said Constitution. Section 7(1) specifically outlaws any form of punishment that is inhuman and degrading. Section 7(2), on the other hand, exempts punishments that were lawful in Botswana immediately before the Constitution came into effect.<sup>23</sup> Since the death penalty existed prior to independence, it is difficult to challenge it on constitutional grounds.

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<sup>17</sup> s298 of the Criminal Procedure and Evidence Act, c08:02

<sup>18</sup> This information is available at the following website, <<http://www.ditshwanelo.org.bw>>

<sup>19</sup> s26(1) provides that 'When any person is sentenced to death, the sentence shall direct that he shall be hanged by the neck until he is dead'.

<sup>20</sup> art 6 of ECOSOC, the Safeguards Guaranteeing the Rights of Those Facing the Death Penalty

<sup>21</sup> Except where a case citation is provided, the information in this section was provided by DITSHWANELO, The Botswana Centre for Human Rights. Much of this information is available on their website, <<http://www.ditshwanelo.org.bw>>

<sup>22</sup> [1995] BLR 151, CA.

<sup>23</sup> s7(2) states, 'Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was lawful in the country immediately before the coming into operation of this Constitution.'

In 1999, the imposition of the death penalty was challenged in the case of *Mr. Maauwe and Mr. Motswetla. DITSHWANELO & Others v. Attorney General of Botswana*<sup>24</sup>. DITSHWANELO applied for a stay of execution on behalf of the two men after they had lost their original appeal and were denied clemency. This was the first time a death sentence had been challenged after all of the normal channels of appeal were exhausted. The High Court granted a temporary stay, and, although the stay application had originally challenged the constitutionality of the death sentence (due to, inter alia, the length of time the two men had spent on death row), the Court ultimately determined that Mr. Maauwe and Mr. Motswetla had not received a fair trial. Specifically, the Court found that the two men's right to a fair trial under Section 10 of the Constitution was violated by the failure of High Court officials to place the men's written complaint about inadequate legal representation and inadequate language interpretation before the Court of Appeal when it considered their appeal and affirmed their convictions.<sup>25</sup> Both men were indigent and thus represented by Pro Deo counsel during their initial trial and appeal.

As a result of its findings, the High Court threw out the two men's convictions and sentence and ordered a retrial. Mr. Maauwe and Mr. Motswetla remain in prison awaiting their retrial. In the course of the proceedings in their case, the High Court made a few significant rulings. First, the Court affirmed that death row prisoners have a right to consult with their attorneys out of the hearing of prison officials (striking down a regulation which required that consultations take place within sight and hearing of prison officials).<sup>26</sup> Second, the Court ruled that DITSHWANELO, as a human rights organisation opposed to the death penalty, had locus standi in the case.<sup>27</sup> As they continue to remain in prisons, their attorneys are in the process of applying for their discharge.

In late 1999, another death row prisoner, Lehlohonolo Kobedi, applied for a stay of execution in the High Court after his murder conviction and death sentence were affirmed by the Court of Appeal<sup>28</sup>. DITSHWANELO also provided assistance in his case. Mr. Kobedi argued that he had not received a fair trial, but the High Court declined to grant a stay in 2001. On appeal from the High Court decision, Mr. Kobedi's attorneys argued the following: (1) the sections of the Penal Code prescribing a mandatory death sentence for murder in the absence of extenuating circumstances were unconstitutional; (2) hanging was unconstitutional; and (3) the imposition of the death penalty was unlawful in Mr. Kobedi's case because he was not afforded the legal representative of his choice, mitigating factors in addition to extenuating factors were not taken into account, and his execution would be inhuman and degrading due to his ill health and the length of time he had spent on death row. In addition, Kobedi's attorneys requested that the Court order a retrial based upon new evidence, which suggested that Mr. Kobedi was innocent. The Court of Appeal, however, upheld the High Court's ruling and only stayed Mr. Kobedi's execution while he could apply for clemency. Among other things, the Court found no reason to revisit its decision on the constitutionality of the death penalty in the Ntesang case and determined that the new evidence brought forth was not so clear as to warrant disturbing the functus officio rule. Mr. Kobedi was executed on 18 July 2003.

### C. *The African Commission on Human and People's Rights*

In two death penalty cases, that of Marietta Bosch and Lehlohonolo Kobedi, communications were submitted to the African Commission on Human and People's Rights, alleging that the imposition of the death sentences in their cases violated the African Charter on Human and People's Rights. In Ms. Bosch's case, her attorneys submitted a communication to the African Commission on 7 March 2001, which requested interim measures to prevent the government from executing Ms. Bosch while the Commission had time to consider her complaint. However, Ms. Bosch was executed on 31 March 2001. The communication on her behalf alleged, inter alia, that her right to life was violated by imposing the punishment of execution for a crime of passion and that hanging constituted inhuman treatment under the African Charter. A further communication complained that her attorneys and family were not afforded reasonable notice of her execution and the outcome of the clemency process. The Commission, in a 2003 decision, found that there had been no violation of the Charter. The Commission stressed this point in its Report

Alleged Violation of Articles 1, 4 and 7(1): Execution of Applicant pending consideration of Applicant's Communication by the African Commission - The last argument is that Article 1 of

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<sup>24</sup> (MISCRA 2/99)

<sup>25</sup> *DITSHWANELO & Others v AG of Botswana* (MISCRA 2/99), Reasons for Judgment of 5 November 1999.

<sup>26</sup> *DITSHWANELO & Others v AG of Botswana* (MISCRA 2/99), Ruling of 21 April 1999.

<sup>27</sup> *DITSHWANELO & Others v AG of Botswana* (MISCRA 2/99), Ruling of 13 September 1999.

<sup>28</sup> *Lehlohonolo Kobedi v State* (Unreported, CA 25/2001).

the African Charter obliges a State Party to comply with the requests of the African Commission. The Complainants base this argument on the letter written by the Chairperson of the African Commission to the President of Botswana on 27<sup>th</sup> March 2001 seeking a stay of execution. The letter was communicated by fax. In its oral submissions during the 31<sup>st</sup> Ordinary Session, the Respondent State argued that the fax was never received by the President. However, in this particular case, the African Commission is not in possession of any proof that the fax was indeed received by the President of Botswana. Article 1 obliges State Parties to observe the rights in the African Charter and to “adopt legislative or other measures to give effect to them”. The only instance that a State Party can be said to have violated Article 1 is where the State does not enact the necessary legislative enactment.

The Commission nevertheless strongly urged Botswana to comply with the resolution urging states to envisage a moratorium on capital punishment.

The African Commission is currently seized with the communication on behalf of Mr. Kobedi. The admissibility hearing was due to take place during the 35<sup>th</sup> Session of the ACHPR held in Banjul, The Gambia from 21 May to 4 June 2004. The Government of Botswana requested a postponement on grounds that they were unprepared. The hearing was then deferred to the 36<sup>th</sup> Session to be held in Dakar, Senegal from 23 November to 7 December 2004. Mr. Kobedi's attorneys have raised many of the same issues that were raised in Kobedi's unsuccessful appeal. Most recently, at the 34<sup>th</sup> Session of the African Commission in The Gambia, DITSHWANELO made a statement drawing attention to the procedures relating to the application of the death penalty in Botswana that the organisation believes are matters of great concern (addressed below under issues of significance).<sup>29</sup>

#### *D. Current Situation*

In 2003 four men were executed after their appeals were dismissed. Another four men's death sentences were reduced to terms of imprisonment at the Court of Appeal in the past year. As noted above, Mr. Maauwe and Mr. Motswetla remain in prison awaiting their retrial<sup>30</sup>, while the communication on behalf of Mr. Kobedi is pending before the African Commission on Human and People's Rights.

#### *E. Issues of Significance*

Several issues relating to the system of administration of capital cases and the death penalty have been identified by DITSHWANELO and some local attorneys as current issues of concern. These include the quality of Pro Deo representation, the clemency process, and secrecy surrounding recent executions. However, it seems in the case of the application of the death penalty in Botswana, except the issue of Pro Deo representation, the procedures compare favourably with the United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty<sup>31</sup>.

##### *1. The Pro Deo System*

There is no legal aid system in Botswana, but for crimes punishable by death, the State pays for Pro Deo counsel to represent the accused who cannot afford to retain an attorney. The adequacy of Pro Deo representation was an issue in both the Kobedi case and in the case of Mr. Maauwe and Mr. Motswetla. DITSHWANELO (and others) have identified the following problems with the Pro Deo system: (1) Pro Deo cases are often handled by inexperienced attorneys who lack the necessary skills to represent individuals charged with crimes punishable by death; (2) The fees paid to Pro Deo counsel are much lower than average attorney's fees, giving attorneys little incentive to zealously represent Pro Deo clients; and (3) Pro Deo counsel often lack the necessary resources to adequately prepare for capital cases.

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<sup>29</sup> See Statement by DITSHWANELO- The Botswana Centre for Human Rights, 34<sup>th</sup> Session of the African Commission of Human and People's Rights, available at DITSHWANELO's website.

<sup>30</sup> The High Court has set October 6 and 7 2004 to hear an application for a stay of prosecution. Motswetla and Maauwe have made an application to the High Court praying that their prosecution be declared unconstitutional.

<sup>31</sup> Adopted by Economic and Social Council resolution 1984/50 of 25 May 1984.

## 2. *The Clemency Process*

DITSHWANELO has also identified the lack of transparency surrounding the clemency process as an area of concern. Under the Constitution, the President is given the power to grant clemency to a prisoner on death row. The President is advised on the use of his clemency power by the Advisory Committee on the Prerogative of Mercy. The procedures the Committee follows are not known. In 1999 and 2003, DITSHWANELO requested information concerning the procedures of the Committee, but never received a response. DITSHWANELO has also noted that the Committee does not officially inform the attorneys or family of the condemned prisoner of the outcome of the clemency process.

## 3. *Secrecy.*

DITSHWANELO has expressed concern that the five most recent executions in Botswana were carried out without prior notification of the condemned prisoner's family, friends, or attorneys. In previous cases, such as that of Maauwe and Motswetla, the impending execution was announced shortly before it was scheduled to take place. In addition, the Prisons Act requires that the prisoner himself or herself be informed of the execution no later than 24 hours beforehand.<sup>32</sup> According to DITSHWANELO, the State provided no notification to family, friends, or attorneys prior to the executions of Marietta Bosch in 2001 and Lehlohonolo Kobedi in 2003. Apparently, no notification was provided prior to the three most recent executions, all of which took place on 19 September 2003. It is possible that increased secrecy surrounding executions is a response to increased advocacy on behalf of death row prisoners. It is, however, not too clear whether this is the norm, as there are no records of the actual practice. It is therefore possible that the alleged secrecy is not a recent development.

## IV. THE DEATH PENALTY AND BOTSWANA'S OBLIGATIONS UNDER INTERNATIONAL INSTRUMENTS

Botswana is currently a signatory to a number of international treaties that are relevant to the application of the death penalty. It is, however, worth noting that international treaties are not self-executing and therefore do not have automatic application in Botswana. They become enforceable when they are incorporated into the domestic law by legislation, judicial pronouncement, or administratively through executive action. Among the relevant international treaties to which Botswana is a party are the following:

- (i) International Convention on the Elimination of all forms of Racial Discrimination, Accession on 20 February 1974
- (ii) Convention on the Rights of the Child, Accession on 14 March 1995.
- (iii) Convention on the Elimination of All Forms of Discrimination Against Women, Accession on 13 August 1996.
- (iv) International Covenant on Civil and Political Rights, signed and ratified on 8 September 2000.
- (v) Convention Against Torture, signed and ratified on 8 September 2000.
- (vi) Rome Statute of the International Criminal Court, signed and ratified on 8 September 2000.
- (vii). Botswana is also a signatory to the African Charter on Human and People's Rights, as well as,
- (viii) The African Charter on the Rights and Welfare of the Child.

## V. CONCLUSION

The Constitution of Botswana protects the right to life. It equally justifies the imposition of the death penalty. The Court of Appeal has therefore decided that the death penalty is constitutional. It is, however, worth noting that the imposition of a death penalty on a person convicted of murder generally satisfies the United Nations Safeguards guaranteeing protection of the Rights of those facing the death penalty. Even though the death penalty is practised in Botswana, by virtue of the use of extenuating circumstances, the courts rarely impose it on accused persons charged with murder. The public, on the other hand, generally supports the death penalty. However, through DITSHWANELO-The Botswana Centre for Human Rights, both the Government and the general public are being challenged to re-examine the attitude towards the death penalty. It is hoped that with time attitudes may change and result in at least a moratorium being placed on the death penalty.

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<sup>32</sup> ss 117-119 of the Prisons Act.