The Botswana – South Africa Extradition Deadlock – Escaping Botswana's Gallows

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ABSTRACT

Botswana, unlike its economically more powerful neighbour, South Africa, retains capital punishment, (death by hanging), for the crime of murder where no extenuating circumstances are found. Presumably fearing the imposition of this penalty, individuals charged with murder in some cases cross the border into South Africa. According to South African law, an individual can only be extradited from South Africa to a country that imposes the death penalty when the country has given an undertaking that the death penalty will not be imposed or, if imposed, will not be carried out. Botswana refuses to give the undertaking. Applying both its domestic law and treaty right, South Africa refuses to extradite. This is the Botswana – South Africa extradition deadlock, which has reared its head in at least two notable cases, hereinafter referred to as Tsebe and Samotse cases. This paper reviews and discusses the Botswana Extradition Act of 1990; decisions in the Tsebe and Samotse cases; and proposes solutions to unlock the Botswana – South Africa extradition deadlock..

1. INTRODUCTION

Extradition is a system of cooperation between states that goes back many centuries. It forms a critical component of transnational criminal law enforcement. Botha[1] defines it as "a process, initiated by an adequately founded, formal request from one sovereign State to another, based on treaty, reciprocity or comity, by means of which an individual, accused or convicted of the commission of a serious criminal offence within the jurisdiction of the requesting State, is surrendered to competent courts in the territory of that State for trial or punishment." Extradition is necessary because of the territoriality of criminal law which entails the idea that "crimes and offenses

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1 N. Botha, "Extradition", *The Law of South Africa*, vol 10 First Reissue, 2nd ed (2008).

against the laws of any State can only be defined, prosecuted and pardoned by the sovereign authority of that State; and the authorities, legislative, executive or judicial, of other States take no action with regard to them …"[2] Because it involves the interaction of states, extradition is a subject of international law. Under international law, owing largely to the doctrine of sovereignty and non-interference in the affairs of other states, states have no obligation to surrender fugitives to other states.[3] As a result of this, states enter into mutual bilateral or multilateral treaties to facilitate the surrender of fugitives to enable such fugitives to be brought to book. In *R v. Arton (No.1)*[4] Lord Russell of Killowen C.J. stated:

> "The law of extradition is without doubt founded upon the broad principle that it is to the interest of civilised communities that crimes acknowledged as such should not go unpunished and it is part of the comity of nations that one State should afford to every assistance towards bringing persons guilty of such crimes to justice."

Notwithstanding its noble intentions, extradition is not a trouble-free and seamless process especially between a State that retains the death penalty and one that does not. In Southern Africa, the extradition deadlock between Botswana and South Africa provides a living example of the troubles that can arise. Botswana[5] retains the death penalty and South Africa[6] has abolished the penalty. Botswana nationals who are accused of committing murder in Botswana escape to South Africa becoming fugitives of justice. In order for Botswana to arrest and try these fugitives of justice, first, they must be extradited to Botswana. Because Botswana retains the death penalty, South Africa declines to extradite these fugitives unless Botswana guarantees that it will not impose the death penalty should they be convicted or if imposed, the death penalty will not be executed. Botswana declines to make the undertaking.[7] As a result, fugitives

2 *Huntington v. Attrill*, 146 U.S. 657, 669 (1892).

3 G. Gilbert, *Transnational Fugitive Offenders in International Law* (1998), p.14.

4 [1896] 1 Q.B. 108 at p. 111.

5 Death by hanging remains a penalty for; *inter alia*, the crime of murder, where there are no extenuating circumstances. The Botswana Court of Appeal, the highest court in the land, has held that the death penalty is constitutional in *Kobedi v. The State 2005 (2) BLR 1 (CA)*. Also see *The State v Rodney Masoko Court of Appeal Criminal Appeal No. CLCGB 058-18 (unreported)*.

6 After the South African Constitutional Court decided that the death penalty was inconsistent with the Constitution in the ground-breaking decision of *State v. Makwanyane*, 1995 (3) SA 391, South Africa did not delay in abolishing the death penalty.

7 See "Murder suspects to benefit from SA-Botswana deadlock." *Mmegi*, 29/09/2011. Also available at http://www.mmegi.bw/index.php?sid=1&aid=316&dir=2011%2FSeptember%2FWednesday28&fb_

remain in South Africa, which has no extra-territorial jurisdiction to try them, and out of reach of the tentacles of Botswana's criminal jurisdiction. And this is for grave crimes. This predicament has given rise to two court decisions in *Minister of Home Affairs and Others v. Tsebe and Others, Minister of Justice and Constitutional Development and Another v. Tsebe and Others, (Tsebe's case)*[8], and in *Samotse and Another v. The Minister of Home Affairs and Others, (Samotse's case)*.[9]

A critical analysis of the Tsebe and Samotse cases is preceded by a review and discussion of the Botswana Extradition Act of 1990, with comparisons and references to extradition statutes of other Southern Africa African countries; and the third section of the paper proposes options for resolving the Botswana – South Africa extradition deadlock.

2 CRITICAL ANALYSIS OF THE BOTSWANA EXTRADITION ACT

Extradition in Botswana is governed by the Extradition Act, 1990.[10] Only salient, notable or controversial aspects of the Act, in need of revision, will be highlighted in this appraisal.

2.1 Definition of Extradition Crime

A fugitive criminal is defined as any person accused or convicted of an extradition crime committed within the jurisdiction of any other country who is in or is suspected of being in Botswana.[11] Under Section 2(2) an extradition crime means " a crime which, if committed within the jurisdiction of Botswana would be an offence punishable with imprisonment for a term of not less than

comment_id=10150328313859759_18755811#prettyPhoto. Last accessed on the 25/04/2018; "South Africa forces Botswana to backtrack on death penalty for extradited criminals". *The SundayStandard*, 27/07/2016. Also available at http://www.sundaystandard.info/safrica-forces-botswana-backtrack-death-penalty-extradited-criminals. Last accessed on the 25/04/2018.

8 [2012] ZACC 16.

9 Unreported.

10 Act No. 18 of 1990.

11 Section 2(1). Under Section 7(1) a person accused or suspected of having counselled, procured, commanded, aided or abetted the commission of any extradition crime, or being an accessory before or after the fact to any extradition crime, shall be deemed, for the purposes of this Act, to be accused or convicted of having committed that crime, and shall be liable to be apprehended and surrendered accordingly.

two years or other greater penalty and includes an offence of purely fiscal character."[12] It is uncertain what meaning attaches to the word 'crime.' The definition suggests that the offence disclosed by the requesting country must be identical, either in its description or in its constituent parts, to some offence in Botswana. The definition could either mean a specific criminal offence under the laws of the requesting country or conduct that is viewed as criminal. If it is read to mean a specific offence under the laws of the requesting state, the definition will be narrow in that it would require the requesting country to show that there exists a crime in its laws that is identical to a crime in the requested country. It is submitted that the more sensible approach is to adopt the conduct-based definition. The test then would be whether the *conduct* of the accused, if it had been committed in Botswana, would have constituted a crime warranting extradition in Botswana.

2.2 Countries to which the Act applies

The Act applies to cases involving (i) countries that have a treaty or an arrangement with Botswana, and (ii) designated Commonwealth countries.

Where Botswana has made an arrangement with any country, with respect to the surrender to that country of any fugitive criminal, the Minister is empowered, by order published in the Gazette, to direct that the Extradition Act shall apply in the case of that country.[13] An arrangement includes a convention, protocol, agreement, scheme or treaty.[14] Once a treaty is concluded, an order is published in the Gazette triggering the application of the Act to the foreign State. The provision obviates the need for Parliament to promulgate a statute to domesticate every bilateral arrangement that is entered into. The order in the Gazette is required to embody the terms of the arrangement and must not remain in force for any longer period than the arrangement. Further, according to Section 4, the Minister may, by order published in the Gazette, declare any Commonwealth country to be a designated country.[15] A designated country

12 Section 2(2). This includes the related crimes of counselling, procuring, commanding, aiding or abetting the commission of an extradition crime or being an accessory before or after the fact to any such crime. See section 7(1) and 7(2).

13 Section 3.

14 Section 2 (1).

15 Section 4.

is defined as a requesting country which is declared as a designated country under section 4, and to which a fugitive criminal may be extradited even though there exists no arrangement between Botswana and that country.[16] This provision implements the so called "London Scheme" which was adopted by Commonwealth countries in 1966.[17] The order may stipulate what crimes shall be deemed to be extradition crimes for the purposes of the order and of the Act, and may be made whether or not the designated country has made any provision for the extradition of any fugitive criminal from its territory to Botswana.[18] The Minister may revoke any order, or remove any country from the list of designated countries where he considers that it would be in the interest of Botswana to do so.[19] In terms of the Extradition (Designated Commonwealth Countries) Order[20] all Commonwealth countries have been declared "designated countries" for the purposes of the Extradition Act.

Under both Sections 3 and 4, the Minister may prescribe the crimes that shall be deemed to be extradition crimes for purposes of the Order and Act. This means the Minister is not confined to the definition of extradition crime in the Act when prescribing extradition crimes for purposes of the order under Section 3(3) and Section 4(2). The wisdom of this provision is questionable. If Parliament found the need to stipulate the ingredients of an extradition crime and to say what amounts to an extradition crime, it is unclear why it would permit the Minister, an executive functionary, to ignore that definition and, by Orders, compile his or her own list of extradition crimes. And the Minister is not provided with any guidelines to use when specifying extradition crimes.

2.3 Restrictions on Surrender of Criminals

The Act contains restrictions on surrender of criminals and imposes safeguards designed to protect the fugitive criminal.

First, the Act provides for the political offence exemption. Where the offence in respect of which the surrender of a fugitive criminal is demanded is

16 Section 2(1).
17 See for example Commonwealth Secretariat, *Commonwealth Schemes for International Cooperation in Criminal Matters*, London (2017), p. 2 and pp. 4 – 38.
18 Section 4(2).
19 Section 4(3).
20 Statutory Instrument (S.I.) 93, 1997.

one of a political character, or if it appears that the requisition for the surrender has in fact been made with a view to try or punish him for an offence of a political character the fugitive criminal must not be surrendered.[21] The Act does not define a political offence. In *Republic of Namibia v Alfred and Others* the Botswana Court of Appeal noted that the "objective of the exemption has been said to be two-fold: it mixes inseparably the humanitarian concept for the fugitive on the one hand and on the other the politically motivated unwillingness of the requested state to get involved in the internal political affairs of the requesting state …"[22] In this case the Republic of Namibia sought extradition for thirteen persons from Botswana to Namibia to face charges for certain offences alleged to have been committed by them. The thirteen persons were part of an organisation known as Caprivi Liberation Army which desired to secure the secession of the Carpivi Strip from Namibia. Following the alleged commission of offences, they fled to Botswana. They were charged with high treason, the unlawful possession of arms and ammunition, murder, attempted murder and the unlawful possession of explosives. Both the High Court and the Court of Appeal declined to extradite finding that the offences were of political character. In the *United States v Pitawanakwat*[23] the court stated that:

> "This exception, which arose in the aftermath of the American and French Revolutions, was first incorporated into treaties in the early nineteenth century and is "now almost universally accepted in extradition law". It was consciously designed to protect the right of citizens to rebel against unjust or oppressive governments and is premised on the following justifications: First, its historical development suggests that it is grounded in a belief that individuals have a "right to resort to political activitism to foster political change". This justification is consistent with the modern consensus that political crimes have greater legitimacy than common crimes. Second, the exception reflects a concern that individuals - particularly unsuccessful rebels - should not be returned to countries where they may be subjected to unfair trials and punishments because of their political opinions. Third, the exception comports with the notion that governments - and

21 Section 8(1)(a).
22 2004 (2) BLR 101 (CA).
23 120F Supp 2d 921 (D Or 2000) quoting from *Quinn v Robinson* (1986) 783F 2d 776 at p 786.

certainly their non-political branches - should not intervene in the internal political struggles of other nations."

The principle is designed to discourage political extraditions. In *Cheng v. Governor of Pentonville Prison*[24] Lord Diplock held that "political" as descriptive of an object to be achieved must be confined to the object of overthrowing or changing the government of a state or inducing it to change its policy.

Apart from political offences, extradition is prohibited in respect of a fugitive criminal who is being accused of or who has been convicted under military law or a law relating to military obligations.[25] Section 8(1) uses the words "military law or law relating to military obligations." It is not clear from the Act what the position is where the charge or the conviction stems from an offence under both the general law and the military law of the requesting country. The Act should be amended to provide that the offence should not also be an offence under the general criminal law. The Zambian Extradition Act[26] is clearer. It provides that extradition shall not be granted for offences under military law which are not offences under ordinary criminal law.[27]

In terms of Section 8 (11) Botswana will not surrender a fugitive criminal where the offence in respect of which his surrender is demanded is punishable by death in the requesting country and where under the laws of Botswana such an offence is not punishable by death if committed in Botswana unless provision is made by an arrangement with that country for securing that he will not be punished by death in respect of that offence. This means in respect of the offences that are punishable by death in Botswana and the requesting state, Botswana will surrender a fugitive criminal. In terms of the Botswana Penal Code[28], the death penalty is a competent sentence for the offence of murder;[29] treason;[30] committing assault with the intent to murder in the course of the commission of piracy;[31] instigating a foreigner to invade Botswana;[32]

24 [1973] A.C. 931.
25 Section 8 (1) (g).
26 Chapter 94, Laws of Zambia.
27 Section 33.
28 Section 202.
29 Section 203 (1).
30 Section 34 (1).
31 Section 63 (2).
32 Section 35.

cowardly behaviour[33] and mutiny.[34] Thus, unless an arrangement has been made between Botswana and the requesting state in the specified terms, Botswana will not surrender a fugitive criminal for all other offences that are not punishable by death in Botswana. The death penalty exception appears in many laws of other countries including Botswana's neighbouring countries.[35] As noted in the abstract, the death penalty exemption is responsible for the extradition deadlock that has arisen between Botswana and South Africa, more fully examined in a subsequent part of the paper.

Further, a fugitive criminal cannot be surrendered if the facts on which the request is made do not constitute an offence under the laws of Botswana. This is called the rule of double/dual criminality which requires that extradition only take place in respect of conduct which is not only an offence against the law of the requesting State but also against the law of the requested State.[36] The Act also incorporates the principle of speciality. The Act prohibits a fugitive criminal from being surrendered to any country unless provision is made by the law of that country, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Botswana, be detained or tried in that country for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded.[37] The specialty principle protects the fugitive criminal. It is designed to prevent treachery in that it avoids the requesting country from obtaining the surrender of a fugitive criminal on an ordinary criminal charge and then going ahead to try him for a political offence.

Other restrictions are designed to preserve respect for the internal judicial system of the requested state. For instance, a fugitive criminal who has been accused of some offence within the jurisdiction of Botswana, not being the offence for which his surrender is asked, or who is undergoing sentence under any conviction in Botswana, shall not, unless the President otherwise directs, be surrendered until after he has been discharged, whether by acquittal or on the

33 Section 29.
34 Section 34-35.
35 See for example Section 5 (1) (d), Namibia Extradition Act No. 11 of 1996.
36 The test is laid down by Lord Diplock in *Re Nielsen,* [1984] A.C. 606 (at page 704). He said: "…in order to determine whether conduct constitutes an 'extradition crime' within the 1870 Act … and thus a potential ground for extradition if that conduct had taken place in a foreign State, one can start by inquiring whether the conduct, if it had taken place in England would have fallen within one of the … descriptions of crimes [listed in the first Schedule to the 1870 Act]."
37 Section 8 (1) (j).

expiration of his sentence or otherwise. Further, a fugitive criminal cannot be surrendered if final judgment has been passed by any court in Botswana upon him in respect of the offence for which his surrender is sought.

Under the nationality exception, which is part of the Act, a fugitive criminal who is a citizen of Botswana and is not also a citizen or national of the requesting state cannot be surrendered unless provision is made by the law of that country, or by arrangement, that fugitive criminals who are citizens of that country may be surrendered to Botswana on being requested.[38] The nationality exception has two functions. First, it is aimed at protecting citizens from facing prosecution in foreign countries for offences committed against foreign laws. The basis for the protection stems from the belief that citizens would be prejudiced or disadvantaged in obtaining justice from courts of a foreign state. The second function of the nationality exception is to enable the fugitive criminal to rehabilitate by serving a sentence in his home state. Lastly, a fugitive criminal shall not be surrendered if such surrender would be contrary to the terms of any arrangement as recited or embodied in any order made under the provisions of section 3 and a fugitive criminal shall not be surrendered until the expiration of 15 days from the date of being committed to prison, to await his surrender.[39]

2.4 Extradition Process and Procedures

Part III of the Act stipulates the procedures and processes for requesting the surrender of a fugitive criminal in Botswana. A requisition for the surrender of a fugitive criminal by any country must be made by a diplomatic representative or consular officer of that country.[40] The requisition must be accompanied by a warrant of arrest for the fugitive criminal issued in the requesting country with the request that the warrant be endorsed for the arrest of the fugitive criminal.[41]

38 Section 8 (1) (i).
39 Section 8 (1) (j) and (k).
40 Section 8 (1).
41 Section 8 (2). In *Hlabangane v Director of Public Prosecutions*, 2012 (2) BLR 340, the High Court held that it was only after the Minister had received the request and forwarded a warrant for endorsement by the magistrate that a fugitive criminal could be arrested and brought before the court. It was only after the execution of the warrant that the magistrate could hold an enquiry. In that case, as there was no evidence that the Minister received the request, and the Magistrate's order committing the fugitive criminal was set aside. See also *Chalira v The Republic of Malawi* [1998] BLR 256.

The Minister "may" transmit the warrant to a magistrate to endorse it for the apprehension of the criminal.[42] By using the permissive word "may", the Act does not oblige the Minister to transmit the warrant to a magistrate. It is an Act of political will. Once a fugitive criminal has been apprehended on an endorsed warrant, he must be brought before a magistrate within 48 hours of his apprehension and the magistrate may make an order of further detention.[43] It is submitted that the 48 hours requirement conforms to the constitutional requirement that a person who is arrested or detained for the purpose of bringing him before a court in execution of the order of a court must be brought as soon as is reasonably practicable before a court.[44]

There are two procedures for requesting the surrender of a fugitive criminal, namely: the "ordinary procedure" in Section 14, and the "special procedure" in Section 16. Under the ordinary procedure, the magistrate is required to hold an inquiry with a view to the surrender of such person to the requesting state.[45] During the inquiry, the magistrate has, *inter alia*, the power to commit any person for further examination, to admit any person detained to bail [46] and to receive any evidence which may be tendered to show that the crime of which the prisoner is accused or alleged to have been convicted is not an extradition crime or is a non-extraditable offence.[47] The Act does not indicate the standard of proof to be satisfied in such proceedings. In *Republic of Namibia v. Alfred and Others*[48] the Court of Appeal held that the correct test was that of a *prima facie* case. According to the Court of Appeal, this is a concept understood by Botswana Courts. Section 14(2) of the Act provides that in conducting the requisite inquiry, the Magistrate must proceed "in the manner in which a preparatory examination is held." Implicit in this is that before an accused can be committed for trial at a preparatory examination, the court must be satisfied that there is a *prima facie* case against him. [49] A *prima facie* case exists where the evidence tendered provides a realistic and reasonable prospect

42 Section 8 (3).
43 Section 12.
44 Section 5(3).
45 Section 14 (1).
46 Section 14 (2)..
47 Section 14 (4).
48 2004 (2) BLR 101 (CA).
49 This is the effect of Sections 77 and 78 of the Criminal Procedure and Evidence Act (Cap 08:02).

of a conviction.[50]

Where it appears to the Magistrate that " by reason of the trivial nature of the case, or by reason of the application for the surrender of the fugitive criminal not being made in good faith, in the interests of justice or otherwise, it would, having regard to the distance, to the facilities of communication, and to all the circumstances of the case, be unjust or oppressive, or too severe a punishment, to surrender the fugitive criminal whether at all or until the expiration of a certain period," the Magistrate is empowered to discharge the prisoner either absolutely or on bail, or order that he be surrendered until after the expiration of the period named in the order, or may make such order in the matter as he/she thinks proper.[51] The fugitive criminal is entitled to appeal the Magistrate's refusal to discharge him.[52] Where it is proved that the fugitive criminal ought to be extradited, the Magistrate must commit him to prison and if the Magistrate is not satisfied with the evidence,[53] he must discharge the prisoner.[54]

The special procedure in Section 16 is reserved for cases where a special arrangement has been made with the requesting country. Where such an arrangement exists, a requesting country is required to send to the Minister for transmission to the Magistrate a record of the case prepared by a competent authority in the requesting state.[55] The record of the case contains the description of the fugitive criminal, details of the offence and summary of the evidence. The magistrate may, without deciding on the admissibility of the matters contained in the record, consider the record and if the evidence is sufficient to warrant a trial of the charges for which the surrender has been requested, commit the fugitive criminal to prison to await his surrender.[56] Any person aggrieved by a decision of the magistrate in committal proceedings may, within 15 days of such decision, appeal to the High Court.[57]

50 *Makwakwa and Others v S*, (A294/10) [2011] ZAFSHC 27.
51 Section 9 (1).
52 Section 9 (2).
53 Section 14 (1) and (2).
54 Section 14 (3).
55 Section 16 (1).
56 Section 16 (6).
57 Section 18..

2.5 Discharge and Surrender of Fugitive Criminals

Part IV of the Extradition Act provides for the surrender or discharge of fugitive criminals. A fugitive criminal may waive committal proceedings and in that case the Magistrate may make an order by consent for the committal of the fugitive criminal to prison or for his admission to bail to await his surrender, as the case may be.[58] This is accompanied by a safeguard. The Magistrate must be satisfied that the request by the fugitive criminal to waive committal proceedings was made voluntarily and with an understanding of the implications of that waiver.[59] To strengthen the safeguard and ensure that fugitive criminals are not intimidated and forced into waiving committal proceedings the Act should incorporate other safeguard measures such as allowing the Magistrate to question the fugitive criminal separately in the absence of police officers or giving the fugitive criminal some "cooling off" time to reconsider. The Act does not provide for a right to legal representation or legal aid.[60] In terms of the Constitution of Botswana a person who is charged with a criminal offence is entitled to legal representation of his own choice at his own expense.[61] "Criminal offence" under this provision means a criminal offence under the laws of Botswana.[62] Accordingly, since a fugitive criminal is not a person charged with an offence under the laws of Botswana it is submitted that the provision that guarantees the right to legal representation does not apply to him. It is necessary that a clear stipulation be made.

Upon the expiration of 15 days from the date of the committal of a fugitive criminal to prison, or if an appeal is made under section 18, from the date of dismissal or lapsing of the appeal, or after such further period as may be allowed by the Minister, the Minister may by warrant order the fugitive criminal to be surrendered to such person as is in his opinion duly authorised by the requesting country to receive the fugitive criminal, together with any property seized under the provisions of section 11 (4) and the fugitive criminal and such property shall be surrendered accordingly. Even after the Magistrate has determined that the fugitive criminal may be extradited, the Minister enjoys

58 Section 19(1).
59 Section 19(2).
60 Section 20 (1) and (2) of the Namibia Extradition Act, No. 11 of 1996.
61 Section 10 (2) (d).
62 Section 10 (14).

discretion not to order extradition. The Minister is the last hope for a fugitive criminal who has been ordered to be extradited by a magistrate. There is no authority that provides guidance on how the Minister may exercise his discretion not to order an extradition. The Act permits the Minister to consider a range of considerations to refuse to order an extradition.

There is a limit to the amount of time a fugitive criminal who has been committed to prison can spend in prison. Where such fugitive criminal is not surrendered and conveyed out of Botswana within two months after the committal, or, if the appeal against such committal has been lodged, after the decision of the court upon the matter, the High Court may upon an application being made to it by or on behalf of the criminal; and upon proof that reasonable notice of the intention to make the application has been given to the Minister order the criminal to be released unless sufficient cause is shown to the contrary.[63] The import of this provision is that there is no jurisdiction for holding a fugitive criminal beyond two months unless sufficient cause is shown.[64] The provision will only apply "two months after the committal, or, if the appeal against such committal has been lodged, after the decision of the court upon the matter," and will not apply where a *habeas corpus* petition for the release of the fugitive criminal has been decided upon. It is submitted that the Act should make provision for such. The fugitive criminal must demonstrate that reasonable notice has been given to the Minister. In terms of Section 4 the State Proceedings (Civil Actions by or against Government or Public Officers) Act,[65] no action can be instituted against the Government[66] until the expiration of one month next after notice in writing has been left at the office of the Attorney-General. By stipulating that the applicant must prove that "reasonable notice of the intention to make the application has been given to the Minister" it is submitted that this excludes the operation of Section 4 of the State Proceedings Act. To insist that the fugitive criminal must comply with Section 4 will defeat the goal of the provision which is to ensure that the fugitive is not in detention for an inordinate period of time.

Provision is made for the transfer of fugitive criminals. Where a

63 Section 21.

64 *George Kutty Kuncheria vs Union of India And Another*, 1998 IIAD Delhi 842; 1998 CriLJ 1871; 71 (1998) DLT 726; and 1998 (44) DRJ 627; *Re Shuter (No.2),* 1959 (3) All E.R. 481.

65 Chapter 10:01.

66 Because the Minister is a representative of the Government, the word Government here covers a Minister.

prisoner, being a fugitive criminal, is serving a sentence under any conviction in Botswana and his surrender is requested by the requesting state to enable proceedings to be brought against the prisoner in relation to the offence for which his surrender is requested, the President is empowered to order his release.[67] The Act prohibits the surrender of a fugitive criminal unless the requesting country has given an undertaking that the fugitive criminal shall be returned to Botswana on the completion of the proceedings in respect of which the surrender is grounded.

3 *TSEBE* AND *SAMOTSE* CASES

3.1 *Tsebe's* Case

In 2008, Tsebe, a national of Botswana, was accused of murdering his romantic partner in Botswana.[68] When the Police in Botswana tried to arrest him, he fled to South Africa. Botswana requested South Africa to extradite him to Botswana.[69] An extradition inquiry was initiated in South Africa in terms of the South African Extradition Act[70] to establish whether Tsebe was liable for extradition.[71] The South African Minister of Justice informed the Minister of Justice in Botswana that South Africa would not extradite Tsebe unless Botswana gave South Africa the requisite assurance that it will not impose the death penalty on Tsebe if found guilty or if imposed the death penalty will not be executed.[72] Botswana declined to give the assurance. The basis of this refusal was that there was no provision for it in its domestic law and in the extradition treaty with South Africa.[73] The South African Minister of Justice issued a non-extradition order to the effect that Tsebe should not be surrendered to Botswana to face the charge of murder.[74]

Despite the non-extradition order, officials of the South African Department of Home Affairs took the view that Tsebe should be deported as he

67 Section 22(1).
68 Para 6.
69 Para 7.
70 Act 67 of 1962.
71 Para 9.
72 Para 9.
73 Para 9.
74 Para 11.

was an illegal foreigner in terms of the South African Immigration Act.[75] Because of this, Tsebe was transferred to a holding facility pending deportation. To stop his imminent deportation, Tsebe moved an urgent application before the High Court to interdict the Home Affairs Minister, certain officials of the Department of Home Affairs, the Justice Minister and the Government from extraditing or deporting him to Botswana in the absence of the requisite assurance.[76] Despite the Minister having given a non-extradition order, in court he did a U-turn, stating that he had not applied his mind to all the facts. The Minister contended that South Africa was entitled to deport Tsebe even when Botswana had refused to give the assurance.[77] According to the Minister, South Africa could apply pressure on Botswana not to execute Tsebe and use other forums under the auspices of the Southern African Development Community (SADC). This was a rather bewildering argument. As the Court pointed out, none of this could stop Botswana from executing Tsebe.

The question before the High Court in South Africa was whether or not the Government had the power to extradite or deport Tsebe to Botswana to face his murder charges even though Botswana had refused to give the requisite assurance.[78] In dealing with this issue, the High Court found that it was bound by the Constitutional Court decision of *Mohamed and Another v. President of the RSA and Others*.[79] In *Mohamed*'s decision the Constitutional Court held that the conduct of the South African authorities in handing Mohamed over to the authorities of the United States of America (USA) to stand trial in that country, with the full knowledge that, if convicted, he could be sentenced to death, without obtaining the requisite assurance from the USA government, violated Mohamed's constitutional right to life, right to human dignity and right to be treated or punished in a cruel, inhuman or degrading way.[80] In light of this decision, the High Court held that if the South African Government extradited, deported or removed Tsebe to Botswana, the extradition or deportation would subject them to the risk of the imposition of the death penalty and would be unlawful.[81] The Court found that the respondents would also be in breach of

75 Act 13 of 2002.
76 Para 15.
77 Para 13.
78 Para 19.
79 [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC).
80 Para 25.
81 Para 20.

their constitutional obligations under Section 7(2) of the Constitution if they extradited or deported or in any way removed Tsebe to Botswana without the requisite assurance.[82]

The respondents appealed to the Constitutional Court. The issue before the Constitutional Court was the same as that before the High Court. The correctness of *Mohamed* was not challenged. The Constitutional Court established that the principle laid down in *Mohamed* was that the Government has no power to extradite or deport or in any way remove from South Africa to a retentionist State any person who, to its knowledge, if deported or extradited to such a State, will face the real of the imposition and execution of the death penalty.[83] This meant that if any official in the employ of the State, without the requisite assurance, hands over anyone from within South Africa, or under the control of South African officials, to another country to stand trial knowing that such person runs the real risk of a violation of his right to life, right to human dignity and right not to be treated or punished in a cruel, inhuman or degrading way in that country, he or she acts in breach of the duty provided for in Section 7(2) of the Constitution.[84] The Court found that *Mohamed* was not distinguishable and that it was bound by the decision. The Justice Minister argued that *Mohamed* was distinguishable because in that case the Court did not examine the provisions of the Extradition Act whereas in Tsebe's case it had to. In dealing with this argument, the Court found, as it did in *Mohamed*, that the obligation of the Government to secure the requisite assurance could not depend on whether the removal is by extradition or deportation, the constitutional obligation depends on the facts of the particular case and not on the provisions of the empowering legislation or extradition treaty under which the deportation or extradition is carried out.[85] This is a very crucial point. The significance of this point is that any conduct by a State department purporting to act in terms of any law, which conflicts with the principles enshrined in the Constitution is 'invalid' and bound to be set aside by courts. It also helps understand why certain legal obligations must be sacrificed in favour of the obligation flowing from the Constitution.

82 Para 20.
83 Para 43.
84 Para 43.
85 Para 49.

3.2 *Samotse's* Case

Samotse was arrested in Botswana in March 2010 on a charge of murder.[86] He fled to South Africa where he was arrested and incarcerated in a holding facility pending extradition proceedings.[87] In July 2014 the Minister of Justice issued a non-extradition order to the effect that Samotse should not be surrendered to stand trial on a murder charge in Botswana.[88] Despite the non-extradition order, a decision was taken to deport Samotse. He urgently applied for and obtained an interdict on the 13th August 2014. A few days later, it was confirmed that Samotse has been deported to Botswana. The Court ordered that the deportation or surrender of Samotse to officials of the Government of Botswana to stand trial on criminal charges in respect of which the first applicant could, if convicted, be sentenced to death was unlawful and unconstitutional. The Court further held that the conduct of the immigration officials infringed Samotse's right to human dignity, to life and not to be subjected to cruel, inhuman or degrading treatment, because they deported or surrendered him in the absence of the requisite undertaking by the Government of Botswana not to seek the imposition of the death penalty in the event of the first applicant being convicted of murder or if imposed, that the death penalty would not be carried out. Other orders were given which are not relevant to this discourse. It is not clear whether this was a deliberate violation of both the non-extradition order from the Minister and the order interdicting deportation or a simple error on the part of the South African officials. The circumstances under which Samotse was deported to Botswana despite these two orders still remain to be explained.[89]

3.3 Analysis of the Decisions

Refusal by a requested State to extradite a fugitive raises serious issues. The concerns range from worry that requesting Botswana to avoid imposing the death penalty or executing it once imposed constitutes interference with the judicial process of Botswana, to concerns that if fugitives are not handed over by South Africa, it will become a safe haven for criminals. Furthermore, clarity

86 Para 11.1.
87 Para 11.3.
88 Para 11.5.
89 Para 10.

over the status of fugitives who enter South Africa illegally confounds the issues - what does South Africa do with an illegal foreigner and fugitive who cannot be extradited to Botswana because Botswana refuses to give the requisite assurance? Although the case fell to be decided on the principle in *Mohamed*, the Court took time to deal with these issues.

The Justice Minister argued that to require Botswana to give the requisite assurance would constitute interference with the prosecutorial independence of the prosecuting authority of Botswana and with the independence of the Judiciary in Botswana.[90] The Court pointed out that it is not an essential requirement of the assurance that the death penalty will not be asked for by the prosecutorial authorities of Botswana nor is it an essential requirement that the trial judge in Botswana will not impose the death penalty.[91] The crucial requirement is the giving of an assurance that, if the death penalty is imposed, it will not be executed.[92] Further, according to the Court, the execution of the death penalty falls within the authority of the Executive and it is up to the Executive whether it is prepared to provide the requisite assurance.[93] The Court correctly found that the Constitution of Botswana gives the President of Botswana the power to intervene and substitute a term of imprisonment for the death penalty.[94] Also, in terms of the SADC Extradition Protocol, to which Botswana and South Africa are parties, Botswana has agreed that South Africa may request it to provide the requisite assurance in a case such as *Tsebe's*.[95]

The other argument advanced by the Justice Minister was that Tsebe was an illegal foreigner under the Immigration Act and as such the Home Affairs Minister had an obligation to deport him.[96] To respond to this concern, the Court began by affirming the supremacy of the Constitution. The Court said that the provisions of the Immigration Act relating to the obligation to deport an illegal foreigner must be read consistently with the Constitution. They cannot be read to require the deportation of a person in circumstances in which the deportation would be a breach of the Constitution.[97] This means that even fugitives who

90 Para 51.
91 Para 51.
92 Para 51.
93 Para 51.
94 Para 51.
95 Para 51.
96 Para 59.
97 Para 59.

enter South Africa illegally have a right not to be deported, extradited or removed to Botswana to stand for trial for murder charges unless Botswana gives the requisite assurance. For Botswana, this must cause concern. As long as Botswana refuses to give the requisite assurance, the situation presents a fertile opportunity for those accused with murder to flee to South Africa.

The Court further said that the continued presence of Tsebe in the country, an illegal foreigner who is wanted by another country for a crime as serious as murder, would be a continuing concern for the Government and the people of South Africa in general.[98] The Court seemed to suggest that Tsebe could be charged with a crime. The Court pointed out that the Immigration Act defines 'deport' in wide terms which include the Director General ordering an illegal foreigner to leave South Africa, but if such foreigner thereafter remains in the country, he is guilty of an offence punishable by imprisonment in terms of the Immigration Act.[99] Prosecuting Tsebe for illegal entry could act as a deterrent to those accused with the crime of murder who are contemplating fleeing to South Africa. But it is a very feeble deterrent. Faced with two options, one for standing trial for murder with the probability of being condemned to death and the other option being standing trial for illegal entry into South Africa, one is likely to go for the latter option. The Justice Minister also expressed the concern that the Government did not want South Africa to be perceived as a safe haven for illegal foreigners and fugitives from justice wanted for serious crimes in other countries.[100] The Court stated that this problem will not arise if countries seeking an extradition of someone would also be prepared to give the requisite assurance. The supremacy of the Constitution was once against affirmed by the Court when the Court stated that the perceptions cannot override the need for South Africa as a country to respect, protect, promote and fulfil human rights and observe the Constitution.[101]

The Court also dealt with the concern that if the Government cannot deport or extradite persons in Tsebe's position, this may be seen as undermining its obligations under treaties concluded with other states in terms which they must co-operate to fight crime, particularly in the SADC region.[102] Yet again,

98 Para 59.
99 Para 59.
100 Para 63.
101 *Ibid*.
102 Para 64.

the supremacy of the Constitution was restated. The Court said it was aware that the country must fight crime, however the Constitution places on the State the obligation to respect, protect, promote and fulfil, amongst others, the right to life, the right to human dignity and the right not to be treated or punished in a cruel, inhuman or degrading way.[103] The Court also referred to the SADC Extradition Protocol in terms of which the signatories are entitled to refuse to extradite suspects if the requesting State does not furnish the requisite assurance. Thus, South Africa's attitude was supported by a regional agreement. Lastly, the Court also emphasized that the obligations of South Africa in terms of the treaties concluded with other countries are required to be consistent with its constitutional obligations.[104]

The *Tsebe* and *Samotse* judgments have also raised complications for South African nationals held as suspects in Botswana who wish to apply for bail. The matter has resulted in conflict of opinion by the High Court. In *Setimela and Another v. Director of Public Prosecutions (Setimela 1)*[105] two South African nationals were committed for trial before the High Court on a charge of murder and had not yet been indicted before the High Court. After fifty-three days in custody they applied for bail. In refusing bail, the High Court took into consideration extradition relations between Botswana and South Africa and stated that:

> "The next consideration points to extradition relations between Botswana and South Africa. The difficulty in the extradition of murder suspects from South Africa to Botswana is common cause. It has been argued forcefully that since the two petitioners are ordinarily resident in South Africa, if they were granted bail, they would estreat(sic) bail and flee and seek refuge in South Africa where they have business and occupational ties thereat, where it would be difficult to extradite them to Botswana and thereby defeating the interest of justice.
>
> As I have noted above, South Africa is reluctant to extradite murder suspects to Botswana as such offence attracts capital punishment which has been abolished thereat in the absence of an undertaking by Botswana to the effect that capital punishment would not be carried

103 *Ibid.*
104 *Ibid*.
105 2011 (2) BLR 906 HC.

> out. The Deputy Director of Public Prosecutions has averred to that fact and has listed about eight murder suspects who have fled to South Africa and whom the latter is reluctant to extradite to Botswana. In amplification thereof, a judgment of the South Gauteng High Court, Johannesburg, in the case of *Tsebe and Another v Minister of Home Affairs and Others*; *Pitsoe (Phale) v Minister of Home Affairs and Others* [2012] 1 All SA 83 (GSJ) declared, amongst others, that the deportation and or extradition and or removal of the said murder suspect from South Africa to Botswana was unlawful and unconstitutional."[106]

However, in *Setimela and Another v. The State (Setimela 2)*[107] the petitioners re-applied for bail again to the High Court and the case went before a different judge. By affidavit, the Deputy Director of Prosecutions indicated to the Court that that on 22 September 2011, the South Gauteng High Court declined to order the extradition of certain suspects sought by the Botswana Government, until a written assurance was received from the Government of Botswana that the applicants would not face the death penalty under any circumstances. In response to this, the High Court stated that:

> "I have reflected deeply on the difficulties alluded by the State. I agree that objectively viewed such a state of affairs as reflected above may induce the petitioners to flee knowing that they may not be extradited to Botswana. The above notwithstanding, it seems to me, that no judgment of any court, anywhere in the world, should dissuade this court from determining bail applications concerning any person in accordance with the laws of the Republic. This court cannot be dictated to by any court, other than perhaps, our own Court of Appeal. To the extent that that judgment may have been directed at the executive arm of the government, it is none of the concern of the judicial arm of government that is at liberty to apply the laws of the Republic without fear of favour and without any undue influence from any entity or authority whatsoever."[108]

The High Court granted bail. It remains indoubt whether the difficulties of extraditing fugitive criminals from South Africa should be a relevant factor in

106 *Ibid*, at p. 913, per Leburu J.
107 2011 2 BLR 1081 HC.
108 *Ibid*, at p. 1090, per Dingake J.

dealing with bail applications. South Africa's argument for refusing to extradite fugitives to Botswana to stand trial for the murder charges is that it is simply complying with its own constitution and domestic laws. On the other hand, Botswana refuses to make the undertaking because its laws require that once a suspect has been convicted of murder without extenuating circumstances the convict must be sentenced to death. However, to resolve this problem, the two countries entered into an Extradition Treaty. Botswana concluded the Extradition Treaty with South Africa in 1969. A number of SADC countries, including Botswana and South Africa concluded a Protocol on Extradition.

The extradition treaty between Botswana and South Africa is complimentary to the SADC Extradition Protocol. Both treaties contemplate a prohibition against extradition where the retentionist requesting state refuses to give the requisite assurance. But Botswana has not done anything to domesticate relevant provisions of these treaties so that they can be easy to implement in the domestic sphere. The two treaties do not create enforceable rights for individuals in Botswana. Since Botswana is a dualist state, treaties do not have the force of law unless such treaties are domesticated by an Act of Parliament.[109] This reinforces Botswana's argument that there is no provision in its domestic law that gives the Government the power to provide the requisite assurance that the death penalty will not be imposed or if imposed, will not be executed. Even the Botswana Extradition Act does not address such a situation. The provision only exists in the SADC Extradition Protocol. From this textual analysis, it appears that neither Botswana nor South Africa can be blamed for this deadlock. However, considering the spirit of the SADC Extradition Protocol one can blame Botswana for not domesticating the treaty provisions. To use this deadlock between the Government of Botswana and South Africa to the detriment of individual fundamental freedoms is serious injustice. It is submitted that the High Court was correct in *Setimela 2*.

4 POSSIBLE SOLUTIONS

Below are some of the possible solutions to the extradition deadlock between Botswana and South Africa to be explored largely by Botswana, short of

109 Attorney General v. Dow [1992] B.L.R 119 at p. 154 C.

Botswana abolishing the death penalty or South Africa re-instating it.

4.1 Domestication of the Botswana-South Africa Extradition Treaty

Since Botswana has entered into an extradition treaty with South Africa, it appears that the simple and logical solution is for Botswana to domesticate and incorporate the treaty obligations into national law. This can be carried out by amending the Extradition Act to allow the Government to make the required undertaking. Of course this option may not be altogether satisfactory to the Government of Botswana. Firstly, the Government of Botswana insists that in Botswana the death penalty exists by popular demand.[110] The Court of Appeal has held that the death penalty is constitutional. Thus, the only way to abolish it is through amendment of the Constitution. Secondly, suspects charged with murder will likely escape to South Africa knowing that when they are extradited back to Botswana the death penalty will be out of the question. With time, this is likely to diminish the death penalty. Therefore, this option can be ruled out.

4.2 Presidential Prerogative of Mercy

As pointed out in *Tsebe's case*, the Constitution of Botswana empowers the President to substitute a less severe form of punishment for any punishment imposed on any person for any offence.[111] The Constitution establishes the Advisory Committee on Prerogative of Mercy constituted by the Vice President or any Minister appointed by the President,[112] the Attorney General[113] and a person qualified to practise in Botswana as a medical practitioner, appointed by the President.[114] According to the Constitution, where any person has been sentenced to death for any offence, the President must 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 or she may require, to be considered at a meeting of the Advisory Committee on the Prerogative of Mercy. After

110 "Khama affirms Botswana's stand on Death Penalty." The Gazette, 22/03/2018. Available at http://www.thegazette.news/khama-affirms-botswanas-stand-on-death-penalty. Last accessed on the 25th April 2018.
111 Section 53(c).
112 Section 54(1)(a).
113 Section 54(1)(b).
114 Section 54(1)(c).

obtaining the advice of the Committee the President shall then decide whether to exercise any of his or her powers under section 53 of the Constitution. After giving the assurance not to execute the death penalty under the empowering legislation that would have been promulgated, the President can exercise his authority under Section 53(c) to substitute a less severe form of punishment for the penalty of death. This option has the disadvantages of the domestication option.

4.3 Wrongly Captured, Properly Detained

Abduction entails the Botswana Police forcibly or unlawfully abducting the fugitives from South Africa and then arresting them in order to bring them before courts of law for prosecution. Judicial opinion is not settled on what the approach of the courts should be in such cases. However, two approaches have developed overtime, countries that apply the *male captus bene detentus* principle and those that refuse to do so.

Under English law, it is an established rule of law that a person being tried for an offence against the laws of a State may not oppose his trial by reason of the illegality of his arrest or of the means whereby he was brought within the jurisdiction of that State. This is captured by the maxim *male captus bene detentus* which means that a State will try an individual notwithstanding that the means of bringing him before the courts were irregular. In *Ex Parte Susannah Scott*[115] the Court of King's Bench said the following:

> "The question, therefore, is this, whether if a person charged with a crime is found in this country, it is the duty of the Court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them. If the acts complained of were done against the law of a foreign country, that country might have vindicated its own law. If it gave her a right of action, she may sue upon it."

In *Ex p. Elliot's* case[116] the Court had to decide whether British soldier who had deserted his unit in 1946 could be tried in England. He was arrested in

115 (1829) 9 B & C. 446.
116 Ex p. Elliot [1949] 1 ALL E.R 373.

Belgium in 1948 by two British military officers accompanied by two Belgian police officers and was then transferred by the British military to England where he was held in custody. It was argued that the British authorities had no authority to arrest the applicant and that the arrest was in violation of Belgian law. The Court dismissed the case and stated as follows:[117]

> "…if a person is arrested abroad and he is brought before a court in this country charged with an offence which that court has jurisdiction to hear, it is no answer for him to say, he being then in lawful custody in this country: 'I was arrested contrary to the laws of the State A or the State B where I was actually arrested.' He is in custody before the court which has jurisdiction to try him. What is it suggested that the court can do? The court cannot dismiss the charge at once without its being heard. He is charged with an offence against English law, the law applicable to the case."

Even under English law, the position is not entirely settled. In *Bennett v Horseferry Road Magistrates' Court and Another*[118] the House of Lords was called on to decide whether in the exercise of its supervisory jurisdiction the court has power to inquire into the circumstances by which a person has been brought within the jurisdiction and if so what remedy is available if any to prevent his trial where that person has been lawfully arrested within the jurisdiction for a crime committed within the jurisdiction."[119] Lord Griffiths answered the question as follows:

> "The courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution. In my view your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party.

117 Per Lord Goddard, at page 376.
118 [1993] 3 All ER 138 (HL).
119 Para 143c.

> If extradition is not available very different considerations will arise on which I express no opinion."[120]

In *Nduli and Another v Minister of Justice*[121] the appellants were unlawfully and forcibly seized in Swaziland and abducted to South Africa by South African Police who had strict orders not to apprehend them there. The Court held that since the seizure and abduction of the appellants were not authorized by the South African State (and were authorised by Swaziland authorities), public international law did not preclude them from being tried in South Africa on criminal charges which were otherwise cognizable by a South African Court. This was mainly because no international delinquency was committed as the South African State had not itself performed any act of sovereignty in Swaziland as a foreign state. In *S v. Mahala and Another*[122] the Supreme Court indicated that "… the soundness of this Court's *ratio decidendi* in the *Nduli* case may have to be reconsidered in future on a wider basis of recent developments in international public law and South African law should the occasion present itself."

In *S v. Mahala* the Court referred to the decision of *State v. Ebrahim*[123] where the Supreme Court held that a South African Court had no jurisdiction to try an accused who had been abducted forcibly and unlawfully from Swaziland by instruments or agents of the South African State and brought back to South Africa where he was handed over to the police and arrested by them. The Court stated that this decision was based squarely on fundamental principles of Roman-Dutch law which did not confer a discretion on a court whether or not to exercise jurisdiction over such person in those circumstances. According to the Supreme Court:

> "The applicable fundamental principles of Roman-Dutch law as enunciated by this Court (p 582B-E) are in accordance with principles of public international law for the maintenance of the territorial sovereignty of States and the good international relations between States; the protection and upholding of human rights; the

120 Paragraph 151 b-d.
121 1978(1) SA 893(A).
122 [1994] ZASCA 48.
123 1991(2) SA 553 (A). See also a discussion of Ebrahim's case by Prof Cowling in (1991) 4 SA Journal of Criminal Justice p384-388 as well as Prof Dugard's article in (1991) 7 South African Journal of Human Rights p199-208.

> promotion of the proper administration of law according to the rule of law; and the prevention of abuse of the process of criminal proceedings."

In *Silverstone (Pty) Ltd v. Lobatse Clay Works (Pty) Ltd*[124] the Court of Appeal held that, "… it is to be noted that the common law of Botswana is the Roman Dutch law. Although this was laid down as long as 1909 (by Proclamation No. 36 of 1909) when Botswana was still the Bechuanaland Protectorate, the Roman Dutch law had continued to this day to be applied and is still so applied in Botswana." It is submitted that the Botswana courts must follow the Roman Dutch approach as laid down in *State v. Ebrahim.* Whilst to some extent the decision is influenced by the Constitution of South Africa, it also lays down the law according to principles of Roman Dutch law**.** This is an uncertain option. It is unlikely that South African authorities will cooperate to violate their laws. And it is uncertain what the courts in Botswana will decide when the point is raised, whether the court will follow the English approach or the Roman Dutch approach.

4.4 Extraterritorial Jurisdiction

Tsebe's case indicated another potential solution to the problem. The South African Justice Minister indicated that his department was working on a revised draft extradition legislation which will give South African courts jurisdiction to try crimes that have been committed outside the boarders of South Africa when countries in which they allegedly committed the crimes are not prepared to give the requisite assurance.[125] This is permissible under the SADC Extradition Protocol.[126] Additionally, the exercise of extraterritorial jurisdiction is also permissible in international law under the protective principle. In *S S Lotus (Fr v Turk),*[127] the Permanent Court of International Justice laid down that:

> "The first and foremost restriction imposed by international law upon a state is that failing the existence of a permissive rule to the contrary, it may not exercise its powers in any form in the territory of another state.

124 [1996] BLR 190.
125 Para 60.
126 Article 5(c).
127 1927 P C I J (ser A) No 10 (Sept 7).

> In this sense jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention."

Under international law it is unequivocally accepted that every country is competent to take any measures that are compatible with the law of nations in order to safeguard its national interests. To avoid being turned into a haven for criminals, South Africa is at liberty to promulgate a law that punishes that conduct. However, whilst that will give South Africa a method of dealing with the fugitives rather than letting them stay in detention centres, South Africa will still remain a better option compared to the hanging Botswana. It appears that Botswana is not opposed to this solution. This is evidenced by Botswana's suggestion to the Justice Minister that Tsebe be put on trial in South Africa. From Botswana's perspective, the difficulty with this solution is that it will deprive the family of the victims of crimes of murder the opportunity to see the perpetrators of the crimes being tried for their crimes. It may also come with costs and delayed justice as witnesses and investigators may have to cross boarders in preparation for trial.

4.5 Curtailing the Right to Bail for Suspects of Murder

Under the Constitution of Botswana[128] any person who is arrested or detained upon reasonable suspicion of having committed a criminal offence and who is not released:

> "….shall be brought as soon as is reasonably practicable before a court; and if any person arrested or detained as mentioned in paragraph (b) of this subsection is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

Thus, the Constitution guarantees every accused person the right to bail. Individuals charged with the crime of murder in Botswana who end

128 Section 5(3)(a) and (b).

up as fugitives of justice in South Africa do so whilst enjoying their right to bail. Under Botswana law, the guiding principles in any bail application are the presumption that the applicant was innocent until proven guilty and the likelihood of his absconding or interfering with State witnesses if granted bail.[129] That is to say, the fugitives of justice would have been judged by a court not to be flight risks. Notwithstanding their release on bail, courts acknowledge that the motive to abscond in such cases is very strong. In *Toteng & Another v. The Attorney General*, the Court had this to say:

> "This Court has discretion to grant bail in all cases but as a matter of practice this discretion is rarely exercised in cases of murder. The reason for this is obvious. If convicted, the punishment meted out will nearly always be a severe one and may well include the death penalty. There exists therefore, in such cases, the strongest possible motive for an accused to abscond."[130]

Can the Government abolish the right to bail for persons accused with murder? The answer to this question is no. This was tried, tested and found deficient in *State v. Marapo*.[131] In this case the question before the court was whether section 142(1)(i) of the Penal Code[132] which provided that any person who is charged with the offence of rape shall not be entitled to be admitted to bail was constitutional or not. In defending section 142 (1) (i), the Attorney General argued that having regard to the mores and norms of the present time and weighing the national ethos, in considering s 142(1) (i), the public interest formed the basis for its enactment; that public interest was the concern about the escalation in the incidence of crimes of rape and, associated therewith, the HIV/AIDS epidemic that currently afflicts the nation. This argument rested on the consistent increase, borne out by statistics, in the crime rate and, in particular, the number of rapes. The Court rejected the argument and held that section 142(1)(i) of the Penal Code offended against the provisions of section 5(3)(b) of the Botswana Constitution and that the denial of bail where a person is alleged to have committed the offence of rape is not in the public interest. An

129 *Mogotsi and Another v The State* [1990] B.L.R. 142, *Nthaisane v The State* [2000] 1 B.L.R. 247, *Dipholo v The State* [2000] 2 B.L.R. 451 at p 453G, *Binikwa v The State* [2005] 1 B.L.R. 285, *Mamadi v The State* [2005] 1 B.L.R. 295 and *S v Fourie* 1973 (1) SA 100 at p 101G-H applied.

130 H. Ct. Civ. Case No. 9 of 1984 (unreported).

131 *Attorney General's Reference: In re – State v. Marapo*, 2002(2) BLR 26 (CA).

132 Penal Code (Cap 08:01), as introduced by Act 5 of 1998.

examination of the limitations under section 5 does not yield any solution.

Thus, any solution to be found on limiting the right to bail can only be obtained by amending section 5(3)(b) of the Constitution.

5. CONCLUSION

The integrity of the criminal system of Botswana and South Africa is suffering on account of this deadlock. Already, the South African criminal system was dented when a fugitive criminal was removed from South Africa against the law. In Botswana, victims of crimes committed by fugitive criminals are deprived of the opportunity to see justice done and closure due to the prolonged delay in trying the offenders. Individual liberties, including the right to bail, have borne the brunt of the deadlock. The two countries stand at extreme ends. South Africa's position that it will not extradite unless an undertaking is made is absolute – it presents no room for exception or negotiation. Botswana's refusal to provide such an undertaking – to let a murder accused escape the death penalty on account of having stepped on South African soil, is similarly absolute. The *status quo* does not afford a solution. And any solution to be found will not be a perfect one. It will have to come with sacrifice from each party. The feasible solutions are South Africa enacting legislation to grant its courts extra territorial jurisdiction and Botswana tempering with the right to bail under its Constitution.