

Capital sentencing discretion in Southern Africa: A human rights perspective on the doctrine of extenuating circumstances in death penalty cases

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Summary

In 1935, South Africa reduced the harshness of the common law mandatory death penalty for murder with the passage of the doctrine of extenuating circumstances. A judge was permitted to substitute a lesser sentence if the accused proved the existence of a mitigating factor at the time of the offence. The doctrine, which operated as a rebuttable presumption in favour of death, passed to the criminal law of Botswana, Lesotho, Namibia, Swaziland, Zambia and Zimbabwe, as well as to the South Pacific nation of Papua New Guinea. The doctrine lacked the analytical rationality of an American or Indian-style discretionary death penalty, which required a judge to articulate an aggravating factor in order to sentence an accused to death, with the burden of proof on the prosecution. The doctrine has now been abolished in South Africa, Namibia, Papua New Guinea, Swaziland and Zimbabwe, and modified in Botswana and Lesotho. The decline of the doctrine of extenuating circumstances accords with the international consensus that the death penalty should be restricted only to the most serious crimes and only based on the circumstances of the individual offence and the characteristics of the individual offender.

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1 Introduction

The common law mandatory death penalty for murder, in which a death sentence is automatic upon conviction, is increasingly out of sync with prevailing human rights norms. By failing to consider individualised circumstances of an offence or an offender, the penalty overpunishes, encompassing mercy killing with sadistic killing and murders in cold blood with those in the heat of passion. Although most former British colonies inherited a process for executive mercy in which the governor-general and later an independent head of state could dispense clemency in troubling cases, the unreviewable power of the pardon does not remove all risk of arbitrariness or mistake. As a consequence, international tribunals such as the Inter-American Commission on Human Rights and the United Nations (UN) Human Rights Committee have determined that a mandatory sentence of death is a cruel and degrading form of punishment because it could be too harsh, and not limited to the 'most serious crimes' as required by international human rights instruments.¹

In the common law world, the harshness of an automatic sentence of death has gradually given way to judicial sentencing discretion in capital cases. In practice, judicial sentencing discretion has taken two forms. The first is to require a trial judge to articulate an aggravating factor that placed a crime into a special category of seriousness meriting the unusual penalty of death; the trial judge is able to review the evidence and pass a sentence specifically tailored to the criminal offence and offender. This was the regime that originated in the United States after the death penalty was reinstated in *Gregg v Georgia* in 1976, and in India after capital punishment was reserved for the 'worst of the worst' in *Bachan Singh v State of Punjab* in 1980.² The second option was the opposite: to require a judge to articulate a *mitigating* factor that removed the case from the sweeping scope of the death penalty, in essence a presumption in favour of death. This was the regime created by the Criminal Procedure and Evidence (Amendment) Act of 1935 in South Africa, which passed into the law of neighbouring Southern African countries in the following decades, where it was known as the 'doctrine of extenuating circumstances'.³ Over the past four decades, the first option, the American or Indian-style discretionary death penalty, has emerged as the consensus in the

1 See art 6(2) International Covenant on Civil and Political Rights UN Doc A/6316 (1966), 999 UNTS 171 (23 March 1976); art 4(2) American Convention on Human Rights; *Thompson v St Vincent* Comm 806/1998, UN Doc CCPR/C/70/D/806/1998 (2000) (UNHRC); *Edwards v Bahamas* Case 12.067, Report 48/01, OEA/SerL/V/II.111 Doc 20 (2000) (IAHRC).

2 *Gregg v Georgia* 428 US 153 (1976); *Bachan Singh v State of Punjab* 1980 (2) SCC 684 (India).

3 Sec 61 Criminal Procedure and Evidence (Amendment) Act 46 of 1935 (SA).

common law world, including in the Commonwealth Caribbean and common law East Africa.⁴

By contrast, the doctrine of extenuating circumstances, which requires a judge to find a mitigating factor in order to determine that a punishment does not merit the death sentence, conflicts with the overwhelming international trend to limit the death penalty only to the 'most serious crimes' by establishing a presumption *against* death.⁵ The doctrine lacks the analytical rationality of a pure discretionary death sentence as it places the burden on the accused person to prove beyond a fair preponderance of the evidence why he or she should *not* be executed, instead of requiring the prosecution to prove both guilt and sentence beyond a reasonable doubt. Unlike the mandatory death penalty, the doctrine of extenuating circumstances has not faced a direct challenge in an international human rights tribunal.

Apartheid South Africa had one of the most active death penalties in the Western world during the twentieth century, and an enormous body of intricate case law developed on the doctrine that was highly influential in the Southern African region. The white legislature of Rhodesia adopted the doctrine in 1949, as did the drafters of the revised penal codes of Botswana, Lesotho and Swaziland prior to independence; Zambia did so in a legislative reform in 1990.⁶ The doctrine of extenuating circumstances was replaced by a discretionary death penalty regime in South Africa in 1990 (prior to total abolition in 1995), in Swaziland in 2005, and in Zimbabwe in 2013. The doctrine was abolished with the death penalty in Namibia in 1989. In addition, both Botswana and Lesotho use a modified version of the original doctrine that removes the most objectionable aspects of the doctrine.⁷ Only Zambia retains the original doctrine, though the constitutional drafting process currently underway offers an opportunity to reform the capital sentencing process in a manner consistent with international human rights and due process norms.⁸ Where the doctrine survives, it is an anachronism, and its abolition contributes to the narrowing of the scope of the death penalty in the common law world.

4 See eg *Reyes v The Queen* [2002] 2 AC 259 (PC) (appeal taken from Belize); *The Queen v Hughes* [2002] 2 AC 259 (PC) (appeal taken from St. Lucia); *Fox v The Queen* [2002] AC 284 (PC) (appeal taken from St Kitts & Nevis); *Kafantayeni v Attorney-General* [2007] MWHC 1 (Malawi HC); *Attorney-General v Kigula* [2009] UGSC 6 (Uganda SC); *Mutiso v Republic* Crim App 17 of 2008 (30 July 2010) (Kenya CA).

5 See art 6(2) International Covenant on Civil and Political Rights.

6 A Novak 'Abuse of state power: The mandatory death penalty for political crimes in Southern Rhodesia, 1964-1970' (2013) 19 *Fundamina* 28.

7 See *Kelaletswe v S* [1995] BLR 100 (Botswana CA); *Letuka v Rex* 1997-1998 LLR-LB 346 (4 February 1998) 360 (Lesotho CA).

8 C Musonda & L Nyondo 'Constitution to stand test of time: Zambia still waits' *Zambia Daily Mail* 7 July 2013) <http://www.daily-mail.co.zm/features/14909> (accessed 31 January 2014).

2 International human rights and the doctrine of extenuating circumstances

The doctrine of extenuating circumstances is less compliant with prevailing human rights norms than a pure discretionary death penalty for three primary reasons. First, the doctrine requires two separate discretionary acts instead of one, which increases the potential for arbitrariness or error, by requiring a judge to consider all mitigating factors in determining whether extenuating circumstances exist, and then, separately, to weigh mitigating factors against aggravating factors to craft an appropriate sentence.⁹ The traditional doctrine shifts the burden to the accused to show why he or she should *not* be executed, accentuating the weakness of defence counsel and state-provided legal aid, and amplifying the risk of error in legal systems that are technical, foreign, and often bewildering.¹⁰

Second, the absurdity of the doctrine arises when a murder trial is bifurcated into two, in which a convicted accused who pleaded innocent must admit guilt and claim extenuating circumstances in order to avoid the noose.¹¹ Invariably, the prosecution claims that the accused had lied and therefore any testimony on extenuating circumstances is not credible, while an accused who maintained his or her innocence during the sentencing stage would fail to carry the onus of showing extenuating circumstances.¹²

Finally, the doctrine of extenuating circumstances fails to completely resolve the underlying tensions of a mandatory death sentence. The artificially narrow traditional definition of extenuating circumstances includes factors that existed at the time of the offence that reduced the moral blameworthiness of the offender. This could mean that an accused with powerful *ex post facto* grounds for mercy (illness, family considerations, religious conversion, remorse, testimony against accomplices) could still face a mandatory death sentence. In practice, the modern operation of the doctrine has expanded this definition in most jurisdictions, but this only exacerbates the failure of the doctrine to predictably guide judicial discretion. As the analysis below explains, the jurisdictions of Southern Africa vary widely as to the factors that are considered extenuating circumstances, and are often based on local policy considerations. In the event that a judge fails to find extenuating circumstances, he or she can disclaim responsibility for the resulting automatic death

9 DM Davis 'Extenuation: An unnecessary halfway house on the road to a rational sentencing policy' (1989) 2 *South African Journal of Criminal Justice* 211-212.

10 A Novak 'Guilty of murder with extenuating circumstances: Transparency and the mandatory death penalty in Botswana' (2009) 27 *Boston University International Law Journal* 194-197.

11 DS Koyana 'The demise of the doctrine of extenuating circumstances in the Republics of South Africa and Transkei' (1991) 4 *Consultus* 118.

12 D van Zyl Smit 'Judicial discretion and the sentence of death for murder' (1982) 99 *South African Law Journal* 86.

sentence, even though the judge possessed full discretion to find otherwise. Requiring a prosecutor to prove both a conviction and a capital aggravating factor beyond a reasonable doubt, as in a discretionary death penalty regime, requires a judge to articulate his or her reasoning for dispensing the ultimate punishment of death and accept personal responsibility for the verdict.

An international human rights consensus is emerging that the mandatory death penalty for murder is a cruel and degrading form of punishment. According to the UN Human Rights Committee, the mandatory death penalty violates the right to life since it is not individually tailored to fit the crime, finding that a death sentence could be disproportionately harsh.¹³ The Committee has even found that a mandatory death sentence for *aggravated* murder violated the International Covenant on Civil and Political Rights (ICCPR) because it did not permit judicial sentencing discretion.¹⁴ The Inter-American Commission on Human Rights has similarly found that a mandatory sentence of death violated the right to life, the right to humane treatment, and the right to a fair trial due to the absence of a sentencing hearing.¹⁵ In 2002, the Inter-American Court of Human Rights followed suit, indicating that, because the penalty could be imposed without regard to circumstances, it was not restricted to the 'most serious crimes' as required by regional human rights instruments.¹⁶ By contrast to the Inter-American system, the African regional human rights system has historically imposed few limitations on capital punishment. This is changing. In 1999, the African Commission on Human and Peoples' Rights (African Commission) passed a resolution advocating a moratorium on the death penalty, and in 2005 created a Working Group on the Death Penalty, which is mandated to develop a strategy for continent-wide abolition.¹⁷ The 1999 resolution, a non-binding document, called on states to limit the imposition of the death penalty only for the most serious crimes.¹⁸ Although the African Commission has never directly addressed the question whether the mandatory death penalty or a rebuttable presumption in favour of death violates the African Charter on Human and Peoples' Rights (African Charter), the Commission did find that Botswana's death penalty did not violate international law, in part due

13 *Thompson v St Vincent* Comm 806/1998, UN Doc CCPR/C/70/D/806/1998 (2000) (UNHRC).

14 *Carpo v Philippines* Comm 1077/2002, UN Doc CCPR/C/77/D/1077/2002 (2002) (UNHRC).

15 *Edwards v Bahamas* Case 12.067, Report 48/01, OEA/SerL/V/II.111 Doc 20 (2000) (IAHRC).

16 *Hilaire, Constantine & Benjamin v Trinidad & Tobago* ser C no 94 (21 June 2002) (IACtHR).

17 L Chenwi 'Taking the death penalty debate further: The African Commission on Human and Peoples' Rights' in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 75 78-80.

18 Resolution Urging the State to Envisage a Moratorium on the Death Penalty, adopted in Kigali, Rwanda (15 November 1999) ACHPR Res 42 (XXVI) 99.

to the ability of judges to consider mitigating circumstances in sentencing.¹⁹

A death penalty that involves judicial sentencing discretion places principles of fairness and proportionality above certainty, and countries with discretionary death penalties have responded differently to the challenge of sentencing disparities in which different judges or sentencing authorities treat like cases differently. A legal regime that fails to provide adequate guidance to sentencers risks erratic and arbitrary sentences or, worse, discriminatory ones as plagued South African courts in the 1970s and 1980s. In some countries, such as the United States and Uganda, legislatures have enacted sentencing guidelines that provide judges with a baseline sentence, typically a term of imprisonment, and permit variations of that sentence within a specified range based on aggravating or mitigating circumstances.²⁰ Elsewhere, appellate courts have strictly monitored lower court decisions for consistency, ensuring that trial judges do not depart from usual parameters for length of an imprisonment sentence in the absence of weighty aggravating or mitigating circumstances.²¹ Finally, the judicious use of mandatory minimum sentences may succeed in preventing wide sentencing disparities without overly constraining a judge's discretion, if accompanied by review of prosecutorial discretion to ensure that prosecutors do not charge a crime too harshly.²² Because the doctrine of extenuating circumstances depends on a more complex judicial sentencing decision than in a pure discretionary regime, Southern African jurisdictions have struggled with balancing these competing tensions of proportionality and predictability.

3 South Africa

The doctrine of extenuating circumstances originated in South Africa, which 'inherited the wide definition of murder, the mandatory death sentence, and the secret process of mercy in death penalty cases' from Britain.²³ First codified in statute in 1917, the mandatory death regime was opaque and unaccountable, and the judicial practice of writing a confidential report to the Governor-General for assistance in clemency deliberations 'only contribute[d] very marginally to exclude

19 *Interights & Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003). See also *Spilg (on behalf of Kobedi) v Botswana* Comm 277/2003 (10th session ACHPR 12-16 December 2011) http://www.achpr.org/files/sessions/10th-ee/comunications/277_-_03/achpreos10_277_03_eng.pdf (accessed 2 April 2014).

20 E Ssekina & S Kakaire 'Order, certainty in new sentencing guide' *The Observer* (Kampala) 19 June 2013.

21 See eg *Tsela v Rex* [2011] SZSC 13 (13 May 2012).

22 S Terblanche & G Mackenzie 'Mandatory sentences in South Africa: Lessons for Australia?' (2008) 41 *Australia and New Zealand Journal of Criminology* 402.

23 R Turrell *White mercy: A study of the death penalty in South Africa* (2004) 4.

all risk of a judicial error'.²⁴ Between 1923 and 1934, no more than 24 per cent of capital sentences were actually carried out, with the remainder receiving clemency or reprieve.²⁵ The doctrine of extenuating circumstances arose as a political compromise in South Africa in 1935 as a result of this historically high rate of commutation by the Governor-General.²⁶ The law was widely accepted by judges, and murder convictions doubled over the next decade as jurors were less hesitant to convict of murder when lesser sentences were available.²⁷ Beginning in the 1930s, with the political consolidation of the white state, the death penalty was 'transformed from a form of class self-defence into a form of racial self-defence'.²⁸ As South Africa was the only country in the world with a rising murder rate between 1900 and 1950, the doctrine of extenuating circumstances provided a pressure valve for an increasingly harsh criminal justice regime.

From the creation of the Union of South Africa in 1910 until the moratorium on executions in 1990, about 4 200 people were hanged in South Africa. Originally applicable only to murder, rape and treason, after 1958 parliament expanded the list to include kidnapping, child stealing, robbery or attempted robbery, and aggravated housebreaking or attempt, as well as terrorism and related crimes, although 90 per cent of executions were for murder.²⁹ The first case to define the doctrine of extenuating circumstances was *R v Mfoni*³⁰ in 1935, which held that 'only such circumstances as are connected with or have a relation to the conduct of the accused in the commission of the crime should have any weight at all', which was to be an enduring feature of the doctrine. Three years later, in *R v Biyana*,³¹ extenuating circumstances were defined as any fact 'associated with the crime which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of the prisoner's guilt'. In 1947, the Appellate Division determined that the onus of showing extenuating circumstances beyond a preponderance of the evidence rested with the accused.³² In *R v Fundakubi*,³³ the

24 B van Niekerk 'Hanged by the neck until you are dead: Some thoughts on the application of the death penalty in South Africa' (1969) 86 *South African Law Journal* 461.

25 G Devenish 'The historical and jurisprudential evolution and background to the application of the death penalty in South Africa and its relationship with constitutional and political reform' (1992) 5 *South African Journal of Criminal Justice* 8.

26 E Kahn 'How did we get our lopsided law on the imposition of the death penalty for common-law crimes? And what should we do about it?' (1989) 2 *South African Journal of Criminal Justice* 146-150.

27 Turrell (n 23 above) 236.

28 Turrell (n 23 above) 21.

29 Symposium 'The relaunch of the Society for the Abolition of the Death Penalty in South Africa' (1989) 106 *South African Law Journal* 40.

30 1935 OPD 191.

31 1938 FDL 310 311.

32 *R v Lembete* 1947 (2) SA 603 (A).

33 1948 (3) SA 810 818 (AD)

Appellate Division provided the seminal definition of extenuating circumstances that endures in Southern African jurisprudence:

No factor not too remote or too faintly or indirectly related to the commission of the crime, which bears on the accused's moral blameworthiness in committing it, can be ruled out from consideration.

The procedure of weighing extenuating circumstances grew more complex over time, and large tracts of case law parsing the doctrine developed in South African courts. In *S v Letsolo*³⁴ in 1970, the Appellate Division framed the judicial responsibility as

a discretion, to be exercised judicially on a consideration of all relevant facts including the criminal record of the accused, to decide whether it would be appropriate to take the drastically extreme step of ordering him to forfeit his life

or whether another alternative, short of this 'incomparable extreme', would sufficiently satisfy the deterrent, punitive and rehabilitative goals of the sentence.

By the 1980s, South Africa's death penalty regime was in crisis. The Appellate Division vastly expanded the common purpose doctrine in political cases, and large numbers of accused were sentenced to death despite having only a trivial role in a crime.³⁵ Statistics on death sentences showed wildly sharp disparities among judges, including how frequently they imposed the punishment or granted leave to appeal.³⁶ In 1990, the African National Congress set a moratorium on executions as a precondition for negotiations with the South African government, which President FW de Klerk announced on 2 February 1990. The South African legislature abolished the doctrine of extenuating circumstances by the Criminal Procedure Amendment Act of 1990, which substituted a discretionary death sentence in all cases.³⁷ The legislation, applicable to all pending appeals, required that the death sentence be imposed only after full consideration of both mitigating and aggravating factors. It also provided review of cases in which the appeals were exhausted and the death sentences confirmed. In *S v Nkwanyana*,³⁸ the Appellate Division found that 'mitigating factors' included a broader range of factors than required by the doctrine of extenuating circumstances, and not just those connected to the commission of the crime. The Court also concluded that the prosecution had the burden of showing aggravating factors *and* the absence of mitigating factors beyond a reasonable doubt. Despite the institution of a discretionary death penalty regime in 1990, however, the gallows at Pretoria Central Prison never again

34 1970 (3) SA 476-477 (A).

35 Kahn (n 26 above) 162 n 99.

36 L Angus & E Grant 'Sentencing in capital cases in the Transvaal Provincial Division and Witwatersrand Local Division: 1987-1989' (1991) 7 *South African Journal on Human Rights* 69.

37 Criminal Procedure Amendment Act 107 of 1990.

38 1990 (4) SA 735 (AD).

hanged another prisoner. In 1995, the Constitutional Court of South Africa found the death penalty unconstitutional in *S v Makwanyane*,³⁹ holding that even in a discretionary system, '[a]t every stage of the process there is an element of chance'. *Makwanyane* has since gone global, cited by courts around the world for its treatment of human dignity in the criminal sentencing process.

4 Zimbabwe

At independence in 1980, Zimbabwe inherited a wide array of capital crimes from a period of white minority rule, including attempted murder, conspiracy, treason, rape and attempt, aggravated robbery and attempt, certain political offences under Rhodesian security legislation, and felony murder.⁴⁰ The death sentence was restricted to murder and treason in 1992.⁴¹ The doctrine of extenuating circumstances was first passed by the Southern Rhodesian Legislative Assembly in 1949, introducing some judicial discretion to capital sentencing.⁴² Then Minister of Justice, Thomas Beadle, told the legislature that 'only half the death sentences which are passed in this colony are ever carried out in fact'.⁴³ Another member noted that the mandatory regime created 'a tendency to strain the law against the finding of murder' and instead convict of manslaughter.⁴⁴ During the stresses of the Rhodesian War, however, the legislature passed mandatory death sentences without consideration of extenuating circumstances for certain political offences, including petrol bombing and possession of arms of war, which were upheld in a series of constitutional challenges.⁴⁵

At independence, the doctrine of extenuating circumstances passed to Zimbabwe wholly unreformed. Courts in Zimbabwe never developed a clear method of weighing aggravating and mitigating circumstances, adhering to the traditional rule placing the burden of proof on the accused. The Supreme Court permitted trial judges to either weigh all mitigating factors and aggravating factors together to determine whether extenuating circumstances existed, or to determine that extenuating circumstances existed before weighing them against aggravating factors.⁴⁶ The Court has upheld a death sentence where extenuating circumstances appeared to exist but were outweighed by aggravating factors, which is a corruption of the

39 1995 (3) SA 391 (CC).

40 G Feltoe *A guide to sentencing in Zimbabwe* (1990) 25-26.

41 Criminal Laws Amendment Act 2 of 1992 (Z).

42 Criminal Procedure and Evidence Amendment Act 52 of 1949 (SR).

43 *Debates of the Legislative Assembly of Southern Rhodesia* (18 October 1949) 2643.

44 *Debates* (n 43 above) 2651.

45 Law and Order (Maintenance) Amendment Act 12 of 1963 (SR); *R v Runyowa* 1966 RLR 42 (PC).

46 G Feltoe 'Extenuating circumstances: A life and death issue' (1986) 4 *Zimbabwe Law Review* 66-78.

doctrine.⁴⁷ Also troubling was the Supreme Court's willingness to confirm death sentences for felony murder and accomplice liability in which the accused did not have the actual intent to kill, although it did recognise as an extenuating circumstance a homicide in which the possibility of death was relatively remote.⁴⁸

One unique aspect of Zimbabwe's doctrine of extenuating circumstances was the degree of deference that the Zimbabwe Supreme Court gave to decisions of the trial courts, rendering it effectively powerless to change a sentence in the absence of misdirection or irregularity, even if it would have imposed a lesser sentence.⁴⁹ In one recent case upholding a death sentence, the Supreme Court noted that 'the trial court exercises what is essentially a moral judgment' that extenuating circumstances exist, and the Court on appeal 'cannot substitute its own view'.⁵⁰ The Court may only interfere⁵¹

if persuaded that the conclusion of the trial court could not reasonably have been reached; or where the court had regard to the wrong factors; or had mistakenly excluded factors proper to be taken into account, or had, in some other way, erred in principle.

This level of deference contrasts markedly with the efforts of other appellate courts in Southern Africa to seek uniformity in sentencing, and conflicts with the global trend toward more robust review in capital cases. In refusing to reduce a sentence for murder with extenuating circumstances from 25 years to 20 years, the justices wrote that it was 'not for this Court to interfere with a sentence passed by a court of first instance merely because it might have imposed a different sentence'.⁵² This level of deference places great weight on the decision of an individual trial judge, increasing the risk of error.

In March 2013, Zimbabwean voters ratified a new Constitution which prohibits the mandatory death sentence.⁵³ The new provision in article 48(2) only authorised the death penalty for murder committed in 'aggravating circumstances', indicating that 'the law must permit the court a discretion whether or not to impose the death penalty', which abolishes the doctrine and grants a judge discretion to impose a lesser sentence even in the absence of

47 *Kanhumwa v S* Crim App 189/2002 (29 November 2004).

48 *Murijo v S* [2005] ZWSC 139 (22 September 2005); *Mugwanda v S* Crim App 215/2001 (6 June 2002); *Siluli v S* [2005] ZWSC 135 (6 September 2005).

49 J Hatchard 'Capital punishment in Southern Africa: Some recent developments' (1994) 43 *International and Comparative Law Quarterly* 925.

50 *S v Woods* 1993 (2) ZLR 284.

51 As above.

52 *Mamvura v S* Crim App 127/2003 (20 June 2005).

53 Art 48(2) Zimbabwe Constitution; 'Zimbabwe approves new constitution' *BBC News* 19 March 2013 <http://www.bbc.co.uk/news/world-africa-21845444> (accessed 31 January 2014).

extenuating circumstances.⁵⁴ The effective abolition of the doctrine of extenuating circumstances in Zimbabwe accords with a global trend toward discretionary death penalty regimes.

5 Botswana

Botswana's Penal Code authorises the death sentence for murder, treason and piracy with intent to murder, although no convictions have occurred under the latter two crimes.⁵⁵ According to the Penal Code, '[w]here a court in convicting a person of murder is of the opinion that there are extenuating circumstances, the court may impose any sentence other than death'.⁵⁶ As in Zimbabwe, South African jurisprudence is an important source of law in capital sentencing. Decisions of South African courts are of 'strong persuasive force' because 'the concept of "extenuating circumstances" in sentences for murder as introduced into the Penal Code was plainly derived ... from and based on legislation in South Africa'.⁵⁷ A court must consider the accused's social background according to standards of behaviour of an ordinary person in the accused's community and judge the accused's behaviour according to his or her own weaknesses, foibles, defects and beliefs.⁵⁸ The Botswana Court of Appeal has generously interpreted extenuating circumstances to include a wide range of factors. Provocation or absence of premeditation alone may be an extenuating circumstance, unlike in Zimbabwe, where a defence of provocation that failed at trial is likely to be rejected by a judge as an extenuating circumstance since the judge already rejected the accused's version of events.⁵⁹

The Botswana Court of Appeal has removed the evidentiary burden on the accused to show extenuating circumstances, removing the most objectionable aspect of the doctrine of extenuating circumstances. In *Kelaletswe v State*,⁶⁰ the Court first determined that the burden of showing extenuating circumstances no longer rested with the accused. A judge and counsel themselves had the responsibility to inquire as to the existence of extenuating circumstances, and the benefit of the doubt belonged to the accused.⁶¹ The Court of Appeal confirmed that a trial judge engages in a single step, weighing aggravating and extenuating circumstances together to determine whether extenuating circumstances exist, obscuring the sentencing analysis. This lack of analytical clarity persists

54 Art 48(2) Zimbabwe Constitution.

55 DDN Nsereko 'Extenuating circumstances in capital offences in Botswana' (1991) 2 *Criminal Law Forum* 267.

56 Sec 203(2) Penal Code.

57 *Gofhamodino v S* Crim App 4/1984 (June 1984) (B).

58 Nsereko (n 55 above) 262-263.

59 *Masono v S* [2000] 1 BLR 46 (CA); *Ndhlovu v S* Crim App 15/1995 (11 July 1995). Compare *Jongwe v State* [2002] ZWSC 62 (8 August 2002).

60 [1995] BLR 100 (CA).

61 As above.

in Botswana's case law, although decisions show more consistency than in Zimbabwe.⁶²

In 2003, in *Kobedi v State*,⁶³ the Court of Appeal addressed a fair trial challenge to Botswana's *pro Deo* system of legal representation in which junior lawyers are paid a flat fee to represent indigent accused. The Court dismissed this ineffective assistance of counsel challenge, finding that most indigent capital accused receive adequate counsel. However, one observer has noted that '[t]he quality of such representation mostly leaves a lot to be desired', and the average amount received for a *pro Deo* case is one-tenth of that made by an attorney in private practice for a single court appearance.⁶⁴ As two human rights organisations have noted:⁶⁵

Most *pro Deo* cases are handled by inexperienced lawyers who lack the skills, resources and commitment to handle such serious matters [affecting] ... the rights of the accused.

Kobedi also raised a challenge to the definition of extenuating circumstances as unconstitutionally narrow because it prevented courts from considering mitigating factors that were unrelated to the offence itself, including a lack of prior convictions, good behaviour, religious conversion, medical needs, familial obligations, or remorse after the fact. The Court dodged the argument, writing that nothing stopped the accused from proffering such arguments.⁶⁶ Botswana continues to use a narrow definition of extenuating circumstances even though it no longer adheres to the burden-shifting aspect of the original doctrine.

6 Swaziland

The doctrine of extenuating circumstances passed into Swazi criminal law via the Criminal Law and Procedure (Amendment) Act of 1959, modelled on the South African provision.⁶⁷ Ratified in 2005, section 15(2) of the Constitution of Swaziland prohibits the mandatory death penalty, the only constitution in Africa to do so until Zimbabwe's in 2013.⁶⁸ In practice, however, the doctrine of extenuating circumstances fell into disuse starting in 1998 after a series of decisions in which the Court of Appeal (renamed the Supreme Court under the new Constitution) determined that the burden did not shift to the accused to show extenuating circumstances; instead, the

62 *Ntesang v S* [1995] BLR 151 (CA).

63 [2003] BWCA 22 (19 March 2003).

64 DG Boko 'Fair trial and the customary courts in Botswana: Questions on legal representation' (2000) 11 *Criminal Law Forum* 454.

65 FIDH & Ditshwanelo *The death penalty in Botswana: Hasty and secretive hangings* (2007) 21.

66 *Kobedi* (n 63 above).

67 Criminal Law and Procedure (Amendment) Act 47 of 1959 (S).

68 Art 15(2) Constitution of Swaziland.

prosecution maintained the burden of showing that there were none, a more progressive interpretation than in Botswana. The most recent case law requires judges to weigh aggravating and mitigating factors even where no extenuating circumstances are found, which provides a path forward for other retentionist countries in Southern Africa.

In an unreported judgment in *Daniel Dlamini v Rex*⁶⁹ in 1998, the Swaziland Court of Appeal wrote: 'We find ourselves in respectful agreement with the conclusion of the Botswana Court of Appeal that no onus rests on the accused person', for which it cited *Kelaletswe*. The Court noted that the trial judge had the duty to consider all of the testimony and weigh all aggravating and mitigating factors in order to determine whether extenuating circumstances existed. In a subsequent case in August 1998, the Court of Appeal reversed a death sentence where a doctor's statement as to the accused's mental state was not contradicted on the record.⁷⁰ Unlike courts in Zimbabwe or Botswana, the determination of whether extenuating circumstances existed was a separate inquiry from the weighing of all aggravating and mitigating factors to determine the appropriate inquiry. Trial judges were directed to consider the nature and circumstances of the offence; the characteristics of the offender, with a 'perceptive understanding of the accused's human frailties'; and the impact of the crime on the community in order to determine an appropriate sentence.⁷¹

In 2009 the High Court ruled that the constitutional prohibition on the mandatory death penalty rendered the extenuating circumstances analysis obsolete since a court *always* had discretion to substitute a lesser sentence, regardless of whether extenuating circumstances existed.⁷² Consequently, the penal code provision authorising extenuating circumstances was unconstitutional to the extent that it required a mandatory death sentence. In a separate case, the Supreme Court of Swaziland confirmed that courts had a discretion to substitute a lesser sentence regardless of whether extenuating circumstances existed, but determined that the doctrine could still be relevant as it could 'fortify a decision to impose' the death penalty.⁷³ Since the establishment of a purely discretionary death penalty in Swaziland, judges have been reluctant to dispose a death sentence even when it was in their discretion to do so. In one High Court decision, the trial judge found that the accused was guilty of murder with no extenuating circumstances and found that the aggravating factors 'far outweigh[ed]' the mitigating factors, but nonetheless opted for a sentence of imprisonment on account of the accused's

69 Crim App 11/1998, cited in *Rex v Blignaut* [2002] SZHC 10 (29 April 2002).

70 *Rex v Motsa* [1998] SZHC 31 (8 October 1998).

71 *Motsa* (n 70 above), citing *S v Zinn* 1969 (2) SA 537; *S v Scheepers* 1977 (2) SA 154.

72 *Rex v Musa Kotso Samuel Dlamini* [2009] SZHC 151 (29 May 2009).

73 *Rex v Ntokozo Adams* [2010] SZSC 10 (30 November 2010).

lack of a prior criminal history.⁷⁴ In the sensationalised case of serial killer David Simelane, convicted of 28 murders of women and girls over a two-year period, the Supreme Court had no such hesitation, upholding the death penalty as the accused 'sunk to the very depths of depraved and evil conduct.'⁷⁵ The two cases together suggest that the death penalty in Swaziland is truly reserved for the rarest of the rare cases, in closer conformity to international human rights standards.

With the rise of a discretionary death penalty, the Supreme Court monitors sentences of imprisonment from the High Court for consistency, creating a kind of judicial common law of sentencing in lieu of legislative sentencing guidelines. The Court has done this in three ways. First, the Court has cited to courts in Botswana, Lesotho and elsewhere to determine the appropriate length of sentence for a given crime.⁷⁶ Second, the Supreme Court has compared recent domestic cases to discern an acceptable range for an offence. In *Tsela v Rex*,⁷⁷ the Court listed the sentences of every murder case in the prior ten years, determining that all sentences fell between five and 25 years, with 15 as the mean, suggesting that lower courts should not depart from this range without good reason. Third, the Court has reasoned by analogy to earlier cases. In *Tfwala v Rex*,⁷⁸ the Court upheld a sentence of 15 years for murder, citing several cases in which the accused acted without provocation but otherwise had no prior convictions and was young at the time of the offence. According to the Court, '[t]hese cases serve to show in rough and general terms the judicial trend in sentencing for murder'. The Swazi Supreme Court's diligence in monitoring consistency is unique in the region and provides a promising counterexample to the Supreme Court of Zimbabwe's troubling deference.

7 Lesotho

The doctrine of extenuating circumstances in Lesotho has evolved in more progressive ways than in Zambia or Zimbabwe prior to abolition, although Lesotho still places the onus on the accused to show extenuating circumstances in order to avoid a sentence of death. The Constitution of Lesotho contains a death penalty savings clause in article 5, and the Penal Code permits the death penalty for murder, treason and rape where a rapist knows or has reasonable suspicion to believe that he or she is infected with the Human Immunodeficiency Virus (HIV), though no person has been sentenced

74 *Rex v Nhlanhla Lucky Dlodlu* [2012] SZHC 236 (28 September 2012).

75 *Simelane v Rex* [2011] SZSC 54 (30 November 2012).

76 See eg *Rex v Mtsethwa* [2010] SZHC 145 (16 September 2010); *Nyandzeni v Rex* [2012] SZSC 3 (31 May 2012).

77 [2012] SZSC 13 (31 May 2012).

78 [2012] SZSC 15 (31 May 2012).

to death for either treason or rape.⁷⁹ Judges in Lesotho 'show a distinct reluctance to impose the death penalty', and have a tendency to 'find extenuating circumstances where their existence is sometimes slender'.⁸⁰ Owori puts the current state of the doctrine in even more stark terms:⁸¹

Of the 915 murder charges brought before the courts in the last five years, there is at the moment not a single convict on death row, partly due to the courts always looking for and *finding* extenuating circumstances.

In recent years, the Court of Appeal has always reversed a death sentence imposed by the High Court by using a broader definition of 'extenuating circumstances' than in neighbouring countries.

In 1998, the Court of Appeal issued a seminal case on the doctrine of extenuating circumstances in *Letuka v Rex*,⁸² developing a clear process for weighing aggravating and mitigating circumstances. After conviction, the accused person has an opportunity to give evidence to rebut the view that the offence fell into the category of heinous crimes deserving of death, and the trial judge must conduct the extenuating circumstances inquiry 'with diligence and with an anxiously enquiring mind'. However, the Court 'caution[ed] against the use of the *onus* as the determining cause for holding that no extenuating circumstances exist', as this bore 'the hallmark of ready recourse to a legal make-weight and can be employed to justify an overly retributive response to serious crime'.⁸³ The Court distinguished the Botswana case *Kelaletswe*, noting that the law of Lesotho required the onus to remain on the accused, but warned that the ready invocation of the onus as a determining factor was 'a course to be avoided' because it constrained a judge's inquiring mind into the totality of the circumstances. The Court continues to hedge on the question of the onus. In reversing a death sentence in 2011, the Court noted that '[e]ven if there was an onus on the appellant, what he said about the bad relationship between him and the deceased was not challenged'.⁸⁴ This jurisprudence suggests that Lesotho is moving toward the position of Botswana in removing the burden of proof from the accused to show extenuating circumstances.

Lesotho courts are also notable for the broad range of extenuating circumstances that they consider at the sentencing stage, including youth, intoxication, emotional conflict, motive, provocation, general background, impulsiveness, minor role, absence of actual intent to kill, witchcraft, absence of premeditation, 'heavy confrontation', and rage

79 Art 5 Lesotho Constitution; sec 297 Criminal Procedure and Evidence Act 9 of 1981; sec 32(a)(vii) Sexual Offences Act 3 of 2003.

80 WCM Maqutu *Contemporary constitutional history of Lesotho* (1990) 55.

81 M Owori 'The death penalty in Lesotho: The law and practice' British Institute of International and Comparative Law (2004) http://www.biiicl.org/files/2298_country_report_lesotho_owori.pdf (accessed 31 January 2014).

82 1997-1998 LLR-LB 346 (4 February 1998) 360.

83 *Letuka* (n 82 above) 364.

84 *Kopano v Rex* [2011] LSCA 19 (20 April 2011).

of an accused.⁸⁵ In one case, the High Court found a confession and co-operation with investigators to be extenuating, which is broader than the original doctrine, although another case rejected the accused's health problems and an offer to pay compensation to the victim's family as extenuating.⁸⁶ Lesotho courts treat youth as an extenuating factor even in the absence of other factors, a broader application than that used in Zambia or Zimbabwe.⁸⁷ Once the Court of Appeal found extenuating circumstances even in the case of a murder for hire, the High Court became more liberal in the extenuating circumstances analysis.⁸⁸ In one case, the trial judge noted that the Court 'moved the goal posts a little' and 'extenuating circumstances are now found in cases where in the past they would not have been'.⁸⁹ Lesotho's liberal application of the doctrine has removed its most objectionable features and is closer to conformity to the limitation on the death penalty in international law to only the most serious crimes. Only total abolition, however, can remove all risk of arbitrariness or error.

8 Zambia

Under the Penal Code Amendment Act of 1990, the death penalty in Zambia was no longer mandatory upon a finding of extenuating circumstances, defined in the statute as any facts 'associated with the offence which would diminish morally the degree of the convicted person's guilt', following the traditionally narrow definition.⁹⁰ The provision sharply narrowed the scope of the death penalty for murder, although it did not allow appellate courts to exercise independent review of whether extenuating circumstances existed, and it placed the onus on the accused.⁹¹ The Zambian Supreme Court refused to find the doctrine retroactive to crimes committed before the statute's passage.⁹² In addition, the Court failed to extend the doctrine to armed robbery, a crime that also triggers a mandatory death penalty, at odds with the growing international consensus that the death penalty should be restricted only to crimes that result in death.⁹³

In general, the doctrine operates in similar fashion as elsewhere. The Supreme Court reversed a death sentence in a witchcraft murder

85 *Letuka* (n 82 above) 363.

86 *Rex v Maphobole* [1981] LSHC 2 (29 January 1981); *Rex v Mbobo* [2012] LSHC 78 (8 May 2012).

87 *Rex v Raseotsana* [1995] LSHC 122 (30 October 1995); *Rex v Mokalanyane* [2001] LSHC 44 (15 May 2001).

88 *Rex v Ramaema* [2003] LSHC 83 (6 August 2003).

89 *Rex v Mosili* [2001] LSHC 87 (23 August 2001).

90 Penal Code Amendment Act 3 of 1990 (Zambia).

91 J Hatchard 'Developing the criminal law in Zambia: The Penal Code (Amendment) Act, 1990' (1992) 36 *Journal of African Law* 103-104.

92 *Mvula v People* [1991] ZMSC 19 (1 August 1991).

93 *Chongo v People* [1999] ZMSC 16 (20 April 1999).

case and in a case with evidence of provocation, but refused to find that the age of an accused or the acquittal of an accomplice to be extenuating circumstances.⁹⁴ Zambia's variant of the doctrine does not include the progressive innovations used by the judiciary of Botswana and Lesotho; the country is the last to adhere to the original version. Voters are expected to vote on a long-postponed constitutional draft some time in 2014, which includes a right to life provision in article 28 that prohibits the death penalty where extenuating circumstances are found relating to the commission of the crime.⁹⁵ This will have the effect of constitutionalising the doctrine in perpetuity, including the shifting of the burden to the accused to rebut a presumption in favour of death. While the death penalty retains popular support, Zambia is considered *de facto* abolitionist and had three presidents in succession who have preserved moratoria on executions.⁹⁶ Nonetheless, by continuing to adhere to a narrow definition of extenuating circumstances and requiring the accused to show why he or she should not be executed (not to mention the death penalty for armed robbery), the scope of the death penalty in Zambia is broader than in its southern neighbours.

9 Namibia

Prior to independence, courts in Namibia (then South-West Africa) appealed to the Appellate Division of South Africa.⁹⁷ As a consequence, the doctrine of extenuating circumstances operated indistinguishably from South Africa. At independence, the death penalty was abolished in Namibia. According to the independence Constitution:⁹⁸

No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia.

The Supreme Court finally put the doctrine of extenuating circumstances to rest in 2003 in *State v Alexander*,⁹⁹ reversing a

94 *Moola v People* [2000] ZMSC 47 (17 October 2000); *People v Kashwenka* [2007] ZMSC 5 (6 February 2007).

95 Technical Committee on Drafting the Zambian Constitution *First Draft Constitution* (30 April 2012) <http://zambianconstitution.org/downloads/First%20Draft%20Constitution.pdf> (accessed 31 January 2014).

96 A Novak 'The death penalty and the right to life in the draft Constitutions of Zambia and Zimbabwe' *AfricLaw.org* 18 April 2013 <http://africlaw.com/2013/04/18/the-death-penalty-and-the-right-to-life-in-the-draft-constitutions-of-zambia-and-zimbabwe> (accessed 31 January 2014).

97 D Dyzenhaus *Hard cases in wicked legal systems* (2010) xxii; SK Amoo 'The structure of the Namibian judicial system and its relevance for an independent judiciary' in N Horn & A Bosl (eds) *The independence of the judiciary in Namibia* (2008) 69.

98 Art 6 Constitution of Namibia.

99 [2003] NASC 5 (13 February 2003).

sentence of life imprisonment where a lower court relied on South African death penalty jurisprudence in determining the appropriate sentence. According to the Court, it was

fundamentally wrong to import and apply pre-independence norms for the imposition of the death penalty to the current sentencing criteria for the imposition of life imprisonment in appropriate instances.

With the constitutional abolition of the death penalty, a judge's discretion was 'no longer tied up in the procedural straightjacket' of determining whether circumstances existed at the time of the offence that reduced an accused person's moral blameworthiness. Judges were to consider the broader 'mitigating factors' rather than 'extenuating circumstances' in determining whether a sentence was appropriate, the Court ruled. The rejection of the extenuating circumstances analysis in non-death penalty cases in Namibia represents a clean break with pre-independence precedent.

10 Conclusion

The doctrine of extenuating circumstances successfully reduced the harshness of the mandatory death penalty by turning the sentence into a rebuttable presumption of death, requiring a judge to articulate a mitigating factor that allowed substitution of a lesser sentence. The doctrine placed an overwhelming emphasis on the most important of mitigating factors, namely, those that existed at the time the offence was committed, but it was not the only – and certainly not the most transparent – means of doing this.¹⁰⁰ In South Africa, the doctrine failed to adequately guide judicial discretion, placed great stress on the defence counsel and legal aid regimes, and led to gross disparities in sentencing by the time of its abolition in 1990. The most objectionable aspect of the doctrine was that it placed the burden on the accused to show why he or she should not be executed, which conflicted with the essential thrust of the presumption of innocence and forced a person convicted of murder into the awkward position of changing his or her story to avoid the death sentence or maintaining innocence at his or her peril.

Increasingly, the doctrine of extenuating circumstances is out of sync with human rights norms in capital cases because it fails to guide judicial discretion in a predictable and rational way. After abolition of the death penalty in South Africa and Namibia, the doctrine of extenuating circumstances continued to survive in Botswana, Lesotho, Swaziland, Zambia and Zimbabwe, although it produced similar tensions in each case. While Botswana and Swaziland eventually discarded the requirement that the accused bears the burden of showing extenuating circumstances, and Lesotho is likely to follow, Zambia and Zimbabwe adhered to the traditional doctrine. The

¹⁰⁰ Koyana (n 11 above) 118.

doctrine is now abolished in Swaziland and Zimbabwe, which fits with the emerging Commonwealth consensus that a trial judge should weigh aggravating and mitigating circumstances and require that the death penalty be reserved only for the most heinous crimes. The doctrine's decline across the region brings capital sentencing closer to conformity with international due process norms, limiting the death penalty to the 'worst of the worst'. Although a rebuttable presumption in favour of death reduces the harshness of a mandatory death penalty regime by importing some discretion to substitute a lesser sentence, international human rights law increasingly demands a presumption *against* death, even if extenuating circumstances are often found. Adopting a discretionary death penalty would narrow the class of persons who could be subject to death, moving closer to the goal of total abolition of capital punishment.