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The death row phenomenon and the prohibition against torture and cruel, inhuman or degrading treatment*

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Summary

The article discusses how two main approaches to the death row phenomenon can be distinguished in the jurisprudence of national courts and international human rights mechanisms. The progressive approach sees a prolonged delay in the execution of the death penalty as a violation of the prohibition against inhuman or degrading treatment. The conservative approach requires further circumstances, such as the conditions on death row and that the delay in execution is not caused by the condemned prisoner himself. The author argues that the two approaches should be easier to reconcile if courts clearly defined what they mean by torture and cruel, inhuman or degrading treatment.

1 Introduction

The death penalty is by no means of modern origin.[1] It has been suggested that the death penalty is the oldest of all punishments and has

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1 It has been noted that the earliest recorded public debate on the desirability of the death penalty in Greece was in 427 BC; GE Devinish *The application of the death penalty in South Africa* (1990) 1; see also Amnesty International *When the state kills . . . The death penalty: A human rights issue* (1989) 72.

its genesis in the dawn of history.[2] However, its antiquity has failed to crystallise into universal acceptance. Indeed, at least at international law, there is a gradual but firm movement towards its abolition.[3] Furthermore, statistics in relation to state practice indicate a trend towards abolition. For example, in 1978 only 16 countries had abolished the death penalty. In 2004, however, the figure has risen to 79, whereas a total of 117 states have not carried out executions in the previous 10 years.[4]

The above notwithstanding, a majority of states still maintain the death penalty.[5] Furthermore, whilst there have been suggestions that the death penalty is prohibited at international law,[6] such assertions are not sustainable. The Universal Declaration of Human Rights (Universal Declaration) refers to the right to life in article 3, but does not provide for explicit exceptions.[7] It is also silent on the issue of the death penalty.

The International Covenant on Civil and Political Rights (CCPR) has a more detailed articulation of the right to life contained in article 6. Article 6 provides that 'no one shall be arbitrarily deprived of his life'. CCPR does not define the term 'arbitrarily', but it has been suggested that it was intended to mean both 'illegally' and 'unjustly'.[8] The article proceeds to expressly address the death penalty. However, CCPR expressly allows for the use of the death penalty. Indeed, this has provided the impetus for the view that the death penalty *per se* cannot be deemed to be torture or cruel, inhuman or degrading treatment, precisely because it is

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2 Amnesty International (n 1 above) 239.

3 WA Schabas 'Justice, democracy and impunity in post-genocide Rwanda: Searching for solutions to impossible problems' (1996) 7 (3) *Criminal Law Forum* 553.

4 See R Skilbeck 'The death penalty in international law: Tools for abolition' unpublished paper presented at the Conference on the Application of the Death Penalty in Commonwealth Africa, Entebbe, Uganda, 10–11 May 2004. See also Amnesty International 'The death penalty worldwide: Developments in 2003' ACT 50/007/2004.

5 In 2003, a total of 1 146 executions were carried out in 28 countries worldwide. See Skilbeck and Amnesty International (n 4 above). In Africa, by the end of 2003 only 11 countries had abolished the death penalty. For a discussion on the various reasons why the death penalty will remain in force in most African countries, see L Chenwi 'Capital trials in the light of international and regional fair trial standards', unpublished paper presented at the Conference on the Application of the Death Penalty in Commonwealth Africa, Entebbe, Uganda, 10–11 May 2004.

6 Eg, the Secretary-General of Amnesty International has posited that deliberately killing someone violates the most basic of all human rights — the right to life, and has no place in today's world. See Amnesty International News Release *Towards a world without executions* 16 June 1999. The statement has been construed as considering the death penalty as a violation of international law. See also R Rich 'Death penalty: An abolitionist perspective' *12th Commonwealth Law Conference Papers* Vol 1 27.

7 For an analysis of the Universal Declaration, see LE Launderever 'Capital punishment as a human rights issue before the United Nations' (1971) 4 *Harvard Law Journal* 511.

8 NS Rodley *The treatment of prisoners under international law* (1999) 220.

authorised as an exception to the right to life.[9] This has also found expression at the domestic level to repel attacks on the death penalty on the premise that the various constitutions recognise the death penalty as a limitation on or exception to the right to life.[10]

The above judicial orthodoxy has forced proponents of abolition to devise alternative attacks to the death penalty. This has led to the emergence of a relatively new legal doctrine, the so-called death row phenomenon, which has been defined as 'the inhumane treatment resulting from special conditions on death row and often prolonged wait for executions, or where the execution itself is carried out in a way that inflicts gratuitous suffering'.[11]

Legal scholars, psychologists and judges appear to be unanimous about the existence of the death row phenomenon. However, the jurisprudence of national courts and international courts and/or tribunals is sharply divided about its precise contours. On the one hand, there is a view that prolonged detention on its own is a sufficient supervening event which may render the carrying out of the death penalty illegal or unjust. On the other hand, there is another view, which posits that over and above the prolonged detention, there must be demonstrated the existence of other circumstances.

The paper has four main aims. Firstly, it examines various judicial and academic views expressed on the precise nature of the death row phenomenon. Secondly, it examines a few selected decisions of national courts and international courts and/or tribunals to find out the approaches to the death row phenomenon in different jurisdictions. The national court decisions are from Zimbabwe, South Africa, Botswana, The West Indies, India, Singapore and the United States. International courts' and tribunals' decisions are those of the Judicial Committee of the Privy Council (Privy Council), the Human Rights Committee (Committee) and the European Court of Human Rights (European Court). It is by no means suggested that these are the only courts that

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9 See the General Comment of the Human Rights Committee 20(44) UN Doc CCPR/C/21/Rev/1/Add 3. See also Chaskalson P in *S v Makwanyane & Another* 1995 3 SA 39 (CC) para 36, where he says that '[c]apital punishment is not prohibited by public international law, and this is a factor that has to be taken into account in deciding whether it is cruel, inhuman or degrading punishment within the meaning of section 11(2) [of the interim Constitution of South Africa]'. It has been said that the statement would have been more accurate if it was framed in the negative, namely that capital punishment is now prohibited by conventional norms that have been ratified by nearly 50 states, and that this suggests an evolution of standards towards it being considered cruel, inhuman or degrading treatment. See WA Schabas 'International legal aspects' in P Hodgkinson & A Rutherford (eds) *Capital punishment: Global issues and prospects* (1996) 35.

10 See eg the Botswana case of *State v Ntesang* [1995] 4 BCLR 426 or [1995] 2 LRC 338; the Tanzanian case of *Mbushu (alias Dominique Mnyaroje) & Another v Republic* [1995] 1 LRC 216.

11 WA Schabas *The abolition of the death penalty in international law* (1993) 127.

have so far dealt with the issue. However, it is submitted that the decisions are representative of the divergent views on the death row phenomenon. Thirdly, the paper examines the above decisions to determine the definition, if any, that has been given to the various components of the prohibition against torture and cruel, inhuman or degrading treatment. The aim here would further be to determine whether it is necessary to define the various components of the prohibition. Lastly, the paper attempts to reconcile the divergent views that emerge from the different jurisdictions.

2 Judicial and academic acceptance of the death row phenomenon

Literature is replete with authority describing the suffering endured by condemned prisoners. This section examines the various views expressed by jurists and other professionals about the death row phenomenon as an inevitable consequence of the imposition of the death penalty.

2.1 Delay on death row

It has been said that the death penalty inevitably causes cruelty by the delay in carrying it out.[12] The reasons for delays on death row are diverse and differ from one country to another.[13] However, it is generally accepted that it is human nature to seek to prolong one's life by all means at one's disposal.[14] Thus, in most cases, as will be seen in the section that follows, the delay is partly due to the condemned prisoner availing himself of appeal procedures.[15] Indeed, as will also be seen in the next section, this is one of the major reasons for the controversy surrounding the death row phenomenon.

Whatever the reasons for the delay, it is clear that delays on death row are on an increase. In the United States, for example, an average length of time spent on death row has risen from around 13 months in 1976 to over seven years by the 1990s.[16] A prisoner in Utah was executed after

12 D Pannick *Judicial review of the death penalty* (1982) 162; in the case of *Riley & Others v Attorney General of Jamaica & Another* [1982] 3 All ER 469 (PC), the Privy Council held at 473 that 'period of anguish and suffering is an inevitable consequence of sentence of death'.

13 For an exhaustive discussion of the various causes of delay, see P Hudson 'Does the death row phenomenon violate a prisoner's rights under international law?' (2000) 11 *European Journal of International Law* 833 834–835.

14 In the *Riley* case (n 12 above), it was said at 479 that '[i]t is no answer to say that a man will struggle to stay alive'.

15 In the *Catholic Commission* case (n 40 below), the Supreme Court of Zimbabwe noted at 334 that the state has nothing to gain by delaying execution.

16 R Hood *The death penalty: A world-wide perspective* (1996) 136.

spending 18 years on death row since the age of 19.[17] In Arkansas, a man's death sentence was commuted to life imprisonment after languishing on death row for 19 years.[18] Generally, it takes an average of ten years to execute a death row inmate in the United States.[19]

Delays on death row are a global problem and are not peculiar to the United States. In Japan, for example, by the end of 2002 most of the over 100 people on death row had been in solitary confinement for over a decade.[20]

In 2001 there were at least 30 condemned prisoners in Zambia who had been on death row for periods ranging from eight years to 25 years.[21] Thus, delays on death row, for various reasons, have become the norm rather than an exception.

2.2 Academic acceptance of the death row phenomenon

A criminologist conducted a study and interviewed 35 condemned prisoners in Alabama, United States. He found that most of the inmates were preoccupied with the length of time spent on death row.[22] He also found out that the isolated conditions under which death row inmates were confined on death row produced widespread feelings of abandonment, leading to what he styled 'death of personality'.[23] The symptoms of the condition, according to the study, were depression, capacity, loss of sense of reality and physical and mental deterioration. He described the condemned prisoners:[24]

> . . . massive deprivation of personal autonomy and command over resources critical to psychological survival; tomblike setting, marked by indifference to basic human needs and desires; and their enforced isolation from the living, with the resulting emotional emptiness and death.

All in all, the various studies describe the exquisite psychological torture resulting from confinement on death row. The result of such torture is often deterioration and severe personality distortions, as well as denial of reality.[25]

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17 *The Guardian* (1992-07-31) quoted in Hood (n 16 above) 137.

18 AI *United States of America: Developments on the death penalty during 1994* 17. AI Index: AMR 51/01/95.

19 Hudson (n 13 above) 835.

20 Amnesty International Report 2003: Japan http://web.amnesty.org/reprt/Jpn-summary-eng (accessed 22 July 2004).

21 AI *Zambia: Time to abolish the death penalty* 9. AI Index: AFR 63/004/2001.

22 R Johnson *Condemned to die: Life under sentence of death* (1981) 4.

23 As above.

24 n 23 above, 110.

25 For a thorough exposition of this issue, see R Johnson 'Under the sentence of death: The psychology of death row confinement' (1979) 5 *Law and Psychology Review* 141; R Johnson & JL Carroll 'Litigating death row conditions: The case for reform' in IP Robbins (ed) *Prisons and the Law* (1985).

2.3 Judicial cognisance of the death row phenomenon

There are perhaps a few issues that have cultivated mutual and universal cognisance by diverse professions such as the death row phenomenon. Various judicial bodies have echoed the sentiments expressed above in relation to the psychological trauma that a condemned prisoner is subjected to whilst on death row. In the United States case of *Ex parte Medley*,[26] Justice Miller observed as follows in relation to condemned prisoners:[27]

> When a prisoner sentenced to death by a court is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it . . . as to the precise time when his execution shall take place.

In the same year, the United States Supreme Court in *Re Kemmler*[28] noted that, although the death penalty might not be cruel *per se*, it becomes cruel when it involves a lingering death, which is beyond the mere extinction of life.

The Supreme Court of India has also made reference to the suffering that a condemned prisoner is subjected to on death row. In *Ediga Anamma v State of Andhra Pradesh*,[29] Justice Krishna Iyer observed that[30]

> [t]he excruciation of a long pendancy of the death sentence, with the prisoner languishing in near solitary confinement suffering all the time may make the death sentence unconstitutionally cruel and agonising.

In yet another case decided by the Supreme Court of India,[31] Chandrachud CJ observed that[32]

> [t]he prolonged anguish of alternating hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional and physical integrity and health of the individual can render the decision to execute the sentence of death an inhuman or degrading punishment in circumstances of a given case.

2.4 Causes of the death row phenomenon

The above exposé reveals the undisputed existence of the death row phenomenon. What may not be clear from the above is the exact cause of the phenomenon. That is, it is not clear whether the phenomenon results from mere confinement or whether it results from a combination of confinement coupled with the treatment that death row inmates are subjected to. Thus, it is imperative to determine whether the

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26 134 US 160 (1890).
27 n 26 above, 172.
28 136 US 436 (1890).
29 [1974] 3 SCR 329.
30 n 29 above, 335.
31 *Sher Singh & Others v State of Punjab* [1983] 2 SCR 583.
32 n 31 above, 591.

phenomenon is suffered as a result of mere confinement on death row, or whether there need to be other circumstances like conditions on death row and the treatment that death row inmates are subjected to.

Most studies have described the psychological trauma that condemned prisoners are subjected to. The trauma has largely been ascribed to the uncertainty in relation to the date of execution coupled with conditions on death row.[33] Whereas the reactions of prisoners on death row have been likened to those of terminally ill hospital patients, it has been noted that their situation is exacerbated by other factors like isolation and deprivation of recreational and other facilities.[34]

The conditions on death row have been crisply described as 'an austere world in which condemned prisoners are treated as bodies kept alive to be killed'.[35] Similarly, Vogelman[36] has noted that 'living in the death row factory is a traumatic experience, whether or not it results in execution. While the condemned are there, they are the living dead.'[37]

What can be filtered from the above is that emphasis is laid on the psychological trauma that is an inevitable consequence of the imposition of the death penalty. The mental trauma and suffering results from various factors associated with the death penalty. These factors include uncertainty of the exact date of the impending death, alternating hope and despair and the feeling of isolation. Thus, although the traditionally rough conditions on death row exacerbate the suffering, it would appear that they need not exist for a condemned prisoner to be subjected to the death row phenomenon. However, as will be noted shortly, the other view is to the effect that prolonged detention on death row would not suffice on its own for purposes of relying on the death row phenomenon to quash a sentence of death.

3 The jurisprudence of the death row phenomenon: A global perspective

The death row phenomenon has occupied the highest judicial echelons of many countries and international tribunals. This section will endeavour to provide a global perspective of the jurisprudence of the death row phenomenon. The aim of this section is to examine the divergent approaches emerging from the jurisprudence and to show that, as yet, there is no consensus as to the exact parameters of the death row phenomenon.

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33 Hood (n 16 above) 137.

34 As above.

35 Johnson & Carroll (n 25 above) 15.

36 L Vogelman 'The living dead: Living on death row' (1989) 5(2) *South African Journal on Human Rights* 183.

37 n 36 above, 195.

3.1 The jurisprudence of national courts

3.1.1 The Supreme Court of Zimbabwe

The earliest reported case on the death row phenomenon in Zimbabwe is that of *Dhlamini and Others v Carter NO and Others*.[38] The appellants sought to interdict the first respondent from carrying out the sentences of death. They argued, among other things, that the delay between the imposition of their sentences and their confirmation was so inordinate as to constitute inhuman or degrading punishment in violation of section 60(1) of the Constitution of the then Rhodesia. The argument was rejected on the basis that, once a lawful sentence has been meted out, it could not be rendered unlawful by subsequent events that may be termed inhuman or degrading.[39]

The Supreme Court was seized with a similar matter in the *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General and Other*s case.[40] This case involved four men who had been sentenced to death. In March 1993, the four men were served with warrants for their execution. They argued that the execution would be unconstitutional due to the prolonged delay,[41] coupled with the harsh conditions on the death row section of the Harare Central Prison. They relied on section 15(1) of the Constitution of Zimbabwe.

The issue before the Court was whether, even though the death sentences were the only fitting and proper punishments to have been imposed, supervening events amounting to inhuman or degrading treatment could be used to set aside the death sentences. The Court commenced by observing that prisoners are not denuded of their rights by mere conviction. The Court then held that a lawfully imposed sentence, including the death penalty, could be set aside by reason of subsequent events. The Court held that in the circumstances of the case the death sentences, if carried out, would amount to inhuman or degrading treatment.

Even though the Court discussed the various decisions of national and international courts, it failed to reconcile the divergent views emerging from the decisions. Similarly, no attempt was made to motivate the preference for the view adopted by the Court over the views adopted by other courts. For example, in relation to the decision of the Committee

38 (1) 1968 RLR 136.

39 n 38 above, 155.

40 1993 4 SA 239 (ZSC).

41 Zacharia Marichi had spent six years and 21 days, Timothy Mhlanga had spent fours years and four months while Martin Bakaka and Luke Chiliko had spent four years and three months each.

in *Barrett and Sutcliffe*,[42] the Court contented itself with saying that the dissenting opinion of Ms Chanet was more 'compelling'.[43]

The Court held that the delay would be taken into account even if occasioned consequent upon the condemned persons taking advantage of the appeal mechanisms at their disposal. Lastly, although the Court held that prolonged delay before carrying out the death sentences could on its own violate section 15(1) of the Constitution, the decision has been criticised for putting too much emphasis on the appalling conditions on death row in Zimbabwe. It has been contended that another court in another country might rely on this in an endeavour to distinguish its scope.[44] Indeed, as it will be noted below, that is what happened in a decision of the Botswana Court of Appeal.

3.1.2 The Constitutional Court of South Africa[45]

One of the first constitutional issues that the South African Constitutional Court had to grapple with was the death penalty in the case of *S v Makwanyane and Another*.[46] In that case, the accused persons had been convicted, among other things, on four counts of murder. Their appeal to the Appellate Division was dismissed. However, as a result of the issue of the validity of the death penalty, the case was referred to the Constitutional Court.

The Constitutional Court held that the death penalty *per se* constituted cruel, inhuman or degrading punishment within the meaning of section 11(2) of the then interim Constitution. Although the Court referred to decisions on the death row phenomenon, it did not directly deal with the issue.[47] However, the Court observed, *obiter dictum*, that if long delays are not considered in themselves cruel, inhuman, or degrading punishment, then this would entail gratuitous suffering which is inevitable in any system which retains the death penalty. So the case appears to endorse jurisprudence to the effect that inordinate delays in themselves constitute cruel, inhuman or degrading punishment.

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42 Communications 270/1988 & 271/1988, *Barrett & Sutcliffe v Jamaica* CCPR/C/44/D/271/1988, 6 April 1992.

43 n 40 above, 333.

44 WA Schabas *The death penalty as cruel treatment and torture* (1996) 147.

45 The Constitutional Court is the only body with the power to rule on the constitutionality of any Act of Parliament; sec 167 of the Constitution of the Republic of South Africa.

46 n 9 above.

47 For an exhaustive discussion of the case, see WA Schabas 'South Africa's new Constitutional Court abolishes the death penalty' (1995) 16 *Human Rights Law Journal* 133–148 and PM Maduna 'The death penalty and human rights' (1996) 12 *South African Journal on Human Rights* 193.

In his concurring judgment, Kentridge AJ added that:[48]

> The mental agony of the criminal, in its alteration of fear, hope and despair must be present even when the time between sentence and execution is measured in months or weeks rather than years.

This statement ought to be construed and understood cautiously and against the backdrop of the Court's holding that the death penalty is arbitrary and inhuman and not as laying down a general rule on the death row phenomenon.

3.1.3 The Court of Appeal of Botswana

The Court of Appeal of Botswana had occasion to address the death row phenomenon in *Lehlohonolo Bernard Kobedi v The State*.[49] The appellant was a citizen of Lesotho who was convicted by the High Court of murder, among other things, and sentenced to death on 14 October 1998. The Court of Appeal dismissed his appeal against both conviction and sentence on 22 January 1999. The appellant spent some ten months on death row before launching a notice of motion in the High Court on 9 November 1999. He contended, among other things, that the execution of the death sentence would be unfair and unreasonable by reason of delay. The application was dismissed and he appealed to the Court of Appeal.

The Botswana Court of Appeal was referred to the *Catholic Commission* case and decisions of the Privy Council prior to *Pratt and Morgan v Attorney General of Jamaica*.[50] The Court then had to decide whether to follow the Zimbabwean case or the Privy Council decisions. In so deciding, the Court said that it was necessary to make certain observations. Firstly, it noted that the death penalty and the method of carrying it out by hanging have been sanctioned by the Constitution of Botswana and therefore its imposition cannot be regarded as inhuman or degrading. It appears from the judgment that the Court relied on section 4(1) of the Constitution,[51] which reads as follows:

> A person shall not be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under any law of which he has been convicted.

It was, however, argued that although the death penalty appears to be contemplated by the Constitution, nevertheless its method of execution was inhuman and degrading. In response, the Court relied on its earlier[52] decision and held that the argument overlooked the provisions

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48 *Makwanyane* (n 9 above) para 136.

49 Court of Appeal Criminal Appeal No 25 of 2001 (unreported).

50 (1993) 14 *Human Rights Law Journal* 338.

51 See eg 33 *per* Tebbutt JP.

52 *Ntesang v The State* 1995 Botswana Law Reports 151.

of section 7(2) of the Constitution, which saved any law which 'authorises the infliction of any description of punishment that was lawful in the country immediately before the coming into operation of this Constitution'.[53] It will be observed from the *Pratt and Morgan* case that section 17(2) of the Constitution of Jamaica is similar to section 7(2) of the Botswana Constitution. However, in the *Pratt and Morgan* case, the Privy Council held that, while the death penalty by hanging may have been lawful and therefore not subject to constitutional attack, a prolonged wait for it was not and could never be protected by the provision. It is submitted that the same reasoning ought to apply in the interpretation of section 7(2) of the Constitution of Botswana. Unfortunately, it appears that the Court of Appeal was not referred to the *Pratt and Morgan* case. As a result, it relied heavily on *Abbott v Attorney General of Trinidad and Tobago and Others*[54] and *Riley and Others v Attorney General of Jamaica and Another*,[55] which have since been overturned by the *Pratt and Morgan* decision.

The second observation that the Botswana Court of Appeal made was that some form of mental strain and suffering was inherent in the death penalty.[56] The Court relied on the dissenting opinions of Lords Scarman and Brighton in the *Riley* case. Yet, what the Law Lords simply meant in that case was that, since mental strain and suffering are an inevitable consequence of the death penalty, it should not matter who caused the delay on death row. They did not mean, as the Court of Appeal appears to hold, that since the suffering is an inevitable consequence of the death penalty, one cannot rely on the suffering to quash the execution.

The third observation that the Court made was that a person sentenced to death will almost invariably pursue his right of appeal and as a result prolong his mental stress and anguish.[57] The Court held then that it could not agree with Gubbay CJ in the *Catholic Commission* case that the period involved in pursuing his right of appeal, or other judicial process available, should not be excluded from the consideration of whether there has been an inordinate delay in the carrying out of the death sentence from the time of its imposition.[58] This approach has been criticised for, among other things, penalising the claiming of the right to appeal by holding that the exercise of that right prevents the defendant from contending that his treatment violates the prohibition against torture and inhuman or degrading treatment.[59] Furthermore, the Court

53 *Per* Tebbutt JP 33.
54 [1979] 1 WLR 1342 (PC).
55 n 12 above.
56 n 49 above, 54.
57 As above.
58 n 49 above, 56.
59 Pannick (n 12 above) 85.

relied religiously on the *Abbott* and *Riley* cases which, as noted, have since been overturned. The Court also relied on the United States cases of *Chessman v Dickson*[60] and *Richmond v Lewis*.[61] What the Court failed to appreciate is that the United States is sharply divided on the issue, as there is yet to be a decisive Supreme Court decision. Further, as one commentator observed, it should always be remembered that United States decisions mostly deal with applications for *habeas corpus* and not appeals *per se*, and that it would be 'extravagant to punish an accused person for exercising his constitutional rights'.[62]

The Court concluded that the delay had been largely caused by the appellant's own actions. It further held that no evidence had been placed before it to show the conditions on death row in Botswana. In fact, the Court used this as an attempt to distinguish the present case from the *Catholic Commission* case. However, as noted above, the actual conditions on death row were not decisive in that case.

3.1.4 The Supreme Court of India

Although the Constitution of India does not proscribe torture or inhuman or degrading treatment or punishment, the Supreme Court of India has since filled the *lacuna*. It has interpreted article 21, which guarantees the right to live with basic human dignity, as embodying the right not to be subjected to torture, inhuman or degrading treatment or punishment.[63]

That decision provided the impetus for considering the question of delay in carrying out the death penalty in the case of *Vatheeswaran v State of Tamil Nadu*.[64] In that case, the Court considered the issue whether it was open to the Court to take cognisance of endless delay before execution and give relief where necessary. The Court quoted extensively from the minority opinion in the *Riley* case, and found that to take the appellants' lives after a delay of eight years would be a gross violation of the fundamental right guaranteed by article 21 of the Constitution.

While the Court conceded that anguish and suffering were inevitable consequences of the sentence of death, it held that 'a prolongation of it beyond the time necessary for appeal and consideration is not'.[65] From this statement, one gets the impression that any anguish and suffering during the period of appeal were acceptable as inevitable. However, the Court went on to say that 'it is no answer to say that a man will struggle

60 275 F 2d 604 (1960).
61 948 F 2d 1473 (1991).
62 Schabas (n 44 above) 142.
63 *Francis Cotalie Mullin v The Administrator, Union Territory of Delhi* AIR 1983 SC 746.
64 AIR 1983 361.
65 n 64 above, 363.

to stay alive. In truth, it is this ineradicable human desire which makes prolongation inhuman and degrading.'[66] The appeal was allowed and the death sentences were set aside and substituted by life imprisonment. The Court went on to say, *obiter dictum*, that the delay of two years should be sufficient to invoke the application of article 21.[67]

The *obiter dictum* in the *Vatheeswaran* case was overturned in *Sher Singh and Others v The State of Punjab*,[68] in which case the Court held that it was normal for appellate proceedings to exceed two years and that it would be inconceivable if a condemned person could delay execution to such an extent by, for instance, filing frivolous proceedings so that it had to be commuted to life under such a rule. Nevertheless, the Court endorsed the *ratio decidendi* in the *Vatheeswaran* case and held that a condemned person who had been subjected to agony and torment was entitled to rely on article 21. The Court said that it was a logical extension of the principle that supervening events may render the execution of a justly imposed death sentence harsh, unjust or unfair.[69]

3.1.5 The Court of Appeal of Singapore

The Court of Appeal of Singapore dealt with the question of delay on death row in *Jabar v Public Prosecutor.*[70] In that case it was argued that it would be cruel and inhuman punishment to carry out execution in view of the prolonged delay of more than five years since the date of conviction. Reliance was placed on the Indian cases discussed above and the Privy Council case of *Pratt and Morgan*. The Court of Appeal drew a rather dubious distinction between the case at hand and the Indian decisions. The Court noted that the death penalty was not mandatory in India and as such the courts would readily consider any delay in the judicial process and make an order of the commutation of the sentence to life imprisonment. This was because the intention of the legislature in India was to make life imprisonment the general rule and the death sentence an exception to be resorted to for special reasons. The Court concluded that the situation in Singapore was markedly different because there the death penalty was mandatory. Interestingly, the Privy Council has recently held that a mandatory death sentence would be in violation of the prohibition against torture and cruel, inhuman or degrading treatment or punishment.[71]

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66 As above.
67 n 64 above, 367.
68 (1983) 2 SCR 583.
69 n 68 above, 593.
70 [1995] 1 SLR 617.
71 See eg *Patrick Reyes v The Queen* (2002) AC 235.

It is submitted that the Court overlooked the fact that the unambiguous finding by the Indian Supreme Court was that *supervening events* might render a lawfully and justifiably imposed death sentence unlawful. The fact that the sentence may be mandatory does not detract from the mental anguish and torment that a condemned prisoner suffers as a result of inordinate delay and harsh conditions on death row.

The Court went on to hold that, once it had disposed of the appeal against conviction and confirmed the sentence of death, it was *functus officio* as far as the execution of the sentence was concerned. With respect, the Court overlooked the fact that a challenge based on the death row phenomenon is not a challenge to the judicial sentence of death *per se*, but rather to its execution *after* an inordinate delay. This is an issue which at the appeal stage is not canvassed and therefore on which a court cannot at a later stage purport to be *functus officio.*

3.1.6 The Judicial Committee of the Privy Council

The Privy Council[72] has dealt with a plethora of cases bearing on the death row phenomenon. The first case that the Privy Council dealt with was *Freitas v Benny.*[73] In that case it was held that the appellant could not complain about the delay totalling three years preceding his petition for clemency caused by his own action in appealing against his conviction.

This case was followed by the *Abbott* case,[74] in which the Privy Council dismissed as untenable a contention that a delay of eight months was so inordinate as to invoke a contravention of the appellant's constitutional rights. The Privy Council held that the delay caused by the prisoner's use of various judicial reviews could never be invoked as evidence of inhumanity. As a result, three years of appeal and two years of pardon application were excluded. Interestingly, the Privy Council observed, *obiter dictum*, that:[75]

> It is possible to imagine cases in which time allowed by the authorities to elapse between the pronouncement of a death sentence and a notification to the condemned man that is was to be carried out was so prolonged as to arouse in him a reasonable belief that his sentence must have been commuted to a sentence of life imprisonment.

However, the Privy Council observed that delay in such a case would be measured in years and not months.

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72 The Privy Council is an advisory body of the British sovereign. The Judicial Committee of the Privy Council acts, *inter alia,* as an appellate court of the Commonwealth. However, the Judicial Committee only has jurisdiction to entertain appeals from courts in independent Commonwealth countries where such right has not been terminated. Most countries in the West Indies have not terminated this right of appeal. As such, the cases discussed here will be from the West Indies.

73 1976 AC 239 (PC).

74 n 54 above.

75 n 54 above, 1348B–D.

The Privy Council then addressed the issue in the case of *Riley*,[76] in which the Privy Council concluded that, whatever the reasons for the delay in the execution of a death sentence lawfully imposed, such a delay could not invoke a violation of section 17(1) of the Constitution of Jamaica, which prohibits cruel, inhuman or degrading punishment. The Privy Council relied on section 17(2) of the Constitution of Jamaica and held that, since at the time immediately before the Constitution came into effect, execution would have been punishment of a description which was lawful, notwithstanding any delay between its passing and the passing of the death warrant, execution of the death penalty would be 'to the extent' that the law allowed.[77] The Privy Council further emphasised that any delay necessarily occasioned by the appellate procedures pursued was to be excluded.[78]

The *Riley* case was overturned in the *Pratt and Morgan* case.[79] In that case, a period of about 14 years had lapsed between the time the death sentence was meted out and the time the applicants petitioned the Privy Council to have the sentence of death commuted to life imprisonment. Although the Privy Council found that some of the responsibility for the serious delay was attributable to the respondents, it held that the responsibility had no bearing on whether or not the overall length of detention on death row can be described as cruel and unusual punishment under section 17(1) of the Constitution of Jamaica. It held that a state wishing to retain the death penalty must ensure speedy execution after allowing a reasonable time for appeal and consideration of reprieve. It held that section 17(2) was confined to authorising descriptions of punishment for which the court may pass judgment, but did not prevent the appellant from arguing that the circumstances in which the executive intends to carry out a sentence are in breach of section 17(1).[80]

The Privy Council then almost fell into the trap that the Supreme Court of India[81] fell in by adding that:[82]

> In any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute inhuman or degrading punishment or other treatment.

It would appear that the Privy Council realised the potential danger in setting a rigid time frame, and therefore endeavoured to qualify its statement in the next case involving Trinidad and Tobago. This case was

76 n 12 above.
77 n 12 above, 473.
78 n 12 above, 471.
79 n 50 above.
80 n 50 above, 343.
81 *Vatheeswaran* (n 64 above).
82 n 50 above, 346.

Guerra v Baptiste,[83] in which the appellant had been served with a warrant for his execution more than four years and ten months after his conviction. The Privy Council observed that:[84]

> The five-year period [enunciated in *Pratt and Morgan*] was not intended to provide a limit, or a yardstick, by reference to which individual cases should be considered in constitutional proceedings.

It held that the period should be judged by referring to the requirement that execution should follow as swiftly as practicable after sentence, after allowing a reasonable time for appeal and reprieve.[85]

It is clear from the above that the present position of the Privy Council is that resort to legitimate appellate procedures should not be a bar to a contention that a delay on death row has violated the prohibition against torture and inhuman or degrading treatment.

3.1.7 The position in the United States

Various courts in the United States have dealt with the issue in various ways. In the *Chessman* case,[86] the Court of Appeal for the North Circuit declined to stay execution because the delay of 12 years was largely due to the skilful manner in which the prisoner's lawyer had managed to exhaust all available avenues. Interestingly, the Court put a lot of emphasis on the prisoner's disposition and personality, to conclude that he could not have suffered mental agony that an ordinary man would have.[87] The same reasoning was employed in various courts to deny relief to applicants who had been on death row for over 13 years[88] and 16 years.[89]

However, the Supreme Court of California adopted a different approach in *People v Anderson.*[90] In that case, the Court was concerned with the question whether the death sentence violated article 6 of the state's constitutional prohibition against cruel or unusual punishment. The Court held that it did, and particularly underlined the cruelty of the delay in carrying out the death penalty. It went further to hold that an appellant's insistence on receiving the benefits that accrue to judicial review does not render the lengthy period of impending death any less torturous.[91] Similarly, in *District Attorney for Suffolk District v Watson Mass*,[92] the Supreme Judicial Court of Massachusetts held the death

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83 [1996] 1 AC 397.
84 n 83 above, 39.
85 As above.
86 n 60 above.
87 n 60 above, 607–608.
88 *Potts v State* (1989) Supreme Court of the state of Georgia.
89 n 61 above.
90 493 P 2d 88 (1972).
91 n 90 above, 89.
92 411 NE 2d 1274 (1980).

penalty to be violative of the state's Constitution, which prohibited cruel punishment. The Court noted, *per* Justice Hennessey, that:[93]

> The fact that the delay may be due to the defendant's insistence on exercising his appellate rights does not mitigate the severity of the impact on the condemned individual, and the right to pursue due process of the law must not be set-off against the right to be free from inhuman treatment.

In the same terms as in the *Anderson* case, the Court held that delay as a result of the defendant's insistence on exercising his appellate rights does not mitigate the severity of the impact on him.

3.2 The jurisprudence of international jurisdictions

3.2.1 The United Nations Human Rights Committee

The Human Rights Committee is a body of 18 independent experts, which has the power to determine individual complaints on alleged human rights violations in countries that are state parties to the Optional Protocol to CCPR.[94] In terms of article 5(4) of the Optional Protocol, its decisions on the merits, which are called views, are not binding on states. However, its views may be a source of international law as highly authoritative decisions. Member states are expected to implement the decisions.[95]

In *Earl Pratt and Ivan Morgan v Jamaica*,[96] the complainants had been on death row for a period of about seven years. The Committee found that prolonged judicial proceedings do not *per se* constitute cruel, inhuman or degrading treatment, even if they can be a source of mental anguish to the convicted prisoners. It, however, noted that in the case of capital punishment, different circumstances might obtain, requiring an assessment of the circumstances of each case. In the case at hand, the Committee found that the authors had not sufficiently motivated their claim that delays in judicial proceedings had turned their detention on death row into cruel, inhuman or degrading treatment. The Committee said that it is incumbent upon the author who alleges such violation to allege and prove facts over and above prolonged detention that render such detention cruel, inhuman or degrading.

In *Barrett and Sutcliffe v Jamaica*,[97] the authors, who had been on death row for a period of over 13 years, claimed that the duration of their confinement to death row was contrary to article to 7 of CCPR. The Committee reiterated the sentiments it expressed in *Pratt and Morgan*,

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93 n 92 above, 1283.

94 M Schmidt 'The Human Rights Committee: Process and progress' (1995) 5 *Human Rights Forum* 31–49.

95 As above.

96 Communications 210/1986 & 225/1987, *Earl Pratt & Ivan Morgan v Jamaica* CCPR/C/35/D/210/1986; CCPR/C/35/D/225/1987, 7 April 1989.

97 n 42 above, 388–390.

that prolonged judicial proceedings do not *per se* constitute cruel, inhuman or degrading treatment, even though they may be a source of mental strain and anguish for the detained persons.

So, although it found the delay between the dismissal of their appeal by the Court of Appeal of Jamaica and the judgment of the Privy Council to be 'disturbingly long', it concluded that it was largely attributable to the authors themselves. This was not a unanimous decision. For example, Ms Chanet of France was of the view that a state party is not exonerated from its obligations under article 7 of CCPR, even if the long delay may be partially due to the failure of the condemned prisoner to exercise a remedy.[98]

In *Joseph Kindler v Canada*,[99] the Committee was faced with a Communication in which the author complained that his extradition to Pennsylvania, United States, would be a violation of article 7. Interestingly, the communication did not deal with an actual violation. The Committee considered the decision of the European Court in *Soering v United Kingdom*,[100] and concluded that it was distinguishable. In particular, the Committee noted that no specific facts had been placed before it in relation to prison conditions in Pennsylvania, or about the possibility or effects of prolonged delay in the execution of the death sentence. It was for the same reasons that the communication of *Errol Simms v Jamaica*[101] was dismissed.

The jurisprudence of the Committee therefore shows an insistence on the requirement of the existence of further compelling circumstances. What is not clear from the jurisprudence is what would suffice to satisfy this requirement.

3.2.2 The European Court of Human Rights

The European Court had occasion to address the issue of the death row phenomenon in the watershed case of *Soering*.[102] Soering, a German citizen, was sought by the United States to face two charges of murder in the state of Virginia under the 1972 Extradition Treaty with the United Kingdom.

A United Kingdom judge held that Soering could be extradited. Appeals having been dismissed, Soering sought relief from the European Commission on Human Rights. He argued that his extradition would

98 n 97 above, 390 (Appendix I to the views of the Human Rights Committee).

99 Communication 470/1991, *Joseph Kindler v Canada,* CCPR/C/48/D/470/1991, 18 November 1993.

100 Judgment of 7 July 1989, Publications of the European Court of Human Rights, Series A No 161. This case will be discussed in detail below.

101 Communication 541/1993, *Errol Simms v Jamaica*, CCPR/C/53/D/541/1993, 3 April 1995.

102 n 100 above.

amount to a violation of article 3 of the European Convention on Human Rights (European Convention).[103] This was because the conditions of detention at Mecklenburg State Prison, where he would be incarcerated if sentenced to death in Virginia, were particularly harsh and thus inhuman and degrading. The Commission found against him, but referred the case to the European Court.

The European Court found that there was a real risk that Soering would be sentenced to death and that, if extradited, article 3 of the European Convention would be violated. The Court assessed the conditions of detention at Mecklenburg State Prison. It also posed the question whether a delay in the appellate process in the United States could be attributable to the condemned person. The Court held that although the delay might be attributable to the condemned person and regardless of the good intentions of the state of Virginia for providing complex post-sentencing procedures, that did not detract from the mental anguish and suffering by the condemned prisoner.[104] The Court concluded therefore that taking into consideration the long time that would be spent on death row in extreme conditions and the personal circumstances of the applicant, including his age (18 years) and his mental state at the time the crime was committed, his extradition would be in violation of article 3.

3.3 The approaches emerging from the jurisprudence

Few issues have succeeded in cultivating mutual cognisance of the jurisprudence of national courts and international judicial bodies like the death row phenomenon. However, judicial cognisance has not translated into judicial consensus on the issue. What follows is a discussion of the two approaches that have been filtered from the above jurisprudential excursion.

3.3.1 The progressive approach

One approach to the death row phenomenon is what will herein be called the progressive approach. This approach has been adopted by the Supreme Court of Zimbabwe, the Supreme Court of India, the Privy Council and the South African Constitutional Court. Gubbay CJ in the *Catholic Commission* case referred to the approach he adopted as more 'progressive' and 'compassionate'.[105] This approach is basically to the effect that the execution of a death sentence after a prolonged delay is a violation of the prohibition against inhuman or degrading treatment.

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103 Art 3 is the equivalent of art 7 of CCPR. They only differ in that the European Convention does not make reference to cruel treatment.

104 n 100 above, para 106.

105 n 40 above, 333.

This is so regardless of the fact that the delay might have been at the instance of the condemned prisoner himself.

3.3.2 The conservative approach

The Committee has consistently held that long detention *per se* does not amount to a violation of the prohibition against cruel, inhuman or degrading treatment. It has maintained that there has to be an existence of 'further and compelling circumstances'.[106] This approach has been termed less progressive by the Supreme Court of Zimbabwe.

The European Court has, on the other hand, noted that:[107]

> For any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable.

The severe stress was said to be inevitable despite the fact the delay might have been due to the exploitation of appeal safeguards by the condemned prisoner. Yet, ultimately what influenced the Court were the peculiar circumstances of the applicant.[108] It is difficult to conclude that the European Court would have reached the same conclusion if the circumstances of the applicant had been different.[109] Some commentators have maintained that neither the age nor the mental state of Soering influenced the court.[110] It is submitted that the emphasis the Court laid on Soering's circumstances leads one to the inevitable conclusion that, but for these circumstances, the Court's conclusion would have been different. It is for this reason that the decision is put under the conservative approach. The Court of Appeal of Botswana and the Court of Appeal of Singapore fall within this category.

Jurisprudence on the death row phenomenon reveals the different approaches that have been adopted by different courts around the globe. Although this discussion is not exhaustive, it is submitted that, geographically, it sufficiently covers a wide spectrum of the globe as it deals with decisions from different continents. What can be observed from the above is that there are two approaches to the death row phenomenon, which are based on diverse and incommensurable convictions. These approaches have led to different decisions on similar cases.

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106 See para 3.2.1 above.

107 n 100 above, para 111.

108 See eg GJ Naldi 'The death row phenomenon held inhuman treatment' *The Review (*International Commission of Jurists) December 1989 61–62; Schabas (n 11 above) 225–226.

109 RB Lillich 'The *Soering* case' (1991) 85 *American Journal of International Law* 145.

110 See eg M Shea 'Expanding judicial scrutiny of human rights in extradition cases after *Soering*' (1992) 17 *Yale Journal of International Law* 110.

4 The meaning of torture and cruel, inhuman or degrading treatment or punishment

What emerged from the previous section is that, although there is no consensus as to the exact parameters of the death row phenomenon, there is general acceptance that it might invoke the violation of the prohibition against torture and cruel, inhuman ad degrading treatment or punishment. It must be noted that various treaties and constitutions employ different terminology. For example, whereas the Constitution of Botswana protects against 'torture and inhuman or degrading treatment', the Constitution of the United States protects against 'cruel and unusual punishment'. It has been suggested that, whilst the terminology is different, the underlying concept is the same in that the aim is to protect persons from unnecessary and undue suffering.[111] Perhaps this explains why less emphasis has been placed on the definition of these terms. However, it is submitted that defining these terms is relevant for, *inter alia*, arriving at a consensus of the exact parameters of the death row phenomenon. Only when there is consensus on how these terms are understood, can the gap between the approaches discussed in the previous section be bridged. This section embarks on a brief evaluation of the jurisprudence on the prohibition against torture and cruel, inhuman or degrading treatment or punishment. It also discusses the various approaches emerging from the jurisprudence.

4.1 The jurisprudence on torture and cruel, inhuman or degrading treatment or punishment

4.1.1 The global approach[112]

In the *Catholic Commission* case, the Supreme Court of Zimbabwe relied on section 15(1) of the Constitution of Zimbabwe.[113] However, all the Court said in relation to the section was that it was 'nothing less than the dignity of a man, it is a provision that embodies broad and idealistic notions of dignity, humanity and treatment'.[114] The Court seemed to overlook the fact that the section referred to various kinds of conducts or acts to which no individual ought to be subjected. Thus, for its exhaustive and industrious comparative analysis of the jurisprudence of

111 See Hudson (n 13 above) 837.

112 This approach has been referred to as 'global' in that it makes no distinction between the components of the prohibition. See NS Rodley *The treatment of prisoners under international law* (1987) 71.

113 The section reads as follows: 'No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.'

114 *Catholic Commission* case (n 40 above) 326.

the death row phenomenon, the case is less helpful in defining the prohibition that it held had been violated. It is submitted that the Court ought to have defined the various terms and said which of the acts the applicants had been subjected to.

Similarly, the Constitutional Court of South Africa in the *Makwanyane* case did not attempt to define the various concepts embodied in section 11(2) of the Constitution. Perhaps this was because the question of cruel, inhuman or degrading treatment or punishment was not the sole issue. In that case the death sentence was challenged on the basis of sections 8,[115] 9[116] and 10,[117] in addition to section 11(2). According to the Court, these rights were treated as components of the inquiry as to whether the death penalty was cruel, inhuman or degrading.

The Constitutional Court also had occasion to examine this prohibition in *S v Williams*.[118] In that case the issue was whether judicial corporal punishment violated the Constitution. However, as in the *Makwanyane* case, the question of cruel, inhuman or degrading treatment or punishment was not the only issue.[119] In concluding that section 11(2) had been violated, the Constitutional Court declined to draw a distinction between the various components of the prohibition. The Court concluded that:[120]

> Whether one looks at the adjectives disjunctively or regards the phrase as a compendious expression of a norm, it is my view that at this time, so close to the dawn of the twenty first century, juvenile whipping is cruel, it is inhuman and it is degrading.

Similarly, the Privy Council has been criticised for providing no real guidance to the interpretation of the norm.[121] It has been observed that it sheds no light on whether the death row phenomenon constitutes torture or whether it is inhuman or degrading.[122]

The Committee has also not laid emphasis on defining the various components of article 7 of CCPR. It has merely found that article 7 had been violated. In some cases the Committee has expressly found that torture alone had been committed, but failed to authoritatively say which of a series of acts constituted torture.[123] In other cases it has

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115 Sec 8 provided for the right to equality and is now replaced by sec 9 of the 1996 Constitution.

116 Sec 9 provided for the right to life which is now embodied in sec 11 of the 1996 Constitution.

117 Sec 10 provided for the right to respect for and protection of dignity and remains the same.

118 1995 2 SA 632 (CC).

119 It was argued that in addition to constituting cruel, inhuman or degrading punishment, corporal punishment also violated secs 5, 9 & 10.

120 *Per* Langa J para 91.

121 Schabas (n 44 above) 123

122 B Phillips '*Pratt and Morgan v Attorney General for Jamaica*' (1994) 88 *American Journal of International Law* 775.

123 Eg see *Sendic (Setelic) v Uruguay* (Communication No R14/63).

specifically found that certain acts amount to inhuman treatment without defining the term.[124]

The above does not mean, however, that the Committee does not acknowledge that there are distinctions between the categories. In its General Comment on article 7 of CCPR, the Committee observed that the distinctions between the categories depends on the purpose, nature and the severity of the treatment. It nevertheless concluded that:[125]

> The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment.

The need to draw a distinction between the categories will be discussed below.

4.1.2 The disjunctive approach

The global approach can be juxtaposed against an approach which will herein be called the disjunctive approach. This has notably been adopted by European bodies and the approach endeavours to draw distinctions between the array of prohibited acts. The European Commission in the *Greek* case[126] observed that torture encompasses inhuman or degrading treatment and that inhuman treatment embodies degrading treatment.[127] Thus the European Commission not only defined the prohibitions, but it also ranked them in order of severity.[128]

Similarly, the European Court has held in *Ireland v United Kingdom*[129] that the distinctions between the various prohibitions lay in the intensity of the suffering inflicted. Although the Court was unanimous as to the difference between the various prohibitions, it was split as to the category in which the impugned acts fell. In the case of *Tyrer v United Kingdom*,[130] that involved a determination as to whether corporal

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124 Communication 37/1978, *Bouton v Uruguay*, CCPR/C/12/D/37/1978, 27 March 1981.

125 General Comment No 20/44 (April 1992).

126 Opinion of 5 November 1969, YB XX11 186. Extracts from the opinion of the European Commission are reproduced in the *Digest of Strasbourg Case Law Relating to the European Convention on Human Rights* Vol 1 (Articles 1–5) 100–101.

127 The European Commission also described torture as an aggravated form of inhuman treatment and inhuman treatment as being that which deliberately causes severe suffering, mental or physical, which is unjustifiable.

128 For more on the jurisprudence, see eg MW Janis, RS Kay & AW Bradley *European human rights law. Text and materials* (1995); R Keightley 'Torture and cruel, inhuman and degrading treatment or punishment in the UN Convention Against Torture and other instruments of international law: Recent developments in South Africa' (1995) 11 *South African Journal of International Law* 379.

129 Judgment of 18 January 1977 (No 25) 2 EHRR 25.

130 Judgment of 25 April 1978, Series A vol 26.

punishment of a juvenile contravened article 3 of the European Convention, the Court held that the assessment of into which category the acts complained of fell is relative.[131]

The European Court's interpretation involves a two-phased inquiry. The first phase of the inquiry is whether the physical or mental treatment complained of has achieved a minimum level of severity. If the answer to the first inquiry is in the affirmative, then the degree is used as a yardstick for determining the category in which to place the treatment complained of.

4.1.3 The need for defining the various prohibitions

One might question the wisdom and the need for defining the various prohibitions discussed above. In relation to article 7 of CCPR, for example, if it is found that it has been violated, does it really matter whether it is the prohibition against torture or inhuman or degrading treatment or punishment that has been violated? It is submitted that the answer is in the affirmative. This is more so in relation to the death row phenomenon where there is controversy as to its parameters. The discussion that follows elucidates this submission.

A plethora of international human rights instruments prohibit torture or cruel, inhuman or degrading treatment or punishment.[132] This prohibition is also found in numerous domestic constitutions.[133] This blanket prohibition envisages that the various concepts therein are distinct. One major factor that points to the difference between these prohibitions is that at international law, the prohibition against torture is regarded as having crystallised into a norm of customary international law while other prohibitions are not.[134] The significance of this is that, at international law, even states that have not ratified the instruments prohibiting torture are nevertheless bound by the prohibition. Needless to say, in relation to other prohibitions that are not part of customary international law, no obligations will attach unless a state has ratified a treaty in question.

4.1.4 The prohibition against torture

Most of the international instruments cited above merely prohibit torture, but they do not define torture.[135] However, the United Nations

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131 n 130 above, para 30.

132 Eg the Universal Declaration under art 5; CCPR under art 7; the African Charter on Human and Peoples' Rights under art 5 and the Convention Against Torture.

133 Eg sec 7 of the Constitution of Botswana; sec 15 of the Constitution of Zimbabwe and sec 12 of the Constitution of South Africa.

134 See the United States case of *Filartiga v Pena-Irala* 630F 2ed 874 (1980).

135 The Inter-American Convention to Prevent and Punish Torture (the Inter-American Convention on Torture) is an exception.

Convention Against Torture (Torture Convention) defines torture.[136] From the definition, the following elements can be deduced:

- Severe physical or mental pain.
- The pain or suffering must have been intentionally inflicted.[137] In the death row phenomenon debate, this requirement is of utmost importance, as it will go a long way in determining whether or not this prohibition is violated even where the delay in execution has been at the instance of the condemned prisoner. This will be discussed in more detail in the next section.
- The intentional infliction of pain must be directed at a particular purpose.[138] It has been suggested that the list is not exhaustive or finite.[139]
- The final element in the definition of torture is that it expressly excludes pain or suffering arising only from, inherent in or incidental to lawful sanctions.[140] This element is also crucial in the context of the death row phenomenon. In the cases discussed in the previous section, there was consensus that a certain amount of mental anguish or suffering is incidental to the imposition of the death penalty. If this is accepted and it is also accepted that the death penalty can be a lawful punishment, then it might be difficult to insist that the inevitable confinement to death row may invoke a violation of the prohibition against torture. It is submitted that, as the prohibition against torture is regarded as a norm of customary international law and the Torture Convention is merely a codification of that norm, then the definition adopted in the Torture Convention should be and is of universal application.

4.1.5 The prohibition against cruel, inhuman or degrading treatment or punishment

This prohibition is not defined in any of the international instruments referred to or in any of the constitutions that the courts relied on in the cases discussed above. However, both the European Commission and the European Court have drawn distinctions between the various components of this prohibition.

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136 See art 1(1).

137 The European Court has also assimilated this requirement into the European Convention. See *Ireland v United Kingdom.*

138 These purposes are listed as the obtaining of information or of a confession, punishment; intimidation; coercion or discrimination. See also the *Greek* case, where the European Commission expressed the same sentiment.

139 See D Blatt 'Recognising rape as a method of torture' (1992) 19 *New York Review of Law and Social Change* 857–858.

140 It has been said that when the same provision was included in the UN Declaration on Protection From Torture, the intention was to ensure that corporal punishment would not be covered by the prohibition. See Keightley (n 128 above) 384.

It is worth noting that, in its definition of inhuman treatment, the European Commission refers to the *intention* to cause severe suffering.[141] This definition might make nonsense of the progressive approach because it specifically requires that there has to be a deliberate intention to inflict pain or suffering. Thus, where a delay in execution has been occasioned because of the condemned person's exploitation of appeal mechanisms, one might find it difficult to establish a deliberate infliction on the part of the state. Lastly, in defining degrading treatment or punishment, there does not appear to be a requirement of intention.[142]

The discussion was intended to highlight the approaches that have been adopted in relation to the prohibition against torture and cruel, inhuman or degrading treatment or punishment. It was also sought to demonstrate that the distinctions between the categories are not a matter of semantics. It is important to draw distinctions between the different categories of prohibited treatments, particularly when dealing with the death row phenomenon.

5 Reconciling the divergent approaches

5.1 The question whether the actual effect of the delay is to be shown

A major issue that has created the rift between the two approaches to the death row phenomenon is whether the actual effect of delay on the condemned prisoner must be alleged and proved. The progressive approach is to the effect that long delays are in themselves cruel, inhuman or degrading treatment. The conservative approach requires the condemned prisoner to allege and prove the existence of circumstances over and above prolonged delay.

The stance adopted by the progressive approach is difficult to support when one adopts the disjunctive approach, as it will here be recommended, in dealing with the prohibition against torture and cruel, inhuman or degrading treatment. If the disjunctive approach is adopted, then each component of the prohibition has to be defined and there must be a clear finding as to which component of the prohibition has been violated.

The definition of torture, as we have seen, has four distinct elements, three of which would not be satisfied if the disjunctive approach were adopted. One would be in difficulty to prove that pain and suffering resulting from prolonged detention is intentionally inflicted. This is more so when the delay is at the instance of the condemned prisoner.

141 n 129 above.

142 As above. Interestingly, the European Convention does not refer to the term 'cruel'.

Similarly, it would be impossible to prove that pain and suffering is directed at a particular purpose. Finally, any pain and suffering arising from, inherent in or incidental to lawful sanctions cannot amount to torture. It will be recalled that in all the cases that have been discussed in the study, the courts echoed the sentiment that a certain amount of suffering and delay on death row is incidental to the imposition of the death penalty. If this is accepted, and it is also accepted that the death penalty can be a lawful form of punishment, then it is difficult to support the view that long delays in themselves may invoke the violation of the prohibition against torture.

The same may be said about the prohibition against inhuman treatment, which requires that there must be an intention to cause severe suffering. Although the definition of degrading treatment does not specifically require intention to cause pain and suffering, it has been held that inhuman treatment encompasses degrading treatment. Therefore it may be argued that, by implication, it must be proved that the pain and suffering was inflicted intentionally. The only distinction between inhuman or degrading treatment lies in the severity of treatment. The end result is that, where there is a delay at the instance of the condemned prisoner which is not accompanied by any aggravating circumstances, like ill-treatment and unfavourable conditions, it would be very difficult to prove that there has been a violation of the prohibition against torture and cruel, inhuman or degrading treatment. Clearly here there would be an absence of an intention to inflict pain and suffering directed at a particular purpose.

It is submitted that the aspect of the progressive approach, which does not require the existence of circumstances over and above mere prolongation and pain and suffering, which are in any event incidental to the lawful imposition of the death penalty, might produce results that are not in consonance with the spirit of abolition. In Zimbabwe, for example, after the decision in the *Catholic Commission* case, section 15(5) of the Constitution was amended as follows:

> Delay in the execution of sentence of death, imposed upon a person in respect of a criminal offence of which he has been convicted, shall not be held to be in contravention of subsection (1).

This amendment effectively overturned the *Catholic Commission* case. Although the amendment cannot be supported and has been heavily criticised,[143] it is not difficult to imagine its root cause. A government whose constitution allows for the imposition of the death penalty as a form of sentence is likely to have difficulties in accepting that *inevitable* consequences of such a sentence may render its execution unconstitutional. It is submitted that, where the carrying out of a sentence of

143 See eg WN Chinamora 'Towards a human rights jurisprudence: Zimbabwe since independence' unpublished LLM dissertation, University of Stellenbosch, 1994 37.

death is declared unconstitutional as a result of avoidable circumstances, which are not inherent in such punishment, a state would be less inclined to overturn the decision by constitutional amendments.

It is submitted that the aspect of the progressive approach that requires only the condemned prisoner to prove mere prolongation of proceedings cannot be supported for the above stated reasons. In this regard, it is submitted that the conservative approach appears to be more attractive to the extent that it requires allegations and proof of circumstances over and above prolonged delay in detention. This is simply because a certain amount of delay and pain and suffering is inevitable in any system which retains the death penalty.[144]

It is therefore submitted that the emphasis should not be on delay, but rather on the actual effects of detention on death row on the condemned prisoner as a result of factors like treatment, conditions on death row and the prisoner's personal circumstances.[145] One advantage with placing less emphasis on delay is that it would end the controversy as to what amounts to unreasonable delay. At the moment there is no consensus as to what amounts to unreasonable delay. As seen from the discussion above, different courts have had to deal with different cases in which the applicants had been on death row for differing periods of time. The five-year period set by the Privy Council in its decisions has been heavily criticised because it resulted in countries speeding up appeal procedures to meet the cut-off point.[146]

5.2 The question whether the author of the delay is a material factor

This is another issue which is a major source of controversy between the progressive approach and the conservative approach. The progressive approach is to the effect that the cause of the delay is immaterial when the sentence is death. According to this approach, the fact that the condemned prisoner himself might have caused the delay does not detract from the dehumanising and degrading character of the delay.

According to this approach, all a condemned prisoner has to prove is that there has been a long delay from the imposition of the death sentence to the time when he is notified of the date of execution. Accordingly, a condemned prisoner need not prove that he did not

144 See the *Makwanyane* case (n 9 above), the *Soering* case (n 100 above) and the *Catholic Commission* case (n 40 above).

145 This seems to be in accord with the meaning of the phrase 'death row' which refers to the area in a prison where inmates awaiting execution are housed. See Hudson (n 13 above) 835.

146 See *International Herald Tribune* (1997-07-08) 7 cited in MG Schmidt 'The death row phenomenon: A comparative analysis' in T Orlin *et al* (eds) *The jurisprudence of human rights law: A comparative interpretive approach* (2000) 70.

cause the delay.[147] However, in the *Catholic Commission* case, it was held that the state could show that the condemned prisoner 'resorted to a series of untenable and vexatious proceedings, which in consequence had the effect of delaying the ends of justice'.[148] In such a case, the onus would shift to him to show that he did not in fact do so. In the *Soering* case, the European Court found that where the delay is due to a *strategy* by a condemned prisoner to prolong proceedings, that factor would not be to his detriment.[149] There is a very thin line between a *strategy to delay proceedings* and an *abuse of process* by bringing vexatious proceedings.[150] It is submitted that this might lead to another controversy about the difference between frivolous proceedings, which shifts the burden to the condemned prisoner, and a deliberate strategy to delay proceedings, which does not.

The conservative approach is to the effect that where delay is at the instance of the condemned prisoner by availing himself of appellate remedies, then even prolonged periods of detention under severe conditions will not invoke the violation of the prohibition against torture, inhuman or degrading treatment.[151] It is difficult to accept this aspect of the conservative approach. That is the major problem with according significance to the delay rather than the actual effects of detention on death row on the condemned prisoner. It is submitted that once the actual effects of detention on death row have been proved, it should be immaterial whether there is delay or not. It should equally be immaterial, in the event there is delay, whether he contributed to it delay or not.

According to the conservative approach, if a condemned prisoner prolongs proceedings and is then permitted to benefit from such conduct, states might be tempted to deprive condemned prisoners of effective appellate remedies.[152] This appears to be an attractive argument, but it remains attractive if emphasis is placed on the delay itself. Where there is a requirement to prove the actual effects of detention on death row on the condemned prisoner, then the argument loses its cogency. In such a case, the challenge to execution would not be that it is the delay, which would be at the instance of the condemned prisoner, that has subjected him to the death row phenomenon. The argument would be that certain special circumstances on death row subjected him to the death row phenomenon. In such a case, the state would have no reason to deprive him of appellate remedies.

147 Chinamora (n 143 above) 34.
148 *Catholic Commission* case (n 40 above) 334.
149 As above.
150 L Madhuku 'Delay before execution: More on it being inhuman and degrading' (1994) 10 *South African Journal on Human Rights* 278.
151 *Barrett & Sutcliffe* (n 42 above) para 8.4.
152 Schmidt (n 146 above) 49.

It is submitted that the better approach is one that does not only require proof of any delay. This does not mean that a condemned prisoner would be precluded from proving that in his case, delay on its own subjected him to the death row phenomenon. A condemned prisoner should be able to prove that certain circumstances, which may include delay, have subjected him to mental and/or physical suffering. This approach, it is submitted, avoids the controversial issues inherent in both the progressive approach and the conservative approach.

5.3 The question whether or not to define torture and cruel, inhuman or degrading treatment

This aspect was discussed at length in section 4 above. It is therefore unnecessary to belabour the issue. Suffice it to say that defining the various components of the above prohibition will go a long way in bridging the gap between the two approaches to the death row phenomenon. In this regard, the disjunctive approach is preferred over the global approach.

It was acknowledged above that the disjunctive approach might lead to the problem of which criterion to adopt to categorise treatment. However, it is submitted that that problem would merely be academic. The problem that might arise in adopting the disjunctive approach does not impact on the question whether there has been a violation of the prohibition against torture, cruel, inhuman or degrading treatment. In such a case, the only question would be whether a particular treatment is inhuman or degrading, which, as was seen in the *Ireland v United Kingdom* case, makes no practical difference.

6 Conclusion

It is a truism that the death row phenomenon is now firmly established as a legal doctrine. The doctrine owes its existence to the realisation that direct legal challenges to the death penalty will, for the foreseeable future, largely be unsuccessful in countries that have entrenched the death penalty in their constitutions. However, universal acceptance of the existence of the doctrine has not ensured unanimity on its precise nature. There is still controversy as to the circumstances under which a condemned prisoner would be entitled to rely on the doctrine to evade the penalty of death. In light of the importance of the doctrine, in that it provides a ray of hope for those facing the penalty of death, it is desirable to harmonise the divergent approaches on the doctrine. The progressive approach has certain inherent weaknesses as demonstrated above. It overlooks the fact that the prohibition against torture and related acts requires proof of intention aimed at achieving a particular result. The conservative approach, on the other hand, tends to penalise a

condemned prisoner for resorting to appellate procedures to avoid execution. The one major cause of the rift between the two approaches is the reluctance of the courts to define the prohibition against torture and cruel, inhuman or degrading treatment. Once each component of the prohibition is defined, as shown above, then the weaknesses in both approaches become apparent. It then becomes easier to reconcile the divergent approaches and to adopt one that places less emphasis on the actual period of the delay, and does not seek to apportion blame.