ARGUMENTS IN FAVOUR OF THE ABOLITION OF THE DEATH SENTENCE IN SOUTH AFRICA

by

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SUMMARY

This paper deals with the history of capital punishment in South Africa and its historical background in Britain where it was abolished, except for a few instances, because it was found to serve no purpose which could not be served by other forms of punishment.

In South Africa, capital punishment is a legal punishment form. Prior to 1990, capital punishment was mandatory for murder, except in a few exceptional cases. Its application was amended by the Criminal Procedure Amendment Act, 107 of 1990. In terms of this Act, capital punishment was made discretionary for all capital offences.

The new provisions do not remove all arguments against capital punishment. Consequently this paper recommends that capital punishment should be abolished. Life imprisonment without the possibility of parole is an effective alternative that will protect society and satisfy aggrieved parties. Life imprisonment has none of the problems that are normally associated with capital punishment.

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CHAPTER 1

HISTORICAL STUDY OF THE DEATH PENALTY

1.1 UNDER ROMAN DUTCH LAW

Under Roman Dutch law there were a considerable number of capital crimes. Van der Linden, a well-known Roman Dutch writer, who wrote at the beginning of the last century, listed 13 capital crimes, including treason, murder, manslaughter, kidnapping, arson, robbery, fraud, falsifications of coinage, sodomy, incest, et cetera.[1]

1.2 REDUCTION OF CAPITAL CRIMES

In England, during the eighteenth century, there were about 200 capital offences. These were gradually reduced to about 15 at the time of Queen Victoria's ascent to the throne in 1837.[2] In the Cape, public hangings continued until 1869, one year after their disappearance from England. Shortly thereafter they were ended elsewhere in Southern Africa. The number of capital crimes in Southern Africa decreased and by the time of the Union (1910), there were only three. These were *treason, rape* and *murder.*

1.3 DISCRETION AND REPRIEVE

The Criminal Procedure and Evidence Act, 31 of 1917, was passed in 1917 and made the death sentence *discretionary* for treason and rape and *mandatory* for murder; except where the offender was a woman convicted of the murder of her newly born child or who was under 16 years of age. The prerogative of mercy was used to mitigate the severity of this rule.[3] Professor Ellison Kahn mentions that 76 percent of condemned prisoners were reprieved during the period from 1923 to 1934 and the majority of those who were sentenced to death were found guilty of murder.[4]

1.4 EXTENUATING CIRCUMSTANCES

Section 61(a) of the General Law Amendment Act, 46 of 1935 introduced the doctrine of extenuating circumstances. There is, however, no legislative definition of extenuating circumstances.

The concept of extenuating circumstances was introduced to mitigate the severity of the rule applicable to convicted murderers and where the death penalty was mandatory. The idea was to give the courts much wider discretion as far as the sentence was concerned. The onus was on the accused to show, on a balance of probabilities, that extenuating circumstances were present at the time of the crime.[5] When determining the presence of extenuating circumstances, the court in *R v Mifoni*[6] said:

> 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 and care should be taken to eliminate any factors which may be either of a purely sentimental character or which are only remotely connected with the crime.

In *S v Mini*[7] Holmes JA said with reference to extenuating circumstances:

> But I venture the suggestion that trial courts might consider, in exercising their functions, whether depending on the circumstances, the moral blameworthiness of a murder is reduced if it is committed with the constructive intention to kill, as distinct from intention plus positive desire.

In *S v Babada*[8] Rumpff JA said:

> Geen omskrywing van wat met 'n versagtende omstandigheid bedoel word, is deur die Wetgewer gegee nie, maar uit die aard van die saak kan dit alleen 'n omstandigheid wees wat die beskuldigde se geestesvermoëns of gemoed beïnvloed het op so 'n wyse dat hy, wat sy wandaad betref, met minder verwyt bejeën kan word.

Similarly, in *S v Van der Berg*[9] Botha JA stated:

> Die feit dat die appellant tot 'n wesenlike mate onder die invloed van drank was en dat dit bes moontlik 'n rol by die pleging van die misdaad gespeel het, en dat appellant tot 'n mate deur Gya beïnvloed was om die daad te pleeg, kan veral met die oog op sy jeugdigheid tereg as versagtende omstandighede aangemerk word.

Extenuating circumstances are circumstances which, at the time when the accused committed the crime, so influenced his state of mind as to render his conduct morally less blameworthy.[10]

In *S v Sauls and Others*[11] Diemont JA said:

> The enquiry is in effect a threefold one: Firstly, are there any factors which may have influenced the accused; secondly if there be such factors, was the accused influenced by them; and thirdly did these factors serve to reduce the moral culpability of the accused?

The test to determine whether there are extenuating circumstances or not, is a subjective test. In *R v Biyana*[12], for example, it was said that an extenuating circumstance is a 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. Then, in *S v Felix and Another*,[13] Diemont JA declared:

> I am accordingly persuaded that the court *a quo* should have found that the appellants were guilty of murder, but that there were extenuating circumstances. The cumulative effect of these two factors, youth and a degree of intoxication, should have been taken into account by the trial court.

If the court finds that there are extenuating circumstances then the court may exercise its discretion as far as the sentence is concerned, as happened in *S v Pieterse.*[14] In this case, after convicting the accused of murder with extenuating circumstances, the court used its discretion in passing sentence and the accused was sentenced to death.

1.5 SUMMARY

From the preceding paragraphs, it can be seen that in England, the number of offences for which capital punishment was permissible as a form of punishment was

drastically reduced. The South African Criminal Procedure and Evidence Act, which was passed in 1917, followed the English trend when it reduced the number of capital offences (recognised in Roman Dutch law) to only treason, rape and murder.

As the next chapter will show, the trend of reducing capital offences was not followed nor maintained in South African law — instead the number of capital offences were increased. The ideal situation is that the death penalty should be abolished, or at best, the list of capital offences should be maintained at three or reduced even further.

END NOTES — CHAPTER 1

1 Kahn, E. 1975. Symposium on capital punishment. *Acta Juridica:* 220.

2 Van Niekerk, BvD. 1969. Hanged by the neck ... . *SALJ:* 461.

3 Kahn, Symposium on ... : 221.

4 Kahn, E. 1970. The death penalty in SA. *THRHR:* 112.

5 *R v Lembete* 1947(2) SA 603 (A) at 610; *S v Bala and Others* 1955(3) SA274 (A).

6 *R v Mifoni* 1935 OPD 191 at 193.

7 *S v Mini* 1963(3) SA 188 (A) at 192.

8 *S v Babada* 1964(1) SA 26 (A) at 27.

9 *S v Van der Berg* 1968(3) SA 250 (A) at 252.

10 *S v Mongesi en Andere* 1981(3) SA 204 (A) at 207.

11 *S v Sauls and Others* 1981(3) SA 172 (A) at 184 C.

12 *R v Biyana* 1938 EDL 310.

13 *S v Felix and Another* 1980(4) 604 (A) at 611 E-F.

14 *S v Pieterse* 1982(31) SA 678 (A).

CHAPTER 2

CRIMINAL PROCEDURE ACT, 56 OF 1955

2.1 INTRODUCTION

The Criminal Procedure Act, 56 of 1955 repealed, among others, the Criminal Procedure and Evidence Act, 31 of 1917 in its entirety.

2.2 PROVISIONS OF ACT 56 OF 1955

Section 329 of this Act declares the death sentence an appropriate penalty to pay under certain circumstances, but only a superior court may pass the death sentence. Section 330 makes the death sentence mandatory for murder and discretionary for treason, kidnapping, child abduction, rape, as well as robbery (including an attempt to commit robbery) and housebreaking if aggravating circumstances are present.

This section further provides that the court may use its own discretion where a woman is convicted of the murder of her newly born child, or where the accused is under 18 years of age, or where after convicting the accused of murder, the court finds extenuating circumstances to be present.

Section 331 provides that when the death penalty is imposed upon a pregnant woman, the accused may apply for a stay of execution pending her delivery of the

child, or until it is no longer possible in the course of nature that the child should be so delivered.

2.3 INCREASING NUMBER OF CAPITAL CRIMES

From 1958 (until the 1990 Act), legislature increased the number of capital crimes. The original number of three (treason, rape and murder) was increased to eight.

The crimes of robbery with the infliction of, or threat of, serious bodily harm and housebreaking with possession of a dangerous weapon; and assault, or threat of assault, were added in 1958.[1] The reason for the addition of these crimes was because each was rapidly increasing in frequency and the courts needed a strong deterrent power.[2]

In 1962 sabotage became a capital offence[3] and shortly after this in 1963 two more offences were included, namely: (a) undergoing training or obtaining information that could further an object of communism, unless the accused could prove beyond reasonable doubt the absence of purpose, and (b) advocating abroad economic or social change in South Africa by violent means through the aid of a foreign government or institution.[4]

Kidnapping and child abduction were placed on the capital offences' list in 1965.[5] The justification advanced was that these were crimes which could attract the ultimate penalty according to Roman Dutch law.[6] Finally in 1967, participation in terrorist activities was also made a capital offence.[7]

2.4 POWER OF EXECUTION

Section 332 provides that as soon as possible after the death sentence has been passed, a judge shall issue a warrant to the sheriff or his deputy for the execution of the sentence, but such warrant shall not be executed until the Minister has, in writing and signed by himself, given notice to the sheriff or his deputy that the State President has decided not to grant a pardon or reprieve, to the person so sentenced, or otherwise exercise his power of extending mercy to any such person.

2.5 SUMMARY

The Criminal Procedure Act, 56 of 1955 maintained the mandatory death sentence for murder and the discretionary death sentence for certain listed offences. Subsequent legislation continued in the same vein, as will be noticed in the following chapters.

If the death penalty is not to be abolished perhaps it would be better to make it discretionary in all cases as will be seen later on.

END NOTES — CHAPTER 2

1 Section 4 of the Criminal Procedure Amendment Act, 9 of 1958.

2 Hansard — *Debates of parliament* 96, col. 356 (28 January 1958).

3 Section 21 of the General Law Amendment Act, 76 of 1962.

4 Section 5 of the General Law Amendment Act, 37 of 1963.

5 Section 10 of the Criminal Procedure Amendment Act, 96 of 1965.

6 Hansard — *Debates of parliament* 15, col. 7910 (1 June 1965).

7 Section 2(1) of the Terrorism Act, 83 of 1967.

CHAPTER 3

CRIMINAL PROCEDURE ACT, 51 OF 1977

3.1 INTRODUCTION

Section 276 of the Criminal Procedure Act, 51 of 1977 makes provision for certain types of sentences — the death penalty among others.

3.2 PROVISIONS OF ACT 51 OF 1977

Section 277(1) of this Act makes the death sentence mandatory in a murder conviction and discretionary where a woman is convicted of the murder of her newly born child, or where a person under 18 years of age is convicted of murder, or where the court, on convicting a person for murder, is of the opinion that there are extenuating circumstances.

3.3 CRITICISM OF THE ACT

In *S v Diedericks*,[1] Van der Heever J criticised section 277 saying that it did not give the court complete discretion when sentencing persons convicted of murder without extenuating circumstances.

The crucial date for determining the accused's age is the murder date, not the conviction date[2], yet in *S v Pietersen*[3] an accused under 18 years of age was

sentenced to death on two counts of murder. A 19-year-old youth found guilty of several offences, including one of murder, was sentenced to death in *S v Ceaser*.[4]

If the court finds the accused guilty of murder, but finds extenuating circumstances present, the court may exercise its discretion as far as sentence is concerned. It may impose the death sentence in what it deems to be appropriate circumstances.[5] In passing the death sentence the court must take into account all the circumstances of both the accused and the crime and it must also be satisfied that there is no other type of sentence — except the death sentence — which will sufficiently satisfy the deterrent, punitive and reformative aspects of sentence.[6] The court's discretion should be exercised judicially. This means that the court, in exercising its discretion, must take into account all the relevant factors, guidelines and rulings provided by other decisions.[7]

The term *newly born child* is not defined in the act therefore the question whether the child is newly born or not is left to the court's discretion. If it was found that the child was not newly born, but the mother's condition at the time of the killing was abnormal, this may be regarded as an extenuating circumstance which, in itself, would allow the court's discretion to impose the death penalty or not. The important factor is the mother's emotional state at the time of the deed.[8]

3.4 CONCLUSION

The death sentence as provided for in the Criminal Procedure Act, 51 of 1977 is unnecessary, as capital punishment has not been proved to serve any useful purpose which cannot be served by other forms of punishment. As will be seen in the

following chapters, the alleged deterrent effect of capital punishment has been put in doubt and consequently, the main argument in favour of capital punishment is no longer valid. Discussions on the purposes of punishment in this paper will show that capital punishment rules out the other purposes of punishment.

END NOTES — CHAPTER 3

1 *S v Diedericks* 1981(3) SA 940 CPD.

2 *S v Rainers* 1961(1) SA 460 (A).

3 *S v Pietersen* 1973(1) SA 148 (A).

4 *S v Ceaser* 1977(2) SA 348 (A).

5 *S v Jack* 1982(4) SA 736; *S v Letsolo* 1970(3) SA 476 (A).

6 *S v Letsolo* 1970(3) SA 476 (A).

7 *R v Von Zell* 1953(4) SA 552 (A).

8 *R v Rufaro* 1975(2) SA 387 (RA).

CHAPTER 4

PURPOSES AND THEORIES OF PUNISHMENT

4.1 INTRODUCTION

Punishment is the sanction of criminal law. Punishment has been defined as "the activity of some responsible agent or agency whereby it deliberately imposes on a person, the reason being that person's moral failure."[1]

There is substantial agreement among commentators that the two outstanding characteristics of punishment are; (1) intentional infliction of suffering upon an offender and (2) expression of the community's condemnation and disapproval of the offender and his conduct. Criminal punishment is generally the infliction of suffering on account of the commission of a crime. Thus it can be applied only to someone found guilty of committing a crime. Normally, the difficulty in criminal punishment is balancing society's interests with the individual offender's interests.

4.2 PUNISHMENT THEORIES

Different punishment theories have been developed as moral justification of punishment and have been instrumental in clarifying the nature of punishment.[2] In broad terms the various punishment theories are classified into the following categories:

(1) absolute theory — retribution

(2) relative theory — prevention, deterrence (general and individual) and reformation

(3) unitary theory — a combination of (1) and (2)[3]

4.2.1 Absolute theory *(retributive theory)*

There is only one absolute punishment theory, namely, the *retributive theory* and this theory is based on the premise that punishment is deserved because of the commission of the crime. Thus it deals with events in the past, events which have already occurred.

The injustice brought about by the commission of the crime is believed to be erased by the imposition of an equivalent evil upon the offender. If the law has been contravened, the balance of the scales of justice have been disturbed and can only be restored if the offender is punished. ''A crime is a negative of the law and by punishing the offender one strives to 'cancel out' or 'wipe clean', as it were, the crime, thus restoring the balance.''[4]

Retribution has two sides to it. Viewed from the community's angle, it amounts to an emphatic denunciation of the offender and his crime *and* the infliction of pain upon the offender. This pain should be fitting to the crime. Viewed from the individual offender's angle, retribution amounts to atonement through the

punishment received, for the crime committed. By the infliction of punishment, society creates the possibility of atonement.[5]

The fact that punishment must be deserved is important as it reflects a concept of proportions. Retribution necessitates some kind of proportion between punishment and the gravity of the offence.[6] There seems to be two different proportions; a proportion between the punishment and the offender's moral blameworthiness and one between the punishment and the harm the offender has inflicted upon society.

"The retributive theory is sometimes criticised as being merely a manifestation of a primitive urge to seek revenge."[7] The *Twelve Tables* (451-50BC) recognised the principle of retribution against the offender, by the victim, but the right to personal vengeance was considerably modified and restricted. Roman Dutch writers also took note of retributive punishment:

> Huber defines punishment as vengeance for crime, taken by the magistracy with a view to the deterrence of others; while for Voet, punishment is the correction or avenging of wrongdoing and is thus an evil to be suffered on account of an evil which has been done.[8]

Another criticism of this theory is that it may be difficult to match the punishment to the harm done. When imposing capital punishment, the only instance where the convicted person's punishment can be matched to the harm done is when the person is convicted of murder. What about instances where the accused is convicted of rape? How *can* the punishment be matched to the harm done? Furthermore, in a case where capital punishment is imposed on a convicted murderer, retributive considerations seem to be the predominant justification for the death penalty and this seems to be an application of the talion principle, that is, an eye for an eye et cetera.

If the talion principle is applied to a murder case the outcome will be that the accused must be killed because he, or she, has killed another person. To put it bluntly, the fact that the accused has killed a person should not mean there has to be another death — that of the accused. In passing sentence, all the other purposes of punishment should be taken into account.

Another problem with the death penalty is that very few murderers are actually executed.[9] This is because many murder cases end up being dropped as the perpetrators cannot be traced; some accused are acquitted for one or other reason; some are convicted of culpable homicide and not murder; some convicted murderers face other types of sentence — again for various reasons and lastly, some of those who have received the death penalty have their sentences commuted to a term of life imprisonment by the State President.

Society's need to be protected against capital offenders can be fully satisfied by genuine *life* imprisonment, with no possibility of parole. A life imprisonment sentence which really means *the offender will remain locked away* from society *until his death* will put a capital offender out of action just as effectively as capital punishment, but without any problems normally associated with capital punishment (eg executing an offender who is later proved to be innocent). Life imprisonment can also satisfy the retribution demand. Thus, if the convicted offender has committed a serious crime, an extremely severe punishment is inflicted without taking another life. Society's condemnation of the offender and his crime will be exhibited by the Draconian punishment of real life imprisonment imposed on the guilty party. Should the offender prove troublesome while in prison, prison

authorities have a host of other remedial measures at their disposal which can be used to deal with that particular offender.

Capital punishment is a cruel type of punishment "based on a primitive motive rooted in vengeance or retribution and in itself violates the moral basis of civilizations".[10] One of the basic human rights is the right to life and a country, claiming to be a civilised country, should respect this basic right. Many countries still retain the death penalty on their statute books because their political leaders are not bold enough to give a proper lead on the question of the death sentence. The majority of people seem to be in favour of capital punishment and the political leaders should lead the way and move towards abolishing capital punishment.

4.2.2 Relative theories

4.2.2.1. Preventive theory

According to the preventive theory, the purpose of punishment is the prevention of crime.[11] Punishment is justified by the value of its consequency - the prevention of crime.[12]

Preventive theory may overlap with the other two relative theories, which are the deterrent theory and the reformative theory, because the purpose of these two theories is the prevention of the commission of crimes.[13] However, in other circumstances, certain forms of punishment (the main purpose of which is prevention) do not necessarily coincide with the purposes of deterrent and reformative theories, for example, capital punishment and certain forms of punishment for sexual offenders applied in some countries.

Generally, we distinguish between individual prevention and general prevention. The idea of individual prevention is that the offender in question should be prevented from repeating the criminal behaviour.[14] The main justification of general prevention is that it is calculated to prevent people, in general, from committing crimes.[15]

The preventive theory is concerned with both, people who have committed crimes and those who have not yet committed crimes. It aims to discourage those who have previously committed crimes from repeating the offence (or any illegal act) and also discourage those who have not yet committed any crime from actually doing so.

In the application of the preventive theory, other punishment theories and all the circumstances of the individual cases must be taken into account, otherwise the punishments imposed might be unjust, or unfair to the accused.[16]

Capital punishment is alleged to be an effective form of preventing the offender from committing further offences, however, this aim can also be achieved by effective life imprisonment under conditions of maximum security with no possibility of parole.

The provisions of the new Criminal Law Amendment Act, 107 of 1990 deal with life imprisonment, but this will be examined in chapter 7.

4.2.2.2 Deterrent theory

A distinction is usually drawn between individual and general deterrence. The purpose of *individual deterrence* is to teach the offender a lesson to ensure he desists from committing further offences. Naturally, the offender should be discouraged from committing offences and encouraged to mend his ways. As far as *general deterrence* is concerned the entire community is the focus and the community at large must be deterred from committing offences. The threat of possible punishment is normally a sufficient deterrent.

Punishment's deterrent effect cannot be considered in isolation: other purposes of punishment should be examined, otherwise, as above, the sentence in a particular case might be unjust or unfair to the accused. For instance, the accused's particular circumstances, the seriousness of the crime et cetera, must also be taken into account in determining the appropriate sentence. If these other factors are not taken into account, a heavy sentence might be unjustly imposed on the accused or the offender.

The deterrent punishment theory has been criticised for various reasons, including the following:

(1) It is unjust to treat the individual as a means for the benefit of others, meaning that the individual should not be ignored.

(2) The effectiveness of deterrence is greatly diminished where the success rate of detectives and actual convictions is low.

(3) Another objection is voiced against the use of general deterrence in the punishment of crimes of negligence.[17]

The common argument is favour of capital punishment is that it has a deterrent effect on capital offenders. This fallacy will be dealt with later. It is unnecessary to execute an offender in order to deter him — or would-be offenders. Imprisonment can serve the same purpose; it does so in countries where capital punishment has been abolished. Life imprisonment with no possibility of parole will effectively inhibit and incapacitate the offender from committing further offences and it should also deter other potential offenders. Life imprisonment without possibility of parole would be as effective as capital punishment and it would be without the problems normally associated with the latter. Strictly enforced life imprisonment can be made a competent sentence for all serious crimes which are presently capital offences.

4.2.2.3 Reformative theory

According to the reformative theory, the purpose of punishment is to reform the offender, so that he may desist from committing offences. This purpose of punishment is acknowledged by Roman Dutch writers, such as Grotius, but only comparatively recently, with the rise of criminological research into the causes of crime and the effects of punishment, did the reformative approach become of great practical importance.[18]

The emphasis is placed on the offender. In this theory the offender commits a crime because of some personality defect, or certain psychological factors.[19] In *S v Anderson*[20] the court, in sentencing an offender for assault, said that: "*At this stage,*

for his own sake and, that of society he has to be separated and psychologically treated in gaol" [my emphasis]. In *S v Zinn*[21] the court said that in imposing a sentence the personal circumstances of the offender should be taken into account. Another example of placing the emphasis on the offender is evident in *S v S*[22] when, sentencing an offender, the court suspended the sentence on condition, *inter alia,* that the offender subjected himself to medical treatment by a court-appointed doctor.

The reformative theory outlined above, is recognised by South African courts. Before a proper sentence is imposed, full personal particulars of the offender, together with reports from social workers and psychologists or psychiatrists (if felt to be necessary), must be obtained to determine how this particular offender is likely to respond to a certain sentence.

Unfortunately, in practice, more often than not, these reports are not obtained and the court-imposed sentences are unlikely to contribute anything worthwhile towards the reformation or rehabilitation of the offender. The death penalty, however, completely ignores the offender's possible reformation. With capital punishment there is no possibility of any reformation. There is the possibility that a person who might not commit any further offence is liable to be given the death sentence — a situation which completely ignores the essence of the theory under consideration.

4.3 SUMMARY

People who argue in favour of capital punishment justify it by retributive considerations. They argue that the offender has earned, or deserves, his punishment by committing a capital offence. They maintain that the punishment meted out must

be proportionate to the crime committed. This argument ignores the other punishment theories and their purposes. It places undue weight on retributive considerations.

ENDNOTES — CHAPTER 4

1 Kleinig, J. 1973. *Punishment and desert.* The Hague: Martinus Nijhoff (pp 41 — 42).

2 Rabie, MA & Strauss, SA. 1985. *Punishment: an introduction to principles.* 4th edition. Cape Town: Lex Patria (p 18).

3 Snyman, CR. 1989. *Criminal Law.* 2nd edition.Durban: Butterworths (p 23); Rabie & Strauss, *Punishment...* .

4 Snyman, *Criminal law:* 18.

5 Burchell, EM & Hunt, PMA. 1983. *South African criminal law and procedure.* 2nd edition. Cape Town: Juta (p 70).

6 See note 4.

7 Snyman, *Criminal law:* 19.

8 Burchell & Hunt, *South African... :* 68.

9 Van Rooyen, JH. 1990a. Die Nederduitse Gereformeerde Kerk en die doodstraf. *THRHR* 2: 161 at 168; Van Rooyen, JH. 1990b. A perspective on the Criminal Law Amendment Bill. *SACJ* 2: 162 at 163.

10 Voslea, WB. 1975. Symposium on capital punishment. *Acta Juridica* (p 225).

11 Rabie & Strauss, *Punishment... :* 23.

12 Burchell & Hunt, *South African... :* 73.

13 Snyman, *Criminal law:* 20.

14 See note 11.

15 Rabie & Strauss, *Punishment... :* 32.

16 See note 13.

17 Burchell & Hunt, *South African... :* 78; see also Rabie & Strauss, *Punishment... :* 26.

18 In *S v Zinn* 1969(2) SA 537 (A) at 540 it was said that the person of the deceased should not be ignored when determining an appropriate sentence.

19 Snyman, *Criminal law:* 22.

20 *S v Anderson* 1964(3) SA 494 (A) at 496 F-G.

21 *S v Zinn* 1969(2) SA 537 (A).

22 *S v S* 1977(3) SA 830 (A).

CHAPTER 5

ARGUMENTS FOR AND AGAINST THE DEATH PENALTY

5.1 INTRODUCTION

South Africa is one country which still has the death penalty on its statute books. The South African government set up a commission, which came to be known as the Lansdown Commission to investigate penal and prison reform. This Commission's report is the *Report of the Penal and Prison Reform Commission: UG Number 47/1947* and its contents constitutethe foundation of the arguments for and against the death penalty in this chapter.

5.2 ARGUMENTS

5.2.1 Lansdown Commission

Paragraph 456 of the *Report of the Penal and Prison Reform Commission: UG Number 47/1947* contains a summary of arguments against the death penalty. These arguments are as follows:

(a) that human life is the most precious of all things, and that its sanctity and inviolability is as binding on the State as on the individual;

(b) that the argument that the murderer has violated the sanctity of human life does not put him outside the ambit of the consideration of (a), but to

deprive him of his life is merely vindictive and against the principles of reform which should govern penal administration;

(c) that the deterrent effect of the death penalty is a matter of opinion or conjecture usually more exaggerated by the retentionist, and that a life sentence has equal, if not greater terrors for the man who resorts to crime;

(d) that the deliberate cold-blooded execution of a murderer adversely affects upon all those who in an official capacity, are compelled to take part in or witness the execution;

(e) that since no human judgment is infallible, innocent men suffer, and have suffered the death penalty; ["men" here include women]

(f) that in most civilised countries of the world the death penalty has been abolished without any consequent increase of murders.

The normal argument in favour of capital punishment is that, as was mentioned earlier, it has a deterrent effect on would-be murderers, rapists et cetera.[1] It is also claimed by retentionists that abolishing capital punishment would increase the risk to police officers. Yet another argument used to justify capital punishment, is that it protects society.

While dealing with the deterrent effect argument, paragraph 460 of the Lansdown Commission stated:

It is common knowledge based on the experience of the courts that, in the mind of the undeveloped Native but recently brought into contact with

western civilisations and ideas, the sanctity of human life is a matter of less concern, than it would be to the western civilised man;

...Such inference as might ordinarily have been drawn from the experience of other countries where the death penalty has been abolished cannot, in the opinion of the commission, be applied to the Union, having regard to the difference of racial and consequently of social and economic conditions.

The Commission concluded that the abolitionists have not established a case and recommended the retention of the death penalty.

5.2.1.1 Dissension

Mrs AW Hoernle, a member of the Lansdown Commission disagreed with its recommendations. In her opinion, capital punishment is an outdated form of punishment and is based on the old notion of simple retribution, which has no place in the modern world. She further said that the argument promoting the deterrent effect of capital punishment had been disproved and she refuted the racial argument forwarded by the Commission.

5.2.2 Royal Commission

The *Royal Commission on Capital Punishment, 1949-1953 Report* was published in England in 1953. Contained in this report was an indepth study of all problems relating to the death sentence. This Commission concluded that there were no indications that capital punishment served any substantial purpose as a deterrent to capital crime.

5.3 COMMENT

From the above it can be seen that the Lansdown Commission used South Africa's peculiar racial composition as a justification for the retention of capital punishment. The Commission's approach is wrong because a person's ethnic origin, or classification, has no bearing on his respect for this sanctity of human life, or his lack of respect for it. Capital punishment's deterrent effect, which is the retentionist's main argument, is in doubt, and consequently the purpose of retaining capital punishment has diminished.

5.4 HUMAN RIGHTS

The death penalty is alleged to be a political weapon for repression, employed disproportionately more against the poor, or certain racial groups, and its deterrent effect is questionable.[2] Others view it as a violation of fundamental human rights. Protocol number six of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that the death penalty shall be abolished.[3]

5.4.1 In Britain

In England, the Murder Act of 1965 (Abolition of the Death Penalty Act) temporarily abolished the death penalty for all murder categories, substituting a life imprisonment sentence. The abolition of the death penalty for murder was made permanent by a resolution passed by both Houses of Parliament in 1969. Now the death penalty can only be imposed in Britain for the following offences:

- high treason (The Treason Act 1814)

- piracy with violence (The Piracy Act 1937)

- setting fire to Her Majesty's ships or arsenals (The Dockyard et cetera Protection Act 1972)

5.4.2 At the United Nations

The United Nations' Covenant on Civil and Political Rights (1976) provides in Article six that:

> (1) Every human being has the inherent right to life. This right shall be protected by law. No-one shall be arbitrarily deprived of his life.
>
> (2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime... .[4]

In 1977 the General Assembly passed a resolution reaffirming that, "the main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing this punishment.[5]

5.4.3 On the African continent

Returning to the local scene, a document issued by the Organization of African Unity's *Ad Hoc* Committee on Southern Africa, commonly known as the *Harare Declaration* and dated 18 June 1989, states in paragraph 19.5, that the South African government should cease all political trials and political executions. Note, the concern here pertains only to political executions, no mention is made of ordinary nonpolitical executions.

The Pan Africanist Congress of Azania called for the abolition of the death penalty in the *PAC's Working Document* of 18 September 1989. The reason given is that the death penalty is the type of sentence which is aimed primarily at the toiling South African masses, namely the poor black population.

5.4.4 In South Africa

Even in South Africa more voices could be heard calling for the abolition of capital punishment. Resolution OGM/04/90 of the Black Lawyers Association states:

> The Black Lawyers Association, as a matter of right and not as a prerequisite to establishing an atmosphere for negotiations, calls for:-
>
> (a) the abolition of the death sentence... .

Lawyers for Human Rights too, dealing with the question of the death penalty, stated that:

> Our aim in Lawyers for Human Rights is twofold:

1 To ensure that each and every person sentenced to death has access to legal advice and representation.

2 To continue our campaign for the total abolition of the death penalty.[6]

5.4.4.1 Politicising the problem

The problem of the death sentence in South Africa has, to some extent, been politicised. Different political groups have taken a stand either for, or against, the death penalty. It is viewed by them as a political issue. Some political groups are of the opinion that capital punishment is manipulated by those in power to silence their opponents — particularly the oppressed black people.

In my opinion the following reasons are just some of those politicising the capital punishment controversy:

(1) Paragraph 460 of the Lansdown Commission states that, based on the experience of the courts, it is common knowledge that in the mind of "the undeveloped native" only recently come into contact with Western civilisation and its ideas, the sanctity of human life is less valued than to the civilised Westerner. When the Commission recommended the retention of capital punishment it created the impression that this type of punishment was predominantly meant for the black populace.

(2) Certain research surveys conducted in South Africa reveal that black people are more likely to be sentenced to death than white people.[7]

(3) In country after country, the death penalty is paid disproportionately more often by the poor. It is often employed as a tool for political repression.[8]

In most countries and especially in South Africa, the poor sector of the population is more likely to be sentenced to death than any other and in South Africa this equates with the black racial group. The reasons for this state of affairs vary from inability to pay for legal defence to racial discrimination.[9] Those in power, at times, use the death penalty to silence their opponents.[10]

(4) Following certain political prisoners being sentenced to death, their political groups rallied around to endeavour to save them from the gallows, for example, the **Save the Sharpeville Campaign** run by the PAC (Pan Africanist Congress of Azania) inside South Africa and in some overseas countries, especially Australia. Another such group is the South African Youth Congress, an affiliate of the ANC (African National Congress) which has the **Save the 32 Patriots Campaign,** calling for clemency for prisoners sentenced to death for politically related crimes.[11]

(5) The judicial system in South Africa is run mainly by white people. In a Supreme Court trial, where the majority of the accused are black, the judge, prosecutor, and sometimes, even the policemen are all white. The black accused may require an interpreter, who is often not fluent in either the accused's mother tongue or the language of the court. Thus, there is a strong probability of misunderstandings and the court's racial prejudice cannot be ruled out.[12] Further more, Brian Currin, National Director of Lawyers for Human Rights, is reported as saying:

> The judiciary is white and system oriented. It does not really understand the ways and aspirations of the black people. Basically whether we like it or not

most white South Africans have racist inclinations. We grew up that way. Most white South Africans somehow seem to feel that black people are less human than white people.[13]

5.4.4.2 Uniformity of sentence

The late Professor Van Niekerk conducted research and concluded that black South Africans were more likely to be sentenced to death than whites and 41 percent of lawyers interviewed, believed that such differences were significant and deliberate.[14] Of the black accused, charged with and convicted of a capital offence, a very high percentage is likely to be sentenced to death in comparison with the percentage of white accused convicted of a capital offence. Of course there are more black people than white, meaning there will be more black convicts than white ones, but the point is that even if the numbers of black and white convicts for a capital offence — rape, for example — were identical, the chances are that more black prisoners would receive the death penalty.

Furthermore, uniformity in sentencing is concomitant with justice, but this fact cannot be allowed to interfere with the free exercise of discretion by a judicial officer.[15] A judicial officer should be free to exercise his discretion in determining sentence. He should not be hindered unfairly by sentences imposed in previous cases for similar offences. He should take into account all surrounding circumstances of the crime committed and the person of the accused in determining appropriate sentence.[16]

Uniformity in sentencing does not mean that people convicted of the same offence should get the same sentence. The reason for this is that the circumstances of each

accused and his or her crime must be taken into account when determining an appropriate sentence. Uniformity in sentencing means that if one and the same case were to be placed before different judges, they should impose substantially the same sentence.[17] Minor disparities in sentences are tolerable but not major disparities. If a person is executed by mistake, that is completely unacceptable, because such a mistake can never be rectified. A person executed by mistake is a person who might not have been executed if he had appeared before a judge who is not one of the "hanging judges".[18]

Death sentence application does not comply with the principle of uniformity, which principle is a concomitant of justice and as a result the capital punishment should be abolished. It is unacceptable that a person's life should depend on before which judge he or she appears.

5.5 JUSTIFICATION FOR THE ABOLITION OF THE DEATH PENALTY

In South Africa, the death penalty dispensation involves huge areas of ineffectively controlled discretion. The solution must be to abolish the death sentence — it does not serve any purpose which cannot be effectively served by other available forms of punishment. Lifelong imprisonment can satisfy the demands of both retribution and incapacitation which, claim the retentionists, are the main reasons for the death penalty.[19]

Lifelong imprisonment can be as painful as the death penalty, and consequently, it will sufficiently demonstrate society's condemnation of the accused's crime. The accused will be made to suffer for his evil deed and he will be sufficiently

incapacitated. The demands of justice can be met by lifelong imprisonment and society will not feel that the accused has been leniently dealt with.

ENDNOTES — CHAPTER 5

1 McNally TP. 1989. Capital punishment: an Orange Free State perspective. *SACJ* 2: 240.

2 Amnesty International. 1989. *When the State kills.* UK: 1.

3 Amnesty International. 1989: 249.

4 Amnesty International. 1989: 242.

5 Amnesty International. 1989: 252.

6 *Lawyers for Human Rights Publications* 2. 1990 (September): 29.

7 Van Niekerk BvD. 1969. Hanged by the neck... . *SALJ:* 467; Commission for Justice and Peace of the South African Catholic Bishops' Conference on capital punishment. 1990. *Study document.* (January): 7.

8 See note 2.

9 Amnesty International. 1989: 46.

10 Amnesty International. 1989: 50.

11 Black Sash Research Project.1989. *Inside South Africa's death factory* (February): 5.

12 See note 7. *Study document.*

13 Black Sash Research Project,*Inside... :* 13.

14 See note 7, Van Niekerk, *Hanged by the neck... .*

15 Rabie, MA & Strauss, SA. 1985. *Punishment: an introduction to principles.* 4th edition. Cape Town: Lex Patria.

16 *S v Reddy* 1975(3) SA 757 (A).

17 Van Rooyen, JH. 1990a. Die Nederduitse Gereformeerde Kerk en die doodstraf. *THRHR* 161: 174; Van Rooyen, JH. Luck should play no role in hanging. *Sunday Star*, 1 September 1991.

18 Curlewis, JD. 1991. Correspondence. *SAJHR* 7: 229-232.

19 Van Rooyen, *Luck should play... .*

Chapter 6

ANALYSIS OF THE 1990 CRIMINAL LAW AMENDMENT BILL

6.1 EVENTS LEADING TO THE CRIMINAL LAW AMENDMENT BILL

The Lansdown Commission was appointed in 1945 and its terms of reference included an investigation into capital punishment. The Commission's report published in 1947 stated that it could not recommend the abolition of capital punishment. The reasons given were that 80 percent of the population had not yet emerged from barbarism and for "the underdeveloped Native but recently brought into contact with western civilisation and ideas, the sanctity of human life is a matter of less concern that it would be to the western civilised man."[1]

In 1969 the question of capital punishment was raised in parliament by Mrs Helen Suzman, in a private member's motion calling for the appointment of a commission of inquiry into the desirability of abolishing capital punishment.[2] Parliamentarians were not prepared to support her motion — in fact a member of the ruling party referred to "the uniqueness of South Africa's position" and concluded that abolition might lead to the collapse of our whole penal code.[3]

Yet again, in 1988, the issue was raised in parliament by Mr Dave Dalling, Opposition spokesman for justice. He asked for an investigation into capital punishment[4] but Mr HJ Coetzee, the then Minister of Justice, rejected pleas for the

appointment of a commission into the matter.[5] Notwithstanding the high numbers of executions, the Minister declared that nothing had happened in South Africa, regarding the death penalty, to justify an inquiry.

Most of South Africa's condemned prisoners, at any given moment, are black people and — given the racist attitude of those in power — the Minister of Justice's above-mentioned
remark that an inquiry was not justified is hardly surprising. I believe that, if the number of white condemned prisoners was as high as the number of black, the Minister of Justice and his parliamentary colleagues would have acceded to Mr Dalling's request. I also believe that the Minister was trying to pander to the electorate which consists, of course, of only *white* South Africans.

Speaking during the justice vote of the 1989 parliamentary session, the Conservative Party spokesman pleaded for the retention of capital punishment,[6] while some of the "coloured" and Indian parliamentarians pleaded for its abolition and others called for a commission of inquiry into the death penalty.[7] It was also suggested that in the interim period, the death penalty should no longer be mandatory in certain cases, but *discretionary in all cases.*[8]

Members of the Democratic Party, calling for the appointment of a commission of inquiry, stated *inter alia* that

> at a time when we are at pains to show our own community and the international community at large that we are intent upon upholding civilised standards in South Africa, the high incidence of executions is actually giving credence to the belief that we are in fact a very primitive society meting out primitive justice in our community.[9]

Before the Criminal Law Amendment Bill of 1990 was published, a lot of articles, dealing with different aspects of the death penalty, were published. In one of these articles JPJ Coetzer said that, to alleviate the problems caused by the imposition of the death penalty, the mandatory imposition of the death penalty in murder cases should be abolished and the courts given discretionary powers.[10] He stated that such a move would result in the reduction of death sentences. JPJ Coetzer further maintained that the emphasis would shift from the obligation to impose the death penalty (unless extenuating circumstances exist) to absolute unfettered discretion to impose any appropriate sentence, including the death penalty. He further suggested that an automatic right of appeal to the Appellate Division be granted to those sentenced to death. His argument was that the above proposals would promote the sound administration of justice.

6.2 THE CRIMINAL LAW AMENDMENT BILL

Following a speech made in parliament by President De Klerk on 2 February 1990, the Criminal Law Amendment Bill (B93-90 [GA]) came into being and the President made mention of a moratorium on executions, pending investigation and law reforms.

The Criminal Law Amendment Bill made far-reaching proposals with regard to the law related to capital punishment. This paper, however, only deals with the important changes contained in this Bill.

6.2.1 Clause 3

Clause 3 of the Criminal Law Amendment Bill proposes to amend section 277 of the Criminal Procedure Act, Act 56 of 1977 by making the death penalty discretionary for offences mentioned in section 277. The list of capital offences remains unchanged. Despite the changing political mood, treason was included as one of the capital offences.

I believe that for political and strategic reasons, treason should have been removed from the list of capital offences. I believe this because treason — in the past few decades — was used by the South African government against the liberation movement fighting morally indefensible apartheid policies. Furthermore, the government has acknowledged that apartheid *is* indefensible and it is now negotiating with those parties whose members it formerly and extensively used the treason charges against. Should the government remove treason from the list of capital offences, it would convincingly demonstrate to its negotiating partners that it is serious about its assertions for wishing to enter genuine discussions and bring about meaningful legal reforms.

The Criminal Law Amendment Bill further states that the death penalty should be imposed only in cases where the court is satisfied that the death sentence is the proper sentence. It will not be imposed if the accused was under 18 years of age at the time the offence was committed. If the accused's age is in doubt, the onus rests on the State to show that the accused was 18 years or older at the time of the offence in question. This clause is unsatisfactory as it should have abolished the death penalty altogether and not made it discretionary.

6.2.2 Clause 4

Clause 4 states that the accused shall not be executed until the Minister has given notice to the sheriff, or his deputy, that the Appellate Division of the Supreme Court has confirmed the death sentence and that the State President has refused clemency to the condemned prisoner.

6.2.3 Clause 5

In the event of an appeal, clause 5 provides that a provincial or local division of the Supreme Court may increase the sentence except, of course, the death sentence. The Attorney-General is granted the right to appeal against the sentence passed by the lower courts, after application for leave to appeal has been granted to the local division having jurisdiction. If the application or appeal fails, the State may be ordered to pay the accused's costs. This provision is unsatisfactory simply because the majority of the accused in criminal trials do not have the means to meet their legal fees and therefore they are unlikely to have the funds to engage legal representatives to oppose the application for leave to appeal, or to represent them at the actual appeal hearing.

6.2.4 Clause 10

Clause 10 pertains to appeals and proposes to introduce sections 316A and 316B.. These new provisions grant a condemned prisoner an automatic right of appeal to the Appellate Division of the Supreme Court. Briefly the proposal states that a

condemned prisoner who wishes to appeal, no longer needs to apply for leave to appeal.

In a case where the condemned person does not appeal, the Chief Justice, or judge designated by him, shall appoint counsel to submit a written address to the Appellate Division, on behalf of the accused, in which it argues the correctness of the conviction concerned and the propriety of the death sentence. The Attorney-General may also put forward his written submissions.

6.2.5 Clause 13

In the case of a condemned person where the Minister doubts the correctness of the conviction or sentence, he may, in terms of clause 13, submit a statement to the Appellate Division setting out the grounds of his doubt and the court will then consider this statement at the appeal or review proceedings.

6.2.6 Clause 16

Clause 16 proposes that the regional court should have jurisdiction over all offences, except treason. In other words, the suggestion is that even murder charges may be heard in the regional court. In the event of a murder charge conviction, it proposes the maximum sentence imposed by the regional court should be 15 years.

6.2.7 Clause 19

Clause 19 stipulates that cases of persons already condemned to death, before the new dispensations come into operation, shall be reviewed by a panel of experts. This

panel will include judges and it will decide whether the condemned prisoner would, or would not, have been sentenced to death had the new dispensation been operative at the time the case was heard. The panel will then inform the Minister of its decision and he will take the appropriate steps.

6.2.8 Clause 20

Clause 20 provides that the new criteria for the imposition of the death sentence should apply to all cases not yet finalised.

6.3 PARLIAMENTARY DEBATE

At the beginning of the Criminal Law Amendment Bill debate, the Minister of Justice referred to President De Klerk's speech of 2 February 1990, saying that in his speech the State President had announced the government was going to introduce proposals in parliament to reform the death penalty. The Minister then informed the House that the Bill before it contained the said reforms.[11]

During the debate the Minister stated that the Bill abolishes the imposition of the compulsory death penalty. Mr Myburgh, a Nationalist member, supported the Bill and told the House that the idea was not to abolish capital punishment completely but to scale it down.[12] On closer examination of Mr Myburgh's speech, one gets the impression that giving the court discretion and abolishing the compulsory death sentence, will reduce the number of cases in which the court imposes capital punishment.

The Minister of Justice further mentioned that the Bill creates a criterion where a judge must decide whether or not the death penalty should be imposed in a particular case. Clause 4 of the Bill provides that the presiding judge must specifically give a ruling on the presence, or absence, of any mitigating or aggravating factors, and on this basis he must be convinced that the death penalty is the appropriate sentence, before it can be imposed. Should the judge not be so convinced then the death penalty cannot be imposed.

Another point made by the Minister was that the Bill creates an automatic right of appeal, in cases where the death sentence has been imposed, and the Appellate Division will ultimately decide whether or not that decision was correct or not. If the condemned person does not appeal, an automatic review procedure by the Appellate Division has been incorporated.

The regional court's jurisdiction will be increased and it will be able to hear a charge of murder. However, it cannot impose the ultimate sentence since this sentence is reserved for the Supreme Court only.

The House was also informed by the Minister that the Joint Committee on Justice proposed the list of capital offences be curtailed and the Appellate Division have the power to set aside the death sentence, if it is of the opinion that it would not have imposed such a sentence. It could then impose what it believed to be an appropriate sentence. The Appellate Division would also have the authority to increase a regional court's jurisdiction from 10 to 15 years imprisonment. The Minister emphasised that this new proposal would significantly influence the imposition of death sentences, bringing us nearer to a just and equitable dispensation in this extremely sensitive area of jurisprudence.

Lastly, the Minister declared that the death penalty should be limited, as a sentence option in extreme cases, and specifically through broadening judicial discretion regarding the imposition of sentence. He reiterated that the Bill's purpose is to broaden judicial discretion as far as capital punishment is concerned.[13] The Minister further said: "A crime is not extreme because of its appellation, but because of the repugnance of its inherent brutality and evil engendered in society. The nature of the crime, the interests as well as the perceptions of society, and the facts of each particular case will indicate whether the crime can be described as extreme."[14] Dealing with the Appellate Division's right to interfere in the trial court's discretion to impose a death penalty, he said:

> It is Parliament, as the supreme decision maker, that is taking a political decision here to effect that it wants the kind of actions it envisages here to apply in respect of this form of penalty, namely that there shall be an exception and that the Appeal Court can put itself in the place of the trial judge.

6.3.1 The Appellate Division

The Appellate Division's normal power to interfere with the trial court's decision is limited. Generally, a Court of Appeal would be slow to reduce a sentence which was correctly imposed, save in exceptional circumstances. The considerations, which have over the years been taken into account are summarised in *S v Anderson* as follows:

> the sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, or that the sentence is out of all proportion

to the gravity or magnitude of the offence, or that the sentence induces a sense of shock or outrage, or that the sentence is grossly excessive or inadequate or that there was improper exercise of his discretion by the trial Judge, or that the interests of justice require it.[15]

The Appellate Division would not easily substitute its discretion for that of the trial judge. The proposed provisions actually empower the Appellate Division to substitute its discretion for that of the trial court and that is why Munnik JP said that the new position "emasculates" the trial courts.[16]

6.3.2 The Conservative Party viewpoint

Conservative member, Mr SC Jacobs, began his address outlining the relationship between the African National Congress (ANC) and the South African Communist Party. He stated that the latter party controls the ANC.[17] He further stated that the Conservative Party (CP) opposes the Criminal Law Amendment Bill, objecting particularly to its important fundamental provisions, namely, those that pertain to the death penalty. He did say, however, that other provisions were acceptable to the CP and he went on to enumerate those which would have his party's support. It was his belief that the Minister of Justice had, with his amendments to the death penalty, become a victim of the State President's "new South Africa".

Mr Jacobs continued, saying that with the proposal for the abolition of a compulsory death sentence, the Minister was linking the Bill to the State President's February speech. In his view, and that of the CP, the new amendment amounts to *de facto* abolition of the death penalty and by suggesting this the Minister and the

government want to fall in with requirements contained in the *Harare Declaration* and in the UN's *Declaration on apartheid and its destructive consequences in Southern Africa*. Mr Jacobs further stated that the government is aware that the ANC feels very strongly about the death sentence and it is abolishing the death sentence to remove a stumbling block to negotiations with the ANC.

Mr CH Pienaar, another CP member, echoed Mr Jacob's sentiments and objected to the Bill's main theme[18] as did Dr CP Mulder, a prominent CP member who opposed the Bill. The latter said that by employing the death penalty the state is protecting life as authorised by the scriptures and it should impose the death penalty in appropriate circumstances. He felt that, by leaving the decision to the judges' discretion, the State is evading its duty.[19]

Dr Mulder's entire argument revolves around the crime of murder; he makes no mention of the other capital offences. This gives the impression that he endorses capital punishment only for the crime of murder.

The political order (and its problems) is then held to be responsible for so many black people being hanged. Dr Mulder feels this is true because the political order is such that first world standards are imposed on people who live in third world conditions. This means that, because of the South African political order, black people living under third world conditions are expected to live in terms of the first world's norms and values and when they fail to do so they end up committing capital offences. Consequently the number of black people hanged is high.

Another CP member, MR MJ Mentz, also opposed the Bill and opted for the maintenance of the *status quo*.[20]

6.3.3 The Labour Party viewpoint

Mr LT Landers of the Labour Party of South Africa (LPSA) stated *inter alia* that the repeal of the compulsory death penalty and the discretion granted to the Supreme Court must be seen in a positive light.[21] He said that if one considers the racial composition of the Bench, and that the overwhelming majority of hanging cases comes from the black community, this development should be welcomed. Mr Landers further welcomed the provision which gives the Attorney-General the right to appeal and felt that this will attend to cases where white farmers, who have beaten labourers to death, are given light sentences by the trial court.

6.3.4 The Democratic Party viewpoint

Mr AJ Leon of the Democratic Party (DP) stated that he supported the Bill, but it could have been better, in that the death penalty should be abolished.[22] He continued,

> that we must not underestimate the political consequences of the death penalty. For example 97% of those executed in the past decade have been black. As another example, though approximately 100 blacks have been executed for raping white women, no white man has ever been executed for raping a black woman without murdering her.

Another DP member, Mr L Fuchs told the House that his party supports the Bill as fewer people will eventually be sent to the gallows by our courts.[23] In Mr Fuch's view the legislation under discussion will ensure that a death sentence is not passed

in error. He felt the Appellate Divisions's new power would eliminate or reduce instances where the death penalty is passed by mistake.

Some of the members of parliament argue as if the death penalty is applicable only in the case of murder, which is an incorrect assumption.[24] The capital offences should not be forgotten, although a very high percentage of people executed are, in fact, executed for murder. Mr PC McKenzie, of the LPSA, said that rape was made a capital offence because the white population feared the black population. It is suspected that capital punishment for rape, is imposed only when a black man has raped a white woman.[25]

6.4 SUMMARY

It appears from the debate that members of the Nationalist, Democratic and Conservative Parties argued and voted along party political lines. The other parties, for example the LPSA, allowed their members to follow their individual conscience.

Members of the CP opposed the Criminal Law Amendment Bill because they disagreed with certain provisions, namely: the proposed amendment to sction 277, which in their opinion, amounts to the abolition of capital punishment; the Appellate Division's powers to interfere with the trial judge's capital sentence where it disagrees with the judge's decision et cetera. The CP also stated they were opposing the Bill because they believe it to be linked to the State President's political initiative.

The DP members supported the Bill because, *inter alia,* they believed the new provisions would reduce the number of people executed. Some members felt the

death penalty should be abolished altogether. The DP further stated that this Bill is an indication of the government's intention to clean up its human rights record.

For the most part, members of the other parties voted in favour of the Bill because they saw it as a reform bill, and because the Appellate Division's new powers will ensure that a death sentence is not passed in error. Others voted against the Bill because they believed that the death penalty must be maintained in its present form.

END NOTES — CHAPTER 6

1 *Penal and Prison Reform Commission Report* 1947 (UG 47/1947) par. 460: 64.

2 Hansard — *Debates of parliament.* cols 2570-2612 (14 March 1969).

3 Hansard — *Debates of parliament.* col. 2594 (14 March 1969).

4 Hansard — *Debates of parliament.* cols 9598-9599 (11 March 1988).

5 Hansard — *Debates of parliament.* col. 9655 (11 March 1988).

6 Hansard — *Debates of parliament.* col. 6957 (27 April 1989).

7 Hansard — *Debates of parliament.* cols 6986 & 7016 (27 April 1989).

8 Hansard — *Debates of parliament.* col. 6986 (27 April 1989).

9 Hansard — *Debates of parliament.* cols 6973-6974(27 April 1989).

10 Coetzer, JPJ. 1989. Further views on capital punishment. *Consultus* 1 (April): 17.

11 Hansard — *Debates of parliament.* col. 15573 (13 June 1990).

12 Hansard — *Debates of parliament.* col. 11585 (13 June 1990).

13 Hansard — *Debates of parliament.* col. 12118 (18 June 1990).

14 Hansard — *Debates of parliament.* col. 12119 (18 June 1990).

15 *S v Anderson* 1964(3) SA 494 (A) at 495.

16 Hansard — *Debates of parliament.* col.11600 (13 June 1990).

17 Hansard — *Debates of parliament.* col. 11577 (13 June 1990).

18 Hansard — *Debates of parliament.* col. 11604 (13 June 1990).

19 Hansard — *Debates of parliament.* col. 11615 (13 June 1990).

20 Hansard — *Debates of parliament.* cols 11628-11629 (13 June 1990).

21 Hansard — *Debates of parliament.* col. 11584 (13 June 1990).

22 Hansard — *Debates of parliament.* cols 11619-11620 (13 June 1990).

23 Hansard — *Debates of parliament.* col. 12098 (18 June 1990).

24 Hansard — *Debates of parliament.* col. 12079 (18 June 1990).

25 Hansard — *Debates of parliament.* col. 12082 (18 June 1990).

CHAPTER 7

ANALYSIS OF THE CRIMINAL LAW AMENDMENT ACT, 107 OF 1990

7.1 INTRODUCTION

In this paper, the intention is to deal only with the more important provisions of this Act.

7.2 IMPORTANT SECTIONS OF THE ACT

7.2.1 Section 4 (amended section 277, Act 51 of 1977)

Prior to amendment under the Criminal Law Amendment Act, section 277 of the Criminal Procedure Act, 51 of 1977 provided that capital punishment was mandatory in the case of murder, unless the accused was a woman convicted of murdering her newly born child, or a person under 18 years of age, or extenuating circumstances were present. The court's discretion was very limited.

The amended section 277 (section 4 of the Criminal Law Amendment Act, 107 of 1990) dispenses with the mandatory death sentence for murder and grants the court discretionary powers. It stipulates that the death sentence shall be imposed when, after ruling on the presence or absence of mitigating or aggravating circumstances, the court is satisfied that the death sentence is the only proper sentence.

The new provisions also lay down that a death sentence cannot be imposed on an accused, under the age of 18 years at the time of the commission of the offence in question. Should the accused's age be disputed, the State bears the onus of proving the accused was 18 years of age or older at the relevant time. The earlier section's provision relating to a woman murdering her newly born child has been deleted. Presumably this eventuality will be covered by the court's new broad discretionary powers.

The list of capital offences has been curtailed. Treason is a capital offence, if committed during times of war, and housebreaking disappears from the list altogether. The criterion used to determine sentence in a murder case is also applicable to other capital offences.

The death sentence can be carried out only after the Minister of Justice has signed a warrant wherein he states that the Appellate Division of the Supreme Court has confirmed the death sentence and the State President has declined to bestow mercy on the accused under sentence of death. As the death sentence is such a serious and final punishment, the legislature thought it wise to allow all condemned people a chance to have their cases adjudicated by the highest court in the country.

The Appellate Division's new powers do not, however, deal effectively with all the problems associated with the death penalty, for example the dilemma of a person being executed in error, has not been resolved by the new provisions. The legislature should have abolished capital punishment altogether.

While I agree that all the capital offences contained in the amended section 277 of Act 51 of 1977 have been reduced I believe that lifelong imprisonment with no

possibility of parole could be effectively used in place of capital punishment. At worst, only murder should merit the death sentence and, at best, capital punishment should be abolished. A person convicted of the crime of rape, kidnapping, child stealing, robbery or treason, committed when the Republic is at war, should not be forced to pay the ultimate price — all the more so if there was no loss of life during the commission of the offence. As life is the most precious of all human rights, it should not be comprised because of an infringement of an inferior right of others.

The government concedes that the death penalty is improper in all but "extreme cases", but it refrains from restricting the death penalty to murder with aggravating circumstances.

The Attorney-General may also submit a written address to the Appellate Division regarding the correctness of the convictions and the propriety of the death sentence. This provision ensures that every accused, condemned to death, is afforded the benefit of having his sentence reviewed and confirmed by the Appellate Division before execution. Naturally the execution will only go ahead if the Appellate Division confirms the sentence and if the State President does not grant clemency.

7.2.2 Section 322(2A)

Section 322(2A) provides that, upon an appeal under section 316A against the death sentence, the Appellate Division may confirm the death sentence — or, if it is of the opinion that it would not have imposed the death sentence, it will set aside the death sentence and impose the sentence it considers fit and necessary under the circumstances. The Appellate Division is now authorised to substitute its own

discretion for that of the trial court. Under the old provision the Appellate Division was only authorised to interfere with the death sentence imposed by the trial judge if an irregularity had been committed, or if the trial judge had misdirected himself.[1] If the trial court exercised its discretion properly, the Appellate Division could not interfere with the death penalty, even if it was of the opinion that it would not have imposed the ultimate sentence under the given circumstances of the case.

7.2.3 Section 322(6)

Section 322(6) of the new act stipulates that, on appeal, the Appellate Division can impose a more severe punishment than that imposed by the lower court, or it can impose another punishment, excluding the death sentence, *in lieu* of, or in addition to, such punishment. The practical effect of this provision is that the death sentence can only be imposed by the trial judge and while it may be confirmed by the Appellate Division, the latter cannot impose a death sentence if the same was not imposed by the trial judge.

7.2.4 Section 325A

Section 325A provides that when the Appellate Division, on review or appeal, has confirmed the death sentence on a person and the same person has not submitted, within 21 days of this confirmation of sentence, a petition to the State President, then the Minister of Justice, or someone designated by him, shall appoint counsel to submit a petition to the State President within a certain period of time, on behalf of the condemned person.

7.2.5 Section 327

Section 327 provides that if a convicted or condemned person has exhausted all available legal procedures regarding appeal or review, or, if they are no longer available, and such person petitions the Minister of Justice (with the accompanying necessary affidavits) stating that further evidence pertaining to his conviction or sentence has come to light, then the Minister may refer the petition and affidavits to the court which convicted or imposed sentence. The Minister will do this only if he is of the opinion that the allegations contained in the papers are true and might indeed affect the conviction or sentence. The court will then assess the value of such evidence by allowing the examination of witnesses, as in a normal trial. Following this, the court will advise the State President of the way the further evidence affects the conviction or sentence. The State President will then give the accused a full pardon, commute the conviction to a lesser one, adjust the sentence accordingly or commute the death sentence to a lesser punishment.

Proceedings in terms of section 327 are not subject to appeal or review. Before the inception of the above provision, once the Appellate Division confirmed the conviction and sentence, that was the end of the road as far as the condemned person was concerned: his only possible route was to approach the Executive. There was no provision in statutory or common law, on the basis of which, the matter could be remitted to the trial court for the hearing of fresh evidence.[2]

7.2.6 Section 89

Before section 89 of the Magistrate's Court Act, 32 of 1944 was amended, it stated that a regional court had jurisdiction over all offences except treason and murder.

The new provision stipulates that the regional court may try murder cases, but it may not impose a sentence of more than 10 years of imprisonment. The death sentence can be imposed by the Supreme Court only.

The Attorney-General may appeal against sentences imposed by both regional and the superior court, however, the Appeal Court is precluded from imposing the death sentence in such cases.[3] The reasoning is that if the court *a quo* was not willing to impose the ultimate penalty, then there must be some doubt about the correctness of capital punishment in the case in question.[4] Once doubt has been established, the death penalty should not be imposed as the nature of such punishment is such that there can be no redress if later it is found to be incorrectly imposed.

The new provisions make a life sentence a viable sentence option. They introduce a true life sentence which can also be resorted to, in certain circumstances, rather than imposing the death penalty.

7.2.7 Section 276

Amended section 276 of the Criminal Procedure Act makes life imprisonment a possible sentence. In appropriate circumstances the court may sentence an accused person to life imprisonment. The newly amended section 64 of the Prisons Act, 8 of 1959 provides that a prisoner serving a life sentence shall be released unconditionally, or on probation or parole, by the Minister after he has received and accepted a report from the advisory release board recommending such prisoner's release.

A prisoner serving a life sentence will be released only after the advisory release board has submitted a favourable report and recommendations to the Minister and he has accepted the said recommendations. The Minister will take the best interests of society into consideration.

These provisions, section 276 — as amended by the Criminal Law Amendment Act, 107 of 1990 and section 64 of the Prisons Act, 8 of 1959 (as amended) deal effectively with the problem of preventing the accused from committing further offences and they make the death penalty redundant, by effectively preventing the accused from committing further offences.[5] Life imprisonment without parole can effectively protect society and also satisfy the demand for retribution.

7.2.8 Section 19

Section 19 deals with the legal machinery for the reconsideration of the sentences of certain persons, already under sentence of death, at the commencement of the Act, or those whose cases were not yet finalised at that time. This section provides that the Minister of Justice appoint a panel consisting of six Supreme Court judges, or retired judges, and another three persons, who in the Minister's opinion, are fit to serve on the panel due to their knowledge of, and experience in, the administration of justice. This panel reconsiders the position of the above-mentioned persons. Of the six judges or retired judges on this panel, at least three shall be of the Appellate Division. Nobody is entitled to appear before the panel and it will sit behind closed doors.

This panel will consider the case of every person sentenced to death who has exhausted all available legal procedures (appeal or review) and also the case of every

person to whom such procedures are no longer available. Excluded here are those persons whose sentences have already been considered by the Appellate Division, under section 20, as if section 4 had always been operative, and those persons whose sentences have been commuted by the State President.

The Attorney-General may submit written arguments as can the convicted person and the convicted person is entitled to *pro Deo* representation for the preparation of the argument, as if the argument were drawn up with a view to an appeal against the death sentence.

After due consideration of a case, the panel will make its findings known to the Minister in writing. Where the panel finds that the death sentence, in its opinion, would not have been imposed, had section 277 of the principal Act — substituted by section 4 of this 1990 Act — been operative at the time of sentence then the Minister will present the case to the State President for his possible extension of mercy to the convicted person. Should the panel find for the death sentence, that is, the death sentence would probably have been imposed, the case will be referred to the Appellate Division for consideration.

The Appellate Division may confirm the death sentence, or if it is of the opinion that *it* would not have imposed the death sentence, it may set aside sentence and remit the case to the trial court, with instructions which it deems fit, for appropriate resentencing in line with the new provisions of section 277.

The purpose of the provision discussed at length above, is to ensure that in any case where the death sentence has been imposed, the Appellate Division should confirm

or deny the correctness of the conviction or sentence, whichever the case may be. This provision augments the test applied to determine whether or not the death sentence should be imposed. Thus, the death sentence will be imposed after certain enquiries and after the trial judge is satisfied that the death penalty is the only appropriate sentence under the given circumstances.[6]

The criterion now applicable will reduce, to a certain extent, the number of death sentences imposed by the courts and will significantly lessen the risk of wrong convictions and sentences. This is true because the Appellate Division, consisting of at least more than one judge, has the power to set aside a death sentence, if in its opinion the death sentence should not have been imposed, and it can impose such punishment as it considers proper. Before the new amendment, the Appellate Division's powers to intervene with the death sentence imposed by the trial judge were very limited. Another point to bear in mind is that the condemned prisoner's fate will now depend on more than one judge as the case will ultimately be considered by the Appellate Division.

The new provisions are also applicable to any cases pending which also ensures that should the accused be sentenced to death, the case will ultimately end up with the Appellate Division and this too may reduce the numbers on death row.

The case, *S v Masina and Others*[7] led to an appeal against death sentences imposed by the Transvaal provincial division. The court applied the provisions of section 277 of the Criminal Procedure Act, 51 of 1977 as amended by section 4 of the Criminal Law Amendment Act, 107 of 1990. It was said that for the appellants to succeed, the Appellate Division must be of the opinion that *it* would not have imposed the death sentence. It was also decided that Act 107 of 1990 has a retrospective effect

which also affects appeals not brought under the new system of automatic right of appeal, provided for by the new section 316A of Act 51 of 1977. The court pointed out that the concept of extenuating circumstances had been abolished and replaced by the concept of mitigating, or aggravating, factors. The court set aside the death sentence and substituted it with a 25 year sentence, in respect of each appellant.

The court examined the facts of the case, as set out by the trial judge. The court found certain mitigating *and* aggravating factors, and having considered them, concluded that the death sentences were not proper sentences. The Appellate Division exercised its own discretion and set aside the death penalties.

In *S v Senonohi*[8] the accused was sentenced to death by the court *a quo*. The Appellate Division, applying the provisions of Act 107 of 1990, held that the death sentence could be imposed where no other sentence was proper. The court further said that the legislature intended that the death sentence would only be imposed in cases of exceptional seriousness. The court found the fact that the accused had no previous convictions was an indication that he was not inherently violent and he could probably be rehabilitated. It ruled that the death penalty was not the only appropriate sentence and the sentence was replaced by a sentence of 18 years' imprisonment.

In *S v Nkwanyana and Others*[9] the court said that the concept of mitigating factors is much wider than extenuating circumstances. The State must prove aggravating circumstances and the accused must prove mitigating factors. It was held that the death sentence must be the only proper sentence and to be confined to cases of exceptional seriousness.

In *S v Mdau*[10] the court stated that life imprisonment, as a form of punishment, must be considered as an alternative to the death sentence where the community's protection is paramount and the initiative for the prisoner's release lies with the Minister of Justice and not with the prison board. The offender sentenced to life imprisonment will, therefore, be permanently removed from society, unless the Minister, in exceptional circumstances, intervenes. The court found the death sentence could not be regarded as the only appropriate sentence and accordingly set it aside, replacing it with life imprisonment.

Once again, in *S v P*[11] the court set aside the death sentence and replaced it with life imprisonment. The court said that it has never been established that the death sentence is more of a deterrent for prospective rapists than long terms of imprisonment.

In *S vS*[12] the accused was convicted, *inter alia*, on a count of rape and sentenced to death on the said count. The court, on appeal, took into account the appellant had no previous convictions for rape, or other crimes of violence, and that the complainant had suffered no lasting physical harm. Thus, it decided that the death sentence was not the only proper sentence and the sentence was reduced to 20 years' imprisonment.

This appeal was heard after the Criminal Law Amendment Act, 107 of 1990, came into effect. The appeal was handled as if sections 4 and 13(b) were in force at all relevant times. The court reiterated that it could exercise its discretion and set aside the death penalty and impose another if it saw fit. The court did, indeed, exercise its

discretion and imposed a different sentence, one of 20 years' imprisonment. On the murder count, the court confirmed the decision of the trial court.

The appellants in *S v Matshili and Others*[13] were convicted in the local division on four counts of murder, and four of them were sentenced to death. On appeal the court found that the group influence resulted in the appellants' responsibility being diminished, to the extent that it sufficiently reduced their moral guilt, despite the brutality of the crime. The death sentence was held not to be the only proper sentence and a lengthy period of imprisonment replaced the original death sentences.

The above-quoted cases indicate that the effect of the new provisions of the Criminal Law Amendment Act, 107 of 1990 is to reduce the number of death row prisoners and this is already apparent. Under the old Act, the Appellate Division, for example, in *S v S* (quoted above), would not have been in a position to use its discretion and set aside the death sentence on the count of rape and substitute it with 20 years' imprisonment. Furthermore, in *S v Senonohi*, the accused was found guilty of murder — no extenuating circumstances could be found — and the trial judge imposed the death penalty. On appeal, the Appellate Division applied the new provisions and came to the conclusion that the death sentence was applied unnecessarily and altered the sentence to one of 18 years' imprisonment.

In *S v Masina and Others*, quoted above, the Appeal Court exercised its discretion and set aside the death sentence. In terms of the old provisions the question, whether or not the death sentence was proper, could not be entertained by the Appellate Division, or altered by it, unless there was some misdirection or irregularity by the trial judge. If the trial judge exercised his discretion properly, the Appellate Division would not interfere with the death penalty already imposed.

Furthermore, the new provisions abolished the term *extenuating circumstances* which is now replaced with *mitigating or aggravating factors*. The term *mitigating factor* has a wider connotation than "extenuating circumstance" and this can be to the accused's advantage. It is much easier to prove a mitigating factor than an extenuating circumstance.

7.3 SUMMARY

The extraordinary procedures contained in the Criminal Law Amendment Act, 107 of 1990, reflect an anxiety that the death sentence ought not to be carried out in error. Unfortunately the possibility that the death sentence can be imposed erroneously cannot be excluded altogether. The accused can still be convicted by mistake due to several factors and moreover, his fate, whether the death sentence is imposed or not, and whether, if imposed will be confirmed by the Appellate Division, still depends on before which judge the trial takes place. On appeal his life will depend on the identity of the judges who adjudicate the matter. If the trial judge and the appeal judges are all in the "hanging judge" category the accused may not escape the death penalty if convicted of a capital offence.

END NOTES — CHAPTER 7

1 *S v Pieters* 1987(3) SA 717 (A) at 734-6; *S v J* 1989(1) 669 (A) at 674.

2 *Hoosain v Attorney-General, Cape* 1988(4) SA 137 CPD; *Sefatsa & Others v Attorney-General, Transvaal & Another* 1988(4) SA 297.

3 Section 13 of the Criminal Procedure Act, 107 of 1990 (amending section 322(6) of the code).

4 Mureinik, E. 1990. Death penalty reform. *SACJ* 2: 171.

5 Section 276(1) of the Criminal Procedure Act 107 of 1990; read with section 64 of the Prisons Act 8 of 1959.

6 Mihálik, J. 1991. The moratorium on executions: Its background and implications. *SA Law Journal* 108, part 1 (February): 130.

7 *S v Masina & Others* 1990(4) SA 709 (A).

8 *S v Senonohi* 1990(4) SA 727 (A).

9 *S v Nkwanyana & Others* 1990(4) SA 735 (A).

10 *S v Mdau* 1991(1) SA 169 (A).

11 *S v P* 1991(1) SA 517 (A).

12 *S v S* 1991(2) SA 93 (A).

13 *S v Matshili & Others* 1991(3) SA 255 (A); see note 4.

CHAPTER 8

ASSESSMENT OF THE CRIMINAL LAW AMENDMENT ACT, 107 OF 1990

8.1 REVIEW OF CAPITAL PUNISHMENT

The Criminal Law Amendment Act, 107 of 1990 does not resolve all the problems or arguments that have been raised against capital punishment.

The death sentence, in my opinion, can only be justified on the basis of a retributive principle, to the exclusion of other purposes of punishment. The proper approach should take into account all purposes of punishment, and in actual fact, emphasise reformation of the accused, as the best way to protect society is to reform the offender. Retributive considerations should play a minimum role.

Mr L Fuchs, of the Democratic Party, stated during the parliamentary debate that "the honourable Minister of Justice is on record ... saying that retribution does not feature strongly at all as an aim of the government in deciding whether a person should be executed".[1] If the government is serious that retribution does not feature strongly in its determination of a sentence, life imprisonment can be used effectively.

8.2 THE ALTERNATIVE OPTION

Life imprisonment, without the possibility of parole, will protect society effectively and will also satisfy the retributive considerations. We do not necessarily have to kill those who have killed; rape those who have raped; steal from those who have stolen; but we impose a sentence which we want to be hurtful to the offender and which takes the seriousness of the offence into account. The holy scriptures tell us that Cain killed his brother and Jehovah punished Cain for his act, but Jehovah never said that Cain should be killed as punishment. In fact, Jehovah said that anyone killing Cain should suffer vengenace seven times.[2] We notice that according to the scriptures, a murderer's punishment should not be capital punishment, but another form of punishment should be employed. Life imprisonment, without the possibility of parole, would be a more appropriate sentence than the death sentence.

8.3 THE EQUITY OF THE NEW ACT

The other difficulty is that the new Act does not give a definition of mitigating or aggravating factors. This is left entirely in the hands of the court. Certain studies have indicated that there was a disparity in the use of the death penalty by individual judges and that this disparity must, to some extent, be attributed to the personal disposition of the judges.[3] It is highly undesirable that the determination of whether a person will die or not should depend on before which judge he appears.[4] Consistency is an element of justice.[5] This very element of justice is compromised by the fact that one judge might give the accused a death sentence while another, on the same set of facts and circumstances, might not.[6]

8.4 CONCLUSIONS ABOUT CAPITAL PUNISHMENT AND ACT 107 OF 1990

8.4.1 Counterarguments

All the arguments against the death sentence stated earlier in this paper are still valid. All the new Act, 107 of 1990, has done is remove, to some degree, the possibility of a wrongful conviction. This is true because now the accused, convicted of a capital offence, has an automatic right of appeal and, for his conviction to stand it must be confirmed by the Appellate Division. The Appellate Divisions has new powers to substitute its discretion for that of the trial judge. The Appellate Division can impose a sentence it considers fit and proper, despite the fact that the trial judge did not misdirect himself or there is no irregularity committed.

8.4.2 Act 107 of 1990: no improvement

As far as the death sentence is concerned, the new provisions have not improved the position at all. The problem of the likelihood of the accused being hanged or not, still depends on before which judge he appears and who the judges sitting in his appeal case are. The element of chance is still there.[7]

8.4.3 Deterrent effect

The deterrent effect of capital punishment has still not been proved beyond any reasonable doubt, and if that is the position, there is no valid reason for keeping such a punishment on our statute books. It has never been shown that the death

penalty deters more than other forms of punishment. If the retentionists are serious about the alleged general deterrent of capital punishment, they should be demanding we execute more people than we have been doing. In South Africa, few people have been executed compared to the total number of capital offences committed.[8] The allegations that capital punishment has a unique deterrent effect is very doubtful. If a particular accused needs to be removed from society, life imprisonment can be utilised to achieve that result.[9]

8.4.4 Retributive considerations

Furthermore, if retributive considerations are to be taken into account in the passing of sentence, life imprisonment can satisfy such considerations[10] because retributive considerations do not demand that we should rape those who have raped, kill those who have killed. In the scriptures, Cain, who killed his brother, was not killed, but was given some other form of punishment. When an accused has raped, we do not say that he should be raped, but we impose some other type of punishment, namely imprisonment. In this eventually, 100 retributive considerations have been met and using the same argument, in a murder case, an accused can be given life imprisonment — rather than killing him. Life imprisonment will incapacitate the offender, deter others and consequently protect society. If life imprisonment can satisfy the retributive considerations and also adequately protect society, the need or purpose of capital punishment disappears altogether. The continued use of capital punishment then becomes immoral as it serves no useful purpose which cannot be served by other humane and civilised forms of punishment.

8.4.5 State responsibility

The cold-blooded execution of a murderer or any person sentenced to death, is an indication that the State does not value human life and this could escalate the violence in the country. The State must take the lead in showing people that it values human life and it must refrain altogether from any actions which are taboo for the community. The State must demonstrate — and be seen to demonstrate — that there is no reason to deliberately take another's life. The State must itself show respect for human life and dignity.

8.4.6 Self-defence

Self-defence is an inalienable right which every human being possesses. If it is necessary to kill to protect yourself, this does not amount to deliberate killing and it can be justified, if certain conditions are met. Killing a human being to protect property or trying to prevent such a person from escaping from custody amounts to deliberate killing of a human being and should not be allowed.

8.4.7 A political weapon

The death penalty is employed by other States for political repression and in South Africa, there are people who believe that the death penalty is used primarily against the black majority. Certain major political and professional groups have come out very strongly against capital punishment. For the sake of peace, prosperity and political reconciliation, capital punishment should be abolished so that we can build mutual trust, understanding and respect. The public's confidence in our legal system will also be restored.

If the majority of black people is in favour of the death sentence, the political leaders should show the way, influence public opinion and abolish the capital punishment because study after study has shown that capital punishment serves no purpose which cannot be served by other forms of punishment.

8.5 THE FINAL WORD

In most civilised Western countries, the death penalty has been abolished and for good reason. In Britain, it was abolished after a thorough investigation put in doubt the deterrent effect of capital punishment. It is, I believe, correct that South Africa should join the ranks of the civilised Western countries and abolish the death penalty. The racial composition of our society should be no factor at all.

END NOTES — CHAPTER 8

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2 *The World translations of the holy scriptures.* 1984 (revised edition). Genesis 4: 8-15. New World Translations Committee.

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