

THE SOUTH AFRICAN DEATH SENTENCE

UNDER A NEW CONSTITUTION

by

ROBERT PAUL RUDOLF KRAUTKRÄMER

submitted in part fulfilment of the requirements

for the degree of

MASTER OF LAWS

in the

DEPARTMENT OF CRIMINAL PROCEDURE

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: PROFESSOR J H VAN ROOYEN

JUNE 1994

ACKNOWLEDGEMENTS

I would like to express my sincere thanks to the following persons:

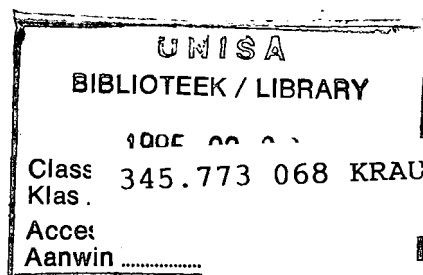
My supervisor, Professor J.H. van Rooyen from the Criminal Procedure Department, University of South Africa, for his expert guidance and advice;

Mr. Dawid Brits from the Department of Justice, for his professional and prompt assistance in providing me with the necessary statistics;

my dear friend, Mr. Steven Le Roux, for his contribution in editing this dissertation;

Mrs. Henriette Jonat, for her untiring patience and the countless reprints;

and last but not least, my family for their encouragement and (financial) support!



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SUMMARY

Although s 9 of the new Constitution¹ guarantees the right to life, there is no express provision which abolishes the death sentence.

Whereas in the past the death sentence could only be avoided by the exercise of judicial discretion or political and public pressure, its imposition will now have to be entirely re-evaluated. Not only are all the laws of the country subject to the new Constitution,² but so too a Constitutional Court will be operational which will have the power to test the constitutionality of any such laws.

By looking at the standards and relevant issues which are considered to define the constitutionality of the death sentence internationally, reviewing current application of the death sentence in South Africa, drawing comparisons, and by studying the problems unique to the South African situation, it will be the aim of this dissertation to determine how the death sentence will fare under a Constitutional Court.

Ten key words:

Death Sentence; Criminal Procedure Act 51 of 1977; South African Constitution; Constitutional Court; Sentencing Discretion; Equal Justice and Due Process; Death Row Phenomenon; Legal Representation; Aggravating and Mitigating Factors; Cruel and Unusual Punishment.

¹ Act 200 of 1993, which came into operation on 27 April, 1994.

² By virtue of s 4(1), which reads, "This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency".

INTRODUCTION

Before being able to consider the constitutionality of the South African death sentence, it will be of primary importance for the Constitutional Court firstly to consider, how the constitutionality of the death sentence has been defined internationally. No Supreme Court in South Africa has ever had the power to question the validity of a South African act according to a constitution which entrenches a chapter of Fundamental Rights - as such it is imperative that the Constitutional Court seeks guidance elsewhere.

DEFINING THE CONSTITUTIONALITY OF THE DEATH SENTENCE

From a comparative point of view, the first step in defining the constitutionality of the death sentence would be to determine what foreign superior courts have said with regard to the constitutionality of the death sentence *per se*. This would be the most logical step, for it would be pointless to continue unless it can be established that there is at least some primary indication as to when and why it can be said that the death sentence is not unconstitutional. Once it has been established what international support exists for this contention, it will be necessary to go further and determine what standards have been set for procedural constitutionality.

a) The Death Sentence *per se*

The first question one must then ask is whether the death sentence can be considered to be constitutional *per se*. In *Gregg v Georgia*¹ the American Supreme Court held that the death sentence was not unconstitutional *per se*.

In coming to its conclusion, the court firstly considers whether such punishment comports with the basic concept of human dignity, which lies at the core of the Eighth Amendment.² The first guideline which the court identifies is the fact that the death sentence is meant to serve two principle social purposes, namely retribution and deterrence.³ Regarding retribution, the court states that it is essential in any ordered society that expects its citizen to rely on the law, rather than on self - help, to vindicate their wrongs.⁴ After all, the decision that the death sentence may be the

¹ 428 US 153 (1976).

² As stated in *Trop v Dulles* 356 US 86 (1958) at 100.

³ Bedau HA (ed) The death penalty in America (Oxford 3rd Edition, 1982) at 276.

⁴ At 308, "The instinct for retribution is part of the nature of man, and channelling that instinct in the administration of criminal justice serves an important purpose in promoting stability in a society governed by law. When people begin to believe that organized society is unwilling or unable

appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are in themselves so grievous that the only adequate response may be the sentence of death.⁵

Regarding the deterrence value of the death sentence, the court points out that statistical attempts to evaluate its worth have been inconclusive.⁶ The reason for this is that there are many cases where murder (for instance) is committed in the heat of the moment or under severe mental stress, in which case the threat of death will have little or no deterrent effect. On the other hand, there are premeditated murders where the threat of death may very well play a significant role in deterring the crime. Statistics however fail to elaborate and differentiate between these two situations.⁷

This being the case, neither the death sentence's alleged effectiveness, or ineffectiveness, can be given determinative consideration.

The third and decisive consideration in *Gregg v Georgia* was whether the sentence of death was disproportionate in relation to the crime for which it was imposed. The court states that where the sentence of death is imposed for the crime of murder, where a life has been deliberately taken, it cannot be said that the punishment was invariably disproportionate to the crime.⁸ Consequently, the death sentence was not regarded unconstitutional *per se*.

Closer to home, in *S v Chabalala*,⁹ the Bophuthatswana Appellate Division held the death sentence not to be unconstitutional *per se* by reason of the following arguments:¹⁰

to impose upon criminal offenders the punishment they "deserve", then there are sown the seeds of anarchy - of self help, vigilant justice, and lynch law".

⁵ At the same time it is important to remember that merely because the majority of a society supports the death sentence, it does not mean that the death sentence should be maintained. With an issue such as this, one cannot place too much reliance on the opinion of the majority. It is submitted that the average South African has had very little exposure to literature concerning the death sentence and therefore has very little knowledge about its implications. As such, it is doubtful whether the average South African can make an informed decision about the death sentence.

⁶ Bedau *supra* at 277.

⁷ *Op cit* 278.

⁸ *Ibid.*

⁹ 1986 (3) 619 (BA); see also Luiz S "A bill of rights: Is it worth the paper it's written on?" 1987 3 SAJHR 105-116 and also Mihalik J "The death sentence in Bophuthatswana: A new deal for condemned prisoners?" 1990 SALJ 465-489.

¹⁰ At 625H-629E. Section 10(1) of the Bophuthatswana Constitution Act 18 of 1977 states that, "[e]veryone's life shall be protected by law and no one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law"; s 11 states that, "[n]o one shall be subjected to inhuman

Firstly, as the Bophuthatswana legislator had expressly envisaged the possibility of the death sentence in s 10(1) of the Constitution, it is as such clearly not inhuman or degrading punishment. Secondly, the Court states that just because certain foreign courts and academics¹¹ have declared the death sentence to be inhuman and degrading treatment, this does not necessarily make it so. If one accepts that degrading punishment includes all punishment that is cruel then all imprisonment would be unconstitutional.¹²

The only relevant question, therefore, is whether the sentence is "out of proportion to the offence".¹³ As the defence was unable to put forward any evidence that the death sentence had ever "been imposed in Bophuthatswana on an arbitrary, discriminatory, capricious, inappropriate, cruel, wanton, erroneous or like basis"¹⁴ (and therefore disproportionately), the court held the death sentence not to be unconstitutional *per se*.¹⁵

By way of summary, the following are issues which have been considered to determine the constitutionality of the death sentence *per se*:

- i) The punishment must be such that it still "comports with the basic concept of human dignity";
- ii) the punishment may not be disproportionate to the crime;
- iii) if the Constitution makes express provision for its imposition, it cannot be labelled as unconstitutional *per se*; and
- iv) the court should not rely on evidence of the death sentence having been applied disproportionately in other countries, but rather on

and degrading treatment or punishment".

¹¹ To which counsel for the defence refers at 626I-629B.

¹² At 628C-F. "I will accept for present purposes *Mr van der Vyfer's* submission that "degrading...punishment" would include all forms of punitive action that would bring dishonour or contempt to bear on the accused and that "inhuman punishment" would include all forms of punitive action that would be cruel or brutal. [If these definitions were to be applied to the Bill of Rights] the imprisonment would not be permissible...Imprisonment is, however, specifically authorised by s 12(3)(a)".

¹³ At 627C.

¹⁴ At 630.

¹⁵ See *infra* "Equal Justice" where sentencing discretion and similar issues are dealt with in greater detail.

evidence which reveals disproportionate application locally.¹⁶

Should the Constitutional Court decide upon these, or like factors, that the death sentence is indeed not unconstitutional *per se*, it will be necessary to determine which procedural standards and issues are pertinent to the question of the constitutionality of the death sentence.

CRUEL AND UNUSUAL PUNISHMENT.

Section 11(2) of the new South African Constitution provides that "[n]o person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment".

Is the death sentence "cruel and unusual punishment",¹⁷ or can it be said that notwithstanding its severity, it is a form of punishment which should cause no greater concern than life long imprisonment for example? How is one to interpret "cruel and unusual"?¹⁸

a) **Proportionality**

Aside from being useful to determine constitutionality *per se*, the question of proportionality is also important to determine whether the death sentence is applied in a "cruel and unusual" manner. What does it mean to say that the death sentence is disproportionate to the crime and hence, unconstitutional?

In the leading Canadian case on this point, *R v Smith*,¹⁹ the Supreme Court of Canada interpreted s 12²⁰ of the Canadian Charter of Rights and Freedoms to mean the following:²¹

¹⁶ See *infra* "Cruel and Unusual Punishment" where it is argued that the court's method of interpretation is too narrow and positivistic.

¹⁷ To use the language of the Eighth Amendment to the American Constitution.

¹⁸ "Cruel and unusual" is something which cannot be viewed in isolation. It is an expression which has found resonance (at least in similar wording) in constitutions and precedence all over the world. Its interpretation has shown that it must be viewed as an "umbrella concept", including issues such as proportionality, the period on death row and the method of execution. Each of the issues are of such a nature however, that they will be dealt with separately *infra*.

¹⁹ [1987] 5 WWR 1 SCC.

²⁰ Section 12 reads, "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

²¹ At 43.

"The criterion which must be applied...is...'whether the punishment prescribed is so excessive as to outrage standards of decency'...[and] the effect of that punishment must not be grossly disproportionate to what would have been appropriate."

According to Whitley,²² this means that the judge must consider the circumstances of the case, the gravity of the offence, personal characteristics of the accused and the particular circumstances of the offence. Punishment, rehabilitation and specific deterrence are relevant at this stage of the process.

Justice McIntyre summarises the situation as follows, holding that "cruel and unusual" will be attracted where:²³

- i) The punishment is of such a character and duration as to outrage the public conscience, or be degrading to human dignity.
- ii) The punishment goes beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of alternatives.
- iii) The punishment is arbitrarily imposed in the sense that it is not imposed for a rational purpose in accordance with ascertained or ascertainable standards.²⁴

In India, Art 21 of the Constitution provides that "[n]o person shall be deprived of his life...except according to procedure established by law". In *Attorney - General of India v Lachma Devi*²⁵ the Supreme Court held this to mean that public executions would be unconstitutional as being in violation of Art 21 as "[a] barbaric crime does not have to be visited with a barbaric penalty".

This could also be interpreted to mean that although the Supreme Court of India has not struck the death sentence down as unconstitutional, a public execution would cause disproportionate and unnecessary harm to the person's dignity as well as that of his family, and as such, be considered as unconstitutional.

²² Whitley SJ Criminal justice and the constitution (Carswell) 1989 at 261.

²³ *R v Smith supra* at 19-20.

²⁴ Although these standards are set in a system where the death sentence does not exist, it is submitted that they are of value in determining criteria for the term "cruel and unusual" nonetheless.

²⁵ AIR 1986 SC 467.

In *S v Chabalala*²⁶ the Court refers to s 11 of the Bophuthatswana Constitution which prohibits inhuman and degrading treatment or punishment. Having dealt with the issue of proportionality in determining constitutionality *per se*, the court states that the "other aspects [of proportionality can only] have reference to torture under interrogation with the object of breaking the resistance of the subject, or to cruelty for its own sake". The court held that because s 277²⁷ of South African Criminal Procedure Act 51 of 1977 had been incorporated into the Bophuthatswana Constitution in its entirety, it was, as such, constitutional.²⁸ With respect, such an approach is far too narrow and positivistic. It is disappointing that the court failed to consider even the *possibility*, that where the crime did not involve loss of life, the death sentence could very well be disproportionate. Rather than merely relying on the incorporation of the South African Criminal Procedure Act,²⁹ the court would have done well to consider aspects such as those listed above by Justice McIntyre.

Also in the United States of America, as already stated³⁰ the Supreme Court has held that the death sentence is not disproportionate where it is imposed for the deliberate taking of a life. Although this may create the impression that the death sentence is unconstitutional when passed for "lesser" crimes (such as rape where no loss of life occurs), the American Supreme Court³¹ has upheld the criminal codes of various states to be constitutional, notwithstanding the death sentence being passed for such "lesser crimes".³²

b) **Method of Execution**

Aside from proportionality being relevant to the question of "cruel and unusual", another is the method of execution used.

Most would probably agree that any sentence which draws out agony for any extended period of time is undoubtedly cruel. The very real possibility

²⁶ *Supra* at 625J.

²⁷ Section 277 (prior to amendment on 27 July 1991) allowed the death sentence for murder, rape, robbery or attempted robbery and housebreaking with the intention of committing a crime (both with aggravating circumstances), treason, child stealing, kidnapping and terrorism.

²⁸ At 632B.

²⁹ *Supra*.

³⁰ In *Gregg v Georgia supra*.

³¹ See *Proffitt v Florida* 428 US 242 (1976) and *Jurek v Texas* 428 US 262 (1976).

³² See *infra* "Sentencing Discretion" with regard to aggravating factors being a statutory requirement before the death sentence may be imposed in these states.

exists however, that methods which are meant to be quick and painless can actually malfunction, with the result that the criminal has to endure prolonged agony and suffering. There is no guarantee that methods such as hanging, execution by firing squad, electrocution or even lethal injections are infallible. It can therefore be stated that although some methods are less cruel than others, the only ones which can be considered not to be "cruel and unusual" are those which can guarantee immediate and painless death without any possibility of malfunctioning.

c) The Period on Death Row

As Joachim Herrmann³³ points out, "The European Court of Human Rights recently held in the *Soering* case that the "death row phenomenon" ... must be considered an important factor that contributes to inhuman and degrading punishment which is outlawed by the European Convention on Human Rights." Of importance to note here, is the fact that s 11(2) of the new South African Constitution also prohibits torture which is "mental or emotional" and as such the Constitutional Court will have to take the period on death row into account.

The "death row phenomenon" is a term used to denote the mental anguish which every death row prisoner and his family endures in anticipation of his execution. This anguish is further exacerbated by delayed executions which are the result of last minute petitions for clemency and appeals. As an example, one can quote the case of *S v Chabalala*.³⁴ In that case the accused was sentenced to death on 31 March 1982. His execution was scheduled for 3 April 1984. Due to an application for a stay of execution the day prior to his execution, the execution was again rescheduled for the 14 March 1985. After obtaining leave to appeal, which was heard and dismissed during June 1985, he was finally executed on 15 April 1986 - more than four years after being sentenced.

The court criticised those responsible for the two previous stays of execution, as nothing was done by them during that time to actually assist the appellant. "The appellant would have been spared the experience of twice having to prepare himself for his imminent execution". However, immediately thereafter, the court admits that "[t]here will obviously be occasions when applications of this nature can only be brought at the last moment, but these do not fall into [this] category [of cases where applications for stay of execution are made solely for the purposes of delay]".³⁵

³³ "Capital punishment - why it needs to be abolished" 1993 *De iure* 384-393 at 392.

³⁴ *Supra*.

³⁵ *Op cit* 625E.

Yet it is exactly these "last moment" attempts which cause so many delays and extended periods on death row. Recently the issue of prolonged periods on death row fell directly under the spotlight in the Zimbabwean case of *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe, and Others*.³⁶ In this case an application was brought by a human rights organisation, to prevent the execution of four prisoners who had been on death row for periods ranging between 52 and 72 months. Section 15(1) of the Zimbabwe Constitution states that no one shall be subjected to torture or to inhuman or degrading punishment or other such treatment. In coming to a decision of whether the detainment has in fact breached this constitutional protection, the court mentions the following factors:³⁷

- i) The court must have regard to the likely effect of the entire extent of the delay and not the cause thereof, the cause being irrelevant since it fails to lessen the degree of suffering. In this regard it would be wrong to differentiate between strong and weak personalities, hence the assessment of the likely, and not the actual, effect of the delay upon the person.
- ii) In this instance, where the delays were between 52 and 72 months, it was necessary to consider how those specific periods of delay differed from the average delay since 1978 when executions were carried out in Zimbabwe. Taking into account that the average delay was only 17,2 months, the court held that, even where extra time was added to include appeal and all other necessary procedures, a period of 52 to 72 months, together with the harsh conditions of incarceration, provided a degree of seriousness sufficient enough to entitle the applicant to invoke on behalf of the condemned prisoners, the protection afforded in s 15(1) of the Constitution.

Accordingly the court ordered that the death sentence be set aside.

DUE PROCESS:

Undoubtedly, the most important and extensive issue to be considered is that of "Due Process", which, in short, means the right of every person to a fair trial.³⁸

³⁶ 1993 (2) SACR 432 (ZS).

³⁷ At 435a-435d.

³⁸ "Due Process" can be termed an "umbrella concept". Although there are various issues pertaining thereto, only those of "Sentencing Discretion" and "Other Standards Providing Procedural Fairness" will be dealt with at this stage. The issues of "Legal Representation" and "Equal Justice" will be dealt with under "Comparing Current Procedure with International Standards". Due to the inherent difficulties these issues present to the South African situation, it will be more practical to discuss those issues there.

a) Sentencing Discretion

It would be unconstitutional for any court to have a free reign on discretion, as this would undoubtedly allow the imposition of the death sentence, quite literally, at will. Thus it is necessary to identify the standards which other countries have set to guide their courts when exercising a sentencing discretion. Especially due to the finality of the death sentence, it is imperative that the court's discretion be guided, so as to avoid arbitrariness as far as possible.

In *McGautha v California*,³⁹ the Supreme Court of America held that where a jury exercised an unstructured discretion in deciding when to impose the death sentence, it was not a denial of due process, i.e., the court held an arbitrary decision in this regard to be constitutional. The following year, however, in *Furman v Georgia*⁴⁰ the same court ruled that in deciding upon the imposition of the death sentence, an unstructured discretion was a denial of the Fourteenth Amendment. Furthermore, the court held that where the death penalty was imposed under such conditions, it also denied the Eighth Amendment.⁴¹ This case had far reaching effects in the American judiciary and legislature. As Bedau points out,⁴² this left legislators with two options:

- to introduce either a mandatory death sentence; or
- a process whereby the death sentence could only be imposed after a guided discretion had been exercised.

In *Woodson v North Carolina*⁴³ and *Roberts v Louisiana*⁴⁴ the Supreme Court ruled a mandatory death sentence to be unconstitutional, being a denial of due process.⁴⁵

In *Gregg v Georgia*,⁴⁶ *Proffitt v Florida*,⁴⁷ and *Jurek v Texas*⁴⁸ the Supreme

³⁹ 402 US 183 (1971) at 196.

⁴⁰ 408 US 238 (1972) at 248n.

⁴¹ *Op cit* 309-310.

⁴² *Supra* at 250.

⁴³ 428 US 280 (1976).

⁴⁴ 420 US 325 (1976).

⁴⁵ See also *S v Chabalala supra* where the court held the mandatory imposition of the death sentence not to be unconstitutional.

⁴⁶ *Supra*.

⁴⁷ 428 US 242 (1976).

Court held that the manner in which the statutes of those three States had made provision for the structuring and guidance of the judge and jury's discretion, was constitutional in that they met the demands made in the *Furman* case.

In all three these States, aggravating factors are to be determined before the death sentence must (in Texas) or may (in Florida and Georgia) be imposed.⁴⁹ The death sentence is only mandatory in Texas, and then only for five types of aggravated murder. Justice White, in the *Roberts v Louisiana* case, criticises the Texas statute for allowing the mandatory imposition of the death sentence,⁵⁰ as it denies the right to due process.

In the *Jurek* case, Justice Stevens defends the Texas statute by stating that when considering the possibility of whether the accused might continue to commit acts of violence and being a threat to society, the accused has the opportunity to point out all mitigating factors and to "bring to the jury's attention whatever mitigating circumstances he may be able to show."⁵¹ He is therefore granted a fair opportunity to maintain his right to due process.⁵²

⁴⁸ 428 US 262 (1976).

⁴⁹ In Texas, once a verdict of guilty has been reached on any one of five specified aggravated forms of murder (Texas Code of Criminal Procedure 37.071) the jury has to go further and ask three questions, namely:

1. Was the conduct which caused the death deliberate with the reasonable expectation of death;
2. would it seem that the offender might be a continued threat to society; and
3. was the conduct of the offender still unreasonable, even if provoked?

If the answer to each question is affirmative, then the death sentence must be imposed, and neither judge nor jury has a discretion to impose another sentence.

The Georgia statute provides (at s 26-3108 Supp. 1975) that, where a capital felony has been committed, (except in the case of treason or hijacking a plane), at least one of the ten statutorily defined aggravating factors must be found to have existed before the death sentence may be imposed (s 27-2534 Supp. 1975). Although the death sentence is not mandatory, the judge is obliged to follow the jury's decision (ss 26-3102, 27-2514 Supp. 1975).

In Florida, eight aggravating and seven extenuating circumstances are listed (see Bedau *supra* at 207). If one aggravating circumstance exists, then the death sentence is presumed to be the proper one, unless any extenuating circumstances are found to outweigh the aggravating ones. The judge is not bound to the jury's decision to impose the death sentence, but he may not impose it unless at least one aggravating factor has been found to exist. See Bedau *supra* at 272, note 1, and at 273.

⁵⁰ Bedau *supra* at 100.

⁵¹ At 272-3.

⁵² The *onus* is thus on the accused to indicate mitigating factors. A similar approach was followed in the *Chabalala* case *supra*.

The focus is thus on aggravating and mitigating factors, the former being statutorily defined and the latter being interpreted to include "any aspect of a defendant's character or record and any of the circumstances of the offence that the defendant prefers as a basis for a sentence less than death".⁵³

In a general comment on Article 6⁵⁴ of the International Covenant of Civil and Political Rights⁵⁵ issued in 1982, the Human Rights Committee set up under the Covenant declared that states parties to the Covenant which have not abolished the death sentence "are obliged to limit its use and, in particular, to abolish it for other than the 'most serious crimes'".⁵⁶

So too in *Bachan Singh v State of Punjab*,⁵⁷ The Indian Supreme Court held that the death sentence for murder should not be used "save in the rarest of rare cases".⁵⁸

b) **Other Standards Providing Procedural Fairness**

Amnesty International⁵⁹ states that "[d]efendants on trial for their lives must obviously be afforded scrupulously fair trials. When accepted standards for a fair trial are ignored or set aside the death penalty becomes open to political abuse and the risk of executing the innocent is increased".

Article 14 of the ICCPR sets certain standards for a fair trial: The right to a fair and public hearing by a competent, independent and impartial tribunal; the right to be presumed innocent until proven guilty; the right to have adequate time and facilities to prepare for a hearing; the right to counsel of one's own choice; the right to free legal assistance for those who cannot afford their own counsel; the right to call and examine one's own witnesses and to cross examine state witnesses and very importantly, the right to have the conviction and sentence reviewed by a higher tribunal.

⁵³ *Lockett v Ohio* 438 US 586 (1976) at 604.

⁵⁴ Which reads, "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases".

⁵⁵ Hereafter the ICCPR.

⁵⁶ See the reference in Amnesty International When the state kills 1989 (Amnesty International Publishers, London) at 35.

⁵⁷ AIR 1980 SC 898.

⁵⁸ See the reference in Cottrell J "Wrestling with the death penalty in India" 1991 SAJHR 185-198 at 186.

⁵⁹ When the state kills *supra* at 42.

It is conceded that this is not at all a comprehensive list⁶⁰ but in addition to those standards mentioned above, these can at least be considered as the minimum requirements for a fair trial and thus also "due process".

CURRENT APPLICATION OF THE DEATH SENTENCE IN SOUTH AFRICA⁶¹

In 1986, 121 hangings took place and in 1987 a record high of 167. This caused renewed calls for an investigation into the death sentence. In 1988 Mr Dave Dalling, opposition spokesman for Justice, called for an enquiry. The Minister of Justice rejected the call however, stating that nothing had happened to justify such an enquiry.⁶² In 1989 a proposal was made that the Law Commission, in the construction of a new Constitution, re-examine legislation dealing with the death sentence, as the majority of the population "feel that they are put on trial by a court in terms of an act into which they had no input".⁶³ Other members went further and called for an abolition of the death sentence.⁶⁴

With the opening of Parliament on 02 February 1990, the then State President FW de Klerk announced a moratorium on executions, pending the passage of a new bill. On 27 July 1990 the Criminal Law Amendment Act 107 of 1990 was passed. Notwithstanding the fact that the act lifted the moratorium, no executions took place thereafter. After pressure from various corners⁶⁵ the moratorium was re-instated in late March 1992.⁶⁶

The Criminal Procedure Act 51 of 1977 regulates the application of the death sentence as follows:

⁶⁰ There are also rules of Evidence which are equally important - but those are beyond the scope of this dissertation.

⁶¹ As will be seen, the manner in which the death sentence is applied in South Africa does not differ substantially from the manner of its application by international standards. However, this is not to say that, as such, it is to be considered constitutional. The following only concentrates on the application of the death sentence in South Africa according to statutory prescriptions and their interpretation by the Supreme Court of South Africa - it does not discuss those other important issues, such as "Due Process" and "Legal Representation" which, due to the difficulties they present, may outweigh any merits which similar procedural standards may have.

⁶² Debates of Parliament (Hansard) 11 May 1988 cols 9654-5.

⁶³ Debates of Parliament (Hansard) 27 April 1989 col 6969.

⁶⁴ *Op cit* cols 6986 and 7016.

⁶⁵ See the reference in Van Rooyen JH "Toward a new South Africa without the death sentence - struggles, strategies and hopes" 1993 Florida State University Law Review Vol. 20:xxx 1-50 at 40-46.

⁶⁶ See Mihalik J "The moratorium on executions: Its background and implications" 1991 SALJ 119-142.

Firstly, the crimes for which the death sentence may be imposed include the following:⁶⁷

Murder;
treason when the Republic is in a state of war;
rape;
kidnapping;
child stealing;
robbery or attempted robbery, with aggravating circumstances; and
terrorism.⁶⁸

The death sentence is no longer mandatory for murder without extenuating circumstances.⁶⁹ Whether to impose the death sentence or not, is left in the discretion of the presiding judge, who, after consultation with his assessors (if any), will make a finding of all the mitigating and extenuating factors, and thereafter decide whether or not the death sentence is the proper sentence.⁷⁰ The fact that the death sentence is no longer mandatory also allows for a wider operation of s 274 of the CPA. This section allows a court to consider any relevant evidence in considering a proper sentence and also allows the accused, as well as the prosecution, to address the court regarding such evidence. Whereas this section was previously inapplicable to murder without extenuation (seeing that the death sentence was mandatory in that case), it can now be used in all cases in deciding upon a proper sentence.

Housebreaking with the intention of committing an offence has been deleted and treason and terrorism are now only punishable by death if committed when the Republic is in a state of war.

Of great importance is the fact that s 277(2) of the CPA no longer speaks of extenuating "circumstances", but of mitigating and aggravating "factors".⁷¹ As is explained *infra*, this allows the Supreme Court much greater freedom in deciding

⁶⁷ Section 277 of the Criminal Procedure Act 51 of 1977 as amended - hereafter the CPA, unless otherwise indicated.

⁶⁸ *S v Mncubi* 1991 3 SA 132 (A) pointed out that as terrorism was subject to the same punishment as treason (s 54 of the Internal Security Act of 1982), it can be assumed that terrorism will also only qualify when the Republic is in a state of war.

⁶⁹ As it was under the "old" CPA. The death sentence was only discretionary if there were extenuating circumstances, if the accused was under the age of 18 at the time of the offence or if she was a woman accused of killing her newly born child. (Section 277(2) of the "old" CPA). The amended s 277(3)(a) also provides that the death sentence may no longer be imposed on an accused who was under 18 years of age at the time of the offence. The *onus* is on the state to prove that the accused was 18 or older if there is uncertainty in this regard.

⁷⁰ Section 277(2)(a) of the CPA.

⁷¹ *Ibid.*

on a proper sentence.⁷² Section 276(1)(b) of the CPA now also makes provision for a term of life long imprisonment, providing a valuable alternative to the death sentence.

Other important changes are the fact that the accused now has an automatic right of appeal⁷³ and no longer has to apply for leave to appeal as was previously the case. So too, s 279(1)(b)(ii) of the CPA provides that every death sentence must be reviewed by the State President. A novel approach has also been followed, in that the Appellate Division is no longer bound by the procedure followed in other appeal cases,⁷⁴ but that in the case of an appeal against the death sentence, it may set aside the death sentence and "impose such punishment as it considers to be proper if it is of the opinion that it would not itself have imposed the death sentence".⁷⁵ It may therefore replace the trial court's discretion with its own.

Furthermore, whereas the Appellate Division was previously empowered to replace trial court's punishment with an even more severe one (i.e., being able to replace a prison term even with the death sentence), s 322(6) of the CPA was amended by including the rider "excluding the sentence of death". Thus the Appellate Division may only confirm or set the death sentence aside.

On this point it is important to consider that s 101(5) of the new Constitution which expressly provides that "[t]he Appellate Division shall have no jurisdiction to adjudicate any matter within the jurisdiction of the Constitutional Court". From this, the logical conclusion is that the Appellate Division is - at least until the Constitutional Court has decided on the issue of the death sentence - no longer able to confirm death sentences, but only deal with them according to s 322(1) of

⁷² Under the "old" act, s 1 of the CPA defined "aggravating circumstances" as wielding a firearm or any other dangerous weapon and the infliction of serious bodily harm or the threat to do so by the offender or an accomplice on the occasion when the offence was committed whether before, during or after the commission of the offence. As the boundaries within which the courts could move had been statutorily laid down, it could hardly be said that the courts had a discretion as to what was aggravating and what was not. It was a question of fact. The courts could only exercise their discretion by deciding whether the aggravating circumstances were of such a nature that the crime should warrant the death sentence. As far as "extenuating circumstances" were concerned, these were limited to "circumstances...connected with or... relat[ing] to the conduct of the accused in the commission of the crime" (*R v Mfoni* 1935 OPD 191) and also those "facts associated with the crime which serve in the minds of reasonable men to diminish morally, albeit not legally, the degree of the prisoner's guilt" (*R v Biyana* 1938 EDL 310). Clearly these interpretations inhibited the courts from taking into account factors such as character, background or lack of previous convictions. In Olmesdahl's words, "it may well be that they were in fact good candidates for rehabilitation and might possibly not have been sentenced to death had the ambit of the court's enquiry...been wider in scope" (Olmesdahl MCJ "Predicting the death sentence" mimeographed paper presented at the Conference on Discretion in Criminal Justice held at the University of Natal 10-11 August 1981).

⁷³ Section 316A of the CPA.

⁷⁴ Section 322(1) of the CPA.

⁷⁵ Section 322(2A) of the CPA.

the CPA.⁷⁶

The reason for this is simply that until the Constitutional Court has decided on the issue of the death sentence, it will serve no purpose to confirm a sentence which may be found to be unconstitutional. The practical solution would therefore be to either deal with the sentence according to s 322(1) or to refer the case to the Constitutional Court for a final decision.⁷⁷

a) **Judicial Interpretation of the Criminal Procedure Act 51 of 1977**

Having dealt with the statutory prescriptions existing in South Africa, it is necessary to examine how the South African Supreme Court, which includes the Appellate Division, has interpreted and applied the "new" Criminal Procedure Act.⁷⁸

In *S v Masina*⁷⁹ the court points out that "factors"⁸⁰ has a much wider connotation than "circumstances" and as such it includes any relevant factors when deciding upon the proper sentence. It can therefore even include factors unrelated to the crime or to the moral blameworthiness of the accused,⁸¹ such as the youthfulness of the accused,⁸² his background⁸³ and even the fact that he was employed at the time of the offence.⁸⁴ Also, the fact that aggravating circumstances are no longer

⁷⁶ a) Allow the appeal; b) replace it with such punishment as ought to have been imposed by the trial court; or c) any other order that justice requires.

⁷⁷ For a more in depth discussion of these changes and ancillary as well as post appeal measures available, see Du Toit E; de Jager F; Paizes AS; Skeen A and van der Merwe S Commentary on the Criminal Procedure Act (Juta) 1991 at 28-10B to 28-16 and 31-1 to 31-28.

⁷⁸ See in this regard Angus L "How are we to treat the sentence of death since the Criminal Law Amendment Act 107 of 1990?" 1992 (1) SACJ 51-71.

⁷⁹ 1990 (4) SA 709 (A) at 713.

⁸⁰ At s 277(2)(a) of the CPA.

⁸¹ *R v Biyana supra*.

⁸² See *S v Lehnberg en 'n ander* 1975 (4) SA 553 (A) at 560-561; *S v Mzinyane and others* 1988 (2) SA 151 (A); *S v Cotton* 1992 (1) SACR 531 (A) and also Du Toit E *supra* at 28-14F for further references.

⁸³ *S v Tsankobeb* 1981 (4) SA 614 (A).

⁸⁴ *S v Ramba* 1990 (2) SACR 334 (A).

defined further indicates a wider sentencing discretion of the court.⁸⁵

"[W]ith due regard" to the presence or absence of aggravating or mitigating factors.⁸⁶ has been interpreted to mean "consideration in a degree appropriate to [the] demands of the particular case".⁸⁷ Thus, the presence or absence of mitigating and aggravating factors are not to be considered decisive⁸⁸ because even if aggravating factors, when considered on their own, outweigh the mitigating factors, there may still be other considerations which will be decisive.⁸⁹

In *S v Senonohi*⁹⁰ the court points out that moral reprehensibility is no longer the overriding factor but one which must be weighed up together with other factors which are relevant to all the purposes of punishment.⁹¹ Only after all these factors have been considered, may the court impose the death sentence. Furthermore, the court states that the death sentence should only be imposed if it is regarded as "the", not merely "a", proper sentence. Although attempting to avoid generalising when such a sentence will be the proper one, the court states that it must have been the legislator's intention (by scrapping the mandatory imposition of the death penalty) to limit it to only those cases of extreme seriousness.⁹²

In *S v Mdau*⁹³ the court states that merely because there is an absence of mitigating factors, this does not imply that the death sentence should be imposed. Conversely, the presence of mitigating factors does not mean that the death sentence should not be imposed. And where both mitigating and aggravating factors are present, these will have to be weighed against one another to determine whether the death sentence is the proper one. In so doing, regard must be given to the purpose of punishment, namely rehabilitation, deterrence, retribution and prevention. In considering the

⁸⁵ For an extensive list of what the courts have considered as mitigating and aggravating, see Du Toit E *supra* at 28-14F to 28-14M and Bekker PM "Die doodvonniss: Voor en na 27 Julie 1990" ("The death sentence: Before and after 27 July 1990") 1993 (6) SALJ 57-71 at 62-66.

⁸⁶ As per s 277(2)(b) of the CPA as amended.

⁸⁷ *S v Nkwanyana* 1990 (4) SA 735 (A) at 745B-C.

⁸⁸ *Op cit* 745A-B.

⁸⁹ *S v Ntuli* 1991 (1) SACR 137 (A) at 142f-h and *S v Cele* 1991 (1) SACR 627 at 632i-j.

⁹⁰ 1990 (4) SA 727 (A).

⁹¹ At 734E-F.

⁹² At 734H-I.

⁹³ 1990 (4) SA 735 (A) at 736F-I.

death sentence, one must also look at whether these objectives cannot be achieved by a sentence other than the death sentence.

If they can, then the death sentence is not the proper one - this is because "the" proper sentence must be interpreted to mean the "only" proper sentence. An especially important issue to be considered is also that of the deterrent effect of the death sentence. As statistical attempts to prove (or disprove) the deterrence effect of the death sentence have been inconclusive, the court must also consider whether a prison sentence would be regarded as an adequate deterrent to others.

If it cannot be said that the death sentence has a greater deterrence effect than say, life long imprisonment, then its propriety as a sentence should be seriously questioned.

As such the court states that life long imprisonment must be considered an alternative to the death sentence when the objective of the court is the protection of the community.⁹⁴ It follows then that the death sentence must be restricted to exceptionally serious cases where it is "imperatively called for".⁹⁵

It is therefore not merely to be used as an instrument to "rid society of unwelcome elements" or to set examples. As the court states in *S v Mazibela*, "Where the imposition of an exemplary sentence would result in a death sentence, whereas a lesser sentence would be the proper sentence for the particular offender, the injustice would never justify the imposition of an exemplary sentence".⁹⁶

Finally, in the *Nkwanyana* case,⁹⁷ the court states that the *onus* of proof is on the state to prove beyond a reasonable doubt the existence of aggravating factors. Furthermore, unless the evidence itself shows mitigating factors to have been present, the defence will merely have to raise mitigating factors - provided of course that such factors have been "genuinely" raised, i.e., based on a proper foundation.⁹⁸ Where this is done, the state will then have to negative beyond a reasonable doubt, the existence of any such factors.⁹⁹ Thus the state will have a heavier burden than the defence.

⁹⁴ *Mdau supra* at 177B-C.

⁹⁵ *Nkwanyana supra* at 745F-G.

⁹⁶ 1991 (2) SACR 129 at 134f-g.

⁹⁷ *Supra* at 743F-744E.

⁹⁸ *Du Toit E supra* at 28-11.

⁹⁹ *Ibid.*

b) Comparing Current Procedure with International Standards

If one could compare all of the above to a recipe, the most important ingredient would be, as Justice McIntyre stated, that a sentence may not be imposed arbitrarily, i.e., without ascertained or ascertainable standards. What then are these standards and how does South Africa compare? By way of summary, the following can be said in favour of the South African procedure:

Firstly, the issue of mitigation and aggravation. In the United States of America the death sentence may only be imposed where the requirement of the presence of statutorily prescribed aggravating factors is met. In South Africa, although the CPA does not require aggravating factors, the courts require that the death sentence be limited only to the most serious of cases. That this is indeed the case can be confirmed by looking at the following statistics:¹⁰⁰ Between 27 July 1990 and 25 May 1994, the death sentence has been imposed 387 times. Over the same period however, the death sentence has also been reversed on 220 occasions. That leaves one with quite a high reversal percentage of 56,7%. When studying the numerous criminal cases which have been decided since 27 July 1990, one will notice that great reliance is placed on the presence of aggravating factors. Secondly and in conforming with the ICCPR,¹⁰¹ the South African Supreme Court has on numerous occasion uttered the expression that the death sentence should be limited to the most serious of crimes. Thirdly, the South African death sentence also meets the requirements as laid down in India, that the death sentence may not be carried out in public.

If the positivistic approach of *Chabalala* is followed, one could perhaps even go so far as to say that because South Africa has a new Constitution which does not expressly revoke the death sentence, it tacitly allows it and is thus, without more, constitutional. The offences for which the death sentence may be imposed in South Africa also greatly correlate with those in other countries where the death sentence has been allowed. Also the method of execution is no more cruel and unusual than in other countries, for it cannot be said that one method is more "cruel and unusual" than another, where both methods are equally efficient and painless, if properly executed.

Furthermore, the *onus* is on the state to disprove the existence of mitigating factors, thereby substantially increasing its burden of proof. Finally, South African procedure also allows for an automatic right of appeal and statutorily requires presidential review in every case.

¹⁰⁰ These statistics were provided by the Department of Justice on 26 May 1994.

¹⁰¹ As at note 56 *supra*.

THE FUTURE OF THE DEATH SENTENCE UNDER A NEW CONSTITUTION

Prima facie, South African procedure seems to meet the standards set on an international scale. However, as already stated,¹⁰² the above is only an indication of the procedure as currently applied. The South African Supreme Court has not yet had to interpret any of the standards according to a Constitution which entrenches a chapter on fundamental rights. There are, therefore, some issues of special import which due to their uniqueness, pose more of a challenge than any other, to the constitutionality of the death sentence in South Africa.

These issues are the following:

a) **Equal Justice**

Section 8(1) of the new Constitution provides that "[e]very person shall have the right to equality before the law and to equal protection of the law" and s 8(2) provides that "[n]o person shall be unfairly discriminated against, directly or indirectly...on one or more of the following grounds in particular: race,...ethnic or social origin, colour,...[or] culture". It is submitted that for the reasons postulated below, this is the most important issue upon which the Constitutional Court will have to make its decision.

Once again the issue of sentencing discretion must be raised. Due to its extreme severity, the death sentence can only be applied according to the requirement of "equal justice" if those standards regulating sentencing discretion are such, that firstly, the possibility of human error is absolutely nil and secondly that if the death sentence is imposed, it must be certain that such would have been the case, no matter which judge had presided at the trial. Human error is not limited to the case of an innocent person being executed. It must also be understood in the sense that the judge may make a mistake as to whether the accused truly "deserves" the death sentence or not - after all, what is to be understood as a "most serious case" is a relative concept subject to individual perception.

What the Constitutional Court must therefore ask itself, is whether the death sentence can ever be applied even handedly and if not, it should be abolished as being unconstitutional.

On several occasions the United States Supreme Court has held that death sentence proceedings must conform to a higher standard than other criminal proceedings "[because] the penalty of death is qualitatively different from a sentence of imprisonment, however long,...there is a corresponding difference in the need for reliability in the determination that death is the

¹⁰² At note 61 *supra*.

appropriate punishment in a specific case"¹⁰³ and that "[w]hen a defendant's life is at stake, the court has been particularly sensitive to ensure that every safeguard is observed".¹⁰⁴

So too the South African legislature has attempted to provide a "better equipped" death sentence procedure. Yet, there is one problem which will always exist, namely sentencing discrepancies.

In the *Chabalala* case¹⁰⁵ Justice Theal Stewart states that "I personally have never seen the necessity to exclude evidence relating to the lifestyle of the accused..."¹⁰⁶ The word "personally" is exactly the flaw which makes the even handed application of the death sentence impossible. Every judge has a different perspective, a different outlook on life. This makes it impossible for any system, no matter the amount of safeguards, to ensure that the death sentence is applied even handedly, i.e., on an objective and equal basis.

Discrepancies will always exist in a penal system - one judge may impose a five year sentence, whereas another may have imposed an eight or even a ten year sentence. Such discrepancies are tolerable however, as there is always the possibility of "administrative adjustments or corrections at a later stage".¹⁰⁷ If a person has been wrongly convicted, he will in all likelihood at least receive some sort of compensation from the state. At the same time, however, such discrepancies may also lead to one judge imposing the death sentence, whereas another may only have imposed a twenty year sentence.

With the death sentence, once the execution has taken place, "adjustments" or "corrections" are no longer possible. No amount of compensation can undo the damage done. Death is absolute and irreversible and under such conditions, lack of uniformity cannot be tolerated.

The death sentence is unconstitutional as long as it is subjected to arbitrary factors such as individual dispositions of trial judges. In the *Chabalala* case, Justice Theal Stewart boasted that "it [cannot] be suggested that any death sentence...had been imposed in Bophuthatswana on an arbitrary, discriminatory...or like basis".¹⁰⁸ Studies have however shown that

¹⁰³ *Woodson v North Carolina supra* at 305.

¹⁰⁴ *Powell v Alabama* 287 US 45 (1976) at 71; see also Hintze DH "The cost of retaining the death penalty: Some lessons from the American experience" 1994 *SALJ* 55-64 at 56.

¹⁰⁵ *Supra* at 634C.

¹⁰⁶ My italics.

¹⁰⁷ Van Rooyen JH "Towards a new South Africa without the death sentence" *supra* at 33.

¹⁰⁸ At 630B.

arbitrary factors do play a large role in deciding upon which defendants" will live and which will die".¹⁰⁹ Even s 277(2)(b) of the CPA allows for arbitrariness, stating that "[t]he death sentence shall be imposed - ...b) if the presiding judge or court, ..., with due regard to the finding [of mitigating and aggravating factors], is *satisfied* that the sentence of death is the proper sentence".¹¹⁰

In *S V Dlamini*¹¹¹ the court held that in deciding whether the death sentence is the proper sentence, aggravating and mitigating factors must be weighed against one another. As there is no guarantee that every judge will consider the same factors as equally mitigating or aggravating, however, different judges will attach different "weights" to such factors. As there can therefore never be consistency with regard to what is considered mitigating and aggravating, these can be termed infinitives - but how does one "weigh" infinitives?¹¹²

One can therefore only agree with Justice Curlewis when he states, "Only an ignoramus, or a person with little regard for the truth would deny this",¹¹³ i.e., that arbitrariness does play a role in the imposition of the death sentence and that ultimately the decision rests on a moral judgement of the presiding judge.

Of special importance to the Constitutional Court, is s 8(4) of the new Constitution which states that "*Prima facie* proof of discrimination on any grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established". When looking at the studies that have been made¹¹⁴ there certainly is, *prima facie* evidence of discrimination. Although South Africa is now in a new era, there is no "magic wand" which will suddenly eradicate the existence of so called "hanging judges"¹¹⁵ - either now or in the future. There will always be some judges more prone

¹⁰⁹ Hintze D *supra* at 59. See also the author's references at note 23.

¹¹⁰ My italics.

¹¹¹ 1991 (1) SACR 128 (A).

¹¹² See also Loubser MM "Versagende omstandighede by moord: Die gradering van skuld" ("Mitigating circumstances in the case of murder: The gradation of guilt") 1977 THRHR 333-342.

¹¹³ In a letter dated 15 April 1991, "Correspondence" 1991 7 SAJHR 229 at 229; see also Van Rooyen JH "Toward a new South Africa without the death sentence" *supra* at 31-37.

¹¹⁴ To mention only a few, Angus L and Grant E "Sentencing in capital cases in the Transvaal Provincial Division and Witwatersrand Local Division 1987-1989" 1991 7 SAJHR 50; Van Zyl Smit D "Judicial discretion and the sentence of death for murder" 1982 SALJ 87-98 and Van Niekerk B "Hanged by the neck until you are dead: Some thoughts on the application of the death penalty in South Africa" (part 1) 1969 SALJ 457-475.

¹¹⁵ As referred to by Justice Curlewis *supra*

than others to impose the death sentence and as long as the imposition is determined by such "chance", there will be *prima facie* proof of discrimination.

Further evidence that the death sentence is imposed arbitrarily is the fact that since 27 July 1990, 56,7% of appeals against the death sentence have been successful. At the very least this indicates an enormous difference of "opinion" (to use the language of s 322(2A)(b) of the CPA) between trial and appellate judges. Arbitrariness is therefore not limited to the trial stage but is also experienced on appeal as the decision is left to the "opinion" of the appellate judges. Finally, when the case is referred to the State President under s 325 of the CPA, he too has to exercise his discretion. Once again the possibility of human error and fallibility is encountered. It is therefore submitted that there is ample *prima facie* evidence, not only on grounds of discrimination but also due to differing personal dispositions, for a Constitutional Court to declare the death sentence unconstitutional.¹¹⁶

b) Legal Representation

Another issue which the Constitutional Court will have to consider is that of legal representation. Section 25(1)(c) of the new Constitution provides that every person who is detained, including every sentenced prisoner, shall have the right "to consult with a legal practitioner of his or her choice, to be informed of this right promptly and, where substantial injustice would otherwise result, to be provided with the services of a legal practitioner by the state".

Where the accused chooses his own counsel,¹¹⁷ the problem most often encountered is that he is unable to afford it. Although South Africa has a Legal Aid Board which will pay for such counsel, the accused has to pass a "means test". This test requires that the accused only earns a certain maximum per month.¹¹⁸ If the accused thus earns "too much", the Legal Aid Board does not pay. In such a case the court will appoint *pro Deo* counsel. The criticism which has often been levelled against this system is that it is normally young and inexperienced advocates who are appointed. The recent changes to the CPA have highlighted the extensive scope of evidence that might be led in mitigation.¹¹⁹ The preparation and leading

¹¹⁶ See also Goldfarb A "The dilemma of discretion: A US perspective on the proposal for reform of the South African death penalty for murder" 1990 SAJHR 266-288 at 272-275.

¹¹⁷ This term is used to denote both an attorney and an advocate.

¹¹⁸ A single person may not earn more than R500-00 per month, or if married, not more than R1000-00 joint income (after certain necessary deductions). An additional amount of R150-00 per child is also allowed.

¹¹⁹ See Mihalik J "Articled clerks, legal aid and capital offenders" 1991 SALJ 718-729 at 725.

of such evidence requires experienced and skilled counsel as well as substantial funds - especially when expert witnesses have to be called in.¹²⁰

Recently a Public Defender scheme was introduced to South Africa, where defenders are employed by the state and remunerated on the same basis as prosecutors.¹²¹ However, the scheme is still a far cry from being implemented country wide and, considering the tens of thousands of capital offenses committed annually,¹²² the workload is such that time simply does not provide sufficient opportunity for counsel to prepare a proper defence.¹²³ Thus, the realities of the practical implications are such that, as far as capital offenders are concerned, "substantial injustice" will still occur, notwithstanding their constitutional right to legal representation.

OTHER ISSUES OF CONSTITUTIONAL CONCERN

Aside from these issues, there are still the following:

- a) Section 25(3)(j) of the new Constitution provides that every accused person shall have the right to a fair trial, which shall include the right "to be sentenced within a reasonable time after conviction". In South Africa the last execution took place in November 1989. That means that some prisoners have been on death row for four and a half years, i.e., 54 months. If one is to apply the test as was laid down in the *Catholic Commission*¹²⁴ case one must agree that this is a period which may very well be extensive enough to make the death sentence unconstitutional. However, not all prisoners have been on death row for such an extended period. Some have only been on death row for a few months. It would be a severe injustice, however, if any "cut off line" is to be determined. It would mean that merely because prisoner "A" committed a crime just two years ago, the

¹²⁰ *Pro Deo* counsel receive R345-00 per accused per day and R145-00 per consultation to a maximum of 10 consultations per case - Senior counsel are otherwise able to earn that within an hour or two! It is therefore hardly surprising that advocates are hesitant to accept such appointments. Furthermore, the accused's defence is severely hampered by the fact that because counsel is payed so little, it is unlikely that they will spend much time on preparing for the trial.

¹²¹ See Jordaan RA "Die openbare verdedigingstelsel as vorm van regshulp" (The public defender system as form of legal aid") 1991 THRHR 685, with regard to the problems which legal representation has presented in the past and the advantages which a Public Defender Scheme has. See also McQuoid Mason D "Legal representation and the courts" 1992 SAJHR Yearbook 141-165.

¹²² See in this regard van Rooyen JH "Toward a new South Africa without the death sentence" *supra* at 38.

¹²³ The scheme is currently limited to the Witwatersrand due to limited funding.

¹²⁴ *Supra*

death sentence would be considered constitutional, whereas if he had committed it three years ago (for example), it would be unconstitutional. If the death sentence is to be maintained, the only fair solution would be either to commute the sentence in all the cases, or non.

- b) Section 33(1)(a) and (b) of the new Constitution deals with the issue of limitation of rights. The section provides that the rights entrenched in the chapter of Fundamental Rights may be limited by law of general application, provided such limitation "a) shall be permissible only to the extent that it is - i) reasonable; and ii) justifiable in an open and democratic society based on freedom and equality; and b) shall not negate the essential content of the right in question,..."

Whether the death sentence is "reasonable" will depend greatly on the issue of proportionality. Although the question of *per se* constitutionality may seem to be the overriding factor, the court must not lose sight of the fact that it must consider the death sentence in its entirety and not limit it to *per se* constitutionality.

The death sentence can only be "justifiable" if it can be shown that no other sentence would have been the proper one. Here issues such as deterrence, retribution, rehabilitation and the option of life long imprisonment must be considered.

Furthermore it may only be imposed if such limitation still respects values such as freedom and equality. Especially here, the issues of "equal justice" and legal representation will have to be considered. As long as the right to life cannot be limited by the death sentence on an equal, that is, even handed basis, such limitation cannot be regarded as reasonable and hence it certainly will "negate the essential content of the right in question".

- c) Finally, there is the issue of interpretation. In the *Chabalala* case,¹²⁵ Justice Theal Stewart adopted an entirely positivistic approach to his interpretation of the Bophuthatswana Constitution and the question of whether the "old" CPA was to be regarded as constitutional or not. As the Constitution incorporated the CPA¹²⁶ the judge regarded it to be constitutional¹²⁷ and as a result, the learned judge, even though acknowledging the possibility of uneven application elsewhere, refused to take into account any such evidence. He was satisfied that as there was no evidence of this being the case in Bophuthatswana, the death sentence was not unconstitutional.¹²⁸

¹²⁵ *Supra*

¹²⁶ As it was prior to amendment.

¹²⁷ At 631D-E.

¹²⁸ At 630A.

Fortunately s 35 of the new South African Constitution expressly provides that "[i]n interpreting the provisions of this Chapter [of fundamental rights] a court of law shall..., where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law". As a result, the Constitutional Court will not be bound to a positivistic approach but be truly able to have "due regard to the spirit, purport and objects of this Chapter".¹²⁹

CONCLUSION

South Africa has come a long way to where it stands today and its past is riddled with strife and violence. Political discord has resulted in countless deaths and a reinstatement of the death sentence will surely do no more than to add to the misery which its people have had to endure for so long. At present there are some 450 prisoners on death row¹³⁰ and their last hopes for a continued existence lies solely in the hands of a Constitutional Court. One important factor which the Constitutional Court must keep in mind is that in the past, the death sentence has been used as an object of political oppression and there is no guarantee that this practice will not continue. Due to democracy finally having seen the light, South Africa will soon have a judiciary which is truly representative of its people - and just as diverse in opinion. Thus it is more likely than ever that discrepancies which already exist in the imposition of the death sentence will only be enhanced.

Before South Africa can therefore be considered a country which truly respects the right to life and equality before the law, the first step it will have to take under a new Constitution will be the unconditional abolition of the death sentence.

¹²⁹ Section 35(3) of the new Constitution.

¹³⁰ Since 01 January 1992 until 25 May 1994 there have been 166 confirmed death sentences and according to an Editorial "The death penalty once again" April 1992 Consultus at 6, there were 295 prisoners on death row as at 31 December 1991.

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