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SOCIETY FOR THE ABOLITION OF THE DEATH PENALTY IN SOUTH AFRICA

JOHANNESBURG LOCAL CHAPTER

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Chairperson

This Appeal is a presentation of the case for the abolition of capital punishment.

The submission of the Appeal to CODESA is made out of a conviction that the case for abolition necessitates the immediate enshrinement of Abolition in a bill of human rights.

As CODESA is an institution for the creation of an equitable future, WITS SADPSA trusts that the injustices of capital punishment will not be neglected.

Yours sincerely

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APPEAL FOR THE ABOLITION OF CAPITAL PUNISHMENT.

INTRODUCTION

The creation of an equitable future necessitates an abolition of the barbarism and injustice of our past. It is the conviction of the Society for the Abolition of the Death Penalty in South Africa of the University of the Witwatersrand (WITS SADPSA) that capital punishment is an iniquity which cannot be reconciled with civilised notions of morality, human rights and justice. The abolition of the death penalty is fundamental to a human rights democracy.

The state must assume its role as instructor. The official premeditated killing of killers erroneously suggests that killing is a solution. Individuals cannot be expected to respect that the right to kill is reserved for the state for those it considers to have offended beyond redemption. The retention of capital punishment sanctions severe and irrevocable conduct provided it be considered warranted.

An acknowledgement of the faults of capital punishment has been displayed by the state through the legislation of the Criminal Law Amendment Act 107 of 1990: the institution of the Booysen's Commission into psychopathy and long term imprisonment: and the Law Commission's evaluation of existing forms of punishment.

This concern is welcome. However, it is asserted that the implicit injustice of capital punishment warrants immediate abolition and that no extent of reform can alter its inherent nature. Capital punishment is prone to judicial fallibility and political abuse. It is a violation of the human rights to equality before the law due its arbitrariness and of the human right to protection against cruel and inhuman punishment. Further, it does not satisfy the objectives of punishment.

It is the duty of the state to reflect society's responsibility to all humans. The state cannot embrace the best and kill the worst. The abolition of capital punishment will declare society's intolerance of killing. It is therefore vital to an equitable future.

JUDICIAL FALLIBILITY.

The judiciary is comprised of humans who are plagued by the undeniable fallibility of being only human. It must therefore be accepted that, due to judicial fallibility, innocent and not so guilty are executed.

The provision for extensive safeguards (as does The Criminal Law Amendment Act 107 of 1990) cannot dehumanize the individuals composing the judiciary, but can only minimize the effects of their human flaw.

Consequently the innocent and not so guilty will constitute only a minority of people executed, though a significant proportion.

The retention of capital punishment necessarily implies that this proportion is judicially regarded as negligible and therefore expendable. The implication is that no person's right to life is secure, as even innocence may not save one from execution.

"It is a repulsive thought that even one person should be wrongly executed in the name of South African society, through the shortcomings of a system..."[1]

Regard for people as expendable is devoid of human compassion and social consciousness and is egocentric. Such regard is irrational and irreconcilable with aspirations for justice.

It violates the cardinal principle that people are innocent until proven guilty; an implication of which is the preferred liberation of guilty rather than the condemnation of innocent.

Further, the judiciary cannot adopt a standard of proof proportionate to the severe consequences of capital punishment.

The necessary escalation of the standard from a balance of probabilities in civil cases to beyond a reasonable doubt in criminal cases, reflects the relative escalation of the effect of conviction. The standard of proof, however, does not escalate in relation to capital cases.

Of a sample of 40 death row prisoners, 10% were convicted on the testimony of a single witness, 5% on circumstantial evidence.[2]

Cognisance must be taken of the drastic consequences of a capital conviction and the requisite escalation in standard of proof introduced. In respect of these consequences, the only appropriate standard would be beyond all doubt. Such standard is unattainable.

Retentionists might respond that multitudes of innocent lives are inevitably lost in the pursuit of daily life (in mines and on roads for example), but that this risk must be tolerated for the sake of living, and therefore, that the risk of the inevitable loss of innocent life due to judicial fallibility must be tolerated. Similarly that error must be accepted as inevitable at all levels of our legal system.

The former response is flagrantly inapt as it implies the tolerance of loss of innocent life by an institution specifically directed at the protection thereof.

The latter response is objectionable in its lack of distinction between life and death which imports a similar lack of value for life. The severity and irrevocability of the deprivation of life elevates the risk of error to the intolerable.

That the judiciary remains sufficiently audacious to condemn people to death while conscious of its fallibility. is indicative of an acceptance of the most severe injustice as a constituent of our law.

These sacrificial humans are as much casualties of an insensitive capital judiciary as crime victims are casualties of a deranged society. Both are victims of iniquity. the crucial difference being that the former expires due to a premeditated judicial mistake. which can and must be stopped.

ARBITRARINESS.

Arbitrariness is a symptom of capital punishment which impedes the equality of people before the law.

DISCRIMINATION.

Amnesty International observed:

"Death sentences [are] imposed disproportionately on the black population by an almost entirely white judiciary."[3]

Statistics testify: of the 1070 people hanged between 1980 and 1988. 97% were black[4]: from June 1982 till June 1983 47% of the 81 blacks convicted of murdering whites were executed. while only 2% of the 52 whites convicted of murdering whites were executed[5]: for the rape (without murder) of white women. 90 blacks have been executed. while for the rape of a black woman. not one white man has been executed.[6]

It is naive to attribute the disparity to a disproportion of crimes committed by the respective races.

It is impossible that South Africa's racist heritage has not impressed itself upon the judgement of the judiciary. The objectivity of the judiciary is impaired.

JUDICIAL PREDISPOSITIONS.

The Criminal Law Amendment Act 107 of 1990 introduced the discretionary imposition of the death penalty.

It is inevitable that a judge's personal attitude toward capital punishment must intrude upon his or her objectivity in deciding whether a sentence of death is proper.

"[O]ne of the vital contributing factors to [the large disparities between judges in relation to various aspects of the use of capital punishment.] is the personal disposition towards capital punishment of the individual judges.
"[A]ttitudes will play a role in judicial decision-making and result in differences in sentencing.
"[T]o shift the discretion ... to the Appellate Division ... does not eliminate the impact of individual attitudes on the decision to send a person to the gallows."[7]

It is intolerable that a person's life be reduced to dependence upon chance of being confronted by a `retentionist' or `abolitionist' judge.

REVIEW PANEL.

Section 19 of the Criminal Law Amendment Act 107 of 1990 (enacted on 27 July 1990) provided for the reconsideration, by a review panel, of sentences of those sentenced to death prior to July 1990 .

The review panel did not, however, escape the implications of sentencing in terms of the law prior to the enactment of the Amendment Act. The consequence is that people may be executed due only to their bad luck of being sentenced at that time. [See appendix D.]

INTERPRETERS.

The dependence of the majority of the accused upon interpreters for communication with the court is prejudicial. The inevitable distortion of discourse is illustrated in the appeal of Thembile Lubelwana which was won through a reinterpretation of the word 'we'.

ACCESS TO COMPETENT COUNSEL.

The majority of death row prisoners emerged from deprived environments. The pro deo council appointed for those who cannot afford to hire their own, are commonly of the most inexperienced and no attorney is appointed for briefing.

Scharlette Holdman, director of Florida's Clearinghouse on Criminal Justice remarks:

"Every person sentenced to die comes from a case fraught with errors. If you're adequately represented you don't get death. It's that simple."[8]

Capital punishment, consequently, inflicts death through exploiting the poverty of the accused as competent council is reserved for the affluent.

DETERMINATION OF CAPITAL OFFENCES.

The distinction between which crimes are sufficiently heinous to warrant a death sentence is itself arbitrary. Why is rape a capital offence, but not torture? Why child-stealing, but not child-molestation? Which order of depravity merits death? There is only an arbitrary distinction between wicked and evil.

In conclusion.in 1989 a proportion of one out of a thousand capital offenders were executed.[9]It is submitted that equality is not attainable through a drastic increase in executions as it is impossible that all such offenders could be sentenced to death, convicted, or even arrested. Further, an increase in executions would result in a decrease in attention paid to avoiding erroneous executions.

An increase in the rate of executions would require an increase in the rate of trial and sentence and a compromise of safeguards due to the pressure of time. A drastic increase in executions would therefore not provide for equality but rather for more errors.

The only prospect of equality before the law, in respect of capital punishment, is abolition.

POLITICAL.

Capital punishment is regarded as a notorious instrument of political suppression.

"Radically different political views make one group's `terrorist' another's `freedom-fighter'. Under these circumstances execution only increases political tensions (for example, the cases of the Sharpeville Six, Upington 14, Barend Strydom, etc.)."[10]

The ANC's proposed bill of rights reflects this concern:

"Capital punishment is abolished and no further executions shall take place."[11]

The recent commutation of death sentences of political prisoners is indicative of a recognition of their motivation and plight. The lives of these prisoners have thus been rescued by an

altered political attitude. Such dependence of life upon political attitude departs from the doctrine of separation of power. The capacity of the state to use capital punishment as a political instrument deprives the judiciary of its independence.

The necessity for the abolition of capital punishment due to its political and discriminatory propensity, is not necessarily in order just to prevent the state at present, but rather to preclude any government from such discrimination or political assertion through the use of this punishment.

THEORIES OF PUNISHMENT.

The objectives of capital punishment are: retribution: deterrence: reform: and prevention. If capital punishment satisfies none of the above objectives beyond other punishment, then its unjust implications render it futile.

RETRIBUTION.

Retribution demands the imposition of an evil upon an offender, equivalent to the offence, in order that justice may be restored. It represents a notion of justice too often confused with the lex talionis which is deceiving in its attractive

simplicity. Retribution only requires punishment of equal gravity to the crime.[12] Our judiciary has obviously recognised the obsolescence of talion law and has dispensed with the retaliatory vengeance which would culminate in arsonists being burnt to death, raping rapists, stealing from thieves and other eye-for-an-eye notions of punishment. The judiciary must, therefore, dispense with the equally barbaric murdering of murderers.

The right of a crime victim or those related, to justice cannot be denied, but is limited to the punishment of the offender. It does not justify the infliction of remorse, equal to that of those related to the victim, upon those related to the offender, who are not responsible for the offender's conduct. Capital punishment achieves such infliction and is therefore not justified.

Capital punishment is incongruous with the penal objective of retribution.

DETERRENCE.

Deterrence is the prevention of crime through a psychological dissuasion of people realising the dire consequences of the commission of a crime.

A justification of capital punishment relies on a philosophy that a person will be deterred if the expected severity of punishment will exceed the expected benefit of commission. Capital punishment therefore divests crime of benefit.

This philosophy is coherent, although defective.

New York Law Professor Anthony Amsterdam explains:

"People who ask themselves those questions - `Am I scared of the death penalty? Would I not be deterred?' - and think rationally,do not commit murder for many, many reasons other than the death penalty."[13]

WITS SADPSA asserts that the realisation necessary for deterrence is implausible at the time of commission.

Also, in the event of premeditation, the prospective criminal reconciles the fear of death with a belief that, due to prudent strategy, the risk of being caught is negligible.

Scientific research does not corroborate the deterrent effect of capital punishment:

"[N]o clear evidence that the death penalty has a deterrent effect has emerged from the many studies made ..."[14]

- Amnesty International

"[S]cientific research shows that there is no convincing evidence of the deterrent effect of the death penalty."[15]

- Society for the Abolition of the Death Penalty

"No studies yet exist that provide unchallenged support for the narrow hypothesis of deterrence."[16]

- John P. Conrad

Due to the severity and irrevocability of capital punishment, it is necessary that those advocating its retention prove its utility. With regard to deterrence, this onus has not been discharged.

REFORM.

Reform or rehabilitation cannot be satisfied by a death sentence as it is impossible to teach a corpse a lesson or indeed for any supposed reform to be of any worth.

PREVENTION.

The protection of society is dependant upon the removal, from

society, of people presenting a threat. It is a truth that certain ex-convicts repeat offences and it is a truth that the executed never repeat offences. However, if the judiciary is incompetent to distinguish on the basis of rehabilitation, who remains a threat to society and who not, then it is obviously incompetent to distinguish between who should live and who should die.

In conclusion, retribution does not require capital punishment. It cannot be proved that capital punishment deters beyond other punishment. Reform is not satisfied. The protection of society does not justify the deplorable implications of the death penalty. Capital punishment, therefore, satisfies none of the objectives of punishment, and is consequently penologically defunct.

The Criminal Law Amendment Act 107 of 1990 requires that the sentence of death shall be imposed if the presiding judge or court is satisfied that the sentence of death is the proper sentence.

Professor Dennis Davis, National Director of the Society for the Abolition of the Death Penalty, comments:

"[I]f one examines the suitability of punishment from a criminological and penological point of view, the death sentence can never be justified as being a proper sentence."[17]

THE VIABILITY OF LIFE IMPRISONMENT AS OPPOSED TO EXECUTION.

The alternative to capital punishment is life imprisonment without the prospect of parole.[18] The most notable advantages of such a substitution would be that: firstly, punishment would no longer be brutally severe where previously an offender would be physically violated; secondly, it would remain revocable for the remedy of erroneous convictions or sentences.

It is argued that the expense of life imprisonment exceeds that of execution and as those convicted of heinous crimes have forfeited their claim upon society, they should be endured no longer.

This argument is contemptible. Justice has no price. That financial considerations be associated with justice is a reflection of the base materialism which motivates crimes such as fraud, theft, and robbery. Such association demeans society of the very values that are worth protecting.

If, however, this argument were entertained, it is doubtful that it is at all founded.

A study of the state of New York established the cost of an average capital case and first stage of appeals at $1.8 million; twice that of life imprisonment.[19]

It is conceded that this statistic applies to the United States, however it is submitted that it is relevant to South Africa. The expense of execution in the United States is attributable to the protracted appeal system by which their courts attempt to avert erroneous executions. It is asserted that if in South Africa the expense of life imprisonment exceeds that of execution, it can only be due to less emphasis upon avoiding erroneous executions than in the United States.

The proportion of the total prison population that those executed or awaiting execution would constitute if a sentence of life imprisonment had been imposed instead of a death sentence would, especially considering the disadvantages of capital punishment, be negligible.

A calculation determines, if 1911 is assumed as the date upon which life sentences were first imposed, this proportion to be 4.5% [See appendix A].

This calculation grossly exaggerates the proportion for two reasons:

1) It is improbable that all prisoners sentenced to life would have survived till 1992.
2) Some life sentences might have been overturned on appeal

Further, as life sentences should be reserved for those who would receive death sentences, which are due to the Criminal Law Amendment Act 107 of 1990 not as easily imposed as before, the proportion should be significantly decreased.

In conclusion, even if this argument was not contemptible and even if the expense of life imprisonment exceeds that of execution, a question would remain: is it worth maintaining the institution of capital punishment for such a negligible proportion (of less than 4.5% of the total prison population) who are commonly, due to arbitrariness and judicial fallibility, simply unlucky? Surely not.

CRUEL AND INHUMAN PUNISHMENT.

The death penalty constitutes "cruel and inhuman punishment" within the meaning of international and constitutional instruments of human rights [See appendix B&C].

The prolonged time from sentence to execution is indispensable for the operation of safeguards. Death row prisoners are tormented during this interval as they become intensely preoccupied with their imminent deaths.

Amnesty International declares:

"The threat of execution is one of the most terrifying forms of torture ..."[20]

The insomnia suffered by death row prisoners due to anxiety and the constant illumination of their cells[21] is itself torture in the form of sleep deprivation.

Prisoners are also distressed by the plight of their families. They are aware of the emotional and financial strain placed upon their loved ones.[22]The friendships which are developed between prisoners as an essential to existence result, upon the execution of a friend, in the anguish of loss and separation. Further, guilt and helplessness emerge due to a sense of inability to prevent the friend's death, or to comfort his or her last moments. Although it is indicative of concern and care, it is ultimately self-defeating as it reduces self-confidence and self-integrity.[23]Fantasies of suicide are contemplated when emotional pain becomes to much to bear, probably more than suicides occur, due to prevention by strict prison security.[24]No explanation need be made for the irony in the

attempt which was made to save the life of Frikkie Muller[25] whose suicide robbed the state of killing him the next day.

The psychological torture suffered by death row inmates is evident in an analysis of the scars carried by ex-inmates. Former death row prisoners are prone to Post Traumatic Stress Disorder (PTSD): "An anxiety disorder resulting from experience with a catastrophic event beyond the normal range of human suffering, and characterised by (A) numbness to the world, (B) reliving of the trauma in dreams and memories, and (C) symptoms of anxiety."[26]

Common symptoms of PTSD suffered by ex-Death Row inmates include:[27]

A. NUMBNESS

1) efforts to avoid thoughts or activities associated with or that arouse recollections of Death Row;
2) inability to recall an important aspect of the trauma;
3) markedly diminished interest in significant activities, for example, getting a job or reading the newspaper;
4) feeling of detachment and estrangement from others;
5) restricted range of affect, for example, distinct disinterest in heterosexual relationships for fear of rejection;

6) sense of foreshortened future. for example. does not expect to have a career. or a long life:

B. RELIVING OF THE TRAUMA

1) frequent intrusive distressing recollections of Death Row:

2) recurrent nightmares of Death Row:

3) sudden feelings of being back on Death Row:

4) distress at exposure to symbols of Death Row. for example. blood of raw meat conjuring up images of the blooded hoods of the executed:

C. ANXIETY

1) chronic sleep disturbances:

2) irritability:

3) difficulty concentrating:

4) hypervigilance:

5) exaggerated startle response:

6) physiological reactivity upon exposure to symbols of Death Row. for example. difficulty eating. due to a stomach ache reinvoking meal time on Death Row.

"The extreme trauma of Death Row requires immense professional support and assistance ..."(Vogelman and Segal)[28]

According to the Diagnostic and Statistical Manual of Mental Disorders torture produces PTSD.[29] It is asserted that the "extreme trauma" which induces PTSD as described above, can only be regarded psychological torture.

It is, therefore, the submission of WITS SADPSA that capital punishment is torture and that it is a violation of the human right to protection against cruel and inhuman punishment.

MAJORITARIANISM.

Retentionists argue that the majority of South African's demand that offenders of heinous crimes be severely punished and that the majority endorse state sanctioned killing of such offenders.

It is submitted that, if the majority do demand capital punishment, it could only be due to an ignorance of the unjust implications of the death penalty (as described in this appeal). Further, with respect to the authority of a majority, justice is not necessarily compatible with the will of such majority, and in this instance, the iniquity of capital punishment makes it quite incompatible.

This appeal is not for autocracy. It is for the realisation of the case for abolition and the subsequent enshrinement of abolition in a bill of human rights by which every person's right to justice would be secured.

Amnesty International declares:

"[Capital punishment] is a violation of fundamental human rights."[30]

Abolition is therefore as vital to a bill of human rights as is such bill to an equitable future.

CONCLUSION.

The severity and irrevocability of deprivation of life elevates the risk of error to the intolerable.

The arbitrariness inherent in capital punishment violates the human right to equal protection under the law.

The death penalty's propensity for use as a political instrument alienates the law from those it should protect.

Capital punishment satisfies none of the objectives of punishment. and is consequently penologically defunct.

Capital punishment is torture. and is thus a violation of the human right to protection against cruel and inhuman punishment.

It fosters a notion that brutality and killing is an acceptable solution.

This appeal is for the enshrinement of abolition in a bill of human rights for the legitimacy of the judiciary and as a declaration of society's intolerance of killing.

Appendix A.

The proportion is calculated by:

A) Adding the number of executions from 1911 till the present with the death row population at present.

$$4280^{31}$$

$$+ \underline{308}^{32}$$

$$\underline{4588}$$

B) Calculating the sum in "A" as a percentage of the total prison population at present.

$$\frac{4588}{101\ 128^{33}} \times \frac{100}{1}$$

$$= 4.5\%^{34}$$

Appendix B.

The death penalty constitutes "cruel and inhuman punishment" within the meaning of international and constitutional instruments of human rights.

Article 3 of the European Convention on Human Rights thus provides:

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

In Patel et al v United Kingdom the general purpose of the prohibition of "degrading treatment" was said to be to prevent interference with the dignity of a person of a particularly serious nature. In Ireland v United Kingdom (1978) it was decided that "degrading treatment" included techniques that "were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical of moral resistance...". The Human Rights Commission further explained that "degrading treatment" is treatment which grossly humiliates and individual or drives him to act against his will or conscience. In Tyler v United Kingdom (1978), a case dealing with corporeal punishment, the court held that what caused punishment to be "degrading" was the institutionalized use of physical violence by one human against another and the assault upon a person's dignity and physical integrity which this involved.

"Inhuman treatment" could be taken to mean cruelty in any form; that is, according to J E S Fawcett (The Application of the European Convention on Human Rights at 34 (1969)), "the infliction of pain or suffering for its own sake".

Fawcett went on to say:

> Inhuman treatment would then be the deliberate infliction of physical or mental pain or suffering, against the will of the victim, and, when forming part of criminal punishment, out of proportion to the offence.

In Ireland v United Kingdom (1978) it was decided that "inhuman treatment" in the facts of that case included "... the physical and mental suffering to the person subjected thereto and also led to acute psychiatric disturbances during interrogation".

The European Convention on Human Rights indeed authorised the intentional deprivation of a person's life "in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law" (art 2(1)). The fact this provision was deemed necessary in a human rights instrument that prohibited "inhuman or degrading treatment or punishment" shows that without such an exception to the general rule enunciated in article 3 of the Convention, the death penalty would not have been possible in States Parties to the Convention. In spite of this exception to the rule against "inhuman or degrading treatment or punishment", the death penalty had in any event for all ends and purposes become obsolete in the countries of the European Community. The position that prevailed in Europe may be summarised as follows:

a) The death penalty has been abolished in Germany (1949)

and Austria (1968).

b) The death penalty has been retained for crimes committed in times of war only in Denmark, Ireland, Italy, the Netherlands, Norway and Sweden.

c) The death penalty has been retained for a limited number of specific crimes only, for instance in Greece (voluntary homicide, brigandage and treason): Turkey (certain aggravated forms of murder, treason, forming or directing a drug-traffic gang, and cumulation of offences involving life imprisonment): Cyprus (premeditated murder, high treason, piracy and certain offences under military law): the United Kingdom (high treason and piracy).

d) In Belgium the death penalty has been retained but is never carried out: and this also applies to Luxembourg in peace time.

Protocol No. 6 to the European Convention "Concerning the Abolition of the Death Penalty" was agreed to by the signatory states of the European Convention in 1983. The countries that ratifies the Protocol include Austria, Denmark, France, Iceland, Luxembourg, the Netherlands, Portugal, Spain, Sweden and Switzerland. In the Soering Case of 1989, the European Court of Human Rights decided that extradition of a suspect in a murder case to the American state of Viginia, where he would be at risk of receiving the death penalty, would constitute a breach of the

proscription in the European Convention of "inhuman or degrading treatment or punishment". The court admittedly did not base its decision on the nature of the death penalty as such but on the conditions that prevailed in "death row" of Virginian prisons.

Appendix C.

International human rights instruments[35] violated by capital punishment. as arbitrary and cruel and inhuman. include:

A) THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Article 5: No one shall be subjected to torture or to cruel. inhuman or degrading treatment or punishment.

Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law.[36]

B) THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Article 6: 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.

C) THE AMERICAN CONVENTION ON HUMAN RIGHTS

Article 4: Every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

D) AMNESTY INTERNATIONAL

Statute of Amnesty International

Article 1: "... the object of Amnesty International shall be to secure throughout the world the observance of the provisions of the Universal Declaration of Human Rights.by:

c) opposing by all appropriate means the imposition and infliction of death penalties and torture or other cruel, inhuman or degrading treatment or punishment of prisoners ..."

Appendix D.

On the 27 July 1990 the Criminal Law Amendment Act 107 of 1990 was enacted amending the Criminal Procedure Act 51 of 1977.

Prior to the Amendment Act the death penalty was compulsory in murder cases where the court was unable to find extenuating circumstances. The 1990 Act abolished this and introduced a discretionary death penalty in all cases. This means that judges have the power to decide whether the death sentence is the proper sentence or not. In addition the Amendment Act provides an automatic right of appeal against the death penalty. Also where an accused has been sentenced to death and does not use his right of appeal and where no attempt has been made to petition the State President for mercy, counsel must be appointed to do so on the behalf of the accused. The Appellate Division is also empowered to set aside the death sentence and impose the punishment it considers proper.

As a result of these amendments three categories of prisoner were on death row:

1. Those on death row, who have exhausted all legal channels available with respect to the appeal or review of their cases, before the introduction of the amendments. They were awaiting review by the panel to be constituted in terms of s19 of the Act 107 of 1990, discussed below.

2. Prisoners convicted in terms of the 'old law' on appeal in terms of the 'new law'.

3. Those whose cases have been heard in terms of the 'new law'.

The cases of categories 2 and 3 will be finalised in terms of the amended law, under the new criteria. The focus of this particular article will be on the fate of those prisoners mentioned in category 1 above, those who were tried and convicted in terms of s277 of the Criminal Procedure Act 1977 before the amending Act was enacted. It would be unheard of to carry out the sentences of these prisoners without allowing them the opportunity to have their cases heard under the amended criteria. The Government's rationale for introducing these reforms is it's acknowledgement that the 'old rules are discredited rules'. As Etienne Mureinik says in an article in the Star dated 2 April 1991:

"By it's fundamental reforms the Government has accepted that the sentences of those tried under the old rules are unsafe."

The amending Act therefore makes provision, for the cases of prisoners in category 1, to be reviewed in terms of the amended legislation. In terms of the 'new rules' the reviewing body will have to examine mitigating factors and aggravating factors.

A mitigating factor, according to the courts, has a wider commutation than an extenuating circumstance : it can include factors unrelated to the crime such as the accused's behaviour after the crime has been committed, or the fact that he has a clean record. Aggravating factors on the other hand, should be seen as including 'any factor which makes the crime worse'.

RECONSIDERATION OF SENTENCES OF CERTAIN PERSONS UNDER SENTENCE OF DEATH.

Section 19 of the Criminal Law Amendment Act 1990 deals with the category 1 prisoners, granting them the benefit of the amendments in that their cases will be reconsidered. The section makes provision for the appointment of a panel who will be reviewing their cases. The panel will decide whether the sentence of death would have been imposed by the trial court had the amending section been in operation at the time sentence was passed.

The amending Act also stipulates that every session of the panel shall be held behind closed doors and that, subject to the provisions of the section, no persons shall be entitled to appear before the panel or make a submission to the panel. This results in unnecessary secrecy about the panel procedure, an unfortunate stipulation that should have been avoided. Because

of this stipulation neither the defence counsel nor the prosecution have the opportunity of knowing or hearing the other case. This makes it particularly difficult for defence counsel to answer allegations by the prosecution, of which it is not aware, when the case has been referred back to the Appellate Division in terms of s19(12) of the Act.

A further problem is that reasons for the panel's finding need not be given. The way in which the panel is applying the new law in these cases and the efficacy of the procedure itself is fraught with speculation.

Submission of argument to the panel must be in writing. Section 19(9)(b) provides that only written argument may be submitted to those persons concerned.

The panel's decision is not final in the sense that it's decision alone determines the fate of the prisoner under consideration. The panel must inform the Minister of it's finding, in terms of s19(10)(b). Section 19(11)(a) states that where the panel finds that the sentence of death would not have been imposed the Minister shall then lay the case before the State President for consideration of mercy.

Where the panel finds that the death sentence would probably have been imposed. the case shall go before the Appellate Division and the case shall be treated as though it were an appeal by the convicted person against his sentence.

The finality of the panel's findings lies in the fact that the decision reached by the panel is not open to discussion. In terms of s19(13) no appeal. review or other proceedings may lie in respect of the findings or recommendations of the panel.

The role of the panel has occasioned some concern among legal practitioners and academics. There are some legitimate concerns about how fairly one can apply facts derived from a case decided in terms of the 'old law' to criteria as set down by the amended law. As Etienne Mureinik said in an interview on Radio South Africa on the 26 April 1991 at 22H00:

"It is essentially a conjectural exercise. It's like changing the rule of tennis and then looking at a video reply of last year's Wimbeldon and trying to work out who would have won it had it been in force."

In addition to the fears expressed above, Lawyers For Human Rights are concerned with the panel procedure itself and the difficulty facing counsel in preparing argument for the panel.

As was said: "It is not possible to review cases in terms of the changes to the law without resources allocated to investigate mitigating factors."

Earlier on in this article a mitigating factor was said to have a wider connotation than an extenuating circumstance. Therefore for the panel to properly reassess the sentence in light of the new criteria it would be necessary for evidence to be presented outside that of the existing trial record.

To adequately present evidence of this nature counsel would need as much assistance and resources as possible. The type of investigation one should contemplate is the type discussed in an American booklet "The California Death Penalty Defence Manual" written by J Thompson and M Laurence. On page 241 of the manual it says:

'The types of evidence that fall within this broad definition of mitigation are limited only by the creativity of counsel. Likewise, the defence presentation should be equally creative. For example, the effort to make the defendant's conduct understandable will include both evidence of the historical facts of the defendant's life, as well as expert testimony to interpret those facts. These experts include sociologists, anthropologists, biologists, chemists, criminologists,

pathologists, psychologists and psychiatrists: indeed any person who has particular expertise in interpreting the effect of the defendant's background or situation as it relates to the imposition of sentence may testify. Lay witnesses will include family members, friends, school teachers, probation officers and prison and jail guards. Together, these persons can address the impact that cultural, environmental, psychological and physiological factors have on the defendant's life, including his criminal behaviour. They may answer the toughest questions imposed by jurors: why did the defendant commit the crime? Is the defendant sorry for what he or she did wrong? Will the defendant try to be better in the future? Is the defendant capable of being better? Will the defendant be successful?

It can immediately be seen that the finances needed for such services must be great. How can counsel in South Africa, particularly pro deo counsel, be expected to present this kind of mitigatory evidence when they do not have the necessary resources to do so?

It is most unjust to offer the opportunity of a 'fighting change' to a prisoner whose case may have been considered hopeless under the 'old rules' and then take that opportunity away because the resources are not there.

A person may be hanged because he had the bad luck to be tried and convicted prior to July 1990 and his opportunity to be tried in terms of the new criteria was destroyed because the necessary resources needed to prepare additional evidence were not made available.

The fact that panel procedure was not without it's flaws cannot be ignored. These were noted and commented on when the panel had still not made it's first announcement. These problems should have instantly been considered. People's lives were being decided upon through a process that had certain technical and evidentiary problems. this should have been immediately addressed.

The potential unfairness and injustices that may be the result of this cannot and should not be ignored.

FOOTNOTES:

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[1]J van der Berg 'Judicial error: can the condemned take comfort?' (1989) 2 SACJ 230.

[2]Black Sash Inside South Africa's Death Factory (1989) 5.

[3]Amnesty International When the State Kills... (1989) 204.

[4]Black Sash op cit (n2) 5.

[5]Amnesty International op cit (n3) 28.

[6]Reported by Brian Currin. Director of Lawyers for Human Rights. in the 1989 Black Sash research project: confirmed till present by facsimile transmission from the Department of Justice to WITS SADPSA on 20 February 1992.

[7]L Angus and E Grant 'Sentencing in Capital Cases in the Transvaal Provincial Division and Witwatersrand Local Division: 1987 - 1989' (1991) 7 SAJHR 69.

[8]K Anderson 'An Eye for an Eye' Time 24 January 1983 26.

[9]J van Rooyen 'A perspective on the Criminal Law Amendment Bill' (1990) 2 SACJ 165.

[10]Society for the Abolition of the Death Penalty in South Africa op cit (n10) 10.

[11]Constitutional Committee of the African National Congress A Draft Bill of Rights for a Democratic South Africa - Working Draft for Consultation Article 2.3.

[12]M A Rabie and S A Strauss Punishment: An Introduction to Principles (1981) 21.

[13]K Anderson op cit (n11) 23.

[14]Amnesty International op cit (n3) 14.

[15]Society for the Abolition of the Death Penalty in South Africa op cit (n10) 2.

[16]J P Conrad and E van den Haag The Death Penalty: A

Debate (1986) 141.

[17]Society for the Abolition of the Death Penalty in South Africa (University of the Witwatersrand) "`Impossible' to Execute Anyone Now" (1991) 7.

[18]Reference to life imprisonment implies life imprisonment without the prospect of parole.

[19]Society for the Abolition of the Death Penalty in South Africa op cit (n10) 27.

[20]Amnesty International op cit (n3) 64.

[21]L Vogelman The Living Dead: Living on Death Row (1989) 5 SAJHR 183.

[22]Ibid 193 and Black Sash op cit (n2) 41.

[23]L Vogelman op cit (n20) 187.

[24]Ibid 190.

[25]Black Sash op cit (n2) 33.

[26]D Rosenhan and M Seligman Abnormal Psychology (1989) 694.

[27]Informed by American Psychiatric Association DSM-III-R (1987) 250: with reference to L Vogelman and L Segal Life After Death Row in South Africa: The Story of Menzi Tafeni (1990).

[28]L Vogelman and L Segal Life After Death Row in South Africa: The Story of Menzi Tafeni (1990).

[29]American Psychiatric Association DSM-III-R (1987) 236.

[30]Amnesty International op cit (n3) 1.

[31]This figure is the sum of 4227 for 1911 to 1988: Editors `The Death Penalty in South Africa' (1989) 2 SACJ 254; and 53 for 1989: Facsimile transmission from Department of Justice to WITS SADPSA on 20 February 1992.

[32]Provided by the Department of Justice in a facsimile

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transmission to WITS SADPSA on 20 February 1992. The figure reflects the Death Row population on the date of the facsimile transmission.

[33]This figure is the sum of 4588 and 96540. the daily average prison population for December 1991. provided by the Department of Correctional Services in a facsimile transmission to WITS SADPSA on 28 February 1992.

[34]This solution reflects the proportion for December 1991 and is an estimation subject to amendment.

[35]Society for the Abolition of the Death Penalty in South Africa op cit (n10) Chapter 6.

[36]M Robertson (editor) Human Rights for South Africans (1991) 53.