

The Final Product (Un)Ltd.

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The Truth and Reconciliation Commission
Johannesburg

Attention : Hugh Lewin

Dear Hugh,

Attached please find an initial submission on the Death Penalty. Initial because given time limits and the breadth of the subject it is far from a complete document.

What we have done is to establish why we believe the TRC should have a special hearing on the Death Penalty. In our view it cannot be dealt with as a section within various other hearings and we hope the TRC will take up the recommendations.

We would be quite happy to do further work on this, and Amnesty have indicated a willingness to assist us.

With thanks

Paula McBride and Sharon Ekambaram



*Research * Writing * Production*
Constitutional and Human Rights Issues, Gender, HIV/AIDS, Development

The Death Penalty

A Submission to
The T.R.C

By: Paula McBride and Sharon Ekambaram
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THE DEATH PENALTY IN SOUTH AFRICA

The gallows is not only a machine of death but a symbol. It is the symbol of terror, cruelty and irreverence for life; the common denominator of primitive savagery, medieval fanaticism and modern totalitarianism"
Arthur Koestler

Introduction

The history of the death penalty in our country is a history of an institutionalised gross human rights violation. A human rights violation that was systematically and legally committed against thousands of citizens of our country. The history of this violation involves all those people who participated in its commission - the law makers, the Judges, the prosecutors and the defence lawyers, the prison system, the State President, the executioner, those doctors who attended executions and certified death after ten to fifteen minutes and the voting public of that period who allowed this to continue.

This Truth and Reconciliation Commission has been mandated to investigate gross violations of human rights committed during the period from 1 March 1960 to the cut off date contemplated in the Constitution. The definition within the Act of a gross human rights violation is :

"

- (a) the killing, abduction, torture or severe ill treatment of any persons; or
- (b) any attempt conspiracy, incitement, instigation, command or procurements to commit an act referred to in para. (a),

which emanated from the conflicts of the past ... and the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive."

In addition, the Commission shall :

- (a) facilitate and where necessary coordinate inquiries into :
 - (i) gross violations of human rights, including violations which were part of a systematic pattern of abuse.

The primary purpose of this submission is to ensure that the Truth and Reconciliation Commission place on record the fact that the use of the death penalty in South Africa constituted a gross human rights violation. The secondary purpose is a more hopeful one : that this practice is never again introduced into our legal system .

During the period under discussion over two thousand five hundred people were hanged in our country. On average, during this period, 100 people were executed each year. 95% of the victims of the hangman's noose were black - 100% of those who sentenced them to die were white.

A study over a ten year period demonstrated the following racial breakdown of those executed :

	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	Total
Black	59	89	131	137	136	98	106	110	129	159	1154
White	2	4	2	1	1	2	1	2	2	5	22

(Phyllis Naidoo - 1989)

Evidence of racial disproportionality in capital sentencing in South Africa acquires greater significance when considered in the context of other evidence that suggests a relationship between capital punishment and state policies of *Apartheid*. In a recent one-year study, 47% of blacks convicted of murdering whites were given the death sentence. Only 2.5% of blacks convicted of murdering blacks were sentenced to death, as opposed to no death sentences at all for whites convicted of murdering blacks. From 1910 to 1975, over twenty-seven times as many blacks as whites were executed. This considerably exceeds the population ratio of approximately five blacks to every white.

It would be academic to ask whether or not the death penalty was associated with the "conflicts of the past". It was but one of the methods used by those in power to oppress those without. 1154 people were executed in SA in the 10 year period 1976 -1985. The state apparatus that arrested, interrogated, tried and executed those 1154 people for capital crimes in SA was the same apparatus that maintained, often by brutal force, the *apartheid* system.

The reality is that our own President, Nelson Rolihlahla Mandela, could have been a gallows statistic - he was one of the lucky ones. Combatants like Andrew Zondo, John Harris, Lucky Payi, Benjamin Moloise, Solomon Mahlangu, Marcus Motaung , Siphso Xulu and many others were not so lucky.

Neither were those who went to the gallows unknown by all except their families - their lives ended in fear and horror by a government which regarded such life with contempt. In 1947, the Landsdown Commission into Penal and Prison Reform highlighted the way in which those in power regarded the lives of those without :

It is common knowledge based on the experience of the courts that, in the mind of the underdeveloped native but recently brought into contact with Western civilisation and ideas, the sanctity of human life is a matter of less concern than it would be for Western civilised man; and the influence of the fear of death on such a native's mind may or may not be less than in the case of the average European*

By 1987, when a total of 181 people were hanged (the highest figure in 75 years) South Africa occupied an unenviable prime position amongst the top five hanging nations in the world - we kept company with China, Nigeria, Iran and the U.S.A. By 1989, there were 80 people on death row in Pretoria for politically related offences. In that year, in what came to be known as the "Christmas Rush", 21 people were executed during the third week of December : 7 at a time on a Tuesday, Wednesday and a Thursday.

The Execution

"It is the policy of the SA Prisons Service to approach executions and everything pertaining to them with the utmost responsibility and respect. This attitude stems from a consideration and respect for the circumstances in which the person concerned finds himself and consequently, also the necessary regard for life and death"

The South African Prisons Service 2nd February 1988

The routine was ghastly but familiar . The Sheriff would arrive at Pretoria Maximum Security Prison with a batch of notices in his hand - some of these gave notice to a prisoner that clemency had been granted, the remaining ones would inform prisoners of their date with the executioner in seven days time.

The prison warders would walk down the silent corridors between the individual cells, and footsteps would stop outside. "Pak toe" was the instruction to the prisoner (regardless of whether clemency or execution was their fate) - at which the prisoner would ready himself for the queue outside the office where the Sheriff sat. If there were no more than seven in the queue it was clear that all those waiting were scheduled to die - if there were more than seven, hope still remained that some of them had received clemency.

Those that the State President in his wisdom had decided should live were moved off to other prisons. Those that were, in his opinion, no longer fit for this world were sent to the "Pot" after being asked for their "baadjie en adres" (their jacket and an address to which their personal belongings could be sent after their death). It was here, in the waiting cells, that the hourly count down began. It was also here that the traditional silence of Death Row was broken - with singing day and night. Singing mostly of traditional and religious hymns but sometimes of freedom songs where those to be hanged were guerrillas.

During the week that they wait to die, they were measured for the hangman : the thickness of their necks, their height and their weight are all measured to ensure that the length of the drop is calculated correctly.

On the night before the execution was to take place, the "responsible and respectful" South African Prisons Service would give each of the condemned prisoners a whole, deboned chicken to eat and R4.00 to buy something from the prison tuckshop.

The following morning they were visited by the prison chaplain at approximately 6.00 a.m. and prayed with him for about half an hour until the warders arrived to lead them away. They were then taken up the steps leading to the gallows. In the execution chamber were the hangman, a policeman (who takes fingerprints to make sure that the correct person was being hanged) and a doctor to certify death.

Here I will leave it to the two Chris Barnards to describe what happens ; Chris Barnard, the executioner, who by his own account hanged "about fifteen hundred people" . and Chris Barnard, the Heart Surgeon, a public opponent of the use of the death penalty.

Put a rope round a man's neck, tie the knot next to his ear, fasten his wrists behind his back and drop him a distance of just less than two metres. If you haven't botched it by miscalculating the length of the drop or the strength of the rope, you'll achieve several things at once. The man's spinal cord will rupture at the point where it enters the skull, electro-chemical discharges will send his limbs flailing in a grotesque dance, eyes and tongue will start from the facial apertures under the assault of the rope and his bowel and bladder may simultaneously void themselves to soil the legs and drip onto the floor - unless of course you are an efficient hangman who has thoughtfully fitted your subject with a nappy or rubber pants. Quick and clean ? I believe that it is slow, dirty, horrible, brutal, uncivilised and unspeakably barbaric to take a man's life in this manner and for the reason that he had caused the death of another. Prof. Chris Barnard, 12th June 1978

I stand right at the back when they come in there, warders lead them, and they walk onto the platform. Under every rope there is two black spoors (footprints) and they stand on these spoors. You put the rope on the one at the back, the second, third, the fourth... five, six, seven. They have white caps on with a flap. The moment you put the rope around his neck they put the strap over his face. He can still see you until you put the flap down. Then you pull the lever and they drop. Now there is a doctor in there and we wait thirteen, fourteen, fifteen minutes. Then they are stripped naked and the doctor examines them and certifies they are dead.. If he's satisfied of death then the warder puts a rope around the body with a pulley and they pull him right up to the top and I take the rope off and lower him down into a stretcher into a coffin. I secure the lid with a hammer and nails and they are taken to a graveyard. ... I stand by the door and the minute before they go I pray to God to have mercy on earth and to every one of them. That is the least I could do to a person who has to meet his maker *Chris Barnard*
- *the Hangman*

The families of those hanged were notified of the impending execution by a local police officer - who arrived at their home with notice in hand as well as a second class train ticket to enable them to reach the prison a couple of days prior to the execution. On their arrival at the Maximum Prison they were accommodated in a small building below the prison walls - from where they would walk to their daily two visits. At each visit, where no physical contact was allowed, the family members would talk to the condemned person through glass and bars.

After the last visit, on the afternoon before the execution, they would go down to their sleeping quarters and wait the night through. In the morning they would be informed that the execution had taken place and they would be allowed into an inter denominational services held in the prison chapel situated just below the gallows chamber. The coffins are brought into the chapel, but relatives were not allowed to see inside the coffins as the bodies of those hanged were state property. After the service they would be handed a bundle of clothing and personal effects and would make their way back to their homes.

The bodies would be taken in the coffins by SAFFAS, a Funeral company, to unmarked graves in one of segregated graveyards around Pretoria (Atteridgeville, Eersterus or Pretoria). No family members were allowed to accompany the coffins or to pray while the bodies were interred. At a later date families were handed a grave number.

In an office within the prison one wall was covered with the photos of condemned prisoners - on the day following executions, those that were now dead had their photos removed - those still to die were moved up the queue. And so the routine continued.

The Law and the Judges

It didn't bother me because the person was sentenced to death. He goes through a trial. The evidence is produced and it's judged. In those days they still had juries and if he is judged on the evidence produced against him and he's found guilty on that and if a man committed murders and it's proved beyond a doubt and there's no extenuating circumstances then he deserves to hang and I had no hesitation, my conscience doesn't worry me. I hang him and that is the end of it. **Chris Barnard - the Hangman**

The pristine and elegant Judges Chambers are as far removed as one could get from the bloody mess in the gallows chambers - yet the link between them is as strong as the rope that was used to hang people. It was the Judges of South Africa who imposed the death penalty - not the prisons service, not the hangman and not the State President but our learned Bench. This section will look not only at the Judges and their Assessors, but at the law they interpreted.

Between the years 1961 and 1990 all the Judges in our country were white and 99% of them were male. Almost without exception they were people who were drawn from the ranks of privilege and power - highly educated one and all. In accepting positions on the Bench they accepted, among other things, the task of interpreting and applying racist and oppressive laws. In addition to this they accepted that they would be empowered to sentence other human beings to death.

Prior to the 1990 amendments, in South African law the death penalty was mandatory for murder where the court found no extenuating circumstances. The sentence was discretionary for rape, robbery with aggravating circumstances, housebreaking with aggravating circumstances, sabotage, terrorism, treason, kidnapping and child stealing. The death sentence could only be passed by a Supreme Court before a Judge and two assessors. Those sentenced to death had no automatic right to an appeal and had to apply to the trial court for leave to appeal against either sentence or conviction. If the trial Judge denied leave to appeal, the condemned person could appeal to the Chief Justice and this petition was considered either in chambers by three Judges of the Appellate Division or be referred to the Appellate Division for consideration. If this application was turned down, the only recourse for a prisoner would be a petition for clemency to the State President.

The State President was empowered to extend mercy and to commute the death sentence to another sentence. He could also request the trial court to examine new evidence which could have a bearing on either the conviction or the sentence.

The question of a "mandatory" death sentence is misleading - it was mandatory for murder *only when the court found no extenuating circumstances*. The question as to whether or not extenuation exists was left to the Judge and his Assessors to determine - this was a judgement they made and it was discretionary. Judges were allowed to hide behind the letter of the law and shift the responsibility for their decision. The fact of the matter is that if Judges did not want to pass the death penalty they did not have to. Judge Raymond Leon, who had himself passed death sentences said as much : " Why should a man's life depend on the chance of which Judge he appears before. Some Judges find extenuating circumstances more easily than others and I know one Judge who has been on the bench for many years and has never passed the death sentence." Judge Leon, in his address at the relaunch of the Society for the Abolition of the Death Penalty in November 1988 said that he had always "disliked" the death sentence but had to honour his oath of office.

I don't know how many times I sent someone to the gallows. But it was at least twelve and possibly as many as twenty times. Both before and after the verdict and sentence I could not sleep. Sometimes it took me weeks to recover. I never got used to it." **Judge Raymond Leon**

Judge Leon was converted to abolition only after sentencing between "twelve and twenty" people to death - most people who have deliberately caused the deaths of others remember how many people they have killed. Judge Leon and others like him had the luxury of passing on the job of death to others. Judge Leon never went into the execution chamber, he did not pull the lever that opened the trap door, he never watched the "dance macabre" or washed the bloodied white hoods worn by the condemned. It was not Judge Leon that had to teargas prisoners out of their cells and drag them up the steps to the gallows. It was not his job to go outside the walls of the prison and inform mothers and fathers of the death of their children. If he had done this, maybe his memory would have served him better.

This was the Judge who sentenced Sibusiso Andrew Zondo to death for his role in the Amanzimtoti limpet mine attack in which five people were killed. Andrew was hanged on the 9th September 1986, with Lucky Payi and Sipho Zulu. At the time Andrew Zondo planted the bomb he was 19 years old. When he was hanged he was 20 years old. Judge Leon and his Assessors decided that in his case there were no extenuating circumstances and that he deserved to die.

The limpet mine that caused the explosion on 23rd December 1985 was detonated by two people - one, Mr X a man of thirty five years old and the other a boy of 19 years old. The limpet mine had been supplied by Mr X who accompanied Andrew to the site. The act was carried out in retaliation for an SADF raid into Lesotho that had killed nine innocent civilians. Mr X became the state's star witness, described as an "excellent witness" on more than one occasion by Judge Leon - he received full indemnity from the court and was a free man. Andrew, who freely admitted his role in the attack received the death sentence.

Judge Leon asked himself questions during his sleepless nights, post sentencing, that he should have asked himself before passing sentence. These are questions that reach into the heart of the debate around the death penalty and we reproduce them in full :

- ◆ Would the outcome have been the same in the hands of more experienced and competent counsel ?
- ◆ Had he asked all the questions he should have asked ?
- ◆ Was his interpretation of the case correct?
- ◆ Did he know enough about the accused's background ?
- ◆ Had the defence investigated the case fully ?
- ◆ What possibility for error existed ?
- ◆ Why should a man's life depend on the chance of which Judge he appears before?

Judge Leon should have added a few more questions to the list when he sentenced Andrew Zondo to death :

- ◆ Why is it that there were two people involved and one is a free man and the other sentenced to die ?
- ◆ Is the fact that Sibusiso Andrew Zondo was nineteen years old not a factor in extenuation ?
- ◆ Should it have made a difference to me that Andrew Zondo went to try and phone in a warning so that people would evacuate the shopping centre ?
- ◆ Did I have the capacity to fully understand what Andrew Zondo was trying to tell the court ?
- ◆ Do I have the moral right to declare him unfit to live - what does that make me?
- ◆ I wonder how many sleepless nights Andrew's family, Aiken , Lephina, Siso, Irene, Sandile and Duduza will have ?

Sadly, for Andrew Zondo and for the other eleven or nineteen people sentenced to death by Judge Leon, he did not ask himself any of these questions - he fully accepted the version of events given to him by a person whose integrity he should have questioned - a person who had turned state witness to protect his own skin. The behaviour of Mr X is in sharp contrast to that of Andrew, who in an effort to protect him told police and the Magistrate that he had acted alone. In summing up, Judge Leon said the following :

On the totality of the evidence we have not the smallest hesitation in accepting the evidence of the accomplice as true and that of the accused as false beyond all reasonable doubt, where the one version differs from the other..... We are unanimously of the clear view that extenuating circumstances are not present in this case.

In the trial later that year of Robert McBride the question of extenuation arose once more and one of the Assessors, Professor John Milton, filed a dissenting report on the question of extenuating circumstances. It is a pity that neither the Judge in the McBride case , Judge Shearer, nor his fellow on the Bench, Judge Leon had the wisdom or the insight of Professor Milton :

How am I to assess the morality of this act ? (the car bomb outside the Why Not Bar). In a normally ordered society where every citizen enjoys the full range of civil liberties and equal access to the political process, to resort to an act of political protest of this sort would be a totally senseless act and in my view without the slightest justification. What then of a society where a citizen does not enjoy equal access to the political process, where he is denied certain rights and liberties by reason of his race ? Prof. John Milton

When Andrew Zondo was asked whether he had anything to say before sentence was passed he said the following :

In fact I wish to say to the people who might have lost their friends and kids or I mean lost their family members ... I am sorry. And the next thing I wish to say I wish my country stays friendly to neighbouring countries.

Judge Leon then passed the sentence of death - not once but five times, ending with the words : May the Lord have mercy on your soul.

Two incidents, fifteen deaths . The outcomes, like the Judge and the defendant, were worlds apart.

On December 19th 1985 an SADF squad, under instructions from their political leadership, with blackened faces crossed the Caledon river into Maseru and killed nine South African refugees

The killers with faces blackened and using weapons burst into a house where a small party was in progress, they killed seven, blood caked the floor, bathroom and bedclothes. Party food still lay on cardboard plates, littered on the floor among dozens of 9mm shell cases. The walls and furniture were pockmarked with bullet holes. The killers then went a further two kilometres to the house of Joe and Jackie Quin where they shot the couple and left. The neighbours, alerted by Joe before he died, took their year old baby Phoenix to the hospital.

The perpetrators of these murders have never been identified, prosecuted or sentenced. There was no Mr. Ros Stuart to prosecute them and describe them as "of evil mind", and there was no Judge Leon to decide whether or not they had gone to Maseru with the intention to kill. The families of these victims have not been afforded their day in court. For all we know, these murderers are alive and well.

On the 23rd December 1985, in an act carried out in retaliation for the SADF attack four days earlier, five people were killed. They were not South African refugees - they were on holiday in Amanzimtoti but their deaths are no less tragic. They died as a result of a limpet mine placed in a refuse bin outside the Sanlam shopping centre in Amanzimtoti. One of those, Andrew Zondo, was tried, sentenced and convicted for this deed.

He was declared to be a man (albeit a nineteen year old one) of "evil mind" by Mr Ros Stuart the prosecutor. The Judge and his Assessors concurred and Andrew Zondo was sentenced to death five times - in addition Judge Leon saw fit to pass an additional, irrelevant sentence of ten years. Judge Leon in his arrogance, presumed no other court would reach a different decision, and he refused Andrew leave to appeal. Andrew Zondo, unlike the SADF soldiers who entered Maseru on the 19th December, is no longer living - he was hanged on the 9th September 1986.

Andrew Zondo himself said of his trial, and these are words that would be echoed by many who came into the courts of South Africa :

I listened to the Prosecutor and I saw that he did not have any ideas about us. He was ignorant of our ways and feelings. I looked at the Judge and the prosecutor and the thought came to me that they were ants and in engaging with them we were dwarfing ourselves. It is a curse to be a Judge when you believe that you hold the life of a person in your hand. Only God holds our lives in His hands. He gives it and He alone can take it"

There are many stories that should be told of young South Africans who ended up on Death Row - sent there by our educated Judges to be hanged by the neck until they were dead. In some instances it took trials of a few weeks for the Judge and his Assessors to arrive at this decision - in others it took no more than a day.

The case of Michael Bini Matli is such a case. Michael Matli was tried, convicted and sentenced to death in the Lichtenburg Circuit Court on August 26th 1988. The sitting Judge was Justice D van Zyl. When Michael Matli appeared in his court room he was given five minutes to decide whether or not he wanted the pro Deo lawyer appointed to him. Mr Matli decided to dismiss the Advocate. He did not give evidence in his own defence nor in mitigation of sentence and he called no witnesses.

He was accused of murdering Brenda Sebotse who died as a result of stab wound on May 17th 1987. In a statement to police soon after his arrest Michael Matli said that he had left a stokvel that night with Brenda and they were on their way to his parents house. She had changed her mind and they had argued. In the tussle he had stabbed her with a knife she had drawn.

In his summing up, at the end of the one day trial, Judge van Zyl said the following : *"The accused did not take the court into his confidence by giving evidence. In the absence of any other evidence, the court finds there was direct intent to commit murder."* Michael Matli was then sentenced to death. In one day, with no evidence before him of who Michael Matli was, where he lived, who his family was, whether or not he had schooled, what influences came to bear upon him and what his life had been like, Judge van Zyl decided that Michael Matli was no longer fit to live.

Judge van Zyl, a highly educated man, no doubt with family and friends of his own and a life that was full and complex, regarded the life of Michael Matli as a life worth so much less than his own. His search for extenuation took him no more than a few brief minutes - no sleepless night for Judge van Zyl.

The Judges are too many to name here and the cases too many to repeat. In just a three year period in the then Transvaal Provincial Division, Judge O'Donovan sentenced 25 people to death, Judge Curlewis - 14, Judge Human - 11, Judge Le Grange 16, Judge JMC Smit 17, Judge Irving Steyn 13, Judge JJ Strydom - 12, Judge Vermooten - 9 and Judge DH van Zyl - 9. In this Division, there was one Judge during the three year period who sentenced no one to death - Judge NM McArthur.

Throughout the country, figures were similar. In Natal you breathed an enormous sigh of relief as an Accused person on a Capital charge if your case was heard by Justice John Didcott - a Judge whose commitment to human rights is unquestioned. He spent many long years on the bench and has never passed a sentence of death. If on the other hand you appeared before some of the other well known liberals in Natal, such as Judge Shearer (famous for growing roses and sentencing Robert McBride to death, despite a finding by one of his Assessors, Professor Milton, that there were extenuating circumstances), Judge Wilson (presently deciding which acts warrant amnesty) or Judge Rabie you weren't so lucky.

In "The Death Penalty in the Cape Provincial Division: 1986-19888' (1989) 5 SAJHR 154 it was claimed that statistical evidence supports the view that some judges are more reluctant to hand down the death penalty than others. This means that the likelihood of an individual being hanged is affected by the identity of the judge before whom he or she is tried.

Research findings showed huge disparities in sentencing practices. Judges Baker, Lategan and Williamson JJ heard 15% of the cases but imposed 51% of the death sentences, and Judges Marais and Rose Innes JJ tried 19,25% of the cases but imposed only 4,02% of the death sentences.

The Judges of the Apartheid era have many questions to answer and many victims to face - their robes and oath of office merely distinguish them in form from the murderers they dismissed to their deaths with such contempt. These robes should no longer be used to shield them from their role in the commission of gross human rights violations .

Political Executions

In 1917 capital punishment was limited to three crimes namely murder, treason and rape. However from 1958 a proliferation of capital offences started taking place. This occurred during the early stages of the application of apartheid policy in South Africa. The extension of the death penalty therefore coincided with an intensification of political oppression. Capital punishment was made applicable to robbery and housebreaking with aggravating circumstances, sabotage, the undergoing of training abroad for the purpose of furthering communism, the furthering overseas of economic and social change in South Africa by means of violent means, kidnapping and participation in terrorist activities. [*The Terrorism Act 83 of 1967. S54(d)(iv) of the Internal Security Act 74 1982. In terms of this section the penalty for terrorism is the same as for treason.*] Altogether the Criminal Procedure Act of 1977 provided for eleven capital crimes.

During the sixties large number of PAC members were executed as was Frederick John Harris who was hanged on the 1st April 1965. Even before he reached the hangman's noose his jaw was broken for the sin he had committed against the Apartheid government. In 1979 Solomon Mahlangu was hanged at aged 21. Like with Andrew Zondo, the Judge in his case found no extenuation.

During the 1980's, when opposition to the government was reaching new heights, the number of persons sentenced to death for politically motivated actions increased dramatically. In the early eighties Marcus Motaung, Jerry Mosololi, Simon Mogoerane, Benjamin Moloise, Sibusiso Andrew Zondo, Clarence Lucky Payi and Siphon Xulu were hanged. By the end of 1987 the number of political prisoners on death row increased to 44 and in 1988 the Minister of Justice stated that 83 people were on death row as a result of "unrest-related crimes". In September of the same year he reported that since 1985 there had been 101 "unrest related" death sentences and seventeen executions.

The state used its power crudely - the execution of three convicted ANC combatants was timed to coincide with the seventh anniversary of uprisings in Soweto.

South African courts refused consistently to recognise liberation movement combatants as prisoners of war under international law. In addition, the courts failed to consider the assumptions, training and motivation of members of the liberation movement as extenuating factors for purposes of capital sentencing. This fact alone brings into question the neutrality of sentencing and the state's objectives in imposing the death sentence.

Confessions and other statements following alleged torture have been central to the conviction and execution of political defendants. For example, Solomon Mahlangu, hanged in 1979 for activities in the armed wing of ANC, claimed he had been tortured while in detention awaiting trial. In the controversial trial of the "Sharpeville Six," a crucial state witness and at least one defendant who was later sentenced to death, alleged that they had been forced to make statements following torture. In refusing to participate in a trial on charges of treason and murder, a spokesperson for four accused ANC guerrillas said "all of us were tortured and brutally assaulted" during eight months of detention without access to legal counsel.

Expert witnesses were often called in political trials but given the judgements that were handed down it would not appear as though such expert testimony affected the mind of the judge and his assessors. In the case of the Messina trialists, Mthetheleli Mncube and Mzondeleli Nondula, expert testimony was led on their experiences while in exile. Mzondeleli Nondula was the sole survivor of the December 1982 raid on Lesotho who survived because he was squashed under the weight of dead bodies and was presumed dead. Mthetheleli Mncube was in Matola, Mozambique when friends of his were killed in the Matola Raid by the SADF. Expert testimony was led in the trial of Robert McBride regarding his experiences of police brutality,. Expert testimony was led in the trial of the Sharpeville Six regarding "deindividuation".

Judges repeatedly pointed out that what they termed "humanitarian considerations" did not count as extenuation . Judge Solomon, who sentenced Menzi Thafeni to death, said "*The fact that persons live in luxurious or poor conditions does not seem to us in any way to affect their rights or their duties to act as reasonable and as decent human beings.*" One wonders what Judge Solomon regarded as reasonable and decent behaviour – and whether passing a sentence of death on another person would fit into this category.

Judge TT Spoelstra sentenced Rodney Moloï and Stanford Lebepe to death after convicting them on the basis of common purpose, for the murder of a policeman who had killed the brother of a fellow trialist.

On sentencing Judge Spoelstra said :

"Circumstances of a purely sentimental character or unconnected with the crime will usually not qualify as extenuating circumstances unless they can be shown to have had the required effect on the accused's mind and his moral blameworthiness"

The doctrine of "common purpose" murder was widely used in political trials which resulted in death sentences being passed - the most famous of these were "The Sharpeville Six" and "The Upington 14".

The Sharpeville Six were convicted of murder, and sentenced to death, for "associating" with a crowd protesting rent increases". South Africa's highest court, the Appellate Division, held that by associating with this crowd, the six defendants had formed a "common purpose" with those in the crowd who killed a Lekoa town councilor, and that the death sentences could be imposed even if the defendants had taken no action causally related to the victim's death. (*S v Safatsa 1988 (1) SA 868 (A) (the 'Sharpeville Six') Judgement delivered by Botha JA*)

In the trial court, all the accused were found guilty of murder except for accused No's 5 and 6 who were held not to have had the necessary intention to kill at the appropriate time. The other accused, however, were found to have been 'mededaders' on the basis that they had had the necessary intention to kill, and had actively associated themselves with the mob's purpose of killing the deceased.

They then appealed on the basis that their convictions had been wrong because the State had failed to prove that their individual conduct had conducted causally to the death of the deceased. Botha JA found it appropriate to deal with the accused' liability on the basis of common purpose, and assumed in favour of the accused that causal connections between the accused' conduct and the death of the deceased had not been proved. Despite this finding, Judge Botha found that a party to a common purpose can be convicted of murder in the absence of proof of a causal connection between his conduct and the death of the deceased.

Common purpose theory was applied even more broadly in a case from the northern Cape Province town of Upington. After police teargassed a peaceful assembly, a policeman was killed by one of four people from the dispersed crowd who were alleged only to have chased him across a field. Twenty five people were convicted of "common purpose" murder in this case. Most were alleged only to have participated in stoning the policeman's house before the fatal incident. Fourteen defendants were sentenced to death, and denied leave to appeal. Among those sentenced to death was Evelina de Bruin and her husband Gideon Madlongolwane, both 60 years old. Quite obviously, age was not regarded as an extenuating factor by the Judge in this case.

The case of the Queenstown Six is another case that should be brought to the attention of the TRC. Six young men were sentenced to death by Justice Kroon in Port Alfred on June 24th 1987. They were Mzwandile Gqeba (22), Lundi Wana (20), Thembinkosi Pressfeet (30), Mzwandile Mninzi (27), Monde Trevor Tingwe (23) and Wantu Salinga (27). They were found guilty, on the basis of common purpose, of the murder of Nospibo Zamela. They were sentenced to death and transported to Pretoria Maximum Security Prison. Six months after their sentence, Wantu Salinga's family were informed that their son had died while on death row of TB (this in a prison which boasted a doctor in daily attendance and a diet devised by qualified dieticians).

On May 23rd 1989 a retrial of the six (now five) was ordered due to a technical irregularity in the trial. The six were retried by Judge C Jansen - same facts, same defendants - different Judge. The six were sentenced to an effective twenty months each in prison. A big difference between this sentence and the death penalty - except of course to Wantu Salinga.

In 1989 just months before the suspension of the death penalty and the start of negotiations with the then banned African National Congress, six political prisoners were hanged: Zwelindumile Mjekula, Kholisile Dyakala, Makhezane Menze, Ndumiso Silo Sephenuka, Abraham Mngomezlu and Mangena Jeffrey Bosman. Time and mercy were not on their side.

Pro Deo Defence

Most political trialists had the benefit of funded attorneys and advocates unlike the majority of other defendants who relied on Pro Deo counsel. This impacted on, among other things, the length of the trial. In a survey of Death Row prisoners conducted by the Black Sash in 1989 a sample of forty trials were studied. Of these eight percent lasted one day, seventeen percent last two to three days and eight percent lasted four to six days. In these cases Pro Deo counsel was appointed.

In a trial lasting a day or two or three or four - there is not much that can be said regarding extenuation. These defendants often went to the gallows without the Judge, prosecutor or even their Advocates having much idea about their lives and the factors that led up to the crime for which they were convicted. The majority of trials were conducted with the use of interpreters - where nuance, body language and customary expressions were all obliterated. Rand Supreme court Judge said of interpreting that it "*just makes the job more difficult. One is one step further removed from getting to know the accused.*"

The system of Pro Deo defence was riddled with problems : the accused persons often saw the counsel as an extension of the court as they were appointed by the state - no trust was possible under these circumstances; in the main, the most junior and inexperienced of the members of the Bar were appointed to defend people on trial for their lives and they were appointed to do this without the assistance of attorneys. Investigations into the case and the background were often cursory under these circumstances.

In many instances (and this was not limited to trial where there was Pro Deo defence), condemned persons had no further recourse to the legal process once sentenced. No applications for leave to appeal were entered and no petitions for clemency were sent to the State President.

The State Presidents and Clemency

The State President was empowered under South African law to extend mercy to a condemned prisoner and prisoners were entitled to petition the State president for such mercy. . The President could commute a sentence or direct the original trial court to examine new evidence which might affect the conviction or sentence. The proportion of death sentences thus reprieved rose from just under 10% in 1978 to 45% in 1983. In 1987 however only 12% of death sentences were reprieved. As with the Judges, the fate of the condemned was once again determined by the character of the President who considered their cases and the extent to which their legal representatives were committed to getting them off death row.

The disparities were extreme : some petitions for clemency were not even a page long, others were hundreds of pages. Some prisoners did not even submit a plea and were unaware that they could do so. Many went to their death barely a few months after arriving in Death Row.

Conclusion

The history of the death penalty in South Africa is a history that encapsulates and concentrates the history of oppression in our country. Pretoria Maximum Security Prison was a prison designed for death. From the first time a prisoner arrived on Death Row however, elaborate mechanisms were put in place to ensure that he or she would not kill themselves. This was a job reserved for the State and no one would take it away.

The lights were kept on 24 hours a day, prisoners were watched from a grille above their heads, they wore no belts. After the suicide in 1987 of Frikkie Muller, who gouged his wrists with a shoe nail on the day before his execution, all the condemned wore soft shoes. In the "pot" in the seven days before the scheduled execution, even greater precautions were taken to preserve life. The privilege of taking a life remained the State's. All visits to prisoners were non contact visits - even on the days prior to their execution the visits would be conducted in the presence of warders with the visitors on the other side of glass and bars.

This extended even to death - family members were allowed to see the coffin in which they were told was the body of their loved one - they were not allowed to see the body. When Andrew Zodo's father was told this he went home - his only comment was that if he wanted to look at a coffin he would go to Doves Funeral Services.

If the system of capital punishment in South Africa is not regarded as a systematic gross human rights violation associated with the conflicts of the past, then there is very little that could fit this definition.

I regard the death penalty as a savage and immoral institution which undermines the legal and moral foundations of a society. A state, in the person of its functionaries, who like all people are inclined to making superficial conclusions, who like all people are subject to influences, connections, prejudices and egocentric motivations for their behaviour takes upon itself the right to the most terrible and irreversible act - the deprivation of life. I reject the notion that the death penalty has any essential deterrent effect on potential offenders. I am convinced that the contrary is true - that savagery begets only savagery. Andrei Sakharov

Recommendations to the TRC

1. That the Truth and Reconciliation Commission hold a Special Hearing on the death Penalty.
2. That the TRC subpoena perpetrators of this gross human rights violation to this hearing :
 - ◆ The Judges - including e.g. Judge Leon, Judge O'Donovan, Judge D H van Zyl, Judge DJP le Grange, Judge Lategan and Judge Williamson JJ.
 - ◆ The prosecutors - including e.g. Mr Ros Stuart
 - ◆ The Hangman - I am not sure whether Chris Barnard is still alive - if not, the person who took over his job should be called (the Department of Justice will have his name)
 - ◆ The Doctors who, against their Hippocratic oath, attended executions
 - ◆ The former State Presidents
 - ◆ Members of the Prisons Service employed at Pretoria Maximum
3. That the hearing should hear testimony from the following people :
 - ◆ Former inmates of death row (refer to Annexure A)
 - ◆ Family members of those executed
 - ◆ Possibly from warders some of whom were sympathetic (refer to Annexure A)
 - ◆ People who worked on the campaign to end the death penalty in South Africa.

Annexure A

1. Former inmates (political prisoners) of Death Row who are contactable are : Robert McBride, Mthetheleli Mncube, Mzondeleli Nondula, Ting Ting Masango, Neo Potsane, Jabu Masina, members of the Uppington 14 as well as members of the Sharpeville Six.
2. The family of Andrew Zondo are also contactable as are the families of Solomon Mahlangu and Siphso Xulu. The ANC will also have other contacts.
3. The prison authorities would have to be contacted for information regarding the last hangman.
4. Warders who may come forward can be contacted through Pretoria Maximum.

The Judges, the Law and the Sentence of Death



A submission to the TRC by Paula McBride and
Sharon Ekambaram

Judges, the Law and the Death Penalty

Everyone now accepts that in the past, a significant body of the law of this country was grossly unjust. It was blatantly designed to comfort, benefit, and protect the white community; and to repress, denigrate, and impoverish everyone else.

It seems obvious that being a member of the judiciary in a country with unjust laws, must, by definition, involve dispensing injustice. There is lots of evidence that the apartheid judiciary did this to great effect. After all, for many years, apartheid ran like clockwork.

The judiciary enforced every aspect of apartheid from the most petty and degrading to the most murderous and genocidal. They sent people to jail for walking the streets of their own country without a pass; for using "white" facilities; for loving someone of the wrong colour; for trying to live or set up business outside of ghettos and bantustans. They sent people to jail or the gallows, knowing full well that they had not had a competent defence. They gladly accepted statements that had obviously been secured through torture. They enforced legislation that silenced the press. They presided over commissions of enquiry that whitewashed security force excesses and corruption. They upheld the grand theft of the homes and lands of black people. They punished opponents of their system (for their's it was) with the harshest array of cruelties, including banishments, house arrests, hard labour, lengthy jail sentences, and wherever they could find any pretext, death.

Even beyond implementing unjust laws, the apartheid judges took legislation that did not contain any obvious bias, and did what the State expected of them - applied it in a biased and twisted manner. One of the most visible examples of this was in the handling of rape cases. Generally, black men found guilty of raping white women were sentenced to death. Generally, white men who raped black women were not even brought to court. One case in the mid-eighties gives us a glimpse at the heart of this issue. Two white men appealed their unusually heavy 7 year sentence for the rape and assault of a black woman. In his reasons for reducing the sentence to two years, the appeal judge said that he had considered the facts that the men were of low IQ and had often sought the company of black women, as extenuation. In other words, the wrong to the woman was not even an issue.

Another sharp example of how judges went that extra mile - to unevenly implement laws which were not ostensibly uneven - is provided by two high-profile murder cases that were heard at around the same time in the eighties. In one, a black teenager who had seen terrible injustice and who had seen friends killed, acting within an ANC structure, planted a bomb that killed five people.

The teenager would have been one of the most obvious candidates for amnesty were he alive today. Judge Leon, a leading "liberal" judge, could find no extenuation and despatched Andrew Zondo to his death. In the other case, an elderly farmer, irritated with people trespassing on his farm, chased two children (5 and 9) with his truck. He drove over them repeatedly until he was sure he had killed them. The judge in this case, using the same legal system with all the of the same precedents, found the man's age (70) was an extenuating circumstance and Mr van der Walt was given a suspended five-year sentence - he didn't even spend a day in jail.

Even the "liberal" apartheid judges gritted their teeth and got on with the job. In doing so, they sealed the fate of the oppressed. They stamped the respectability of their learning and the unassailability of their robes on the devious and cruel designs of the apartheid politicians and policemen. In many senses it could be argued that what they did was far worse than what the apartheid police did - they were educated enough to have known better.

Yet even up to now they have managed to preserve and propagate the absurdity that they were somehow above it all, impartial. This illusion has to be exposed. You cannot implement unfair laws fairly. The judiciary's role in pretending to do so made them more valuable to the fortification of apartheid than a thousand Vlakplaas farms could have done. It gave the system a veneer of respectability which the State could flaunt to the outside world, and at the same time added steel to the hand that crushed so many of the people of this country.

The legal confraternity, which is obviously well represented in the TRC, must resist the pressure to close ranks to protect the men of the apartheid judiciary. These men were instrumental in inflicting degradation, great hardship, and death. Some may have done it more enthusiastically than others, but they all did it. They must all be exposed. And there must be a concerted effort to rapidly remove those who remain in positions of authority - they have shown that they lack the morality to be entrusted with making decisions over the lives of others.

In doing so, the TRC will expose one of the most lethal weapons in apartheid's oppressive armoury, and acknowledge the wrongs that were done to so many. It will also give due recognition to the many members of the legal profession who made principled decisions not to join the judiciary, and thus not to play a role in legitimizing the barbarity.

This submission will focus specifically on the role of the judiciary with regard to the death penalty.

It didn't bother me because the person was sentenced to death. He goes through a trial. The evidence is produced and it's judged. In those days they still had juries and if he is judged on the evidence produced against him and he's found guilty on that and if a man committed murders and it's proved beyond a doubt and there's no extenuating circumstances then he deserves to hang and I had no hesitation, my conscience doesn't worry me. I hang him and that is the end of it. **Chris Barnard - the Hangman**

The pristine and elegant Judges Chambers are as far removed as one could get from the bloody mess in the gallows chambers - yet the link between them is as strong as the rope that was used to hang people. It was the Judges of South Africa who imposed the death penalty - not the prisons service, not the hangman and not the State President but our learned Bench. This section will look not only at the Judges and their Assessors, but at the law they interpreted.

Between the years 1961 and 1990 all the Judges in our country were white and 99% of them were male. Almost without exception they were people who were drawn from the ranks of privilege and power - highly educated one and all. In accepting positions on the Bench they accepted , among other things, the task of interpreting and applying racist and oppressive laws. In addition to this they accepted that they would be empowered to sentence other human beings to death.

Prior to the 1990 amendments, in South African law the death penalty was mandatory for murder where the court found no extenuating circumstances. The sentence was discretionary for rape, robbery with aggravating circumstances, housebreaking with aggravating circumstances, sabotage, terrorism, treason, kidnapping and child stealing. The death sentence could only be passed by a Supreme Court before a Judge and two assessors.

Those sentenced to death had no automatic right to an appeal and had to apply to the trial court for leave to appeal against either sentence or conviction. If the trial Judge denied leave to appeal, the condemned person could appeal to the Chief Justice and this petition was considered either in chambers by three Judges of the Appellate Division or be referred to the Appellate Division for consideration. If this application was turned down, the only recourse for a prisoner would be a petition for clemency to the State President.

The State President was empowered to extend mercy and to commute the death sentence to another sentence. He could also request the trial court to examine new evidence which could have a bearing on either the conviction or the sentence.

The question of a "mandatory" death sentence is misleading - it was mandatory for murder *only when the court found no extenuating circumstances*. The question as to whether or not extenuation exists was left to the Judge and his Assessors to determine - this was a judgement they made and it was discretionary. Judges were allowed to hide behind the letter of the law and shift the responsibility for their decision. The fact of the matter is that if Judges did not want to pass the death penalty they did not have to.

Judge Raymond Leon, who had himself passed death sentences said as much : " Why should a man's life depend on the chance of which Judge he appears before. Some Judges find extenuating circumstances more easily than others and I know one Judge who has been on the bench for many years and has never passed the death sentence." Judge Leon, in his address at the relaunch of the Society for the Abolition of the Death Penalty in November 1988 said that he had always "disliked" the death sentence but had to honour his oath of office.

I don't know how many times I sent someone to the gallows. But it was at least twelve and possibly as many as twenty times. Both before and after the verdict and sentence I could not sleep. Sometimes it took me weeks to recover. I never got used to it." Judge Raymond Leon

Judge Leon was converted to abolition only after sentencing between "twelve and twenty" people to death - most people who have deliberately caused the deaths of others remember how many people they have killed. Judge Leon and others like him had the luxury of passing on the job of death to others. Judge Leon never went into the execution chamber, he did not pull the lever that opened the trap door, he never watched the "dance macabre" or washed the bloodied white hoods worn by the condemned. It was not Judge Leon that had to tear gas prisoners out of their cells and drag them up the steps to the gallows. It was not his job to go outside the walls of the prison and inform mothers and fathers of the death of their children. If he had done this, maybe his memory would have served him better.

This was the Judge who sentenced Sibusiso Andrew Zondo to death for his role in the Amanzimtoti limpet mine attack in which five people were killed. Andrew was hanged on the 9th September 1986, with Lucky Payi and Sipho Zulu. At the time Andrew Zondo planted the bomb he was 19 years old.

When he was hanged he was 20 years old. Judge Leon and his Assessors decided that in his case there were no extenuating circumstances and that he deserved to die.

The limpet mine that caused the explosion on 23rd December 1985 was detonated by two people - one, Mr X a man of thirty five years old and the other a boy of 19 years old. The limpet mine had been supplied by Mr X who accompanied Andrew to the site. The act was carried out in retaliation for an SADF raid into Lesotho that had killed nine innocent civilians. Mr X became the state's star witness, described as an "excellent witness" on more than one occasion by Judge Leon - he received full indemnity from the court and was a free man. Andrew, who freely admitted his role in the attack received the death sentence.

Judge Leon asked himself questions during his sleepless nights, post sentencing, that he should have asked himself before passing sentence. These are questions that reach into the heart of the debate around the death penalty and we reproduce them in full :

- ◆ Would the outcome have been the same in the hands of more experienced and competent counsel ?
- ◆ Had he asked all the questions he should have asked ?
- ◆ Was his interpretation of the case correct?
- ◆ Did he know enough about the accused's background ?
- ◆ Had the defence investigated the case fully ?
- ◆ What possibility for error existed ?
- ◆ Why should a man's life depend on the chance of which Judge he appears before?

Judge Leon should have added a few more questions to the list when he sentenced Andrew Zondo to death :

- ◆ Why is it that there were two people involved and one is a free man and the other sentenced to die ?
- ◆ Is the fact that Sibusiso Andrew Zondo was nineteen years old not a factor in extenuation ?
- ◆ Should it have made a difference to me that Andrew Zondo went to try and phone in a warning so that people would evacuate the shopping centre ?
- ◆ Did I have the capacity to fully understand what Andrew Zondo was trying to tell the court ?
- ◆ Do I have the moral right to declare him unfit to live - what does that make me?
- ◆ I wonder how many sleepless nights Andrew's family, Aiken , Lephina, Siso, Irene, Sandile and Duduza will have ?

Sadly, for Andrew Zondo and for the other eleven or nineteen people sentenced to death by Judge Leon, he did not ask himself any of these questions - he fully accepted the version of events given to him by a person whose integrity he should have questioned - a person who had turned state witness to protect his own skin. The behaviour of Mr X is in sharp contrast to that of Andrew, who in an effort to protect him told police and the Magistrate that he had acted alone. In summing up, Judge Leon said the following :

On the totality of the evidence we have not the smallest hesitation in accepting the evidence of the accomplice as true and that of the accused as false beyond all reasonable doubt, where the one version differs from the other..... We are unanimously of the clear view that extenuating circumstances are not present in this case.

In the trial later that year of Robert McBride the question of extenuation arose once more and one of the Assessors, Professor John Milton, filed a dissenting report on the question of extenuating circumstances. It is a pity that neither the Judge in the McBride case, Judge Shearer, nor his fellow on the Bench, Judge Leon had the wisdom or the insight of Professor Milton :

How am I to assess the morality of this act ? (the car bomb outside the Why Not Bar). In a normally ordered society where every citizen enjoys the full range of civil liberties and equal access to the political process, to resort to an act of political protest of this sort would be a totally senseless act and in my view without the slightest justification. What then of a society where a citizen does not enjoy equal access to the political process, where he is denied certain rights and liberties by reason of his race ? Prof. John Milton

When Andrew Zondo was asked whether he had anything to say before sentence was passed he said the following :

In fact I wish to say to the people who might have lost their friends and kids or I mean lost their family members ... I am sorry. And the next thing I wish to say I wish my country stays friendly to neighbouring countries.

Judge Leon then passed the sentence of death - not once but five times, ending with the words : May the Lord have mercy on your soul.

Two incidents, fifteen deaths . The outcomes, like the Judge and the defendant, were worlds apart.

On December 19th 1985 an SADF squad, under instructions from their political leadership, with blackened faces crossed the Caledon river into Maseru and killed nine South African refugees

The killers with faces blackened and using weapons burst into a house where a small party was in progress, they killed seven, blood caked the floor, bathroom and bedclothes. Party food still lay on cardboard plates, littered on the floor among dozens of 9mm shell cases. The walls and furniture were pockmarked with bullet holes. The killers then went a further two kilometres to the house of Joe and Jackie Quin where they shot the couple and left. The neighbours, alerted by Joe before he died, took their year old baby Phoenix to the hospital.

The perpetrators of these murders have never been identified, prosecuted or sentenced. There was no Mr. Ros Stuart to prosecute them and describe them as "of evil mind", and there was no Judge Leon to decide whether or not they had gone to Maseru with the intention to kill. The families of these victims have not been afforded their day in court. For all we know, these murderers are alive and well.

On the 23rd December 1985 , in an act carried out in retaliation for the SADF attack four days earlier, five people were killed . They were not South African refugees - they were on holiday in Amanzimtoti but their deaths are no less tragic. They died as a result of a limpet mine placed in a refuse bin outside the Sanlam shopping centre in Amanzimtoti. One of those who placed this mine , Andrew Zondo, was tried , sentenced and convicted for this deed.

He was declared to be a man (albeit a nineteen year old one) of "evil mind" by Mr Ros Stuart the prosecutor. The Judge and his Assessors concurred and Andrew Zondo was sentenced to death five times - in addition Judge Leon saw fit to pass an additional, irrelevant sentence of ten years.

Judge Leon in his arrogance, presumed no other court would reach a different decision, and he refused Andrew leave to appeal. Andrew Zondo, unlike the SADF soldiers who entered Maseru on the 19th December, is no longer living - he was hanged on the 9th September 1986.

Andrew Zondo himself said of his trial, and these are words that would be echoed by many who came into the courts of South Africa :

I listened to the Prosecutor and I saw that he did not have any ideas about us. He was ignorant of our ways and feelings. I looked at the Judge and the prosecutor and the thought came to me that they were ants and in engaging with them we were dwarfing ourselves. It is a curse to be a Judge when you believe that you hold the life of a person in your hand. Only God holds our lives in His hands. He gives it and He alone can take it*

There are many stories that should be told of young South Africans who ended up on Death Row - sent there by our educated Judges to be hanged by the neck until they were dead. In some instances it took trials of a few weeks for the Judge and his Assessors to arrive at this decision - in others it took no more than a day.

The case of Michael Bini Matli is such a case. Michael Matli was tried, convicted and sentenced to death in the Lichtenburg Circuit Court on August 26th 1988. The sitting Judge was Justice D van Zyl. When Michael Matli appeared in his court room he was given five minutes to decide whether or not he wanted the pro Deo lawyer appointed to him. Mr Matli decided to dismiss the Advocate.

He did not give evidence in his own defence nor in mitigation of sentence and he called no witnesses.

He was accused of murdering Brenda Sebotse who died as a result of stab wound on May 17th 1987. In a statement to police soon after his arrest Michael Matli said that he had left a stokvel that night with Brenda and they were on their way to his parents house. She had changed her mind and they had argued. In the tussle he had stabbed her with a knife she had drawn.

In his summing up, at the end of the one day trial, Judge van Zyl said the following :
"The accused did not take the court into his confidence by giving evidence. In the absence of any other evidence, the court finds there was direct intent to commit murder." Michael Matli was then sentenced to death. In one day, with no evidence before him of who Michael Matli was, where he lived, who his family was, whether or not he had schooled, what influences came to bear upon him and what his life had been like, Judge van Zyl decided that Michael Matli was no longer fit to live.

Judge van Zyl, a highly educated man, no doubt with family and friends of his own and a life that was full and complex, regarded the life of Michael Matli as a life worth so much less than his own. His search for extenuation took him no more than a few brief minutes - no sleepless night for Judge van Zyl.

The Judges are too many to name here and the cases too many to repeat. In just a three year period in the then Transvaal Provincial Division, Judge O 'Donovan sentenced 25 people to death, Judge Curlewis - 14, Judge Human - 11, Judge Le Grange 16, Judge JMC Smit 17, Judge Irving Steyn 13, Judge JJ Strydom - 12, Judge Vermooten - 9 and Judge DH van Zyl - 9.

In this Division, there was one Judge during the three year period who sentenced no one to death - Judge NM McArthur.

Throughout the country, figures were similar. In Natal you breathed an enormous sigh of relief as an Accused person on a Capital charge if your case was heard by Justice John Didcott - a Judge who spent many long years on the bench and has never passed a sentence of death. If on the other hand you appeared before some of the other well known liberals in Natal, such as Judge Shearer (famous for growing roses and sentencing Robert McBride to death, despite a finding by one of his Assessors, Professor Milton, that there were extenuating circumstances), Judge Wilson (presently deciding which acts warrant amnesty) or Judge Rabie you weren't so lucky.

In "The Death Penalty in the Cape Provincial Division: 1986-19888' (1989) 5 SAJHR 154 it was claimed that statistical evidence supports the view that some judges are more reluctant to hand down the death penalty than others : the likelihood of an individual being hanged is affected by the identity of the judge before whom he or she is tried. Research findings showed huge disparities in sentencing practices. Judges Baker, Lategan and Williamson JJ heard 15% of the cases but imposed 51% of the death sentences, and Judges Marais and Rose Innes JJ tried 19,25% of the cases but imposed only 4,02% of the death sentences.

The Judges of the Apartheid era have many questions to answer and many victims to face - their robes and oath of office merely distinguish them in form from the murderers they dismissed to their deaths with such contempt. These robes should no longer be used to shield them from their role in the commission of gross human rights violations .

Political Executions

In 1917 capital punishment was limited to three crimes namely murder, treason and rape. However from 1958 a proliferation of capital offences started taking place. This occurred during the early stages of the application of apartheid policy in South Africa. The extension of the death penalty therefore coincided with an intensification of political oppression. Capital punishment was made applicable to robbery and housebreaking with aggravating circumstances, sabotage, the undergoing of training abroad for the purpose of furthering communism, the furthering overseas of economic and social change in South Africa by means of violent means, kidnapping and participation in terrorist activities. [*The Terrorism Act 83 of 1967. S54(d)(iv) of the Internal Security Act 74 1982. In terms of this section the penalty for terrorism is the same as for treason.*] Altogether the Criminal Procedure Act of 1977 provided for eleven capital crimes.

During the sixties large number of PAC members were executed as was Frederick John Harris who was hanged on the 1st April 1965. Even before he reached the hangman's noose his jaw was broken for the sin he had committed against the Apartheid government. In 1979 Solomon Mahlangu was hanged at aged 21. As in the case of Andrew Zondo, the Judge found no extenuation.

During the 1980's, when opposition to the government was reaching new heights, the number of persons sentenced to death for politically motivated actions increased dramatically. In the early eighties Marcus Motaung, Jerry Mosololi, Simon Mogoerane, Benjamin Moloise, Sibusiso Andrew Zondo, Clarence Lucky Payi and Sipho Xulu were hanged.

By the end of 1987 the number of political prisoners on death row increased to 44 and in 1988 the Minister of Justice stated that 83 people were on death row as a result of "unrest-related crimes". In September of the same year he reported that since 1985 there had been 101 "unrest related" death sentences and seventeen executions. The state used its power crudely - the execution of three convicted ANC combatants was timed to coincide with the seventh anniversary of uprisings in Soweto.

South African courts consistently refused to recognise liberation movement combatants as prisoners of war under international law. In addition, the courts failed to consider the assumptions, training and motivation of members of the liberation movement as extenuating factors for purposes of capital sentencing. This fact alone brings into question the neutrality of sentencing and the state's objectives in imposing the death sentence.

Confessions and other statements following alleged torture have been central to the conviction and execution of political defendants. For example, Solomon Mahlangu, hanged in 1979 for activities in the armed wing of ANC, claimed he had been tortured while in detention awaiting trial. In the controversial trial of the "Sharpeville Six," a crucial state witness and at least one defendant who was later sentenced to death, alleged that they had been forced to make statements following torture. In refusing to participate in a trial on charges of treason and murder, a spokesperson for four accused ANC guerrillas said "all of us were tortured and brutally assaulted" during eight months of detention without access to legal counsel.

Expert witnesses were often called in political trials but given the judgements that were handed down it would not appear as though such expert testimony affected the mind of the judge and his assessors. In the case of the Messina trialists, Mthetheleli Mncube and Mzondeleli Nondula, expert testimony was led on their experiences while in exile. Mzondeleli Nondula was the sole survivor of the December 1982 raid on Lesotho who survived because he was squashed under the weight of dead bodies and was presumed dead. Mthetheleli Mncube was in Matola, Mozambique when friends of his were killed in the Matola Raid by the SADF. Expert testimony was led in the trial of Robert McBride regarding his experiences of police brutality,. Expert testimony was led in the trial of the Sharpeville Six regarding "deindividuation".

Judges repeatedly pointed out that what they termed "humanitarian considerations" did not count as extenuation . Judge Solomon, who sentenced Menzi Thafeni to death, said "*The fact that persons live in luxurious or poor conditions does not seem to us in any way to affect their rights or their duties to act as reasonable and as decent human beings.*" One wonders what Judge Solomon regarded as reasonable and decent behaviour - and whether passing a sentence of death on another person would fit into this category.

Judge TT Spoelstra sentenced Rodney Moloï and Stanford Lebepe to death after convicting them on the basis of common purpose, for the murder of a policeman who had killed the brother of a fellow trialist.

On sentencing Judge Spoelstra said :

"Circumstances of a purely sentimental character or unconnected with the crime will usually not qualify as extenuating circumstances unless they can be shown to have had the required effect on the accused's mind and his moral blameworthiness"

The doctrine of "common purpose" murder was widely used in political trials which resulted in death sentences being passed - the most famous of these were "The Sharpeville Six" and "The Uppington 14".

The Sharpeville Six were convicted of murder, and sentenced to death, for "associating" with a crowd protesting rent increases". South Africa's highest court, the Appellate Division, held that by associating with this crowd, the six defendants had formed a "common purpose" with those in the crowd who killed a Lekoa town councilor, and that the death sentences could be imposed even if the defendants had taken no action causally related to the victim's death. (*S v Safatsa 1988 (1) SA 868 (A) (the 'Sharpeville Six') Judgement delivered by Botha JA*)

In the trial court, all the accused were found guilty of murder except for accused No's 5 and 6 who were held not to have had the necessary intention to kill at the appropriate time. The other accused, however, were found to have been 'mededaders' on the basis that they had had the necessary intention to kill, and had actively associated themselves with the mob's purpose of killing the deceased.

They then appealed on the basis that their convictions had been wrong because the State had failed to prove that their individual conduct had conducted causally to the death of the deceased. Botha JA found it appropriate to deal with the accused' liability on the basis of common purpose, and assumed in favour of the accused that causal connections between the accused' conduct and the death of the deceased had not been proved. Despite this finding, Judge Botha found that a party to a common purpose can be convicted of murder in the absence of proof of a causal connection between his conduct and the death of the deceased.

Common purpose theory was applied even more broadly in a case from the northern Cape Province town of Upington. After police teargassed a peaceful assembly, a policeman was killed by one of four people from the dispersed crowd who were alleged only to have chased him across a field. Twenty five people were convicted of "common purpose" murder in this case. Most were alleged only to have participated in stoning the policeman's house before the fatal incident. Fourteen defendants were sentenced to death, and denied leave to appeal. Among those sentenced to death was Evelina de Bruin and her husband Gideon Madlongolwane, both 60 years old. Quite obviously, age was not regarded as an extenuating factor by the Judge in this case.

The case of the Queenstown Six is another case that should be brought to the attention of the TRC. Six young men were sentenced to death by Justice Kroon in Port Alfred on June 24th 1987. They were Mzwandile Gqeba (22), Lundi Wana (20), Thembinkosi Pressfeet (30), Mzwandile Mninzi (27), Monde Trevor Tingwe (23) and Wantu Salinga (27). They were found guilty, on the basis of common purpose, of the murder of Nospibo Zamela. They were sentenced to death and transported to Pretoria Maximum Security Prison. Six months after their sentence, Wantu Salinga's family were informed that their son had died while on death Row of TB (this in a prison which boasted a doctor in daily attendance and a diet devised by qualified dieticians).

On May 23rd 1989 a retrial of the six (now five) was ordered due to a technical irregularity in the trial. The six were retried by Judge C Jansen - same facts, same defendants - different Judge. The six were sentenced to an effective twenty months each in prison. A big difference between this sentence and the death penalty - except of course to Wantu Salinga.

In 1989 just months before the suspension of the death penalty and the start of negotiations with the then banned African National Congress, six political prisoners were hanged : Zwelindumile Mjekula, Kholisile Dyakala, Makhezane Menze, Ndumiso Silo Sephenuka, Abraham Mngomezlu and Mangenia Jeffrey Bosman. Time and mercy were not on their side.

Pro Deo Defence

Most political trialists had the benefit of funded attorneys and advocates unlike the majority of other defendants who relied on Pro Deo counsel. This impacted on, among other things, the length of the trial. In a survey of Death Row prisoners conducted by the Black Sash in 1989 a sample of forty trials were studied. Of these eight percent lasted one day, seventeen percent last two to three days and eight percent lasted four to six days. In these cases Pro Deo counsel was appointed.

In a trial lasting a day or two or three or four - there is not much that can be said regarding extenuation. These defendants often went to the gallows without the Judge, prosecutor or even their Advocates having much idea about their lives and the factors that led up to the crime for which they were convicted. The majority of trials were conducted with the use of interpreters - where nuance, body language and customary expressions were all obliterated. Rand Supreme court Judge said of interpreting that it "*just makes the job more difficult. One is one step further removed from getting to know the accused.*"

The system of Pro Deo defence was riddled with problems : the accused persons often saw the counsel as an extension of the court as they were appointed by the state - no trust was possible under these circumstances; in the main, the most junior and inexperienced of the members of the Bar were appointed to defend people on trial for their lives and they were appointed to do this without the assistance of attorneys. Investigations into the case and the background were often cursory under these circumstances.

In many instances (and this was not limited to trial where there was Pro Deo defence), condemned persons had no further recourse to the legal process once sentenced. No applications for leave to appeal were entered and no petitions for clemency were sent to the State President.

The State Presidents and Clemency

The State President was empowered under South African law to extend mercy to a condemned prisoner and prisoners were entitled to petition the State president for such mercy. . The President could commute a sentence or direct the original trial court to examine new evidence which might affect the conviction or sentence. The proportion of death sentences thus reprieved rose from just under 10% in 1978 to 45% in 1983. In 1987 however only 12% of death sentences were reprieved. As with the Judges, the fate of the condemned was once again determined by the character of the President who considered their cases and the extent to which their legal representatives were committed to getting them off death row.

The disparities were extreme : some petitions for clemency were not even a page long, others were hundreds of pages. Some prisoners did not even submit a plea and were unaware that they could do so. Many went to their death barely a few months after arriving in Death Row.

Conclusion

I regard the death penalty as a savage and immoral institution which undermines the legal and moral foundations of a society. A state, in the person of its functionaries, who like all people are inclined to making superficial conclusions, who like all people are subject to influences, connections, prejudices and egocentric motivations for their behaviour takes upon itself the right to the most terrible and irreversible act - the deprivation of life. I reject the notion that the death penalty has any essential deterrent effect on potential offenders. I am convinced that the contrary is true - that savagery begets only savagery. Andrei Sakharov

