*Scientia Militaria*
*2022, VOL. 50, NO. 3, 103-119*
*DOI: 10.5787/50-3-1393*

# Historical reflections on the deterrent effect of the death penalty on capital crimes in South Africa: Lessons from 1917–1995

*Chris Derby Magobotiti*
*IPID-Parliamentary Liaison Officer*

**Abstract**

The death penalty was long practised in South Africa as one of the sentence options for capital crimes such as murder, rape, treason, terrorism, and robbery with aggravating circumstances. Its practice has a matching effort for its abolishment or restricted application. Reflecting on some specific historical periods of the practice of the death penalty in South Africa, the author sought to contextualise the article, namely to understand the socio-political experience and perception of the death penalty in order to gauge its current relevance. The goal of the study on which this article reports was to determine whether the death penalty had a deterrent effect on capital crimes in South Africa during the pre-1996 constitutional period. In order to achieve the goal of the deterrence of serious crimes by the death sentence in South Africa, the author discusses legislation, case law, execution patterns and deterrence literature in its context.

**Keywords:** death penalty, deterrent effect, constitutionality, proportionality, capital crimes, execution patterns

## Introduction

Section 277(1)(a) of the Criminal Procedure Act (No 51 of 1977), made the death sentence a competent sentence for murder.[467] This section provides for eight capital crimes. It further provides that a sentence of death may be passed upon a person convicted of murder, treason, rape, kidnapping and child stealing, robbery and attempted robbery, housebreaking or attempted housebreaking – if there are aggravating circumstances. Section 1(1) of the Criminal Procedure Act defines aggravating circumstances to include, amongst others, the use of a weapon or firearm, violence or threats of violence. As the title suggests, the scope of the study stretched from 1917, which marked legislative shifts by adding capital crimes and made the death penalty mandatory for murder[468] through key moments until 1995, when the 1993 Interim Constitution outlawed the death penalty and its legislation, which was repealed in 1997, as discussed below.

In 1995, the death penalty was abolished by the Constitutional Court as a sentence option for capital crimes in South Africa.[469] Subsequently, section 277 of the Criminal Procedure Act was repealed by the Criminal Law Amendment Act (No. 105 of 1997).[470] In the Makwanyane case, the Constitutional Court held that capital punishment infringed the

rights to life and dignity, and constituted a cruel, inhuman or degrading punishment.[471] The state's major argument was that capital punishment was justified by its deterrent effect. This argument was rejected by the court on the grounds that there was no clear proof that capital punishment serves to deter murder.[472] The court also rejected arguments by the Attorney General, which attempted to justify capital punishment for its retributive function or measure to prevent criminals from killing again.[473] The court emphasised that various factors, such as elements of arbitrariness, possibility of error in the enforcement of the death sentence, inequality, destruction of life, make capital punishment cruel, inhumane and degrading, which is in conflict with the Constitution.[474]

The principle of proportionality, which says, 'punishment must fit the crime', has long been practised in South African sentencing law, in order to promote balanced sentencing of the offenders.[475] Van Zyl Smit notes that the Constitution endorses the principle of proportionality, which Chaskalson identified in the Makwanyane case as a factor to be considered when deciding whether a particular punishment was cruel, inhumane or degrading.[476] Similarly, Currie and De Waal point out that in the Makwanyane judgment, Chaskalson called for penalties to be proportional to the harm caused by crime as required by the Constitution.[477]

Currently, there are calls for reinstatement of the death penalty by certain small sections in South Africa, as a response to the perceived increase in violent crimes. This article seeks to contribute to an understanding whether the death sentence was historically a deterrent to capital crimes.

In order to achieve the goal of determining the deterrent effect of the death penalty, the study on which this article reports, applied a secondary methodology, which reviewed literature studies, legislation and case law with a narrow focus.[478] The first task of the study was to establish the historical sentencing patterns and the nature of cases and legislation in which the death penalty was commonly imposed by courts. The second task of the study was to determine if there is penal philosophical and statistical evidence that suggests whether the death penalty is a deterrent to serious crime, or not. In this regard, a deterrent effect was explored as the main focus within the proportionality principle. This suggests that incapacitation and other utilitarian sentencing justifications – including retribution – were not the direct focus of the study. This was due to the historical nature of the study, and the purpose of a narrow focus in accordance with the goal of this article. Based on this discussion, conclusions were drawn.

**The death penalty in South Africa**

The death penalty was applied in South Africa together with the gradual corresponding movement for its abolishment or limited application.[479] During the early colonial years in South Africa, there were public hangings at the Cape. Those years, the method of execution in South Africa was hanging by the neck, except for the 1914 execution of Jopie Fourie, found guilty of treason, who was executed by firing squad during wartime.[480] At the end of this period, capital crimes were murder, rape and treason.[481] The court had discretion, and the death sentence could be imposed where there were aggravating circumstances or evidence of grave circumstances.[482] The Criminal Procedure and Evidence Act (No. 31

of 1917) specified capital crimes, and section 338(1) provided for mandatory hangings in the case of murder.[483]

By 1935, section 61 of the General Law Amendment Act (No. 46 of 1935) introduced some shifts from mandatory capital punishment for murder, with the idea of "extenuating circumstances".[484] At the time, the meaning of the term 'extenuating circumstances' depended, to a large extent, on the interpretation and understanding of each individual judicial officer trying capital crimes.[485] The Act broadly considered extenuating circumstances to include the age factor (under 18), the lack of use of dangerous weapons, personal circumstances, first offender, state of mind, and aggravating and mitigating factors in the context of the death penalty. Currin cites the *S* v. *Lembete* judgment to illustrate the complex nature of extenuating circumstances. This judgment, unlike the previous cases, placed a duty on the accused to prove its presence in respect of a capital case.[486] This judgment took place in 1947, and is perceived as an important development in case law.[487] Extenuating circumstances were cited involving weight of evidence so circumstantial, an unplanned act and surrounding circumstances, extenuating circumstances were not proved by the accused at the court. In this case, the ruling of the court had serious consequences to the accused due to *pro Deo* system, among others, which often lacked adequate representation as a result of financial problems.[488]

By 1958, a number of amendments had been introduced to the Criminal Procedure Act (No. 56 of 1952).[489] This led to the creation of new capital crimes by section 4 of the Criminal Procedure Act (No. 9 of 1958) and each punishment of a crime depended on the discretion of the court.[490] The crimes ranged from robbery or attempted robbery with aggravating circumstances to infliction or threat of serious bodily harm, housebreaking and attempted sabotage. Subsequently, the General Law Amendment Act (No.76 of 1962) widened the definition of sabotage to include strikes, trade union activity, and writing slogans on the walls.[491] The crime of kidnapping was determined by an amendment to the Criminal Procedure Act (No. 56 of 1955). Participation in terrorist activities, such as sabotage and treason, was widely defined as a capital crime, and was created by the Terrorism Act (No. 83 of 1967).[492] Sentencing trends and patterns reveal that murder was most frequently the crime to result in the imposition of the death penalty in the early 1950s to the late 1960s.[493] In 1954, the number of executions totalled 73,[494] while in the period 1957 to 1968, the number increased to 93 executions. From mid-1961 to mid-1962, there was a dramatic increase in the number of hanged persons, to 128.[495]

In the period 1947 to 1969, execution trends and patterns reveal that capital crimes other than murder were seldom punished by death. For example, for rape, the number of executions is estimated to be around 135 for this period.[496] In the same period, the number for robbery or housebreaking with aggravating circumstances was around 70, and for sabotage, around 7.[497] From this picture, it seems that not all capital crimes were met with the death sentence. It appears that, in this period, most executions, approximately 90%, were for murder.[498] In 1951, there were around 37 executions.[499] From 1958 to 1960, 291 death sentences were imposed, and 140 executions carried out.[500] Of the number of death sentences imposed between 1963 and 1965, 794 executions were carried out. Currin,[501] Kahn[502] and Olmesdahl[503] seem to agree broadly on the increase in capital convictions and executions from the late 1950s to the mid-1960s. They also reflect on the growing

number of commutations of death sentences at the time. It is possible that the shift towards the notion of extenuating circumstances permitted wide possibilities by judicial officers in respect of convictions for murder.

Currin suggests that capital cases in the period 1950 to the 1980s have been executed in accordance with the rigid application of the principle of extenuating circumstances.[504] Others within the period have shown a strong application of the doctrine of 'common purpose', which developed in English case law.[505] It is stated that, in the English case of *R* v. *Maclin, Murphy and Others*,[506] the court defined the doctrine as follows:

> It is a principle of law, that if several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in terms of the law, done by all.[507]

Subsequently, the common purpose principle was adopted in South Africa as part of the common law as far back as 1886. In accordance with the common purpose principle, in *R* v. *Mgxwiti*, the accused, together with seven other persons, was charged before a judge and assessors in the East London Circuit Local Division with the murder of a woman.[508] The first and second accused persons were convicted of murder with no extenuating circumstances and were sentenced to death.

The conviction for murder was based on the finding that the court had proved a common purpose of the group of persons who attacked and killed the deceased, and that the appellant was part of such purpose. On appeal, the defence argument was that the appellant could not be held guilty of murder, on the doctrine of common purpose, unless he had associated himself with that purpose at the time when the deceased had not received a fatal injury. The contention was disputed and dismissed, and conviction for murder was endorsed.

Prior to 1950, the case of *McKenzie* v. *Van der Merwe* related to the principle of common purpose.[509] The evidence seemed to reveal that the accused, while in rebellion and acting in concert with other persons in rebellion, was an assistant commandant of the rebel forces in the Orange Free State during the 1914 rebellion. The rebels had come to the plaintiff's farm to cut his wire fences and take away his stock. However, the plaintiff did not succeed in his claim on the basis that there was no direct evidence that linked the accused with other rebel groups who were on the scene. According to Davis in the appeal, the contention by the complainant centred on the fact that "[e]very rebel was liable for acts such as those complained of, done by every other rebel in furtherance of the common purpose."[510] Subsequently, the appeal was rejected on the grounds that it was improper to make a narrow inference to hold the accused liable for the deeds of rebel forces within the limitations of the doctrine of common purpose.[511] It is worth noting that the court approach was more concerned with the causal connection with the individual accused than with the group of participants.[512]

In *S* v. *Malinga and Others*, four appellants were convicted of the capital crime of murder by a judge and two assessors, and were sentenced to death in the Durban and Coast Local Division.[513] It appears from the case that the appellant had consent to commit the crime

of housebreaking with the intent of 'breaking in and (or the former is the wording of this common law crime at that time) stealing'. One appellant was armed with a loaded revolver, with which he consequently shot and killed a policeman. The court pronounced that the other appellants should have foreseen the likelihood of such occurrence, and were party to and equally guilty of the murder. In this case, the court emphasised that mere association in a common purpose constitutes participation in the unlawful act, and that association in the common design makes the act of the principal offender the act of all. The association needs not be expressed; it may be implied from conduct. In this view, once participation by association is established, what follows is whether the accused had the necessary intention to commit the crime. In *S* v. *Dladla and Others*, the accused was convicted of the murder of a police informer.[514] The court judgment was that the accused should have foreseen the crowd's murderous intent to kill the victim, and it appeared from the evidence that the appellant had participated in the actions that resulted in the killing.

Gauging the pattern of sentencing in accordance with the doctrine of common purpose, there seems to be a shift from the earlier pattern of rendered judgments. From 1950 onwards, the application of the common purpose principle appeared to be understood narrowly or loosely as a mere attempt to secure convictions, compared to prior to the 1950s. This pattern of approach in sentencing decisions could be associated with the possibility of an increase in capital crimes. For example, in the case of *S* v. *Malinga and Others*, the state tried to prove its case by all means likely to set an example to deter other potential offenders. This is suggested by the role of an accomplice who turned informer and state witness, which resulted in the accomplice being discharged from liability for prosecution.

In 1963, in *S* v. *Mkaba and Others*,[515] the appellants were charged with –

- 17 counts of sabotage in terms of section 21 of the General Law Amendment Act (No. 76 of 1962);[516]
- six counts of contravening section 11(a) of the Suppression of Communism Act (No. 44 of 1950);[517]
- one count of housebreaking with the intent to steal; and
- the murder of a police informer.

The three appellants were convicted with no extenuating circumstances, and the death sentence was passed on each appellant. It appears from the evidence of the court that, at the time of the murder, the appellants were members of the regional committee of Umkhonto we Sizwe[518] in the Eastern Cape. The appellants' contention was that there were extenuating circumstances based on the fact that the murder took place in the context of political aspirations, and the motive was to further political objectives. Although the court recognised political motives, it concluded that these motives could not serve to extenuate the culpability of the crime. The court held that the murder could not be treated as if it took place in an open field or where there was political conflict. The court further held that the murder of the deceased was carefully planned with a common purpose, and dismissed the appeal.[519]

In cases where groups were accused of the crime of murder in the period between 1950 and 1969, there seemed to be a trend to convict the accused without strong evidence that linked with the act as an individual. For example, in the case of *S v. Malinga and Others*,[520] the court of appeal stated that association with an illegal common purpose constituted participation in the unlawful act, and association in the common design made the act of the principal offender the act of all. By contrast, in *McKenzie* v. *Van der Merwe*, the court refused to establish liability without showing direct proof.[521] These are the disparities in sentencing decisions and patterns with respect to the use of the common purpose doctrine.

**The death penalty from 1970 to 1979**

As described earlier, the period from the beginning of the 1950s up to the early 1960s was characterised by a significant upsurge in the resistance to the development of apartheid; yet, by the end of the 1960s, there was a political lull due to the detention of those found challenging the authority of the state.[522] By the 1970s, there was a revival in political resistance, and the period is mostly marked by the events of 16 June 1976, the Soweto student uprising, which consequently appeared to have resulted in new repressive laws and amendments in the penal realm to strengthen state social control measures.[523]

Execution patterns from 1971 to mid-1972 reflect 56 hangings. From mid-1972 to mid-1973, there were 55 hangings.[524] These hangings were mostly for the crime of murder, followed by robbery. The third type of crime to account for these execution patterns was robbery with aggravating circumstances. Rape is counted to have received less attention in respect of capital punishment during this period.[525] From 1974 to 1975, around 59 persons were hanged, from 1976 to 1977, there were around 87 executions, and from 1978 to 1979, there were around 148 executions.[526]

From 1971–1972, 91 persons sentenced to death by the courts were admitted to prison. On 30 June 1971, there were 41 persons who had been sentenced to death, but who were still awaiting execution in prison. From 1971–1972, 56 persons were executed, while during the previous year, 1969–1970, 80 persons were executed, and in 1970–1971, another 80 persons were sent to the gallows. In 1968–1969, 84 persons were executed. Midgley and Newman conclude that the figure of 56 executions for 1971–1972 represents a decrease of one third in the number of executions since 1968–1969, which showed a trend towards a decrease in the use of the death penalty, compared to the previous years.[527] Of the 56 executions in the period 1971–1972, 49 were for murder, three for robbery and murder, one for rape, and three for robbery with aggravating circumstances.[528] The execution trends and patterns in this period showed an increase in hangings. This suggests that conviction rates for serious crimes were on the increase, and a prevalence of such crimes in the context of uprising. Another dimension is that the doctrine of common purpose permitted judicial officers to arrive at the conviction of a group of persons, and to find the whole group liable for the unlawful conduct of one individual.

By the mid-1970s, there was a resurgence of politically related trials.[529] These cases appeared to have been tried under the ambit of the common purpose doctrine. In the case of *S* v. *Mahlangu*, there seems to have been strong elements of the application of

the common purpose doctrine.[530] The accused appeared to be youthful, and had left the country after the Soweto student uprising in 1976. In 1977, he returned with two men, heavily armed as African National Congress (ANC) guerrillas. On their way, the police stopped them. Mahlangu ran away, one other man disappeared, and Motlaung, the third man, ran into a warehouse in Goch Street, Johannesburg, where he shot and killed two men, threw a hand grenade and injured two other men (all civilians). It appeared that Mahlangu was not on the scene.

Later, both Mahlangu and Motlaung were charged, but Motlaung was declared unfit to stand trial due to brain damage and blows to his head sustained during the struggle at the warehouse when he was captured. Only Mahlangu was tried for the two crimes of murder. The court argued that the accused as well as Motlaung realised that, in the event of certain circumstances, the firearm in their possession would be used to kill. The judgment stated, "Mahlangu was equally liable for all the acts that Motlaung had done; the pulling of the trigger was as much the pulling by Mahlangu or by Motlaung".[531] Mahlangu was sentenced to death for his part in the killing of two men on 13 June 1977 and was executed on 6 April 1979.[532] While Mahlangu was associated with these acts, the court approach seems not to have taken into account the nature and the political context of this serious crime in the light of the upheavals of the time. It appears from the case that the youthfulness and political motives of the accused did not constitute extenuating circumstances in the sentencing decision. Thus far, the justification for the use of the death penalty was based on retribution, but mostly on deterrence and incapacitation. Nevertheless, it is difficult to prove the preventive value of such decisions during that specific period.

**Capital punishment from 1980 to 1989**

During the 1980s, capital punishment was increasingly imposed by the judicial decision-makers in South Africa as a mandatory sentence for specific capital crimes.[533] In this period, the death penalty was viewed as a deterrent sentence for adult offenders convicted of capital crimes. However, the manner in which some individual judicial officers applied their discretion has given rise to the perception that their penal philosophy was influential in determining the death sentence decision.[534] This suggests that sentencing disparities and elements of inequality with regard to capital sentences tended to be arbitrarily based on sentencing theories held by individual judicial officers as well as other factors.[535] As shown in the discussions, a pattern of sentencing can be illustrated by the decision of Judge Lategan, regarded as a harsh judge, who sentenced 29 individual offenders to death between 1 January 1986 and December 1988, while Judge Didcott was known to have publicly condemned capital punishment.[536]

In a 1989 research study conducted in the then Cape Supreme Court, differences were found among the judges when imposing the death sentence.[537] In terms of this study, of 32 judges who presided over capital cases from 1986 to 1988 in the Cape Provincial Division, three accounted for more than half of those sentenced to death, while other judges did not send anyone to the gallows at all. One judge imposed the death sentence in 44% of the cases he heard. The study also revealed that three of the judges heard only 15% of the cases, while responsible for 51% of the cases in which the death penalty was

imposed.[538] In contrast, there were also three judges who heard 32% of the cases, but only sentenced 12% of the accused to death. Disparities and variations in death sentencing decisions suggest that the life of an accused individual could depend on the trial judge. Similarly, one accused was sentenced to death, but the Appeal Court found he should have been discharged at the end of the trial, as there was no evidence that he had been at the crime scene.[539] The study pointed out that some accused petitioned the Minister of Justice for clemency, or for the stay of execution. Some succeeded while others did not. In one case, for instance, misfiling and error were discovered on the eve of execution, and this led to the perception that an innocent accused could have been executed despite criminal justice safeguards.[540]

According to Amnesty International, between June 1982 and June 1983, 81 blacks were convicted of murdering whites, and 38 were hanged in South Africa; yet, none of the 21 whites convicted of murdering blacks were executed.[541] Similarly, a Black Sash report states that "over 90 black men have been executed for raping white women. On the other hand, not a single white man has been executed for raping a black woman".[542] This suggests racial bias in the death penalty following sentencing decisions. Another study of the Black Sash found that the average prisoner on Pretoria's Central Prison death row came from a disadvantaged background, 92% did not complete school education, and 47% had been prosecuted for the first time while there were juveniles.[543] This is a complex and similar picture to that in the United States, as shown by studies in Florida and Texas between 1977 and 1986.[544] These differences in the stances and approaches of individual judges show how much meaning and interpretation were given to extenuating circumstances and other factors in accordance with the penal philosophy of the judges. Another dimension could be the number of capital cases decided by a particular judicial officer. Statistics released on executed persons from 1980 to 1990 give an insight into and a broader picture of judicial approaches to capital crimes, as shown in Figure 1 below:

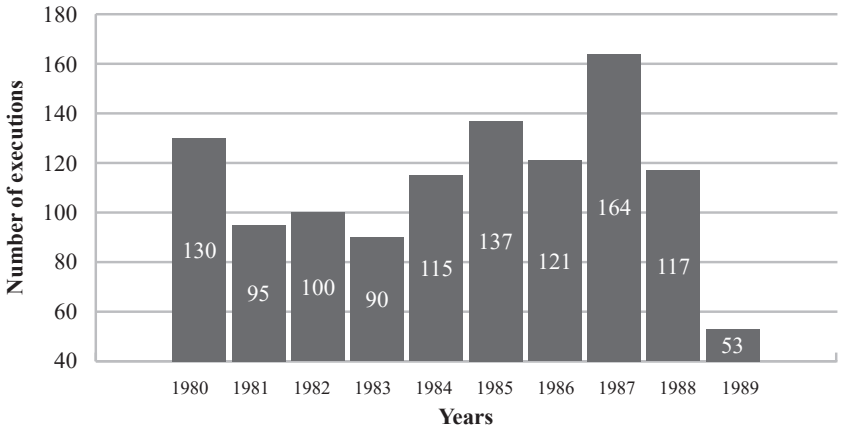


Figure 1: Total number of executions in South Africa from 1980 to 1989.[545]

In Figure 1 above, the high number of executions in the 1980s can be attributed to the late 1970s uprisings. While in 1981 there was a decrease of 35 executions, in 1982, there was an increase of five, with a subsequent drop of ten in 1983. These numbers show less consistent trends, but quantitative shifts do not seem to be substantial, probably due to reprieves. In 1987, there was a more significant increase in executions than in any other year, as shown in Figure 1. In 1989, however, there was a substantial decline in executions, as shown above. Of the 53 executions in that year, two were for rape.[546] Murray, Sloth-Nielsen and Tredoux suggest that the 1989 figures might have been influenced by the political climate with respect to those sentenced to death for unrest-related crimes.[547] Historical sentencing studies suggest that the death penalty can be characterised as a state violent measure to coerce its opponents.[548] This is evident in the cases discussed above. The last executions took place in 1989 and a moratorium on executions was announced on 2 February 1990.[549]

Execution patterns, as shown in Figure 1 statistics, reveal very little about the deterrent effect of the death penalty in capital crimes. This is despite the fluctuation of figures, but from year to year there were significant figures of execution, which indicate that capital crimes continued to be prevalent during the period of executions.

It is important to note that capital punishment was described by some academics, particularly in relation to young offenders, as a broadly repressive and inhumane practice.[550] Such repressive penal measures were carried out by the state. Under the Bill of Rights, the state has no right to kill; rather, section 7(2) of the Constitution obliges the state to "respect, protect, promote and fulfil the rights in the Bill of Rights":[551] According to the Cape Provincial Division study, Murray et al. and Sloth-Nielsen and Tredoux remark that some judges imposed the death sentence more frequently than others in respect of the same cases of murder.[552] The latter researchers recognise that not all murders present the same circumstances; hence, it is not possible to treat the accused all in the same in a mechanical manner.

In *S* v. *Safatsa and Others*,[553] the sentencing court seems to have applied the law of common purpose in a manner that suggests a keen sense of continuity, compared to the pattern of approaches to crowd-related crimes in earlier years. In this case, six of the accused were convicted of the murder of the mayor of the town council of Sharpeville on 3 September 1984. A crowd of people numbering about 100 attacked the mayor's house, throwing stones and petrol bombs and setting the house alight. The deceased was caught by the crowd as he was running away from his burning house. Stones were thrown at him, and he was dragged into the street, where petrol was poured over him and he was set alight. He died at the scene.

The contention in this case seems to be the argument that there was no proved causal connection between each individual action of the accused and the death of the deceased.[554] In accordance with the common purpose principle, the court however believed there was no reason for the state to prove the causal connection between the conduct of the accused and the death of the deceased. Justice Botha referred to previous similar judgments on common purpose, such as Mgxwiti,[555] endorsing that sentencing trends suggest similar approaches. The judge stated, "consequently the acts of the mob which

caused the deceased's death must be imputed to each of these accused".[556] Regarding Safatsa, professors Burchell and Hunt identified the major challenge for sentencing courts as the notion of 'proof' of the participation of an individual with a common purpose.[557] In Safatsa, the notion of de-individuation, arising from crowd behaviour, was described in the expert testimony of Tyson (psychologist) as reducing a person's awareness of the consequences of his or her actions, due to the emotional situation, and could be seen as extenuating circumstances. But the court could not find extenuating circumstances, and the appeal against the accused's conviction of murder and the death sentence imposed, was dismissed.[558] Du Toit and Mangani, as quoted by Davis,[559] seem to suggest that the notion of de-individuation portrays crowd conduct away from the context in a manner that seems to be ahistorical and apolitical. They believe that the notion of de-individuation tends to decontextualise the mob acts as without political motivation, rather than as irrational mob psychosis.

In *S* v. *Thabetha and Others*,[560] the court accepted the notion of de-individuation in the crowd-related crime of murder, to constitute extenuating circumstances. The murder charges emanated from the events after the funeral of a civic leader. The accused were youthful: three were 17 years of age at the time of the commission of the crime, one was 19, and the other was about 14 years old. The judge considered, inter alia, the youthfulness of the accused to constitute grounds for extenuating circumstances during the appeal. In this regard, Skeen endorses the view that de-individuation should be proved, not as a generality but in connection with the individual accused.[561] A similar case in which the court found extenuating circumstances, inter alia on the grounds of de-individuation and the age factor, was that of the Queenstown Six[562] during retrial by Justice Jansen. As captured by Currin,[563] in passing sentence the judge considered the subjective state of mind of the accused that consciously or unconsciously led them to necklace[564] the deceased. The judge recognised the perception of the community regarding their sense of deprivation, alienation, frustration and experience of police actions. This judgment substituted the death sentence for less than two years' imprisonment.

In *S* v. *Khumalo and 25 Others*,[565] as described by Currin, unlike in the Queenstown Six judgment, Justice Basson found that all 26 of the Upington accused had intent to kill the deceased, as the motive was political resistance against authority.[566] Among those accused sentenced to death on common purpose without extenuating circumstances, there seems to have been young accused under the age of 18.[567] It appears from these judgments that capital crimes by persons under the age of 18 took different forms at specific historical moments. From the trend of these common purpose judgments, the trial court could not find the age factor and other social factors to constitute extenuating circumstances. Patterns of judicial sentencing approaches appear to place much emphasis on the degree of gravity of the crime, which appears to increase the level of culpability of the accused.[568] It seems that the approaches of judicial officers, particularly about capital crimes, tended to depend on and reflect the reasoning of the appointed judge. The Queenstown Six case of Judge Jansen and the Upington 26 case of Judge Basson seem to illustrate this perception.

In another common purpose case, *S* v. *Mgedezi and Others*,[569] the accused were convicted of murder at a mining compound. In responding to his critics, Justice Botha reflected

on the judgment in *S* v. *Safatsa and Others*.[570] The judge argued that the court never pronounced that a mere presence in crowd violence could lead to liability for the crime. Eventually the Appeal Court found that the trial court constituted a misdirection in the sense that there was no direct proof of the role of each accused in the death of the deceased, and the death sentence was substituted with a prison sentence. Compared to earlier cases, the pattern of Appeal Court judgments suggests a trend that seems to consider wider factors in the application of the common purpose doctrine. In *S* v. *Zwane and Others*,[571] the eight accused were charged with high treason, sedition and subversion. The charge appeared to subvert the authority of the state in respect of conspiring with the ANC and involvement in a people's court. The appeal court held that the necessary hostile intent required for high treason had not been proved, and conviction was confirmed for sedition in respect of all accused.

In *S* v. *McBride*,[572] the accused was convicted and sentenced to death for bombing a bar in 1987 in which three women were killed and 89 persons injured. The court appeared to recognise that the killing might have been politically motivated, but refused to view that as amounting to extenuating circumstances. As in 1965 in the case of Mkaba and Others,[573] the court held that there was no ground for interference with the notion of extenuating circumstances, and the death sentence was imposed by the trial court. Professor Milton, as an assessor in his minority judgment, reflected on the appellant's mind at the time of the commission of the crime, "[h]is age, he is a young man of an age still suggestive of lack of maturity and the thoughtless susceptibility to the stress of intense emotions."[574] The professor went on to ask:

> How am I to assess the morality of this act? In a normally ordered society – where every citizen enjoys the full range of civil liberties and equal access to political protest – this would be a totally senseless act and in my view without the slightest justification, in his moral blameworthiness no different to one who placed a bomb in a normal society.'[575]

Another case (unreported 1985) in which social and political backgrounds were raised in extenuation to politically motivated offences, was that of Andrew Zondo.[576] The accused was a young person at the time of the commission of the offence and was charged with planting a limpet mine in an Amanzimtoti shopping centre near Durban in 1985. The accused was convicted for killing five people and injuring others, and he was executed in September 1986. In this case, sociological evidence was presented by Professor Meer, who reflected:

> Well, a person like Andrew Zondo, born in 1966, grows up totally within the ambit of Bantu Education and Bantu Authorities, and to my mind these are the pillars of the kind of society which has been devised for him – Apartheid society.[577]

Van Zyl Smit calls for the necessity of a wider view in the search for proportional sentencing approaches.[578] In this regard, sentencing patterns over the years tended to be disproportionate and inconsistent. The death penalty statistical trends tended to question

the deterrent value of these sentences, although they continued to be applied despite criticism within and outside judiciary.

**Deterrent effect of the death penalty**

The justification of criminal deterrence is premised on the idea that punishment is meant to be the chief end.[579] This refers to the degree of severity of punishment for the purpose of prevention of future offending and no more through fear in the potential offender. Hypothetically, from a utilitarian viewpoint, a sentencer might base his or her reasoning on the need for public protection.[580] This refers to imposing the death penalty on an individual in order to deter potential offenders. This assumes that offenders have rational choice-making to consider benefits and costs before committing capital crime.[581] Bentham provides three preventive descriptions of deterrence punishment in the individual offender.[582] Firstly, the individual offender's physical power may be taken away, which relates to physical incapacitation through incarceration and capital punishment. Secondly, punishment may be inflicted to take away the desire to offend, which relates to rehabilitation. Thirdly, the theory believes that punishment may induce the offender not to offend again by intimidation, that is, punishment may seek deliberately to inflict pain.

Incapacitation seeks to deal with offenders in a manner that makes them incapable of offending for a substantial period of time in the interests of the public good.[583] This theory tends to be applied to certain groups, such as dangerous offenders, career criminals or other persistent offenders, and is likely to call for the sentencing option of imprisonment.[584] Wilson[585] argues that incapacitation theory makes no assumptions about human beings, while deterrence assumes rationality. Gross and Von Hirsch argue that courts tend to give weight to general preventive considerations as long as the sentence remains reasonable proportionate to the crime.[586] In terms of the deterrence effect of the death penalty, "it is difficult to establish whether there is correlation and causation which determine the deterrent effect of punishment".[587] This relates to whether severe punishment causes the reduction of crime.

Similarly, research studies suggest difficulties to find evidence that executions reduce murder rates.[588] The estimated relationship is indirect. This is due to a limited amount of data that can be used to determine the deterrent effect of the death penalty on capital crimes.[589]

The deterrence theory seeks to establish the relationship between execution risk and capital crime incidents. This difficulty is evident in Figure 1 above, which shows frequency of execution patterns and difficulty to determine the deterrent effect of executions in terms of capital crimes. Stolzenberg and D'Alessio[590] are of the view that:

> The reasoning behind deterrence theory is that individuals are free-will actors who rationally weigh the probable benefits and potential liabilities or costs before engaging in criminal activities. This requires the individual to have knowledge and personal experience with criminal punishment that is likely to be imposed by the state and awareness of how punishment has been meted out to the apprehended individual in the past.

Although most murders occur from interpersonal conflict, few result from a planned lethal act. In this view, the fear of the death penalty could deter a potential criminal, and the deterrence effect requires communication to the wider public and effective criminal justice system that increases conviction rate. Executions or hangings have, over the years, been associated with the escalation of violence in society, particularly in South Africa, as discussed above. People tend to imitate violent behaviour, including forms of killing other people.

Similarly, Ernest van den Haag is of the opinion that "it is difficult to statistically prove and just as impossible to disprove that the death penalty deters more capital crimes than available alternative punishments such as life imprisonment".[591] This includes life imprisonment without parole. He suggests that statistical empirical evidence on the deterrent effect of the death penalty is lacking. Conrad agrees with Van den Haag, namely that it is difficult to find empirical proof that capital punishment deters potential murderers.[592]

However, Conrad believes that the death penalty can still be inflicted only once on any offender, because it is a unique severe penalty. He maintains that the death penalty is likely to deter some murderers, but not necessarily all of them. If the death penalty is not frequently applied, then the argument for incapacitation of murderers for life imprisonment could prevail.[593] Hugo Adam Bedau,[594] Van den Haag and Conrad[595] and Stolzenberg and D'Alessio[596] concur on the lack of scientific evidence and analysis, which could result in conclusive findings that the death penalty has a deterrent effect. This is due to a lack of reliable data to support the claim in favour of or against the deterrent effect of the death penalty. Consequently, most studies on the deterrent effect of the death penalty lack empirical evidence to make conclusive findings.

**Conclusion**

Referring to the goal of this article, there is a lack of vigorous scientific analysis and empirical evidence to determine whether there is, historically, a deterrent effect of the death penalty in South Africa. The analysed historical sentencing data, case law and statistical execution patterns have shown little evidence of a deterrent effect of the death penalty in South Africa during the period 1917–1995. It is difficult to find a connection or causal relationship between capital crimes and the frequency of the death penalty, and whether it causes a reduction in capital crime, as discussed in the article.

Nevertheless, this article can provide a broadly historical indirect relationship between execution patterns and occurrence of capital crimes in South Africa before the abolishment of the death penalty. However, it is difficult to show the causal connection in terms of the limited empirical data and the review of the deterrence literature. The discussion also suggests the need to strengthen criminal justice efficiency in order to ensure apprehension of a suspect, increase conviction, sentencing consistency, and equality in sentencing in order to achieve greater deterrence. In this regard, more vigorous scientific study with applied methodology could be undertaken in the future.

# Endnotes

[467] Criminal Procedure Act, No. 51 of 1977, sec 277(1)(a).
[468] M Robertson. *South African human rights and labour law year book*. Cape Town: Oxford University Press, 1990, 2.
[469] S v Makwanyane & Another 1995 (3) SA 391 (CC).
[470] I Currie & J de Waal. *The Bill of Rights handbook* (6th ed). Cape Town: Juta, 2013, 260. See also Section 11 of the Criminal Law Amendment Act No. 105 of 1997.
[471] *Ibid.*, para 326-7, referred to sections 10 (right to human dignity), 11 (right to life) and 12 (freedom and security of the person) of the Constitution. See also judgment of P A Chaskalson at para 95.
[472] *Ibid.*, see the judgments of P A Chaskalson at para 116-25, J J Didcott at para 181-83, J S Kentridge at para 202, J J Kriegler at para 212-13, J I Mahomed at para 286-294, J Y Mokgoro at para 317 and J K O'Regan at para 341.
[473] *Ibid.*, see the judgment of P A Chaskalson at para 95.
[474] *Ibid.*, para 135.
[475] D van Zyl Smit. *Sentencing and punishment*. Seminar readings for LLM class. Cape Town: University of Cape Town, 2004, 15.
[476] *Ibid.*, See also the judgment of P A Chaskalson at para 94.
[477] *Ibid*., p. 260.
[478] M McConville & WH Chui. *Research methods for law*. Edinburgh: Edinburgh University Press, 2014, 4. See also R Grinnell. *Social work research and evaluation* (4th ed.). USA: Peacock, 1997, 19.
[479] B van Niekerk. "Hanged by the neck until you are dead". *South African Law Journal*. 86. 1969. 457-475.
[480] *Ibid.*, p. 459. See also E Kahn. "Capital Punishment" "Symposium on Capital Punishment". In *Proceedings of the Conference on Crime, Law and the Community.* Cape Town: Juta, 1975.
[481] *Ibid.*
[482] M Robertson. 1990, p. 222.
[483] *Ibid*. See also Criminal Procedure and Evidence Act, No. 31 of 1917.
[484] E Kahn. "Capital punishment", 1975, p. 224.
[485] *Ibid.*
[486] *Ibid.*
[487] *Ibid.*
[488] General Law Amendment Act, No. 76 of 1962.
[489] Criminal Procedure Act, No. 56 of 1955.
[490] Criminal Procedure Act, No. 9 of 1958.
[491] *Ibid.*
[492] Terrorism Act, No. 83 of 1967.
[493] E Kahn. 1975, p. 223.
[494] B Van Niekerk, 1969, p. 458.
[495] *Ibid.*
[496] *Ibid.*
[497] *Ibid*, 1975, p. 223.
[498] *Ibid.*, p. 224.
[499] *Ibid.*, p. 22.
[500] MCJ Olmesdahl & NC Steytler. *Criminal justice in South Africa: Selected aspects of discretion.* Cape Town: Juta, 1983, 192.
[501] *Ibid,* 1990, p. 22.

[502] *Ibid,* 1975, p. 224.
[503] *Ibid*, 1983, p.192.
[504] *Ibid.*
[505] D Hansson & D van Zyl Smit. "Capital punishment and the politics of the doctrine of common purpose". In D Hansson & D van Zyl Smit, eds. *Towards justice? Crime and state control in South Africa*. Contemporary South African Debates Series. Cape Town: Oxford University Press, 1990, p. 139.
[506] R v Maclin, Murphy and Others 1838.
[507] *Ibid.*
[508] R v Mgxwiti 1954 (1) SA 370 (AD).
[509] McKenzie v Van der Merwe 1917 SA 41 (AD).
[510] *Ibid*, 1990, p. 140.
[511] *Ibid.*
[512] *Ibid.*, pp. 140–141.
[513] S v Malinga and Others 1963 (1) SA 692 (AD).
[514] S v Dladla and Others 1962 (10) SA 307 (AD).
[515] S v Mkaba and Others 1965 (1) SA 215 (AD).
[516] General Law Amendment Act, No. 76 of 1962.
[517] Suppression of Communism Act, No. 44 of 1950.
[518] A banned organisation at that time.
[519] *Ibid.*
[520] *Ibid*.
[521] *Ibid.*
[522] B McKendrick & W Hoffmann (eds). *People and violence in South Africa: Contemporary South African debates.* Cape Town: Oxford University Press, 1990, 87.
[523] D Davis & DM Slabbert (eds). *Crime and power in South Africa: Critical studies in criminology.* Cape Town: David Phillip, 1985, 56.
[524] D Foster, D Davis & D Sandler. *Detention and torture in South Africa.* Cape Town: David Phillip, 1987, 28.
[525] *Ibid.*
[526] *Ibid.* See also J Midgley, J Steyn & R Graser. *Crime and penal statistics in South Africa: Crime and punishment in South Africa*. Johannesburg: McGraw-Hill, 1975, 16.
[527] *Ibid.*, p. 18.
[528] *Ibid.*, p. 51.
[529] M Lobban. *White man's justice: South African political trials in the black consciousness era.* Oxford: Claredon Press, 1996, 2.
[530] *Ibid.*, 1996, p. 155. (unreported 1978).
[531] *Ibid.*
[532] *Ibid.*, p. 158. See also M Coleman. "Political executions". In editor, ed. *A crime against humanity: Analysing the repression of the apartheid state.* Cape Town: David Phillip, 1998, 84.
[533] Amnesty International. *When the state kills: The death penalty v human rights*. London, 1989, 2.
[534] National Association of Democratic Lawyers. 'Judicial imposition of the death penalty'. *The role of lawyers and legal system in gross human rights violations of apartheid*. Cape Town: South African Truth and Reconciliation Commission, 1998, 45.
[535] *Ibid*. See also CD Magobotiti. "The contribution of social work to the prevention of crime by the criminal justice system in the Western Cape". MA thesis, Stellenbosch University, 2001, p. 178. An interview with a former death row prisoner who was under the age of 18 at the time of committing the murder, now serving a life imprisonment sentence in Drakenstein Prison, since the death penalty was abolished by the Makwanyane judgment.

[536] See Society for the Abolishment of the Death Penalty. *Death by decree: South Africa and the death penalty*. Cape Town: Institute of Criminology, University of Cape Town, 1991, 6.
[537] *Ibid.*, 1991, p. 9.
[538] *Ibid.*
[539] *Ibid.*, p. 7.
[540] *Ibid.*, p. 5.
[541] *Ibid.*, 1989, p. 31. See also *Ibid.*, 1991, p. 8.
[542] Black Sash. *The death penalty*. Research report. Johannesburg: Witwatersrand University, 1989.
[543] Black Sash. *Inside South Africa's death factory*. Research report. Johannesburg: Witwatersrand University, 1989.
[544] *Ibid*.
[545] Department of Justice. *'Re Statistics on the Number of People Executed'.* Pretoria: Government Printer, 26-06-1995.
[546] M Robertson, 1990, p.11.
[547] C Murray, J Sloth-Nielsen & C Tredoux. "The death penalty in the Cape Provincial Division: 1986–1988". *South African Journal on Human Rights* 5/2. 1989. 154–182.
[548] *Ibid.*, 1991, p. 10.
[549] Department of Justice *op. cit.*
[550] B McKendrick & W Hoffmann. 1990, p. 74. See also F Meer. *The trial of Andrew Zondo: A sociological insight*. Johannesburg: Skotaville, 1989, 127–134.
[551] Constitution of the Republic of South Africa, 1996. See also *Ibid*.
[552] *Ibid.*, 1989, p. 165.
[553] S v Safatsa and Others 1988 (1) SA 868 (AD).
[554] P Diar. The Sharpeville Six. The South African Trial that Shocked the World. Toronto: McClelland & Stewart Inc. 1990, p. 181.
[555] D Hansson & D van Zyl Smit. 1990, p. 143.
[556] *Ibid.*, p.144.
[557] EM Burchell, JRL Milton & JM Burchell. *South African Criminal Law and Procedure* (Vol 1, 2nd ed). Cape Town: Juta, 1983, 434–435.
[558] *Ibid.*.
[559] Hansson & Van Zyl, *Towards justice? ... op. cit*., p. 147.
[560] S v Thabetha and Others 1988 (4) SA 272 (T).
[561] A Skeen. "Cases and comments". *South African Journal on Human Rights* 5. 1989. 78–81.
[562] Unreported, 1989.
[563] *Ibid.*, 1990, p. 7.
[564] This is a method of killing by putting a tyre around a person's neck and setting it alight.
[565] Unreported, 1989.
[566] *Ibid.*.
[567] A Durbach. Judgment by Justice Basson. *Upington: A story of trials and reconciliation*. Cape Town: David Phillip, 1999, 81, 128.
[568] CD Magobotiti. "An analysis of judicial sentencing approaches to persons convicted of serious crimes". DLitt et Phil thesis, University of South Africa. 2009, p. 155.
[569] S v Mgedezi and Others 1989 (1) SA 687 (AD).
[570] D Hansson & D van Zyl Smit. 1990, p. 146.
[571] S v Zwane and Others 1989 (3) SA 253 (T).
[572] S v McBride 1988 (4) SA 10 (AD).
[573] *Ibid.*, 1990, p. 140.
[574] *Ibid.*, p. 142.
[575] *Ibid.*
[576] Unreported, 1985.
[577] F Meer. 1989, p. 128.

[578] *Ibid*, 2004, p. 14.
[579] K Devlin. *Sentencing offenders in magistrates' courts.* London: Sweet & Maxwell, 1970, 7.
[580] R Henham. "The policy and practice of protective sentencing". *The International Journal of Policy and Practice* 3/1. 2003. 57–83.
[581] A von Hirsch, AE Bottoms, E Burney & P-O Wikstrom. *Criminal deterrence and sentence severity: An analysis of recent research.* Oxford: Hart, 1999, 6.
[582] A von Hirsch & A Ashworth. *Principled sentencing: Readings on theory and policy* (2nd ed). Oxford: Hart, 1998, 53.
[583] *Ibid.*, p. 54.
[584] M Bagaric. *Punishment and sentencing: A rational approach*. Sydney: Cavendish, 2001, 128.
[585] *Ibid.*, p. 113.
[586] H Gross & A von Hirsch. *Sentencing*. Oxford: Oxford University Press, 1981, 195.
[587] Von Hirsch *et al. op. cit*., p. 5.
[588] L Stolzenberg & S D'Alessio. "Capital punishment, execution publicity and murder in Houston, Texas". *The Journal of Criminal law & Criminology* 94/2. 2004. 351.
[589] *Ibid.*, p. 352.
[590] *Ibid.*, p. 353.
[591] E van den Haag & JP Conrad. *The death penalty: A debate*. New York, NY: Plenum Press, 1983, 67.
[592] *Ibid.*, p. 71.
[593] HA Bedau. *The death penalty in America* (3rd ed). New York, NY: Oxford University Press, 1982, 284.
[594] *Ibid.*, p. 294.
[595] *Ibid.*, p. 133.
[596] *Ibid.*, p. 356.