Selectivity and racial bias in a mandatory death sentence dispensation: a South African case study

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This contribution reports an analysis of prosecution, sentencing, and execution data for the Republic of South Africa during the late 1980s. The data are of special interest for three reasons. First, we document the operation of a judicial system that was administering a death sentence statute that was essentially a mandatory model in cases of murder. Second, the statistics show a pattern of selectivity depending on the race of a homicide victim that is as extreme as any to be found in the world literature on the death sentence. Finally, the outcome seriously challenges the constitutionality not only of the death sentence dispensation that was the focus of the study, but even more pertinent of the present South African death sentence dispensation with its wider discretion.

ADMINISTRATION OF THE MANDATORY DEATH SENTENCE
Murder in South Africa is a common-law crime defined as 'the unlawful and intentional causing of death of another human being'. There is no division of murder into degrees. The offence covers roughly the same ranges of killings defined as murder in Anglo-American penal codes. The present death sentence dispensation is governed by section 277 of the Criminal Procedure Act 51 of 1977 as amended by the Criminal Law Amendment Act 107 of 1990. We focus on the old, unamended, dispensation.

The pre-1990 version of section 277 of the Criminal Procedure Act mandated that a court sentence a person convicted of murder to death. Judicial discretion to avoid a death sentence was available only if the offender was a...
woman who had murdered her new-born child; the offender was under eighteen at the time of the crime; or the offender could establish by a preponderance of the evidence that there were extenuating circumstances that a reasonable person would conclude reduced his moral blameworthiness.\(^3\)

By its terms, this may be defined as a basically mandatory death sentence dispensation for murder.

The reputation of the South African criminal justice system in the 1980s was, by world standards, one of vigorous support for repressive law enforcement. What was the empirical reality of the death sentence under this dispensation?

The ideal method of assessing the impact of discretion in criminal case processing is to take a sample of cases that became known to police or prosecutors and to follow these cases through the legal system to observe its operation at each decision-making point. This case-cohort method is limited in the number of cases it can cover and also usually requires that data be gathered within a short period of the cases originating.\(^4\) When such longitudinal data is not available, an alternative method of estimating the impact of decisions at various stages of the system is to analyse aggregate case flow through various stages of the system during the same historical period. Although this tells the observer nothing of the outcome of any particular case, the method can identify the major influences on case disposition in the aggregate.\(^5\) Unlike case-cohort studies, aggregate case flow analysis provides information on a high volume of cases.

The only available research method for present purposes in South Africa is the latter, ie aggregate case flow analysis. From official records of the late 1980s we establish the annual averages for murders reported, murders prosecuted, criminal convictions resulting from homicide, death sentences, and actual executions. Data on reported murders, death sentences, and executions are from the calendar years 1987 and 1988. Data on prosecutions and convictions are for the fiscal years ending in July 1988 and 1989. These two-year totals were halved to produce a typical annual output at each stage in the process, as shown in Figure 1.\(^6\)

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\(^3\)See Geldenhuys & Joubert (eds) n 1 above 277.


\(^5\)The most sustained and detailed study of this variety is reported in Samuel Gross & Robert Mauro Death and discrimination: social disparities in capital sentencing (1989).

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The drop-off at each of the documented stages in the South African system was substantial. Just over half of all murders reported by the police resulted in prosecution, and almost exactly half of those prosecutions resulted in convictions. Of the convictions, about nine per cent on average attracted the death sentence and about sixty per cent of the death sentences resulted in hangings.

For the purpose of evaluating the operation of the mandatory death penalty statute, the two most important ratios are the number of death sentences as a proportion of prosecutions, and the number of death sentences as a proportion of convictions. (Death sentences rather than executions are the relevant standard because only the death sentence — and not executions — is legally mandatory, since the law allows executive discretion by the President.) We now examine these two ratios.

First, we examine the ratio of death sentences to murder prosecutions. (This is the broadest measure of discretionary drop-off.) During this period in South Africa there was one death sentence for every twenty-three murder prosecutions (5,298 ÷ 230); i.e. only some four per cent of murder prosecutions resulted in death sentences. This large drop-off is found in a country that was officially maintaining one of the highest execution rates in the world. Evidently, non-conviction, conviction for a lesser offence, or the presence of extenuating circumstances played an important role in avoiding the imposition of the death sentence.

Secondly we consider death sentences as a proportion of convictions, which

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7 See Amnesty International The death penalty (1979) at 58. During the 1970s, with execution numbers close to the 140 average, South Africa had one of the highest reported execution rates.
is a more conservative measure of discretionary drop-off. We see that more than ninety per cent of murder convictions produced a punishment other than the death sentence; ie less than ten per cent of murder convictions led to a death sentence. In all of the ninety per cent non-death sentence murders, there must therefore have been a finding of extenuating circumstances resulting in the discretionary non-imposition of a death sentence. This reduces the weight of arguments that greater discretion was needed than the old law provided; the South African judiciary had ‘amended’ the old death sentence statute in practice long before the legislation was changed in 1990 to accommodate greater discretionary leniency!

One remarkable contrast shown in Figure 1 is between the small number of convictions that produced death sentences (230 out of 2 654) and the large number of death sentences that produced executions (140 out of 230). Despite the law providing the executive with express authority for mercy, close to sixty per cent of death sentences resulted in hangings. By contrast, about ninety per cent of convictions did not result in death sentences. Part of this difference in screening ratios is a result of the sequence of selection; the judges have to choose before the executive. If only the most serious murders survive the first screening, this will tend to reduce the drop-off at successive stages. We should consequently expect that if a large number of cases a year had resulted in the death sentence (say, 1 000), the executive would have permitted executions in a smaller proportion of that larger group of cases. However, in our discussion of the figures we suspected that more than the sequence of selection explained the different propensities of judges and the executive branch in South Africa of the late 1980s. The drop-off in potential executions is very much greater where least expressly authorised by statute. We concluded that one plausible interpretation of this pattern is that the executive branch had considerably greater enthusiasm for hangings during that period than did most judges. This is confirmed by the fact that executive commutations doubled the moment reform-minded FW de Klerk took over as State President.

RACIAL SELECTIVITY IN DEATH SENTENCING
It has long been known that a disproportionately large majority of persons condemned to die in South Africa were non-white, but little published detail existed on the cases which produced death sentences and how they compared to other South African murders.

We were able to obtain data on the race of victims for murders reported by the police from the Annual Reports of the Commissioner of Police for the calendar years 1988 and 1989. Death sentence data on the race of victims came from a

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8Between 1923 and 1934, executive reprieves were issued for seventy-six per cent of persons sentenced to death. This was because the concept of 'extenuating circumstances' did not exist before 1935. The only methods of ameliorating the situation were therefore by manipulating the substantive law (to achieve, eg, convictions for culpable homicide rather than murder), acquittal, or executive reprieve. See Ellison Kahn, Symposium on Capital Punishment, Acta Juridica (1975).

9See Van Rooyen n 1 above at 747 (text at n 85); (1990) 3 SACJ 316.
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University of South Africa study.\(^\text{10}\) *Table 1*\(^\text{11}\) reports the parallel figures.

<table>
<thead>
<tr>
<th></th>
<th>Murders known to police</th>
<th>Death sentences</th>
</tr>
</thead>
<tbody>
<tr>
<td>White victims</td>
<td>2.7%</td>
<td>43.4%</td>
</tr>
<tr>
<td>Non-white victims</td>
<td>97.3%</td>
<td>56.6%</td>
</tr>
<tr>
<td>Total</td>
<td>100.00%</td>
<td>100.00%</td>
</tr>
</tbody>
</table>

*Table 1*  

*Murders and death sentence murders by race of victim, 1988 and 1989*

The focus is on victims, not on perpetrators. Murders with white victims account for less than three per cent of all murders but more than forty-three per cent of all death sentences. When all races other than white are aggregated into a general non-white category, the data in *Table 1* produce an odds ratio that a murder with a white victim will result in a death sentence about twenty-seven times as often as a murder with a non-white victim.\(^\text{12}\)

The message of *Table 1* is clear and not surprising. *Figure 1* shows the magnitude of discretion in the South African criminal justice system regarding murder. *Table 1* shows one primary impact of that discretion in a governmental system where invidious racial distinctions were a defining characteristic of the regime. In a culture and government where the special value of white lives was a central tenet, the fact that the sentiments of government officials produced a system where the murder of a white was twenty-seven times more likely to produce a death sentence than the murder of a non-white, should come as no surprise. It is the interaction of discretion in the criminal justice system and pronounced racist sentiments in the government that produced this pattern of unequal justice, of unequal protection of the law.

Note, once again, that this analysis focuses on the population groups of *victims* as an indicator of the ‘value of life’ and not on the population group of perpetrators: the point is that the murder of a white (whether by a white or non-white perpetrator) was twenty-seven times more likely to produce a death sentence than the murder of a non-white (whether by a white or non-white perpetrator). Precisely herein lies the ‘unequal protection’ of the law-in-operation, of the death-sentence-as-a-selective-system.

\(^{10}\)CMB Naudé & A Ladikos *Criminal justice and the death penalty in South Africa: a criminological study* Department of Criminology and Institute for Criminology, University of South Africa (1992) (this department and institute are separate and distinct from the Department of Criminal and Procedural Law and the Criminal Justice Research Unit).

\(^{11}\)Sources: Annual Reports of the Commissioner of Police, South Africa 1988-1989 (homicides); CMB Naudé 1992 (death sentences).

\(^{12}\)The odds ratio is calculated from *Table 1* as \(\frac{43.4 \times 97.4}{2.7 \times 56.52} = 27.6\).
CONCLUSION

Would a more specific legal framework for death sentencing reduce racial patterning of death sentences? Reducing the number of death-eligible cases (eg through specific sentencing guidelines) could further reduce the role of discretion, as long as the fraction of death-eligible cases actually sentenced to death increases as the pool diminishes. But as long as only a minority of death-eligible cases lead to death sentences or execution, the role of discretion and the dominance of non-legal factors in making the decision between life and death will remain great. 

The major problem in the administration of a death penalty is the essentially arbitrary difference between the large number of murder cases where death is not the punishment and the very few cases where execution will occur. This is a problem of principle that will exist wherever the majority of murderers do not die. The South African law which attempted to create a mandatory-type of death sentence dispensation prior to 1990 did not succeed in managing this problem; on the contrary, the application of that law produced monstrous results. It could not have survived constitutional challenge under the new South African constitution. 

The new South African death sentence dispensation creates more, not less, uncontrolled discretion. The problems of the death sentence as an uncontrolled selective system leading to unequal protection of the law are therefore likely to be exacerbated under the new law. It, too, could not and should not survive constitutional challenge.

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14Act 200 of 1993; see chapter 3 'Fundamental Rights', especially s 8 'Equality'.
15See Van Rooyen n 1 above at 756ff; 767ff; and the articles cited there in nn 4, 198–200.