

## **CAPITAL PUNISHMENT JANUARY 1990**

A Study Document from the Commission for Justice and Peace, and the Theological Advisory Commission of the Southern African Catholic Bishops' Conference.

Throughout history the Christian Church has the task of discerning the action of God's Spirit at work in the world. In bringing about the New Creation this Spirit "blows where it wills." Amid the changing events of different "times and seasons" the Good News of God in Christ sheds its light, enabling people to view in a new way what they had formerly taken for granted.

An instance of this new light coming into the Church was its gradual realisation during the last century that it too should be working for the abolition of slavery.

Today, in this moment of history, one clear sign of the times is a worldwide movement to reject capital punishment.

The report of Amnesty International, "When the State Kills" (1989), states that around 80 countries, representing 40 per cent of the world's people, have done away with the death penalty either in law or in practise. Around 100 countries still retain it. South Africa is one of these and has one of the highest rates of executions, alongside Iran and China. As Christians, we have to turn our attention to the debate between those who favour capital punishment and those who would abolish it.

### **Worldwide debate**

What gives the state the right to punish at all, to retribution? What are the purposes and likely results of particular punishments, incapacitation, deterrence and rehabilitation?

The basis of all punishment for crime lies in retributive justice, where a proven offender receives according to law the just deserts for an offence against society. Since crime violates society and takes unfair advantage of its members, it is right that society impose some punishment on the criminal to redress the harm done.

Retribution, the fairness or proportionality of the death penalty is highly problematic. In terms of the expected results and consequences of punishment, imprisonment and above all the death penalty, are to protect society by preventing criminals from committing crime again: So too, long term imprisonment or protective custody for the insane. Less severe forms of punishment (than the death penalty) allow for both reform and rehabilitation.

In the countries where capital punishment has been abolished, there is no evidence of higher rates of violence and murder. On the contrary, there is actual evidence that countries retaining capital punishment have a higher incidence of serious, violent crime. South Africa, which still maintains the death penalty, is an abnormally violent society with one of the highest murder rates in the world.

Other factors are the death penalty offers no redress for any miscarriage of justice. The execution of an innocent person is a shocking affront to human justice and the

rule of law, let alone to Christian love. Practically all other mistakes in meting out justice can be reversed or some compensation made, whereas the death penalty contains the inherent risk of a judicial error that can never be repaired.

The death penalty is inherently inhuman and cruel. It is repugnant to human dignity and decency.

### **Legal Details for South Africa**

The death penalty in South African courts is legislated for in the Criminal Procedure Act of 1977 (Strafsproeswet 1977). According to this act the death penalty is obligatory for murder unless extenuating circumstances are found.

The act itself, however, permits of two exceptions to the capital sentence, namely, in the cases of a mother convicted of murdering her newly born child, and of someone under eighteen years old being convicted of murder. The same sentence is optional for treason, kidnapping, child stealing, rape, aggravated or attempted robbery, aggravated or attempted housebreaking. Since the Internal Security Act of 1982 “terrorism” has been added to the list.

Capital trials are held in the Supreme Court before one judge and two assessors. The assessors can judge matters of fact, the judge alone decides questions of law and alone has discretion over sentencing. The right of appeal against a capital decision is not automatic. However, the defendant can apply for leave to appeal – first of all to the trial judge, and failing that to the Chief Justice. The decision of the Chief Justice is final – save for the possibility of an ultimate reprieve by the state president as an act of clemency.

“The manner of execution of the sentence of death shall be that the person sentenced to death shall be hanged by the neck until he is dead.” (Section 279[4] of the said Act).

### **Some facts and figures**

All executions by hanging are carried out at Pretoria Central Prison. Seven persons can be hung at a time. The number of executions varies from year to year; the highest figure is 164 for the year 1987. It is estimated that for the years 1980-1988 the annual average was 119. More politically related cases have been tried and convictions obtained since 1982 for treason, protest, political unrest and so-called guerrilla activities. A further legal precedent was introduced in 1987 with conviction for murder based on “common purpose”. This means that a person may be convicted for murder and sentenced to death, if he or she joined a group or crowd, some members of which committed serious crime.

Studies undertaken of those awaiting execution show the typical person on “death row” to be: Black, single male, under thirty years old, from a disadvantaged background, poor, reared by a single parent or relative, not having matriculated, an unskilled labourer, who was sickly when young.

A disturbing facet of capital punishment in South Africa is how many accept it in a fatalistic fashion. This is the time to cut through the many biased opinions about capital punishment and give the whole issue deep, serious reflection, for linked

closely to public opinion is the machinery for opinion making of the media that plays a major role in such discriminatory approach.

That which needs to be seriously challenged is the extension of the death penalty to deal with treason and “political crimes”, for the moral issue is: Ought capital punishment be used as a political weapon. Surely this is a travesty of justice and unacceptable in a so-called democratic society.

Another problem is the extension of capital punishment to cases of rape and felony. Can one compare the value of a human life with that of sexual integrity and material possession? Imposing the death penalty is an excessive punishment for such crimes and in South Africa the imposition of the death penalty is far from being an impartial enactment of justice. It is open to abuse, like many other social institutions, because of the far reaching racial, economic and political inequalities of this society. Consequently, instead of being a step, even if only a limited one, toward greater social justice and harmony amongst the whole population, capital punishment on balance actually aggravates divisions and upholds prevailing social injustices.

### **Theological reflection**

The only known occasion on which Jesus was faced with the issue of capital punishment was when he was confronted with the woman taken in adultery (John 8:3-11). The woman was clearly guilty of the crime. Clear too was the punishment prescribed by the Mosaic law, which for the Jews was the law of God. The scribes and Pharisees had evidently hoped to trap Jesus. His attitude to sinners was well known. The very idea of executing even a serious sinner seemed to go against all he stood for. In his response Jesus avoids their trap. Seeing that they were not motivated by concern for the law but rather to trap him, he suggested that the one who is without sin should cast the first stone – something that no one dared to do. But through avoiding the trap he also avoided agreeing with the idea that execution is an acceptable way of dealing with sinners, even serious sinners.

### **Fulfilment of the Old Law**

Jesus demands of us – or rather promises us – that our understanding of God and what he asks of us should deepen. The Spirit “will lead you to the complete truth” (John 16:13). We see Jesus enabling his own hearers to grow in understanding. For instance, in his reply to the lawyer who asked what he must do to inherit eternal life, Jesus made it clear that God’s entire law was summed up in two equally important commandments: Love of God and love of neighbour (Luke 10: 25-28). This has radical implications for understanding the law. It meant judging the law by the demands of love, rather than judging love by the demands of the law. As he put it on another occasion, “the Sabbath was made for people, not people for the Sabbath” (Mark 2:27). By judging the law in this way, one brought it to fulfilment. And so his hearers were asked to take the heart of the law – love – so seriously that would not harm their neighbours even in ways permitted by the law (see Mt 5:17-48). In this way, their questions would go beyond the questions of the scribes and the Pharisees (Mt 5:20).

### **The judicial murder of Jesus and its effects**

It is important to remember that Christian tradition always regarded Jesus’ death as abrogation of Mosaic Law (Rom 7:1-7; Gal 2:19). Jesus’ death was itself an instance

of capital punishment. The punishment of death laid down by the law was appealed to (John 19:9), in order to justify his execution. However, his own execution came to be regarded as abolishing that very law and its provisions for execution. This does not mean that all forms of capital punishment are automatically excluded, but any biblical legitimation for them is now abrogated. Anyone who wishes to argue for it must henceforth do so on grounds other than God's revealed Word.

In reflecting on Jesus' own execution, it is noteworthy that a major reason for his death was precisely his attitude to sinners. His refusal to reject people like adulterous women contributed greatly to his conflict with the Jewish leaders. The way they saw it, God's law demanded that sinners be punished. At the very least they must be excluded from the circle of God's friends. Jesus did not view God in that way. He preached a God who sought the conversion rather than the death of sinners. For Jesus this meant not rejecting each other. The irony is that Jesus experienced the ultimate rejection – capital punishment – precisely because he insisted that it was wrong to reject sinners.

The high priest justified Jesus' death in the same way that contemporary death penalties are justified; they are said to be for "the common good" (John 11:50-51). The religious leaders of Jesus' day, were blind to their own real motives for eliminating him which were his demands that they love others with the love he preached and practised; and that the social system they supported and identified with the common good be changed, since it was oppressive to many people.

### **Christian tradition**

In the pagan world into which Christianity was inserted the death penalty was an acknowledged fact of life. During the early centuries of emerging Christianity the attitude of the Church towards the practise of capital punishment was ambivalent. Gradually more Christians along with Pope Innocent III (1198-1216) simply took capital punishment for granted – a legitimate means for the state to exercise its authority. St Thomas Aquinas (1225-1274) also defended the use of the death penalty by state authorities from the point of view of the common good and the loss of human dignity in the case of a sane murderer ("Summa Contra Gentiles III, ch 145, nn 4-5; Summa Theologiae II-II, qq 64 and 66"). Pope Leo X (1513-1521) defended the right to burn heretics; the Church invoked similar principles for its inquisitional trials and practices; and as recently as 1952 Pope Pius XII (1939-1958) defended the right of the state to use capital punishment.

Catholic theologians have in general accepted the legitimacy of the death penalty. There never has been any official teaching by the Catholic Church on the matter. Indeed, capital punishment is the one exceptional case where the Church has not uncompromisingly condemned direct killing.

### **Christian values**

Though there has been a remarkable growth in sensitivity to human rights and particularly the right to life in Catholic magisterial teaching and in Catholic theological research (one need only refer to the Church's public stand against abortion), the stance of a Christian community on matters pertaining to the value of life ought to stem from a consistent life ethic.

We combat “murder, genocide, abortion, euthanasia, wilful self-destruction” as the Second Vatican Council suggests in the “Pastoral Constitution on the Church in the Modern World (Gaudium et Spes)”, n 27. The Vatican “Declaration on Procured Abortion” (1974) requires that “human life must be protected and favoured from the beginning, just as at the various stages of its development” (6). All human life has high value and is sacred in the eyes of God. Surely then even that of the convicted criminal is to be respected and protected?

In following the example and teaching of Jesus Christ, all Christians are called to a life of love that includes granting pardon, forgiveness and mercy towards enemies. This aspect of charity brings us to be perfect like the Father (Lk 6:36-37) and merciful love gives human justice its specifically Christian dimension. Strict legal justice ought always to be tempered with compassion.

### **What are we called to do?**

The death penalty is symptomatic of a widespread social malaise in South African society: The absence of respect for human life.

More is required than simply abolishing capital punishment. A consistent ethic of life calls for respect for persons from the womb to the tomb, since the right to life is basic to other human rights.

Another reason why it is imperative that the death penalty be abolished is South Africa is its connection in practise with apartheid.

Furthermore, abolition of the death penalty would have added significance of being a move away from South Africa’s repressive political and legal system, towards a more just post-apartheid society.

### **Alternatives to capital punishment**

The abolition of capital punishment does not suggest all forms of punishment be dropped. Other penalties can take its place. Further issues in connection with punishment concern imprisonment and rehabilitation: For undoubtedly, certain criminals should be withdrawn from society, and given the chance and opportunity to make up for their crimes and reform their lives. Prisons are necessary, but should offer far greater scope for rehabilitation. As far as possible incarceration should not be a period of prolonged brutality, but a step towards a more humane existence. The fact that someone is prisoner, whether a convicted criminal or a detainee held without trial, gives no one the right to torture or be cruel to them.

In South Africa greater use could be made of available experts in the fields of psychology, social work and counselling. Prisons, racially mixed in an equitable fashion for staff inmates, could be a training ground for non-racial cooperation afterwards. Prisons should stress Christian values of personal conversion and social rehabilitation, reparation and restitution, reconciliation and forgiveness.

A more humane and Christian approach naturally should apply to children’s reformatories and industrial schools and corporal punishment ought to be discouraged in such centres of reform.

In many respects in South Africa the law and its enactment through the judiciary seriously depart from recognised standards of justice and civilisation. In particular, the judicial system should be based more on human values than racial or ideological ones. There is a serious imbalance when the legal system puts robbery on a par with murder, rape and violence; things should not be regarded as more important than people. Furthermore, theory underlying criminal justice would benefit from a critical reassessment, undertaken in the light of current worldwide emphasis on human rights.

People captured as “guerrillas”, “freedom fighters” or “terrorists” should not simply be brought to trial and condemned to death. According to a protocol of 1977 added to the Geneva Conventions of 1949, “prisoner of war” status ought to be accorded to those involved in ‘freedom struggles’ or ‘wars of national liberation’. Although this protocol was not accepted, that error should be corrected. In this way the system of criminal justice, including the death penalty, would cease to be a political weapon. It is noteworthy that the 1977 Protocol was adopted by the African National Congress (Dugard et al, 1989).

Other areas that require attention include accelerated entry of black people into the legal profession, the introduction of the automatic right of appeal, the provision of a Bill of Rights, the right to use any language of the people in the courts, the phasing out of the “pro deo” system in certain criminal cases by financing more competent lawyers.

Lawlessness and crime will never be completely eradicated from society, so justice demands that the people and the commonwealth be protected. In South Africa the system of policing should help generate a greater appreciation of the different cultural values of the whole of South Africa.

### **Further ramifications**

It is impossible to regard the abolition of the death penalty in South Africa as a single issue; it has too many ramifications in the social, political, legal and economic fields. Violence and crime undoubtedly often have their origin in public indifference and lack of care for others that continual poverty, social deprivation and poor educational facilities manifest.

Through want of decent housing, employment, adequate wages and hospital services, basic needs of people are not met and they experience society’s indifference towards them. In many instances this generates a corresponding indifference and lack of care for others, which may easily lead them to compensate for their deprivations by resorting to violence and crime. In South Africa many glaring inequalities and prevailing indifference produce frustration, hopelessness and despair in many lives. Only the removal of this seedbed for crime will make society less violent and offer the chance of a better life for all.

### **Immediate action to be taken**

In order to remove capital punishment from the statute book, we call on the government to:

- Place a moratorium on all executions immediately;
- Appoint a commission of enquiry into all facets of the death penalty and to examine its relation to the widespread violence in our society.

We call on the Church to:

- Urge its members to pray for all those condemned to death and their families;
- Support through prayer and join with other organisations that campaign for the abolition of capital punishment, and to involve its own members in their work;
- Present a detailed and critical study of all moral issues involved in the death penalty to the Theological Advisory commission of the Southern African Catholic Bishops' Conference; and
- Cooperate in a nationwide educational campaign to enlighten the general public about the wider moral implications of violence and capital punishment.

**A select bibliography on Capital Punishment: General studies, the South African situation and the Roman Catholic tradition, is available from SACBC Secretariat, PO Box 941, Pretoria 0001.**