

NOTES AND DOCUMENTS. ' h July 1970

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CAPITAL mm

SOUTH AFRICA

"The abolition or '11: . Rope would do more for South
Arriu' 5 image than Anything else we can reasonably hope
for. It would bring a gentleman to our country which wq
dearly need. "

Editorial in mg, Johannesburg,
Jam 26, 1966

. "South Atria bu the fourth honigide rate and, as tar
as aniluble figures indicate, the highest execution rate in
the world .00

"We have to race the fact that there 13 .methins
seriously wrong with our society: thehenomous crime rate
13 an indication 01' a rooted alienation among large sections
of the community. To bclim tint the death penalty gives
us protection is a. snare and o. delusion."

Mr. David R1311, lecturer M: the
University of Gap. Town, in am,
_____Pismmm1969.____

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Hanginggrand apartheid

The alarming and ever-increasing rate of hangings in South Africa has caused growing concern in South Africa and in United Nations organs. The high rate of hangings in South Africa is a result of the apartheid policy. A study made in 1969 showed conclusively that there is a greater probability of conviction in murder trials when the victim is white; that it is rare for a white to be convicted for murder when the victim is non-white; and that whites are not executed for the rape or murder of non-whites, while non-whites are usually hanged for the rape or murder of whites;

In a pamphlet issued in April 1970, Mr. Peter Randall, Director of the Study Project on Christianity in Apartheid Society, 1/ pointed out:

"Whereas the rest of the civilized world has steadily decreased the range of offences for which the death penalty can be imposed, South Africa has dramatically gone in the opposite direction.

"The last decade has seen a sudden increase in the number of crimes for which the death penalty may be imposed in South Africa.

"In stark figures the statistics show that between 1911 and 1947, fewer than twenty-five people were hanged on an average each year. From 1948 to 1966 the figure stood at more than sixty-six, while it rose to more than eighty during the decade 1957 to 1966.

"In 1968 one hundred and eighteen people were executed in South Africa...

"From 1911 to 1966 (inclusive), 2,107 people were executed in South Africa; 1,952 for murder, 125 for rape, 44 for robbery and housebreaking with aggravating circumstances, seven for sabotage without murder, and one (Japie Fourie) for high treason.

"Half of the total executions since 1910 took place between 1955 and 1966. South Africa accounts for nearly half of the wgylgfg_known exegntigng,"

Mr. Randall pointed out that the reasons for the high incidence of hanging are found in the country's social structure. The legal system reflects the apartheid structure accurately, with the judges white and the majority of the judged black. He noted that several writers had pointed to racial discrimination in the distribution of punishment by South African courts.

1/ Peter Randall, The Death Penalty; and the Church in South Africa, April 1970. Published by Director of Publications, South African Council of Churches, Box 51190, Braamfontein, Transvaal, South Africa, Price: 55 cents.

United Nations concern

United Nations organs have been concerned for several years with the question of capital punishment in South Africa, particularly in connexion with the execution of persons for "acts resulting from their opposition to apartheid". After the banning of the African National Congress and the Pan Africanist Congress in 1960, and the enactment of a number of stringent laws to suppress peaceful resistance to apartheid measures, the resistance increasingly took the form of underground activity, sabotage and violence. The Government countered with the enactment of the General Law Amendment Act of 1962 - commonly known as the Sabotage Act - and the Terrorism Act of 1967, creating new capital offences of "sabotage" and "terrorism", with a minimum penalty of five years' imprisonment and a maximum penalty of death.

In October 1963, the General Assembly urgently considered reports that Mr. Nelson Mandela and other political prisoners had been charged under the Sabotage Act. On 11 October 1965, it adopted - by 106 votes to one - resolution 1881 (XVIII) calling on the Government of South Africa "to abandon the arbitrary trial now in progress and forthwith to grant unconditional release to all political prisoners and to all persons imprisoned, interned or subjected to other restrictions for having opposed the policy of apartheid".

The Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa noted in its report of 25 March 1961; (A/5692-s/5621) that forty persons had been sentenced to death in political trials in 1965 and that, in March 1966, three persons - Mr. Vuyisile Mini, Mr. Wilson Khayinga and Mr. Zinakile Mkaba - had been sentenced to death in Port Elizabeth. The Committee recommended that as a first step in order to prevent irrevocable consequences, the Security Council should demand that the South African Government should refrain from the execution of persons sentenced to death under arbitrary laws providing the death sentence for offences arising from opposition to the Government's racial policies, and further, that the South African Government should end immediately the trials then proceeding under those arbitrary laws.

In its resolution 190 (1966) of 9 June 1966, the Security Council urged the South African Government "to renounce the execution of the persons sentenced to death for acts resulting from their opposition to the policy of apartheid". . Further, in its resolution 191 (1966) of 18 June 1966, the Security Council again urgently appealed to it to:

- "(a) renounce the execution of any persons sentenced to death for their opposition to the policy of apartheid;
- "(b) grant immediate amnesty to all persons detained or on trial, as well as clemency to all persons sentenced for their opposition to the Government's racial policies...

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The South African Government⁹ however⁹ refused to accede to these urgent appeals. Though death sentences were not imposed in the Rivonia trial, such sentences were imposed in several other trials and were carried out. The three persons sentenced to death in Port Elizabeth, referred to above, were executed in November 196k, despite the appeals by the General Assembly and the Security Council, as well as appeals by the Secretary-General, a number of Member States, the Second Conference of the Heads of State or Government of the Non-Aligned States, the African Group at the United Nations and numerous organizations around the world. In resolution 259k (XXIII), adopted on 26 November 1968 on "capital punishment in southern Africa", the General Assembly noted with concern "the existence of the death penalty as a means of suppressing resistance to the policies of apartheid, racial discrimination and colonialism ... by the racist Government of South Africa"; condemned "... (the) racist Government in South Africa for resorting to the application of the death penalty and the threat or use of capital punishment in (its) attempts to suppress the natural aspirations of the peoples of southern Africa to social and economic justice, civil rights and political freedom"; called upon "the Government of South Africa to renounce the execution of any persons sentenced to death for their opposition to apartheid"; and requested the Commission on Human Rights and the Economic and Social Council to keep this matter under constant review. The Commission on Human Rights requested its Ad Hoc Working Group of Experts to investigate and report on the matter.

Laws providing for the death sentence

The death sentence has been mandatory in South Africa for murder and permissive for rape and treason from 1917. It is also permissive in the case of a woman convicted of murdering her newborn child, or if the convicted person is under eighteen years of age. In 1955 the concept of extenuating circumstances was introduced, allowing discretion to the court. g/ Since 1958, the courts have been empowered to impose the death penalty for robbery; attempted robbery; house-breaking and attempted house-breaking with intent to commit an offence where aggravating circumstances are present; kidnapping; and child-stealing.

More recently, the death penalty has been provided for in two security laws enacted to suppress opposition against apartheid - the General Law Amendment Act of 1962 and the Terrorism Act of 1961 which have been condemned by United Nations organs.

g/ Extenuating circumstances, as interpreted by courts, include immaturity and degeneracy of mind; the undue influence of a person in authority; clouded reason or judgement; a wrong belief that a fatal attack was to be made; minor degree of participation in the crime; mercy killings; and tribal customs or such factors such as belief in witchcraft.

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Under the General Law Amendment Act of 1962, relatively minor offences dealt with in other laws were transformed into the offence of "sabotage" if they were calculated to produce any of a series of effects listed in the Act. The burden of proof that the act was not committed in order to produce any of those effects is placed on the defendant. Moreover, persons accused of sabotage are tried summarily, and the procedure prescribed for magistrate's courts applies, although the trial is by the Supreme Court. Juveniles, if convicted of sabotage, are not eligible for the special milder, corrective treatment provided for non-adults. The Terrorism Act, 1967 is retroactive to five years and defines "terrorism" extremely broadly as the commission of any act, or attempting to commit any act or aiding the commission of any act, with intent to endanger the maintenance of law and order in the Republic. The intent is presumed unless the accused proves beyond a reasonable doubt that he did not intend any of twelve listed results. The Act provides for unlimited detention of arrested persons in solitary confinement and denies the detainees the right to habeas corpus or judicial relief of any sort; The procedural provisions are even more arbitrary than in the Sabotage Act.

Nymherpf recent death sentences and executions .

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As noted earlier, the number of persons sentenced to death and executed has risen dramatically. On the other hand, the percentage of condemned people who are reprieved has decreased sharply. In the eleven years before 1955, no less than 665 of the 868 people sentenced to death or 77.4 per cent, had been reprieved. j/ But the percentage of reprieves dropped to 25 per cent in the period 1962-1965. 5/ Some recent statistics are given below.

On May h, 1965, in reply to a question in the House of Assembly, the Minister of Justice provided the following statistics for the years 1959-1960 to 1965-196n: 5/

Death sentences and executions

Administrative year; s_gl_gglx; jp; gygg) 991 1959-1960 or 39n 1965: 196h

Number sentenced to death Number executed

Year - __m__ 1__ . __. 1. _- - ----- "m-

White Coloured Asiatic Bantu Total White Coloured Asiatic Bantu Total .

1959-1960 2 18 - 98 118 1 11 - 70 82

1960-1961 5 17 1 89 110 2 15 1 67 85

1961-1962 2 20 1 152 175 2 15 - 120 157

1962-1965 7 15 1 129 150 7 9 - 91 107

u 16 - 158 158 u 1h - 91 109

1965-196h

Randall, op. cit.

A. Sachs, South Africa: n The Violenggwgiy Apartheiq, 1969. Published by the International Defence and Aid Fund, 2 Amen Court, London, E.C.h.

h shillings and 6 pence.

South Africa. House of Assembly Debates (Hansard), May h, 1965, col. 5268.

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On August 12, 1966, he provided Parliament with statistics for the period July 1, 1965 to June 30, 1966. 6/

Death sentences and executions

Number sentenced to death Number executed

Year _____. - _____. "1__11__1, "5 ,1____1____1_.._m"__,,

White Coloured Asiatic Bantu Total White Coloured Asiatic Bantu Total

1965-1966 5 54 - 100 159 5 17 - 50 70

On April 2, 1968 and February 14, 1969, in reply to further questions, he gave the following figures for 1967 and 1968. 1/

Death sentences 222123692319221.196112ng_192&

Number sentenced to death Number executed

1967 1968 1967 1968

White 8 4 2 5

Coloured 16 20 14 21

Asiatic 1 - - -

Bantu 102 77 81 95

TOTAL 127 101 97 119

A significant feature in recent years is the execution of a number of persons for offences arising from political motives. In these cases, tried under new security laws, the courts have tended to show greater severity of punishment than for offences under the Criminal Procedure Act.

The Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa has reported in some detail on a number of death sentences and executions in political cases. In its report of August 10, 1965, the Special Committee noted that 299 persons had been sentenced to death in 1965 and

1964 and 205 had been hanged. It stated that a substantial percentage of these executions were for offences committed with a political motive, namely, the desire to end apartheid. According to the information then available to the Committee, fifty persons had been executed in 1965 and 1964 and two others (My. Washington

According to the report of the Commissioner of Prisons for the year ended 30 June 1965, there were 115 hangings during the year, or 52 more than in the previous year. The report of the Prisons Department for 1965-1966 gives the number executed in 1965-66 as 107. South Africa Prisons Department.

3/ South Africa. House of Assembly Debates (Hansard), April 2, 1968, cols. 5209-10, and February 14, 1969, cols. 755-6.

.8/ A/5957/Add-1, para. 155.

6/ South Africa. House of Assembly Debates (Hansard), August 12, 1966, col. 616.

Bongco and Mr. Frederick John Harris) in 1965 for such offences. 9/ It reported the following comment in gpgtlight on South Africq, Congress, published in Dar es Salaam, on April 50, 1965:

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"The attitude to human life which leads to nearly 100 hangings every year cannot be separated from the attitude which led to the murder of 68 people within the space of a few seconds at Sharpeville. The increasing number of political executions will no doubt send the figures soaring even higher. This slaughter must stop."

Mr. A. Sachs, a South African advocate now in exile, recently wrote:

"By increasing the number of crimes carrying a possible death sentence and by reducing the number of commutations the South African authorities have brought about a position in which their country is now responsible for almost half the world's total number of executions. The judges make their contribution by virtue of passing more and more death sentences in circumstances where they are not obliged by law to do so..."

"Yet though the judges must take their share of responsibility the main cause of the extraordinarily high rate of executions would seem to lie in deliberate Government policy... the South African Parliament has in the last decade increased the number of offences carrying the death sentence from three to nine."

"Equally significant has been the extent to which the rate of commutations has declined. Before the present Government came to power, well over half the death sentences imposed were commuted to life imprisonment. From 1948 onwards the percentage of reprieves consistently declined until in the period 1962-1965 the proportion of reprieves dropped to as little as 25 per cent ..."

"Something new in recent years has been the number of executions which have taken place for offences with a political background. Some of these have aroused international concern, such as the case of three trade unionists executed in 1964 for planning the murder of an informer; others have been noticed but not protested about, such as the case in 1967 in which nine Africans were hanged for killing one white man, but many more have taken place virtually without publicity." lp/

Those executed in 1964 included forty-seven persons condemned for offences connected with Pogo or the Pan Africanist Congress (listed in the Committee's document A/AC.115/L.125) and three leaders of the African National Congress, Mr. Vuyisile Mini, Mr. Wilson Khayinga and Mr. Zinakile Mkaba.

Recently the Pan Africanist Congress office in Maseru published a more up-to-date list of its adherents who had been executed. The Africanist, Maseru, March 1969.

Sachs, op. cit. pp. 2-5.

the organ of the African National

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At the last session of the South African Parliament on March 14, 1969, Mrs. Helen Suzman (Progressive Party) moved "that this House (of Assembly) requests the Government to consider the advisability of appointing a commission to inquire into the desirability of abolishing capital punishment". She referred to the startling statistics and pointed out that while there was a constant tendency throughout the world towards abolition of capital offences, either in totu in certain respects, South Africa has moved in the opposite direction in two respects:

"Firstly, we have added to the list of capital offences over the years, and secondly, we are reprieving fewer people than we did twenty years ago. Originally, as honourable members no doubt know, the death penalty in South Africa applied only to treason, murder and rape. Those were the only three capital offences in South Africa, and the death sentence was mandatory upon a conviction for murder until the 1930s, when the 'extenuating circumstances' provision was introduced and the death sentence left to the Judge's discretion. I might say that the percentage of death sentences imposed for murder dropped dramatically thereafter. But since the 1950s South Africa has steadily added to the list of capital offences and since those days we have had armed robbery, housebreaking with aggravating circumstances, sabotage, child-stealing, kidnapping and terrorism added to the list of capital crimes...

"South Africa has reprieved fewer people over the years, unlike other countries where reprieves are mounting in most countries that do retain capital punishment. But in South Africa the percentage of people reprieved is dropping. For instance, between 1947 and 1956, 55 per cent of the Whites who were sentenced to death were reprieved, but in the period between 1959 and 1964 only 11 per cent of Whites sentenced to death were reprieved. Thirty-one per cent of non-Whites sentenced to death between 1947 and 1956 were reprieved but only 28 per cent were reprieved between 1959 and 1964.

"The rising homicide rate in South Africa, and it is rising steadily all the time, is also disturbing. Another United Nations survey shows that we have probably the fourth highest homicide rate in the world. Let me point out that, despite retention of capital punishment, we have a very steeply rising homicide rate. This rising homicide rate, together with the combination of the two factors I have already mentioned, i.e., the increase in the number of capital offences in South Africa and the decrease in the number of reprieves, have resulted in the steady increase in the number of executions in South Africa. Let me give the House the relevant figures which, of course, are taken from official figures given to me over the years by Ministers of Justice.

"In 19h5, 1% people were hanged, in 19h7, 27, in 1957, 104, in 1966, it reached an all-high figure with 12% people being hanged. In 1967 the number dropped to CT, and last year 119 people were hanged." 11/

She continued:

"The idea that abolition is not possible because of our non-White population, the so-called Ibarbarous' 80 per cent, is widely held in South Africa. People fear that the abolition of the death penalty will result in thousands of non-Whites, overcome by their primitive instincts, murdering us in our beds. Incidentally, I want to say that prosecution figures over a ten-year period show that Whites commit murder and rape on non-Whites at a rate four times greater than non-Whites on Whites...

"There was a very interesting article in the last \$gngay gimes by Mr. David welsh, senior lecturer at the University of Cape Ibwn, who is an ardent abolitionist. He points out the fallacy in the concept that primitive tribal Africans are given to murder on a large scale. According to his article this is just not true... What undoubtedly is true is that there is a great deal of violence today, particularly among urban non-Whites. Nebody can possibly deny that. I think there are over nine murders per day in South Africa. But as Mr. Hoernle has stated in the Iansdown Report, the reasons for the higher homicide rate among non-Whites are to be found in the whole circumstances of their lives, and not in any difference in racial constitution. I submit that the crux of the matter lies not in the retention of the death penalty, but in the removal of conditions that are the root cause of violence and crime, of social dislocation, of poverty, low wages, hopelessness, bad living conditions, and migratory labour - that cancer in our society..." 12/

The motion was opposed by members from the two major parties and by the Minister of Justice, and was not voted upon.

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On February 1969, the Executive Committee of the South African Council of Churches (consisting of 26 Churches and religious organizations) circulated a report recommending the phased abolition of the death penalty, and suggested:

- (a) a campaign for penal reform aimed at finding an adequate alternative for capital punishment;
- (b) a campaign for a reduction in the number of capital offences in South Africa;
- (c) the unequivocal rejection by the ChUrches of the principle of capital punishment, and collective Church pressure for a Government inquiry into the death penalty;
- (d) a concerted effort by the Churches to educate and inform the public on the death penalty to South Africa.

House of Assembly Debates (Hansard), March 1%, 1969, cols. 2572-2575.

Ibid., cols. 2578-2579.

In an article in *Qodicillus*, the journal of the Law Faculty of the University of South Africa, published in June 1969, Mr. M.A. Thompson, a lecturer at the University, noted that in 1952 and 1962, which were years of social turbulence in South Africa, the executions totaled nineteen and twelve respectively. In 1968, the number of executions was 119. He pointed out that the threat of hanging was not a deterrent: the African townships of Johannesburg, for instance, had an average of three slayings a day, despite the death penalty and the many executions. He also noted that even the neighbouring Portuguese Colonies of Angola and Mozambique managed without capital punishment.

In the *South African Law Journal*, November 1969 and February 1970, Dr. Barend van Niekerk, senior lecturer in law at the University of the Witwatersrand, published the results of a questionnaire on the death penalty answered by 158 advocates and fourteen judges. More than 80 per cent of the advocates who answered were in favour either of abolishing the death penalty or limiting the number of crimes for which it can be imposed. More than three-quarters favoured an exhaustive governmental inquiry into the reasons for the retention of the death penalty.

Almost 50 per cent believe that justice as regards capital punishment is meted out on a differential basis to the different races and 1 per cent who so believe are also of the opinion that such differentiation is 'conscious and deliberate'.

Of the fourteen judges, four favoured total abolition of the death penalty, three were "doubtful" and eight were in favour of an exhaustive governmental inquiry into the death penalty.

Professor Ellison Kahn, Dean of the Faculty of Law at the University of the Witwatersrand, discussed the question of capital punishment in an address to a conference of law teachers in Cape Town on January 27, 1970. He said that between 1911 and 1968, 2,525 people were executed in South Africa, more than half of them since 1955. About 85 of these were Whites. The average number of hangings rose from twenty-one between 1911 and 1947 to ninety-three between 1957 and 1968.

Dr. Kahn said that he did not know of an instance in South Africa where an innocent white man had been hanged because the court had based its decision on erroneous facts or mistaken identity. "I cannot say this of non-whites."

Early in April 1970, the police visited Professor Kahn and Dr. van Niekerk in connexion with their studies on the death penalty. They also visited a Johannesburg newspaper which reported the studies.

This action led to condemnation in academic circles. Professor John Dugard, of the Faculty of Law of the University of the Witwatersrand, said on April 4, 1970, that this incident appeared to be an act of intimidation which was intended to suppress scholarly comment on and criticism of the administration of justice.

Dr. G.R. Bozzoli, Vice-Chancellor of the University, expressed concern at the police interrogation as "direct intimidation of professors and other academics whose primary duty is to study and examine matters on which they profess knowledge". Mr. van Niekerk was subsequently charged with contempt of court, but was acquitted by the Pretoria Supreme Court in June 1970.