THE DEATH PENALTY IN THE CAPE PROVINCIAL DIVISION: 1986-1988*

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With the exception of 1988, the last ten years have seen a steady increase in the number of hangings in South Africa. Public concern about this trend is reflected in the relaunch last November of the Society for the Abolition of the Death Penalty in South Africa and the issue has been highlighted by the controversy surrounding cases such as that of the 'Sharpeville Six'.[1] In spite of this, information concerning the imposition of the death penalty is difficult to obtain and researchers generally must rely on the rather limited information supplied by the Department of Justice. Consequently, a survey of all criminal cases heard by the Cape Provincial Division (CPD) of the Supreme Court between 1 January 1986 and 31 December 1988[2] was conducted. The main aim of this research was to identify problematic

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1 An example of the continuing criticism is the resolution passed at the Conference of Law Teachers in January 1989 calling for the appointment of a judicial inquiry into the death penalty in South Africa and a moratorium on all pending executions.

2 The statistics reflect the position on 3 February 1989. Excluded from this study, therefore, are those cases which were missing or incomplete on that date (namely 1/86, 52/86, 55/86, 151/86, 199/86, 278/86, 346/86, 62/87, 112/87, 126/87, 219/87, 257/87, 270/87, 274/87, 61/88, 81/88, 105/88, 113/88, 115/88, 138/88, 154/88, 169/88, 175/88, 189/88, 198/88, 199/88, 200/88, 202/88, 216/88, 217/88, 219/88, 221/88-225/88, 227/88-232/88, 242/88, and any subsequent to 243/88). These were presumably either still being heard by the trial court or were at some stage in the appeal process. Where the files were available, albeit incomplete (particularly concerning appeals), as much information as was obtainable has been included. Cases which were begun in 1985 and decided in 1986 or subsequently do not fall within the ambit of our research.

areas in the process leading to judicial execution. To illuminate this process the study focused on the frequency with which different judges impose the death penalty. Information was also collected concerning the number of discretionary death sentences that were imposed, and by whom, and statistics relating to appeals and reprieves were collated.

This article presents the data that we collected in four tables. These are explained in the first section below. The second part of the article examines three issues that emerge from the data. First, we note the disparity in the use of the death penalty by individual judges and argue that, in part at least, this must be attributed to the personal disposition of judges. Then we examine the figures relating to appeal procedures and conclude that the procedure should be reformed. Thirdly we comment on the reprieve process. The last section of the article suggests areas in which future research on the death penalty may fruitfully be conducted.

Description of this Study

Table A reflects the total number of criminal cases tried in the CPD and how many of these were decided by each judge. These totals include cases in which there was an acquittal, cases in which there was a finding on a lesser charge, and cases in which a sentence other than the death sentence was imposed.[3] The number of accused persons sentenced to death by each judge is also indicated in this table, as is the overall total for the CPD.

Virtually all of the criminal cases that come before the Cape Supreme Court for trial are cases in which the death penalty is a competent sentence. For example, of 214 completed cases from 1988 included in our survey, all but one are cases in which the death penalty was a competent sentence. Table A indicates which judges did not sit for the full period under review, but neither temporary absences from the bench nor the availability of a judge to preside in criminal cases is considered. For example, we do not indicate when a judge may have presided in a long trial, many civil trials or a commission of inquiry. Because we assess death sentences handed down in relation to the number of criminal cases a judge has heard, these factors do not affect our findings.

Our material might have been presented in a variety of different ways. For instance, acquittals could have been excluded from the reckoning or the number of cases in which murder with extenuating circumstances was found juxtaposed with cases in which murder without extenuating circumstances was the verdict. Culpable homicide convictions could also have been enumerated. However, we

3 Therefore, obviously, those cases in which all charges were withdrawn by the state or in which the accused absconded have not been included because, since the judge came to no verdict, they are irrelevant for the purposes of this study.

do not purport to examine the multitude of reasons which may lead to a culpable homicide conviction, a finding of extenuating circumstances, a conviction for assault or an acquittal. In each of these cases a judicial choice is exercised and in each it is likely that the attitude of the judge to the death sentence itself may be relevant.[4]

Table B accounts for each judge named in Table A, ie both the judges who handed down death sentences and those who did not. It details the relationship between the number of accused that a judge has sentenced to death and his or her case load. Column 1 reflects the percentage of cases (out of 803) that each judge adjudicated, and this is used to calculate the expected number of cases that would have been heard by each judge had an equal allocation taken place (see note below Table B). Column 2 shows the expected number of accused that each judge would have sentenced to death, relative to his or her case load, all other things being equal. (This figure is based on the figure of 120 accused who were sentenced to death and on the proportion of cases that each judge heard.) Column 3 reflects the actual number of accused sentenced to death by each judge.

A comparison between columns 2 and 3 (which relate to numbers of accused sentenced to death) or columns 4 and 5 (which express these as percentages) indicates that the actual number of accused sentenced to death relative to each judge's case load differs considerably from the expected number. For example, if no variables come into play, Baker J, the first judge on the table, would be expected to be responsible for 2,24 per cent, or 2,69 of the accused sentenced to death in our sample, given his case load. He was, in fact, responsible for 12,5 per cent or 15 accused being sentenced to death. This represents a difference of 10 per cent or 12 people.

Table C presents information regarding the number of cases each judge adjudicated in which a death penalty was imposed, and relates this information to the expected frequency of death penalty cases. (The data relied on in drawing up this table is contained in Table D.) Here, then, cases in which the death penalty was imposed are used as the criterion for assessment, rather than accused sentenced to death, as in Table B. Column 1 repeats the percentage of cases that each judge adjudicated (out of a total of 803), and column 2 calculates the number of death penalty cases that each judge would be expected to have tried, given his or her case load and assuming all things were equal. (Column 4 expresses these figures as a percentage.) Column 3 gives the observed number of death penalty cases that each judge tried, in other words the number of cases in which one or more death

4 See the text to note 38 for further reference to this issue. It can be argued that in practice there is an element of discretion even in cases of murder without extenuation (ie mandatory cases) since the concept of extenuation permits of fairly wide interpretation. It has also been alleged that judges hand down verdicts of culpable homicide in order to avoid a finding of murder and the consequent mandatory death sentence (former judge of appeal, Mr Justice Trengove at an IDASA conference in Cape Town in 1988).

penalties were imposed. (In column 5 this is expressed as a percentage of the total number of cases (80) in which the death penalty was imposed.) The illustrative value of these statistics can be explained thus: Baker J heard 2,24 per cent of all the cases included in our sample, and 10 per cent of the death penalty cases. All things being equal, he would have been expected to have heard 1,8 cases in which the death penalty was imposed, yet he heard 8 such cases. This represents a difference of 6 cases.

Column 6 provides a different perspective on judicial sentencing practices. The figures given here (expressed as percentages) show in which proportion of the cases heard by each judge death penalties were imposed. To use the example of Baker J again, the death penalty was imposed in 44 per cent of the cases that he heard.

Tables B and C provide two different ways of assessing the frequency with which different judges use capital punishment, as Table B indicates the number of accused sentenced to death and Table C the number of cases in which the death penalty was handed down. A third possible way of comparing the frequency with which judges use capital punishment would involve assessing the total number of potential opportunities for handing down the death sentence each judge had, and measuring this against the actual number of death sentences. A rough method of doing this would consider the number of accused appearing before each judge and the number of resulting death sentences. To be more accurate, the number of charges for which the death sentence is a competent verdict would have to be calculated and then measured against death sentences. In this way full cognisance would be taken of both cases involving multiple accused and those involving multiple charges.

A number of factors led us to omit this method of comparison. First, it is clear from the results of Tables B and C that the essential conclusions that may be drawn from the one are corroborated by the other. Table B indicates that for most judges there is a disparity between the expected number of accused sentenced to death relative to his or her case load, and the actual number of accused sentenced to death. In some instances, the observed number of accused sentenced to death is higher than the expected number of accused sentenced to death, in others the reverse position obtains. Where the observed number is higher than the expected number, the figures for Lategan, Baker, Williamson, Van den Heever and Nel JJ show the greatest disparity. Table C, which analyses the imposition of the death sentence by comparing death sentence cases to case load, reveals similar disparities in observed and expected frequencies of death penalty cases for the same judges.

Secondly, a survey of our material suggests that the spread of multiple accused and multiple charges is fairly even. In other words, while there are a handful of cases in which one judge handed down a

number of death sentences either upon the same accused or a number of accused, there are many cases in which none or only one of a group of accused was condemned to death or in which, although a number of capital charges were involved, only one (or none) attracted the death sentence.[5]

Finally, a comparison of the third type would involve drawing in a massive quantity of data. Most cases involve more than one capital charge, and many, multiple accused. The general concurrence of results in the two methods tabulated suggests that this third method would not lead to conclusions sufficiently different to justify its use in a preliminary study of this nature. Accordingly, we think that Table B fairly reflects the disparity in death sentencing practices by different judges, and therefore it is these figures that we use in the remainder of this paper.

Table D provides a more detailed analysis of the information obtained, focusing only on those judges who imposed death sentences during the period in question. In order to facilitate accurate comparison, the table has been divided into three sections, one relating to cases, one to accused persons, and one to death sentences. The totals in the first column, as in Table A, indicate how many criminal cases were decided by each judge. The second column shows the total number of cases in which one or more death sentences were imposed. This is distinguished from the total number of accused who received the death penalty because more than one accused may be sentenced to death in a single case. Since each accused may receive several death sentences (for example, one each for murder, rape and robbery), the number of death penalty cases must also be distinguished from the total number of death sentences imposed by each judge (see column 8). Case 220/86 exemplifies these distinctions: of the two accused sentenced to death, the first received two death sentences (for murder without extenuating circumstances and rape) and the second, one death sentence (for rape).

Column 9 tabulates discretionary death sentences. While the death penalty is mandatory in certain circumstances, it is discretionary in others. Under s 277 of the Criminal Procedure Act,[6] a judge is obliged to impose the death penalty in any case where the accused has been convicted of murder. There are three exceptions to this provision, the

5 A comparison between columns 2 and 3 of Table D may suggest that, in certain instances, the presence of many accused who are sentenced to death in one case spuriously inflates the disparity between the number of accused that a judge could be expected to have sentenced to death, relative to his or her case load, and the actual number sentenced to death. There are, for instance, cases in which six or seven accused received the death sentence (see case 159/86). It may be alleged that the *circumstances* of such cases (for example, a prison gang murder) inevitably attract multiple death sentences and that such a feature distorts the statistics. We do not intend to address the substance of this argument (which we believe is unfounded) here, but would point out that the method employed in examining disparity in sentencing practices in Table C neutralizes the effect of multiple death sentences in individual cases.

6 Act 51 of 1977.

most important being that if extenuating circumstances are proved to have been present the imposition of the death sentence becomes discretionary rather than mandatory. There are also several other crimes (for example, rape, robbery, housebreaking) for which the death penalty is a competent, but not mandatory, sentence. The discretionary death sentences shown in the table are, therefore, those imposed for the commission of crimes other than 'murder without extenuation'. These are significant because the judge is not under any legal obligation to impose such a sentence but chooses to do so (for example, he may find extenuating circumstances and yet still hand down a death sentence). For this reason, the total number of discretionary death sentences imposed by each judge is included in the table, with more detailed information in the notes. Discretionary death sentences are often found in combination with mandatory ones. For example, an accused may be convicted of murder, for which no extenuating circumstances are found, and in addition convicted of rape. In such a case, the accused would be executed even if the judge had not imposed an additional discretionary death sentence. In the next column we indicate those discretionary death sentences which were *not* accompanied by a mandatory death sentence imposed on the same accused in the same case. In these cases, then, the accused would not be executed but for the discretionary sentence of the judge.

There is no automatic right of appeal against a decision of the Supreme Court. An accused who wishes to appeal against his conviction or sentence must apply to the court which heard his case for leave to do so. The 'applications pending' column represents those instances where there was, during the period in which our research was conducted, no indication of application for leave to appeal. The trial court grants leave to appeal if there is a reasonable possibility that another court could come to a different conclusion.[7] If the trial court refuses to grant leave to appeal (as happens in the majority of cases), the accused's next option is to petition the Chief Justice for leave to appeal. If leave to appeal is granted, whether by the trial court or by the Chief Justice, the appeal is heard by the Appellate Division,[8] which may confirm the decision of the trial court, overturn the conviction or reduce the sentence.[9] The 'outcome pending' column indicates those cases in which the legal process has not run its full course (ie the result of an application, petition or appeal was not available), and these accused were presumably still on death row when our research was completed.

7 See s 316(3) of the Criminal Procedure Act and E Du Toit, F J De Jager, A Paizes, A St Q Skeen and S Van der Merwe *Commentary on the Criminal Procedure Act* (1987) 31-9.

8 Because the death penalty is imposed, the appeal goes directly to the Appellate Division and not, as in other appeals from the Supreme Court, to a full bench of the Supreme Court.

9 See, generally, ss 315, 316 and 322 of the Criminal Procedure Act.

Once all the judicial options have been exhausted,[10] there is still the chance that the State President may exercise his prerogative and grant the accused a reprieve. Although there is no statutory procedure regulating reprieves, the practice is that the State President receives reports from both the Attorney-General's office and the presiding judge. A report from defence counsel may also be included. In addition, legal advisers in the Department of Justice may be required to investigate the case.[11]

The total number of reprieves granted thus far in the surveyed cases within the period considered (ie until 3 February 1989) is reflected in the table, with additional information in the notes regarding the individuals who were reprieved. Of those still on death row when our data was collected, some were awaiting the outcome of a pending case, others were awaiting a possible reprieve and the remainder, to whom the State President had declined to grant a reprieve, were awaiting execution.

COMMENT

In the introduction to this article we indicate that the research project was designed to collect empirical information about capital cases in order to identify possible future areas of research, and to assess where to expect problems. We return to this goal in the next section, where we outline further issues that merit attention. Below we address some preliminary issues that were clearly raised by the survey.

Frequency of the Imposition of the Death Penalty

Tables B, C and D indicate statistically significant[12] disparities in the use of capital punishment by individual judges for case load. To illustrate, Baker J handed down the death penalty in 44 per cent of the criminal cases that he heard, while King J did not sentence an accused to death in any one of his 32 cases.

Three judges (Baker J, Lategan J and Williamson J) heard only 15 per cent of the cases among them, yet they sentenced to death 51 per cent of the accused in our sample. On the other hand, another group of three judges who did impose the death penalty (Marais J, Munnik JP and Rose Innes J) sentenced only 12 per cent of the condemned people, while they tried 32 per cent of the criminal cases. Both these illustrative statistics and the difference between the actual number of accused sentenced to death and the expected number for case load (recorded in columns 2 and 3 of Table B) show that the

10 We have summarized only the usual procedure; there are other exceptional judicial options available (for example, the Criminal Procedure Act s 316(1) and (3) (application to lead new evidence) and s 323 (appeal by the Minister on behalf of the person sentenced to death)).

11 Section 326 of the Criminal Procedure Act, and see P Yutar 'The Office of the Attorney General in South Africa' (1977) 1 *SACC* 135.

12 See note 2 to Table B.

disparities in death sentences handed down cannot be due to the uneven numerical distribution of criminal cases among individual judges.[13]

An obvious explanation for the disparity in the imposition of death sentences would be that some judges favour capital punishment while others do not. We believe that a judge's personal predisposition to the imposition of capital punishment does indeed play a crucial role in explaining our statistics. This is an issue to which we return later in this article. There is, however, a preliminary question which might be raised as a response to our figures. It could be alleged that some judges are routinely assigned to cases where the death penalty is more probable, while their brethren are allocated less serious trials. This would imply that some judges receive a far larger proportion of cases to try where the death penalty is likely. There is some evidence that differential allocation of trials has taken place in political cases,[14] and it was mentioned informally in the course of our research by court personnel that a similar process takes place in 'ordinary' criminal trials.

In provincial divisions of the Supreme Court the roll is organized by the Judge President and currently the criteria which operate in the allocation of criminal trials are obscure. But, unless allocation occurs according to a procedure which can be openly assessed, it must be rejected. An examination of three very different possible forms of allocation substantiates this point. Let us take what may to some seem to be the most benign form of allocation, the form most likely to appeal to abolitionists. Assume that cases are allocated on the basis of compassion, that the Judge President benevolently isolates cases that he believes, or is advised, are most likely to attract the death penalty, and allocates them to judges who (he believes) are reluctant to impose the death penalty. Would this system of allocation appease abolitionists or satisfy lawyers? The answer must be 'No'.

A decision by the Judge President that *severe* cases should go to *compassionate* judges involves the uncontrolled determination of two factors that are vague, imprecise and irrelevant. It necessarily means that by some private process the Judge President intervenes in advance to influence the outcome of a trial. This procedure can be no more acceptable than its opposite, a second possible form of allocation, where the Judge President deliberately gives those cases that he believes are most severe to judges who he thinks are more disposed to handing down death sentences.[15] Any system which permits the

13 See M C J Olmesdahl 'Predicting the death sentence' in M C J Olmesdahl and N C Steytler (eds) *Criminal Justice in South Africa* (1983) 191 at 197 for a similar finding.

14 See John Dugard 'The Judiciary and National Security' (1982) 84 *SALJ* 655, where it is argued that such allocation takes place in the Transvaal Provincial Division. See, too, the *Commission of Inquiry into the Structure and Functioning of the Courts* (the Hoexter Commission) (RP 78/1983) at para 1.3.8.

15 This form of allocation would raise problems analogous to those before the American Supreme Court in *Witherspoon v Illinois* 391 US 510 (1968). In this case the court upheld the argument that the practice of challenging and excluding prospective jurors in death penalty cases where those

unrestrained manipulation of such factors cannot be condoned. It undermines the fundamental principle of equality before the law.

This value is embodied, for instance, in Art 101 1 2 of the German Fundamental Law (Grundgesetz), which provides that the allocation of judges to cases should be determined objectively in advance. It is seen to be an essential part of the administration of justice that appointments to preside should not be discretionary. The mode of allocation of judges to cases must be determined by a statute or open set of rules of general application. An arrangement such as ours which permits the Judge President to choose which judge should preside in a particular case would be unconstitutional.

A third form of allocation which involves setting aside cases believed to be severe for trial by particular judges would involve choosing judges on the basis of seniority or expertise. On the face of it, this may appear to be an acceptable process. However, in the CPD allocation of death penalty cases does not occur on the basis of seniority. According to Table A the judges who handed down the most death sentences between 1986 and 1988, and who thus might be argued to have heard more serious cases, were Baker J, Lategan J, Van den Heever J and Williamson J. While Van den Heever and Baker JJ were of the more senior judges on the Cape Bench during the period we reviewed (Van den Heever J was first appointed to the Northern Cape bench in 1969 and Baker J to the Cape bench in 1973), many judges have sat for longer than both Lategan and Williamson JJ.

We cannot refute empirically the suggestion that judges who preside in death penalty cases are assigned cases on the basis of their greater expertise in criminal matters. Nevertheless, this form of allocation is no more acceptable than the other possibilities we have discussed. The notion that certain judges have greater expertise in criminal law matters is questionable.[16] While it may be true that many newly appointed judges have had little or no criminal practice in their last years at the bar, their judicial function requires a vast amount of criminal work, particularly dealing with cases on review from magistrates' courts. Judges cannot avoid criminal matters and the structure of the judicial office suggests that criminal work cannot be considered specialist work. Moreover, the disposal of most criminal matters, whether they are 'severe' murder cases or deal with 'less serious' offences, depends heavily upon the assessment of credibility and the evaluation of evidence, a function central to any judicial officer's work.

jurors admit to having scruples about capital punishment is unconstitutional. Such automatic challenge results in a biased penalty determination process since an accused is sentenced by a 'death-qualified' jury rather than one drawn from a representative sample of the community. This violates the due process requirement in the American constitution.

16 We would take issue with Adrienne van Blerk *Judge and be Judged* (1988) 88 who maintains that '[a]ssignment of judges according to expertise, or to achieve an equal distribution of work and, where possible, as a general rule in contentious cases according to seniority, seems to be a satisfactory way of manning (sic) a Bench'. The 'truism' she refers to (at 61) that 'not only must justice be done; it must also palpably be seen to be done' seems appropriate.

Linked to this objection is the problem raised previously in the context of compassionate allocation. There is no formal process by which allocation on the basis of expertise could take place. It would depend entirely on the opinion of the Judge President. Furthermore, singling out death penalty cases for trial by particular judges cannot be compared to a process whereby complicated tax or patent cases are heard only by judges with special knowledge in the field. Not only is an argument based on expertise inapposite in the context of criminal trials, but the issues involved in the death penalty itself make it inappropriate to limit such trials for hearing by a handful of judges. Death penalty cases, like political cases, are inevitably controversial. Indeed, it would be extraordinary if there were no controversy in the imposition of the death sentence which is a morally problematic penalty.

In the context of political trials, Sydney Kentridge has warned that 'there ought never to be the slightest suspicion that the courts are being manipulated'.[17] Without clear criteria which can be discussed both in the profession and in public, putting aside apparently severe cases for trial by judges chosen by the Judge President for unknown reasons cannot be accepted.

Any system of discretionary allocation is inappropriate in capital trials. Nevertheless, the concerns that the tabulated statistics raise about the imposition of the death penalty in the Cape Provincial Division are unlikely to be fully addressed by simply ending whatever system of allocation may exist. To account for the wide disparity in the number of death sentences handed down by different judges revealed in our survey, other factors must also be taken into account.

Variables relating to the accused and the crime such as race, the age of the accused and victim, and the severity and place of the crime, influence the outcome of a capital case. In public and academic discourse, these sorts of factors are frequently asserted to be pre-eminent in explaining differences between individual sentences. The conventional wisdom is that on account of the infinite variety of individual circumstances which constitute each case, sentences cannot be compared. As Nicholas J has noted, '[a] comparison between cases is fallible because "appropriate punishment depends so largely upon the particular circumstances of the case and upon the particular circumstances of the accused concerned..." (per Ogilvie Thompson JA in *S v Berliner* 1967 (2) SA 193 (A))'.[18] Nicholas J is constrained to indicate another factor relevant in sentencing, namely that the matter is one of an exercise of discretion and in such matters reasonable men may differ. The general aim of 'consistency and

17 'Telling the Truth about the Law' (1982) 99 *SALJ* 648 at 653.

18 'The Courts—Disparity in Sentencing: Consistency and Discretion—are they reconcilable?' (1972) 1 *Crime Punishment and Correction* 22 at 26.

fairness' in punishment, while usually mentioned by commentators, is implicitly held to be subservient to both the individual circumstances of each case and a free exercise of discretion.[19]

Excessive emphasis on the multitude of individual factors differentiating case from case obscures an important factor in sentencing, namely the disposition of the adjudicator, and reduces the general aim of consistency and fairness to mere rhetoric. Any serious attempt to maintain fairness in sentencing must acknowledge that judicial disposition influences sentencing.[20] In his seminal work on sentencing, Hogarth found that the individual penal philosophy of a magistrate is consistently reflected in the pattern of sentencing decisions by that magistrate.[21] Magistrates' sentences are often consistent within themselves, yet inconsistent with one another's sentences. Personal sentencing philosophy would of course be reflected in the sentencing practices of judges too, and personal views in connection with capital punishment necessarily play a greater role in the decision whether or not to impose this punishment than, say, a choice between two other forms of punishment. As Mr Justice Leon, former judge in Natal, points out, 'I know from my own experience that some judges find extenuating circumstances more easily than others. I know judges who impose the death sentence not infrequently, and I know one judge who has been on the bench for some years who has never passed the death sentence.'[22] It is well known that some judges are strongly opposed to the death sentence while others defend its role as a punishment.

Although few judges have publicly committed themselves while they are still on the Bench, Mr Justice Didcott has spoken out in favour of abolition of the death penalty.[23] Conversely, David Bruck's research[24] suggests that Mr Justice Kriek and Mr Justice Munnik view the death sentence as an appropriate penalty. Other judges have on

19 See, in general, *S v Holder* 1979 (2) SA 70 (A) and *S v Pieters* 1987 (3) SA 717 (A). This issue is discussed in John Dugard 'Training Needs in Sentencing' (1985) 1 *SAJHR* 93, J R Lund 'Discretion, principles and precedent in sentencing (part one)' (1979) 3 *SACC* 203 and J R Lund 'Consistency as a principle of sentencing' (1983) 7 *SACC* 3.

20 The allegation that sentencing practice in death penalty cases is affected by the personal attitudes of the presiding judge is one of the issues considered by Olmesdahl in a study of death sentences in the Durban and Coast Local Division between 1970 and 1979 (M C J Olmesdahl, op cit note 13). Olmesdahl concludes that the individual judge's role in hearing a matter does not explain significant variance in the imposition of the death penalty when certain other extenuating and aggravating factors are taken into account. However, there are methodological problems with Olmesdahl's research and his conclusions are not reliable. This issue is dealt with in the Appendix on page 171.

21 J Hogarth *Sentencing as a Human Process* (1971) especially chapters 5, 6 and 7.

22 (1989) 106 *SALJ* 42 at 47.

23 J M Didcott 'Should the Death Penalty be Abolished' (1980) 4 *SACC* 298. See also Ellison Kahn 'The Death Penalty in South Africa' (1970) 33 *THRHR* 108 at 122–3, who adds Justices Hiemstra, Cloete, Maritz and Krause to the list.

24 David Bruck 'On Death Row in Pretoria Central' 13 and 20 July 1987 *The New Republic* 18 at 21. It is also arguable that the readiness of the trial judge in *S v S* 1987 (2) SA 307 (A) (Lategan J) to hand down the death sentence where he perceived the prison system to malfunction indicates a favouring of capital punishment.

occasion revealed this attitude towards capital punishment privately, or during the course of a trial.

Whatever other factors may contribute to the wide disparities that our research reveals, we cannot ignore the wealth of evidence from judges and researchers alike that personal views on penal policy are an important factor in explaining differing sentences.[25]

The influence of personal philosophy is more particularly relevant when the death sentence is imposed in the exercise of a 'free' discretion to do so (for example for rape, robbery or murder with extenuating circumstances). Although the notion of moral blameworthiness inherent in the legal interpretation that has attached to s 277 of the Criminal Procedure Act is one that permits of a difference of opinion,[26] the factors which may validly constitute reduced moral blameworthiness are to some extent circumscribed.[27] This constraint does not apply when a purely discretionary death sentence is imposed and, therefore, discretionary sentences are undoubtedly reflective to a larger extent of the personal penal philosophy of the adjudicator. Our statistics reveal that sixteen of the eighteen discretionary death sentences were imposed by only two judges (Lategan J handed down ten and Munnik JP six).

Leave to Appeal

Table D indicates that in only a limited number of cases does the trial judge give leave to appeal (in 40 out of 120 completed hearings in our sample). Moreover, the tendency of a judicial officer to grant leave to appeal ranges from 0 per cent (Baker J) to 63 per cent (Lategan J).[28] In even fewer instances does the Chief Justice grant this right. Although the number of cases in which the death sentence is overturned is not high (8 out of 31 appeals in our sample), this occurs frequently enough for a condemned person to have a right to have his or her sentence reconsidered.[29] The present system, whereby leave to appeal must first be sought from the trial judge, and if he or she refuses, a petition may be addressed to the Chief Justice seeking leave to appeal, does not seem to provide sufficient safeguards. In a number of cases no petition at all was addressed to the Chief Justice.[30] This may be because the accused's legal representative had no confidence in the prospect of success but could also be due to the inexperience of

25 While Hogarth's study (op cit note 21) is the most important, see also Roger Hood and Richard Sparks *Key Issues in Criminology* (1970) chapter 5, and A K Bottomley *Decisions in the Penal Process* (1973) chapter 4 for references to material substantiating this point.

26 R Leon (1989) 106 *SALJ* 42 at 47.

27 For example, the absence of previous convictions may not be proved.

28 This figure was reached by dividing the number of times trial court judges granted leave to appeal into the total death sentences imposed and by converting this to a percentage.

29 See also, for example, D van Zyl Smit 'Judicial Discretion and the Sentence of Death for Murder' (1982) 97 *SALJ* 87 and P J P Coetzee 'Beskouings oor die Doodstraf' (1988) 1 *Consultus* 15.

30 Cases 118/86, 159/86, 168/86, 314/86, 25/87, 67/87, 212/87, 278/87 and 238/87.

counsel or mistakes.[31] Furthermore research suggests that there are cases in which the accused is successful on appeal in spite of a refusal by the trial judge to grant leave to appeal.[32]

While the defence system in capital cases is staffed by inexperienced pro deo counsel, as it is at present, we cannot lend our voice of support to calls for an automatic *right* to appeal. The true nature of the remedy should be an automatic appeal procedure, which need not solely depend on the vigilance and enthusiasm of the pro deo counsel. Such a procedure may be likened to a form of automatic review and needs to be carefully constructed to address existing problems.

Reprieves

From 1984 to 1987 the number of reprieves expressed as a proportion of the number of people executed showed a steady decline.[33] In 1986 and 1987, for example, statistics compiled from the number of reprieves and executions for South Africa (excluding Transkei, Bophuthatswana, Venda and Ciskei) indicate that that ratio was 7:1, ie 285 executions and 42 reprieves. In 1988 there was a sudden and dramatic change in these ratios, as 117 people were executed and 49 reprieved. This approximates a proportion of 3:1. By 31 May, 37 people had been reprieved during 1989, while the number that had thus far been executed was 26. (This increase has not dramatically altered the reprieve figures that we provide in column 5 of Table D. By 31 May, only 2 further reprieves pertained to cases included in our study.) It seems that there has for the moment been a re-evaluation of policy regarding the granting of clemency by the executive. It is probable too that these changes have been influenced by the political climate regarding executions of people sentenced to death for 'unrest related' offences. However, while the reprieve process remains secret, and since no explanations are provided when executive clemency is granted or refused, it is difficult to establish the reasons for the recent increase in the number of reprieves conclusively.

Clearly reprieves are the prerogative of the executive and are not directly related to judicial activity. Yet the confidential judge's report that is forwarded to the executive for consideration may influence the reprieve process. It has been persuasively suggested that this report has a significant role to play in the deliberations of the executive.[34] No judge has, to our knowledge, commented publicly upon this aspect of judicial activity. Little is known, therefore, about the scope and complexity of these reports. Du Toit asserts, however, that the ambit of

31 This occurred in the case of Isak Tshongoyi whose petition to the Chief Justice for leave to appeal was misfiled. The error was discovered on the eve of his execution (*Cape Times* 25 November 1988).

32 Case 67/87, for example.

33 Christina Murray and Julia Sloth-Nielsen 'Hangings in Southern Africa: The Last Ten Years' (1988) 4 *SAJHR* 391.

34 E Du Toit *Straf in Suid-Afrika* (1981) 507.

the report is not confined to issues related to the trial, but that the judge is afforded an opportunity of expressing his or her informal views about the impending execution.[35] Clearly, then, the judge's personal predisposition concerning capital punishment will influence the formulation of his or her recommendation.

In addition, judges may hold divergent views about their role in the reprieve process itself. This, too, may determine the nature of their submissions to the executive. David Bruck's research illustrates the problem:

> 'The Durban judge ... told me that, on occasion, he had even imposed death sentences merely to frighten local criminals, while fully intending to write to the Ministry of Justice to recommend clemency. He didn't know whether these death sentences had actually been commuted. He felt sure they had been, but he'd never inquired. (If he had, he might have been surprised. The judge had informed me that the state president commutes about 80 per cent of the death sentences every year, but the actual commutation rate last year was just 15 per cent, less than a fifth of what he believed.)'[36]

Future Research in Death Penalty Cases

The goals of the research documented in this article were limited, but the project has provided important pointers to areas which require further, more detailed, investigation. Those areas which, in our opinion, require urgent attention are outlined here. First, however, it is important to note a very basic constraint operating upon those researchers who might wish to implement these suggestions. In very few Supreme Court cases are typed records of either the trial or the judgment available. The proceedings of cases in which the death penalty is imposed are transcribed, but this seldom occurs in other instances. This means that the primary research material relating to the proven facts of cases where, for example, extenuating circumstances were found to be present, is difficult to procure. Obviously any detailed study would therefore require substantial funding in order to transcribe untyped records, before any further collation and analysis could be tackled. Were such a task to be undertaken, the material we examined in the course of this research indicates that the following matters should be given priority.[37]

1. *Discretion in Conviction*

The range of competent convictions on a charge of murder gives judges an unusually wide discretion relating to verdict. The commonly-held notion that death penalty cases involve more serious factual situations neglects the consideration that similarly gruesome facts are to be found in any number of Supreme Court trials where the

35 Du Toit loc cit.

36 See note 24 at 20.

37 The suggestions that follow are based to a significant extent on observations made while collecting the data reproduced in this article.

death penalty is not imposed. Any comparison of cases which purported to explore the exercise of judicial discretion in relation to the death penalty would have to explain the possible variance between judges in findings relating to the presence or absence of extenuating circumstances. (This may require investigating not only judgments on the question of extenuation but also the adequacy and scope of the defence evidence presented on extenuation. We note with concern that our research suggests that often little evidence is led by the defence on the issue.) But it is not only in the finding on extenuation that judicial discretion is an issue. In addition, a study illuminating judicial discretion in handing down the death penalty will have to consider culpable homicide convictions, since this verdict may be used as a device to avoid hangings.[38] Furthermore, we observed that a proportion, albeit small, of murder charges results in a conviction for assault. A comprehensive study of such cases might elucidate whether these verdicts too are used by the judiciary to avoid hangings. Lastly, acquittals cannot be left out of the reckoning. Ten per cent of the cases in our sample resulted in acquittals on all charges. It is possible that in cases where the death penalty is in issue some judges may be more than usually zealous in their application of the burden of proof.

2. *Discretionary Death Sentences*

Cases where the death sentence is not mandatory warrant separate consideration because here the sentencing discretion is not concealed by the formal issue of whether or not extenuating circumstances are present. An independent analysis of these cases might further our understanding of the way in which such sentencing decisions are made. This is more particularly urgent since the Minister of Justice has recently suggested that the government is considering enacting legal provisions abolishing mandatory death sentences.

3. *Issues concerning the Application of the Concept 'Extenuating Circumstances'*

(i) It appears that death sentences are frequently imposed on youthful offenders. Some are between the ages of 18 and 21. In *S v Lehnberg*[39] it was held that youth was prima facie an extenuating circumstance unless the murder was committed by reason of 'inner vice'. We suspect from a cursory examination of cases involving youths (for example cases 36/87, 131/87, 245/87 and 87/88) that judges apply widely differing approaches to the consideration of youth as a factor in extenuation. These cases are seldom reported, which means that an important aspect of the law relating to extenuating circumstances may be developing unsystematically and without academic scrutiny.

38 See note 4 above.
39 1975 (4) SA 553 (A).

(ii) As noted above, it is apparent that in many cases little evidence is led in extenuation. The use of witnesses, including expert witnesses, requires investigation. For instance, it is possible that the introduction of reports by social workers, the testimony of psychologists and expert criminological evidence may play a determining role in the finding that extenuating circumstances are present.[40] Judicial activism in this context may also be considered. To what extent do (or should) judges call for such evidence where counsel do not offer it?

(iii) It is axiomatic that women are treated differently from men in the criminal justice system. Common parlance has it that women are seldom hanged, for example. However, we noted at least two instances of women sentenced to death.[41] We also noted many other instances in which women were convicted and given lesser sentences. Further research directed at examining prosecutions of women in the Supreme Court may well expand our understanding of judicial perceptions relating to women and the relationship of this to the finding of extenuating (or mitigating) factors.[42]

4. *Appeal Procedure*

As we point out above[43] the absence of an automatic appeal procedure is a serious defect in our system. It is a matter which requires urgent attention from both researchers who might indicate methods of addressing the problem, and the legislature.

5. *Reprieves*

The broad outlines of the reprieve process have been officially documented[44] but details remain obscure. Yutar's assertion that 'no stone is left unturned in order to ensure that no miscarriage of justice results'[45] does not allay our disquiet that cases exist in which mitigating factors do not come to light. This concern is at least in part predicated upon the limited evidence in extenuation that is presented in many capital cases by pro deo counsel. Whether State machinery can supplant the role of a competent defence counsel when it investigates an accused's claim for a reprieve is questionable. Nevertheless, executive action through granting reprieves is central to the scheme in South Africa and investigation is necessary to assure us that the

40 See *Inside South Africa's Death Factory* Black Sash (1989) 55-6.

41 These were Victoria Gwe (case 67/87), and Sandra Smith (case 325/86). Both were tried with men as co-accused. On appeal Gwe was acquitted on the charge for which the death sentence was imposed. Sandra Smith was executed on 2 June 1989.

42 It may be interesting, too, to consider the position of women as victims of crime in Supreme Court prosecutions. Our attention was attracted to this issue by the widely divergent results in successful rape prosecutions. Death sentences were imposed for rape (for example, *S v Pietersen* case 114/88), yet a sentence of nine months was also noted.

43 See text to note 29.

44 *Lansdown Report of Penal and Prison Reform* UG 47 of 1947 para 466.

45 Op cit note 11 at 141.

mechanisms and structure of the process provide sufficient safeguards.

6. *Counsel, Prosecutors, Interpreters and Assessors*

While our primary interest is the role of judicial disposition in imposing the death sentence, our research suggestions include references to the much criticized pro deo system of defence in capital trials. It is clear that future research should continue to highlight the inadequacies of the structure of legal representation in criminal trials in the Supreme Court. In addition, the respective roles of prosecutors, interpreters and assessors in these cases deserves sustained analysis.

CONCLUSION

The matters raised in the previous section require detailed consideration and we believe that empirical data and comprehensive statistical information will provide important insights into current problems in capital cases. Indeed, any substantial analysis of sentencing patterns in Supreme Court trials cannot but extend our understanding of penal policy and the judicial process. We consider, though, that many of the issues raised above should not be addressed by statistical methods alone. For example, the role of interpreters in Supreme Court trials can be meaningfully assessed only by employing a process-oriented research methodology. Researchers in South Africa who have used these methods have delivered important findings on the profound structural constraints inherent in the process of adjudication in criminal trials in a multi-racial and multi-lingual society.[46]

Nevertheless, the outcome of our preliminary research confirms what many practitioners would regard as self-evident. There are substantial disparities among judges in handing down death sentences. It is possible that some disparity is explained by the differential allocation of trials to judges by the Judge President. It is clear too, though, that personal penal philosophies also inform the decision to sentence a person to death. We would argue that the disparity in death sentences for case load amongst CPD judges is itself disturbing enough to raise serious doubts about the fairness of the system. It can never be accepted in a moral legal system that whether an accused lives or dies depends on the judge before whom he or she is tried.

46 See N C Steytler *The Undefended Accused on Trial* (1988) and D Hansson *Differences in the comprehensibility of testimony: a comparative study of magistrates' credibility judgments, witnesses' ethnicity and court role* (Unpublished MSocSci dissertation, University of Cape Town 1985).

APPENDIX

OLMESDAHL AND THE ROLE OF JUDICIAL DISPOSITION IN THE IMPOSITION OF THE DEATH SENTENCE IN SOUTH AFRICA

Olmesdahl, in a recent empirical study of factors contributing to the imposition of the death penalty in the Durban and Coast Local Division ('Predicting the death sentence' in M C J Olmesdahl and N C Steytler (eds) *Criminal Justice in South Africa* (1982) 191) claims that the 'personal disposition' of the judge makes a relatively negligible contribution to the decision to impose the death penalty. Olmesdahl's claim is particularly important as it contradicts our assertion that judicial disposition does influence sentencing. Moreover, Olmesdahl's research has recently been used by Adrienne van Blerk in *Judge and be Judged* (1988) at 53 to support the proposition that the temperamental disposition of judges plays no significant role in trials. We will argue here that the claim is not supported by the empirical evidence, and, in particular, that it rests on a number of methodologically and statistically indefensible premises. It effectively leaves the question of the contribution of judicial disposition to decisions regarding the death penalty unanswered. The most important of our arguments is contained in section 2 below. The other criticisms are subsidiary if the argument in section 2 is well-founded.

It is necessary to outline briefly the procedure and method of analysis used by Olmesdahl in order to demonstrate its limitations. Olmesdahl, using a method commonly known as 'archival' or 'historical' research, collected data concerning a large number of relevant 'variables' for each criminal case heard by the Durban and Coast Local Division of the Supreme Court for the period 1970-1979. (A prototype of the record sheet that Olmesdahl used to record information on is appended to his article.) It should be noted that the only information relating to 'personal disposition' collected by Olmesdahl for each case and used in the statistical analysis was the identity of the judge presiding over the case. Thus, in what follows, 'personal disposition' refers only to the fact that each case is associated uniquely with one judge, and not, for example, to 'personality type'.

In a preliminary analysis in which Olmesdahl considers the cases heard by the entire Natal Provincial Division in 1979, he shows that the tendency to impose the death penalty varies across judges, some judges imposing such a sentence more frequently than other judges. He reflects that this unequal tendency may be explicable in terms of factors that occur unequally across cases, and should not be taken as firm evidence of the personal predisposition on the part of some judges to impose the death penalty. Olmesdahl consequently attempts to look at the effect of many variables in concert on the decision to impose the death penalty, one of these variables being the 'personal

disposition' of the judges. The statistical method chosen in this attempt is multiple regression analysis, which, it should be noted, is a relatively sophisticated method. The method may best be characterized as 'actuarial' or 'predictive' in nature: a numerical equation (usually of the first degree, or power) is generated, in which a number of numerical variables are weighted and added to each other in such a manner as to obtain the best prediction of another numerical variable. Conclusions regarding the causal relationships of variables cannot usually be made on the basis of multiple regression analysis, especially when the method of archival analysis is used. Multiple regression analysis is also not ideally suited to the task of assessing a particular variable's relative contribution to the predicted variable, although judicious use of the method does permit an approximate answer to this question. (Detailed accounts of multiple regression analysis may be found, in order of complexity, in F N Kerlinger, *Foundations of Behavioral Research* (1985); D C Howell, *Statistical Methods for Psychology* (1987); N R Draper and H Smith, *Applied Regression Analysis* (1981).)

Olmesdahl's statistical analysis of cases concerning the imposition of the death penalty appears to show that the factors which in combination are most highly predictive of whether the death penalty is imposed, are the existence of a theft motive, the presence of pictures of the deceased in the trial and the existence of an alibi defence, among others. These variables account, in concert, for 46 per cent of the variance in the predicted variable (imposition of the death penalty). (What is meant by 'accounting for 46 per cent of the variance' is quite technical statistically, and for our purposes may best be taken as an indication of the predictive accuracy of the composite equation formed from the predictor variables.) The personal disposition of the judge, on the other hand, appears to account for only 2 per cent of the variation in the predicted variable. In other words, once we have considered other variables of importance, the personal disposition of the judge is only very weakly related to whether the death sentence is imposed or not.

Olmesdahl's conclusion on the basis of this analysis is that the postulated personal predisposition of some judges to impose the death penalty is not supported by the evidence, and that, on the contrary, factors unique to judges play little role in death sentencing in the D&CLD. Buttressed as this claim is by empirical analysis, we think that it is seriously flawed, which we will presently attempt to demonstrate.

1. The Method Used to Identify the Relative Contribution of the Judge to the Sentencing Decision

The first problematic aspect of Olmesdahl's work that we wish to point to is the way in which he adduces evidence in support of the

claim that the personal disposition of the judge contributes *relatively* little to the sentencing decision. His evidence stems from the multiple regression analysis, which he seems to think shows that the personal disposition of the judge accounts for only 2 per cent of the variation in sentencing decisions. We mentioned earlier that the method of multiple regression analysis is not ideally suited for answering this type of question, but that approximate solutions to the problem exist. Olmesdahl's method does not qualify as one of these solutions. It is not sufficient to examine the amount of variance supposedly explained by the 'personal disposition' variable because the amount that it 'explains' will depend on the order in which it is entered into the regression equation (see Kerlinger at 545). This point can be made by using an analogy. Imagine that we are interested in predicting the amount of fuel that a car will use. One variable which will be a useful predictor here will be the size of the engine, measured in cubic centimetres. Simply expressed, bigger engines tend to use more fuel. (This relationship is of course imperfect, but certainly quite strong.) Another variable which will be predictive is the mass of the vehicle. Heavier cars tend to use more fuel. However, these two 'predictor' variables are related in turn to each other—bigger engines tend to be housed in heavier cars. Imagine now that we are interested in the predictive power of these two variables in concert, and we accordingly conduct a multiple regression analysis. If we enter the mass of the car into the analysis first we will find that this mass accounts for a considerable amount of the variation in fuel consumption across all the types of cars on the market. If we now enter the size of the engine into the equation we will find that it accounts for little more of the variation in fuel consumption. This is because the mass of the car and the size of the engine are in themselves related and share a degree of predictive power with respect to fuel consumption. By entering the mass of the car first we have deprived the engine size of some of its predictive power. Conversely, if we had entered engine size into the analysis first we would have found that it explained a substantial amount of variation in fuel consumption, and mass of the car would have explained relatively less by virtue of the fact that entering the engine size has deprived the mass of the car of some of its predictive power. For this reason it is impossible to identify the relative contribution of a variable by considering only the degree of variance explained by the variable in a particular regression equation. One possible solution is to enter the variable first, and then to repeat the procedure, entering the same variable last, comparing the amounts of explanatory variation due to the variable in question in each case. A better method than this is to calculate the squared 'semi-partial correlation' of the predictor variable with the predicted variable (ie, the portion of variance in the predicted variable that the predictor variable accounts for, the predictor variable being 'purged' of all

variance that it shares with other predictor variables in the analysis) (see Howell at 501). Olmesdahl unfortunately pursues neither of these options in his analysis, and so cannot claim to have identified the relative contribution of the personal disposition of the judges to the decision to impose the death sentence. If he had altered the entry of variables into the regression analysis he may well have found that 'personal disposition' explains considerably more than 2 per cent of the variation in sentencing decisions.

2. The Coding of the 'Personal Disposition' of the Judge

Multiple regression analysis, as we indicate above, uses numerical variables to predict other numerical variables. Olmesdahl consequently had to convert much of the information he collected into a numerical form suitable for analysis. This is usually quite easily achieved, for example coding sex of the victim as '1' for 'male' or '0' for 'female'. However, the way in which Olmesdahl transformed the sentencing decision into a numerical variable is extremely problematic, and seems to us to flaw his analysis profoundly. He reports that he assigned each judge a dichotomous classification of 'high severity' or 'low severity' and then coded this for numerical analysis. He arrived at the classification by ranking the judges in terms of the number of death sentences imposed, assigning each judge above the median value a 'high severity' classification and each judge below the median value a 'low severity' classification. (There is some confusion here with regard to the information that Olmesdahl used to classify each of the judges. It would appear from his article that he based this categorization on the entire 1970–1979 period for the D&CLD. However, in personal communication with him in 1989, he confirmed that Table 5 covering the entire NPD in 1979 alone was used for the classification of 'high' and 'low severity' judges. If he indeed followed this course, then his analysis must have been incomplete, since several judges retired during the 1970–1978 period (Fannin J springs immediately to mind), and he would consequently have been unable to categorize these judges, and would have had to have dropped them and the cases they tried from the regression analysis. Despite this uncertainty, the argument which follows is applicable whichever approach was adopted.)

It is not difficult to see that Olmesdahl's classificatory procedure is extremely problematic. In effect it amounts to using a transformed version of the predicted variable in order to predict itself. Apart from being logically tautologous, the procedure also seriously violates one of the statistical assumptions underlying multiple regression analysis, which is beyond the scope of the discussion here, but has to do with the independence of the variables used in the analysis. What is surprising in this context is that the explanatory power of the 'personal disposition' is so low. After all, if you use the severity of a

judge in order to predict how severe he is, you expect your prediction to be perfect. This lack of explanatory power can be explained partly by the fact that Olmesdahl transformed the severity variable from a continuous scale (number of death penalties imposed) to a dichotomous scale (high severity or low severity). This transformation will inevitably result in a substantial loss of explanatory power: a predictor variable is perfectly predictive in the sense that it 'matches' the variation in the predicted variable perfectly, and in the present case this is clearly impossible since the predictor variable can only take on two values as opposed to the many values that the predicted variable can take on.

Perhaps the most disconcerting observation here is that the coding into high and low severity was totally unnecessary insofar as the aim of the coding was to investigate the predictive power of the 'personal disposition' of the judges. The conceptualization of 'personal disposition' used in Olmesdahl's study (theoretically impoverished as it is) could quite easily have been investigated by simply assigning a unique number to each judge and by entering this 'identification variable' into the regression analysis.

3. Amount of Variance Explained by Personal Disposition

We believe that there is enough evidence at this stage to dismiss Olmesdahl's claim regarding the unimportance of judicial disposition in the imposition of the death penalty. Nevertheless, there are a number of other issues which are raised by Olmesdahl's study and which are generally relevant to any empirical analysis of sentencing decisions. In the first place, consider Olmesdahl's claim that it is not sufficient to demonstrate that some judges impose the death sentence more frequently than others to conclude that judicial disposition plays a significant role in sentencing decisions. This is true in the sense that some judges may consistently receive cases in which the death penalty is more warranted than in cases other judges receive (ie, where extenuating circumstances are absent). Olmesdahl suggests that the appropriate analysis is to take the personal disposition of the judge into account alongside a variety of other factors, and to effectively 'partial out' the contribution that factors other than judicial disposition make to the sentencing decision. This is correct up to a point. Olmesdahl surely does not mean that the decision made by the judge under the hypothesis of 'personal disposition' will be irreducible; that the decision depends on an inexplicable idiosyncratic disposition. The hypothesis of 'personal disposition' means that some judges are imposing the death sentence because they are favourably disposed to the existence of such a sentence in South African law, or that some judges are less likely to find extenuating circumstances, ceteris paribus, or some such situation that is in accord with a motivational basis. The point is that the unequal tendency of judges to

impose the death sentence may well be explicable, and it may well be possible to explicate this tendency by identifying the basis on which judges are imposing the sentence. This does not nullify the hypothesis of personal disposition, because it is precisely the unequal sensitivity of the judges to such factors that leads them to impose the death sentence with unequal frequency. Take for example Olmesdahl's purported finding that the presence of photographs in trials is highly predictive of whether the death sentence is imposed or not. It may well be that some judges are sensitive to the content of such photographs, which are often quite gruesome, and that these judges are more likely to impose the death sentence faced with a photographic depiction of the gruesome result of the misdemeanour. If it is the case that photographs have an unequal tendency to appear in criminal trials then it may well be that it is precisely in those cases where there are judges who are sensitive to photographs that such photographs make their appearance (and prosecutors might not be completely innocent of the unequal tendency of such photographs to appear). If we follow Olmesdahl's procedure, on the other hand, then we are likely to partial out the effect due to the presentation of photographs, and mistakenly conclude that the disposition of the judges bears no relation to the sentencing decision.

A related point concerns the question of the 'amount of variance' explained by 'personal disposition'. It will be recalled that one of Olmesdahl's key assertions is that the personal disposition of judges in his study accounts for very little of the variation in sentencing decisions. The point we would like to make here is that it is difficult to decide how much variation personal disposition has to explain before it is accorded theoretical significance. (There are statistical tests of significance in multiple regression analysis, but they answer the question of departures from random sampling variation only. They are of little use in deciding on theoretical importance.) It is unreasonable to expect personal disposition to explain terribly much variation, because that would mean that sentencing decisions were largely (ie, for the greater part) determined by judicial idiosyncrasies, which is as unlikely as it is undesirable. To compound problems, statisticians and researchers who employ statistical methodologies tend to dismiss multiple regression equations that account for as much as 50 per cent of the variation as inadequately explanatory. This is especially the case where regression equations are employed in situations that they were devised for, namely for the development of scientifically satisfactory models, where the explanation of a large amount of variation is a sine qua non, for methodological and not statistical reasons. In the case we are concerned with, it is highly likely that even relatively small variations explained by the personal disposition of judges will be legally interesting.

CONCLUSION

Olmesdahl's paper cannot seriously be cited in support of the proposition that the 'personal disposition' of judges is not an important factor in the imposition of death sentences in South Africa. We have pointed to many flaws in Olmesdahl's methodology, and wish simply to repeat the most damning of these, which is that the way in which Olmesdahl analysed the information regarding 'personal disposition' is tautological and methodologically and statistically indefensible.

TABLE A

Judge	*Total Criminal cases heard*	*Total accused sentenced to death*
Baker[1]	18	15
Berman	13	—
Burger[1]	51	6
Comrie[2]	9	—
Conradie[3]	18	1
Cooper[2]	4	—
De Kock	7	—
Fagan	33	2
Foxcroft[3]	30	2
Friedman	14	1
Griessel[2]	1	—
Hoberman[2]	1	—
Hodes[2]	5	—
Hofmeyr[2]	3	—
Howie	26	—
King	32	—
Lategan	65	29
Marais	63	4
Munnik	102	8
Nel	28	8
Rose Innes	84	1
Scott[2]	6	—
Seligson[2]	9	—
Selikowitz[3]	7	—
Tebbutt	47	6
Thring[2]	2	—
Van den Heever	28	13
Van Heerden	36	3
Van Schalkwyk[2]	15	3
Viljoen[2]	3	—
Vivier[1]	3	—
Williamson	40	18
	803	120

Notes to Table A

1 Judges no longer on the Cape bench (ie retired, deceased or appointed to the Appellate Division).
2 Acting judges who, within the research period, were not appointed permanently to the bench.
3 Judges who acted for a period and were, within the research period, given permanent appointments.

TABLE B

Imposition of the death penalty: analysis of sentencing in terms of accused

		ACCUSED SENTENCED TO DEATH*			
Judge	*Percentage of cases tried by judge*	*Expected number*	*Observed number*	*Expected percentage*	*Observed percentage*
	Col. 1	Col. 2	Col. 3	Col. 4	Col. 5
Baker	2,24	2,69	15	2,24	12,50
Berman	1,67	2,00	—	1,67	—
Burger	6,35	7,62	6	6,35	5,00
Comrie	1,12	1,34	—	1,12	—
Conradie	2,24	2,69	1	2,24	0,83
Cooper	0,50	0,60	—	0,50	—
De Kock	0,87	1,04	—	0,87	—
Fagan	4,11	4,93	2	4,11	1,67
Foxcroft	3,74	4,49	2	3,74	1,67
Friedman	1,75	2,09	1	1,75	0,83
Griessel	0,12	0,14	—	0,12	—
Hoberman	0,12	0,14	—	0,12	—
Hodes	0,62	0,74	—	0,62	—
Hofmeyr	0,37	0,44	—	0,37	—
Howie	3,24	3,89	—	3,24	—
King	3,99	4,79	—	3,99	—
Lategan	8,09	9,71	29	8,09	24,17
Marais	7,85	9,42	4	7,85	3,33
Munnik	12,70	15,20	8	12,70	6,67
Nel	3,49	4,19	8	3,49	6,67
Rose Innes	10,40	12,50	1	10,40	0,83
Scott	0,75	0,90	—	0,75	—
Seligson	1,12	1,34	—	1,12	—
Selikowitz	0,87	1,04	—	0,87	—
Tebbutt	5,86	7,03	6	5,86	5
Thring	0,25	0,30	—	0,25	—
Van den Heever	3,49	4,19	13	3,49	10,83
Van Heerden	4,48	5,37	3	4,48	2,50
Van Schalkwyk	1,87	2,24	3	1,87	2,50
Viljoen	0,37	0,44	—	0,37	—
Vivier	0,37	0,44	—	0,37	—
Williamson	4,98	5,97	18	4,98	15,00

Notes to Table B

* Calculations are based on the case load of each judge and on the total number of accused sentenced to death.

1 The expected percentage of cases allocated if allocation were equal is 3,13.

2 To eliminate the possibility that the disparities between the expected and the observed number of accused on whom the death penalty was imposed is due merely to random sampling variation (ie, could have occurred merely by chance), a chi square statistic was computed. The value of the statistic (Chi square = 184,12; df = 31; $p < 0,005$) strongly suggests that the discrepancy is not due merely to chance variation.

TABLE C

Imposition of the death penalty: analysis of sentencing in terms of cases

		CASES IN WHICH DEATH PENALTY WAS IMPOSED*				
Judge	*Percentage of cases tried by judge*	*Expected number*	*Observed number*	*Expected percentage*	*Observed percentage*	*Percentage of judge's individual case load*
	Col. 1	Col. 2	Col. 3	Col. 4	Col. 5	Col. 6
Baker	2,24	1,80	8	2,24	10,00	44,40
Berman	1,67	1,34	—	1,67	—	—
Burger	6,35	5,09	6	6,35	7,50	11,76
Comrie	1,12	0,89	—	1,12	—	—
Conradie	2,24	1,80	1	2,24	1,25	5,50
Cooper	0,50	0,40	—	0,50	—	—
De Kock	0,87	0,70	—	0,87	—	—
Fagan	4,11	3,30	2	4,11	2,50	6,06
Foxcroft	3,74	3,00	1	3,74	1,25	3,33
Friedman	1,75	1,40	1	1,75	1,25	7,14
Griessel	0,12	0,09	—	0,12	—	—
Hoberman	0,12	0,09	—	0,12	—	—
Hodes	0,62	0,50	—	0,62	—	—
Hofmeyr	0,37	0,30	—	0,37	—	—
Howie	3,24	2,60	—	3,24	—	—
King	3,99	3,20	—	3,99	—	—
Lategan	8,09	6,48	17	8,09	21,25	26,10
Marais	7,85	6,30	4	7,85	5,00	6,34
Munnik	12,70	10,18	7	12,70	8,75	6,87
Nel	3,49	2,80	7	3,49	8,75	25,00
Rose Innes	10,40	8,40	1	10,40	1,25	1,20
Scott	0,75	0,60	—	0,75	—	—
Seligson	1,12	0,90	—	1,12	—	—
Selikowitz	0,87	0,70	—	0,87	—	—
Tebbutt	5,86	4,70	4	5,86	5,00	8,51
Thring	0,25	0,20	—	0,25	—	—
Van den Heever	3,49	2,80	5	3,49	6,25	17,80
Van Heerden	4,48	3,60	3	4,48	3,75	8,33
Van Schalkwyk	1,87	1,50	2	1,87	2,50	13,30
Viljoen	0,37	0,30	—	0,37	—	—
Vivier	0,37	0,30	—	0,37	—	—
Williamson	4,98	4,00	11	4,98	13,75	27,85

Note to Table C

* Calculations are based on the case load of individual judges and on the total number of cases in which the death penalty was imposed.

TABLE D

	CASES		ACCUSED					DEATH SENTENCES									
												Leave to appeal granted		Outcome on appeal			
	Total criminal cases heard	Cases in which death penalty imposed	Total accused sentenced to death	Accused whose sentence reduced by AD	Reprieved	Executed	On death row	Total death sentences imposed	'Discretionary' death sentences	'Discretionary' death sentences not accompanied by 'mandatory' death sentences	Application for leave to appeal pending	By trial court	By Chief Justice	Conviction and sentence confirmed	Conviction and sentence overturned	Sentence reduced	Outcome pending
Baker	18	8	15	—	—	15	—	15	—		—	—	—	—	—	—	—
Burger	51	6	6	1	—	3[6]	1	8	1[8]	1	—	1	1	—	—	1	1
Conradie	18	1	1	—	—	1	—	1	—	—	—	—	—	—	—	—	—
Fagan	33	2	2	—	—	2	—	2	—	—	—	—	—	—	—	—	—
Foxcroft	30	1	2	—	—	—	2	2	—	—	2	—	—	—	—	—	—
Friedman	14	1	1	—	—	1	—	2	—	—	—	—	—	—	—	—	—
Lategan	65	17	29	4	1[1]	14	10	35	10[9]	5	—	22	4	16	1	4	5
Marais	63	4	4	—	1[2]	1	2	4	—	—	—	2	—	1	—	—	1
Munnik	102	7	8	—	—	3	5	13	6[10]	4	4	—	—	—	—	—	—
Nel	28	7	8	—	—	5	3	8	1[11]	1	1	3	—	2	—	—	1
Rose Innes	84	1	1	—	1[3]	—	—	1	—	—	—	1	—	1	—	—	—
Tebbutt	47	4	6	2	1[4]	2	1	6	—	—	—	2	—	—	2	—	—
Van den Heever	28	5	13	—	1[5]	10	2	13	—	—	—	1	1	1	—	—	1
Van Heerden	36	3	3	—	—	3	—	3	—	—	—	—	—	—	—	—	—
Van Schalkwyk	15	2	3	—	—	2	1	3	—	—	—	3	—	2	—	—	1
Williamson	40	11	18	—	—	9	9	20	—	—	—	5	2	—	—	—	7
Overall totals	672	80	120	7	5	70[7]	36	136	18	11	7	46	8	23	3	5	17

Notes to Table D

1 Name: Edmund van Zyl
Age: 21
Race: 'Coloured'
Sex: Male
Crime: Murder without extenuating circumstances (Case 221/86).

2 Name: George Rapegadie
Age: 22
Race: 'Coloured'
Sex: Male
Crime: Murder without extenuating circumstances (Case 108/87).

3 Name: Peter Koopman
Age: 27
Race: 'Coloured'
Sex: Male
Crime: Murder without extenuating circumstances (Case 139/86).

4 Name: Alec Pietersen
Age: 38
Race: 'Coloured'
Sex: Male
Crime: Murder without extenuating circumstances (Case 283/87).

5 Name: Niel Retief
Age: 18
Race: 'White'
Sex: Male
Crime: Murder without extenuating circumstances (Case 288/86).

6. One accused committed suicide in prison (Case 333/86).
7. The same accused was sentenced to death by two different judges in two separate cases (74/86 and 100/86). This total reflects only one of these cases.
8. Case 72/88: Rape.
9. Case 71/86: Rape
   95/86: Murder with extenuating circumstances (×2)
   220/86: Rape (×2)
   2/87: Rape (×4)
   229/87: Robbery.
10. Case 102/86: Rape
    237/87: Rape (×2)
    144/88: Rape (×3).

11 Case 192/86: Rape.