The Death Penalty and Public Opinion

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Introduction

South African jurisprudence at present is attempting to bridge the gap between the past where the law scarcely protected human rights and the future where their protection is paramount.[1] The Constitutional Court is required to fulfil an important role in the process — not only in guiding all inferior courts on matters constitutional but also in guiding the citizens of South Africa into the future.[2] Thus the decision in *S v Makwanyane*[3] to outlaw the death penalty came as no real surprise in spite of the apparent uncertainty [4] about its survival on our statute books.[5] There are a number of features of this judgment that call for comment.[6] This note confines itself to the role of public opinion and the attitude of the Court towards it. The perceived negative response of the public to the decision to declare the death penalty unconstitutional[7] prompts some questions about the role of public opinion in relation to the protection of human rights by the Court. The question to be asked is whether public opinion was rejected by the Court and thus whether the perceived outrage of the public at such rejection is justified? The judgment reveals that in the infancy of constitutionalism in South Africa it is difficult to define the role of a reviewing court in a democratic society.[8] As will become apparent the decision gives us some important clues as to how the Court perceives its role in protecting human rights (in the face of public demands to the contrary) despite some arguments that the process of protecting human rights in a constitutional system is unpredictable.[9]

To some extent the judgment anticipated the perceived negative response of the public. This occurred for two reasons. Firstly the Attorney-General in argument[10] advanced the importance of public opinion as a factor in determining the constitutional validity of the death penalty. Secondly, perhaps more importantly, the emotional nature of the issue presented a perfect opportunity for the Court to indicate

to the public what its role is in an open and democratic society based on freedom and equality.[11]

The Role of Public Opinion

Some of the judges who dealt with the question assumed that public opinion, however constituted,[12] expressed support for the retention of the death penalty as contained in section 277 of Act 51 of 1977.[13] This note is premised on a similar assumption, viz: that public opinion presently expresses dissatisfaction with the constitutional abolition of the death penalty.[14]

The judgment of Chaskalson P is based on the right of individuals not to be subjected to cruel, inhuman and degrading punishment.[15] This right was linked to the rights of life and dignity.[16] It was within this context that the Attorney-General argued "that what is cruel, inhuman and degrading depends to a large degree upon contemporary attitudes within society, and that South African society does not regard the death sentence for extreme cases of murder as a cruel, inhuman or degrading form of punishment."[17] In response to this and expressed in its most general form, Chaskalson P held: "The question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution[18] allows the sentence." He did not reject public opinion out of hand completely. It was held that while public opinion may have *some relevance*[19] to the enquiry as to whether the Constitution allows for the death penalty, it is not a substitute for the duty vested in the court to uphold the provisions of the Constitution. To hold otherwise, Chaskalson P argued, would be to permit a return to parliamentary sovereignty where the protection of rights is left to a mandate from the public. It was for the same reason that the decision could not be left to referendum as this may result in a majority view prevailing over the wishes of a minority.[20] It was held that the very reason for vesting the power of judicial review in the courts was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. These minorities include, so it was held, social outcasts and other marginalised people of our society. This view was premised on the basis that "… only if there is a willingness to protect the worst and weakest amongst us, that all of us can be secure that our own rights will be protected."[21] Chaskalson P quoted from two opinions of the Supreme Court of the United States[22] which support his view that a clear distinction has to be drawn between the wishes of the majority and the role of the Court in upholding the values of the Constitution especially when matters of life and death are at hand. The absence of any definite characterisation of public opinion offered by Chaskalson P blurs the distinction that may be required to be made between moral consensus and fluctuating public opinion.[23] This problem was identified by Langa J in *S v Williams and Others*[24] as follows: "The relationship between "contemporary standards of decency" and public opinion is uncertain and I am not convinced that they are synonymous." It is submitted that they are certainly not synonymous at least in so far as the Court would more readily accept the former than the latter in determining the constitutional validity of a provision.

The judgment of Kentridge AJ[25] suggests that there is a distinction between standards of decency and public opinion. What is not clear is how they are to be distinguished. He held that: "… were public opinion on the question clear it could not be *entirely ignored*," and adds that: "[t]he accepted mores of one's own society must

have *some* relevance to the assessment whether a punishment is impermissibly cruel and inhuman."[26] Unfortunately no clarity is given to the weight of public opinion nor the extent to which it is relevant. Most importantly he gives no indication as to the difference between "clear" public opinion on the one hand and the mores of society on the other hand. Kentridge AJ held that in terms of section 35 of the Constitution the Court was obliged to consider the practices of other societies that promote the values which underlie an open and democratic society based on freedom and equality. He found that there is some support in these societies for the contention that the death penalty is impermissible when measured against the standards of humanity and decency that have developed in those societies.[27] The statement of Kentridge AJ at paragraph 200 that to defer to public opinion would be an abdication of constitutional function does not indicate how that function is performed in light of his acceptance that public opinion cannot be ignored. Nor does Kentridge AJ indicate how public opinion, to the extent that it is taken into account, is to weigh up against standards of humanity and decency. The reference by Kentridge AJ to Weems v United States 217 US 349 (1910) at 378 that the provisions of a constitution might "acquire meaning as public opinion becomes enlightened by a human justice" suggests a greater status for public opinion if it accords with standards of humanity and decency. This dictum also appears to contradict Kentridge AJ's statement that the court does not function from a premise of superior wisdom but merely according to the dictates of the Constitution. It is submitted that the Court operates from a position of superior[28] wisdom to the extent that it will reject public opinion if it does not accord with standards of humanity and decency.[29]

The judgment of Didcott J lends support to this submission. He reasoned that even assuming that public opinion supports the retention of the death penalty, that support is given in the belief that there is a unique deterrent force in the death penalty and that the public is safer with it than without it. It was held that this would be an understandable belief if its premise was a good one.[30] Didcott J's judgment, however, contains an analysis to show that the premise is a false one, ie: there is inadequate proof that the death penalty serves a better deterrent purpose than an alternative to it in the form of long term imprisonment.[31] Thus, it was held, no "homage" need be paid to public opinion if it is founded on a false premise. At the very least Didcott J makes a clear argument why public opinion should be ignored.[32] However Didcott J also held that in any event it would be wrong "… [t]o allow ourselves to be influenced unduly by public opinion."[33] Furthermore in deciding what was cruel and inhuman Didcott J had regard to the judgment in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General, Zimbabwe and Others* 1993(4) SA 239 (ZSC) that took account of the changing sensitivities of civilised society. It is submitted that what emerges from this is an acceptance by Didcott J of public opinion only to the extent to which it accords with, in this instance, the sensitivities of civilised society.[34]

Kriegler J was less equivocal.[35] He held that: "The issue is not whether I favour the retention or the abolition of the death penalty, nor whether this Court, Parliament or even overwhelming public opinion supports the one or the other view. The question is what the Constitution says about it."[36] However his judgment recognises that the judicial process "cannot operate in an ethical vacuum," and to some extent that value judgments are called for.[37] This recognition that value judgments are being made is outweighed by clear dicta that the process is a legal one, for example: "… the framework and the outcome of the exercise must be legal," and "[t]he incumbents [of the court] are judges, not sages; their discipline is the law, not ethics or philosophy and certainly not politics.[38] [39] Kriegler J was clear that the approach must be a legal

one and that the enquiry is whether there was an invalid infringement of a right protected by Chapter Three of the Constitution.[40] However, what is not clear is the extent to which value judgments are a permissible part of the "legal" enquiry and more importantly it is not clear what the source of these values is[41]

The Source of the Governing Values

There are indications in the judgment that the source of the values governing a decision about the validity of a provision is the Constitution itself. If it is indeed the Constitution that is the source of the values that govern the decision, then the approach of Kriegler J, for example, is easier to justify. However, the notion of ubuntu (expressly referred to in the Constitution in the so-called post-amble) which influenced the thinking of a number of judges does not appear to be something inherent to the Constitution. It has a source outside of it. Thus the recognition that the Constitution has created a framework in which a new culture must take root and develop may not be an entirely accurate statement. The values of that culture are already a part of the society, the Constitution merely incorporates them and gives voice to them.[42] According to Mokgoro J "an all-inclusive value system, or common values in South Africa, can form a basis upon which to develop a South African human rights jurisprudence … one shared value and ideal that runs like a golden thread across cultural lines, is the value of ubuntu[43] – a notion now coming to be generally articulated in this country." She held that the values of ubuntu are central to the coherence of all the rights entrenched in Chapter Three and that this can be used in interpreting the Bill of Rights.[44] The content of ubuntu[45] is seemingly something that already existed prior to the enactment of the Bill of Rights.[46] If this is indeed so then it is apparent that the content of the Constitution does not create a new set of values, it contains values that may have been forgotten or neglected by previous judicial practices and that are now being revived. Thus Mokgoro J held that while the notion of a constitutional state is a revolutionary change in South African legal terms the idea is consistent with the inherited traditional value systems of South Africans in general.[47]

The judgment of Mokgoro J also reveals the difficulty of reconciling the respective roles of public opinion and standards of decency. She quotes from *Dudgeon v United Kingdom* (1982) 4 EHRR 149 to the effect that in a democracy the law must be in touch with the moral consensus of the community but at the same time recognises that one must distinguish between enduring values and public opinion.[48] It becomes apparent that the task then is to seek out these enduring values. They are described by Sachs J as "core values" and are he says deserving of attention.[49] In his survey of the sources of these values as historically recorded[50] he concludes that the rational and humane adjudicatory approach is the one consistent with the rights enshrined in our Constitution[51] and it is apparent that any suggestion that the imposition of the death penalty is consistent with our neglected tradition[52] is to be rejected.

What is evident here is that the approach is consistent with one in which "recourse [is had] to a system of values which is external to the text in the sense that the values emanate from the ideas which underpin the text rather than from the express wording thereof."[53] The court, it is submitted, recognised that value judgments are called for.[54] This is confirmed in the subsequent judgment of the Constitutional Court in *S v Williams*[55] when Langa J held: "In determining whether punishment is cruel, inhuman or degrading within the meaning of our Constitution, the punishment in question must

be assessed in light of the values which underlie the Constitution."[56] At paragraph 22 he said the following:[57] "The interpretation of the concepts contained in section 11(2) … involve the making of a value judgment which "requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the … people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in the civilised international community …""

Conclusion

What clues then do we derive from *S v Makwanyane* in assessing the approach of the constitutional Court when seeking the source of the value system against which legislation will be tested. At the very least the rejection of public opinion is to be confined within narrow limits. Only when public opinion does not accord with standards of civilisation[58] will it be rejected outright. It is apparent that true to constitutionalism some of the Justices voiced objections to the role of public opinion, but none of these objections were expressions of complete rejection. In the state of transformation in which South Africa presently finds itself the Court, at least in *S v Makwanyane*, envisages for itself an important role in determining what part of public opinion is relevant and the weight that is to be attached to it in assessing the validity of a provision. In addition once the relevance and weight of public opinion has been determined, the Court plays a role in educating the citizens as to why such a determination was made. In this regard the Court does operate from a position of superior wisdom.

Notes:

[1] There are a number of dicta in the judgement that recognise the importance of human rights in a new South African jurisprudence. Perhaps the more eloquent are those of Langa and Mahomed JJ in paragraphs 221-225 and 262-264 respectively.

[2] See for example the judgement of Langa J at paragraph 220-221 and Sachs J at paragraph 362.

[3] 1995(3) SA 391 (CC); 1995(6) BCLR 665 (CC).

[4] This uncertainty was expressed by Chaskalson P at paragraph 118 with reference to death row prisoners' anxiety about the moratorium on the execution of death penalties.

[5] Before the judgement in *S v Makwanyane* the death penalty was provided for in section 277(1)(a) of Act 51 of 1977.

[6] For example the interpretation of section 33(1)(b) and the meaning to be given to the essential content of a right – in particular the essential content of the right to life. See Mahomed J at paragraph 269 for example.

[7] At paragraph 146 Chaskalson P found: "The requirements of *section* 33(1) have … not been satisfied, and it follows that the provisions of *section* 277(1)(a) of the Criminal Procedure Act, 1977 must be held to be inconsistent with *section* 11(2) of the Constitution. In the circumstances it is not necessary for me to consider whether the section would also be inconsistent with *sections* 8, 9 or 10 of the Constitution if they had been dealt with separately and not treated together as giving meaning to *section* 11(2)." Section 11(2) provides inter alia that no person shall be subject to torture of any kind nor shall any person be subject to cruel, inhuman or degrading treatment or punishment. Section 9 provides for the right to life. Section 10 refers to the right to dignity. Section 8 refers to the right to equality.

[8] See van Wyk et al *Rights and Constitutionalism, The New South African Legal Order* Juta 1994 at 6ff for a review of the theoretical debates around this question. The debate as to the role of a reviewing court in a democracy resolves around resolving the so-called countermajoritarian dilemma. This is expressed in the contradiction that exists in society if an unelected and unaccountable court with the power of review can set aside as unconstitutional legislation that emanates from a parliament that is supposedly representative of the wishes of the majority. A number of possible explanations and justifications for the contradiction are offered ranging from an idealistic acceptance that reviewing judges have the skills to ensure the maintenance of enduring values, and may thus be a tolerable part of the democratic process itself, to more sophisticated rationalisations based upon an understanding of the different approaches to the interpretation of a constitution and an understanding of political process theory. Common to all the theories that seek to reconcile judicial review within a democratic society, it is submitted, is an attempt to accommodate values that justify interference with the wishes of the majority. The task of the reviewing court is to persuade the majority that despite their wishes, the values justifying an interference are worth maintaining. If this is accepted then it becomes apparent why a reviewing court at the very least will almost always pay lip service to public opinion. The fact that the Court appears to have paid serious attention to arguments based on the demands of public opinion in *S v Makwanyane* lend support to this contention.

[9] Cf van Wyk et al supra at 10.

[10] See below.

[11] It is perhaps not without significance that all eleven justices handed down judgements.

[12] For a general exposition on the reliability and role of public opinion in death penalty cases see Vidmar and Ellsworth *Public Opinion and the Death Penalty* (1975) 26 *Stanford Law Review* 1245.

[13] Chaskalson P at paragraph 87 and Didcott J at paragraph 188 were express in making assumption. Kriegler J at paragraph 206; Madala J at paragraph 255-257; and Mahomed J at paragraph 266 impliedly made the assumption. Presumably the assumption includes the premise that it is the vast majority of the public that would express this view. The judgements of Kentridge AJ, Mokgoro J and Sachs J merit separate treatment, see below. In addition see Vidmar and Ellsworth supra.

[14] The question that then arises is whether law makers will take account of public opinion and devise death penalty legislation that will pass the scrutiny of the court. Vidmar and Ellsworth supra.

[15] The text of section 11(2) of the Constitution reads: "No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment."

[16] See paragraphs 10 and paragraphs 144-145. The texts of sections 9 and 10 respectively are: "Every person shall have the right to life," and "Every person shall have the right to respect for and protection of his or her dignity.

[17] Paragraph 87.

[18] Act 200 of 1993, referred to as the Constitution.

[19] My emphasis, Chaskalson P gives no clear indication of what weight is to be given to public opinion.

[20] Paragraphs 87. See note 7 above.

[21] Paragraph 88.

[22] Paragraph 89. *Furman v Georgia* US 238 (1972) and *West Virginia State Board of Education v Barnette* 319 US 624 (1943).

[23] See the judgement of Mokgoro J at paragraph 305. See also van Wyk et al supra at 13.

[24] 1995 (3) SA 639 (CC); 1995(7) BCLR 861 (CC).

[25] Kentridge AJ was the only judge who found that public opinion, if anything, supported the abolition of the death penalty, see paragraph 201.

[26] Paragraph 200, my emphasis.

[27] Paragraph 198. The states referred to are Namibia, Angola and Mozambique as well as California (where the US Supreme Court in *People v Anderson* 493 P. 2d 880 (1972) struck down the death penalty) and Massachusetts (where the court in *District Attorney for the Suffolk District v Watson* 381 Mass 648 (1980) struck down the death penalty).

[28] Paragraph 192. See van Wok et al supra at 8ff for a discussion of the view that the process of judicial review according to a constitution may well involve a search for universal truths in the same way that Plato's philosopher kings might have. See also Sunstein *The Partial Constitution* Harvard University Press 1993 at 23 where the purpose of judicial review is "… to protect the considered judgements of the people, as represented in the extraordinary law of the Constitution, against the ill-considered or short-term considerations introduced by the people's mere angst in the course of enacting ordinary law."

[29] Public opinion will also be rejected if it is based on ignorance or is ill-formed. See Vidmar and Ellsworth supra.

[30] Paragraph 188.

[31] Paragraph 181-184.

[32] The approach of Didcott J is not dissimilar to that advanced by Vidmar and Ellworth, supra at 1248, 1255, and 1262, to the effect that an uninformed public opinion might be different to an informed public opinion.

[33] Paragraph 188, my emphasis.

[34] Similar examples are to be found in the judgement of Kentridge AJ at paragraph 200 where he quoted from *Furman v Georgia* 408 US 238 (1972) at 277: "a severe punishment must not be unacceptable to contemporary society." Similarly at paragraph 199 it was held that "evolving standards of civilisation demonstrate the unacceptability of the death penalty in countries which are or aspire to be free and democratic societies." What is not clear is how the task of the court is to be influenced by public opinion and what the difference is between that public opinion on the one hand and the mores of society; or moral consensus; or evolving standards of civilisation on the other. The judgement of Sachs J suffers from this difficulty as well. See paragraph 368-370.

[35] As was Madala J at paragraphs 255-259.

[36] Paragraph 206.

[37] Paragraph 207.

[38] Paragraph 207. But cf Mahomed J at paragraph 262.

[39] Kriegler J's judgement is one based in an analysis of the extent to which the death penalty is inconsistent with Chapter 3 of the Constitution, and to what extent such inconsistency is justified. See paragraph 208.

[40] Kriegler J at paragraph 208. His judgement ultimately rested upon the right to life as contained in section 9: "… as capital punishment … strikes at the heart of the right to life, the debate need go no further. See paragraph 214.

[41] For other indications of the rejection of public opinion, see the judgements of Mahomed J at paragraph 266 and Madala J at paragraphs 255-257. See Sunstein supra at 26-28 where it is suggested that if public values account for legislation and government action then such law and action will be constitutionally valid provided the values that inform the court's decision are the product of a political process of debate and deliberation.

[42] The process of review as articulated by Mahomed J reveals that part of the process is "factual and historical considerations" and "the content and the sweep of the ethos expressed in the structure of the Constitution." See paragraph 266 and cf van Wok et al supra at 13.

[43] Cf Chaskalson P at paragraph 131.

[44] Paragraph 307. See also the judgement of Madala J at paragraph 237: "[ubuntu] … is a concept that permeates the Constitution generally and more particularly Chapter Three …"

[45] See Mokgoro J at paragraph 308 (humaneness, group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, humanity and morality, conciliation), and paragraph 313 (the protection of basic human rights including the right to life and dignity).

[46] See for example Madala J at paragraphs 241-247, and paragraph 250; Mahomed J at paragraph 263-264 ("It is against this historical background and ethos that the constitutionality of capital punishment must be determined."); Mokgoro J at paragraph 300 ("… indigenous African values are not always irrelevant … these values are embodied in the Constitution …"), paragraph 394 ("… our own (ideal) indigenous value systems are a premise from which we need to proceed and are not wholly unrelated to our goal of a society based on freedom and equality."); Sachs J at paragraph 361 ("… I wish firmly to express my agreement with the need to take account of the traditions, beliefs and values of all sectors of South African society when developing our jurisprudence"), paragraph 373 ("… s.35(1) requires this court … to have regard to … all the dimensions of the evolution of South African law … this would require reference … also to traditional African jurisprudence.") Mokgoro J at paragraph 308 said that ubuntu is a part of our heritage.

[47] Paragraph 310.

[48] Paragraph 305.

[49] Paragraph 373-374. The search for core values is a difficult task and may defy definition. See van Wok et al supra at 9 and Sunstein supra at 26-30.

[50] Paragraphs 376-381.

[51] Paragraph 382.

[52] Cf van Wok et al supra 14.

[53] Van Wok et al supra at 4.

[54] With the exception perhaps of Kriegler J, but even his judgement recognises the inevitability of the value choice that has to be made. The real issue is to determine the source of those values. Cf Chaskalson P at paragraphs 104-109; Didcott J at paragraph 177; Kentridge AJ at paragraph 198; Langa J at paragraph 222. See also Sunstein ibid.

[55] Supra.

[56] At paragraph 37.

[57] Quoting from a judgement of Mahomed J, as he then was, in *ex parte attorney General, Namibia* 1991(2) SA 76 (NmSC) at 861.

[58] This term is used synonymously with other terms interspersed throughout the judgement, eg: "contemporary standards of decency", "the mores of society", "standards of humanity and decency", "enduring values" and "sensitivities of civilised society".