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Although the Mandela government was abolitionist, the attorney general of Witwatersrand pressed for the death penalty for two people. This, it turned out, did the world a favour.

Ismail Mahomed, 2011. Flickr/Laura Kidd. Some rights reserved.

Eight months after a post-Apartheid, multi-racial government elected through universal suffrage, led by Nelson Mandela, took office in May 1994, the Constitutional Court of South Africa was formally inaugurated on 14 February 1995. The very next day it began hearing the case of *The State v Makwanyane and Mchunu*. The two men at the centre of the case had been convicted of murders,

attempted murder and robbery with aggravated circumstances and their appeals against the death penalty had been rejected by the Supreme Court.

South Africa's interim constitution had not expressly abolished the death penalty. Not because of any oversight. In fact, in the early 1990s, everyone from the then president F.W. de Klerk and later his "justice" minister (the quotation marks are deliberate: what justice under an Apartheid regime?), the South African Law Commission and more importantly, those writing the Interim Constitution had in effect washed their hands of the issue and left it to a future Constitutional Court to decide. Courts handing down the death penalty had also taken note of the fact that South Africa was soon to enter a new era, with the implication that there was a virtual moratorium in effect.

President Mandela's government, through its counsel George Bizos – who had risen to prominence during the Rivonia Trial of 1963-4, in which the death penalty was perhaps narrowly avoided for Mandela and others – had made it clear that it favoured abolition, but the attorney general of Witwatersrand pressed for the death penalty for the two convicts. And thereby inadvertently did the world a great favour as it led to cascades of some of the most scintillating prose by the likes of Justices Arthur Chaskalson, Ismail Mahomed, Yvonne Mokgoro, Kate O'Regan, Albie Sachs and others. Most importantly the 11 members of the bench unanimously and conclusively established through their brilliant argumentation that the death penalty was inconsistent with the Interim Constitution of South Africa of 1993 (overtaken by the updated one of 1996).

The Constitutional Court consisted of jurists from different races, religions and age groups – Justice O'Regan was 37 when she was appointed to the court. Many of the 11 judges were or are internationally renowned jurists.

Presiding judge Chaskalson noted, in his judgement delivered on 6 June 1995, that no executions had taken place in South Africa since 1989 and that in 1995 as many as 400 people were on death row, some of them convicted as far back as in 1988. At least half of them had been sentenced more than two years earlier. He termed it an "intolerable situation".

Arguably the most stirring words in the full judgement came from Justice Mahomed:

> *"The deliberate annihilation of the life of a person, systematically planned by the State, as a mode of punishment, is wholly and qualitatively different. It is not like the act of killing in self-defence, an act justifiable in the defence of the clear right of the victim to the preservation of his life. It is not performed in a state of sudden emergency, or under the extraordinary pressures which operate when insurrections are confronted or when the State defends itself during war. It is systematically planned long after – sometimes years after – the offender has committed the offence for which he is to be punished, and whilst he waits impotently in custody, for his date with the hangman. In its obvious and awesome finality, it makes every other right, so vigorously and eloquently guaranteed by … the Constitution, permanently impossible to enjoy. Its inherently irreversible consequence makes any reparation or correction impossible, if subsequent events establish, as they have sometimes done, the innocence of the executed or circumstances which demonstrate manifestly that he did not deserve the sentence of death."*

(This quote figures prominently in a most useful book for students of human rights, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, by Professor Nihal Jayawickrama, 1096 pages, Cambridge).

Presiding judge Chaskalson, while reviewing death penalty jurisprudence from various parts of the world, had this astute observation about a country that retains the death penalty and yet preens itself

as a great democracy, namely the United States:

> *"The differences that exist between rich and poor, between good and bad prosecutions, between good and bad defence, between severe and lenient judges, between judges who favour capital punishment and those who do not, and the subjective attitudes that might be brought into play by factors such as race and class, may in similar ways affect any case that comes before the courts, and is almost certainly present to some degree in all court systems. Such factors can be mitigated, but not totally avoided, by allowing convicted persons to appeal to a higher court. Appeals are decided on the record of the case and on findings made by the trial court. If the evidence on record and the findings made have been influenced by these factors, there may be nothing that can be done about that on appeal. Imperfection inherent in criminal trials means that error cannot be excluded; it also means that persons similarly placed may not necessarily receive similar punishment. This needs to be acknowledged. What also needs to be acknowledged is that the possibility of error will be present in any system of justice and that there cannot be perfect equality as between accused persons in the conduct and outcome of criminal trials. We have to accept these differences in the ordinary criminal cases that come before the courts, even to the extent that some may go to gaol when others similarly placed may be acquitted or receive non-custodial sentences. But death is different, and the question is, whether this is acceptable when the difference is between life and death. Unjust imprisonment is a great wrong, but if it is discovered, the prisoner can be released and compensated; but the killing of an innocent person is irremediable."*

Noting the "death row phenomenon" – of prisoners clinging to life for many years (in fact decades) – trying to exhaust any possible avenue of redress, he said: "The difficulty of implementing a system of capital punishment which on the one hand avoids arbitrariness by insisting on a high standard of procedural fairness, and on the other hand avoids delays that in themselves are the cause of impermissible cruelty and inhumanity, is apparent." (Moreover it is now known that keeping a prisoner alive for life costs far less in the United States than going through the appeals procedures.)

Justice Chaskalson observed that the South African constitution specifically guaranteed the right to human dignity and right to life. (Article 10 of Chapter 2 of the constitution says: "Everyone has inherent dignity and the right to have their dignity respected and protected." And Article 11 says: "Everyone has the right to life." Period. (Incidentally, there are no ifs and buts nor any neverthlesses or notwithstandings appended to this six-word sentence. More of this later.)

He then began demolishing the arguments of the Witwatersrand attorney general. The latter had said what is cruel, inhuman or degrading depends on contemporary attitudes and that South African society favoured the death penalty for the extreme case of murder.

> *"If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled*

> *to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected."*

The attorney general argued that countries which had abolished the death penalty were on the whole developed and peaceful and that the punishment was needed in South Africa to deter crime. But Justice Chaskalson forthrightly rejected the "deterrence" argument:

> *"We would be deluding ourselves if we were to believe that the execution of the few persons sentenced to death during this period, and of a comparatively few other people each year from now onwards will provide the solution to the unacceptably high rate of crime. There will always be unstable, desperate, and pathological people for whom the risk of arrest and imprisonment provides no deterrent, but there is nothing to show that a decision to carry out the death sentence would have any impact on the behaviour of such people, or that there will be more of them if imprisonment is the only sanction. No information was placed before us by the Attorney General in regard to the rising crime rate other than the bare statistics, and they alone prove nothing, other than that we are living in a violent society in which most crime goes unpunished - something that we all know."*

In one of the most remarkable observations and one supported by feminists, especially in India – where they have been stressing the certainty and not the severity of justice to deter heinous crimes such as rape and murder, – Justice Chaskalson said:

> *"The greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is presently lacking in our criminal justice system; and it is at this level and through addressing the causes of crime that the State must seek to combat lawlessness."*

A comparison of the crime figures between abolitionist Europe (excepting retentionist Belarus) and the United States and those between the abolitionist and retentionist US states themselves would show that that the death penalty has no deterrent effect. More than 140 countries have, realising this, abolished the death penalty in law or practice as of now.

As for prevention, the death penalty is not the only way of ensuring it and imprisonment would serve the purpose too, he said. On retribution, Justice Chaskalson said:

> *"Punishment must to some extent be commensurate with the offence, but there is no requirement that it be equivalent or identical to it. The state does not put out the eyes of a person who has blinded another in a vicious assault, nor does it punish a rapist, by castrating him and submitting him to the utmost humiliation in gaol. The state does not need to engage in the cold and calculated killing of murderers in order to express moral outrage at their conduct. A very long prison sentence is also a way of expressing outrage and visiting retribution upon the criminal."*

He concluded that:

> *“The rights to life and dignity are the most important of all human rights, and the source of all other personal rights … By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby.”*

Justice Chaskalson ordered that “(a) the State is and all its organs are forbidden to execute any person already sentenced to death under any of the provisions thus declared to be invalid; and (b) all such persons will remain in custody under the sentences imposed on them, until such sentences have been set aside in accordance with law and substituted by lawful punishments.”

Albie Sachs, 2009. Wikicommons/Ram.eisenberg.Some rights reserved.

All the other members of the bench wrote concurring judgements. Space does not permit a consideration of them all. Just a few vignettes follow.

Justice Johann Kriegler, in one brief sentence, sought to dismiss the Witwatersrand AG’s case: “In as much as capital punishment, by definition, strikes at the heart of the right to life, the debate need go no further.” Justice Kate O’Regan expanded on this: "(The death penalty's) very purpose lies in the deprivation of existence. Its inevitable result is the denial of human life. It is hard to see how this methodical and deliberate destruction of life by the government can be anything other than a breach of the right to life."

Ditto Justice Albie Sachs, a remarkable individual who had lost an eye and an arm thanks to a bomb placed in the Mozambican capital, Maputo, by agents of Apartheid South Africa in 1988. (In other words he was a survivor of a terrorist act and he was effectively ruling out the death penalty for everyone including those convicted of terrorism): “Our Constitution … is different from those that expressly authorise deprivation of life if due process of law is followed, or those that prohibit the arbitrary taking of life. The unqualified statement that 'every person has the right to life' in effect outlaws capital punishment.”

Justices Tholie Madala and Yvonne Mokgoro – along with other Black judges including Justice Pius Langa lending a strong African perspective to the judgement – found that the death penalty went against the grain of the indigenous philosophy of *Ubuntu*, which in the words of Archbishop Emeritus Desmond Tutu is defined thus:

> *"We believe that a person is a person through another person, that my humanity is caught up, bound up, inextricably, with yours. When I dehumanize you, I inexorably dehumanise myself."*

Justice Mahomed, whose quotation now familiar to many a law student and human rights activist around the world was cited above, went on to say, echoing the *Ubuntu* philosophy: "It is not necessarily only the dignity of the person to be executed which is invaded. Very arguably the dignity of all of us, in a caring civilization, must be compromised, by the act of repeating, systematically and deliberately, albeit for a wholly different objective, what we find to be so repugnant in the conduct of the offender in the first place."

He said in another set of erudite sentences that have been oft-quoted by opponents of the death penalty:

> *"The death sentence must, in some measure, manifest a philosophy of indefensible despair in its execution, accepting as it must do, that the offender it seeks to punish is so beyond the pale of humanity as to permit of no rehabilitation, no reform, no repentance, no inherent spectre of hope or spirituality; nor the slightest possibility that he might one day, successfully and deservedly be able to pursue and to enjoy the great rights of dignity and security and the fundamental freedoms protected in … the Constitution, the exercise of which is possible only if the 'right to life' is not destroyed. The finality of the death penalty allows for none of these redeeming possibilities. It annihilates the potential for their emergence. Moreover, it cannot accomplish its objective without invading in a very deep and distressing way, the guarantee of human dignity afforded by ... the Constitution, as the person sought to be executed spends long periods in custody, anguished by the prospect of being 'hanged by the neck until he is dead'... The invasion of his dignity is inherent. He is effectively told: 'You are beyond the pale of humanity. You are not fit to live among humankind. You are not entitled to life. You are not entitled to dignity. You are not human. We will therefore annihilate your life'."*

South Africa's constitutional court has distinguished itself through not only this judgement but several other trail-blazers: In *Mohamed v President of the RSA*, it prohibited extraditing anyone to a country that imposes the death penalty without an express guarantee that the person will not be subject to capital punishment. Even more remarkably, the court has excelled in the sphere of equality, especially gender equality and LGBTQ rights (the court's website contains the links to those judgements). In *August v Electoral Commission*, it affirmed the right of prisoners to vote.

Alas, during the mad regime of President Mandela's ill-chosen successor Thabo Mbeki and his equally appalling health minister Manto Tshabalala-Msimang, nicknamed Dr Garlic for her insistence in the late 1990s that South Africa's then raging AIDS epidemic could be stemmed through the use of garlic and beetroot, things took a downslide. Jacob Zuma has only further defiled the chair on which Mandela sat.

Chief Justice Pius Langa, 2013. Wikicommons/ WP:NFCC#4.Some rights reserved.

In other words, South Africa has a judiciary that stands with the best in the world. The executive lags far behind.

It is another matter that in other nominally democratic countries such as the United States, India and Japan, the legislature, the executive and the judiciary are all dominated by conservative, corporatist and majoritarian chauvinist interests and where deeply conservative holdovers such as the death penalty remain in use.