

Abstract

The death penalty during apartheid was discriminatory towards blacks and used as a tool of the government to suppress opposition. The Constitutional Court used the newly created Constitution to rule in *S v Makwanyane* (1995) that capital punishment was unconstitutional.

Keywords

Death Penalty, Capital Punishment, Constitutional Court, CODESA

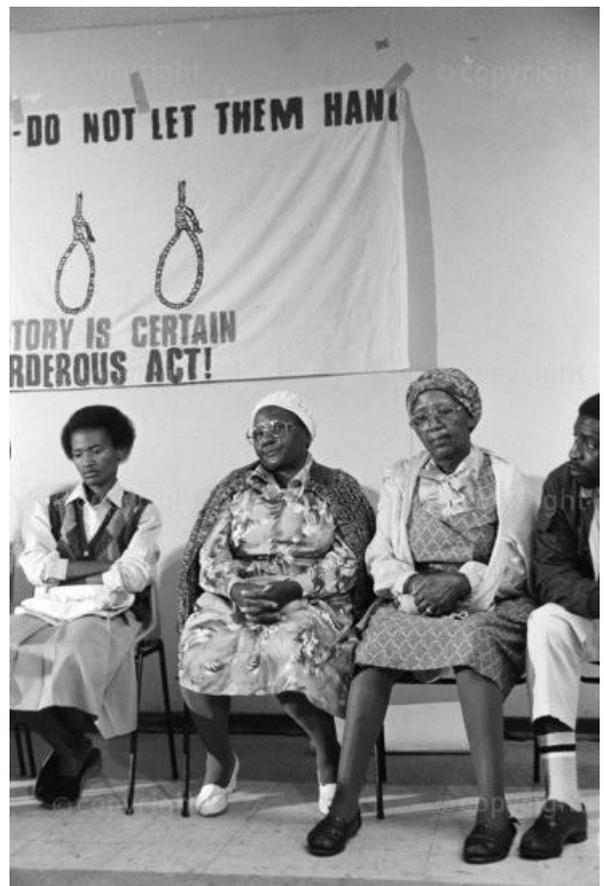
The Right to Life

Mojalefa Sefatsa, Theresa Ramashomola, Reid Mokena, Oupa Diniso, Duma Khumalo, and Francis Don Mokheisi were anti-apartheid protesters found guilty for the murder of Kuzwayo Jacob Dlamini, the Deputy Mayor of Sharpeville. Historically and famously known as the [Sharpeville Six](#), they were all sentenced to death in 1985. Given the lack of substantial and concrete evidence for their guilt, this scandal was condemned by the international community as unlawful and racist. During apartheid in South Africa, a country reported to have one of the highest rates of executions in the world, cases like the Sharpeville Six were all too common; capital punishment was an instrument of the apartheid government to keep those in the [African National Congress](#) (ANC) and others against the National Party from opposing the leading party's force. Capital punishment during apartheid acted as a discriminatory aid until this sentence was abolished in 1995. The Interim Constitution of the Republic of South Africa, although not explicitly clear about the legality of the death penalty, was used to argue in *S v*

Makwanyane and Another (1995) that everyone, including those found guilty of the most heinous crimes, has the right to life, ignoring the public’s opinion and thereby abolishing the death penalty.

Although the death sentence was controversial during apartheid, this sentence had started in South Africa long before that. In 1652, the death penalty was brought into the Cape by the colonial powers of the Dutch. Those found guilty of crimes including murder, rape, theft, robbery, arson, fraud, sodomy, bestiality, incest, public violence, and falsifying coin could all receive capital punishment (le Roux 1). These standard practices continued until the twentieth century, when laws were adjusted to better fit society. The Criminal Procedure and Evidence Act of 1917 made the death penalty the mandatory sentence for murder “unless the offender was under 16 years of age or was a woman who had murdered her newly born child” (le Roux 1). By 1935, that act was replaced by the General Law Amendment Act, providing a judicial framework to be used until 1990. During the apartheid era, the standard practice for carrying out executions was hanging and most hangings took place in Pretoria Central Prison, infamously known as “The Pot.”

By the 1980s, a number of studies found that the apartheid government was using the death penalty as a discriminatory aid, such as how they used it on the Sharpeville Six. Between June 1982 and June 1983, “of the 81 blacks convicted of murdering



The picture above depicts, “parents and relatives of the Sharpeville Six at a protest meeting in Johannesburg. The Sharpeville Six were protesters convicted of the murder of Deputy Mayor of Sharpeville, Kuzwayo Jacob Dlamini. The convictions were widely condemned by the international community as unlawful and racist” (Africa Media Online

whites, 38 were hanged. Of the 52 whites convicted of murdering whites, only one was hanged. None of the 21 whites convicted of murdering blacks was hanged. Of the 2,208 blacks convicted of murdering blacks, 55 were hanged” (le Roux 4). This suggests that when hearing murder cases, judges were more inclined to give the death penalty to blacks over whites, and more so if it was for blacks killing whites and less so if it was for whites killing blacks. In a research report by the Black Sash in 1989 on South African death row prisoners, “the average person...is black, comes from a financially disadvantaged home, was raised by a single parent, did not complete school, and is an unskilled or semi-skilled laborer” (Vogelman 183). These findings show that the death penalty targeted and was most commonly practiced on blacks.

One tactic of the government to prevent uprisings and protests of black South Africans was to pose the threat of capital punishment, such as with the Sharpeville Six. An exception to this commonality was [Frederick John Harris](#). Harris was the only white man to receive the death penalty for a political crime during apartheid in 1965. He was publically involved with the [Liberal Party of South Africa](#), the National Committee, the South African Nonracial Olympic Committee, and later joined the [African Resistance Movement](#) after his passport was seized under the Suppression of Communism Act. On 24 July 1964, Harris planted a bomb at the Johannesburg train station, injuring twenty-three civilians and killing one. He was convicted of murder and sentenced to death on 1 April 1965 (Dirks). The chronological breakdown of the death penalty timeline shows that the highest number of executions occurred in 1987; there was close to one judicial hanging every other day (le Roux 4). From 1987 to 1989, the number of executions declined as a result of the widespread negative views from anti-apartheid groups.

In 1990, the President of South Africa, F.W. de Klerk, put a moratorium on the death penalty sentence while negotiations were taking place between the ANC and [National Party](#). In

the Criminal Law Amendment Act of 1990, death sentences were up to the discretion of the trial judge and an automatic right of appeal was allowed. Additionally, “evidence relating to the character of the accused and prospects for his or her rehabilitation, which would ordinarily be quite relevant to sentencing, were considered irrelevant to the inquiry into extenuation” (Le Roux 3). Although this moratorium on executions had been operative in South Africa, “the death penalty was still on the statute book and courts were still imposing it, albeit to a lesser extent as before,” meaning judges could still sentence those deemed necessary to death, but none could be executed (Le Roux 3). It is impossible to disassociate the racial influence from the death penalty in South Africa. Although the death penalty began in South Africa in the seventeenth century, this racial influence did not become apparent until the twentieth century. The apartheid government, led by the National Party, used it as a posing threat against black South Africans who thought about protesting.

The Interim Constitution, initially discussed at [CODESA](#) negotiations and drafted during the Multi-Party Negotiating Process (MPNP), was used to abolish the death penalty. After the breakdown of CODESA in 1992, The subsequent Record of Understanding between ANC and the National Party government agreed upon the need for a “democratic constitution assembly/constitution-making body and that for such a body to be democratic it must...draft and adopt the new constitution” (Record of Understanding). One of the requests of the ANC was to release all political prisoners, some of which were on death row at the time, serving in Pretoria Central Prison or Robben Island. The ANC and National Party agreed “that all prisoners whose imprisonment is related to political conflict of the past and whose release can make a contribution to reconciliation should be released” (Record of Understanding). Following the Record of Understanding, the Interim Constitution was drafted at the Multi-Party Negotiating

Process (MPNP), ratified on 22 December 1993, and enacted on 27 April 1994 (ConstitutionNet). Once it was implemented, it became the temporary supreme law of the land, until the final Constitution of 1996 replaced it. The Interim Constitution was the skeleton and framework of the 1996 Constitution. The 1994 Constitutional Assembly added onto the Interim Constitution and solidified its values to create the 1996 Constitution, formally known as the Constitution of the Republic of South Africa (ConstitutionNet). The Constitutional Court used the Interim Constitution to show the unconstitutionality of capital punishment.

S v Makwanyane (1995) was one of the first major decisions of the newly created Constitutional Court in South Africa and established the unconstitutionality of capital punishment. The decision concerned two South Africans, T. Makwanyane and M. Mchunu, convicted on four counts of murder and one count of attempted murder and robbery and sentenced to death. They appealed their convictions and the Appellate Court dismissed the appeal against the counts of robbery and murder, but postponed the appeal for the death sentence until all constitutional issues had been decided. At the time of the appeal, the ANC and National Party were drafting the Interim Constitution, so the court delayed the hearing until it was admissible in court. The Constitutional Court case was heard on 15 February 1995 to 17 February 1995 and the hearing was delivered on 6 June 1995. The following is the final Constitutional Court decision, delivered by Constitutional Court President [Arthur Chaskalson](#):

“The carrying out of the death sentence destroys life, which is protected without reservation under section 9 of our Constitution, it annihilates human dignity which is protected under section 10, elements of arbitrariness are present in its enforcement and it is irremediable. Taking these factors into account...and giving the words of section 11 the broader meaning to which they are entitled at this stage of the enquiry, rather than a

narrow meaning, I am satisfied that in the context of our Constitution the death penalty is indeed a cruel, inhuman and degrading punishment...Everyone, including the most abominable of human beings, has the right to life, and capital punishment is therefore unconstitutional” (S v Makwanyane).

However, divergent from what one might assume, the Court in *Makwanyane* did not declare the death penalty unconstitutional on the basis of its conflict with the right to life exclusively, but also relied on section 10 of the Constitution on human dignity and section 11, declaring the death penalty to be a form of inhuman, cruel, and degrading punishment.

Justices in the court ruling of *S v Makwanyane* that declared capital punishment to be unconstitutional cited sections 8 through 11 of the Bill of Rights of the Constitution: section 8 declared equality for all people, stating “the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race”; section 9 affirmed “everyone has inherent dignity and the right to have their dignity respected and protected”; section 10, declared that “everyone has the right to life”; section 11 of the constitution stated “everyone has the right to freedom and security of the person, which includes the right...not to be treated or punished in a cruel, inhuman or degrading way” (Constitution). Arthur Chaskalson declared that the framers of the Constitution were not clear on the constitutionality of capital punishment. Because it was not stated specifically, he decided, “it has been left to this [Constitutional] Court to decide whether the penalty is consistent with the Constitution.” Justice Chaskalson, as well as the other justices, used these sections of the Bill of Rights to interpret the death penalty as unconstitutional.

Each Constitutional Court Justice made their own, unique judgments, but all claims were similar in principle. [Justice Raymond Ackermann](#) emphasized the unequal and arbitrary essence

of the death penalty, stating, “the right to life must include the right not to have one’s life ended by the state in a matter which is arbitrary and unequal” (le Roux 11). Acting [Justice John Didcott](#) agreed with Ackermann about the unconstitutionality of the death penalty because of the right to life, but added that it also violates section 11 against cruel, inhuman or degrading punishment. According to Justice Kentridge, “capital punishment is qualitatively something quite apart from even the longest term of imprisonment as it entails the calculated destruction of a human life” (Le Roux 12). Kentridge also considered that the “death row phenomenon,” which is the “mental agony of the criminal, in its alternation of fear, hope, and despair” experienced by prisoners while on death row, is a cruel and inhuman punishment. [Justice Albert Sachs](#) believed that “executing someone is not limiting that person’s life, but extinguishing it” and therefore a breach of the right to life” (le Roux 15). In addition to mentioning the right to life and human dignity, [Justices Pius Langa](#), [Yvonne Mokgoro](#), and [Tholakele Madala](#) all mentioned how capital punishment conflicts with the norms of *Ubuntu*. Although *Ubuntu* is not defined in the constitution, it is a “culture in which communality and the interdependence of the members of a community are emphasized. An outstanding feature of *Ubuntu* in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one’s own” (le Roux 13). Citing sections 9, 10, and 11 of the constitution was a common theme on all the Justices of the Constitutional Court, but some added a statement on *Ubuntu* to relate to the public, who had differing opinions on the death penalty in South Africa.

Many of the Justices who heard *S v Makwanyane* outwardly opposed the effect of public opinion in the judicial system. In the criminal complaint, Chaskalson affirmed, “the question before us...is not what the majority of South Africans believe a proper sentence for murder

should be. It is whether the Constitution allows the sentence” (S v Makwanyane). This was stated before the final judgment and was an announcement to the public that their opinion, which for some was pro-capital punishment, did not affect the court’s ruling because of the nature of the Constitutional Court. He reaffirmed the duty of the Constitutional Court by stating that it “cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favor with the public...it itself is no substitute for the duty vested in the Courts to interpret the Constitution” (le Roux 15). He questioned that “if the public opinion were to be decisive, there would be no need for constitutional adjudication” (le Roux 15). Other justices backed up his assertions. Justice Didcott argued that popular opinion is a legislative concern, not a judicial one. Justices Langa, Kriegler, Mahomed, and Mokgoro “were all *ad idem* in emphasizing that the issue before the Court was one of constitutionality and not one of desirability” (le Roux 16). The main argument of the public in support of the death penalty was that there was no other punishment for criminals that had committed a crime as harsh as the death penalty sentence. Both Kriegler and Chaskalson rebutted this; Justice Kriegler understood both sides of the public’s opinion, acknowledging that the court received thousands of documents “in support of and opposed to the death penalty, ranging from the religious, ethical, philosophical, ideological to the mathematical and statistical” (le Roux 12). Kriegler concluded, however, “no empirical study has been able to demonstrate that capital punishment has any deterrent force greater than that of a really heavy sentence of imprisonment” (le Roux 12). Chaskalson agreed and pointed out in the criminal complaint, “it has not been shown that the death sentence would be materially more effective to deter or prevent murder than the alternative sentence of life imprisonment would be” (S v Makwanyane).

Although the public opinion was a divided one, the court did not let it dictate or influence their ruling.

The Constitutional Court of South Africa ruled in 1995 that with an immediate effect, “all states and all its organs are forbidden to execute any person already sentenced to death under any provisions thus declared invalid,” which applied to 453 prisoners on death row at the time. The ruling was carefully delivered to the public and written in stone so it would be difficult to overturn in the future. They anchored their argument in the “fundamental values of the right to life, human dignity, equality and legality that are the cornerstones of the whole constitutional order” (van Zyl Smit). The Justices of the Constitutional Court tried to appeal to Africans in two ways. One, which was used by a number of judges, was to “emphasize the concept of *Ubuntu*, of communal humanity, as a concept underlying both right to life and to dignity and as an overarching idea in the new South African Constitution” (van Zyl Smit). The other way, which was adopted by Justice Sachs, was to remind the public of the foundation and culture of South Africans. He tried to “engage with those African critics who argue that abolitionism was un-African and to show that, although pre-colonial Africa had had its share of bloody wars, historically the systematic use of the death penalty was not part of indigenous Southern African culture” (van Zyl Smit). The newly founded Constitutional Court in its first major ruling made the death penalty illegal. Their ruling “underscored the importance of the issue in a country where for decades execution was used not just as a weapon against common crime, but as a means of terror in enforcing the system of racial separation known as apartheid” (Howard). The abolishment of the death penalty signified the end of apartheid in South Africa and had a profound effect on the justice system.

South Africa's Constitution and its stance on the death penalty is often cited as an example by leading anti-capital punishment organizations, such as the International Commission Against the Death Penalty and Amnesty International, but some believe the abolishment of the death penalty in South Africa has had a severe effect on its crime. Since capital punishment was declared unconstitutional, "there has been a crime wave sweeping South Africa. Crime has rocketed to levels never previously experienced in this country... The abolition of the death penalty, coupled with the huge increase in crime, has led to a general perception that the Bill of Rights is interpreted in such a way that the individual offender benefits more by its provisions than the innocent, law-abiding citizen" (le Roux 16). Although there is no proof of whether the end of the death penalty had an effect on the increased crime rate, these perceptions suggest people believe a relationship could exist between the two.

From 1911-1995, a total of 4,288 South Africans were executed. The apartheid government used capital punishment as a tool to suppress those who opposed them. Through their interpretation of the Constitution of the Republic of South Africa, the Constitutional Court ruled in *S v Makwanyane* the unconstitutionality of the death penalty. The ruling by the Court was a significant one, signifying the end of apartheid and the start of a new era, based on the values of equality and *Ubuntu*.

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