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THE ROLE OF PUBLIC OPINION IN COURT DECISIONS ON THE LEGALITY OF THE DEATH PENALTY: A REFLECTION ON THE SUPREME COURT DECISION ON THE DEATH PENALTY AND THE SOUTH AFRICAN POSITION

By

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Abstract

There are various schools of thought on the role of public opinion in court decisions especially on the death penalty. A person's view of the role of public opinion will be profoundly affected by whether the public he or she is thinking of is the totality of the electorate, those paying attention to the issue or some other group. Some categorically disapprove of any effective role of public opinion. While some argue that it should play a role in court decisions on the death penalty, others say that there is a role, but not a determinative one reasoning that judicial ethics and rules do not allow consulting the masses, but courts do not decide the law in the vacuum and so society influences are inevitable. Other schools of thought suggest that there is a role, but are not sure what it is and the rest think that public opinion should have no role at all in court decisions on the legality of the death penalty. The rest offer a critique without choosing sides. This enhances the debate and it can be discerned from the above views that determining the role of public opinion in court decisions is no easy task. It is even harder when dealing with death penalty cases because they affect the right to life. What emerges as the strongest school of thought is that public opinion has no effective role to play in court decisions as it takes into consideration the reality of public opinion while at the same time promoting judicial ethics.

Introduction

Following the decision of the Supreme Court in the Criminal Appeal of *Kigula & Ors v. Uganda*¹ it was deemed necessary to write about how the views of the public (citizenry in Uganda) affects the decision of this kind on the death penalty. This paper is divided into two parts. The first part introduces the international, regional and national normative standards before discussing the role public ought to play in court decisions in general while the second part concentrates on the role public opinion ought to play in court decisions on the legality of the death penalty.

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¹ Appeal from Susan Kigula and Others v AG constitutional petition 6 2003 (CC). (Unreported).

According to Welsh, prior to 1968, courts simply assumed the constitutionality of capital punishment because parliamentary supremacy reigned. The powers of courts to review laws, least of all constitutions, were unheard of. Therefore, the role of courts in deciding the legality of capital punishment is a fairly recent development.² The rest offer a critique without taking sides.³ This paper analyses these various positions.

Normative Standards on the Role of Public Opinion in Court Decisions

No particular international legal instrument has been made on the role of public opinion in court decisions. However, particularly instructive on the matter are various instruments on the independence of the judiciary which also provide that courts shall decide cases without interference and only in accordance with the facts and the law.

The Role Public Opinion Ought to Play in Court Decisions Generally

The following is a presentation of an attempt by courts and writers to identify the role public opinion should play in general court decisions. The views are divided into three schools of thought: The 'no' role school; the 'non-determinative' role school; and the 'determinative' role school.

The 'No' Role School

The 'No' role school of thought advocates that public opinion should not play a role in court decisions. Dismissing the role of public opinion in court decisions, it has been suggested that assessment of popular opinion is essentially a legislative, not a judicial, function. Choper suggests instead, that the judiciary should play a supervisory role and restrains the majority will through judicial review.⁴ Murray agrees with this school of thought and although he concedes that decision-makers are required,

² S Welsh The death penalty in the nineties: An examination of the modern system of capital punishment (1987) 4.

³ W Schabas The death penalty as cruel treatment and torture: Capital punishment challenged in the world's courts (1996).

⁴ J Choper quoted in V Wyk Rights and constitutionalism: The new South

African legal order (1994) 9.

above all, to be 'in touch', this, for him does not apply to the courts. He suggests that though judges are expected to be conspicuously responsive to community values, this involves knowing those values; a task that is not always as easy as it sounds. He states:⁵

Judges have no techniques for or expertise in, assessing public opinion. Judges ordinarily do not seek to influence public opinion. They do not sample community opinion for the purpose of informing their decision-making. And they do not set out to influence wider community values.

Opponents argue that judges would be exposed to improper pressure and interference if they were to be intimidated by popular disapproval. They state that it is one thing for individual judges, and the judiciary as an institution, to show a proper respect for community values and to be conscious of the importance of public confidence, and it is another thing for judicial decisions to bend before the changing winds of popular opinion. Nothing is more likely to undermine public confidence in judicial independence and impartiality than the idea that judges seek popularity or fear unpopularity.⁶ This position tends to agree with the normative standards outlined above.

Total reliance on public opinion for decision-making has been particularly discouraged by opponents like Anne. Weiss however, recognises that public opinion represents people's support and states:⁷

The leaders of democracy ought never to make any decision just because a poll shows that it will be the most popular one. Polls must not become a substitute for debate and discussion.... Polls can promote government by the people in other ways. They can reflect the country's changing needs.

It has also been argued that judges, as opposed to claims by proponents of the role of public opinion, understand the needs of society. Those who want to influence judicial decision-making, and regret their lack of capacity to do so, often find the judiciary frustratingly unresponsive and may regard the independence of judges as

⁵ Murray, G 'Out of touch or out of reach?' Judicial conference of Australia colloquium - Adelaide

⁶Tbid.

⁷ AE Weiss 'Polls and surveys, a look at public opinion research' (1979) 61 & 67

<<http://www.amazon.com/gp/product/book-citations/0275949893htm>> (accessed 5 September 2014).

evidence of inappropriate isolation from the rest of the community.⁸

Finally, it has been argued that public opinion should not be the determining factor because judges may be called upon to protect the rights of citizens who are in conflict with government and who are despised by most members of the community. This would create a conflict as the people would be judges in their own cases. Unelected public officials are meant to be outside the political process. They are not supposed to compete with politicians for popular support or to seek political legitimacy.

The 'Non-Determinative' Role School

Some writers have acknowledged the difficulty of choosing sides and have thus suggested a middle position which entails courts to consider, although not as a determinative factor, public opinion in arriving at decisions. Kanyeihamba writes:⁹

Whereas it is a principle of the judicial oath that a judge should not be influenced by public hysteria, he or she must take into account the attitudes of the responsible members of the society, in respect of which the law is to be upheld.

This approach sounds attractive as far as it allows both sides to feel accommodated. However, it presents practical difficulties of compliance leading to the 'dilemma'. This school proposes that while courts do not have to reflect public opinion, they must not disregard it and that perhaps the main duty of the court is to lead public opinion. This was reiterated in Mhlakaza and Makwanyane. This is a more realistic view than the pure rejectionist one because it acknowledges that courts cannot just decide in total disregard of the circumstances around them.¹⁰

The view that once the law is out of touch with the moral consensus of the community, whether by being either too far below it or too far above it, the law is brought into contempt supports the role of public opinion in court decisions. Following this, the European Court of Human Rights has held that '... in a democracy, the law cannot

⁸ See generally Murray, *supra* note 5.

⁹Kanyeihamba, G 'Reflections of a judge on the death penalty in Uganda' (2004) *The Uganda Living Law Journal* 2 (1) 93, 94 & 96.

¹⁰Mhlakaza and another v S [1997]2 All SA 185 (A) 189.p-1.

afford to ignore the moral consensus of the community.¹¹ This decision is instructive in as far as it reminds the courts not to take extreme positions of either totally relying upon public opinion or totally ignoring it when making decisions. Without deviating from the African judicial approach, it presents a more accommodative position.

The need to refer to the moral aspects of the society was acknowledged by the court in Makwanyane observing that while it was important to appreciate that in the matter before the court, it had been called upon to decide an issue of constitutionality and not to engage in debate on the desirability of abolition or retention, it was equally important to appreciate that the nature of the court's role in constitutional interpretation, and the duty placed on courts would of necessity draw them into the realm of making necessary value choices.¹² This displays the dilemma caused by the judicial oath as illustrated below.

The 'Determinative Role of Public Opinion'

The position of the 'determinative role of public opinion' school of thought is that public opinion should play a decisive role in The Court in Mbushuu was of the view that the matter of the death penalty is to be decided by members of Tanzania society holding that 'But the crucial question is whether or not the death penalty is reasonably necessary to protect the right to life. For this we say it is society which decides.'¹³

This school has support under Article 126 of the Constitution of Uganda which provides that '... justice shall be exercised in the name of the people and in conformity with law and with the values, norms and aspirations of the people.' This was raised in Kigula where the respondent, relying on Article 126, among other grounds, argued successfully that the Constitution required courts to take into account public opinion when making judicial decisions. The Court went ahead to hold that if the people wished to retain the death penalty, it should be so.¹⁴

¹¹Dudgeon v United Kingdom (1982) 4 EHRR 149 184.

¹²State v Makwanyane and Another 1995 1 LRC 269 (CC), 303.

¹³Mbushuu (Alias Dominique Mnyaroje) and Another v Republic of Tanzania 1995 TLR 97(CA),117.

¹⁴Kigula case supra note 1, 113-134.

In effect, this school asserts that public opinion should play a determinative role in court decisions. Most of the reasons advanced by this school are similar to those given in support of the role of public opinion in court decisions on the legality of the death penalty.

The 'Dilemma' Courts Face in Deciding Whether to Rely Upon Public Opinion

Courts of law are comprised of human beings who grow up, are educated and live in society. They acquire the attitudes of the society before and while at law school. While still living in the society, and capable of public pressure, they are required by judicial ethics and rules, to totally ignore the views of the public and decide all cases in accordance with abstract legal rules. This presents a dilemma that is discussed below.

Murray raises many questions to display the dilemma of relying upon public opinion. He asks for instance:¹⁵ How should judges keep in touch? Should they employ experts to undertake regular surveys of public opinion? Who exactly is it that they ought to be in touch with? Whose values should they know and reflect? What kind of opinion should be of concern to them? Any opinion, informed or uninformed? What level of knowledge and understanding of a problem qualifies people to have opinions that ought to influence judicial decision-making?

Other writers have contributed to the dilemma of relying on public opinion. For instance, Kanyeihamba questions; 'Should a court take into account the degree of revulsion felt by law-abiding members of the community for the particular crime?'¹⁶ Harwood joins and adds; 'Why should the people, however defined, be consulted? What is justice? Is it to be found in some higher moral order or here and now in the decisions of the majority? On what kinds of questions, if any, is the general public especially competent?'¹⁷ There are also questions raised by supporters of public opinion. Cleote asks; 'So what rights have the courts not to give the public what it wants and what the

¹⁵ Murray supra note 5.

¹⁶Kanyeihamba supra note 9, 93.

¹⁷ HL Childs An introduction to public opinion (1940)349.

elected representatives of the public have enacted?'¹⁸ Hans chips in his; 'but should the human rights ideal need to protect itself from public opinion?'¹⁹

There are no definitive answers to the questions, but the views on these and other profound philosophical questions have a very important influence on the role people think public opinion should play in public policy decisions.²⁰

How Public Opinion Has Influenced Court Decisions on the Legality of the Death Penalty

The issue of whether public opinion itself affects what people think is a question of long standing.²¹ While some courts like in Uganda²² Tanzania²³ and Nigeria²⁴ have held that public opinion is relevant and should be relied upon in deciding death penalty cases, others like the South African Constitutional Court have rejected it as irrelevant.²⁵ In addition, there are middle-ground views suggesting that while public opinion should not be the determining factor, courts must never ignore it.²⁶

The Practice in Retentionist States: The Political Context in Uganda

According to the US State Department report,²⁷ Uganda got independence October 9, 1962 from the British. In 1966, Milton Obote suspended the Constitution. The country has undergone several military coup detats and got several presidents as a result. The Idi Amin's 8-year rule produced economic decline, social disintegration, and massive human rights violations.

¹⁸Cloete, T 'Sentencing: Public expectations and reaction note and comments' (2000) *The South African Law Journal* 618-623p. 620.

¹⁹ G Hans *The barbaric punishment; Abolishing the death penalty* (2003) 4.

²⁰ Childs *supra* note 17, 349.

²¹ RG Walden *Public opinion polls and survey research: A selected annotated bibliography of U.S. guides and studies from the 1980s* (1990) 44.

²²Kigulacase *supra* note 1.

²³Mbushuu case *supra* note 13, 115-117.

²⁴Kalu v the State (1998) 13 NIULR 54.

²⁵Makwanyane case, *supra* note 12.

²⁶Mhlakaza case, *supra* note 10, 189.

²⁷ <http://www.state.gov>

Uganda has been under limited operation of political parties, but is now a multiparty system from 2005. The current constitution was promulgated 1995 provides for an executive president, to be elected every 5 years. Parliament and the judiciary have significant amounts of independence and wield significant power. The current government has largely put an end to the human rights abuses of earlier governments, initiated substantial economic liberalisation and general press freedom. This makes the need for capital punishment persist as the population still wants punishment for past atrocities.

In retentionists states, public opinion is frequently invoked in defence of capital punishment. Politicians and jurists argue that they cannot move far ahead of public opinion thus the survival of the death penalty on many statute books. According to Hans, retention is said to be both a consequence of democratic rule and a will of the majority. He states:²⁸ Democracy leans toward abolition, but retentionists defend the death penalty in the name of the will of the people.... Yet public opinion is increasingly being invoked by States to justify abolitionist measures.

According to Amnesty International, one reason put forward by officials for retaining the death penalty is that public opinion demands it and it would be undemocratic in the face of such support for the penalty to be abolished.²⁹ Citing the example of Rwanda which in 1994 opposed the United Nations Security Council resolution creating the International Criminal Tribunal for Rwanda (ICTR), Schabas states that it was argued that the draft statute was not acceptable to the citizens because it excluded the death penalty. He illustrates:³⁰ During debates on the death penalty, it is usually argued by retentionists and frequently conceded by abolitionists, that public opinion favours its use...they frequently invoke public opinion in order to account for their reticence. Public opinion has been regarded highly in Tanzania where the Court of Appeal has held that the people should decide if the death penalty is

²⁸ Hans, supra note 19, pp. 1, 4 & 5.

²⁹ Amnesty International 'When the state kills...the death penalty: a human rights issue' 22

³⁰ Schabas, supra note 3, 79.

desired, and that it could not be abolished when it was still popular. The Court explained:³¹

The society can only discharge its duty of protecting the right to life by deterring persons from killing others. Tanzania, like many other societies, has decided to do so through the death penalty.... But the crucial question is whether or not the death penalty is reasonably necessary to protect the right to life. For this we say it is society which decides.

The Ugandan Constitutional Court has also accepted that public opinion should be relied on, holding that if the majority of Ugandans desires the death penalty, the Court should uphold it. The Court also agreed with the argument of the respondent that public opinion was a relevant factor for consideration and that there is a legal basis for following public opinion, since the courts are enjoined by article 126 of the Constitution to respect the law, the norms, values and aspirations of the people.³² The Speaker of Parliament of Uganda has reiterated support for the role of public opinion in deciding the legality of the death penalty arguing that ‘you cannot tell people that you can kill someone and never be touched. It would cause anarchy in our villages.’³³

It is evident that courts in many jurisdictions seem to acknowledge that the public usually supports retention of the death penalty.³⁴ This may tend to influence the decision of the constitutionality of the death penalty especially in retentionist states.

The Practice in Abolitionist States: The Political Context in South Africa

According to the US State Department report,³⁵ South Africa became a republic in 1961 and is multiparty parliamentary democracy with a bicameral National Assembly. There is a president elected to a 5-year term by the National Assembly. Until 1991, South African law divided the population into racial categories. The country's first non-racial elections were held in 1994. South Africa's

³¹Mbushuu case supra note 13, pp. 115 & 117.

³²Kigula case note 1, pp. 113-134 (Twinomujuni J).

³³ ‘Speaker backs death penalty’ Daily Monitor 27 July 2006 4. <<http://www.monitor.co.ug>> (accessed 27 July 2015).

³⁴ Hans supra, note 19, pp. 4 & 5. He refers to Mbushuu case, supra note 13, 351.

³⁵ (<http://www.state.gov>)

post-apartheid governments have made remarkable progress in consolidating the nation's peaceful transition to democracy and the Truth and Reconciliation Commission (TRC) has helped the healing process. The current constitution entered into force in 1997 and provides for an independent and impartial judiciary, and, in practice, these provisions are respected. The constitution's bill of rights provides extensive guarantees. This history has dictated that respect for human rights is given a priority so as to end the abusive past.

In abolitionist states like South Africa, public opinion has not been embraced in arriving at judicial decisions. In South Africa, where it was argued by the State that the constitutionality of the death penalty should have been decided relying upon public opinion, Chaskals on J held that public clamour did not enjoy the same constitutional guarantee as the rights to life and human dignity.³⁶ Abolitionists argue that a court is neither bound by the will of the majority, public sentiments nor the intent of the legislature. That it is parliament that is under public pressure and constitutional courts do not hunt for popularity among members of the society.³⁷ Even in abolitionist states, public opinion was a big factor in the delay to abolish the death penalty. For example, in South Africa, there was a long-standing support for the death penalty before Makwanyane was decided, as Keith states:³⁸

One of the factors ...against the abolition of the capital punishment in this country is public support for its retention. The only official investigation into capital punishment in South Africa, the Lowdown Commission of 1947 (Report of the Penal and Prison Reform Commission U6, 47 of 1947) argued that public opinion was such that the abolition of the death penalty was not to be tolerated.

Similarly, in the US, public opinion played a role in abolition. Joan states that for more than a quarter-century, the Supreme Court upheld the death penalty relying on attitudes both in the states and foreign countries. Accordingly, the Court had decided that it would consider

³⁶ Makwanyane case, supra note 12, 78.

³⁷ See Hungary Decision No. 23/1990 (x.31) AB of the Constitutional Court.

³⁸ I Keith 'The penalty of death: public attitudes in South Africa' SACJ (1989) 2 SAS 256.

public consensus when deciding when the death penalty is inappropriate.³⁹

It appears, therefore, that public opinion is a factor in determining which side a court takes on this matter. Consequently, public opinion is frequently cited as the reason for retaining, abolishing or reinstatement of the death penalty.⁴⁰

Critique of the Approaches Taken by Courts in the Selected States

The first parts of this chapter have presented the practice of courts in retentionist and abolitionist states. Different reasons are given for the positions taken by these Courts. A critique of the different approaches in particular cases will now be embarked on beginning with the retentionists.

Keith states that although a substantial number of people support the death penalty, they mostly do not know much about its effects and circumstances.⁴¹ In spite of the acknowledgment of the lack of adequate information by the public by the Appeal Court in Mbushuu, the final holding was that the people should decide.⁴² This displays the Court's readiness to accept and rely upon public opinion even if it may not be formed after an appraisal of relevant facts.⁴³ No wonder, some courts have dismissed the relevance of public opinion because it is not properly informed.⁴⁴ Lloyd explains that the main reason for the rejection of public opinion is that South Africans are uneducated about the death penalty and are not versed with what it means and how inhumane it is. He maintains that people seem to think that there are only two options; the

³⁹ J Biskupic 'Door open to death-penalty limits' (2002) <<http://www.ceu.hu/legal/legal/Friedman.htm>> accessed 10 August 2015).

⁴⁰ R Hood The death penalty: A world-wide perspective (2002) 148.

⁴¹ Keith, *supra* note 38, 259.

⁴² Mbushuu case *supra* note 13, 116. The Court of Appeal quoted the trial judge as holding that 'there may be a majority of Tanzanians who support the death penalty blindly, and these are not enlightened and not initiated or aware of the ugly aspects of the death penalty'

⁴³ P Hodgkinson & W Schabas (eds) Capital punishment: Strategies for abolition (1996) 239.

⁴⁴ Hans *supra* note 19, pp. 4 & 5.

death penalty or the release back into society of dangerous killers.⁴⁵

Concerning the approach that the society should decide the appropriateness of the death penalty, this misses the point. The constitutionality of the penalty is clearly not a matter within the power of the people who usually pass on the same to the Court through the Constitution. It can be argued that were this to indeed be a matter for the society, the court should always decline jurisdiction and refer it back for a referendum.⁴⁶

Popularity of the death penalty is not an ingredient for court to rely upon in deciding its constitutionality. This violates the normative rules set out above as it allows undue influence and deciding the matter not based on the law but on popularity. In essence, this would mean that whatever is popular, including mob justice, should be legalised, an idea that has no legal backing.

Another criticism is that whereas public opinion is hard to prove, courts in retentionist states tended to overlook this. For instance, the required evidence of public opinion was regarded inadequate in South Africa where the Court held that appropriate source material is limited and any conclusions that individual members of the Court might have wished to offer would inevitably have to be tentative rather than definitive. It was decided that the Court would have required much fuller research and argument than was the case.⁴⁷ In *Mbushuu*, the Court seemed to presume that the majority of Tanzanians supported the death penalty. While it might have been true that the death penalty was still popular, this was not proved in court.⁴⁸ In *Kigula*,⁴⁹ the statistics court relied on were neither updated nor a result of a specific referendum on the death penalty.⁵⁰ The sampling was not representative enough and the percentage of the

⁴⁵ S Graeme & V Lloyd 'The Death penalty in South Africa' <<http://www.E:\The Death Penalty in South Africa - Simpson & Vogelmann.htm>> (accessed 16 August 2015).

⁴⁶ A call for a similar referendum in Uganda 'Hold poll on the death sentence' *The New Vision* 7 February 2005 11.

⁴⁷ *Makwanyane* case supra note 12, 372.

⁴⁸ *Mbushuu* case supra note 13. No opinion poll was particularly conducted for this.

⁴⁹ *Kigula* case supra note 1.

⁵⁰ Statistics as per Odoki and Ssempebwa Commission Reports.

supporters of the death penalty was not high enough to lead to a conclusion that they were the majority of Ugandans.

Need for education has been cited by the retentionists too as reason for the delay to abolish the death penalty. They argue that the legal consciousness of the population is still very low.⁵¹

Arguments for and Against the Role of Public Opinion in Court Decisions

This part seeks to examine arguments for and against the role of public opinion in court decisions. Having analysed the different approaches adopted by the Courts above, I now examine arguments for and against the role of public opinion in court decisions generally and particularly court decisions on the legality of the death penalty.

Arguments in Support of the Role of Public Opinion in all Court Decisions

One of the arguments advanced in favour of the role of public opinion is that some constitutions make it a duty for courts to decide cases in accordance with views and aspirations of the people. The argument goes further to postulate that these views and aspirations can only be obtained through public opinion polls. This was raised in *Kigula*⁵² where the respondent, relying on Article 126 of the Ugandan Constitution, among other grounds, argued successfully that the Constitution required courts to take into account public opinion when making judicial decisions. Article 126 of the Ugandan Constitution provides in part that ‘... justice shall be exercised in the name of the people and in conformity with law and with the values, norms and aspirations of the people.’ The respondents interpreted this article as guaranteeing consideration and reliance upon public opinion by courts. The Constitutional Court agreed with the respondent on the constitutional basis for following public opinion, with *Twinomujuni J* holding:⁵³

I agree that the norms and aspirations of the people must be taken into consideration when interpreting this Constitution. The courts are also enjoined by article 126 of the Constitution

⁵¹ P Hodgkinson & A Rutherford (eds) *Capital punishment global issues and prospects* (1996) 58.

⁵² *Kigula* case supra note 1.

⁵³ *Ibid*, 113-134.

to respect the law, the norms, values and aspirations of the people. I do not agree that public opinion is an irrelevant factor.

It has additionally been argued that constitutional principles need to be interpreted in light of the prevailing views of the people which views may keep changing.⁵⁴ The need to consider public opinion in constitutional interpretation was reiterated in *Weems v United States*⁵⁵ where the Supreme Court held that a constitution was ‘not fastened to the obsolete’, but might ‘acquire meaning as public opinion becomes enlightened by human justice.’ This implies that constitutional principles need to be interpreted in light of the prevailing views of the people which may keep changing. Court decisions, especially from the constitutional courts, usually relate to issues of interpretation. The legality of the death penalty is one of such issues and accordingly, it is argued, public opinion input is essential to court decisions.

Proponents of public opinion base their support on the proposition that law is a product of the society and that it is meant to operate in society. As custodians of the law, courts are expected to consider public opinion. Following this, the European Court of Human Rights has held that ‘... in a democracy the law cannot afford to ignore the moral consensus of the community.’⁵⁶

A related reason advanced to support the role of public opinion is that it would be strange if courts were immune to social forces. This stems from the fact that courts are made of people, deal with people and operate in society. It has been further argued that if the judicial system were highly autonomous, it would produce many wrong results which go against what major social, economic and political forces see as their interests. It is asserted that people with wealth and power would challenge the work of a judicial system if it refused to do as they wished.⁵⁷ Given the fact

⁵⁴ See *Tuffuo v Attorney-General* [1980] GLR 637 where the Supreme Court of Ghana in expounding on rules of constitutional interpretation, held at 647-648 that a constitution embodies the will of the people, contains their aspirations and hopes, and mirrors their history. This implies the necessity of considering public opinion.

⁵⁵ 217 US 349, 378 (1910).

⁵⁶ *Dudgeon v United Kingdom* (1982) 4 EHRR 149 184.

⁵⁷ See generally B Friedman & B Burbank (eds.) *Judicial independence at crossroads: An interdisciplinary approach* (2002).

that the people express themselves through public opinion, this builds a case for its consideration in court decisions.

It is also argued that making court decisions without public support would undermine the confidence in the law and perhaps lead to private vengeance as it is undemocratic to ignore strong public sentiment. This argument goes on to contend that the state must express the will of the people and the extent to which a government will base their penal policy on the attitudes expressed by the general population depends on sources from which they believe the authority of the law should emanate.⁵⁸

In Uganda, the Constitution stipulates that all power belongs to the people.⁵⁹ The judiciary as a branch of the state should, therefore, consider public opinion when making decisions. Obtaining compliance with judicial orders provides additional incentive for courts to be cognizant of public opinion. Courts do not have their own enforcement mechanisms.

Adjudication of cases does not take place in a vacuum. Supporters of public opinion reason that the societal factor in judicial decision-making cannot be ignored because society entertains high expectations of the judiciary and the trial of cases. The pressure exerted by these expectations from the general public confronts judges with the ‘old dilemma of responsivity’ on the one hand versus ‘independence, objectivity and distance’ on the other.⁶⁰ To put it differently, courts are made to choose whether to consider public opinion or strictly adhere to judicial ethics and thus interpret the law as it is.

Public opinion has been described as ‘the prime mover’ of democracy and opinion polls and as ‘the pulse of democracy.’ Therefore, it has been argued that any public representative who fails to gauge the mood of the public correctly must realise that he or she does so at the cost of being relieved of his or her duties.⁶¹ While it may be argued

⁵⁸ Hood *supra* note 40, pp. 148 & 150.

⁵⁹ Under article of 1(1) the Constitution, all power belongs to the people; (2) all authority in the State emanates from the people, while under clause (3) the Constitution derives its authority from the people. [Emphasis is mine].

⁶⁰ M Malsch ‘The citizen and the criminal justice system’ 8 <http://www.nscr.nl/themas/burger_projE.htm> (accessed 10 July 2015).

⁶¹ M Seleane *The death penalty: Let the people decide* (1996) 136.

that judicial officers are not public representatives, democracy is necessary for the courts to function. Participation by all, and rule by the majority are cardinal principles of democracy. These demand that public opinion be considered in court decisions. To fortify this argument, Cleote proposes that since 'The courts categorise themselves as the mouth piece of society, it would also be popular to give the public what it wants.'⁶²Cleote's argument seems to be better fitted for political decisions than judicial ones since it is the politicians that depend on popularity and therefore require public support. The other reason for supporting public opinion is that the majority should decide. For instance, the Court in *Mbushuu* held that it is society that has a constitutional duty to ensure that its law abiding members are not deprived of their rights.⁶³ This implies a right on the part of the society to decide punishments. Lenta describes the right of participation as the 'right of rights.' He argues that democracy entitles people to govern themselves in accordance with their own judgments, so that if people elect to place decisions about principles in the hands of the judiciary, this amounts to a refusal of self-government.⁶⁴

Supporters of public opinion argue that views of the public should be considered and relied upon when deciding penal sanctions. For instance, in *Mbushuu*, the Court held that in answering whether or not the death penalty is necessary, society should decide.⁶⁵ This view was supported in *S v Mhlakaza*, observing that while courts may not rely upon public opinion in reaching judicial decisions, they must not disregard it. The Court further observed that perhaps the main duty of the court is to lead public opinion.⁶⁶

It is proposed that courts should not ignore public opinion because it forms part of real life and should prevail. The temptation to erect a rigid wall between law and politics, especially in constitutional adjudication, is discouraged, because a moment's reflection will show that constitutional adjudication asks more of the court than to

⁶²Cloete supra note 18, 620.

⁶³*Mbushuu* case supra note 13, pp. 115 & 117.

⁶⁴P Lenta 'Democracy, rights disagreements and judicial review' (2004).

⁶⁵*Mbushuu* case, supra note 13, pp. 116 & 117.

⁶⁶ [1997] 2 All SA 185 (A) 189 g-1.

simply adopt a guardian role when it comes to the Bill of Rights as Max observes:⁶⁷

But equally so, I believe that the Court is under an obligation to engage with and inform the public whose opinion it has refused to follow. To allow the court to exercise power in favour of the few, with little more than a dismissive nod to the many, is to live in a constitutional utopia where judges espouse constitutional 'truths' at the expense of the public becoming restless. It has also been suggested that the people, through the elected representatives, are the ultimate judges of the court system they have created. It is due to this that judges are subject to discipline and even to removal under certain circumstances, and are not beyond criticism of their performance.⁶⁸ The end result of this is that public opinion must be consulted.

Absolute judicial power to decide matters of public concern, it is argued, suffers from a deficit of democratic legitimacy and this has important practical consequences for judicial practice. It has been stated that the public is competent, probably more competent than any other group – elitist, expert or otherwise – to determine the basic ends of public policy, choose top policy makers, appraise the results of public policy, and to say what, in the final analysis, is fair, just and moral.⁶⁹ However, it is not suggested that public opinion is all-wise or that the public interest is always what public opinion says it is on all kinds of questions.⁷⁰ There are also arguments against the role of public opinion in all court decisions as illustrated in the following paragraphs.

Arguments against the Role of Public Opinion in All Court Decisions

It has been argued that the legal position with regard to the role of public opinion in court decisions was that public opinion is irrelevant. That the duty of courts is

⁶⁷ P Max 'Between apology and utopia: The Constitutional Court and public opinion' (2002) SAJHR 1.

⁶⁸ 'The Virginia Bar Association Judiciary Committee Model speech on independence of the judiciary' (edited) <<http://www.vba.org/section/judicial/projects.htm>> (accessed 10 July, 2015).

⁶⁹ Childs *supra* note 17, 350.

⁷⁰Ibid, 354.

to decide in accordance with the Constitution and other laws, and courts should not be reduced to the status of election returning officers. The argument goes on that it would set a very dangerous precedent if every time a court had to make a decision, it had to seek public opinion so that it decides in accordance with it, since this would make the role of courts meaningless.⁷¹ Proponents of this school argue that public opinion has not obtained the status of a sole determining factor in court decisions. For instance, in *Kigula*, the petitioners insisted that even if a majority of the 20 million citizens had been in favour of the death penalty, this would not make the death penalty constitutional as the courts have not given pre-eminence to the role of public opinion on such issues.⁷² This argument brings out the legal position on judicial independence and emphasises judicial ethics. While the legislature and executive may be required to consult their constituencies in making political decisions, courts are not allowed to be influenced by any factor or person as this would have negative effects on the effective and fair dispensation of justice.

Opponents of public opinion argue that courts should not relegate their judicial functions to the masses. For instance, the petitioners in *Kigula* argued that whereas article 126(1) of the Constitution of Uganda enjoined courts to exercise judicial power in conformity with law and aspirations of the people and therefore public opinion might have some relevance, it was, in itself, no substitute for the duty vested in courts to interpret the Constitution and to uphold its provisions without fear or favour.⁷³ This implies that courts could consider public opinion without necessarily being bound by it. This argument that courts cannot allow themselves to be diverted from their duty to act as independent arbiters of constitutions by making choices on the basis that they will find favour with the public was reiterated in *Makwanyane* where the Constitutional Court held that courts do not represent the people because they are 'courts of law' not 'of public opinion'. It was further observed that the determining factor

⁷¹*Kigula* case supra note 1, pp. 113-134.

⁷²*Ibid.*

⁷³*Ibid.*

is the law under consideration. Public opinion, even if expressed in Acts of parliament, could not be decisive.⁷⁴

Another argument against the role of public opinion is that courts cannot follow it since majoritarianism is not wholly applicable in constitutional adjudication. Majoritarianism was thus rejected in *Makwanyane*, holding that the Constitutional Court was not a politically responsible institution to be seized by majoritarian opinion.⁷⁵

Fear of parliamentary sovereignty is another ground for rejecting public opinion. It is feared that since the people speak through legislators as their representatives, allowing their views to hold sway without review by courts, is to invite parliamentary sovereignty. Under parliamentary sovereignty, courts cannot challenge or overrule any legal provision enacted by parliament. This fear was expressed in *Makwanyane* thus:⁷⁶

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. This approach would not offer enough protection of human rights because the legislators as representatives of the society that is wronged by the capital offenders cannot be impartial.

A further argument by the opponents to the role of public opinion in court decisions is that human rights issues like the legality of the death penalty as affecting the right to life are not a decision of the general public. They are left for the courts to determine judiciously. The argument goes further that there should be a distinction when it comes to human rights adjudication because if public opinion was to be canvassed each time individual rights were in jeopardy, there could be little doubt that human rights guarantees would usually come out the loser.⁷⁷ This was illustrated in *Makwanyane* thus:⁷⁸

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.

⁷⁴*Makwanyane* case supra note 12, 89.

⁷⁵*Ibid*, 370.

⁷⁶*Makwanyane* case supra note 12, 88.

⁷⁷ *Schabas* supra note 3, 80.

⁷⁸*Makwanyane* case supra note 12, 111.

One's right to life ... and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

It is the view of the opponents to the role of public opinion in court decisions that consulting public opinion is not a function of courts as it promotes policies that are not to be found in the law itself. This is said to allow courts to prescribe what they believe to be the current public attitudes or standards in regard to these policies. This view was supported by the court in *Bongopi v Council of the State, Ciskei*⁷⁹ holding that courts are not the makers of the law and will enforce the law as they find it. The lack of reliability of sources of public opinion forms part of the grounds for its rejection.

This stems from the usual evidence requirement in judicial matters. The difficulty is partly because people's views change depending on the circumstances and the prevalence of crime. For instance, it has been stressed in *Makwanyane* that enduring values are not the same as fluctuating public opinion. The Court concluded that the sources of public opinion that included newspaper articles, letters to newspapers, debates in the media and representations to the authorities, could hardly be regarded as scientific.⁸⁰ The various methods employed to gather public opinion have proved faulty thus the Court's observation that 'needless to say, there was no similar evidence before us.

Public opinion has not expressed itself in a referendum, nor in any recent legislation.⁸¹ Opponents rely on this problem of lack of reliability of results of opinion polls to argue that since public opinion is determined inter alia through opinion polls, the common defects in the process make the results unattractive. Murray has related faulty opinion polls to inadequate education of the respondents arguing that the two form a ground for the rejection of public opinion. He explains:⁸²

Opinion polls are obviously defective in methodology. The public are not well-informed about the level of sentences that courts in fact impose. The more information people are given about what sentencing judges are doing, and why they are doing it, the less likely they are to believe that there is a gulf

⁷⁹1992 (3) SA 250 (CK) at 265 H - I, as per Pickard CJ.

⁸⁰*Makwanyane* case supra note 12, 259.

⁸¹*Ibid*, 201.

⁸² Murray supra note 5.

between their expectations of the criminal justice system and the reality.

One of the greatest weaknesses of public opinion is that it is hardly formed after evaluation of relevant information. For instance, the South African Constitutional Court rejected public opinion because values intended to be promoted by the Constitution were not to be founded on what might well be uninformed or indeed prejudiced public opinion.⁸³ This criticism is fortified by the general illiteracy of the members of the public and the technical nature of death penalty issues.

Arguments in Support of the Role of Public Opinion in Court Decisions on the Legality of the Death Penalty

Support for public opinion in court decision on the death penalty has been expressed by the Ugandan Constitutional Court basing on the fact that society should decide. For instance the respondents in Kigula successfully argued that the answer to the issue of the constitutionality of the death penalty was to be found from the public which had expressed support for the penalty as per statistics from the Odoki and Ssempebwa Constitutional Commissions reports.⁸⁴ The Constitutional Court agreed with the respondents that the majority of Ugandans still favoured retention of the death penalty and that consequently, the death penalty was not yet viewed as a cruel, inhuman and degrading punishment in Uganda. According to Twinomujuni J (agreeing with the majority) ‘if the majority of Ugandans want violent crimes to be punished by death without any excuse so be it.... The majority of Ugandans approve of it.’⁸⁵

It follows, therefore, that in order to decide whether the death penalty is justifiable under the provisions of a given constitution, public perceptions have to be considered. This has received judicial support in Zimbabwe

⁸³Makwanyanecase supra note 12, 259.

⁸⁴ The Report of the Constitutional Review Commission. Findings and Recommendations 10 December 2003, 13- 172 (Ssempebwa Commission) and The Report of the Uganda Constitutional Commission: Analysis and Recommendations 1993 154 (Odoki Commission)..

⁸⁵Kigulacase supra note 1, 134.

where, discussing the constitutionality of the death penalty, it was held in Catholic Commission that:⁸⁶

... whether a form of ... punishment ... is inhuman or degrading is dependent upon the exercise of a value judgment ...; one must not only take account of the emerging consensus of values in the civilized international community (of which this country is a part) ..., but of contemporary norms operative in Zimbabwe and the sensitivities of its people.

Proponents argue further that public opinion ought to have a say in the determination of serious criminal sanctions like the death penalty. They reason that such sanctions are meant to protect members of the society who should then have a say in the determination of how they are protected. This was reiterated in the US in *Furman v the State of Georgia* where the Court observed that one of the principles inherent in the constitutional prohibition of cruel and unusual punishments was that ‘a severe punishment must not be unacceptable to contemporary society.’⁸⁷ This is supported by the reasoning that public attitudes should be referred to because an effective punishment aims, *inter alia*, at both deterrence and retribution.⁸⁸

It has also been argued that public opinion has a role to play particularly in areas of criminal law. They argue that the law cannot be divorced from the views of the public and in the reality of the social process; an important end of the criminal law is to reinforce and uphold the moral sentiments of the community. As Kanyeihamba states, ‘Criminal law must represent a remarkably high average of the population’s views with regard to the penalties.’⁸⁹ This view may not reflect a perfect position of the effectiveness of criminal sanctions because applying it means that a society dominated by rapists would proscribe no penalty for rape. It seems to follow from this view, that for courts to decide whether the death penalty is appropriate, public opinion should be sought.

Reliance on public opinion is also based on the view that effectiveness of any legal punishment like the

⁸⁶Catholic Commission for Justice and Peace in Zimbabwe v The Attorney General, Sheriff of Zimbabwe and the Director of Prisons 1993 4 SA 239, 248 B-C Gubbay CJ

⁸⁷ 408 US 238 (1972) 277 Brennan J.

⁸⁸ Schabas *supra* note 3, 80.

⁸⁹Kanyeihamba *supra* note 9, pp. 93-94.

death penalty depends to a large extent, on the perspective in which a given society sees it.

It can be discerned from the above discussion that in spite of some weaknesses, public opinion is not wholly irrelevant in issues of punishment. Its supporters argue that it must inevitably contribute to an assessment of a punishment that is appropriate and effective.⁹⁰

Arguments against the Role of Public Opinion in Court Decisions on the Legality of the Death Penalty

To some scholars, no role at all should be played by public opinion in judicial decisions like the legality of the death penalty. To them, judges must make decisions based on the law, and judicial officers who are influenced by public opinion in making decisions violate the solemn oath to apply the law impartially.⁹¹ It has been argued that public support is not a prerequisite for abolition of the death penalty.

This goes against the supporting argument that the majority of the people support the death penalty. For instance, it is illustrated that in France, Germany, The United Kingdom (UK) and Canada, abolition took place even though a majority of the population was opposed to it.⁹² No wonder, it has been observed that the public has never welcomed the abolition of the death penalty.⁹³ It is further suggested that support from the public may not be as inevitable as has been portrayed by some proponents. This is because there is no uniform route to abolition as Schabas illustrates:⁹⁴

In Ireland, it was by referendum. In South Africa, Albania, and Ukraine it has been by Constitutional Court judgment. In Russia, it was by executive fiat. In Turkey, it was by legislation. But in all of these recent cases of abolition of the death penalty, probably the most significant single impetus has been the dynamism of international human rights law.

⁹⁰ Schabas *supra* note 3, 80.

⁹¹ See 'What role should public opinion play in the decisions a judge makes'

<<http://www.cherylforjudge.com/press.php> (accessed 10 July 2015).

⁹² Hood *supra* note 40, 150.

⁹³ Makwanyane case *supra* note 12.

⁹⁴ Schabas *supra* note 3.

The opponents to the role of public opinion in court decisions further argue that the public usually supports the death penalty due to the erroneous belief that it is deterrent. The Court in Makwanyane observed that these erroneous beliefs deserved no homage.⁹⁵

It has been suggested that courts do not need to seek public opinion. That court decisions are a product of judicial deliberations and not public debates and opinions. Referring to the arguments by the state that the decision should have awaited a referendum, Madala J observed:⁹⁶

I do not agree with this submission, if it implies that this Court or any other court must function according to public opinion. In order to arrive at an answer as to the constitutionality or otherwise of the death penalty or any enactment, we do not have to canvass the opinions and attitudes of the public.

This argument was reiterated in Mhlakaza, with the Court observing that courts are independent organs and do not rely on popularity for their functioning. The Court held:⁹⁷

The object of sentencing is not to satisfy public opinion but to serve the public interest Sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. The Court cannot allow itself to be diverted from its duty to act as an independent arbiter by making choices on the basis that it will find favour with the public.

Rejection of the need to consult public opinion was further held in Hungary Decision a case challenging the death penalty that courts are neither bound by the will of the majority nor by public sentiments and that constitutional courts do not hunt for popularity among members of the society. This followed an argument that the appropriate forum to make the decision on the death penalty was parliament and not the Court.⁹⁸

Much of the criticism of public opinion has been directed to the methods of data collection and the fact that the respondents do not possess the necessary informed opinion. This applies to Uganda, South Africa and Tanzania. Keith states that although a substantial number of people support the death penalty, they mostly do not know much about its effects and circumstances.⁹⁹The support is

⁹⁵Mhlakaza case supra note 10, 111.

⁹⁶Makwanyane case supra note, pp. 255 256.

⁹⁷Mhlakaza case supra note 10, 189.

⁹⁸Ibid, pp. 12 & 32.

⁹⁹ Keith supra note 38, 259.

usually borne out of sentiments of anger against capital offenders. The nature of questions posed in opinion polls too has been criticised for not requiring people to think, but to just react spontaneously.¹⁰⁰ Hodgkinson agrees that the opinion of the public sought and found is a very crude indicator, as it invariably requires little more than a ‘yes’ or ‘no’ response.¹⁰¹ It is observed that the scientific aspects of many of these questions loom so large that sometimes the non-scientific aspects well within the competence of the lay man, and not the expert are lost sight of.¹⁰²

It has been argued in Makwanyane that the issue of the constitutionality of the death penalty is a constitutional one for the Courts to decide and not a political one where public opinion has a say. Ruling on its capacity to decide the issue, the court observed:¹⁰³ “The issue is also, however, a constitutional one. It has been put before us squarely and properly. We cannot delegate to Parliament the duty that we bear to determine it, or evade that duty otherwise, but must perform it ourselves.”

Opponents to the role of public opinion insist that the difficulty in determining public opinion makes it unattractive and that clear and reliable evidence to prove public opinion is difficult to find. This was the position in Kigula¹⁰⁴ where the petitioners argued that no accurate figures as to what percentage of the people of Uganda supported the death penalty were presented. They argued that there was no reliable poll that had been taken on the matter and that the report of the Constitutional Review Commission was not determinative of the matter because the sample size was small. The data from the report showed that about 23,656 people (less than 0.12% of Ugandans) addressed the Commission on the question of whether the death penalty should be abolished or retained. From this number, 13,610 supported the retention of the death penalty, while 10,046 advocated abolition. Therefore, it was clear that even among the few people who presented their views to the Commission, 57.5% favoured retention and 42.5% advocated abolition – not an overwhelming majority even

¹⁰⁰ Hodgkinson supra note 43, 239.

¹⁰¹ Ibid.

¹⁰² Childs supra note 17, 352.

¹⁰³ Makwanyane case supra note 12.

¹⁰⁴ Kigula case supra note 1.

of the number who responded, as was claimed by the respondent.¹⁰⁵

This shows that opinion on retention of the death penalty was divided. Therefore, public opinion polls as evidence of support for retention have shortcomings and should not be relied on. Japan is an example where officials cited public opinion, but the polls were criticised by the Japanese Bar Association as imprecise and not fairly interpreted.¹⁰⁶

A related view was held in Makwanyane that there was no evidence of a general social acceptance of the death penalty for murderers such as might conceivably have influenced court conclusions. That the official executive moratorium on the death penalty of 1992, while not evidence of general opinion, did cast serious doubt on the acceptability of capital punishment in South Africa. The Court held further that since 1989, there had been no judicial execution in South Africa.¹⁰⁷

The role of public opinion is further diminished by the difficulty in determining what it is. Asher illustrates this stating that while public opinion is not synonymous with the results of public opinion polls, the two are often treated as though they are identical.¹⁰⁸

General Conclusion

The following conclusions can then be drawn:

Public opinion is difficult to define given the attempt in chapter one. Part of the public opinion finds its way into the judicial system and finally the court decision circles. This then causes the debate as to whether courts should consider public opinion when deciding cases.

According to the existing standards on judicial independence as illustrated in chapter two, courts should not decide according to public perceptions. The practice in Uganda and South Africa shows a difference in the interpretation and application of the standards. The Constitutional Court of South Africa employs a stricter approach than the Ugandan one, when it rejects public

¹⁰⁵ See the Ssempebwa Commission Report *supra* note 84, 172.

¹⁰⁶ Amnesty International *supra* note 29.

¹⁰⁷ Makwanyane case *supra* note 12, 201.

¹⁰⁸ H Asher Polling and the public: What every citizen should know (1991) 20.

opinion and decides on the law and facts in Makwanyane. This difference in approach can be explained from the history and transitional contexts in the respective countries.

The opponents to the role of public opinion in court decisions support their views on the fact that opinion polls are rarely preceded by adequate mass sensitisation, among other reasons. It can be concluded that the public does not usually have enough information to decide on. Most members of the public know little about the circumstances in which murder takes place, the characteristics of murderers and all aspects of capital punishment.¹⁰⁹ Related to inadequate information is lack of education of the public. It appears that most people do not know much about capital punishment, although a substantial number of them support the death penalty.¹¹⁰

Concerning the death penalty in particular, this study reveals that the public is quite misinformed and generally ignorant of even the basic facts about capital punishment in their own jurisdiction.¹¹¹

This study has revealed that there is a dilemma in deciding the role public opinion should play in court decisions. Part of the reasons is that public opinion is not static. Research shows that attitudes towards death penalty can change with more knowledge of facts.¹¹² There appears to be no formula to follow in the abolition as each country finds its own path to a civilised and humane system of criminal law.¹¹³

The courts are expected to be independent, not only from the government whose legislation and conduct they must scrutinise, but also from the public who may have an opinion on the matters that come before the Court.

Courts have a legal defence for their decisions that conflict with public opinion. There continues to be a wide spread view that public opinion ought not to have any direct impact on the judicial decision-making process. From the literature discussed in this study, it is concluded that public opinion should have no role to play in court decisions

¹⁰⁹ Hood *supra* note 40, 153.

¹¹⁰ Keith *supra* note 38, 259.

¹¹¹ Hodgkinson *supra* note 43, 58.

¹¹² Amnesty International *supra* note 29.

¹¹³ Schabas *supra* note 3.

generally and court decisions on the legality of the death penalty in particular.

One would wait and see how the state would react to the Supreme Court ruling. The Attorney General has said the decision is being studied. The public reaction is, as expected, not uniform. Another analytical paper will follow once the Decision has been appreciated fully.