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Abdication of Responsibility or Justifiable Fear of Illegitimacy? The Death Penalty, Gay Rights, and the Role of Public Opinion in Judicial Determinations in Africa†

This Article analyzes the extent to which some of the highest courts in Africa have tackled the potential conflict between the power of judicial review on the one hand, and public opinion on the other, by looking at two controversial subjects, i.e., the death penalty and gay rights, and by considering the influence of public opinion on the judicial determination of the constitutionality of laws that imposed the death penalty or criminalized sodomy. The Article observes that the two principal reasons that can possibly justify the judicial consideration of public opinion are the democratic principles of popular sovereignty and its inherent ideals, and consequentialist theories. Yet, finding the answer to a constitutional issue in public opinion contradicts the very purpose of judicial review as a counter-majoritarian institution. In particular, judicial reliance on public opinion raises serious concerns about the protection of human rights of unpopular minorities and about their causes which often lie at the heart of the issue of constitutionality and judicial review. The Article argues that courts should not exclusively rely on public opinion to determine constitutional issues. It appears that public opinion has played a particularly determinative role in African courts in gay rights decisions, more so than when the constitutionality of the death penalty was the issue. It seems that African courts, with the exception of the South African Constitutional Court, have succumbed to the fear of democratic illegitimacy by abdicating their legal and moral responsibility to decide constitutional human rights issues in a neutral, independent manner.

I. Introduction

. . . [t]he death penalty is cruel, inhuman and degrading . . . But the crucial question is whether it is reasonably neces-

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> sary to protect the right to life. For this, we say it is the society which decides. Tanzanian Court of Appeal
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> Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. South African Constitutional Court
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> 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. 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. And nothing is more likely to expose judges to improper pressure and interference than a belief that they can be intimidated by popular disapproval. Murray Gleeson, Judge, High Court of Australia

The question to what extent courts ought to rely on strong and ascertainable public opinion when resolving constitutional disputes has posed a serious dilemma in the judicial resolution of gay rights and death penalty issues in Africa. This concern generally forms part of the debate over the democratic legitimacy deficit that haunts courts and the judicial decision-making process. When courts invalidate legislation as unconstitutional, the judiciary comes into direct conflict with the notion of democracy. The tension between democracy and judicial review is even more apparent when legislation truly reflects the views of the people.

Courts do not have the "sword" nor the "purse," and they primarily rely on public confidence and support for their legitimacy and for the enforcement of their decisions. This can at times induce them to succumb to popular opinion when adjudicating socially sensitive issues. Still, courts should decide cases based solely on law and facts without fear or favor from any person or segment of society and even, ideally, free of their own biases. Gay rights and the death penalty are issues that may cause courts and judicial review to collide head-on with the principles of democracy and majoritarian governance. It is sometimes argued that failure to consider public opinion makes courts seem "out of touch" with the society they serve, but bowing to public opinion will curtail their independence.[1]

1. Murray Gleeson, Out of Touch or Out of Reach? (Oct. 2, 2004), http://www.highcourt.gov.au/speeches/cj/cj_02oct04.html (last visited Mar. 30, 2011).

This Article analyzes the extent to which some of Africa's highest courts have tackled the potential conflict between judicial review and public opinion by looking at two controversial issues: the death penalty and its enforcement, and the criminalization of sodomy.[2] Section two presents the question whether courts should rely on public opinion in determining constitutional issues. Section three discusses death penalty cases and the influence of public opinion on the judicial determination of the constitutionality of capital punishment. Gay rights and judicial reaction to the democratic challenge in deciding sensitive moral and policy issues are discussed in section four. Section five concludes with the findings.

The countries are selected according to whether their courts have had occasion to address the constitutionality of the death penalty, or its mandatory enforcement, or the constitutionality of laws criminalizing sodomy. The death penalty and the crime of sodomy are selected because there is a common, strong, and often ascertainable majority opinion, whether informed or uninformed, against or in favor of abolition. However, the purpose of this Article is not to assess whether the death penalty or the crime of sodomy violate any constitutional rights, but rather to analyze the role public opinion played in the decisions of the courts.[3]

The Article observes that African Courts, with the exception of the South African Constitutional Court, have shown enormous deference to public opinion in deciding gay rights and death penalty issues. While some courts have given public opinion a determinative function, others have granted it only a peripheral role. On the whole, public opinion has played a particularly determinative role in sodomy cases, and a lesser one in the death penalty debate.

II. Theoretical Debates on the Role of Public Opinion in Judicial Reasoning

For decades, scholars around the world, particularly in the United States, have grappled with the anti-democratic implications of judicial review. The "countermajoritarian" objection[4] to judicial review essentially challenges the power of unelected judges and

2. In this Article, public opinion simply means the ascertainable (either through polls or other surveys) opinion, whether informed or uninformed, of the majority of the adult population of a country on a particular issue, such as whether the death penalty should be maintained or whether sodomy should be criminalized. Of course, public opinion is often shaped and influenced by cultural and religious beliefs, the media, and the overall social context. *See* Roger Hood, The Death Penalty: A World-Wide Perspective 181 (3d ed. 2002).

3. For an assessment of the death penalty in Africa, see Lilian Chenwi, Towards the Abolition of the Death Penalty in Africa: A Human Rights Perspective (2007).

4. Bickel coined the "countermajoritarian" difficulty; *see* Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962).

unaccountable courts to quash decisions of democratically elected bodies. The concern is that granting the final say over constitutional issues to unelected judicial bodies deprives the democratic majority and its elected bodies of the right to govern.[5] According to this concern, "the will of the majority ought to prevail in the fashioning of law and policy."[6]

On the other hand, supporters of the institution of judicial review argue that there is nothing in the concept of democracy that inherently contradicts judicial review[7] which is instrumental in ensuring the protection of individual rights, especially the rights and interests of minorities, which tend to be overlooked by the majority. Judicial review can therefore add to the overall representativeness of a system by protecting the participation of vulnerable groups in the political decision-making processes.[8]

In most democratic states, the power to review the constitutionality of legislation and executive action lies with independent judicial institutions. This reflects the general consensus on the instrumentality of judicial review for building, maintaining, and reinforcing constitutional democracy and the rule of law.[9] Ran Hirschl noted that the recognition of some form of active judicial review characterizes contemporary constitutions,[10] particularly in federal states and in those where the protection of human rights is constitutionally guar-

5. Waldron and Tushnet have been some of the most vocal objectors to judicial review; *see* Jeremy Waldron, *The Core of the Case Against Judicial Review,* 115 YALE L.J. 1346, (2005-2006); JEREMY WALDRON, LAW AND DISAGREEMENT (1999); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); *see also* Mark Tushnet, *Democracy and Judicial Review,* DISSENT MAGAZINE (Spring 2005), http://www.dissentmagazine.org/article/?article=248 (last visited Nov. 29, 2011)—describing judicial review as a "false god" that "stands in the way of self-government."

6. Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution,* 141 U. PA. L. REV. 1, 17 (1992-1993). *See also* WALDRON, LAW AND DISAGREEMENT, *supra* note 5, at ch. 10, and Waldron, *The Core of the Case Against Judicial Review*, *supra* note 5.

7. Dworkin is one of the main proponents of judicial review. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996). *See also* Horacio Spector, *Judicial Review, Rights and Democracy*, 22 LAW AND PHILOSOPHY 285 (2003).

8. MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 43 (1989); Christopher Peters, *Adjudication as Representation,* 97 COLUM. L. REV. 312 (1997).

9. *See generally* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCE OF THE NEW CONSTITUTIONALISM (2004) addressing the apparent and real reasons behind the increasing empowerment of the judiciary—juristocracy; *see also* Pasquale Pasquino, *Constitutional Adjudication and Democracy. Comparative Perspectives: USA, France, Italy*, 11 RATIO JURIS 38, 38 (1998) noting that constitutional control of legislation has become an essential character of the constitutional state.

10. Ran Hirschl, "*'Negative" Rights vs. "Positive" Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order*, 22 HUM. RTS. Q 1060, 1060 (2000); *see also* CAPPELLETTI, *supra* note 8, at 4. Cappelletti noted that "one of the forceful reasons for the expansion of the scope of judicial review is the trend towards the adoption and judicial enforcement of declarations of fundamental rights."

anteed.[11] Within the African context, the African Union Assembly has expressed its satisfaction with the fact that African states have progressively created judicial mechanisms to assure the constitutionality of laws.[12] The theoretical objections to judicial review, based on the majoritarian concept of democracy, have therefore not impeded the constitutional recognition of judicial review worldwide.

Nevertheless, the democratic legitimacy deficit often provides the theoretical basis for opposition and criticism to specific judicial decisions and to the extent of judicial review.[13] Courts and legislators are therefore sensitive to the anti-democratic characteristics of judicial review. In response, courts have developed various interpretative tools to avoid intruding too far into the legitimate bounds of the other branches.[14] Moreover, countries with a strong tradition of parliamentary supremacy have crafted different structural designs which recognize judicial review, but still give the final word regarding constitutional issues to the elected democratic majority.[15]

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11. Warren J. Newman, *Standing to Raise Constitutional Issues in Canada, in* STANDING TO RAISE CONSTITUTIONAL ISSUES: COMPARATIVE PERSPECTIVES 195 (Richard Kay ed., 2005).

12. Decision on the Establishment of an African Framework for Constitutional Justice, Doc. Assembly/AU/17(XVII) Add. 5, para. 4 (2010). It should be noted that the AU is founded on the principles of democracy, rule of law, good governance and human rights—see the Constitutive Act of the AU, Principle 4(m) (2000).

13. As recently as July 8, 2011, the President of the Republic of South Africa, Jacob Zuma, remarked that

> [t]he powers conferred on the courts cannot be superior to the powers resulting from the political and consequently administrative mandate resulting from popular democratic elections . . . . Political disputes resulting from the exercise of powers that have been constitutionally conferred on the ruling party through a popular vote must not be subverted, simply because those who disagree with the ruling party politically, and who cannot win the popular vote during elections, feel other arms of the State are avenues to help them co-govern the country . . . . Political battles must be fought on political platforms.

This comment has triggered a vigorous debate on the exact role of judicial review and judicial accountability in South Africa. *See* Keynote Address by President Jacob Zuma on the Occasion of the 3rd Access to Justice Conference, Pretoria, (July 8, 2011), http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=244907&sn=Detail&pid=71616 (last visited July 14, 2011).

14. Bickel's famous formulation of the "passive virtues" including the political question doctrine and the principle of constitutional avoidance are (self-imposed) judicial interpretative tools that help courts to remain within their constitutional boundaries. *See generally* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS, 111-19 (2d ed. 1986). In the U.S. context, the passive virtues relate to the use of justiciability and policy to avoid judicial decisions that might infringe upon the powers of the other branches. The principle of constitutional avoidance, avoidance of advisory or anticipatory opinions, and avoiding the formulation of constitutional principles broader than what the facts require them to be, are some of them—see the U.S. Supreme Court case of Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).

15. New forms of rights-based judicial review that retain the final say over constitutional issues with the political organs have been designed in Canada, the UK, and New Zealand. For a comparative discussion of these new models, see Stephen

Most of the academic writings have focused on the undemocratic implications of judicial review when courts quash the decisions of representative organs. Not so much has been written on the extent to which judicial bodies should consider public opinion when determining constitutional issues, particularly in the African context. The tension here lies between the exercise of the power of judicial review and direct democracy, as opposed to the tension with representative democracy when courts deem legislation unconstitutional, whether or not the legislation reflects the wish of the people.[16] The former tension arises particularly in cases that address socially, religiously or culturally sensitive and divisive issues, such as the criminalization of sodomy or the imposition of the death penalty.

There are at least three different approaches for the courts to heed public opinion: they can treat public opinion as a (1) decisive, (2) relevant but non-decisive, or (3) irrelevant factor to judicial determination. According to the supporters of a decisive role, courts should rely on public opinion to decide constitutional cases, particularly when social, cultural and political issues are involved. Courts may even rely exclusively on public opinion when even the vaguest constitutional support is lacking. This is how the Supreme Courts of Zimbabwe and Namibia and the Court of Appeal of Botswana argued in the gay rights cases discussed below. The Tanzanian Court of Appeal similarly argued that in the absence of clear constitutional guidance on socially sensitive issues—the death penalty in that particular case—it is for society to decide.

Under this approach, courts are mere receivers and followers of public opinion but cannot play a role in creating or leading it nor reinforce acceptable minority opinion; in other words, courts should merely conform to public opinion and leave opinion leadership to politicians and the media. The main justification for this assertion is that all democratic power belongs to the people and that courts are but part of the social and political framework established to ensure that the people exercise their power. Judicial deviation from the prevailing public opinion therefore constitutes an undue usurpation of the legitimate supreme power of the people.

In addition, there are practical reasons that may explain why courts should be sensitive to public opinion. Cass Sunstein, for instance, attempted to justify why courts may or should be wary of

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Gardbaum, *The New Commonwealth Model of Constitutionalism* 49 AM. J. COMP. L. 707 (2001); and Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8 INT'L. J. OF CONSTITUTIONAL LAW (I-CON) 167 (2010).

16. Du Plessis observed that "the counter-majoritarian dilemma remains particularly acute for courts faced with the practical difficulty of deciding against public opinion"; Max du Plessis, *Between Apology and Utopia: The Constitutional Court and Public Opinion*, 18 SAJHR 1, 11 (2002).

handing down decisions that may cause public outrage.[17] According to Sunstein, in certain circumstances "consequentialist considerations do seem to justify a degree of judicial hesitation."[18] Judicial futility as a result of non-compliance with judicial decisions, the risk of majoritarian backlash, and the possibility of overall harm associated with deciding against public opinion, all require courts to seriously consider possible public indignation before rendering a decision.[19] According to Sunsein, courts should therefore employ minimalist interpretative tools such as Bickel's "passive virtues"[20] to avoid confrontation, particularly in cases where public outrage is likely.[21] This is particularly important in cases where public opinion is bolstered by the political elite. When public opinion is supported by the elected political majority, disregard could seriously undermine the courts' popular and institutional legitimacy.

Those who argue that public opinion should not have any role in judicial determination of constitutional issues encourage courts to follow a principled, law-based adjudication.[22] In *West Virginia State Board of Education v. Barnette*,[23] for instance, the U.S. Supreme Court held that:

> 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. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

In another case, Justice Powell observed in dissent that:[24]

17. Cass R. Sunstein, *If People Would be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155 (2007-2008). Sunstein provides two possible explanations as to why courts should consider public outrage in their decisions: Consequentialist—to avoid bad consequences, and epistemic reasons whereby public outrage might suggest that the court's ruling is incorrect. Sunstein, however, also identifies several reasons why courts should not consider public outrage including (1) judicial fallibility in assessing public outrage due to their lack of appropriate and reliable measurement tools, (2) judicial consideration of public opinion might breed strategic behavior on the part of the public in anticipation of judicial decisions, and (3) because consideration of outrage might produce undue judicial timidity. For criticisms of Sunstein's suggestions, see Andrew B. Coan, *A Response to If People Would be Outraged by Their Rulings, Should Judges Care?,* 60 STAN. L. REV. 213 (2007).

18. *Id.* at 182.

19. *See generally* Sunstein, *supra* note 17, at 170-71.

20. *See generally* BICKEL, *supra* note 14.

21. *See* Sunstein, *supra* note 17, at 211.

22. The idea of a consistent and principled approach to adjudication was particularly championed by Ronald Dworkin; RONALD DWORKIN, LAW'S EMPIRE (1986).

23. 319 U.S. 624, 638 (1943).

24. Furman v. Georgia, 408 U.S. 238, 290 (1972) at 443.

> . . . the weight of the evidence indicates that the public generally has not accepted either the morality or the social merit of the views so passionately advocated by the articulate spokesmen for abolition [of the death penalty]. But however one may assess amorphous ebb and flow of public opinion generally on this volatile issue, this type of inquiry lies at the periphery—not the core—of the judicial process in constitutional cases. The assessment of popular opinion is essentially a legislative, and not a judicial, function.

Most authors and courts, however, support the middle course of encouraging courts to consider, but not to be necessarily bound by strong and ascertainable public opinion.[25] Max du Plessis expressed concern about the practice of the South African Constitutional Court to reject public opinion and argued that the Court has "an obligation to engage with and inform the public whose opinion it has refused to follow."[26] Du Plessis observed that "[t]o 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."[27] Courts can attach different levels of significance to public opinion, depending on the circumstances, such as the clarity of the constitutional provision at stake, and they can seek public opinion to reinforce legal arguments formulated in line with acceptable rules of interpretation. George Kanyeihamba, a former Ugandan judge, for instance, argued that: "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."[28]

The decisions of African courts, except Tanzania and South Africa, on the constitutionality of the death penalty were decided along these lines—relying on the clear constitutional provision that limits the right to life to uphold the death penalty, but stating that the de-

25. In relation to the role of public opinion in sentencing policy and practice, for instance, see Justice T. Cloete, *Note and Comments: Sentencing: Public Expectations and Reaction*, S. AFRICAN. L. J. 618-23 (2000) stating that "it is not wrong that the natural indignation of interested persons and that of the community at large should receive some recognition in the sentences that courts impose"; *see also* George Kanyeihamba, *Reflections of a Judge on the Death Penalty in Uganda*, 2 THE UGANDA LIVING LAW JOURNAL 99 (2004).

26. Du Plessis, *supra* note 16, at 4.

27. Du Plessis, *supra* note 16, at 4. Du Plessis suggested, as a balance between apology (judicial reliance on public opinion) and utopia (the absolute rejection of public opinion), judicial reliance on "critical morality" as opposed to positive/public morality. According to him the distinction between the two is that public morality is the morality accepted and shared by a particular social group, whereas critical morality is that body of generally accepted forms of reasoning which is used to second-guess the public mores (i.e., morality that is informed and defensible)—at 12.

28. Kanyeihamba, *supra* note 25, at 94 & 96.

termination whether to uphold capital punishment has to be made by society. The European Court of Human Rights similarly held that "in a democracy, the law cannot afford to ignore the moral consensus of the community."[29] The African Commission on Human and Peoples' Rights also ruled that justifications for limiting rights "cannot be derived *solely* from popular will."[30]

Courts should not attach determinative value to public opinion. The democratic justification for considering public opinion should be rejected based on the very reasons that created judicial review: to restrict the outcomes of the majoritarian process whether exercised through representatives or directly by the people. The consequentialist justifications for considering public opinion should be abandoned as well, for the simple reason that there is no guarantee that public opinion is well-informed, and that it is fickle.[31] Besides, "judges are unlikely to have good information about the content or the grounds of the public's views."[32] Furthermore, judicial reliance on public opinion may contradict the principles of legal certainty and predictability which are essential tenets of the rule of law. Lack of information as to public opinion, personal bias, potential consequences, and the possibility of breeding strategic public behavior to influence judicial decisions, all militate against judicial reliance on public opinion.[33] In particular, the potential impact of strategic behavior is significant given the influence of organized interest groups which may easily mobilize support for their views[34] and "capture" the democratic process to advance their own interests at the expense of the common good.[35]

Even if it were stable, reliance on public opinion rather than on the constitution would substitute the supremacy of the constitution with majoritarian supremacy, which contradicts the very purpose of human rights protecting vulnerable individuals and groups, whether of a majority or minority, from abuse by an individual, the govern-

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

30. Legal Resources Foundation v. Zambia (2001) AHRLR 84 (ACHPR 2001) para. 70.

31. For criticisms of Sunstein's consequentialist arguments, see Coan, *supra* note 17.

32. In relation to the death penalty, for instance, it is difficult to know whether retribution or deterrence is the reason for the public's opinion. *See* Coan, *supra* note 17, at 225.

33. Sunstein, *supra* note 17, at 176.

34. The impact of strategic public behavior, led by interest groups, can be particularly influential in jurisdictions where judges are elected. Upholding the rights of minorities in the face of majoritarian pressure can lead to the voting out of judges, thus promoting strategic judicial behavior.

35. Tamanaha observed that "the influence of special interests in securing favourable legislation is notorious." BRIAN TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS AND THEORY 101 (2004). Wellington similarly observed that "it is common for individuals who are neither elected nor recently appointed by elected officials to direct or influence significantly the course of government." Harry Wellington, *The Nature of Judicial Review*, 91 YALE. L.R. 486, 490 (1981/1982).

ment, or the public at large. This is particularly worrisome regarding permanent minorities such as gay people or death row inmates who are left virtually helpless by judicial reliance on public opinion.[36]

The arguments propounded by Sunstein ignore that judicial decisions, even if ignored or unfavorable, can help to "inspire political action" and reset the parameters of political dialogue.[37] Moreover, courts should use their legitimacy and influence to be opinion leaders.[38] Public opinion should be ignored when constitutions are adopted with an explicit transformative and ambitious ethos to ensure a "decisive break" with certain social and government traditions and practices, as in the case of the South African Constitution.[39] Especially in such instances, judicial reliance on public opinion defeats the constitutional goal.

Assigning a determinative role to public opinion is also often at odds with actual legislative practice. For example, in countries that expressly prohibit female circumcision or other harmful traditional practices, even though the majority of the population favors them, are courts going to invalidate such laws simply because they do not reflect current public perceptions? Proponents of a decisive role of public opinion should therefore not only anticipate cases where legislation accommodates public opinion but also cases where legislation disregards it. Where the courts face a conflict, the appropriate way to resolve it is to decide cases based, not on often hysterical and fluctuating public opinion, but on the constitution which harbors expressions of public sentiments.

This does not imply that public opinion is irrelevant. Courts should not, and cannot, be completely indifferent to public opinion;

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36. *See* Stephen Macedo, *Against Majoritarianism: Democratic Values and Institutional Design*, 90 B.U.L. REV 1029, 1038 (2010), observing that reliance on the majoritarian rule cannot be fair.

37. Jules Lobel, *Losers, Fools and Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1332 (1994-1995). Lobel observed that "[l]itigation may serve to legitimate a political movement, to publicize the issues raised by that movement, and perhaps to spur political action." Lobel identified inspiring political action as the primary goal of losing cases, i.e., cases that are brought by public interest litigants although the prospect of success is slim. See also Douglas Nejaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2010-2011).

38. Bickel observed in this regard that "[t]he [U.S. Supreme] Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own." BICKEL, *supra* note 14, at 239.

39. The Constitutional Court observed that

> [t]he South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and ambitiously egalitarian ethos, expressly articulated in the Constitution.

S v. Makwanyane and Another (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) para. 262.

they should, whenever ascertainable and strong, acknowledge the views of the public and address, to the extent possible, why such opinion is either reasonable or misinformed, unreasonable or otherwise contrary to the values embodied in the Constitution.[40] In particular, courts have good reason to consider public opinion where constitutional or legislative provisions or jurisprudence, both national and international, offer no guidance as to how to resolve a constitutional dispute. The legislature and the executive, not the courts, are bound to give effect to public opinion by constitutions which in themselves express public compromise or consensus regarding the most important legal, social, political, and economic interests.

The following sections discuss the issues of the constitutionality of the death penalty as well as gay rights and the role public opinion played in shaping the decisions of some of the highest courts of Africa. While the South African Constitutional Court has bowed the least to public opinion, the Tanzanian, Botswana, and Namibian Courts accorded public opinion determinative value. On the whole, public opinion influenced judicial decisions more in the constitutional challenges against the crime of sodomy than the death penalty.

III. Death Penalty Cases

There has been an increasing global trend to abolish the death sentence, especially after the adoption of the Second Optional Protocol to the International Covenant on Civil and Political Rights (1989). In its 2011 Report on the death penalty, Amnesty International observed that 2010 saw fewer executions than 2009.[41] According to the report, as of March 2011, there were sixteen African countries that have abolished the death penalty altogether,[42] while others have imposed a moratorium on executions.

This section analyzes African cases in which either the constitutionality of the death penalty itself or its mandatory nature was challenged. Except for South Africa, the constitutions of the countries considered here contain explicit exceptions to the right to life guarantee.

40. Du Plessis argued that in this regard courts should not simply dismiss public opinion. Rather, they should plausibly show why public opinion is incorrect. This way courts continue to enjoy the public support that sustains them. *See* Du Plessis, *supra* note 16, at 37-40.

41. Amnesty International reported that executions declined from at least 714 people in 2009 to approximately 527 in 2010, excluding China. *See* Death Penalty in 2010: Executing Countries Left Isolated after Decade of Progress, (Mar. 28, 2011), http://www.amnesty.org/en/news-and-updates/report/death-penalty-2010-executing-countries-left-isolated-after-decade-progress (last visited Dec. 7, 2011).

42. The latest country to abolish the death penalty in Africa is Gabon.

A. *The Tanzanian Court of Appeal: An Abdication of Responsibility?*

One of the earliest judicial challenges to the constitutionality of the death penalty in Africa was launched in Tanzania.[43] The Constitution of Tanzania guarantees that "[e]very person has a right to life and subject to law, to protection by the state according to the law."[44] According to the penal code of Tanzania, individuals who are convicted of murder "shall be sentenced to death."[45] In *Mbushuu*, the applicants argued that the death penalty (not just its mandatory nature) violated the protection against torture as well as inhuman treatment and punishment guaranteed under article 13(6) of the Tanzanian Constitution and also under the Universal Declaration of Human Rights and other international instruments ratified by Tanzania. The Court of Appeal held that the death penalty indeed amounted to torture.[46] However, the Court relied on the constitutional provision that permits the limitation of the right to life "in accordance with the law" to hold that the criminal law requiring the death penalty was nevertheless constitutional as it provides a lawful sentence anticipated and permitted by the Tanzanian Constitution.[47] The Court also held that the preservation of the death penalty was in the interest of public opinion.

According to the Court of Appeal, the determination of whether the death penalty was reasonably necessary to protect the right to life should be decided by elected representatives of the people. The Court held that:[48]

> . . . [t]he death penalty is cruel, inhuman and degrading . . . But the crucial question is whether it is reasonably necessary to protect the right to life. For this, we say it is the society which decides. The trial judge acknowledges that presently the society deems the death penalty as reasonably necessary.

The Court thus found the answer to the constitutionality of the death penalty in public opinion. Some authors have criticized the

43. Republic v. Mbushu (1994) LRC 349.

44. Tanzanian Constitution, art. 14.

45. Tanzanian Penal Code, sections 196, 197.

46. To this extent, the Court of Appeal agreed with the High Court's decision in Mbushuu v. Republic [1995] 1 LRC 216; (1994) TLR 154. The High Court, however, declared the provision imposing the death sentence unconstitutional as it amounts to torture. The case was an appeal by the State against the decision of the High Court.

47. This is based on the idea that torture does not include pain or suffering arising from, inherent in or accidental to, a lawful function. *See* Aniceth Gaitan & Bernhard Kuschnik, *Tanzania's Death Penalty Debate: An Epilogue on* Republic v Mbushuu, 10 AHRLJ 459, 468 (2009).

48. Mbushuu and Another v. The Republic Criminal Appeal No. 142 of 1994 (Jan. 30, 1995).

Court for failing to cite any authority for this undue reliance on public opinion to "concretely decide over the constitutionality of a legal provision."[49]

In a recent case the Court of Appeal overturned the decision of the High Court which had ruled unconstitutional a constitutional amendment to ban party-independent political candidacy.[50] The Court of Appeal left the issue in the hands of political representatives. It observed that:[51]

> . . . [a]part from the legal argument we have advanced there is a purely practical issue. Where will we stop? The argument is that the provisions of Art 21 [of the Tanzanian Constitution] have been abridged since a candidate has to belong to and be sponsored by a political party. The next complaint will be why should a parliamentary candidate be required to be of the age of 21 years and a presidential candidate 40 years? Why not be the age of majority of 18 years? Also why should the presidential candidate be a citizen born in Tanzania? Why do we exclude those born outside the Republic simply because their parents were faithfully serving the Republic outside the country? Are all these not abridging Art 21?

Thus the issue of independent candidates is political and not legal.

The Tanzanian Court of Appeal has thus been reluctant to decide politically or socially charged issues. In this context, the Court has failed to protect the "weakest and worst amongst us."[52] The consistent reliance on society or the political process for determining constitutional issues implies that the Court has willingly abdicated its responsibility in favor of purely democratic decision-making processes.

B. The South African Constitutional Court: A Rejection of Public Opinion

The Interim South African Constitution guaranteed the right to life without any qualifications.[53] The Constitutional Court had to determine, in the absence of an explicit exception, whether the imposition of the death penalty authorized by the applicable criminal law violated the right to life or the prohibition against torture and

49. Gaitan & Kuschnik, *supra* note 47, at 476.

50. The Honorable Attorney General v. Reverend Christopher Mtikila, Misc. Civil Cause No 10 of 2005, Court of Appeal (June 2010).

51. *Id*. at 44-45.

52. The South African Constitutional Court in S v. Makwanyane and Another, *supra* note 39, at para. 88.

53. Article 11 of the Constitution of the Republic of South Africa Act No 108 of 1996 simply provides: Everyone has the right to life.

inhuman or degrading treatment and punishment.[54] The Court held that the death penalty indeed violated these constitutional guarantees. Since the State failed to produce evidence that the death penalty in fact deters crime more than alternative sentences, such as life imprisonment, it was not saved by the limitation clause of the constitution which allows the restriction of rights only as a last resort.[55]

One of the main justifications propounded by the Attorney General for retaining the death penalty was the fact that the majority of South Africans favored it in certain extreme cases.[56] The Court brushed the issue of public opinion aside and held that: "[t]he 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."[57]

The Court did not consider public opinion absolutely irrelevant, but it did hold that public opinion must not prevail over the duty of courts to adjudicate constitutional issues, however politically or socially volatile:[58]

> Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. 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.

The Court justified its rulings by the need to protect minorities and others who cannot adequately safeguard their rights and interests through the democratic process. In short, the Constitutional Court essentially ignored the democratic deficit challenge to judicial review by relying on the Constitution which vests the power of judicial review of all legislation in the courts. In the words of the Court, 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

54. S v. Makwanyane, *supra* note 39. This case was resolved under the 1993 Interim Constitution of South Africa.

55. It should be noted that the South African jurisprudence on limitation of rights establishes the applicant's burden of proof that there is a *prima facie* infringement of rights. If there is proof, the respondent, often the State, must show why the limitation is reasonable and necessary.

56. S v. Makwanyane, *supra* note 39, at paras. 87-89.

57. *Id.* at para. 87.

58. *Id.* at para. 88.

they will find favour with the public."[59] Furthermore, the Court observed, "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."[60] The Court therefore declared that only it, and not the people or their representatives, has the authority to say what the Constitution means, regardless of the issues involved.

C. Ugandan Courts and the Death Penalty: Public Opinion Accorded a "Very Relevant" Role

In a constitutional case that challenged the death penalty alleging that it violated the absolute prohibition of cruel, inhuman or degrading punishment or treatment,[61] the applicants argued that the constitutional requirement, which commands courts to exercise judicial power in conformity with the law and the aspirations of the people, does not require courts to succumb to public opinion, particularly in cases where the Constitution is clear.[62] The respondent Attorney General, by contrast, relied on a report according to which the majority of Ugandans still favored the death penalty,[63] and further argued that the Ugandan Constitution only recognized a qualified right to life as opposed to the unqualified right guaranteed in the South African Constitution.[64] The Ugandan Constitutional Court simply relied on the qualifications surrounding the right to life in the Constitution to rule that the death penalty was not unconstitutional. It held that the absolute guarantee against inhuman treatment and punishment did not necessarily abolish the right of the State to impose the death penalty if the sentence was reached in a fair trial by a competent court and confirmed by the highest appellate court.[65] Hence "[i]mposition of death penalty . . . constitutes no cruel, inhuman or degrading punishment."[66]

Yet, the Court found the mandatory death penalty for certain crimes to violate the right to a fair trial, because it deprives convicts faced with a death sentence of the right to be heard in an effort to mitigate the punishment, an opportunity given to convicts facing lesser sentences. The Court noted that such different treatment clearly amounted to an unfair and unjustifiable discrimination and

59. *Id.* at para. 89.
60. *Id.* at para. 88. *See, however,* MANDLA SELEOANE, THE DEATH PENALTY: LET THE PEOPLE DECIDE (1996), arguing that the case for a referendum on the death penalty in South Africa still stands.
61. Susan Kigula & 416 others v. The Attorney General, constitutional petition no 6 of 2003, Constitutional Court of Uganda (2005).
62. *Id*. at 10.
63. *Id.* at 11.
64. *Id*. at 12.
65. *Id*. at 16.
66. *Id*. at 17.

also constituted an intrusion by the legislature into the realm of the judiciary as it deprives courts of the discretion to consider the individual circumstances of the case and of the convict by requiring the death penalty without alternative.[67] The Court also held that a delay in the execution of a death sentence of more than three years after confirmation by the highest appellate court constituted an inordinate delay and was hence unconstitutional.[68]

With regard to the relevance of public opinion, the applicants, drawing on the decision of the South African Constitutional Court in *State v. Makwanyane,* submitted that:[69]

> . . . the duty of the court was to decide in accordance with the Constitution and the court should not be reduced to that of an election returning officer. It would set a very dangerous precedent if every time a Constitutional Court had to decide on a constitutional provision it had to canvass and seek public opinion so that it decides in accordance with it. That would make the role of the Constitution and the Constitutional Court useless and meaningless.

Justice Okello essentially agreed:[70]

> While . . . the norms and aspirations of the people must be taken into consideration when interpreting this Constitution, the language and spirit of the Constitution must not thereby be compromised.

The observations of Twinomujuni, JA deserve to be quoted at some length:[71]

> In Uganda, the death penalty is so clearly spelt out and authorized by the Constitution that it is not necessary to resort to public opinion in order to determine whether it is cruel, inhuman or degrading treatment or punishment or whether it is authorised by the Constitution. However, I do not agree that public opinion is an irrelevant factor. It is a very relevant factor because of the Constitution . . . . In the interpretation of this Constitution and indeed any other law, the views of the people, wherever they can be reasonably accurately ascertained, must be taken into account. This is a command which no court can ignore. There is no equivalent provision in the Constitutions of Tanzania or the Republic of

67. *Id*. at 28.
68. *Id*. at 44.
69. *Id*. at 58.
70. *Id*. at 28.
71. *Id*. at 64.

> South Africa. Their authorities on this matter are not very helpful to Uganda.

It appears that the Constitutional Court misquoted the Constitutional Court of South Africa in that the latter did not say public opinion was completely irrelevant; rather, it said that it may be relevant but not determinative. The Constitutional Court of Uganda did not say that public opinion is determinative either. It simply said that public opinion is not irrelevant and that the views of the people, if they can be accurately ascertained, should be taken into account. But it is apparent that the Constitutional Court of Uganda is willing to accord more import to public opinion than the South African Constitutional Court which generally attributes to public opinion merely a peripheral role. But unlike the Tanzanian Court of Appeal, the Ugandan Constitutional Court did not leave the issue of the death penalty to public opinion entirely. It found a middle ground between the South African and Tanzanian standards.

The Supreme Court of Uganda confirmed the decision of the High Court that the death penalty did not constitute cruel, inhuman treatment or punishment.[72] It also agreed that the mandatory nature of the death penalty was unconstitutional.[73] The Supreme Court did not, however, raise the issue of the extent to which public opinion may influence its interpretation of the Constitution.

D. Kenyan Courts, the Death Penalty and Public Opinion

The Kenyan courts have not yet heard cases challenging the constitutionality of the death penalty as such. They have, however, considered the constitutionality of its mandatory nature for certain crimes.[74] The Court of Appeal held that this mandatory nature is "antithetical to the Constitutional provisions on the protection against inhuman or degrading punishment or treatment and the right to fair trial."[75] Although the death penalty in and of itself was not an issue, the Court observed that "[a]s to the offence of murder and the death penalty, those are issues which lie in the realm of the peoples' representatives in Parliament or the people themselves in a referendum."[76] In support of this ruling, the Court cited a decision of the U.K. Privy Council:[77]

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72. Attorney General v. Susan Kigula & 417 others, constitutional appeal no. 03 of 2006, Supreme Court of Uganda (2009) at 34.

73. *Id.* at 44-45.

74. Godfrey Ngotho Mutiso v. Republic, Criminal Appeal no 17 of 2008, Court of Appeal of Kenya (2010).

75. *Id.* at 35.

76. *Id.* at 20. Compare the decision of the South African Constitutional Court that the issue of the constitutionality of the death penalty should be decided by the Court and may not be referred to a referendum.

77. Reyes v. The Queen [2002] 2 AC 235 at pages 245-46 cited at 21.

> In a modern liberal democracy, it is ordinarily the task of the democratically elected legislature to decide what conduct should be treated as criminal, so as to attract penal consequences, and to decide what kind and measure of punishment such conduct should attract or be liable to attract.

It is not entirely apparent to what extent the Court of Appeal was willing to accord relevance to public opinion in constitutional decision-making. It is clear though that the Court has completely left the decision whether to retain the death penalty to the public or the democratically elected legislature. The position of the Court might have been prompted by the clear constitutional exception to the right to life allowing the death penalty. It remains to be seen how much significance the Court will bestow upon public opinion in relation to issues that are not explicitly addressed in the Constitution, such as the issue of homosexuality, which the Constitution neither clearly recognizes nor rejects.[78]

In summary, while the South African Constitutional Court accorded minimal or no significance to public opinion, the Tanzanian Court of Appeal showed nearly absolute deference to public opinion on the issue of the constitutionality of the death penalty. The position of the Ugandan Supreme Court has been significantly influenced by the unique constitutional provision that requires courts to exercise judicial power "in conformity with the law and with the values, norms and aspirations of the people." The Ugandan Constitutional Court therefore considered public opinion "very relevant" but not necessarily decisive. The approach of the Kenyan Court of Appeal is less clear because the issue before it, the death penalty's mandatory nature, was an issue on which it is hard to identify public opinion. But it appears that the Court is willing to accord significant relevance to public opinion, at least at the level of the Ugandan courts and perhaps even to their Tanzanian counterparts.

IV. Gay Rights Cases

Although gay rights are probably among the most suppressed in Africa, there have been very few judicial challenges to the constitutionality even of the criminalization of sodomy, let alone other aspects of equality between homosexual and heterosexual individu-

78. In fact, in a recent case that concerned the recognition of intersex as a separate gender, the Kenyan High Court rejected the request holding that intersex persons are sufficiently protected in the Kenyan legal system and observed, *inter alia*, that sexuality issues should not be divorced from the attitudes and norms of society, and that to acknowledge intersex as a separate gender would be contrary to societal perceptions—RM v. Attorney General and Four Others, Petition 705 of 2007 reported in [2010] Kenya Law Review (KLR).

als. This section looks at four African courts that have considered the constitutionality of the criminalization of sodomy and the reasoning and importance accorded to public opinion.

A. The Sodomy Case in South Africa

The South African Constitution is the only one in Africa that explicitly prohibits discrimination based on sexual orientation.[79] Aided by this provision, the Constitutional Court has delivered several judgments invalidating statutes that draw distinctions based on sexual orientation. In fact, its constitutional jurisprudence on unfair discrimination based on sexual orientation is richer than that on any other prohibited ground.[80] In a short history of judicial activism and courage, the Constitutional Court has not only found the criminalization of sodomy to be unfair discrimination[81] but also rendered several decisions that have reaffirmed the equal moral and legal status of homosexual and heterosexual relationships. This jurisprudence ultimately culminated in the *Fourie*[82] case where the State was ordered to legalize same-sex marriages.[83] This was achieved amid serious challenges, both from the political majority in parliament as well as the majority of the population. The Constitutional Court invalidated the criminalization of sodomy (both statutory and common law) as inconsistent with the constitutional prohibition of discrimination based on sexual orientation.

Although the Court did not explicitly address the relevance of public opinion as it did in the *Makwanyane* case, there are several indications that the Court considered itself obligated to protect minorities, both social and political. It held that "gay men are a permanent minority in society,"[84] and it further observed that:[85]

> The impact of discrimination on gays and lesbians is rendered more serious and their vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves.

In a similar vein, the Court held that the sodomy laws have "no other purpose than to criminalise conduct which fails to conform with the

79. Sections 9(1)&(2).

80. I CURRIE & J DE WAAL, THE BILL OF RIGHTS HANDBOOK 251, (5th ed. 2005).

81. National Coalition of Gay and Lesbian Equality & Another v. Minister of Justice & Others 1999 (1) SA 6 CC, 1998 (1) BCLR 1517 (CC). (SA Sodomy case).

82. Minister of Home Affairs & Another v. Fourie & Others 2006 (1) SA 524(CC), 2006 (3) BCLR 355 (CC).

83. For a discussion of the cases and implications on sexual orientation, see CURRIE & DE WAAL, *supra* note 80; and STUART WOOLMAN ET AL, CONSTITUTIONAL LAW OF SOUTH AFRICA 35-64, 35-69 (2d ed. 2007).

84. SA Sodomy case, *supra* note 81, at 26(a).

85. *Id.*, at 20-1, 25.

moral or religious views of a section of society."[86] According to the Court, the State "may not impose orthodoxies of belief systems [even of the majority] on the whole of society."[87] As a result:[88]

> . . . gays and lesbians cannot be forced to conform to heterosexual norms; they can now break out of their invisibility and live as full and free citizens of South Africa . . . . [t]hose persons who for reasons of religious or other belief disagree with or condemn homosexual conduct are free to hold and articulate such beliefs. Yet, while the Constitution protects the right of people to continue with such beliefs, it does not allow the state to turn these beliefs -even in moderate or gentle versions- into dogma imposed on the whole of society.

In a subsequent case that challenged the prohibition of gay marriages, the Court reiterated that:[89]

> [i]n the open and democratic society contemplated by the [South African] Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group, the law will legitimately acknowledge a diversity of strongly-held opinions on matters of great public controversy . . . . [the Court] stress[es] the qualification that there must be no prejudice to basic rights. Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom.

Tying itself to the mast of the constitutional inclusion of sexual orientation as one of the prohibited grounds for discrimination, the Constitutional Court has transformed the legal regime and, with the support of advocacy and awareness creation campaigns, increasingly

86. *Id.* at 26(b).
87. *Id.* at 137.
88. *Id.* at 137.
89. Minister of Home Affairs and Another v. Fourie and Another (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) para. 94.

also the public opinion on homosexual behavior and relationships.[90] The value attached to public opinion, or rather public prejudice, by the Constitutional Court is even less significant in gay rights cases than in the *Makwanyane* decision. The Court has made it clear that it exists primarily to protect the rights of (permanent) losers in the political game.

B. The Courts of Namibia: Sole Reliance on Public Opinion

In the *Frank* case, the Namibian Supreme Court had to decide whether the refusal to issue a permanent residence permit to the applicant, a German national who had a lesbian relationship with a Namibian citizen, violated the right to non-discrimination and privacy.[91] Because lesbian marriage was not permitted in Namibia, the partners could not get married, which would have entitled the applicant to apply for Namibian nationality.

The Court held that Parliament is one of the most important institutions to express the present day values of the people.[92] It also held that fundamental rights involving value judgments must be interpreted in accordance with the current values of the Namibian people.[93] It further observed that "public opinion as established in properly conducted opinion polls" and "referenda" are some of the sources from which objective factors can be gleaned.[94] According to the Court, "in interpreting and applying the fundamental rights in Namibia, the value judgment that it [the Court] has to make must take cognisance in the first place of the traditions, values, aspirations, expectations and sensitivities of the people of Namibia."[95] Failure to recognize this principle of interpretation, the Court noted, "would strengthen the perception that the Courts are imposing foreign values on the Namibian people."[96] It further observed that "the President of Namibia as well as the Minister of Home Affairs have expressed themselves repeatedly in public against the recognition and encouragement of homosexual relationships."[97] The "social norms and values" of the Namibian people did not recognize lesbian

90. The judgments are yet to have an impact on the grassroots level as there have been numerous reports of "corrective" rape, killing and harassment of LGBIT people especially in poor black townships.

91. Chairperson of the Immigration Selection Board v. Frank and Another 2001 NR 107 (SC) (Frank case). For an analysis and critique of this case, see Dunia P. Zongwe, *Equality Has No Mother But Sisters: The Preference for Comparative Law over International Law in the Equality Jurisprudence in Namibia, in* INTERNATIONAL LAW AND DOMESTIC HUMAN RIGHTS LITIGATION IN AFRICA (Magnus Killander ed., 2010).

92. Frank case, *supra* note 91, at 106.

93. *Id.* at 102.

94. *Id.* at 106-07.

95. *Id.* at 114.

96. *Id.* at 115.

97. *Id.* at 132.

relationships and hence the criminalization of sodomy did not violate the Constitution of Namibia.[98] The Court concluded that it is:[99]

> . . . the right and responsibility of Parliament to provide in legislation which classes or categories of persons should be given special dispensation and which not. In this function Parliament is entitled, *inter alia,* to consider and give effect to the traditions, norms, values and expectations of the Namibian people . . . .

According to the Court, the social norms and values that have been codified through legislation by Parliament may not be tampered with by the Courts. Clearly, the Court held that public opinion, as expressed in the choices made by elected representatives, are superior to the Namibian Constitution in cases that involve basic value judgments. Public opinion therefore played a decisive role in constitutional analysis.

C. Sodomy Case in Botswana: Public Opinion as Determinative

In a case that challenged the criminalization of sodomy in Botswana,[100] the High Court ruled that the statute did not constitute discrimination based on gender or sex because the law prohibited sodomy not only between men but also between a man and a woman. The Court also held that the rights to privacy, expression and association may be infringed by legislation enacted to protect public morality. It further opined that the identification of moral norms or values is the preserve of society. Criminalizing sodomy, according to the Court, was necessary to prevent likely harm not only to society as a whole, but also to the individual, male or female. The Court essentially ruled that because society is conservative and thus outraged by homosexual acts, the criminalization of sodomy was constitutional.

On review, the Court of Appeal of Botswana held that discrimination on the basis of sexual orientation was not prohibited by the Botswana Constitution.[101] The Court therefore modified the question and asked: "whether in Botswana at present time the circumstances demand the decriminalization of homosexual practices as between consenting adult males, or put somewhat differently, is there a class or group of gay men who require protection under section 3 of the

98. *Id.* at 133.
99. *Id.* at 145.
100. Kanane v. The State, High Court Criminal Trial 9 of 1995, High Court of Botswana (Kanane case). For a detailed analysis and critique of the gay rights cases in Botswana, see Kealegoga N Bojosi, *An Opportunity Missed for Gay Rights in Botswana: Utjiwa Kanane v The State*, 20 SAJHR 466, (2004); and Mboki Mbakiso Chilisa, *Two Steps Back for Human Rights: A Critique of the Kanane Case*, 1 THE BOTSWANA REVIEW OF ETHICS, LAW AND HIV/AIDS 42 (2007).
101. Kanane v. The State, Criminal Appeal 9 of 2003 (Unreported).

Constitution?"[102] This shifted the burden to the applicant to prove that public opinion in Botswana has changed to an extent that required decriminalizing sodomy. Since the appellant could not adduce the requisite evidence, the sodomy laws were upheld. The Court observed that public opinion mattered in constitutional interpretation, especially when it has been expressed in parliamentary legislation. The judges found that "the courts would be loath to fly in the face of public opinion, especially if expressed through legislation passed by those elected by the public to represent them in the legislature."[103] It concluded that "so far from moving towards the liberation of sexual conduct by regarding homosexual practices as acceptable conduct, such indications as there are show a hardening of a contrary attitude."

In the end, the Court of Appeal did not really address whether the criminalization of sodomy was *constitutional*, as it should have done. It simply asked itself whether the criminalization of sodomy was in line with public opinion and preferred to ignore the supremacy of the Constitution of Botswana. Mboki Chilisa criticized the judgment as a reflection of a conservative and positivist approach. He concluded that:[104]

> The conservative segment of society may be entitled to *feel* that homosexuality is morally wrong and disgusting and may be entitled to *express* those views in the exercise of their constitutional right to freedom of speech and conscience. However, their feelings, expression and prejudices should not be legislated for at the expense of other individuals' rights to privacy and equality. The Court seemed to have missed this point in failing to strike down the prohibition against homosexual conduct and justifying such failure on the basis that the majority of Batswana support such a prohibition.

Just like in Namibia, public opinion thus played a determinative role in the judicial resolution of the constitutionality of the criminalization of sodomy in the Botswana Court of Appeal.

D. Zimbabwean Courts: Public Opinion as Determinative

Both the Namibian Supreme Court and the Botswana Court of Appeal were heavily influenced by the decision of the Zimbabwean

102. The formulation of the issue was rather strange and detrimental to the applicant as the question should have been whether or not the criminalization of sodomy violated the bill of rights and not whether it was contrary to prevalent public opinion.

103. Kanane case, *supra* note 100, at 23.

104. Chilisa, *supra* note 100, at 51.

Supreme Court[105] which had held that "[f]rom the point of view of law reform, it cannot be said that public opinion has so changed and developed in Zimbabwe that the courts must yield to that new perception and declare the old law obsolete." The Zimbabwean Court further held that it must be "guided by Zimbabwe's conservatism in sexual matters" in interpreting the Constitution. It upheld the sodomy laws because it was hard to prove that "the 'social norms and values' of Zimbabwe are pushing us [the Court] to decriminalize consensual sodomy." It concluded that "[the Supreme] Court, lacking the democratic credentials of a properly elected Parliament, should strain to place a sexually liberal interpretation on the Constitution of a country whose social norms and values in such matters tend to be conservative." The Court "did not believe that it is the function or right of this Court, undemocratically appointed as it is, to seek to modernize the social mores of the State or of society at large."
The Zimbabwean Supreme Court essentially held that the answer to constitutional rights over sensitive issues is to be found in public opinion, unreliable and changing as it is. This line of thinking encouraged courts of neighboring Namibia and Botswana to apply a similar standard.

V. Conclusion

The Article has presented the theoretical tussle over the role of public opinion in determining constitutional human rights issues. It argues that constitutional adjudicators should not attach determinative value to public opinion as that contradicts the duty to uphold the Constitution and to protect those unable to influence the democratic process. It considered the actual practice of African courts and their decisions as to the constitutionality of the death penalty and the criminalization of sodomy. Public opinion as a determinative factor in a constitutional dispensation is stronger in gay rights cases than in death penalty cases, perhaps due to judicial anticipation of considerably more serious public outrage over the decriminalization of sodomy than the abolition the death penalty, i.e., due to judicial pragmatism arising out of the need to avoid challenging not only public opinion but also an unsupportive or even hostile political elite.[106] Except in the Tanzanian Court of Appeal, the bow to public opinion to resolve

105. S v. Banana, 2000(2) SACR 1 (ZSC). The reference to Zimbabwe and not South Africa was due to the fact that the South African Constitution explicitly prohibits discrimination based on sexual orientation while the constitutions of Zimbabwe, Botswana and Namibia have no similar explicit provision protecting sexual orientation.

106. In this regard, Sunstein argued that a consequentialist judicial approach may justify restraint on the part of courts if decisions are likely to attract serious public outrage. *See* Sunstein, *supra* note 17, at 170. Roux also observed that courts in new democracies act cautiously not to endanger their institutional security even if this sometimes means subtly compromising principled judicial approach. *See generally*

the constitutionality issue of the death penalty was secondary to the reliance on the explicit constitutional provisions that condoned it.[107] In the gay rights cases, on the other hand, in the absence of explicit constitutional provisions preempting the issue of discrimination against gay people as in South Africa, the African courts considered here relied largely, and in some cases almost exclusively, on public opinion. The courts either explicitly, as is the case in Zimbabwe, or implicitly as is the case in Namibia and Botswana, alluded to their lack of democratic pedigree in deciding issues in which there is significant social disagreement and in relation to which there is no explicit constitutional guidance.

The approach taken by all the courts other than the South African Constitutional Court raises serious concerns for unpopular minorities and causes which are doomed to lose and are often overlooked or systematically disfavored in the democratic decision-making process. If courts resort to popular opinion to resolve constitutional issues, they are reinforcing, rather than tackling the potential abuse and manipulation of the democratic process and of populism. Hiding behind the cloak of the popular to determine the fate of the unpopular is to assuage the fear of illegitimacy at the expense of human rights, a troublesome abdication of constitutionally and morally imposed judicial responsibility to enforce the constitution without fear or favor. If African courts are to remain true to the values embedded in constitutional human rights, they should not rely on public opinion as a determining factor in resolving constitutional human rights issues, especially with respect to the most socially controversial ones.

Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 INT'L. J. OF CONSTITUTIONAL LAW (I-CON) 106 (2009).

107. It should be noted that in all the death penalty cases where public opinion was considered, the death penalty was upheld. Where public opinion was not considered, the death penalty was ruled unconstitutional.