The politics of executive-mindedness: Rossouw v. Sachs

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Paper for LSA Conference, June 1991

Introduction

This paper is my attempt at a response to a remark made by Michael Lobban last year, when he, Rick Abel and I were discussing our work. Michael said that he had been surprised to find that jurisprudential work on law and politics in South Africa had focused exclusively on judicial reasoning in 'hard cases' - cases that turn on points of law. One effect of such a focus was the utter neglect of the way in which judges and other judicial officers had deployed evidence and procedure in constructing the discourse of political trials.

As a continuing offender in this regard, I am troubled by this remark. My response to it is not offered as an excuse for my own research project - the implications for mainstream theories of adjudication of an inquiry into judicial interpretations of apartheid laws.[1] Rather it is to show how that project is not in any way distinct from the perhaps more important project of inquiring into the jurisprudence of political trials. Indeed, my suggestion will be that these two projects are of a piece, given one particular assumption.

This assumption is the one best expressed by Antonio Gramsci's view of ideology.[2] As I understand him, Gramsci thought that all people are philosophers in the following sense. They will have a conception of the political and social world which will inform the way in which they act in that world. That conception will be implicit in the way that they act. But they may also find it necessary to elaborate in more or less abstract ways what that conception is. The more abstract the elaboration, the more it will amount to a justification for the way in which they act. Ideologies are then at base justifications for ways of acting in the world. The clash between the different values which figure in the most abstract elaborations of particular ideologies is therefore very important.

The ideology that is hegemonic or dominant will 'reflect' reality. Its dominance is in part assured by the fact that powerful social and political actors are committed to it; they think it is right or justified. But it is also assured by the fact that social and political reality gets largely constructed in accordance with the values of that ideology. Any attempt to contest a hegemonic ideology has therefore to do at least two things. First, it has to contest the claim to reflect reality by showing that things could be different. But, secondly, it can only make sense of the claim as to how things could be different in the light of an argument about how things should be different.

In short, a Gramscian account of ideology assumes that one cannot understand social and political reality without engaging

in arguments about political justification. There will be a jurisprudence of political trials and a jurisprudence which determines the decision of hard cases.

On this view of ideology, judges will at times provide more or less fully elaborated philosophical justifications for their decisions. This occurs when they have to write a judgment which justifies their decision on a point of law. Far rarer are elaborated justifications for the ways in which they evaluated evidence during the trial. In order to find out how it is that a judge went about this evaluation, and what his justification for it was, one will usually have to be familiar not only with the complete record of the trial but also with relevant events outside of the court room both before and during the trial. This far more daunting task explains perhaps the paucity of work in this area. Nevertheless, if this account of ideology is correct, one should expect that some core set of values, one jurisprudence, will determine both the hard cases and the trials decided by judges who hold to a particular ideology. And it that possibility that I want to investigate today.

Executive Mindedness in Hard Cases

The charge that a judge is 'executive-minded' has its origin in Lord Atkin's description of the majority reasoning in his dissent in a case heard at the height of World War II - Liversidge v. Anderson.[3] In issue was an Order in Council - Defence Regulation 18B - which stated that the Home Secretary, in

order to justify a detention order, had to have 'reasonable cause to believe' certain facts about the person detained. The court held that this did not mean that his decision was reviewable in a court of law.

In Rossouw v Sachs,[4] a 1964 decision of the Appellate Division, Ogilive Thompson J.A. held that the South African judges should follow the interpretative approach set out by Lord Wright in one of the majority judgments in Liversidge. Lord Wright had said:

> [T]he only question is as to the precise nature of the powers given. The answer to that question is only to be found by scrutinizing the language of the enactment in the light of the surrounding circumstances and the general policy and object of the measure.[5]

In Ogilvie Thompson's own words, a court should determine the meaning of the section upon an examination of its wording in the light of the circumstances whereunder it was enacted and of its general policy and object.[6]

In Rossouw, the statutory section to which the judge is referring is section 17 of Act 37 of 1963, or the 90-day law, which provided for the detention for up to 90 days of people suspected of various offences. In issue, was whether the terms of detention meant that it was in the discretion of the detaining officer whether a detainee should be allowed reading and writing material. Ogilvie Thompson decided that it was within the

officer's discretion since, on his interpretation of section 17, its objective was to 'induce detainees to speak'.

This particular decision might not amount to much in the grand scheme of oppression in South Africa. Nevertheless, Ogilvie Thompson's statement of an appropriate interpretative approach has been cited with approval in almost every important decision on security legislation since Rossouw which has in effect come down in favour of the executive.

This might seem puzzling just because the approach seems merely to be that judges should interpret statutes in the light of the appropriate legal context.[7] One might then suppose that the statement is just a facade for a judge's determination to grease the wheels of executive action. But there is something distinctive about the approach, already suggested in these more abstract statements of it, once we understand a rather more concrete statement. In Rossouw, Ogilivie Thompson said of the issue in the case:

> The problem thus posed is easier stated than solved: it essentially derives from the failure of the Legislature to make either directly or indirectly in sec. 17 itself, or indirectly by way of incorporating therein an enabling power to make regulations, any express provision (save such as is disclosed in the words of the section itself) prescribing conditions whereunder detainees are to be held. The interests of clarity would have been better served had such conditions ... been prescribed, instead of leaving, in a matter so vitally concerning the liberty of the individual, the intention of the Legislature to be determined by the Court from the relatively brief, though manifestly stringent, terms of the section itself.[8]

As in Liversidge, the case is hard, it is controversial what the law is, because in play is a common law value which requires that judges interpret the law so as to respect aspects of individual liberty. While both Ogilvie Thompson and the majority in Liversidge express, I think sincerely, their desire to interpret the legislation in issue as if it were intended to respect this value, they find this course closed to them.

That is because they adopt a 'plain fact' approach to interpretation. In terms of that approach, they adopt a political doctrine of judicial responsibility which requires them to interpret statutes in such a manner as to determine what legislators in fact intended the law to mean. They should thus focus, at least initially, on the terms of the statute itself. And they should be alert for indications, no matter how implicit, as to actual legislative intention. It is only if interpretative tests designed to determine facts about legislative intention come up with nothing that plain fact judges will resort to other sources of legal meaning, for example, the common law.

Their doctrine of judicial responsibility is a political one because plain fact judges regard it as their legal duty to adopt their interpretative approach. The doctrine is standardly justified in a majoritarian fashion. Judges should interpret the law in accordance with the way that the majority of legislators wanted it to be interpreted, because that want is to be taken as representative of what the majority of the electorate wanted.

Now in a situation such as the South African one, the second limb of the justification is starkly absent, just because most adults are denied the franchise. But notice that the plain fact approach can operate if judges consider it sufficient legitimation that the majority of legislators wanted the statute interpreted in a particular way. Why should they think that?

The answer lies in the political and legal theory of Thomas Hobbes. According to Hobbes, individuals left to their own devices in a state of nature will end up in a state of war, one against all, because of the poverty of individual reason. There is only one thing on which individual reasoners should rationally agree - that any social order is preferable to the chaos of the state of nature. What makes order possible, is the establishment of a sovereign with unlimited power over his subjects. If they take his commands as determining their legal and their moral obligations, the slide into chaos can be prevented. In order for his commands to do the job of preventing the slide into chaos, their content must be determined by purely factual, publicly accessible tests. For if it is controversial what the content of the commands is, citizens are thrown on the resource of their natural reason and chaos looms.

On this picture, judges have the duty to interpret the law - the sovereign's commands - as he intended them to be interpreted, even if it is unclear sometimes what he intended. The common law is a secondary and poor resource of legal meaning, to be resorted to only if plain fact interpretative tests fail to come up with

anything. Moreover, judges should regard themselves as justified in enforcing the law against the wishes of even the majority of the population, because it is irrational to fail to perceive that any order is preferable to chaos.

That, in my view, is the jurisprudence that underpins the plain fact approach to legal interpretation. Most important of all is its justificatory feature. It provides a justification for a conception of law, for constructing interpretative tests which cohere with that conception, and for imposing that kind of law on an oppressed majority.

It might be the case that a judge will adopt the plain fact approach because it coheres, say, with his racist beliefs. The approach will, that is, deliver results that serve to uphold the status quo. Nevertheless, the approach is not a mere facade but a way of making sense of and justifying a conception of legal order and of the rule of law. If challenged as to his plain fact way of understanding the law, a racist judge will not try to justify his interpretations by saying that they cohere with his racist beliefs. Rather he will say that his interpretations reflect the law that exists as a matter of fact, by which he means the law the Legislature actually intended to enact. And if asked to justify the Legislature's authority to make law, he will say that as a politically responsible judge it is not his business to ask such questions about the legitimacy of sovereign power. Finally, it does, as I have indicated, happen that judges who do not like the status quo will adopt the plain fact approach. The approach

creates problems of dissonance for them since they have to apply law whose content they find morally repugnant. But the approach tells them that it is the Legislature's job to decide on what is in fact morally appropriate.[9]

Does the plain fact approach inform the way that judges approach issues of evidence in political trials?

Plain Fact Judges, States of Emergency, and Political Trials

The political justification for the plain fact approach becomes more manifest in the interpretation of legislation which gives executive officials emergency or quasi-emergency powers to deal with political opposition. That is to be expected because the granting of such powers indicates that it is the sovereign's perception that the social order is under direct attack. In accordance with the political justification for the plain fact approach, it is the judicial duty to take this perception as given and to interpret the law accordingly.

Sometimes judges will happen to agree with this perception, witness Steyn. J.'s extraordinary statement in Bloem v. State President of the RSA.[10] But it does not matter whether they do or not. What matters is that they adopt the plain fact approach; for the politics of that approach requires judges to interpret in accordance with the sovereign's perceptions, whatever they themselves might think.

However, the political justification for the approach is just more manifest in the interpretation of such statutes. The

history of South African security legislation is one in which indications of legislative intention as to how security statutes should be interpreted became more obvious. And judicial appointments since the late 1950s were largely of judges who the government could count on to adopt a plain fact approach which would fasten on to such indications, whether or not the judges were in fact government supporters.

A rather similar history is in evidence in political trials. The government's answer to the extraparliamentary opposition organized around the Freedom Charter was the arrest in December 1956 of 156 leading activists of all races committed to extraparliamentary action as the means to bring about a nonracial democracy. This mass arrest heralded the start of the mammoth 'Treason Trial', in which the government sought to break political opposition in South Africa by convicting the leaders of extraparliamentary, peaceful opposition of treason.

In this respect the trial was a miserable failure. By 1961 all the accused had either been dismissed or acquitted. But the implications of the trial for the political and legal development of South Africa were immense. The prosecution sought to prove a treasonable conspiracy by placing the Freedom Charter in a context of 'the world-wide communist movement and the history of the extra-parliamentary opposition in South Africa.'[11] Its argument can be summarized as follows. The Freedom Charter was radically incompatible with the existing political set up. The government would never be moved by non-violent and lawful

political action. Therefore those who supported the Freedom Charter must be committed to, and engaged in a conspiracy to promote, violent and illegal political action with the objective of overthrowing the State.

The defence, as Thomas Karis put it, 'denied the Prosecution's assumption that no middle ground existed between the ballot box and treason.'[12] The defence argument was that the activities of the accused were characteristic of extraparliamentary and non-violent movements in countries that excluded a large selection of the population from the political process. This argument won the day. But, as Karis perceptively commented at the time, the trial posed two important questions:

> For unenfranchised and dissatisfied non-whites, the question is: does the breadth of the Prosecution's argument leave open any extraparliamentary outlets for free speech or agitation? For whites seeking contact with these non-whites, the question: does the involvement in the trial of men like ex-Chief Luthuli and Professor Mathews mean that contact is possible only with the Africans who are in basic agreement with official policy?[13]

As events proved, the answer to both questions was 'yes'. The security legislation enacted since the trial, and executive action in terms of that legislation, made it crystal clear that the government was determined to prevent the extraparliamentary opposition from occupying any middle ground between the inevitably illegal politics of armed struggle and inaction.

Further, as I have already suggested, when the terms of

security legislation were questioned in courts of law, plain fact judges could generally be relied on to hold that security forces were acting within their powers, and thus in accordance with law. Even more significant was that in trial after trial, magistrates and judges accepted the prosecution's argument that opposition to the government was opposition to the state and therefore either treason or in contravention of one or security statute.

The drift of my argument should now be clear. In order for judges to take that stance they had to accept that whether or not the government was right in its perception of a 'total onslaught' which threatened social order in South Africa, nevertheless, as the armoury of security legislation made clear, it <u>in fact</u> was the majority of legislators' perception that there was such an onslaught.

It is therefore no surprise to find that the political context which informed the accuseds' decision to take this or that political action was generally disregarded in deciding the issues of evidence and thus guilt. The context in which evidence was evaluated was one which would tend to screen out any claims which contested the legitimacy of executive policy. If this is right, then rules of evidence would have been used and abused depending on whether they tended to perform the screening function. Indeed, until very recently judicial officers, and I suspect to some extent lawyers representing political accused, thought that the proper place to argue on the basis of such a context was in mitigation of sentence.

An important change in this regard was signalled in Van der Walt J.s judgment in S v. Mayekiso,[14] where the judge found several politically prominent residents of Alexandra township not guilty of treason. He took seriously the story that residents of Alexandra had to tell about the conditions which constrained political activity in the townships. And taking into account that story, he saw little option for them, if they were to engage in politics at all, to have done otherwise. Thus he concluded:

> Treason is a crime in a very special category. Where the ideas and political aspirations of those charged are part of the issue - in this very strange and complex society of ours ... - and given the spectrum of the politics of our citizens from black to white and from far left to far right - in most cases legitimate, and the often intemperate and exaggerated language and liberally spiced with current political cliches, most of these citizens just striving for a better South Africa - a charge of treason should be very carefully considered and reconsidered before it is brought before the court.[15]

In order for the judge to come to this finding, he had to be able to listen sympathetically to the story Alexandra residents had to tell. And in order to do that, he had to assume that it legitimate for citizens of a particular jurisdiction to engage in a range of political activity in order to achieve some measure of control over their lives. Moreover, he had to hold to that assumption in the face of a barrage of statutes and past judicial practice to the contrary. For him facts about legislative intention and past judicial practice are not constitutive of legal order. What justifies and therefore constitutes legal order

are political principles, apparent I think in even this brief extract, which for convenience I will refer to as principles of democracy.

The same conception of legal order underpins the interpretative approach adopted by those few judges who over the years resisted a plain fact approach to the interpretation of security statutes. These judges adopt what I call a 'common law approach' because it insists that statutes have to be interpreted in a context constituted by certain common law values. Most notably, these are values of fairness, natural justice, reasonableness and equality. Statutes are interpreted as if they were intended to cohere with these values, even if it is very difficult to make this appear to be the case. But what justifies pushing interpretation to the limits, overriding even very clearly expressed plain facts as to legislative intention, is the idea that statutes are justified only on condition that they are the kinds of statutes a democratic legislature would pass. Legal authority, the law-making power, is conditional on political principles to which judges should resort in interpreting legislation.

The Common Law Approach and Democracy

In conclusion, I want to draw together the several themes of this paper, on the basis of a passage from Wigmore's Evidence. It was quoted in an important common law dissent to a decision which

did more than any other to entrench the plain fact approach outlined in Rossouw.[16]

From the point of view of society's right to our testimony, it has to be remembered that the demand comes, not from any one person or set of persons, but from the community as a whole - from justice as an institution, and from law and order as indispensable elements of civilized life ... The vital process of justice must continue unceasingly; a single cessation typifies the prostration of society; a series would involve its dissolution.

Wigmore's point is that a proper right of testimony is essential not only to law but to the very social order that makes civilized life possible. A parallel point lies in the significance of the several states of emergency under which until recently South Africans lived. The combination of emergency legislation with a dominant plain fact approach to interpretation meant that the security forces had a free hand. As one prominent lawyer said, a state of 'official lawlessness' prevailed.[17] In effect, no matter one's conception of the rule of law, one would have to admit that legal order had disappeared.

My suggestion is that democratic principles are the principles which make the best sense of legal order, whether one is concerned with the adjudication of hard cases or with political trials. In hard cases, if judges do not or cannot decide what law is in accordance with what Lon L. Fuller called an 'inner morality of law', law or legal order in effect

disappears.[18] Similarly, in order for evidence in political trials to reveal what is at stake in contests over the legitimacy of political order, the legal order which shapes the context in which evidence is heard and evaluated must be more than what a particular legislative perception takes it to be. Judges must reach beyond the law as it is declared by the Legislature for the principles which justify having legal order itself.

Now it might be objected that whatever it is that judges should do in the face of tyranny, in a true democracy they should adopt a plain fact approach. For in a true democracy, the second limb of the justification for the plain fact approach is not missing - the majority of legislators will in fact carry out the will of the majority of the people.

This objection has its political foundation in Jeremy Bentham's utilitarian theory of government. The trouble is that it requires that judges take facts about legislative intention to be, as it were, self-justifying. And that attitude ends up, like it or not, in the Hobbesian position sketched above.

My point here goes back to my understanding of Gramsci's account of ideology. On that account, at stake in all of this is in part ultimate justifications for particular ideologies, because reality cannot be taken as given. One has to go behind reality in order to contest not only the way reality is, but the values in whose service it is constructed. Put another way, one has to have a basis for contesting the self-validating nature of

actual experience, which is to a large extent experience of the status quo.

And if one does that on the basis of some set of democratic values, one should not then propose as a means of establishing those values an interpretative approach which is deliberately cut adrift from them. It is precisely in the circumstances which follow a long and hard fight under terrible oppression for the right to live in a democracy that this message needs most to be heard.

Endnotes

1. See my Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy (Oxford, 1991).

2. See A. Gramsci, Selections from the Prison Notebooks, G. Nowell Smith and Q. Hoare, eds. and translators (Southampton, 1971).

3. [1942] AC 206.

4. 1964 (2) SA 551 (A).

5. At 260-1.

6. At 563-4.

7. For this reason, judges who are not executive-minded have sometimes cited Ogilvie Thompson's statement in support of altogether different interpretative approaches. See Chapter 6 of Hard Cases in Wicked Legal Systems.

8. At 557-8.

9. Compare Steyn's and Ogilvie Thompson's speeches in, respectively, Tydskrif vir Heedendaagse Hollandse-Romeinse Reg, 30 (1967), 101 and South African Law Journal, 89 (1972), 30.

10. 1986 (4) SA 1064 (OPD), at 1067-8.

11. Quoted in T. K. Karis, 'The South African Treason Trial', Political Science Quarterly, 76 (1961), 227.

12. Ibid., 231-2.

13. Ibid., at 234-5.

14. Unreported decision in the Witwatersrand Local Division, case number 115/89, 1989.04.24.

15. At 57.

16. Schermbrucker v. Klindt (1965) (4) SA 606 (A), Rumpff J.A. at 615.

17. G. Budlender, 'Law and Lawlessness in South Africa', South African Journal on Human Rights, 4 (1988), 139-40.

18. See his The Morality of Law (New Haven, 1969).