Licence to kill?

Section 49(2) of the Criminal Procedure Act 51 of 1977 is unconstitutional

Phakamisa Tshiki

The Constitutional provision of the right to life had the effect of the death penalty being outlawed in South Africa in the case of S v Makwanyane and Another 1995 (6) BCLR 665 (CC). The court also declared invalid all corresponding provisions of other legislation sanctioning capital punishment. The basis for the abolition of the death penalty was, inter alia, that it infringed on the right to life, the right to dignity as well as the right not to be subjected to cruel, inhuman or degrading treatment and punishment in terms of the interim Constitution.

The court in Makwanyane declined to express its view regarding the death sentence for treason committed during wartime. Any other form of killing sanctioned by the state should, in the light of this judgment, also be unconstitutional. I have in mind s 49 (2) of the Criminal Procedure Act 51 of 1977 which provides that any male person between sixteen and sixty years can arrest or assist in arresting any person who has committed or is reasonably suspected of having committed an offence in the first schedule and whose minimum sentence, if convicted, should be six months' imprisonment. Section 49(2) provides:

'Where the person concerned is to be arrested for an offence referred to in Schedule 1 or is to be arrested on the ground that he is reasonably suspected of having committed such an offence, and the person authorized under this Act to arrest or assist in arresting him cannot arrest him or prevent him from fleeing by other means than by killing him, the killing shall be deemed to be justifiable homicide.'

The section was apparently designed to ensure the immediate arrest of wrongdoers and to fight crime. Private citizens are also authorised to assist so that, if possible, where the private citizen is able to help the police official, the culprit should not escape the arm of the law and further investigations can be made and property may be recovered while the matter is still fresh.

However, my emphasis is on s 49(2) which sanctions the killing of an alleged wrongdoer who cannot be brought to justice by any means other than killing. It is not clear how killing can secure a person's being brought to justice. The right to life is protected by the Constitution even when a person has been convicted of a serious offence, and it follows that the state can never sanction killing for the purpose of an arrest when it is not justified as a form of punishment of even the most serious crime.

The only circumstances, in my view, in which a person can be justified in taking the life of another are defence of self or others. Section 49(2) has been the subject matter of many decisions of our courts, which in the main have held that the section is not an unqualified licence to kill, see Government of the Republic of South Africa v Basdeo and Another 1996(1) SA 355 (A). Our courts, in attempting to find a reasonable balance between individual freedom and society's values of protecting human life, on the one hand, and the need to maintain law and order on the other, have laid down a number of detailed and restrictive conditions for someone to be able successfully to raise such a plea as a defence to a charge of murder. It clearly legalises state-induced death, which would appear, prima facie, to be in direct conflict with the right to life enshrined in s 11 of the final Constitution. The limitation clause cannot justify the existence of the section because if killing sanctioned by the state has been abolished for purposes of punishment it cannot be justified to secure an arrest.

In Makwanyane, while specifically refraining from expressing a view on the validity of s 49(2), Chaskalson P said

"...greater restriction on the use of lethal force may be one of the consequences of the establishment of a constitutional state which respects every person's right to life" (para 140).

There is merit in this comment, for the taking of a person's life should be restricted to cases of necessity in the legal sense, for example where the person who flees poses an immediate danger to the arrested. In the light of this judgment and the Constitution, the killing of a person for simply running away from an arrest, irrespective of the offence he is alleged to have committed or reasonably suspected of having committed, cannot be justified. The right to life is regarded as one of the fundamental rights of any human right legal order (see Makwanyane).

The repeal of s 49(2) was mooted as far back as 1998 but to date nothing has been done about it and people are still relying on the section in defending prosecutions for murder or culpable homicide in situations justified by the section.

Should the section be repealed, amended or declared unconstitutional, what would happen to those accused persons already charged or prosecuted for murder who rely on the protection of the section? The declaration of unconstitutionality or repeal will, in my view, not apply retrospectively, and therefore the court, on finding that the section is unconstitutional, will be obliged to acquit the accused provided he has satisfied all the other requirements of the section.

Civilised countries such as Germany and America allow the killing, in circumstances of our s 49(2), only in circumstances of defence of self or others.

Conclusion

As s 49(2) is unconstitutional, there is an urgent need to bring it into line with the constitutional protections so that authorities are not seen to be paying lip service to our Constitution. I would propose that, if amended, the section should justify killing only in circumstances of necessity in the legal sense of defence of self or others where the person arrested is posing imminent and unlawful danger to the arrestor or any other member of the public in the vicinity. There is no justification for the existence of a piece of legislation such as s 49(2) in its present form.

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