



Is public opinion decisive?

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It is the will of the people, not the law that matters, and the will of the people always tramples the law.”

- State V Makwanyane – DP abolition case RSA 1995

“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.”

- *Old dispensation*
 - *oppressive laws enacted*
 - *The will of the people via a minority parliament sovereign*
 - *The masses suffered apartheid and grave Human rights abuses*

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- State v. Unity Dow – Equal rights for Women Botswana 1990
- In this case the opposite is true
- The will of the people, equality for women before the law, was not reflected in the law
- While men could pass citizenship on to their children, women could not.
- In this case, until Unity Dow went to court, the will of half the population of the nation did not matter., the law mattered.
- However, the will of the people trampled the law.
- Effects continue to be seen in rights for women to inherit under customary law being another monumental decision

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lessons learnt

- Sometimes the law reflects the will of the people: a small undemocratic minority
- courts can and should intervene to protect human rights
- Sometimes the law does not reflect the will of the people
- Courts should intervene to ensure that human rights and human dignity are protected
- The will of the people is changeable, and subject to social and cultural norms and political realities.
- Human rights and human dignity are the unchanging touch stone and test
- The courts can and should guarantee stability even as public opinion waxes and wanes.