Ethics and the problem of evil: *S v Makwanyane*

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1 INTRODUCTION

In *S v Makwanyane & Another,* the accused, Makwanyane and Mchunu, were convicted by the court *a quo* on four counts of murder, one count of attempted murder and robbery with aggravating circumstances. Upon appeal the Appellate Division came to the conclusion that the circumstances of the murders were such that the accused should receive the heaviest sentence permissible by law,[1] at that stage, the death penalty.[2] In the Constitutional Court Kentridge J described the acts of the accused as 'murders of horrifying callousness motivated by nothing but greed'.[3] Although the *Makwanyane* case is generally regarded as a landmark decision in South African legal history, the facts are sadly, in general terms, neither new nor unique. Throughout most of human history, it has been the difficult and distressing task of judges to deal with inhuman acts committed by humans and to make decisions about the fate of those members of society who have committed 'evil' acts. Historically, this judgment upon evil is the traditional, perhaps most traditional, duty of judges. It may therefore be fitting that the Constitutional Court started its career performing this rather unenviable but time-honoured function.

However, from a theoretical point of view the court's responsibility of convicting and sentencing criminals does not come unencumbered. These tasks are underpinned by a cluster of convictions whose main feature is its self-evidence. According to Alain Badiou, one can trace these presuppositions back to Kant's idea that there exist formally representable imperative demands that 'are to be subjected neither to empirical considerations nor to the examination of situations'.[4] These imperatives apply naturally to cases of offence, of crime, and of so-called 'evil'. The system thus first relies on an *a priori* ability to discern evil through consensus. It assumes a self-evident, universal demarcation of what is incompatible with the human essence. In the *Makwanyane* case, the callous killing of innocent people for financial gain falls within this category. The second self-evident assumption is that good is what intervenes visibly against evil. From this perspective, law itself is first of all, law 'against' evil, and the so-called 'rule of law' authorises 'a space

1 *S v Makwanyane en 'n Ander* 1994 3 SA 868 (A)
2 S 277(1)(a) of the Criminal Procedure Act 51 of 1977
3 *S v Makwanyane* 1995 3 SA 391 (CC) para 197
4 Badiou A *Ethics. An essay on the understanding of evil* (translated by Peter Hallward) (2001) 8

for the identification of evil (the "freedom of opinion" which, in the ethical vision, is first and foremost the freedom to designate evil) and provides the means of arbitration when the issue is not clear (the apparatus of judicial precaution)'.[5]

If one looks at the *dicta* in the *Makwanyane* case, none of the judges had a problem with fulfilling this traditional task of identifying evil and intervening against it. However, most of the judges also thought it necessary to state this position explicitly, reiterating their belief in society's 'righteous anger against those who destroy the human rights and dignity of others',[6] their abhorrence and condemnation of evil acts. This rather odd stating of the obvious comes in the wake of the court's new function, that of the moral guardian of the nation. The courts cannot escape their conventional tasks – although they undoubtedly have acquired a few more – but the *way* in which these duties are performed is now different. While dispensing justice the court must keep in mind aspects like the 'moral and ethical direction the nation has identified for its future'.[7] Mahomed JP describes this new ethos with reference to the term *ubuntu* used in the postamble of the Interim Constitution:

> '"The need for *ubuntu*" expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognizing their innate humanity, the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by.'[8]

Stated thus the complex, maybe impossible or paradoxical, position the judges found themselves in becomes clear: on the one hand, the abhorrent facts before the court – dead and maimed bodies and the fate of those responsible for the acts of evil; on the other hand, the call of ethics, *ubuntu* – love and joy in our collective humanity. Before reflecting on the court's awkward position, it is necessary to take a more rigorous look at the possible uses of the word 'ethics'. Running the risk of over-simplification, one can distinguish between so-called modernist or metaphysical ethics, on the one hand, and a more radical ethics, what Lévinas calls the 'ethics of difference',[9] on the other hand.

2 MODERNIST ETHICS v THE ETHICS OF ALTERITY

Ethics, which one can very minimally, in this context, define as the problem of what we are 'to do', is of course very closely connected to what we 'can know'. The question of action cannot be separated from the question of rationality. Thus, when one speaks of the ethics of modernity or metaphysical ethics it carries with it all the baggage associated with an overwhelmingly powerful philosophical tradition – a tradition so pervasive, especially in legal theory, that it can hardly be distinguished from the 'self-evident' mentioned earlier. Stated as plainly as possible, one can say that metaphysical ethics

5 Badiou (fn 4 above) 8–9
6 See (fn 3 above) *per* Didcott J, para 232.
7 See (fn 3 above) *per* Mahomed DP, para 262.
8 See (fn 3 above) para 263.
9 See in general, Lévinas E *Totality and infinity: An essay on exteriority* (1969).

claims to provide fixed points of reference and a set of steady principles or, that very fashionable word, 'values'. This is possible because metaphysics, in whichever form, is based on pure interest-free rationality and objective knowledge. The idea is that as the collective knowledge of the world grows, so our collective wisdom will also grow. Not only does technical and scientific data about the universe increase with the use of better equipment, but we are better able to learn from each other. Our Constitutional Court judges can, for example, compare the position of our condemned criminals with those in Canada, the United States and India. What we 'know' provides the guardrails of what we are 'to do'. A difficult ethical problem – where one cannot decide what to do (maybe something like the *Makwanyane* case, and many cases after that) – can be solved by doing more or better research, in other words, by increasing one's objective knowledge of the problem.

There are two aspects of modernity, and hence, of the ethics of modernity, that will be looked at more closely, albeit very briefly: first, the topic of subjectivity (or the understanding of the self); and second, but related to that, the topic of the singularity of ethics.

Many philosophers have insisted on the link between the concept of subjectivity and metaphysical thought/modernity. In the sense that subjectivity is inevitably conceived as unitary, closed and complete it is perhaps not only linked to metaphysics but is, *in itself*, the essence of metaphysics. This modernist concept of the subject is what Adorno critically refers to as the 'logic of identity'. Iris Young explains:

> 'The logic of identity expresses one construction of the meaning and operations of reason: an urge to think things together, to reduce them to unity. To give a rational account is to find the universal, the one principle, the law, covering the phenomena to be accounted for. Reason seeks essence, a single formula that classifies concrete particulars as inside or outside a category, something common to all things that belong in the category.'[10]
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> The logic of identity aims at generating fixed categories, bringing everything under control, eliminating uncertainty and unpredictability – objectives usually regarded as conducive to a stable legal order. The project of reducing heterogeneity also implies that the self must be reduced to unity. The subject has no basis outside itself, it is self-generating and autonomous and its representation of reality will be unambiguous and true.

Traced back to Hegel's relational concept of difference in the *Phenomenology of Spirit*,[11] 'subjects' in this sense, are seen as phenomenologically symmetrical, and this symmetrical or reciprocal relationship between people can be seen as the basis of our modern concept of law and justice (for example, the law of contract and maybe our constitutional principle of equality). Derrida[12] criticises the conceptualisation of the other as ego, but only 'in relation to me'. The other is perceived as the other of the same, a mere extension or alter ego of the self. The rights of the individual can only be secured through the universal 'we'. Rawlingson explains:

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10 Young I *Justice and the politics of difference* (1990) 98
11 Hegel GWF *The phenomenology of spirit* (first published in 1807) (1998) ed
12 Derrida J 'The ends of man' in Margins of Philosophy (1982) 121

> 'Through his conversion into the citizen or legal person, the particular consciousness rids himself of the contingency of blood and reconstitutes his relation to the other as one of reciprocal or mutual recognition, guaranteed by the formality of contract.'[13]

Seeing subjectivity in this way may be conducive to legal certainty, but it makes an ethical relationship (non-violent relationship) with the other difficult, if not impossible. One's own subjectivity is always parasitic on the Other being pushed outside its clearly-fixed boundary and thus effecting its own closure. For 'us' fully rational and self-reflexive subjects to be on the inside, the 'Others' must be on the outside – thus creating an inescapable system of binary oppositions of inside/outside, subjective/objective, male/female, love/law, etc.

The second issue is that of the singularity of ethics. According to Badiou, the so-called 'moderns', since Descartes, have regarded ethics as more or less synonymous with morality.[14] In Kant's view it is a 'matter of how subjective action and its representable intentions relate to a universal Law. Ethics is the principle that judges the practice of a subject, be it individual or collective'.[15] Hegel has introduced a subtle distinction between 'ethics' [*Sittlichkeit*] and morality [*Moralität*], whereby ethics apply to *immediate* action, while morality is concerned with *reflexive* action.[16] According to Badiou, the contemporary use of ethics in modernist conversation is closer to Kant (ethics of judgment) than to Hegel (ethics of decision).[17]

But, what if one believes that ethical acts occur in the singular, or rather, in the unprecedented and unrepeatable situations of individual lives? That there is no such thing as general ethics, no ethical person or institution, no ethical law or principle? Then one can say, at most, and with Kierkegaard's 'much fear and trembling',[18] that a singular event was carried out with justice. This would mean that one can, maybe, conclude that the judgment in the *Makwanyane* case was just, but this does not lead to a general feeling of satisfaction concerning our good progress up to now. It does not mean that we can entertain the idea that, despite some small setbacks, we are in general not doing 'too badly'; we cannot even sleep soundly at night in the knowledge that we are living under a 'just' Constitution.

These and other objections to Kant's (or modernity's in general) perception of ethics led to a more radical articulation, which has its origin in the work of Immanuel Lévinas and that came to be known as the 'ethics of the other' or the 'ethics of alterity'.[19] In broad terms, Lévinas maintains that metaphysics has subordinated thought to the logic of the same, to the primacy of identity. But, according to Lévinas, it is impossible to arrive at an authentic thought of the other (and thus an ethics of the relation to the other) from the despotism

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13 Rawlingson MC 'Levers, signatures, and secrets. Derrida's use of woman' 73 in Feder E *et al* (eds) *Derrida and Feminism* (1997)
14 Badiou (fn 4 above) 2
15 *Ibid*.
16 See (fn 11above) par 280.
17 Badiou (fn 4 above) 2
18 Kierkegaard S *Fear and trembling* (first published 1843) (2005) Penguin ed
19 See in general Lévinas E (fn 9 above).

of the same, which is incapable of recognising the other. The modernist dialectic of same and other ensures the absence of the other in effective thought. It suppresses all genuine experience of the other and bars the way to an ethical opening to alterity.[20] From a Jewish rather than a Greek philosophical tradition, the Other is always anterior to the law of the same. The Law (ethics) is not dependent on an initial theoretical mastery of experience – what 'to do' does *not* depend on what we know. It is imposed by the existence of the other, the other 'in person' (the 'fleshy epiphany' of the other). The ethical relationship is not grounded in mimetic recognition (the other as similar/identical to me), but rather in the primacy of the Altogether-Other which we experience as a distance, an essential non-identity. As Lévinas puts it: 'The thou [*tu*] prevails over the I'.[21] The ethical relationship is one of non-symmetry and non-reciprocity.

The ethical radicalism that Lévinas expounded and his critique of Western metaphysics were taken up by contemporary French philosophers and via this route got assimilated in so-called 'postmodern' continental and American jurisprudence.[22] Transporting or applying the far-reaching 'ethics of difference' to the legal realm, where not only our eleven Constitutional Court judges, but also people, such as Makwanyane and Mchunu, live, is obviously not easy. What follows is a cursory list of concerns that present themselves at first glance but that clearly need more discussion.

The first, rather contested claim is that Lévinas's ethical order is essentially and inescapably religious.[23] The argument, in crude form, is as follows: the ethical primacy of the Other over the same requires that one experiences the other always 'at a distance' – the mimetic recognition of the other as resembling me will always bring one back to the logic of the same. The phenomenon of the Other (his face) must attest to a radical alterity which he does not contain in himself and which we might not experience. Badiou explains the consequences of this:

> 'In order to be intelligible, ethics requires that the Other in some sense be *carried by a principle of alterity* which transcends mere finite experience. Lévinas calls this principle the "Altogether-Other", and it is quite obviously the ethical name for God. There can be no Other if he is not the immediate phenomenon of the Altogether-Other. There can be no finite devotion to the non-identical if it is not sustained by the infinite devotion of the principle to that which subsists outside it. There can be no ethics without God the ineffable.'[24]

Seen like this, the ethical dominance of the other over the theoretical ontology of the same is entirely bound up with a religious axiom. To regard ethics, in this sense, as anything but a category of pious discourse is a betrayal of the radicality of what Lévinas thought.

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20 Lévinas E 'Ethics of the infinite' in Kearny (ed) *States of mind: Dialogues with contemporary thinkers* (1955) 177

21 As quoted by Badiou (fn 4 above) 19

22 See Le Roux WB and Van Marle K 'Postmodernism(s) and the law' in Roederer, Moellendorf (eds) *Jurisprudence* (2004) 368.

23 Badiou (fn 4 above) 18–22

24 Badiou (fn 4 above) 22

The next critical question is what becomes of this category when one suppresses or denies its religious character, when one sees it as 'decomposed religion'? This question can be asked even without giving any credibility to Badiou's argument above: What would the 'ethics of alterity' mean in a discourse without piety, a legal discourse, for instance? Badiou has argued that one will get diluted and meaningless theories or strategies, such as the 'recognition of the Other' (for instance, against racism, which would deny this Other); 'the ethics of differences' (against substantialist nationalism which would exclude immigrants or sexism, which would deny feminine being) or 'multiculturalism' (against the imposition of a unified usually western model of behaviour and intellectual approach). It is even seen as the basis of 'tolerance', which consists of not being offended by the fact that others think and act differently from you. These theories represent what he calls 'the contemporary catechism of goodwill with regard to "other cultures"',[25] but it is strikingly distant from Lévinas's actual conception of things.

The question remains: What is wrong with goodwill and tolerance or, for that matter, with our own home-grown *ubuntu*? Critics of the so-called 'right to difference' variety of ethics often point out that in practice the celebrated 'Other' can only be tolerated if he or she is a *good* other. This, so the argument goes, means that he or she is, at least somewhat, like 'us'. Respect for differences is accepted as a value, but only in so far as that which differs also respects the said differences. Just as there can be 'no freedom for the enemies of freedom',[26] so there can be no respect for those whose difference consists precisely in not respecting difference. This 'respect for *reasonable* differences', far from denying modernist identity thinking, actually seems to define an already dominant identity. Become like me and I will respect your differences! If ethics is, in Drucilla Cornell's definition 'the non-violent relationship with the other',[27] the question would be if this includes the relationship with the violent other.

A further criticism sometimes levelled by radical theorists is the problem that in expressing well-meant goodwill and tolerance towards others, one adopts the attitude of 'modestly' accepting that all one's own positions are relative and conditioned by contingent historical constellations. This 'modesty', they say, becomes a bit suspicious when one notices that it is always members of dominant cultures and groups that can afford it. Žižek reminds us of Chesterton's strong words of condemnation:[28]

> 'At any street corner we may meet a man who utters the frantic and blasphemous statement that he may be wrong. Every day one comes across someone who says that of course his view may not be the right one. Of course his view must be the right one, or it is not his view.'[29]

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25 Badiou (fn 4 above) 26

26 A quote from the Pentagon

27 Cornell D *The Philosophy of the Limit* (1992) 13, where she writes: 'The ethical relation, a term which I contrast with morality, focuses … on the kind of person one must become in order to develop a nonviolative relationship to the Other.'

28 Žižek S *Welcome to the desert of the real* (2002) 78

29 Chesterton GK *Orthodoxy* (first published 1908) (2004 ed) 37

According to Žižek, the 'apparently modest relativization of one's own position is the mode of appearance of its very opposite, of privileging one's own position of enunciation'.[30]

Žižek illustrates the ambiguous ('undecidable' is the more fashionable term) nature of the contemporary debate around the notion of 'respect for the Other' with reference to the argument between Badiou and his critics. Badiou regards the notion of 'respect for the Other' as indicative of a hegemonic attitude and in an interview in 2001 made the following rather shocking remarks:

> 'I must particularly insist that the formula "respect for the Other" has nothing to do with any serious definition of Good and Evil. What does "respect for the Other" mean when one is at war against an enemy, when one is brutally left by a woman for someone else, when one must judge the works of a mediocre "artist", when science is faced with obscurantist sects, etc.? Very often, it is the "respect for Others" that is injurious, that is Evil. Especially when it is resistance against others, or even hatred of others, that drives a subjectively just action.'[31]

Critics of Badiou first point out that with this line of argument Badiou ended up directly supporting Communist terror. Second, they level the obvious criticism that Badiou's own examples show the limit of his logic. Yes, one might hate the enemy (maybe the violent criminals in the *Makwanyane* case) and regard one's action as subjectively just, but shouldn't one then – and especially then – respect a certain limit, the limit of the other's radical otherness? Žižek explains this position:

> 'We should never reduce the Other to our enemy, to the bearer of false knowledge, … always in him or her there is the Absolute of the impenetrable abyss of another person. The twentieth century's totalitarianism, with its millions of victims, shows the ultimate outcome of following to the end what appears to us a "subjectively just action".[32]

Žižek immediately goes on to contend that this is precisely the line of reasoning one should reject – that one should not show respect for the abyss of the radical otherness of, for example, Hitler's personality beneath all his evil acts. Ethics is not only to save victims, but also to annihilate those who made them victims.

Without choosing sides, one can illustrate the problem of ethics and danger (if not evil) with Zenon Bankowski's very basic problem with the tiger:[33] He argues that it is wrong to keep tigers in zoos because, amongst other things, it takes away the particularity of the actual tiger in the interests of giving us an example of the species:

> 'In so doing the particular tiger is lost; it no longer displays the beauty and grace it did in the wild. And this is precisely because it is no particular tiger – I no longer show any awe and respect for that tiger because I no longer confront it. Now it is not the particular (the tiger) that gives me a reason for action but the rules (the tiger in the zoo).' With reference to Lévinas he goes on: '[T]he only appropriate response to the tiger is to confront it and stand in awe in front of it … in complete submission to the "other"'.

Then suddenly, reconsidering his position, he says: 'Think of the tiger again.

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30 See (fn 24 above) 78.
31 'On evil: An interview with Alain Badiou' *Cabinet* Issue 5 (Winter 2001) 72
32 Žižek (fn 24 above) 67–68
33 Bankowski Z *Living Lawfully. Love in Law and Law in Love* (2001) 141

We cannot just encounter the tiger and stand in awe of it. Tigers are dangerous and they are liable to bite or eat you.'[34]

3 CONCLUSION

If ethics is about the question 'What to do?' we seem to have painted ourselves into a corner. The project of modernity, progress and 'making things better' through rational thought is floundering. This can show that the political project of modernity remains unfinished. Following Habermas one can believe that we are still working on it and, despite setbacks, it remains a worthwhile pursuit. More pessimistically, one can follow Adorno and believe that the modern project of (political) freedom has failed, that it is 'a false appearance whose "truth" is embodied by subjects who lost the last shred of autonomy in their immersion into the late capitalist "administered world"'.[35] In a speech he gave two years ago, Breyten Breytenbach, after surveying the state of the world, in his own poetic but rather negative way, said the following:

> 'It is true, in an absolute sense, that we know no more than we knew before. In that there has been no progress. Every generation lives in the fullness of its own comprehension. Nor do we learn from the mistakes of the past – perhaps because we equate survival with progress, with the need to forge ahead. Maybe we are doomed to make the same errors.'[36] Whatever one's view on this, the guardrails of metaphysics, namely, stable and autonomous subjectivity and well-defined principles and values, are being displaced, if not becoming obsolete.
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> At the other end of the scales, one finds an ethics of radical alterity – where the other comes first and becomes the condition of existence of the self and of law.[37] But this might be impossible or at least unusable outside the religious realm and the diluted version of this – an ethics of differences and tolerance – more often than not turns out to be an insincere strategy at maintaining identity thinking; a theory that can only cope with the assimilated other, the 'tiger in the zoo'.[38]

And yet one cannot avoid acting. We might have slightly lost our balance, but we must still stand, and act, in the same world, the only world of which we have any experience, and something needs to be done. As Caputo puts it 'Like someone charged with disarming a bomb, one has to do *something*.'[39] Nowhere is this more true than in a court of law. Caputo adds, 'but, being the only one around, one stands a good chance of being scattered to the four winds. That inspires caution. It makes one proceed in such a way as to keep as many options open as possible. It deflates pretension and divests us of too great a confidence in our schemes, from pressing them to the last detail, from being willing to draw blood on their behalf'.[40] This, little as it may be, might be the only worthwhile suggestion to be made.

We need an ethics that distrusts everyone who wants to save the world,

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34 See (fn 29 above) 141.
35 Žižek (fn 24 above) 95
36 Unpublished. Copy available from author
37 Douzinas C and Warrington R *Justice miscarried: Ethics, aesthetics and the law* (1994) 199
38 See Bankowski (fn 29 above).
39 Caputo JD *Radical Hermeneutics* (1987) 262
40 Caputo (fn 35) 259

people who want to save us and give us foundations. One cannot proceed with no ideas and with no concepts (one can even call them principles or values or *ubuntu*), but the provisionalness of ethical rules demands suspicion, demands that one suspects that after a certain point every good idea becomes inflexible and, at the end, repressive. Our institutions – also our Constitution and our court – are not part of the 'powers that *be*', but instead of the 'powers that *become*'. This becoming is not only the product of accumulated wisdom and refined reason (as Gadamer would have it), but neither is it only the product of power politics (as Foucault[41] thinks). It proceeds, as Caputo says, 'partly by cunning reason and partly by cunning alone'.[42] The ongoing conversation of mankind, borrowing Richard Rorty's phrase,[43] but also the ongoing conversation in our Constitutional Court, must not be stilled by offering *overall* strategies, *master* plans or some kind of *final* blueprint. The paradox of dealing 'ethically' with those that harm society, with *Makwanyane & Another*, will not go away. It cannot go away because ethics opens the law to the singularity of the individual, which is all there is. It opens the law to the unpredictability of the future and to the excess of the gift beyond temperance and duty. In this, we all have to keep on reimagining ourselves and our world.

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41 See in general Foucault M Power/Knowledge: Selected interviews and other writings (1980) Gordon C *et al* (eds).

42 Caputo (fn 35) 263

43 See in general, Rorty R *Contingency, irony and solidarity* (1989).

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