The value of minority judgments in the development of constitutional interpretation in South Africa

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Abstract

The Constitution of the Republic of South Africa, 1996, has reconfigured the way judges do their work. There is scope for jurisprudential creativity and self-reflection. This article illustrates how minority decisions contribute to the development of South African jurisprudence of constitutional interpretation, provided the interpretation accommodates external, societal and internal jurisprudential values.

1 Introduction

It has been said that the South African Constitution aspires to a culture of justification and a transformative discourse about our social relations, and that it is historically conscientious. All these assertions point to the fact that any interpretation of the Constitution must accommodate these aspirations in order to conform to the Constitution. Since, as it has been said, constitutional norms and values are culturally and socially contingent, judges have to find some

2 KE Klare ‘Legal culture and transformative constitutionalism’ 1998 SAJHR 146.
4 H Botha ‘Judicial dissent and democratic deliberation’ 2000 SAPL 321.
interpretive methods to deal with the lack of objectivity in constitutional norms and values.

This article analyses the value of minority judgments in our jurisprudence of constitutional interpretation. It argues that a minority opinion may be able to show the viability of an alternative approach in constitutional adjudication. A minority judgment may challenge dominant interpretive methods in adjudication, and show that methods of interpretation need to be contextualised and used in a balanced fashion according to the circumstances of each case. Minority judgments in this regard mean judgments that differ from the majority judgments in terms of legal reasoning, techniques of interpretation and reasons for the decision. Three judgments will be discussed to show that a minority opinion may prove to be of value in developing our jurisprudence of constitutional interpretation. They are *President of the Republic of South Africa and Another v Hugo*,\(^5\) *Prince v President of the Law Society of the Cape of Good Hope and Others*\(^6\) and *Harksen v Lane NO*.\(^7\)

2 **Statutory and constitutional interpretation**

When the interim Constitution was adopted, judges had nothing at their disposal to help them to deal with the plasticity and ambiguity of language in constitutional norms. They had the complex task of designing the most appropriate theory according to which the Constitution should be read.\(^8\) It has been argued that what was required to focus the minds of the judges on the new

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5 1997 (6) BCLR 708 (CC).
6 2002 (3) BCLR 321 (CC).
7 1997 (11) BCLR 1489 (CC).
constitutional order was a concerted judicial revisionism that would activate judicial thinking and constitutional jurisprudential development. The idea is that judicial revisionism must transform the judiciary’s intellectual and attitudinal inclinations to manifest creativity, tact, imagination and sensitivity in constitutional issues.

In developing its jurisprudence in this regard, the court resorted to some methods of interpretation that are used in other countries. Among the methods used are textual, verbal interpretation, contextual interpretation, and historical and purposive interpretations. Scholars have been engaged in a debate whether constitutional interpretation should differ from statutory interpretation and, if so, what standards should apply to constitutional adjudication. The former Chief Justice of South Africa, Justice Mahomed, has said that international authority establishes that although a constitution is a legal instrument its interpretation requires an approach that is qualitatively different and more expansive than the approach that traditional lawyering adopts towards the construction of ordinary statutes.

The idea is that, unlike ordinary statutes, a constitution does not seek merely to define a legislative reaction to special situations and problems perceived to require legislative regulation. It seeks more fundamentally to articulate the very ethical and jurisprudential foundations upon which the state is structured and to articulate the values that bind its peoples. Justice Moseneke expressed a similar view when he asserted that judicial interpretation under the Constitution had placed different imperatives on judges, as the severe legalism suitable for the interpretation of statutes was not suitable for constitutional interpretation.

However, these views are not shared by all, because it has been contended that it is not just constitutions that comprise open-ended principles – so do other legal texts. Not only are constitutions incomplete, in the sense that they do not regulate every problem in detail, but so are statutes. It is submitted that the different interpretive methods to apply to a statute and a constitution depend on the specific question to be answered. Some methods of statutory interpretation may also be useful in constitutional interpretation. There are no hard-and-fast rules of constitutional adjudication.

However, the Constitutional Court’s approach in this regard has attracted various criticisms from other academics who contend that the court has largely remained in a formal mode of reasoning or engaged in ad hoc value-based interpretations.

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9 Chetty op cit (n 8) at 3.
10 Chetty op cit (n 8) at 4.
13 Mahomed op cit (n 12) at 463.
15 Brugger op cit (n 11) at 399.
formal reasoning, it has been argued, is a legally authoritative reason on which judges are required to base a decision.¹⁷ A legal system is formal to the extent that the norms applied to dispute resolution are intrinsic to the legal system.¹⁸

The court has also failed to engage in moral, political and social issues in constitutional adjudication. The fact that there is no single objective meaning in the language of the 1996 Constitution, and that constitutional norms are socially and culturally contingent, calls for a consideration of social, political and moral values. Focusing only on formalism and value-based interpretations would not help develop a viable jurisprudence in this regard.

Traditional adjudicative methods normally call for a complete separation between legal and political issues in adjudication. But the real picture is that the judge’s personal political values and sensibilities cannot be excluded from interpretive processes or adjudication. This is because the exclusion called for by the ideal of the traditional rule of law is simply impossible.¹⁹ It is just that some judges are reluctant to apply (or even acknowledge the importance of) their political, moral and social values to adjudication.

Some academics have also called for a shift from a formal vision of law to a substantive vision of law. A substantive reason is a moral, economic, political or other social consideration. A formal reason, as set out above, is a legally authoritative reason on which judges are required to base a decision and which overrides any other substantive reason.²⁰ It is submitted that a substantive vision of law can be a viable approach in developing our interpretive methods. This approach invites major infusion of moral, policy-oriented or other substantive reasoning at the point of application of the law.

Justice Moseneke made the same point when he asserted that under the Constitution, the courts should search for substantive justice and transformation. He added that personal intellectual and moral preconceptions of judges do intrude on their adjudicative function and that they should acknowledge their political and moral responsibility in adjudication.²¹ He advances an alternative approach in constitutional adjudication, which he calls ‘transformative adjudication’. According to him, transformative adjudication requires, inter alia, a complete reconstruction of the state and society, including redistribution of power and resources.²²

All these points call for a change in constitutional analyses – a change that will embrace the transformative aspirations of the Constitution. This change must also involve judicial sensitivity to social, political and moral issues.

¹⁸ Klaaren op cit (n 16) at 16.
¹⁹ Klare op cit (n 2) at 163.
²⁰ Cockrell op cit (n 17) at 5.
²¹ Moseneke op cit (n 14) at 317; Moseneke ‘Transformative adjudication’ 2002 June De Rebus 12.
²² Moseneke op cit (n 14) at 315; C Albertyn & B Goldblatt ‘Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality’ (1998) 14 SAJHR 248, 249.
Three majority judgments

In this section, the majority judgments in the three above-mentioned cases will be discussed. It will be shown that the majority of the judges in these cases approached constitutional interpretation narrowly and differently from the minority judgments.

The first case concerns the majority judgment in President of the Republic of South Africa and Another v Hugo. In casu, the president had granted a remission of sentences to certain categories of prisoners pursuant to his powers under s 82(1)(k) of the interim Constitution of 1993. The president and his deputies had signed a document called the Presidential Act in terms of which all mothers in prison on 10 May 1994 with minor children under the age of 12 years were granted a remission of their sentences.

It is common cause that the respondent (Hugo) would have qualified for remission, but for the fact that he was the father and not the mother of his son who was under the age of 12 years at the relevant date. The respondent alleged that the Presidential Act was in violation of the provisions of s 8(1) and (2) of the interim Constitution inasmuch as it unfairly discriminated against him on the ground of sex or gender. The crux of the matter was whether male prisoners had been unfairly discriminated by the manner in which the president exercised his powers under the Presidential Act.

The majority judgment delivered by Justice Goldstone held, inter alia, that the pardon was granted in the public interest not to an individual, but to a group ± to confer an advantage upon them as an act of mercy at a time of great historical significance. It was held that male prisoners outnumber female prisoners almost fifty-fold and that a release of all fathers would not have been appropriate. The court concluded that many fathers play only a secondary role in child rearing and that their release would not have contributed significantly to the achievement of the president’s purpose. The discrimination was therefore not unfair.

However, as will be shown below, the majority judgment approached the equality clause in the interim Constitution in a narrow and formal fashion.

Another case, which exposes the weaknesses of a formalist approach, is Prince v President of the Law Society of the Cape of Good Hope and Others. In this case, the appellant (Mr Garreth Prince) wished to become an attorney and applied for registration of his contract of community service with the Law Society of the Cape. His application was denied because he disclosed that he had two previous convictions for possession of cannabis and expressed his intention to continue using cannabis. He stated that the use of cannabis was inspired by his Rastafarian religion.

\[23\] Supra (n 5).
\[24\] Supra (n 6).
The appellant challenged the constitutionality of the decision of the Law Society, alleging that it infringed his rights to freedom of religion,\textsuperscript{25} to dignity and not to be subjected to unfair discrimination.\textsuperscript{26} It is common cause that cannabis is listed in Part III of schedule 2 to the Drugs Act as an undesirable dependence-producing substance. Its use and possession is prohibited by s 4(b). The appellant contended that the impugned provisions were unconstitutional to the extent that they failed to provide an exemption applicable to the use and possession of cannabis by Rastafarians for bona fide religious purposes.

The majority judgment acknowledged that Rastafarianism is a religion and that the use of cannabis is central to this religion. The majority of the judges held that it is not incumbent on the state to devise some form of exception to the general prohibition against the possession and use of cannabis in order to cater for the religious rights of Rastafarians. One of the reasons is that Rastafarians are a small and marginalised group and that it would not be possible to supervise or regulate their religion. The majority concluded that the use of cannabis by Rastafarians cannot be sanctioned without impairing the state’s ability to enforce its legislation in the interest of the public at large. It was held that in terms of the limitation clause, the limitation is reasonable and justifiable under the Constitution.

However, the minority judgment shows how the majority of the judges approached the limitation clause in a narrow and formalistic way. The minority judgment shows the importance of the proportionality test in weighing and balancing competing values in this regard.

Another majority judgment that followed a formal approach in constitutional analyses appeared in the case of \textit{Harksen v Lane NO}.\textsuperscript{27} The constitutionality of s 21(1) of the Insolvency Act was in question in this case. Section 21(1) provides that, upon the sequestration of the estate of an insolvent spouse, the property of the solvent spouse vests in the Master of the Supreme Court (High Court) or the trustee of the insolvent estate. It was contended that this section infringes the equality and anti-discrimination clause in the interim Constitution.

The majority of the Constitutional court judges found that the provision did not infringe the equality and anti-discrimination clause in the interim Constitution. It was held, inter alia, that even though s 21(1) discriminates against solvent spouses, such discrimination is not unfair, as it does not lead to the impairment of their fundamental human dignity or an impairment of a comparably serious nature.

However, the majority of the judges in this case approached the equality standard in a formalistic and mechanical manner. It disregards the social and economic effects of s 21(1) of the Insolvency Act on the solvent spouse.

\textsuperscript{25} Ss 15 (1) and 31 (1) of the Constitution of the Republic of South Africa, 1996.
\textsuperscript{26} S 9 of the Constitution.
\textsuperscript{27} Supra (n 7).
4 Three minority judgments

It is my argument that minority judgments can contribute to developing our approach to constitutional interpretation. They can draw attention to the importance of the judge’s political, moral and social preconception in constitutional adjudication. A minority opinion may be able to point to the weaknesses of the majority’s approach in concentrating on any single method of adjudicating in constitutional issues. A dissenting judge may show the importance of approaching constitutional issues in a balanced and flexible manner, taking into account the values and aspirations that the Constitution was designed to achieve.

In this section, some of the most important minority judgments in the South African judiciary will be discussed. The first case concerns the minority judgment of Justice Kriegler in *President of the Republic of South Africa and Another v Hugo.*

The minority judgment in this case shows that the majority of the judges approached the equality clause in the interim Constitution in a narrow and formal fashion. This case illustrates the capacity of dissenting opinions to challenge formalist assumptions and to demonstrate that contextual and policy considerations matter.

According to Justice Kriegler, the question was whether the Presidential Act, regardless of its impressive provenance and charitable appearance, complied with the demands of s 8(2). He emphasised the importance of a wide context in the interpretation of s 8(2) read with s 8(4). He considered the preamble, the ranking of sex discrimination immediately after racial discrimination in the enumeration of prohibited bases for discrimination in s 8(2) and a host of other provisions, all of which stress the need to tackle unfair discrimination. He contended that, in terms of s 8(4), read both textually and contextually, a distinction drawn on the basis of gender or sex, such as the one in this case, must be found to be unfair.

Justice Kriegler took into account social, economic and historical factors in reaching his conclusion, rather than the narrow approach taken in the majority judgment. He held that the notion that women are the primary caregivers of young children is a root cause of women’s inequality in our society. His minority judgment shows the weaknesses of the majority opinion in approaching the equality clause narrowly and disregarding the social and economic impact in constitutional adjudication. The minority judgment is more sensitive to the purpose of the equality clause and the social and historical context within which it should be interpreted. It shows that inattention to context often defeats the transformative aspirations of the Constitution.

This shows that a minority judgment may help in developing alternative methods of constitutional interpretation. It has the capacity to strengthen the quality of a court’s interpretive jurisprudence by providing theoretical counter-principles of interpretation the court may have ignored. As shown above, some judges are not aware of the importance of their personal intellectual, moral, political and social

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28 Supra (n 5).
perceptions in constitutional adjudication. Some of them still adhere to the strict divide between law and politics.\textsuperscript{30} Reasoned from a substantive point of view, a minority judgment may point to the weaknesses of this traditional approach. It may argue for an inclusive approach that takes into account the real social, historical and political perspective within which constitutional adjudication has to operate.

Another case which shows the value of minority judgments is *Prince v President of the Law Society of the Cape of Good Hope and Others*.\textsuperscript{31} As set out above the minority judgment of Justice Sachs showed how the majority approached the limitation clause in a narrow and formal way. He contended that the limitation analyses involved the weighing and balancing of competing values based on proportionality. He emphasised the importance of contextualising the balancing exercise required by s 36 of the Constitution. He stressed that the balancing had to be done in the context of a lived and experienced historical, sociological and imaginative reality. Once again, Justice Sachs emphasised the importance of contextual, historical and social interpretations that take into account the realities that people live with.

Justice Sachs also pointed to the weaknesses of a formal approach in the limitation analyses. He emphasised that the limitation analysis under our Constitution is based not on formal or categorical reasoning, but on processes of balancing and proportionality as required by s 36. Justice Sachs’s approach amounts to a call for a substantive reasoning in contrast to a formal reasoning discussed above.\textsuperscript{32} His approach can be associated with a substantive reasoning because, in interpreting s 36, it is more engaged with moral, historical and social issues.

Disallowing a limited accommodation of the Rastafarian religion, the majority judgment can also be associated with ‘decisional minimalism’.\textsuperscript{33} According to Currie, decisional minimalism is the practice of saying no more than necessary to justify an outcome and leaving as much as possible undecided. Decisional minimalism also entails avoiding decisions that do not have to be made.\textsuperscript{34}

This, then, is the making of decisions that are shallow and narrow (minimally theorised) rather than deep and wide (highly theorised).\textsuperscript{35} The majority judgment in this case can be regarded as a minimalist approach in its analysis of the limitation clause, because it is narrow and not highly theorised to guide future claims of religious rights. According to Cass Sunstein, one of the reasons for this approach is that, on issues of great complexity or controversiality, it is easier to find consensus on the shallow issue of the theoretical justification for that outcome, rather than on

\begin{itemize}
\item \textsuperscript{30} K Van Marle ‘Revisiting the politics of post-apartheid constitutional interpretation’ 2003 *TSAR* 550.
\item \textsuperscript{31} Supra (n 6).
\item \textsuperscript{32} Cockrell op cit (n 17) at 5.
\item \textsuperscript{33} I Currie ‘Judicious avoidance’ 1997 *SAJHR* 138.
\item \textsuperscript{34} Currie op cit (n 33) at 147.
\item \textsuperscript{35} Ibid.
\end{itemize}
the deep issue of the theoretical justification for that outcome. The practice of deciding as little as possible is not available to other discourses that aim for more comprehensive theorising on religious or moral philosophy.

Taking all these points into account the minority judgment is more sensitive to substantive reasoning and more highly theorised having regard to the social, historical and imaginative realities of Rastafarians. As Justice Sachs concluded in his dissent, 'no amount of formal constitutional analysis can in itself resolve the problem of balancing matters of faith against matters of public interest'.

Another minority judgment which may help in developing our interpretive jurisprudence is Harksen v Lane NO. The minority decisions differed from the majority judgment on the question of equality and discrimination in terms of s 21 of the Insolvency Act. Both O'Regan and Sachs JJ based their dissent on a much more fundamental and critical view of society and the societal effects of s 21 than the one offered by the majority judgment. Like the previous cases discussed above, the approach taken in the minority decisions demonstrated that the majority decision applied the equality standard in a formalistic and mechanical manner.

Once again, the approach by the minority of judges shows the weaknesses of formalism in constitutional analysis. In her dissent, O'Regan J found that s 21 constituted unfair discrimination. In her analysis of the limitation clause, she concluded that the purpose of s 21 could have been achieved by less restrictive means within the limitation clause. She emphasised, inter alia, that s 21 was unfair in the sense that the effects of the vesting provision were severe and potentially disastrous for a solvent spouse.

Judge Sachs also criticised the majority decision for its failure to take into account the social, historical and political context within which s 21 of the Insolvency Act operates and its disregard of the power relations that underlie and are perpetuated by the provision in question. He concluded that s 21 promotes a concept of marriage in which the estates of spouses are merged, regardless of their living arrangements and careers. Sachs J’s approach amounts to a call for a contextual approach that embraces a substantive reasoning in constitutional interpretation. His analysis is more advanced in terms of engaging with the social, historical and political context within which the section in question should be

37 Currie op cit (n 33) at 149.
38 Prince v President of the Law Society, Cape of Good Hope supra (n 6) at 295B C.
39 Supra (n 7).
40 Per O’Regan J, with whom Madala and Mokgoro JJ concurred and per Sachs J in a separate judgment.
41 See AJ Van Der Walt & H Botha ‘Coming to grips with the new constitutional order: Critical comment on Harksen v Lane NO’ 1998 SAPR/PL 31.
42 Botha op cit (n 4) at 330.
43 S 33 of the interim Constitution.
44 Van der Walt & Botha op cit (n 41) at 35.
interpreted. The minority decisions, by engaging in a critical analysis of s 21, have exposed the logical lapses inherent in a formalist and minimalist approach to constitutional analysis.

This shows that a minority judgment may undermine the belief that judges can arrive at correct answers simply by applying legal rules in a formal fashion. By emphasising social, economic and cultural considerations, a dissenting judge may uncover the hidden assumption and inarticulate premises underlying the majority’s approach. A minority judgment may also reveal the contested nature of constitutional norms and values in constitutional adjudication. It may show that these values and norms are socially, culturally and morally contingent. This points to the fact that constitutional norms and values do not exist in isolation from their social, cultural and moral origin and that any constitutional interpretation has to take these contingencies into account.

It seems that judges will be able to develop our interpretive jurisprudence only if they are sensitive to social, historical, moral and political considerations. It seems also that the judges, in most cases, adopted an unduly narrow approach to their interpretive function that has been described as a mechanical or phonographic approach, which denied a creative role in judicial law making. The court also seems to be reluctant to embrace a substantive approach in constitutional interpretation. This unwillingness may have arisen from the fact that substantive reasons are difficult reasons, because they require hard choices to be made between moral and political values that are inherently contestable and the rationale for which people will disagree about.

Every interpretive method has to be tailored to the circumstances of each and every case. As the judgment of Sachs J demonstrates, the context within which the majority judgment approached the problem was not appropriate in view of the facts of the case or the task of the court in constitutional adjudication.

5 Conclusion

Minority decisions can contribute to developing our jurisprudence of constitutional interpretation. As some of the dissenting opinions discussed above show, any interpretation should strive for a reasonable accommodation of external, societal and internal jurisprudential values. It has been argued that judicial interpretation should strive to integrate the ideals of systemic consistency, social congruence and stability of doctrine over time.

45 Botha op cit (n 4) at 323.
46 Ibid.
47 Botha op cit (n 4) at 321.
48 J Dugard ‘The judicial process, positivism and civil liberty’ (1971) 88 SALJ 182.
49 Cockrell op cit (n 17) at 11.
50 Brugger op cit (n 11) at 414.
The court should avoid concentrating on any one particular method of constitutional adjudication that focuses on either the textual (formalist) or purposive interpretation. The cases discussed above have shown that these methods will not always yield a result that will develop our jurisprudence in this regard. We should adhere to what has been called an ‘integration theory’ in analysing methods of constitutional interpretation. As contended, it is important that the Constitution has reconfigured the way judges should do their work. It invites them onto a new plane of jurisprudential creativity and self-reflection about legal methods, analysis and reasoning consistent with its transformative roles.

51 Brugger op cit (n 11) at 415.
52 Moseneke op cit (n 14) at 318.