



JUDICIAL ROLE IN INTERPRETING CONSTITUTIONS AND LAWS: IMPACT ON PUBLIC AND INTERNATIONAL CONFIDENCE AND IMPLICATIONS FOR DEVELOPING JUDICIAL CAPABILITIES

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The Honourable Justice Hayne, Chairperson of the Asia Pacific Judicial Reform Forum Secretariat, the Honourable Justice Menon, the Chief Justice of Singapore, esteemed members of the panel, distinguished guests present here today, ladies and gentlemen, I greet you.

The significance of a Constitution

The Constitution of any given country is supposed to constitute the covenant entered into by the citizens of that country and their successive governments, setting out in broad terms eternal fundamental rights and the obligations to be fulfilled by that government. It is the embodiment of a trans-generational vision as well as the aspirations of a nation, an

irrevocable vow to forever order the affairs of a nation and to be governed in a particular way. This notion is aptly captured by the preamble of the constitution of the Republic of South Africa in these terms:

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; improve the quality of life of all citizens and free the potential of each person; and build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations...”.¹

Albie Sachs a retired Justice of our Constitutional Court had this to say about the Preamble:²

“The Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive

¹The Constitution of the Republic of South Africa, 1996 (Preamble)

² Sv Mhlungu 1995(7) BCLR 973(CC)

value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicates its fundamental purpose. This is not a case of making the Constitution to mean what we like, but of making it to mean what the framers wanted it to mean; we gather their intention not from our subjective wishes but from looking at the document as a whole.”

I must hasten to add that our Constitutional Court of South Africa has since jettisoned the notion of the intention of the Legislature or of the drafters in favour of the objective purpose of the Constitution or the legislation.

The important role that the Constitution plays in the life of the nation explains why our Constitution is supreme law. It holds out promises that must be kept. It defines the national agenda and dream.

That said, how then is the Judiciary to interpret constitutions and laws in a way that would boost the all-important public and international

confidence in the Judiciary and what measures must be employed to enhance judicial capabilities necessary for the attainment of this noble objective.

The link between public and international confidence and judicial interpretation

The clear and over-arching objective sought to be achieved by and through the Constitution and the laws must manifestly always loom large in the interpretation of the Constitution and the particular law being interpreted. Judges must not seek to contort the meaning of the constitution or the law for the attainment of an objective that is difficult to reconcile with the overall constitutional project or vision or the legislative purpose set out in the particular law. For it is when, language which is unduly strained and things do not add up in that the logic is difficult to follow or the reasoning and outcomes are at odds with the thrust of the provision being interpreted, that public and international confidence in the particular Judiciary is in jeopardy.

Courts are therefore expected to interpret the Constitution and the laws in a way that gives practical expression to the thrust of the constitutional

promises held out to the people. Otherwise, they will reasonably think that courts are betraying their constitutional mandate of upholding and protecting the Constitution and the human rights entrenched in it, and the oath or solemn affirmation to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. And that is how the public and the international community lose confidence in the Judiciary.

The words and principles of the Constitution endure and cement the authority and legitimacy because they have been made relevant to the conditions and challenges of each generation through an ongoing process of interpretation. This interpretive approach would cause each generation of any democracy relate to and to see the Constitution as its own.³

Ultimately, what accounts for a nation's enduring faith in the Constitution is not that the drafters' understandings of what the Constitution meant was rigidly adhered to. It is that the nations courts continually interpreted the Constitution's language and applied its principles in ways that are faithful to its original purposes and to the social context in which new

³ Goodwin Liu et al p34

challenges arise. But the people will keep faith in the Constitution because its text and principles are generally interpreted in ways that are in keeping with the needs and understandings of the people.⁴

The purpose of interpretation

To avoid this loss of confidence, the Judiciary must follow the interpretive principles set out in the Constitution as well as those developed by the courts themselves over the years. Interpretation is as you know a rational activity of giving meaning to a legal text which is the primary task and most important tool of a court.⁵ And that begs the question: What is the purpose of interpretation?

“Indeed, you cannot know how to interpret without knowing why you are interpreting. In my worldview, the answer to the question, for what reason ? is the following: The aim in interpreting a legal text(such as constitution or statute) is to realize the purpose the text serves. Law is the social life of the community, on the one hand, and human rights, equality and justice on the other. The history of law is a search for the proper balance between these goals, and the interpretation of the legal text must express this balance. Indeed, if a statute is a tool for realizing a social objective, then interpretation of a statute must be done in a way that realizes this social objective. Moreover,

⁴ Goodwin Liu, Pamela S Karlan and Christopher Schroeder : Keeping Faith with the Constitution(Published by American Constitution Society for Law and Policy (2009) at p44

⁵ Aharon Barak. “The Judge in a Democracy “ at page 122

the individual statute does not stand alone. It exists in the context of society, as part of general social activity. The purpose of the individual statute must therefore also be evaluated against the backdrop of the legal system. This approach underlies the system of interpretation that I think is proper: purposive interpretation”⁶

The interpretive guidelines

One of the interpretive aids is set out in section 2 of our Constitution which provides that the “constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”. This provision does not only undergird the supremacy of the Constitution, but also empowers anyone to challenge the constitutional validity of any legislation or conduct in a court of law.

Another legitimacy-enhancing provision of our Constitution is section 8(3) which empowers courts to apply or develop the common law in order to give effect to a right in the Bill of Rights that legislation does not

⁶ Aharon Barak – The Judge in a Democracy p 124 – 125

provide for or develop rules of the common law to limit a constitutional right in a way that is constitutionally permissible.⁷

The additional and powerful interpretive tool is section 39 of our Constitution which provides:

When interpreting the Bill of Rights, a Court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, must consider international law, and may consider foreign law. When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill”.

⁷ Section 36 of the Constitution.

The Constitutional Court of South Africa was seized with a very difficult and sensitive matter which had the potential to impact negatively on the diplomatic relations between the Republic of South Africa and the Republic of Zimbabwe. The farms of about seventy seven farmers were, in terms of the Constitution of Zimbabwe, expropriated without compensation. And they were constitutionally forbidden from approaching any domestic court in Zimbabwe to challenge the validity of that non-compensable dispossession. Consequently, they successfully approached the Tribunal established to resolve disputes between member States of the Southern African Development Community and their citizens for relief. Sadly, Zimbabwe refused to have the order of the Tribunal enforced against it. The Constitutional Court of South Africa relied on section 39 of the Constitution to develop the common law on the enforcement of foreign orders, hitherto applicable only to orders made by national courts, to extend its application to the enforcement of international Tribunals in these terms:

“When courts are required to develop the common law or promote access to courts, they must remember that their ‘obligation to consider international law when interpreting the Bill of Rights is of pivotal importance’”. This is an obligation

imposed on them by section 39(1)(b) of the Constitution. Measures to be taken by this Court in fulfilling its obligations in terms of sections 34, 8(3) and 39 of the Constitution, in relation to this matter, are to be informed by international law, as set out in the Amended Treaty, which obliges South Africa to facilitate the enforcement of decisions of the Tribunal”⁸

Judicial Independence

Section 165 of our Constitution, which provides for judicial independence⁹, was interpreted as follows:

⁸ Government of the Republic of Zimbabwe vs Fick CC 101/12 : Paragraph 68

⁹ The independence of the courts is affirmed in a number of international instruments as the foundation of a properly constituted judicial system. And the confidence in as well as the credibility of a judicial system depends on the existence of enabling conditions within a given country. These conditions include but are not limited to the following:

- Constitutionally protected independence of the Judiciary, separation of powers and the rule of law;
- A transparent appointment of competent judicial officers who must be persons of integrity with appropriate training or qualifications in law;
- Guaranteed tenure until a mandatory retirement age or at the expiration of the term of office where such exists; and
- Adequate remuneration and favourable conditions of service.
- Judges must be kept free from political or any other pressure so that judgeship should never be used as a reward for a political service;
- The Judge’s freedom of thought should be reinforced with immunity from prosecution, suit or any other action, flowing from the performance of judicial functions.

“Historically, the generally accepted core of the principles of judicial independence has been complete liberty of the individual judges to hear and decide cases that come before them, no outsider, be it government, pressure group, individual or even another judge, should interfere, with the way in which a judge conducts his or her decision.

This core continues to be central to the principle of judicial independence”.¹⁰

Alluding to the enormous responsibility courts bear to stay faithful to their constitutional mandate and to maintain public and international confidence, former Chief Justice Chaskalson said:

“The courts are the guardians of the Constitution and the institutions to which the people of our country can turn if they wish to challenge the legitimacy of the laws or conduct of the Legislature, the Executive or any other organ of state. In performing that function, the judicial power must not

¹⁰*Hermanus Frederick Van Rooyen and Others v The State and Others* 2002 ZACC 8

be constrained by other arms of government. Courts must be, and seen to be, independent”¹¹.

The interpretive authority of the courts is rooted in their independence. By virtue of security of tenure enjoys independence from the political branches and public passions of the moment. Insulated from partisan pressures, the Judiciary is able to render decisions without fear or favour toward the political majority. As Alexander Hamilton said, independent courts serve as an “excellent barrier to the encroachments and oppressions of the representative body,” and they play a “peculiarly essential” role in safeguarding individual rights and liberties. On the other hand, the Judiciary “has no influence over either the sword or the purse”; it has “neither force nor will, but merely judgment.”¹²

What they must however avoid is the imposition of their policy preferences on the other arms of the State. A measure of self restraint is at times required. The notion of judicial restraint therefore requires of Judges to be vigilant against abuses of their own power.

¹¹A Chaskalson: *Judicial Independence and Sustaining the Confidence of the Public in the Judiciary*, 2011

¹² Goodwin Liu et al at p24

But how does the Judiciary refrain from encroaching into the operational space of the other arms of the State without being overly deferential or without looking like it is compromising its own independence or shirking its constitutional duty to administer justice without fear, favour or prejudice?

The helpful approach to interpretation

Judges generally look to a variety of sources to elucidate the meaning of the Constitution. These sources include the text, and context, history, scheme or structure, and purposes, as well as judicial precedent. They also include contemporary practices, evolving public understandings of the Constitution's values, and the societal consequences of any given interpretation in dealing with present-day problems.¹³

Constitutional meaning is a function of both text and context.

In many instances, a court cannot be faithful to the principle embodied in the text unless it takes into account the relevant social context in which the text is interpreted. This includes not only social conditions and facts about the world, but also public values and social understandings as reflected in statutes, the common law, and other parts of the legal

¹³ Goodwin Liu et al at p33

landscape. The words of the Constitution must be read in context, and interpretations must sometimes change as the context changes, if the meaning of the text is to be preserved over time.¹⁴

The voice of the Judiciary on constitutional matters ultimately draws its authority from the public's acceptance of its institutional role, even when its specific decisions are controversial. The Court's judgment must reflect the nation's best understanding of its fundamental values, "[f]or the power of the great constitutional decisions rests upon the accuracy of the Court's perception of this kind of common will and upon the Court's ability, by expressing its perception, ultimately to command a consensus." In interpreting and applying the Constitution, the Judiciary must exercise independence from politics and reflect the common will in order to secure the democratic legitimacy of its decisions.¹⁵

Conclusion

The principle-centered interpretation of the Constitution and the laws by the Judiciary, requires not only the creation of certain institutional arrangements with built-in guarantees for judicial independence but also

¹⁴ Goodwin Liu et al p34

¹⁵ Goodwin Liu et al at p24

training programmes focussed on capacity-building or independence-enhancement.

The application of constitutional principles must be evolutionary, and open to adaptation if the Constitution's original meaning is to retain its essence. This would allow the constitution to remain relevant even as the conditions and norms of a given society become ever more distant from those of the founding generation.

Strong and focussed judicial leadership is critical to the creation of conditions necessary to enable courts to continuously give practical expression to the legitimate aspirations of the nation, in a reasonably predictable way.

All of the above would help create the climate necessary for Judges to interpret the Constitution and the laws in ways that would birth and sustain public and international confidence. There can be no doubt that the acceptance of judicial decisions by the citizens and government is essential for peace, stability, welfare and maintenance of the rule of

law.¹⁶ Of equal importance is that international confidence in the Judiciary has great potential to create an investor-friendly environment which would attract investment, job creation and economic growth which the continent of Africa, needs desperately.

I THANK YOU.

¹⁶*Former Chief Justice Ngcobo, Claude Leon Lecture, University of Cape Town, 2010*