Constitutional interpretation in the so-called 'hard cases': Revisiting *S v Makwanyane*

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OPSOMMING

Grondwetlike interpretasie in sogenaamde 'moeilike sake': 'n Herbesoek aan *S v Makwanyane*

Grondwetlike interpretasie in sogenaamde 'moeilike sake' verg, in sekere gevalle, dat regters van subjektiewe maatstawe moet gebruik maak om definisie te verskaf aan grondwetlike regte en waardes. Dit beteken dat regters van nie-tradisionele bronne gebruik moet maak wanneer grondwetlike interpretasie plaasvind. Dit laat die moontlikheid dat die bevinding van die hof beïnvloed kan word, of selfs baseer mag wees, op die persoonlike geloof-, politieke- of waardesisteem van die regter. In *S v Makwanyane*, 'n voorbeeld van 'n moeilike saak, het die hof bevind dat subjektiewe interpretasie onontbeerlik deel is van grondwetlike interpretasie. Subjektiewe interpretasie is egter moeilik inaggenome die plig wat op howe rus om 'n beredeneerde rede vir hul beslissings te verskaf. Hierdie artikel stel voor dat regters die effek van eie persoonlike vooroordele moet ondersoek en indien dit moontlik 'n rol mag speel in die beslissing van die hof dit te erken. So erkenning word dan geartikuleer in die beslissing van die hof wat 'n mate van objektiwiteit daaraan verskaf en dit blootstel vir kommentaar en moontlike kritiek.

1 Introduction

In most cases commonly before the courts, the legal sources point to a clearly defined outcome after the facts and legal arguments have been heard. The sources of law that the judge must interpret to arrive at a just and fair conclusion are obvious. If the plaintiff in a delictual claim for damages proved, by fact and legal argument, that the defendant has assaulted him intentionally and unlawfully, he is entitled to the damages that he can prove. The legal sources point in one direction: a delict was committed and the plaintiff is entitled to damages. Therefore, there is conformity in the objective legal interpretation of the sources. However, adjudication is also sought in matters where the accepted sources of law are not always clear, may contradict one another, or may offer no clear and acceptable legal sources for the resolution of the dispute. These are referred to as 'hard cases', in which an objective way of reaching a judgment based on the accepted sources of law is problematic.

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In South Africa, the first source for judicial decision-making will be the Constitution,[1] followed by the accepted current law in the form of statutory law, common law, customary law; as well as court precedent, international, and foreign law.[2] However, in hard cases, the court will often have to reach a fair and just decision based on other sources. In some instances, these 'other sources' find their origin in the subjective identity of the judge – the sum of his or her upbringing, culture, life experience and religious- or political beliefs. However, this presents a conundrum, as the courts are duty-bound to give reasoned decisions.[3] The decision-maker, therefore, has to deliberate before reaching a decision - and justify the decision made. This means the decision of the court should be based on fact and sound reason, as well as being well-founded in prevailing law. It must present a just appraisal of the facts, evidence and arguments placed before the courts. This requires the judge to make the reasoning for the decision public in the form of a written court decision, which articulates the reasoning behind the decision.

This paper investigates the interpretation of the often vague and undefined constitutional rights and values fundamental to the South African Constitution by revisiting *S v Makwanyane*.[4] *Makwanyane* was chosen because the Court had to deal with the undefined rights and values articulated by the Interim Constitution.[5]

Makwanyane is an example of a 'hard case' due to its extremely difficult interpretive choices. The drafters of the Constitution and the incumbent government left the resolution of the question of the constitutionality of the death penalty up to the courts. The text of the Interim Constitution offered no guidance and section 11 was unqualified, stating that everyone has the right to life. The general limitation provisions of section 36 stated that rights could be limited, but there was no previous precedent or comparable South African jurisprudence to guide the adjudication.

The analysis shows that the original Constitutional Court followed a method of constitutional interpretation based on traditional methods of interpretation, as well as a measure of subjective constitutional interpretation. Interpretation, that is, not based on the traditional sources of the law. This article investigates how the subjective element in constitutional interpretation in hard cases can be balanced with the duty of the courts to give reasoned decisions.

1 Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).
2 Section 39(1) of the Constitution. When interpreting the Bill of Rights, a court (b) must consider international law; and (c) may consider foreign law. Hereafter, any reference to 'current law' includes these sources.
3 *Helen Suzman Foundation v Judicial Service Commission* 2015 (2) SA 498 (WCC) para 16.
4 1995 (3) SA 391 (CC).
5 Constitution of the Republic of South Africa Act 200 of 1993.

2 Defining So-Called 'Hard Cases'

In hard cases, where the court is asked to resolve an issue fairly, the court is asked to decide something about which the parties themselves could not agree and for the determination of which no standard exists.[6] There is no precedent before the court and the law is unclear on the matter. This means that the objective application of the law to the facts of the case and the legal arguments before the court is problematic. Posner states the following regarding hard cases:[7]

> If a case is difficult in the sense that there is no precedent or other text that is authoritative, the judge has to fall back on whatever resources he has to come up with a decision that is reasonable, that other judges would also find reasonable, and ideally that he could explain to a layperson so that the latter would also think it a reasonable policy choice. To do this, the judge may fall back on some strong moral or even religious feeling. Of course, some judges fool themselves into thinking there is a correct answer, generated by a precedent or other authoritative text, to every legal question.

Hard cases require the judge to seek interpretation of the law in resources not traditionally associated with the law. The judge must look outside the law to find the sources for interpretation of the current law. This requires of judges, when the conventional legal materials fall short, to have 'recourse to other sources of judgment, including their own political opinions or policy judgments, even their idiosyncrasies.'[8] This requires subjective interpretation of the law from the judge; a self-imposition on him- or herself of his or her own moral, religious or political beliefs. The judge then is the 'interpreter for the community of its sense of law and order and must supply omissions, correct uncertainties, and harmonise results with justice through a method of free decision'.[9] In this context, the method of free decision means that previous precedent, or current law, does not bind the judgment of the court, but the judge must still make a decision based on the facts of the case and the legal arguments before the court.

According to Dworkin, a hard case is a situation in law that gives rise to genuine arguments about the truth of a proposition of law that cannot be resolved by recourse to a set of plain facts determinative of the issue.[10] Dworkin states that where the law is not clearly identifiable by reference to the facts of the case before the court (what he calls the rule of recognition) there is no law on the matter. In order to perform his duty to bring the case to a just and fair conclusion, the judge must consult resources other than legal ones. In other words, the judge must exercise

6 Fuller and Winston 'The forms and limits of adjudication' 1978 Harvard Law Review 373.
7 Segall 'The Court: A talk with Judge Richard Posner' The New York Review of Books http://www.nybooks.com/articles/archives/2011/sep/29/court-talk-judge-richard-posner/ 2011 accessed 2015-11-21.
8 Posner *How judges think* (2010) 9.
9 Cardozo *The nature of the judicial process* (1946) 16.
10 Guest *Ronald Dworkin* (1997) 136.

discretion in order to come to a decision.[11] This exercise of discretion allows a judge to consult his- or her own subjective disposition in order to conclude matters justly and fairly.

In a South African context, Dworkin's argument can be explained by reference to the rights and values imbedded in the Constitution. The rights and values are fundamental to the Constitution, establishing its character and structure. These rights and values are not defined and are often vague and abstract. The values are vague and abstract because they do not spell out the impact they are intended to have on any actual situation or how these values are to be compromised against other values or rights. The effect of this is twofold. As there is no clear definition or meaning attached to the constitutional values there is nothing to direct the judge in the interpretation thereof, but, on the other hand, there is also nothing that constrains the judge in his- or her interpretation. This concept is not as startling as it may first appear, it conforms to the principle of transformative constitutionalism, a grounding pillar of the Constitution, 'the primary purpose of which is to intervene in unjust and impermissible power and resource distributions, and liberates the judicial function from an austere legalism'.[12]

The views expressed by both Posner and Dworkin are contrary to the classical view of legalism, the view that judges base their decisions on the law. Posner suggests that legalism is overrated with legal materials rarely so clear that they provide unobjectionable, easily identifiable solutions to legal disputes.[13] The statement by Posner reflects a reality inherent in the rights and values fundamental to the South African Constitution, they are neither clear nor provide easy solutions to legal disputes.

3 Constraints on Judicial Decision-Making in South Africa

Transformative constitutionalism does not mean that there are no legal constraints flowing from the Constitution placed on the judge when interpreting constitutional values. Interpretation of the Constitution is governed by its own provisions, as expressed in section 39. When interpreting the Constitution courts must promote the values that underlie a democratic society based on human dignity, equality and freedom. The courts must consider international law and may consider foreign law. However, the concepts of human dignity, equality and freedom are also undefined and abstract concepts where the meaning in interpretation will defer from judge to judge. Furthermore, the fact that the Constitution allows judges to consider international and foreign law allows for the possibility of interpretive choice; a judge may choose to

11 Guest *Ronald Dworkin* 136-137.
12 Moseneke 'Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' 2002 *SAJHR* 318.
13 Posner 2008 *How judges think* 47.

rely on international and foreign law that supports his- or her own preconceived notions.

However, a court still has to give meaning and substance to the constitutional rights values even though the meaning thereof is often unclear. This requires of the judge to make a value judgment to give effect and meaning to constitutional rights and values.

In terms of the Constitution, courts are constrained in their decision-making by the supremacy of the Constitution and the rule of law.[14] However, the courts are further constrained by legislation, the common law, precedent and procedural rules in order to arrive at the outcome that is the most correct, both on the factual basis of the case and the application of the law to the matter. Examples of these include the exclusionary rules of evidence, the *audi alteram partem* rule and the right to legal representation. In the South African constitutional setting, established legislation, prevailing precedents and other accepted sources of law can be used by the courts in the adjudication process.

Courts are further restricted in the process of decision-making by the duty to provide reasoned decisions. The judgment of the court serves as the basis on which the legality of the trial is weighed.

In *Helen Suzman Foundation v Judicial Service Commission*,[15] the Court described the duty to give reasoned decisions:

> In the first place, a duty to give reasons entails a duty to rationalise the decision. Reasons therefore help to structure the exercise of discretion, and the necessity of explaining why a decision is reached requires one to address one's mind to the decisional referents which ought to be taken into account. Secondly, furnishing reasons satisfies an important desire on the part of the affected individual to know why a decision was reached. This is not only fair: it is also conducive to public confidence in the administrative decision-making process. Thirdly — and probably a major reason for the reluctance to give reasons — rational criticism of a decision may only be made when the reasons for it are known. This subjects the administration to public scrutiny and it also provides an important basis for appeal or review. Finally, reasons may serve a genuine educative purpose, for example where an applicant has been refused on grounds which he is able to correct for the purpose of future applications.

The decision-maker therefore has to deliberate before reaching a decision and justify the decision made. In this way, the duty to give reasons tempers the exercise of discretion present in the judge's decision-making. Furthermore, the furnishing of reasons allows an aggrieved party to evaluate and argue the rationality, lawfulness, reasonableness and justness of the impugned decision.[16] This means the decision of the court should be based on fact and sound reason and it

14 Section 1 of the *Constitution*.
15 2015 (2) SA 498 (WCC) para 14.
16 *Helen Suzman Foundation v Judicial Service Commission* 2015 (2) SA 498 (WCC) para 16.

must be well founded in contemporary law. It must present a just appraisal of the facts, evidence and arguments placed before the courts.

4 The Interpretation of Constitutional Values by the Court in *S v Makwanyane*

In *Makwanyane*, the Court held that provisions of the Constitution should not be construed in isolation, but in their context, which includes the history and background of the adoption of the Constitution together with the other provisions of the Constitution itself and, in particular, the provisions of the Bill of Rights.[17] Provisions must also be construed in a way that secures for 'individuals the full measure' of its protection.

The Court further held that it was permissible, in interpreting a statute (in this case the Constitution), to have regard to the purpose and background of the legislation in question.[18] The Court referred approvingly to the *dictum* in *Jaga v Dönges*,[19] where the Court stated:

> Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background.

The Court further found that, when interpreting a statute, it might be permissible to take into account debates of Parliament, statements by the Minister responsible for the legislation, explanatory memoranda providing reasons for new bills and the report of a judicial commission of enquiry on the object of the legislation.[20] Background material in the form of reports by technical committees assisting the multi-party negotiating process can provide a context for the interpretation of the Constitution.[21]

The Court held that, because there is no definition of what is to be regarded as cruel, inhuman or degrading punishment,[22] the Court had to give meaning to these words itself.[23]

Chaskalson CJ, pronouncing on whether the death penalty constituted cruel and unusual punishment, referred to reports by the South African

17 Para 10.
18 Para 13.
19 1950 (4) SA 653 (A) 662G-H.
20 *Makwanyane* para 14.
21 Para 17.
22 Section 11(2) of the *Interim Constitution.*
23 *Makwanyane* par 8.

Law Commission,[24] press statements by the Minister of Justice[25] and international and foreign comparative law.[26] The Chief Justice stated that public international law would include non-binding as well as binding law to be used as tools of interpretation. Furthermore, international agreements and customary international law provided a framework within which the Human Rights Charter of the Interim Constitution could be evaluated and understood. Therefore, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, could be sourced in constitutional interpretation.[27] However, in relation to interpreting the Constitution by sourcing comparative international and foreign law, he said:[28]

> In dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the Constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.

The Court acknowledged that the majority of South Africans favour the retention of the death penalty, but stated that public opinion could not sway the Court. The question that had to be answered was whether the Constitution allowed the sentence.[29]

The Court, therefore, listed appropriate sources for the interpretation of constitutional rights and values. However, the judges were not consistent in their interpretative method, nor in the sources used in their individual interpretation of constitutional values.

Although the judgment of the Court was unanimous, the judges based their reasoning and decisions on different aspects of constitutional interpretation and different values and sources of law.

Chaskalson CJ stated that the core argument against the death penalty is based on section 11(2), which prohibits cruel and inhuman punishment.[30] From this right other constitutional rights flow, such as the right to life, equality and dignity. Because of the arbitrariness of the death penalty, these rights would be breached.

Ackerman J also based his decision on the prohibition of cruel and inhuman punishment, but added that the constitutional right to life cannot be qualified.[31] He further relied on the fact that the arbitrariness of the death penalty results in unequal treatment of persons, therefore

24 Para 22.
25 Para 23.
26 Para 33.
27 Para 35.
28 Para 39.
29 Para 87.
30 Para 8.
31 Para 155.

violating the right to equality. The judge argued that, when deciding on whether to impose the death penalty, the decision maker had to make a subjective decision. This involved weighing up mitigating and aggravating factors and, subsequently, a value judgement as to whether the death sentence was appropriate. This left wide latitude for difference of individual assessment, evaluation and normative judgment that are inescapably prejudiced.

Didcott J emphasised the constitutional right to life.[32] He argued that the imposition of the death penalty called for a value judgment that could be influenced by one's own moral attitude and feeling. He acknowledged, however, that the courts' experience and training warned against the trap of undue subjectivity.

Kentridge J argued that the imposition of the death penalty was not a question of the right to life, but whether the imposition of the death penalty constituted cruel and inhuman punishment.[33] He found that the imposition of the death penalty was cruel and inhuman because it infringed on the right to life, dignity and equality.

Kriegler J argued that the question called for legal and not moral or philosophical reasoning.[34] However, value judgements in the answering of the question were inescapable. The judge stated that law does not operate in a vacuum and calls for value judgements, within which extra-legal considerations may loom large. The judge, unfortunately, did not specify what extra-legal considerations would be deemed acceptable. The judge found that the right to life was unqualified and, therefore, it was unnecessary to consider further inconsistencies with other constitutional rights.

Langa J emphasised the right to life and used the principle of *ubuntu* as a source to define the right to life and human dignity.[35]

Madala J also looked to the principle of *ubuntu* as a source to define constitutional values. Central to this was the ideas of humaneness, social justice and rehabilitation.[36] Because the death penalty offered no chance for rehabilitation, it was cruel and inhumane.

Mahomed J argued that the Constitution articulated the shared aspirations of a nation and defined the values which bind its people, and were the basic premises upon which judicial, legislative and executive power was to be wielded.[37] The judge was rational in his interpretational approach, reasoning that there was no rational justification for the death penalty. Facts and argument for the retention of the death penalty did not justify a rational and judicious judgment for its retention.

32 Para 177.
33 Para 194.
34 Para 207.
35 Para 215.
36 Para 235.
37 Para 261.

Mokgoro J referred to indigenous South African values that had to be recognised in promoting the underlying values found in an open and democratic society.[38] The concept of *ubuntu* embodied these values. According to the judge, constitutional interpretation involved making constitutional choices by balancing competing fundamental rights and freedoms. This could only be done by reference to a system of values extraneous to the Constitution. These principles constituted the historical context in which the text was adopted and which explained the meaning of the text. However, the courts would have to make the necessary value choices.

The judge argued that balancing opposing rights required value judgements, which form the nature of constitutional interpretation. However, because the Constitution allows the courts to seek guidance in international norms and foreign judicial precedent (reflective of the values that underlie an open and democratic society based on freedom and equality), and because the court articulated, rather than suppressed the values that underlie the judgment, the court was not being subjective. Because the courts set out the foundations for their interpretations in a transparent and objective way and made their decisions available for criticism, the courts were objective in their reasoning.

O'Regan J argued that the right to life encapsulated all other rights in the Constitution.[39] Therefore, the right to life could not be qualified. The Justice referred to acceptable common-law principles as sources for values to provide guidance for constitutional interpretation.

Sachs J did not agree with the reliance placed on the prohibition against cruel and inhuman punishment.[40] He argued that the right to life was unqualified. He further argued that whatever one's personal view might be, the response had to be a purely legal one. The judge took a rational interpretational approach by arguing that, based on rationality and proportionality, the death penalty could not be justified. The judge was also more formalistic in his interpretation, stating that section 9 should be read to mean exactly what it says: every person shall have the right to life. Because it was not qualified in any way, the drafters of the Constitution did not intend to allow the state to take the life of its citizens. He also referred to customary law as a source to interpret constitutional values.

The analysis of the *Makwanyane* case shows that although the judgment was unanimous, the judges reached their decisions by relying on different constitutional values and rights, different methods of constitutional interpretation and different sources for their interpretation. They were faced with an inescapable normative choice in deciding which constitutional values and rights should be prevalent. The argument of each judge presented an interpretive choice between the

38 Para 300.
39 Para 318.
40 Para 345.

constitutional values or sets of values. Six of the judges premised their arguments on the right to life, with two reasoning that this right could not be qualified. Three based their findings on the fact that the death penalty constituted cruel and inhumane punishment,[41] while two said that the death penalty violated the right to dignity and equality and, as such, was arbitrary and unconstitutional.

The *Makwanyane* judgment illustrates four methods of interpretation based on an adapted version of the Savignian model[42] described by Du Plessis:[43]

(a) Grammatical interpretation: concentrating on ways in which the conventions of natural language can assist legal interpretation and can help to limit the many possible meanings of a provision. The Court quoted approvingly from *Jaga v Dönges NO*,[44] where the Court held that words and expressions used in legislation must be interpreted according to their ordinary meaning.[45]

(b) Systematic interpretation: as a manifestation of contextualism, calling for an understanding of a specific provision in the light of the text or instrument as a whole and of extra-textual *indicia*. The Court held that constitutional provisions should not be construed in isolation but in their context, which includes the history and background of the provisions.[46]

(c) Purposive interpretation: that sheds light on the possible meanings of a provision with reference to its purpose. The Court must have regard to the purpose of the constitutional provisions.[47]

(d) Historical situating: a provision in the tradition from which it emerged and allowing qualified recourse to information concerning the genesis of the text in which the provision occurs and concerning the provision itself. The Court held that the history and background of the adoption of the Constitution together with the other provisions of the Constitution itself and, in particular, the provisions of the Bill of Rights must be taken into account when interpreting constitutional provisions.[48]

However, the analysis also shows that the judges acknowledged that subjective constitutional interpretation is unavoidable in constitutional jurisprudence. Mokgoro J argued that, because judgments of the courts are articulated and available for criticism and are based on acceptable

41 Kentridge J went so far as to state that the matter before the court was not a question of the right to life. *Makwanyane* para 194.
42 Le Roux 'Six (individually-named) notes on the counter-aesthetics of refusal' in Van Marle 'Refusal, transition and post-apartheid law' 2009 African Sun Media 73: The traditional continental model of interpretation in which various common-law canons of statutory interpretation must be classified into grammatical, systematic, purposive, historical and comparative reading strategies.
43 Du Plessis 'Learned Staatsrecht from the heartland of the Rechtsstaat' 2005 PELJ 86.
44 1950 (4) SA 653 (A) para 662g-h.
45 *Makwanyane* para 13.
46 Para 10.
47 Para 13.
48 Para 10.

sources in the form of applicable international and foreign precedent, the interpretation is not subjective.

This argument is not entirely correct. Although the Court considered applicable international law and foreign law, it did not consider sources that argued that the death penalty was an appropriate penalty.[49] This reflects the critical role of interpretive choice in adjudication.[50] Interpretive choice, choosing the sources of law that will support your own subjective view of constitutional interpretation, is still a measure of subjective interpretation. This, however, does not make the decision of the Court arbitrary or unrestricted.

The Court was transparent in its analysis of the inherent fundamental values of the Constitution. However, the judges did not explain their reliance on the particular case law of the countries in question. This leaves the possibility that the subjective disposition of the judges was a deciding factor in choosing these sources.

The *Makwanyane* case laid the foundation for a particular style of constitutional interpretation. The opinions of the judges were the product of a human rights text setting forth a liberal culture of rights founded upon human rights and values and premised on justification. The Court turned to these human rights and values for guidance in their constitutional interpretation. According to Harcourt, the judges were strongly optimistic and idealistic in the realisation of these rights and values. The Court was able to articulate forcefully and transparently the fundamental changes that have taken place in South Africa, thereby setting forth a culture of rights and justification.[51]

The *Makwanyane* case also shows the conundrum of constitutional interpretation. In hard cases, Judges will have to give meaning to the undefined rights and values of the Constitution by relying on a measure of subjective interpretation. How then can subjective interpretation and reasoning be presented as a reasoned decision on the part of the court?

49 The Court relied heavily on jurisprudence of the United States of America and India that argued against the death penalty, although the death penalty was considered a competent sentence in both of these countries. The Court also referred to African countries (Namibia, Mozambique and Angola), where the death penalty was abolished, but it did not refer to Botswana, a constitutional democracy, where the death penalty was a competent verdict. *Makwanyane* para 33.

50 Harcourt 'Mature adjudication: Interpretive choice in recent death penalty cases' 1996 *Harvard Human Rights Journal* 256.

51 Harcourt 'Mature adjudication: Interpretive choice in recent death penalty cases' 1996 *Harvard Human Rights Journal* 267.

5 Balancing Subjective Constitutional Interpretation With the Duty of the Court to Give a Reasoned Decision

Klare is of the opinion that judges will always be confronted with conflicting pulls and tensions of freedom and constraint. He articulated this tension between judicial constraint and judicial freedom as follows:[52]

> On the one hand, there is a grand constitutional text replete with broad phrases and redolent with magnificent hopes to overcome past injustice and move toward a democratic and caring society. Yet, on the other, just about everyone takes for granted that adjudication is not and cannot be infinitely plastic and open-ended, that judges and lawyers are not completely at large to say and do as they please by the lights of whatever personal vision of freedom they hold.

Klare's point of view is undoubtedly true of the rights and values contained in the South African Constitution. What encapsulates dignity for one reader of the Constitution will not necessarily mean the same for another. As such, subjective interpretation is an integral ingredient of constitutional adjudication in South Africa. While this does not mean that judges are not impartial, absolute neutrality in adjudication is impossible.[53] The culture of substantive adjudication must, however, be balanced by justification in the form of the court's decision.

The normative content of the Constitution is clearly based on Western liberal-democratic principles, with dignity, equality and freedom prominent. As these values are not defined, their interpretation will depend on the subjective value-system of the interpreter. In a constitutional democracy, set in a multi-cultural community, this is certainly a necessity:[54]

> Judges will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging.

Nevertheless, interpreters of the values of the Constitution, including and – especially – judges, should be aware of their own preconceived notions.[55]

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52 Klare 'Legal culture and transformative constitutionalism' 1998 *SAJHR* 149.
53 *South African Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd* 2000 (3) SA 705 (CC) para 14.
54 *R v S (RD)* (1997) 118 CCC (3d) 353 para 38.
55 Venter 'Judges, politics and the separation of powers' 2007 *Speculum Juris* 74.

In the *M & G Media Ltd* case,[56] the Supreme Court of Appeal acknowledged that discretion plays an important part in decision-making and that discretion 'permits abstract and general rules to be applied to specific and particular circumstances in a fair manner'. The scope of these discretionary powers may vary.[57]

Where broad discretionary powers are conferred, there must be some constraints on the exercise of those powers so that those who are affected by the exercise of the powers will know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision.[58]

An example of broad discretionary powers conferred on the courts can be obtained from the power of the courts to ascertain what constitutes a reasonable member of the public, and what their views would be. This is not done in a vacuum; it is context-specific. Judges often rely on their own experience as members of society to determine this.[59] The same principle holds true for the often vague and undefined constitutional rights and values.

In adjudication, the judge engages in a fact-finding exercise. The court attempts to give a meaningful interpretation of a set of events, so fact-finding seems unavoidable. According to conventional understanding, fact-finding involves establishing congruence between statements made about the world and the world itself.[60] However, most facts litigants seek to establish in adjudication, and in particular constitutional litigation, are social facts rather than phenomena intrinsic to nature.[61] When adjudicating on matters relating to social facts, divergent viewpoints can cause problems for the administration of justice. This is especially likely in a deeply split society, like South Africa, where normative standards are uncertain. The undefined rights and values fundamental to constitutional interpretation may aggravate this uncertainty.

Does this mean that constitutional interpretation has been reduced to a system of contradictory discourse, which can never be conclusive, as there is no prevailing standard method of interpretation of constitutional values; no supreme principle determining which value should prevail?

56 *President of the Republic of South Africa v M & G Media Ltd* 2011 (2) SA 1 (SCA) para 1.
57 *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 53.
58 *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 34.
59 *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* 2015 (1) BCLR 1 (CC) para 207.
60 Damaska 'Truth in adjudication' 1998 *Yale Law School Faculty Scholarship Series* 291.
61 Damaska 'Truth in adjudication' 1998 *Yale Law School Faculty Scholarship Series* 293.

Judges are human and therefore absolute neutrality in judicial officers is not possible.[62] Cardozo describes this as follows:[63]

> There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals can. All their lives, forces which they do not recognize and cannot name, have been tugging at them, inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, the total push and pressure of the cosmos, which, when reasons are nicely balanced, must determine where choice shall fall.

Therefore, '[w]e may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.'[64] However, constitutional adjudication requires that judicial officers interpret the Constitution in ways which will give effect to its fundamental values. When the constitutionality of legislation is in issue, judges are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.[65]

Proponents of the Critical Legal Studies Movement highlight the role of ideology in law by claiming that the legal reasoning and justifications of courts are only argumentative techniques. There can never be a 'correct legal solution' that differs from the correct ethical and political solution to a legal problem. The Movement claims that legal text does not constrain the judge's interpretation in any significant way.[66] Therefore, adjudication cannot be separated from subjective interpretation or ideological influence. This statement is founded, at a fundamental level on the notion that, when assigning meaning to the values of the Constitution, each person seeking interpretation will face the danger that what is sought will be a construction of the 'search' instituted to find it. This means that each individual's search for constitutional value interpretation will be a construct of his or her own making. Such construct will depend, in turn, on the subjective disposition of the individual him- or herself. Therefore, when giving meaning to constitutional rights and values, the judge's search is an extension of his- or her own beliefs.

The interpretation by the courts of the Constitution, including its undefined rights and values, is critically important in constitutional litigation. These rights and values are fundamental to, and entrenched in, the Constitution, establishing its character and structure. Judges of the

62 *South African Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd* 2000 (3) SA 705 (CC) para 14.
63 Cardozo *The nature of the judicial process* (1946) 12.
64 Cardozo *The nature of the judicial process* (1946) 13.
65 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) para 22.
66 Kennedy 'Freedom and constraint in adjudication: A critical phenomenology' 1986 *Journal of Legal Education* 518.

South African Constitutional Court recognise the danger of unrestrained subjective interpretation of the Constitution. Therefore, the Constitutional Court seeks to implement the moral vision of the Constitution, as articulated by the imbedded values, while justifying its decisions in terms acceptable to the legal community. Furthermore, the process of interpreting the Constitution must 'recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights'.[67] However, these democratic values are themselves, in turn, open to a degree of subjective interpretation.

The courts recognise that legal training and experience prepare judges for the difficult task of fairly determining where the truth may lie in a welter of contradictory evidence.[68] Legal tradition, in the form of community expectations, the legal training of the judge and the traditions of the bench, the advocates' bars and the different law societies also condition a judge to be fair and just in adjudication. Furthermore, judicial conditions of service and codes of conduct provide valuable guidelines for ensuring a fair trial. Therefore, judges are assumed to be people of conscience and intellectual discipline, capable of judging a particular controversy fairly based on its own circumstances.[69] This will show in instances where the judge may differ from the political, religious or traditional ideology of a party, or may have sympathy with a party, but still adjudicate the case on the strength of constitutional principles to reach a just and lawful conclusion. Furthermore, it is appropriate for judges to bring their own life experience to the adjudication process.[70] Nevertheless, Cardozo asks the following questions:[71]

> If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals?

When adjudicating, a judge must recognise the internal view that comes into play when hearing a case. The judge should look to his or her conscience, consider his or her own moral position, the facts and evidence of the case, the litigants and the constitutional rights and values at stake, and conclude that his or her own moral presumptions do not cloud the judgment. The internal view acknowledges that inherent personal views may influence the judgment of the court. This introspective view gives rise to a theory of acknowledgement, which

67 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) para 21.
68 *President of the Republic of South Africa v South African Rugby Football Union* 1999 4 SA 147 (CC) para 40.
69 *United States v Morgan* 313 U.S. 409 (1941) para 421.
70 *President of the Republic of South Africa v South African Rugby Football Union* 1999 4 SA 147 (CC) para 42.
71 Cardozo *The nature of the judicial process* 10.

allows judges to frame subjective predispositions into the court's reasoning.

In articulating the theory of acknowledgment, the argument of Mokgoro J in *S v Makwanyane*[72] may useful. The judge argued that, because judgments of the courts are articulated and available for criticism and are based on acceptable sources in the form of applicable international and foreign precedent, the interpretation is not subjective. This is true to a certain extent. However, in the quest for objectivity, judges should acknowledge and address the extent of their own predisposition on the case before them. Should the introspection show that the judge's own moral predisposition might be in play, this must be articulated in the court's decision.

CJ Mogoeng Mogoeng's ambivalence over gay rights was put in the spotlight when he dissented from a judgment of the Constitutional Court that said it was not defamatory to call someone gay.[73] The Chief Justice provided no reasons for his dissent. While it is not possible to determine the reason behind the dissent, it seems possible that it was based on his personal moral convictions. If that was indeed the case, for the sake of legal clarity and objectivity it would have been preferable if this was articulated in the judgment. Although it might have opened the decision of the Chief Justice to criticism, it would certainly have been more preferable than a bland denial of subjective predispositions and an absence of justification.

In *Justice Alliance of South Africa v President of the Republic of South Africa*,[74] the Court had to decide whether the Chief Justice might continue to serve after the expiry of the non-renewable term of twelve years.[75] The Court held that any attempt to extend the term of the Chief Justice would be unconstitutional. However, three members of the Court did not agree with the decision of the Court.[76] Neither the names of the dissenting judges nor their reasons for dissent were given. This again raised the spectre of possible subjective predispositions that should have been acknowledged and articulated in the judgment.

The theory of acknowledgment provides legitimacy and objectivity to the judgment by exposing the subjective interpretational element to criticism. The theory of acknowledgement allows for a process through which subjective interpretation becomes objectively verifiable and provides acceptable grounds for interpretation and justification. If subjective adjudication is influenced by the moral presumptions of our judges, it is their duty to articulate and make public such influences for insight and possible criticism.

72 1995 (3) SA 391 (CC) para 300.
73 *Le Roux v Dey* 2011 (3) SA 274 (CC).
74 2011 (5) SA 388 (CC).
75 Section 176 of the *Constitution.*
76 Justice Alliance of South Africa para 95.

The theory of recognition also allows for the realisation of the words of the late Chief Justice Pius Langa:[77]

> Articulating the subjective interpretational element in adjudication allows the realisation of our constitutional legal culture, which requires that we expressly accept and embrace the role that our own beliefs, opinions and ideas play in our decisions.

6 Conclusion

Constitutional interpretation in the so-called hard cases sometimes requires subjective interpretation of the law from the judge. This means that the judge must look outside the accepted law to find sources of interpretation for the current law. In some instances, this could lead to a judgment of the court that is based on or influenced by the judge's own moral, religious or political belief.

In *Makwanyane,* the court had to make a normative value judgment to give effect and meaning to the undefined constitutional rights and values and the justices acknowledged that subjective constitutional interpretation is unavoidable in constitutional jurisprudence. However, this is not compatible with the duty of the court to give a reasoned decision for its judgment.

Therefore, judges should acknowledge and address the extent of their own predisposition on the case before them. Should this introspection show that the judge's own moral predisposition might be in play, this must be articulated in the court's decision. This provides legitimacy and objectivity to the judgment by exposing the subjective interpretational element to criticism. The acknowledgement then allows for a process through which subjective interpretation becomes objectively verifiable and provides acceptable grounds for interpretation and justification.

77 Langa 'Transformative constitutionalism' 2006 *Stell LR* 353.