In die Skriflig / In Luce Verbi
ISSN: (Online) 2305-0853, (Print) 1018-6441

The South African Constitution as an instrument of doing what is just, right and fair

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Dates:
Received: 02 Feb. 2020
Accepted: 26 June 2020
Published: 21 Dec. 2020

How to cite this article:
Dube, F., 2020, 'The South African Constitution as an instrument of doing what is just, right and fair', *In die Skriflig* 54(1), a2601. https://doi.org/10.4102/ids.v54i1.2601

The South African Constitution creates rights and imposes obligations. However, it is not established that constitutional obligations include doing what is just, right and fair. This article sought to ascertain whether the Constitution binds South Africans to legally enforceable obligations to do what is just, right and fair. The article used the doctrinal legal research methodology, which entailed the analysis of primary and secondary sources of law such as the Constitution, case law, books and journal articles. The analysis showed that doing what is just, right and fair is legally mandated by the spirit of the Constitution, which is expressly and implicitly articulated in the preamble, the founding values and the Bill of Rights. The analysis further showed that the judiciary is at the epicentre of facilitating justice and ensuring that all public and private conduct is right and fair.

Keywords: Constitution of South Africa; Justice; Preamble; Founding values; Bill of Rights.

Introduction

The Constitution of the Republic of South Africa, 1996 ('the Constitution'), creates competing rights and imposes obligations on the state, juristic persons and natural persons. However, it is not established in legal scholarship whether constitutional obligations include doing what is just, right and fair or whether this is a matter of morality and individual conscience. This article examines the Constitution to ascertain whether it establishes a society that is bound to a set of legally enforceable principles of justice, right and fairness. The article uses a doctrinal legal research method, which entails the analysis of primary sources of law (such as the constitution and case law) and secondary sources (such as academic commentary in books and legal periodicals). The Constitution is the supreme law of South Africa (s. 2 of the Constitution) and is thus the main source of law used in this article. This article identifies and discusses three parts of the Constitution that articulate the obligations to do what is just, right and fair – namely, the preamble, the founding constitutional values in Chapter 1 and the Bill of Rights in Chapter 2 of the Constitution. Arguably, the Constitution not only places an obligation on power holders to exercise power within a legally prescribed framework created to guard against injustice, wrong and prejudice, but also provides avenues for the vindication of rights. The ethos of doing what is just, right and fair is not peculiar to South Africa because the principles of justice, right and fairness are as old as the law itself and have influenced legal processes and constitution-making for centuries.

The analysis in this article emphasises the constitutional obligation to do what is just, right and fair because of South Africa's challenging past, which was anchored in injustice, inequality, discrimination and other prejudices. The three parts of the Constitution identified as the sources of the obligation to do what is just, right and fair (the preamble, the founding constitutional values in Chapter 1 and the Bill of Rights in Chapter 2) are examined against the historical background. The discussion in this article also shows that the judiciary (the Constitutional Court in particular) is the ultimate authority on the meaning, interpretation and application of what is just, right and fair.

Constitutional aspirations for doing what is just, right and fair

Adopted against a background of centuries of colonialism and decades of apartheid, the Constitution is an embodiment of an ethos of overcoming injustice. The *Constitution of the Republic of South Africa Act 200 of 1993*, which started the transition from apartheid to constitutional democracy, expressly stated the ethos of justice when it declared in its post-amble that:

Note: Special Collection: Law and Justice Conference.

> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.
>
> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation. (n.p.)

This powerful declaration found judicial favour in the second judgement of the Constitutional Court (*S v Makwanyane 1995* [6] Butterworths Constitutional Law Reports [BCLR] 665 para. 261). In the Constitution, the ethos of justice, right and fairness is enshrined and entrenched in the preamble, the founding values and the Bill of Rights. The significance of these three parts of the Constitution is evident from the historical context in which the Constitution was adopted and from the desires of the constitutional drafters to make a Constitution that, in the words of Mahomed DP (*S v Makwanyane 1995* 6 BCLR 665):

> [*R*]etains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is … authoritarian, insular, and repressive. (para. 261)

While the gallant efforts of South Africans to move away from the past are evident, the historical context is still relevant to matters of justice, right and fairness because 'the past is not done with us; … it is not past … it will not leave us in peace until we have reckoned with its claims to justice' (*Daniels v Scribante 2017* [8] BCLR 949 para. 154).

However, the importance of history in post-apartheid jurisprudence should be taken with a pinch of salt, particularly given that some parts of the history are contested and unclear. For this reason, Cameron J warned the Constitutional Court that 'it is bad to hide behind the indeterminacies of history and the inevitable incompleteness and partiality of its telling' (*Daniels v Scribante 2017* [8] BCLR 949 para. 155). Notwithstanding, the significance of the historical context in which the constitutional obligation to do what is just, right and fair arises should not be overlooked, as it influences judicial interpretation. The cases discussed in this article show that whereas judges give ordinary meaning to constitutional provisions, they often use the history to broadly construct the values of the Constitution. The interpretation of the Constitution by judges is not merely an endeavour to find the literal meaning but a process during which judges give meaning to constitutional values and principles (*Matiso v Commanding Officer, Port Elizabeth Prison 1994* [4] SA 592 p. 87).

The preamble

The Constitution identifies the universal and democratic ethos of justice, right and fairness within which the state, juristic persons and everyone in South Africa should operate. In understanding the constitutional framework, it is essential to look at the preamble, which is the introduction to the Constitution. The preamble boldly declares that the Constitution was adopted by '[w]e, the People of South Africa'. In any democratic state, the Constitution's preamble serves several purposes. It declares the sovereignty of the people; contextualises the historical narrative behind the adoption of the Constitution; lays down the supreme goals of the Constitution; and articulates the national identity (Orgad 2010:715). In South Africa, the preamble is also a vital aid in the interpretation of the Constitution, particularly when it comes to ascertaining the 'spirit' of the Constitution.

The most significant aspect of the preamble is that it sets the context for doing justice by recognising the injustices of colonial and apartheid regimes. It honours all persons who fought the unjust regimes to attain justice and freedoms and pays tribute to all persons who worked hard to build and develop South Africa. Unlike in most constitutions, the preamble declares that 'South Africa belongs to all who live in it, united in our diversity'. This declaration lays the foundation for equality and non-discrimination, and thus serves to articulate the importance of the ethos of justice, right and fairness, all of which can only be attained through democratic values and respect for fundamental rights. The preamble calls for a South African society that is not only democratic but also open and governed according to the will of South Africans. It calls for the improvement of 'the quality of life of all citizens and to free the potential of each person' to advance social justice.

Judgements of the courts show that the preamble seeks to create a South Africa that contrasts with the colonial and apartheid injustices through the advancement of equality and freedom, as opposed to the inequality and discrimination that characterised the old order. In *Du Plessis v De Klerk 1996* (5) (BCLR 658 para. 75), Mahomed DP contextualised the preamble in the interim constitution as 'a very clear and eloquent commitment to the creation of a defensible society based on freedom and equality'. In the same judgement, Kriegler J (at para. 132) acknowledged that the preamble is an eloquent proclamation of the urgency of the need to establish a legal order that enables citizens to freely exercise fundamental rights, which the Constitution protects. Kriegler J proceeded in his judgement to draw wisdom from Mahomed DP's articulate expression in *Makwanyane* that the preamble is a declaration of a new legal order based on justice and fairness (*Du Plessis v De Klerk 1996* [5] BCLR 658 para. 158). The preamble does not stand in isolation but also informs the founding provisions in Chapter 1 of the Constitution (Fowkes 2014:8).

The founding constitutional provisions

The founding values underlie the Constitution and carry symbolic importance (Cameron 2014:177). Section 1 of the Constitution identifies constitutional supremacy, the rule of law, human rights and freedoms, representative democracy and good governance as the founding constitutional values. These values sustain constitutionalism through accountable, responsive and open governance (Dube 2019:32). The founding values strengthen and sustain the constitutional order and reinforce the commitments to justice and fairness, hence the

need for everyone to scrupulously observe them. South Africa will face a constitutional crisis if the government and the people do not honour the founding provisions (*Nyathi v MEC for the Gauteng Department of Health 2008* [5] SA 94 para. 80).

However, the founding provisions and the preamble do not confer enforceable rights on South Africans, even if they expressly refer to some rights that are entrenched elsewhere in the constitution (*Rail Commuters Action v Transnet Ltd t/a Metrorail 2005* [4] BCLR 301 para. 21). The essence is that a person who is aggrieved by injustice or another form of prejudice cannot legally rely on the preamble or the founding constitutional provisions. Aggrieved persons must seek remediation through reliance on the Bill of Rights. At times, aggrieved individuals are not permitted to rely directly on the Constitution. This is in line with the principle of subsidiarity (*My Vote Counts v Speaker of the National Assembly 2015* [12] BCLR 1407 paras. 47–54). The principle of subsidiarity means that if Parliament has enacted a statute to give effect to a right or to impose an obligation on the state, a person who wishes to mount a legal challenge for whatever reason must not directly rely on the right provided in the Constitution or in another constitutional provision but must base his or her case on the enabling legislation (Devenish 2005:27–29). In *My Vote Counts v Speaker of the National Assembly 2015* (12) (BCLR 1407), the Constitutional Court put the position as follows:

> These considerations yield the norm that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right. This is the form of constitutional subsidiarity Parliament invokes here. Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role. (para. 53)

The Bill of Rights

The South African Bill of Rights has received much critical acclaim in South Africa and beyond. One notable admirer is Ackerman J, one of the first judges of the Constitutional Court. Ackerman J declared that the Bill of Rights represents the best in all liberal democracies and that it is paradigmatic for all 21st-century democracies that commit to justice through human rights (Ackerman 2012:15). The Bill of Rights, enshrined in Chapter 2 of the Constitution, is the cornerstone of South Africa's democracy and affirms the rights and the values of dignity, equality and freedom that comprise the foundational constitutional values. The Bill of Rights is essential to the discussion on justice, right and fairness, as it protects the rights to access to justice (s. 34), fair and equal treatment (s. 9) and just administrative action (s. 33). These rights, taken together with other rights in the Constitution (such as the right to property, the right to freedom and security of the person, the right to life, the right to access healthcare and adequate housing), affirm the aspirations for a South Africa that is just, right and fair.

The most critical aspect of the Bill of Rights is the justiciability of the rights. The rights are enforceable through the courts; it being the rule that the Bill of Rights binds Parliament, the presidency and cabinet, the courts and other organs of state, and mandates the state to protect, promote and fulfil the rights. In *De Lille v Speaker of the National Assembly 1999* (4) (All South African Law Reports [All SA] 241 para. 14), the Appellate Division held that any person who is affected by state conduct is entitled to judicial protection. When determining cases of injustice and other claims arising from the Bill of Rights, the courts have authority and the power to make any orders that they deem appropriate and that are just and equitable (s. 172[1][b] of the Constitution). However, the courts have the discretion to refuse to grant legal relief in cases of injustice and prejudice if they are convinced that doing so would not vindicate the rule of law. The case law establishes that a constitutional remedy should vindicate and entrench the rule of law (*Steenkamp v Provincial Tender Board of the Eastern Cape 2007* [3] BCLR 300 para. 29). The courts would also refuse to remedy an injustice when the person whose rights have been violated has also been complicit in legal violations (*Corruption Watch NPC v President of the Republic of South Africa*; *Nxasana v Corruption Watch NPC 2018* [10] BCLR 1179 para. 82).

In protecting the rights of all people who live in South Africa, the Bill of Rights places emphasis on the protection of vulnerable groups. The rationale for special constitutional protection of vulnerable groups, such as children and women and linguistic, religious and racial minorities, is that the vulnerable groups are the most exposed to injustice and prejudice. Several court judgements affirm this. Admittedly, democratic processes are not readily available and are often ineffective to protect vulnerable groups who do not have adequate resources and the democratic clout to influence things in their favour (*S v Makwanyane 1995* [6] BCLR 665 para. 88). However, there is no consensus on which minority groups deserve legal recognition and protection. The legal, moral and religious questions regarding the Rastafari and lesbian, gay, bisexual and transgender people have often led to disagreements. Hence, the courts had to intervene, culminating in a judgement in which the Constitutional Court declared that the Rastafari are a protected group under the Constitution and that they need special protection from persecution by the dominant groups (*Prince v President of the Law Society of the Cape of Good Hope 2001* [2] BCLR 133 para. 26).

In some instances, doing what is just, right and fair within the context of the Bill of Rights entangles legal scholars, judges and religious groups in complex questions. There is an ideological conflict between constitutional values and competing religious interests in maintaining order and stability. The adoption of a liberal constitution for South Africa planted the seeds of the ideological conflict between conservative Christian values and the exceedingly ambitious liberal notions of constitutional democracy. The liberal democratic constitution exerts immense pressure on Christianity, specifically. The legal reality is that the

constitutionalist view of what is tolerable will always prevail because the Constitution means what the Constitutional Court judges say it means in their judgements. One of the first ideological clashes emerged in *Christian Education South Africa v Minister of Education 2000* (10) (BCLR 1051), in which the Constitutional Court declared that the practice of corporal punishment in schools is contrary to the Bill of Rights and therefore unlawful. The applicants had approached the Constitutional Court seeking exemption from the *Schools Act*, which prohibited teachers from administering corporal punishment to learners, even if the parents of the learners were consenting to the administration of such corporal punishment on their children. The religious argument was raised in terms of Sections 15 and 31 of the Constitution, which protect the rights to religion and culture. In an earlier ruling, in *S v Williams 1995* (3) (SA 632), the Constitutional Court had outlawed the practice of juvenile whipping as a sentence for criminal conduct in terms of Section 294 of the *Criminal Procedure Act*.

In another case, *S v YG 2018* (1) (SACR 64), the High Court refused to uphold a defence of reasonable chastisement of the child. A father of a 13-year-old boy was on appeal challenging conviction on a charge of assault after he had beaten up his son for watching adult videos and lying about it. The court viewed the chastisement of a child as an unconstitutional invasion into the rights of the child to equality (s. 9 of the Constitution), the right to human dignity (s. 10 of the Constitution) and the right to freedom and security of the person (s. 12 of the Constitution). The High Court judgement was upheld by the Constitutional Court (*Freedom of Religion South Africa v Minister of Justice and Constitutional Development 2020* [1] SACR 113). The court prohibitions of corporal punishment contradict the celebrated biblical command not to spare the rod and spoil the child.

Applicable constitutional principles

Doing what is just, right and fair in a constitutional democracy like South Africa, which emerges from a difficult past of colonial subjugation and apartheid excesses, is contestable, particularly given that South Africa moved on from apartheid more than two decades ago. Ideally, the government should be judged on current terms, not on historical terms. However, the reality is much more complex, with the result that policies, principles and doctrines adopted in the 1990s to mould a just, right and fair South Africa continue to find application in contemporary South Africa with a zeal not imagined before. Two of the most contested principles in this regard are transformation and transformative constitutionalism. These principles are relevant, as they are perceived among minority circles as the avenues for legalised discrimination and exclusion.

The post-1996 South African government adopted transformation as one of its most important underpinnings, resulting in the discourse on radical economic transformation. Venter (2018:144) observes that transformation is expressed as 'the need for change, adaptation and the creation of a modified society'. The envisaged transformed society is one that entails reconciliation, ubuntu, social reconstruction and overcoming the divisions of the past (Venter 2018:151). The aspirations of transformation were eloquently expressed in the post-amble to the interim Constitution, previously quoted. The context of the adoption of the current Constitution, as expressed in the preamble, is another testimony of the transformative nature of the Constitution. However, the notion of transformation is elusive and vulnerable to abuse, as its meaning depends on each context and because transformation is used with arbitrariness, thus raising questions about justice, right and fairness (Venter 2018:144). Notwithstanding, the judicial enforcement of transformation not only affirms the obligation of the state to create a conducive social space for transformation but also takes an active role in facilitating transformation. For the most part, the ambiguity of the transformation agenda has seen the judiciary endorse policies and regulations that seek to advance previously disadvantaged groups through reverse discrimination, it being the general view in judicial circles, policymaking and the discourse that all white South Africans are beneficiaries of the apartheid system.

In *City of Tshwane Metropolitan Municipality v Afriforum 2016* (9) (BCLR 1133 para. 122), the Constitutional Court declared that the benefits that accrued to the white population under the apartheid system have not dissipated and continue to accrue mostly to white South Africans. The judges were riled by the use of historically insensitive language by Afriforum in its application, which challenged the renaming of streets in Pretoria. While Afriforum had a legitimate case in the preservation of the country's history and heritage, its case was severely undermined by the denialist approach of the discriminatory nature of apartheid. The denialist approach has only served to embolden the judiciary to greenlight some unjust policies. It was in this context that in *City of Tshwane Metropolitan Municipality v Afriforum 2016* (9) (BCLR 1133), the Constitutional Court said that:

> [*W*]e disagree profoundly with Afriforum's view of history. And we think it would be better for white Afrikaans people, and indeed everyone else, to find their sense of place and belonging, not only in the past, but also in a shared future, one the Constitution nurtures and guards for all of us, together, united in our diversity. (para. 123)

Whereas transformation is a political term, legal scholars and judges have found the term relevant in law through terminological adaptation, hence the term 'transformative constitutionalism'. Transformative constitutionalism is the equivalent of the term 'egalitarian constitutionalism' (Frankenberg 2018:98). Klare (1998:150) is perhaps the dominant authority on transformative constitutionalism. Klare defines the concept as the inducement of nationwide social change through peaceful political processes anchored in the law. Despite no reference to transformative constitutionalism in the constitutional text, the allure of the term to judges is evident in judgements and in the extra-curial writings. In *Hassam v Jacobs 2009* (11) (BCLR 1148 para. 28), the Constitutional Court concluded that its interpretative

approach enunciated in its jurisprudence in several cases would lead to the achievement of transformative constitutionalism. Interestingly, the Constitutional Court has infused transformative constitutionalism and other concepts such as ubuntu in the founding values of the constitution, it being the judicial view that the function of the Constitutional Court is 'to articulate the fundamental sense of justice and right shared by the whole nation as expressed in the text of the Constitution' (*S v Makwanyane 1995* [6] BCLR 665 para. 362).

Notwithstanding the aspirations for justice, right and fairness expressed in the preamble, the founding values and the Bill of Rights, there is no denial that South Africa experiences unprecedented levels of injustice, wrong and prejudice. This is because the Constitution is not the destination to doing what is just, right and fair; the Constitution is merely the vehicle to the destination. The past two decades have shown that the Constitution is not unchallengeable but has many shortcomings that can only be addressed if South Africans acknowledge that the Constitution has limitations and that whereas it is the supreme law, it is not the *ultimate law*. As such, South Africans might have to look beyond the Constitution for solutions to some of the contemporary challenges to justice, right and fairness. However, not everyone shares this view. There are strong viewpoints and differences in this regard. For instance, the current approach of the courts on the seventh biblical commandment (as illustrated in *DE v RH 2015* [9] BCLR) is not without criticism by the Christian community.

Conclusion

The South African Constitution is built, *inter alia*, on an ethos of justice, right and fairness. As such, the people of South Africa and the state are legally bound by the Constitution – the supreme law – to do what is just, right and fair. The Constitution's preamble, the founding values and the Bill of Rights provide and reinforce a supreme and overriding framework for all claims to justice, and for the need to do what is right and fair. They commit all South Africans to always thrive for the fulfillment of this ethos. However, the implementation of these three constitutional pillars is fluid and context-dependent because of the demands of liberal democracy and transformation. The judicial interpretation of conflicting claims to justice, right and fairness is strongly influenced by historical factors. It is up to the Constitutional Court, which sits at the apex of the judiciary, to decide on what is just, right and fair to each group and what is in the best interests of the nation. In the result, the Constitution can be both an instrument of justice, right and fairness, on the one hand, and a channel for injustice, wrong and prejudice, on the other hand.

Acknowledgements

This article was completed with the financial generosity of the National Research Foundation (Grant no. 115581).

Competing interests

The author declares that he has no financial or personal relationships that may have inappropriately influenced him in writing this research article.

Author's contribution

F.D. is the sole author of this research article.

Ethical considerations

This article followed all ethical standards for research without direct contact with human or animal subjects.

Funding information

This article was made possible by the generous support of the National Research Foundation through the South African Research Chair in Cities, Law and Environmental Sustainability.

Data availability

Data sharing is not applicable to this article as no new data were created or analysed in this study.

Disclaimer

The views and opinions expressed in this article are those of the author and do not necessarily reflect the official policy or position of any affiliated agency of the author.

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