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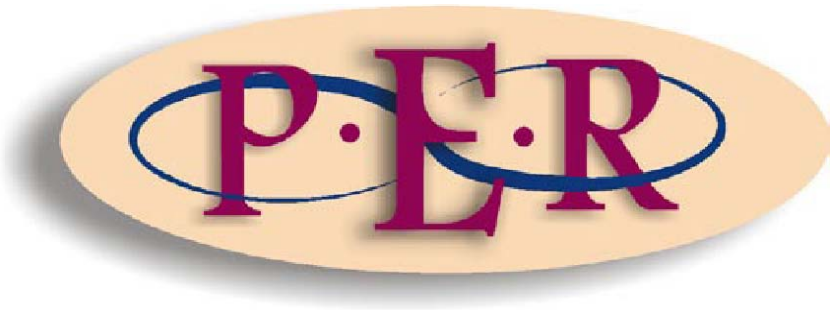

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There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action.[1]

1 INTRODUCTION

The entrenchment of a Bill of Rights in a supreme Constitution in South Africa means that constitutionalism will become central in a new emerging jurisprudence. The constitutional requirement that the courts promote "the values which underlie an open and democratic society based on freedom and equality[2] implies that the interpretive task will be radically different from what it was under the doctrine of parliamentary sovereignty. The duty imposed on the courts by section 39(1)(a) and 7(1) will compel them to make value choices and to make those values explicit through clear and transparent articulation.[3]

In the words of Bickel:

> Yet it remains to ask the hardest questions. Which values…qualify as sufficiently important or fundamental or what have you to be vindicated by the Court against other values affirmed by legislative acts? And how is the Court to evolve and apply them?…[H]ow are other values found and applied, and what weights are assigned to them when they come in conflict with competing values or interests?"[4]

1 Kent (ed) Law and Philosophy 392.
2 Constitution of the Republic of South Africa.
3 Van Berk Jurisprudence An Introduction 25.
4 Bickel The least dangerous branch 2 ed (1986) 55.

2 FACTS

In Prince v President of the Law Society of the Cape and others[5], the Constitutional Court had to deal with religious freedom for the third time in its short history. In brief the Law Society refused to register the applicant's contract for community service, since he not only disclosed two previous convictions for possession of cannabis, but also indicated his intention to continue using it for religious purposes (he is a member of the Rastafari religion). The respondents based their argument on the view that his convictions disqualified him to be admitted as an attorney, because he is not a "fit and proper person" if he intends to keep breaking the law. The appellant based his appeal against this decision on the basis that his religion (Rastafarianism) required the use of cannabis. The argument in the Constitutional Court was not that all use of cannabis be legalised, but that the relevant legislation[6] is overbroad in that it does not provide for an exemption for religious use. Narrowed down, the only question was whether the law is inconsistent with the Constitution [109], and whether such an inconsistency (or infringement) is indeed justified[111].

3 CONSTITUTIONAL INTERPRETATION

The interpretation of Chapter 2 of the Constitution involves the making of value judgments,[7] it must occur in the light of the values which underlie the Constitution,[8] it must be situated 'against the backdrop of the values of South African Society'; and it must be tested against 'the values we find inherent in, or worthy of pursuing in this society.[9] Thus, constitutional adjudication requires a 'holistic, value-based' framework.[10] This explicit intrusion of constitutional values into the adjudicative process signals a transition from a 'formal vision of law' to a 'substantive vision of law' in South Africa. An important aspect of this transition is that judges who were accustomed to working with 'formal reasons' are now required to engage with 'substantive reasons' in the form of moral and political values.[11] A substantive reason is a moral , economic, political, institutional or other social consideration,[12] while a formal reason, in contrast, is a legally authoritative reason on which judges are required to base a decision and which overrides any countervailing substantive

reason arising at the point of application.[13] This distinction makes clear that a formal reason, such as a rule, operates as a screen to insulate the decision-maker from consideration of all those substantive reasons, which have not been incorporated into the rule.[14] All their lives, forces which [judges] do not recognise 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, a sense of 'the total push and pressure of the cosmos' which, when reasons are nicely balanced, must determine where choice shall fall.[15]

5 *Prince v President*, *Cape Law Society and others* 2001 2 SA 398 (CC).
6 Section 4(b) of the *Drugs and Drug Trafficking Act* 14 of 1992 and section 22A(10) of the *Medicines and Related Substances Control Act* 101 of 1965.
7 *S v Williams* 1995 3 SA 632 (CC) para 22 at 639F, per Langa J.
8 *S v Williams* 1995 3 SA 632 (CC) para 7 at 37, 644D, per Langa J.
9 *S v Williams* supra note 7 at para 50 648C-D, per Langa J.
10 *Coetzee v Government of the Republic of South Africa* 1995 10 BCLR 1382 (CC) para 46 at 403H-I, per Sachs J.

4 ASPECTS AND/OR VALUES CONSIDERED IN THE THREE DIFFERENT JUDGMENTS

In the light of the aforesaid, it makes sense to evaluate the considerations taken into account by the three different judgments in reaching their conclusions in the Prince case.

In the initial stage of my evaluation, I thought the easiest classifications to be made was that of the majority judgment, delivered by Chaskalson, which clearly inclined towards a communitarian approach, which means that the interest of the community plays the determining part. Individual autonomy is not universal, but culturally and socially construed. Individual freedom and independence are protected, and a neutral position is taken towards the private moral life of citizens. (Communitarism strongly opposes liberalism). It is acknowledged that there is an infringement of the appellants right of freedom of religion, but an exemption is not justified, since it will be too much trouble for the state to regulate and administer such and exemption. Apart from that, it is argued that the prohibition serves 'a pressing social purpose' and it would contradict international obligations to allow such an exemption. At this point the question arose how much consideration was given to values and the actual rights of the individual, and it is curious that the word 'values' is not used even once throughout the whole judgment. Much is made of the vertical relationship, the difficulty of implementing a permit system and policing it, as well as the power of the legislature and the duty to sanction inconsistent conduct. The question therefore arises whether this judgment in fact engages with substantive reasoning whatsoever, and whether it's possible that a legal positivistic approach wasn't followed, which is quite unable to find a place for 'values' within its improvised methodology.

11 Cockrell 1996 SAJHR 3.
12 Atiyah and Summers Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory and Legal Institutions (1987).*l.5 RJ.
13 Atiyah and Summers Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory and Legal Institutions (1987).* l.5 RJ.
14 Cockrell 1996 SAJHR 5.
15 Kent (ed) Law and Philosophy 394.

Ngcobo considers the central role of religion in the appellant's overall activities, even though it may strike other as "bizarre, illogical or irrational". A he point out that "the protection of diversity is the hallmark of a free and open society"[49] and the word "values" is used no less than 9 times throughout the judgment. He argues, on behalf of the minority, that the means employed to achieve the goal is unreasonable and does constitute an unreasonable infringement on the right of religious freedom, as guaranteed in the constitution. The fact is posed that the faithful are being forced to choose between following their religion or complying with the law. After a balancing of public and community interest, it is concluded that it is the duty of the legislature to make provisions for such exemption and the administering of it.

Ngcobo, in my opinion, engages in substantive reasoning, by following a realist-cum-liberal-cum-africanist approach:

Liberal in the sense that the individual's rights are recognised and an exemption proposed, but weighed up against public interest and the integrity of the law.

Rules, principles and policy apply, and the purpose of the legislature is regarded important.

Africanist in the sense that the history of the use of cannabis and origin of the religion as black consciousness movement seeking to overthrow colonialism and white oppression, is regarded, but also in the effort to permit other cultures a harmonious entrance into South African law.[16] Realist in the sense that a "subjective, intuitive and creative" role is ascribed to the judge[17] in applying a balancing of rights and values against the social background and history.

Sachs, for the minority, strongly emphasises, even pleads, for tolerance towards multiculturalism and religious diversity, as well as a sensitivity towards marginalized, vulnerable and stigmatised groups. He opposes rigid mainstream norms which "put believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law".[18] In concluding his argument it is stated that the failure of the legislature to acknowledge and accommodate religious diversity, will not always survive constitutional scrutiny, since there is, according to

the Court, a 'right to be different'. The word "values" is used once throughout the judment, and in my view, this judgment effectively engages with substantive reasoning by regarding values in a plural society.

As a scholar of the Critical Legal Studies movement, he wishes to show that if legal consciousness – the belief in the inevitability of a status quo which favours some groups and some visions over others – can be changed, then society itself can be changed. Law is politics. According to Sachs, the interpretation of the notion of reasonableness according to Western standards is inappropriate in a plural society such as South Africa.

5 CONCLUSION

Much is still to be said of 'subjective' and 'objective' reasons for decisions, as well as the wedge between 'legal reasoning' and 'moral and political reasoning', but from this brief assessment it is clear that it is inevitable for the Constitutional Court to engage in moral and political reasoning in order to fully embrace the substantive vision of law in matters pertaining to the interpretation to the Bill of Rights. This will require the construction of a rationally defensible moral and political viewpoint, even though adjudicators will frequently be unable to escape making difficult value judgments, where logic and precedent are of limited assistance.[19]

16 Van Blerk Jurisprudence An Introduction 18.
17 In 'The judicial Process, Positivism and Civil Liberty' (1971) 88 SALJ 181 at 199, Dugard called for the adoption of a 'realist-cum-natural-law approach' to the judicial process. In Human Rights and the South African Legal Order (1978) 400 Dugard modified this in favour of a 'realist-cum-value-orientated approach'.
18 Para 12.
19 *Coetzee v Government of RSA* RJ 12.