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Where does the "objective, normative value system" come from?

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NOW WITHOUT HESITATION

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Where does the "objective, normative value system" come from?

If South African constitutional interpretation rests on an "objective, normative value system," it is important to understand how that system is to be discerned. The answer, given by the Constitutional Court in its first two decisions, was to adopt "an approach which, whilst paying due regard to the language that has been used, is 'generous' and 'purposive' and gives expression to the underlying values of the Constitution." S v Makwanyane and Another 1995 (3) SA 391 (CC) para 9.

Quoting with approval from a Canadian decision, R v Big M Drug Mart Ltd (1985) 18 DLR (4th) 321, 395-96, the Constitutional Court indicated that "this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter [or Constitution] itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter." Makwanyane, para 9; S v Zuma and Others 1995 (2) SA 642 (CC) para 15.

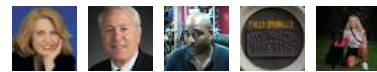
To this the Court added in Makwanyane (para 10) the guidance that a provision of the Bill of Rights (Chapter 3 of the South African Constitution) "must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of Chapter 3 of which it is part. It must also be construed in a way which secures for 'individuals the full measure' of its protection." (footnote omitted)

I think it makes sense to say, at this moment in South African history, that these sources can guide judges to an "objective, normative value system." That's not to say that this value system is so precisely structured that unanimity is inevitable; it isn't. But it is reasonable to view the Constitution as embodying a pretty strong consensus about many of the issues facing the newly democratic South Africa -- and that consensus, essentially, is the objective, normative value system.

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Two points are striking about this. The first is that the objective, normative value system is enacted -- not just through words, to be sure, but through the history and background that help give meaning to the words chosen. In this sense, South Africa, which suffered bitterly during the apartheid years because of the imprimatur that legal positivism was said to give to every enacted law, no matter how repellent, remains a positivist legal jurisdiction -- it has a pathbreaking constitution because it enacted one.

The second is that the constitutional consensus, like any consensus, must break down over time. Circumstances change, and over time the questions the constitutional adopters actually considered resemble less and less the issues their successors encounter. Just as important, people change and so do their perspectives. Within quite a short time, I think, people may come to conclude that values they hold call for different concrete conclusions than they formerly thought they called for. In the United States, for example, commitment to equal protection found renewed force for African-Americans in the 1950s, then grew to encompass women in subsequent decades, and now seems far along in extending its reach to gays and lesbians -- all without a word of new constitutional text explicitly enhancing the rights of any of these groups (in fact, despite the defeat of the Equal Rights Amendment that would have created textual protection for women).

It seems to me, in other words, that inevitably, over time, the normative value base of South African constitutional law will gradually detach itself from its basis in original, enacted intentions. As it does so, will it find a new "objective" foundation?

POSTED BY STEPHEN ELLMANN AT 6:17 AM 

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