

JUDICIARY AND STATUTORY INTERPRETATION: A GAME OF POWER DYNAMICS

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MINISTER OF HOME AFFAIRS V MARIÉ ADRIAANA FOURIE

The case is about legalizing same sex marriage in the country of South Africa. It is a case in the constitutional court of South Africa. They claim that “The law excludes them from publicly celebrating their love and commitment to each other in marriage and far from enabling them to regularize their union, it shuts them out, unfairly and unconstitutionally.”¹ The law, which was claimed to be unconstitutional, was the Marriage act.² The Marriage Act provides that a minister of religion who is designated as a marriage officer may follow the marriage formula usually observed by the religion concerned.³

So the presence of the words like wife and exclude the same sex couples and thus discriminatory towards them. The citizens have the right to equality irrespective of their sexual orientation as per Section 9(3) of the constitution. Therefore, Section 30(1) of the Marriage Act is unconstitutional. To come up with this verdict, the court used various interpretation tools to interpret certain words and laws to perform its quasi-legislative function. So whenever there is interpretation of law in question, it is the duty of the judiciary to apply strict or literal interpretation of law. Departure from literal rule leads to unwarranted expansion or restriction. But if literal interpretation of the statute leads to an absurdity then the court should resort to different rules of interpretation. The idea behind judicial interpretation of the statutes is to avoid inconvenience. In this case, section 30 (1) of the marriage act discriminates between the couple of same sex and does not allow them to form a marriage with each other. It was discriminating towards the couple of same sex through its wordings like “husband” and wife”. It can be seen that Literal interpretation of this section was giving an absurd result. It is so because the constitution of South Africa has exclusively mentioned that nobody should be discriminated due to their sexual orientation. Here, the marriage laws are discriminating the homosexuals because of their sexual orientation. A literal interpretation of the section or the statute was leading to an absurd result, as it was inconsistent with the constitution. Therefore, the court resorted to other tools of interpretation so that the absurdity can be reformed and a coherent

¹ Minister of Home Affairs v Marié Adriaana Fourie, CCT 60/04

² Act 25 of 1961

³ Section 30(1) states in this regard: “[A]ny marriage officer designated under section 3 may follow the marriage formula usually observed by his religious denomination or organization if such marriage formula has been approved by the Minister”

interpretation of the law can take place. Therefore, in this case, the court has resorted to external aids to statutory interpretation for a coherent and logical interpretation of the law.

According to Farlam JA., What has happened is that the marriage formula contained in the Act was framed on the assumption that the common law definition of marriage was correct, which it was in 1838 and in 1961. He found that the formula can be changed by a process of innovative and 'updating' statutory interpretation by reading "wife (or husband)" in this provision as "spouse".⁴ One of the external aids to construction is *Later Social, Political and Economic Developments and Scientific Inventions*. The court resorted to this tool of interpretation to explain how the common law did not recognize gays and lesbian and the common law definition of marriage never thought of this kind of relationship could exist, when it was enacted.

The main idea behind this rule of interpretation is to recognize that the law can change. There can be a change in social conditions may produce a novel situation, not contemplated at the time when the statute was first enacted. The courts have the power to apply current meaning of the statute to present day conditions to overcome an absurd interpretation or give a more coherent theory of law. If the language is wide enough, may extend the application to changed circumstances. This helps the court to give a dynamic interpretation to certain statutes so that the laws could be interpreted in the current context, which prevails in the current time. In *R v. R*⁵, when in the changed circumstances the common law fiction that by marriage the wife must be deemed to have irrevocably consented to sexual intercourse in all circumstances have become anarchistic, the husband can be convicted of rape under the Sexual Offences (Amendment) Act, 1976 punishes rape if as sex with her without her consent. If the law could be changed because of the social and political development in the society, and if it results to a better law, which is more relevant in the present time, it should prevail. Here in this judgment, the talks about how the common law is not consistent with the Bill of rights and it should be interpreted in a way, which is relevant in current situation. With the change in social attitude towards the homosexuals, it is necessary for the legal statutes to recognize the social acceptance. The constitution has recognized such developments and the court said that it was the intention of the parliament that there should not be any discrimination. The court talks about how South Africa has a history of intolerance and the constitution "represents a radical rupture with a past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all."⁶

The reference to historical facts like that the there has been discrimination and the government had failed to recognize the existence of homosexuals in the society. Under those circumstance and time period the laws were formulated in a different way. The court to recognize that and understand the subject matter of the statute has bought this historical

⁴ Supra Note 1

⁵ (1991) 4 All ER 481

⁶ Supra Note 1

fact in the judgment. The court mentioned it so that the mindset of the legislature could be studied and a better judgment could be given in the relevant times.

The reference of the constitution as a result of intolerance and discrimination in South Africa, gives the court the power to interpret it more liberally and in a much wider sense. It refers to the intent of the constitution maker and states that the idea is to have discrimination free state, and if any such law exists which constitutes discrimination, should be quashed. The marriage act is a foundation to the formation of a family. The court talks about how UDHR does not talk about one particular model of a family. It talks about a family in general.

External aid to interpretation allows the courts to refer to other statutes for a clear interpretation or to support their interpretation of a certain statutes. References to other statutes in per-materia as an aid to construction. All statutes, which deal with the same subject matter, relating to the same class of persons or things. Even if both these statutes are constructed in different times, but if the subject matters of the statutes are similar in nature. And one gives clarity to the other, then the statute can be used for the interpretation of the other statute, which is question. There is no necessity that the statute should refer to each other for them to be used as aids of interpretation. Here the court used international declaration UDHR for a more dynamic and coherent interpretation of the marriage act.

The court was right in using the UDHR to aid their interpretation because one system was explanatory to the other and gave an interpretation, which was not absurd in nature. Even though other statutes can be used to aid the interpretation of a statute, these other material should be legal statute. The state's contention that many religious books and religion are opposed to the idea of homosexual marriages and do not recognize it as a valid marriage or a relationship. They believe that it is against the order of the nature and the foundation of the family. The court dismissed this argument of the state correctly by saying that even though other texts are allowed to help the court to interpret a statute correctly; only legal text could be referred to do the same. The religious texts do not serve the legal purpose and thus therefore not the correct authority to use a reference for a legal interpretation of a statute. Throughout the judgment, the court has resorted to various external aids of interpretation to interpret the current marriage act and to understand the context in which it was constructed. It has tried to understand the spirit of the existing act with reference to its historical background. It has tried to establish that how it is necessary for the legislature to recognize the intent of the parliament when such laws were enacted and to modify the laws with time. The court emphasizes on how the marriage act is not just discriminatory towards the homosexuals, it is also a failure to human dignity, which is the foundation of the South African constitution.