The pigeonhole dictated by *logos*: Behind the text in *Volks v. Robinson*

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Introduction

It is a notorious fact that South African legal culture, underpinned as it is by a resilient mode of legal education that holds tenaciously to roots grown over the past 70 years, is extremely conservative.[1] Generations of law students have been told that the objective of legal education is that students must be taught to think like lawyers. In effect, that means that a law student must embrace a recognised and legitimate mode of reasoning and argument, one that can determine the source of legal authority, and adhere to expression that is restrained and subservient to established legal hierarchy. As Peter Goodrich has observed: "If there was to be any empirical study of law, it was to be that of the objects of legal regulation, of the market, of economic actors and actions defined in terms of ideal types, rational action and pervasively hypothetical situations."[2]

The purpose of this paper is to illustrate an alternative mode of analysis which can help to strip away these formal modes of argumentation to re-examine the manner in which a court arrives at its judgment; in this case a textual analysis of the mode of argumentation in a single judgment, that of the majority judgment of the South African Constitutional Court in *Volks v. Robinson*.[3]

In seeking to parse the text of this judgment, this paper turns to the application of an important part of the rhetorical tool kit: *logos*, *pathos* and *ethos*; and the manner in which they shape legal argumentation.[4] *Logos* as applied to judicial writing focuses on the manner in which the judgment invokes precedent derived from previous case law, the legally established rules of statutory interpretation, principles of law sourced in legal practice and, for present purposes, a set of common sense assumptions and distinctions shared between judicial writer and her audience, which are foundational to the development of the overall line of much of the judgment. *Pathos* involves the evocation of the emotions, such as pity, regret or anger, in which the judge clothes the judgment to gain the approval of the legal community and the parties who constitute the audience and which are invoked to justify the decision. *Pathos* should not be confused with purely subjective emotion. Like *logos*, it has an important public aspect in the presentation of the judgment in that it seeks to draw on shared feelings and stock responses which are sustained by a common set of cultural understandings within the specific factual context confronting the court. It is not often overtly present in judicial rhetoric, save in cases where there is public controversy or clear judicial division, as in keeping with the manner in which it is demanded that it is important to behave like a lawyer, the nod towards *pathos* must be careful to maintain a veneer

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[1] D.M. Davis, "Legal Transformation and Legal Education: Congruence or Conflict?", *Acta Juridica*, 2015, p. 172.

[2] Peter Goodrich, "Rhetoric and the Law" in Michael J. Mcdonald (ed.), *The Oxford Handbook of Rhetorical Studies*, (Oxford: Oxford University Press, 2017), p. 618.

[3] *Volks NO v. Robinson and Others* 2005 (5) BCLR 446 (CC).

[4] John Harrington, Lucy Series and Alexander Ruck–Keene, "Law and Rhetoric: Critical Possibilities", *Journal of Law and Society*, 46(2), 2019, p. 302.

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of objectivity. Arguments in controversial criminal, medical or other cases involving delictual wrongdoing or, on occasion, constitutional cases that invoke strong moral or ethical controversy are clear exceptions. By contrast, *ethos* is central to the persuasive strategies of judges and advocates, as is the case with testimony from some expert witnesses in which emphasis is placed upon the practices and modes of address adopted, reinforced by the manner in which the court building and courtroom are structured.

Take, for example, the standard trope that the court applies the law and not morals, or the statement that this is not a decision that is influenced by or involves politics; here the concept of *ethos* is highlighted to full effect. The denial of any presence of anything other than forensic objectivity is central to the presentation of law as it emerges from the courtroom, a point luminously illustrated in the following comment of Erwin Grisswold, one-time Dean of Harvard Law School:

> "A courtroom is not a stage: and witnesses and lawyers, and judges and juries and parties, are not players. A trial is not a drama, and it is not held for delectation, or even public information. It is held for the solemn purpose of endeavoring to ascertain the truth–and very careful safeguards have been devised out of the experience of many years to facilitate that process. It can hardly be denied that if this process is broadcast or televised, it will be distorted. Some witnesses will be frightened some will want to show off, or will show off, despite themselves. Some lawyers will 'ham it up'. Some judges will be unable to forget that a million eyes are upon them. How can we say that our primary concern is the equal administration of justice if we allow this to be done?"[5]

In any case, a judge can probably do no more than observe the complexities of social reality through the eyes, often distorted, of witnesses and the prism of evidence that the law regards as admissible. A judge discovers reality, not in the manner in which an anthropologist might, but rather fashions facts out of a complex record of evidence presented during the legal proceedings. In a civil trial, all a court is required to do is find determinative facts on a balance of probabilities – a likelihood greater than 50 percent – that is, what is probable, not that which is necessarily actually factual.[6]

However, as is evident from the standard trope expressed by Grisswold, the creative, performative dimension of the judicial function and its method of fact and legal findings is generally ignored or accorded little emphasis; indeed, such an approach is regarded as not legal and thus unscientific, even as the "science" does not take us very far at all in determining the outcome of cases, especially the hardest cases in the highest courts.

Volks v. Robinson

It is necessary firstly to set out the facts of the case and then turn to parse the reasoning employed in the majority judgment in *Volks v. Robinson*. In summary, Mr Archie Shandling and Mrs Ethel Robinson were never married and no children were born of their permanent relationship, which commenced in 1985 and endured until Mr Shandling died in 2001. During the lifetime of Mr Shandling, the couple had jointly occupied a flat situated in Cape Town on a continuous basis from early 1989, until the

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[5] E.N. Grisswold "The Standards of the Legal Profession: Canon 35 should not be Surrendered", *American Bar Association Journal*, 48, 1962, p. 616.

[6] See the compelling analysis for the importance of rhetoric in legal education by Gary Watt, "The Art of Advocacy: Renaissance of Rhetoric in the Law School", *Law and Humanities*, 12, 2018, p. 116.

deceased's death. Mrs Robinson remained in occupation of the flat until the end of December 2002. Mr Shandling had previously married Edith Freedman (Mrs Shandling), in 1950. Three children were born of their marriage, two sons and a daughter, all now majors, who had established families of their own in the United States of America. Mrs Shandling had passed away on 27 January 1981, due to lung cancer.[7]

The description offered by Mrs Robinson to the Court of their relationship was in broad terms accepted by Mr Shandling's executor, Mr Volks. She stated that, to a large extent, Mr Shandling had supported her financially. He gave her R5 000 per month in order to cover household necessities and would deposit money into her account whenever she needed it. He also provided her with petrol money from the law firm's account and paid for her car maintenance. She was accepted as a dependant on his medical aid scheme from January 2000.[8]

In April 2002, Mrs Robinson sought legal advice from the Women's Legal Centre concerning her rights to claim maintenance from the deceased estate of Mr Shandling. After consulting with Mr Volks in his capacity as the executor of the Shandling estate, the Centre advised her that the residue in the estate was minimal and that she should not pursue her claim. In June 2003 she received a copy of the Final Liquidation and Distribution Account, which reflected a residue of R248 533.87. In accordance with Mr Shandling's will, the residue was bequeathed to his three children.[9]

During August 2003 the Centre wrote letters to Mr Volks and to the Master of the High Court advising them that Mrs Robinson had a claim similar to that of a surviving spouse. The attorneys, acting for the estate, rejected the claim on the basis that Mrs Robinson was not a "spouse" for the purposes of the Act. Following this response, Mrs Robinson launched a two-part application in the High Court. Part A sought an urgent interdict preventing Mr Volks from winding up and distributing the assets in the estate, pending the determination of the constitutional challenge to the Act, which relief was sought in Part B of the application. The application for the interdict was not opposed and was granted by the High Court.[10]

In an amended notice of motion, Mrs Robinson sought an order declaring that she was the "survivor" of the late Mr Shandling for the purposes of the Maintenance of Surviving Spouses Act[11] (the Act), and therefore entitled to lodge a claim for maintenance under the Act. In the event that it was found that she did not qualify as a "survivor" for the purposes of the Act by virtue of not being "the surviving spouse in a marriage dissolved by death", she sought an order declaring that the exclusion of the survivor of permanent life partnerships from the provisions of the Act was unconstitutional. She contended that this exclusion violated the provisions of sections 9(3) and 10 of the Constitution, in that it discriminated unfairly on the ground of marital status (section 9(3)) and infringed her right to dignity (section 10). In this regard she submitted that the definition of the words "survivor", "spouse" and "marriage" in the Act should include a reference to survivors of permanent life partnerships.

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[7] *Volks v. Robinson*, para. 4.
[8] *Ibid.* para. 5.
[9] *Ibid.* para. 8.
[10] *Ibid.* para. 10.
[11] Act 27 of 1990.

In relation to the declaration of invalidity that was sought by Mrs Robinson, Mr Volks argued that the reading-in of words to the Act was unacceptable. He argued that the entire structure of the Act was premised on the concept of marriage and the protection of surviving spouses of such a marriage. Thus reading-in, in the form sought, did not deal properly with these provisions, nor did it fit in with the structure of the Act. Mr Volks argued further that, in the event that the Court found that the Act was inconsistent with the Constitution and thus invalid, it would not be just and equitable for an order to apply to permanent life partnerships in respect of which a partner had already died. He argued for an order which would only have prospective effect. He argued that a retrospective order would not sufficiently protect the freedom and dignity of the deceased. He also argued that the relief sought by Mrs Robinson and the Trust may affect other legislation like the Administration of Estates Act.[12]

As shall presently be seen, the most important part of the argument raised by Mr Volks was that Mrs Robinson had chosen to live with Mr Shandling without entering into a marriage although there was no legal or other impediment to them so marrying. In his view, there was no basis in law or in principle why the laws of marriage should be imposed upon the deceased, his estate, or the heirs of Mr Shandling. He argued that it would constitute an infringement of the deceased's freedom and dignity to have the consequences of marriage imposed in circumstances where there was a clear choice not to enter into a marriage relationship. As evidence of this choice on the part of the deceased, he referred to a statement that Mr Shandling made to him that "if he were ever single again he would not marry". Mr Volks also relied on the fact that Mr Shandling referred to Mrs Robinson as "my friend" in his will, whereas he referred to his deceased wife, Mrs Shandling, as "my wife".

Mr Volks drew attention to the fact that Mr Shandling, in terms of his will, had made a choice as to how his assets would be disposed of. He did this with an understanding that the laws of marriage would not apply to his estate. In the view of Mr Volks, his freedom and dignity would be violated if his choice as to how to dispose of his assets were to be overridden by a court permitting a claim for maintenance against his estate. Indeed, his right not to be arbitrarily deprived of property in terms of section 25(1) of the Constitution, the protection of property clause, would be infringed.

Mrs Robinson's arguments found favour with the High Court, which issued the following order:

> "1. It is declared that: The omission from the definition of 'survivor' in [section] 1 of the Maintenance of Surviving Spouses Act 27 of 1990 of the words 'and includes the surviving partner of a life partnership' at the end of the existing definition is unconstitutional and invalid. The definition of 'survivor' in [section] 1 of the Maintenance of Surviving Spouses Act 27 of 1990 is to be read as if it included the following words after the words 'dissolved by death': 'and includes the surviving partner of a life partnership'.
> 2. The omission from the definition in [section] 1 of the Maintenance of Surviving Spouses Act 27 of 1990 of the following, at the end of the existing definitions, is unconstitutional and invalid: '"Spouse" for the purposes of this Act shall include a person in a permanent life partnership'."[13]

[12] Act 66 of 1965.
[13] *Volks v. Robinson,* para. 25.

The Constitutional Court Asserts the Sanctity of Marriage

As a consequence of this order, the dispute made its way up to the Constitutional Court. Shortly before the hearing, legal representatives of the Shandling estate informed the Court that they would not pursue the appeal. The Court decided, however, as the order of the High Court had declared legislation to be unconstitutional, it was obliged to hear the case.

At the hearing an amicus, the Centre of Applied Legal Studies (CALS) made application for further evidence to be admitted, in the form of a report aimed largely at demonstrating the vulnerability of women in existing relationships between unmarried cohabitants, and the fact that few women have a choice about whether they should marry. The rule in this regard is that evidence of this nature can be admitted if the facts contained in a report are common cause or otherwise incontrovertible; or are of an official, scientific, technical or statistical nature capable of easy verification. Justice Thembile Skweyiya, on behalf of the majority of the Court, refused to admit the report:

> "The whole of the report tendered by the amicus cannot be considered to consist merely of evidence of a statistical or incontrovertible nature, or which is common cause. It is apparent that the conclusions and solutions offered are not incontrovertible. Furthermore, Mr. Volks does not accept that the evidence sought to be introduced is necessarily incontrovertible or uncontroversial. Indeed the report in its own words notes: 'As is evident from our methodology, our findings are *not representative* but simply indicate trends which confirm our *general assumptions about cohabitation*' (my emphasis)."[14]

> "In the executive summary provided, the study was defined as 'qualitative primary research amongst poor "African" and "Coloured" communities'. Moreover, the entire study consisted of interviews with only 68 people in eight sites. This non-representative sampling, which was not quantitative but qualitative and was conducted in only eight poor communities, cannot be said to be statistical or scientific evidence capable of easy verification, nor can it be said to be incontrovertible. A more representative study might well lead to different conclusions."[15]

Given that the case brought by Mrs Robinson was based upon the constitutional guarantees of equality and dignity, the following paragraph is even more telling:

> "The evidence is not directly relevant to the issue before us. That issue is whether the protection afforded to survivors of marriage under section 2(1) of the Act should be extended to the survivors of permanent life partnerships. The admission of the evidence would impermissibly broaden the case before us. It cannot be admitted."[16]

Justice Skweyiya then moved to discuss the purpose of the relevant sections of the Act, the purpose of which he considered to be the following:

> "The challenged law is intended to provide for the reasonable maintenance needs of parties to a marriage that is dissolved by the death of one of them. The aim is to extend an invariable consequence of marriage beyond the death of one of the parties. The legislation is intended to deal with the perceived unfairness arising from the fact that maintenance obligations of parties to a marriage cease upon death. The challenged provision is aimed at eliminating this perceived unfairness and no more. The obligation to maintain that exists during marriage passes to the estate. The provision does not confer a benefit on the parties in the sense of a

[14] *Ibid.* para. 33.
[15] *Ibid.* paras. 32-34.
[16] *Ibid.* para. 35.

> benefit that either of them would acquire from the state or a third party on the death of the other. It seeks to regulate the consequences of marriage and speaks predominantly to those who wish to be married. It says to them: 'If you get married your obligation to maintain each other is no longer limited until one of you dies. From now on, the estate of that partner who has the misfortune to predecease the survivor will continue to have maintenance obligations.'"[17]

Having accepted that the word "spouse" could not plausibly be interpreted to include a life partnership, Justice Skweyiya turned to the question as to whether Mrs Robinson had a cause of action on the grounds of section 9(3) of the Constitution which reads: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

The judgment then embarked on the critical framing question. In the view, of the majority of the Court, the questions before the Court could be reduced to the following:

> "The question for determination in this case is whether the exclusion of survivors of permanent life partnerships from the protection of the Act constitutes unfair discrimination. The Act draws a distinction between married people and unmarried people by including only the former. We are not concerned with the exclusion of survivors of gay and lesbian relationships, nor are we concerned with survivors of polygynous relationships.
>
> Although it is arguable whether the distinction or differentiation amounts to discrimination, I am prepared to accept that it amounts to discrimination based on marital status. That being the case, the discrimination is presumed to be unfair in terms of section 9(5) of the Constitution. The question however is whether it is indeed unfair discrimination."[18]

In determining whether the impugned provisions of the Act constituted unfair discrimination, Justice Skweyiya began by emphasising the importance of marriage as an institution: "The constitutional recognition of marriage is an important starting point for determining the question presented in this case. Marriage and family are important social institutions in our society. Marriage has a central and special place, and forms one of the important bases."[19] From this recognition, it follows according to the judge that the law is entitled to distinguish between married people and unmarried people. In this connection Justice Skweyiya cited from an earlier judgment of the Court in *Fraser*:

> "In the context of certain laws there would often be some historical and logical justification for discriminating between married and unmarried persons and the protection of the institution of marriage is a legitimate area for the law to concern itself with."[20]

Hence, "the law may in appropriate circumstances accord benefits to married people which it does not accord to unmarried people or family life in our society".[21] Justice Skweyiya then turned to apply these findings to the case brought by Mrs Robinson. He emphasised that she had never married Mr Shandling and that:

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[17] *Ibid.* para. 39.
[18] *Ibid.* para. 50.
[19] *Ibid.* paras. 51-52.
[20] *Fraser v. Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC), para. 26.
[21] *Volks v. Robinson,* para. 54.

> "There is a fundamental difference between her position and spouses or survivors who are predeceased by their husbands. Her relationship with Mr. Shandling is one in which each was free to continue or not, and from which each was free to withdraw at will, without obligation and without legal or other formalities. There are a wide range of legal privileges and obligations that are triggered by the contract of marriage. In a marriage the spouses' rights are largely fixed by law and not by agreement, unlike in the case of parties who cohabit without being married."[22]

The distinction drawn at this stage of the judgment becomes crucial to the outcome as is apparent from the following passage of the judgment:

> "The distinction between married and unmarried people cannot be said to be unfair when considered in the larger context of the rights and obligations uniquely attached to marriage. Whilst there is a reciprocal duty of support between married persons, no duty of support arises by operation of law in the case of unmarried cohabitants. The maintenance benefit in section 2(1) of the Act falls within the scope of the maintenance support obligation attached to marriage. The Act applies to persons in respect of whom the deceased person (spouse) would have remained legally liable for maintenance, by operation of law, had he or she not died."[23]

The argument of Mrs Robinson that the only different factual matrix between her situation, being in a lifelong partnership and a marriage, was the contract of marriage, received short shrift from the majority:

> "That [argument] is an over-simplification. Marriage is not merely a piece of paper. Couples who choose to marry enter the agreement fully cognisant of the legal obligations which arise by operation of law upon the conclusion of the marriage. These obligations arise as soon as the marriage is concluded, without the need for any further agreement. They include obligations that extend beyond the termination of marriage and even after death. To the extent that any obligations arise between cohabitants during the subsistence of their relationship, these arise by agreement and only to the extent of that agreement."[24]

For these reasons, the majority rejected the equality challenge. It considered that it was not unfair to distinguish between survivors of a marriage and survivors of a heterosexual cohabitation relationship. In the context of the provision for maintenance of the survivor of a marriage by the estate of the deceased, the majority of the Court refused to impose a duty upon the Shandling estate where none arose by

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[22] *Ibid.* para. 55.

[23] *Ibid.* para. 56.

[24] *Ibid.* para. 58. In his minority judgment, Justice Albie Sachs supported Mrs Robinson's line of argument: "The critical question accordingly must be: is there a familial nexus of such proximity and intensity between the survivor and the deceased as to render it manifestly unfair to deny her the right to claim maintenance from the estate on the same basis as she would have had if she and the deceased had been married? I believe that there are in fact at least two circumstances in which, applying this test, it would be unfair to exclude permanent, non-married life partners from the benefits of the Act. The first would be where the parties have freely and seriously committed themselves to a life of interdependence marked by express or tacit undertakings to provide each other with emotional and material support. The unfairness of the exclusion would be particularly evident if the undertakings had been expressed in the form of a legal document. Such a document would satisfy the need to have certainty, at least inasmuch as it establishes clear commitment to provide mutual support within their respective means and according to their particular needs. Like a marriage certificate, the document would thus both prove the seriousness of the commitment and at the same time satisfy the need for certainty" (paras. 251-252).

operation of law during his lifetime. In short, "such an imposition would be incongruous, unfair, irrational and untenable".[25]

That left the challenge on the basis of dignity for determination by the Court. As the Court had found that it was not unfair to eschew the imposition of a duty on an estate to provide maintenance in the case of Mrs Robinson, her case based upon the constitutional guarantee of dignity suffered the same fate. Much had been made in argument about the social and economic context in which the constitutional challenge raised by this case should be located. In essence the argument ran thus: Women are generally less powerful in these relationships. They often wish to be married, but the nature of the power relations within the relationship makes this aspiration extremely difficult to attain. The reason is not hard to find: the more powerful participants in the relationship refuse to be bound by marriage. The consequences are that women are exploited to the extent that there is no compensation for the essential contributions by women to a joint household through their labour and emotional support.

In the light of these arguments, Justice Skweyiya considered it necessary to deal with the substance thereof which he did as follows:

> "I have a genuine concern for vulnerable women who cannot marry despite the fact that they wish to and who become the victims of cohabitation relationships. I do not think however that their cause is truly assisted by an extension of section 2(1) of the Act or that vulnerable women would be unfairly discriminated against if this were not done. The answer lies in legal provisions that will make a real difference to vulnerable women at a time when both partners to the relationship are still alive. Once provision is made for this, the legal context in which section 2(1) falls to be evaluated will change drastically."[26]

Replying to the criticisms voiced in the dissenting judgments of Justices Yvonne Mokgoro and Kate O'Regan and Albie Sachs respectively, Justice Skweyiya said that the problem lay with the legislature and not the Court:

> "Both dissenting judgments make it plain that there are many ways in which these relationships can be regulated. It is not for us to decide how this should be done. In any event, this case is not concerned with the provision that should be made to ensure that partners in relationships other than marriage treat each other fairly during their lifetime. That does not mean, however, that fairness in the case of people who are married will be the same as fairness between parties to a permanent life partnership. It is up to the legislature to make provision for this."[27]

Analysing the Character of the Majority Judgment

It is now possible, having set out the essential steps taken in the majority judgment to arrive at the conclusion that Mrs Robinson's case (that the Act had breached her rights to equality and dignity) lacked legal merit, to revisit the application of *logos*, *pathos* and *ethos*.

The judgment is replete with examples of the manner in which legal rules are employed as well as the application of standards and policies. The judgment commences with a rejection of the evidence sought to be admitted by CALS. The rejection is justified by a strict interpretation of the applicable rules and, in particular,

[25] *Ibid.* para. 60.
[26] *Ibid.* para. 64.
[27] *Ibid.* para. 67.

that it was a limited study. But the Court had previously admitted into evidence a range of studies which were hardly uncontroversial, or which obviously passed scientific muster.[28]

But even more significant is the manner in which Justice Skweyiya defined the key issue in the case and thereby rejected the relevance of the evidence sought to be admitted in that the evidence sought to show the vulnerability of women in South Africa who were unprotected and thus vulnerable in that they did not enjoy the protective cloak of marriage: the case for the majority is about whether "the protection afforded to survivors of marriage under section 2(1) of the Act should be extended to the survivors of permanent life partnerships. The admission of the evidence would impermissibly broaden the case before us."[29]

Here we arrive, very early in the judgment, at the critical move: the definition of the legal problem to be determined and which in this judgment receives a narrow treatment, that is, social and historical context is eschewed in favour of the definition of the problem confronting the Court being a matter of statutory construction of section 2(1) of the Act. That move is characterised as being based on precedent and principle, yet it is nothing of the kind. As Justices Mokgoro and O'Regan note in their minority judgment:

> "The law has tended to privilege those families which are founded on marriages recognised by the common law. Historically, marriages solemnised according to the principles of African customary law were not afforded recognition equal to the recognition afforded to common law marriages, though this has begun to change. Similarly, marriages solemnised in accordance with the principles of Islam or Hinduism were also not recognised as lawful marriages though this too is now altering. The prohibition of discrimination on the ground of marital status was adopted in the light of our history in which only certain marriages were recognised as deserving of legal regulation and protection. It is thus a constitutional prescript that families that are established outside of civilly recognised marriages should not be subjected to unfair discrimination."[30]

The rejection of the majority of this line of entry confines the inquiry to one that not only reduces the words employed in section 2(1) of the Act to a mechanistic analysis, but also significantly narrows the constitutional inquiry in respect of sections 9 and 10 of the Constitution. Observe the way Justice Skweyiya finds that, while he cannot dismiss the existence of vulnerability of women, particularly in South Africa, the topic grid, the pigeonhole dictated by *logos*, justifies the finding that the problem is one for the legislature as opposed to the judiciary, this finding notwithstanding that the Constitution applies to all law, whether common or statutory law and that, for this reason, the Constitutional Court is the ultimate custodian of law:

> "In the case of the very poor and the illiterate the effects of vulnerability are more pronounced. The vulnerability of this group of women is, in my view, part of a broader societal reality that must be corrected through the empowerment of women and social policies by the legislature. It is a widespread problem that needs more than just implementation of what, in their case, would be no more than palliative measures. It needs more than the extension of benefits under section 2(1) to survivors who are predeceased by their partners. Unfortunately, the reality is

[28] See *S v. Makwanyane and another* 1995 (3) SA 391 (CC), paras. 120ff.
[29] *Volks v. Robinson*, para. 35, cited earlier but which bears repeating due to its critical importance.
[30] *Ibid.* para. 101 (footnotes omitted).

> that maintenance claims in a poverty situation are unlikely to alleviate vulnerability in any meaningful way."[31]

Whereas Justices Mokgoro and O'Regan based much of their analysis of marriage on the manner in which law constructs reality,[32] the majority attribute inherent qualities to marriage which extend way beyond the significance of the institution being sourced in a legal construct, albeit that it is underpinned by law. In particular, the majority cites the following with approval:

> "The vital personal right recognized by *Loving v. Virginia* is not the right to a piece of paper issued by a city clerk. It is not the right to exchange magical words before an agent authorized by the state. It is the right to be immune to the legal disabilities of the unmarried and to acquire the legal benefits accorded to the married."[33]

The majority seeks to buttress acceptance of its approach by calling into aid the mode of proof referred to as *pathos*. The attempt at employing legal rules, precedent and policy to find against Mrs Robinson, presumably in the light of two eloquent minority judgments, requires the invocation of pity and empathy. Hence Justice Skweyiya says:

> "I have a genuine concern for vulnerable women who cannot marry despite the fact that they wish to and who become the victims of cohabitation relationships. I do not think however that their cause is truly assisted by an extension of section 2(1) of the Act or that vulnerable women would be unfairly discriminated against if this were not done. The answer lies in legal provisions that will make a real difference to vulnerable women at a time when both partners to the relationship are still alive. Once provision is made for this, the legal context in which section 2(1) falls to be evaluated will change drastically."[34]

Turning to the *ethos* in the judgment, given the specific context of judgment writing, some further explication is required. Aristotle made the point that:

> "there is persuasion through character whenever the speech is spoken in such a way as to make the speaker worthy of credence; for we believe fair-minded people to a greater extent and more quickly [than we do others] on all subjects in general and completely so in cases where there is not exact knowledge but room for doubt. And this should result from the speech, not from a previous opinion that the speaker is a certain kind of person; for it is not the case, as some of the technical writers propose in their treatment of the art, that fair-mindedness on the part of the speaker makes no contribution to persuasiveness; rather, character is almost, so to speak, the controlling factor in persuasion."[35]

Aristotle appears to be referring to what has been called the discoursal self rather than the real self. The pattern of justification contained in the judgment, the references to existing legal authority to support the conclusions so reached, the formal writing

[31] *Ibid.* para. 64.
[32] As the two Justices write: "Marriage, as presently constructed in common law, constitutes a contract between a man and a woman in which the parties undertake to live together, and to support one another. Marriage is voluntarily undertaken by the parties, but it must be undertaken in a public and formal way and once concluded it must be registered" (*Volks v. Robinson*, para. 112).
[33] From John T. Noonan, "The Family and the Supreme Court", *Catholic University Law Review,* 23, 1974, p. 273, cited in *Volks v. Robinson*, para. 42.
[34] *Volks v. Robinson*, para. 68.
[35] Aristotle, *On Rhetoric: A Theory of Civic Discourse*, trans., intro., notes and apps., G.A. Kennedy, (Oxford: Oxford University Press, 1991), pp. 38-39.

making use of legal prose reinforce its "legal character". All these features are external to the judge but as she incorporates them into the text, she makes them part of her discoursal self, which is how her judicial authority and credibility is reinforced. In this way these discoursal "features of the judicial text define the character of the judicial author".[36]

In dismissing the argument that Mrs Robinson had been subjected to unfair treatment on the grounds of her marital status in that she and Mr Shandling had not married, Justice Skweyiya first referred to the "objective intention" of the legislature in passing the relevant sections of the Act:

> "It must be borne in mind that the legislature, by enacting the law, in fact qualified the right to freedom of testation. It said that freedom of testation would be limited to the extent that where marriage obliged the parties to it to maintain each other, freedom of testation ought not to result in the termination of the obligation upon death. The question we have to answer is whether it was unfair for the legislature not to qualify freedom of testation further, by creating a posthumous duty to maintain on cohabitants."[37]

He then moves to invoke the Constitution as authority for his refusal, even as he, a few paragraphs later, articulates his personal view that the circumstances in which many women find themselves is a social problem: "The Constitution does not require the imposition of an obligation on the estate of a deceased person, in circumstances where the law attaches no such obligation during the deceased's lifetime, and there is no intention on the part of the deceased to undertake such an obligation."[38]

The judgment nods in the direction of recognising the social context of the institution of marriage and its relationship to the vulnerability experienced daily by women in South Africa, but this gives way to the authority of legal doctrine in the form of the Constitution and the Act as interpreted through the majority's understanding of the legislative purpose.

Conclusion

> "Like all human language, legal language is embedded in a particular setting, shaped by the social contexts and institutions surrounding it. It does not convey abstract meaning in a legally-created [sic] vacuum, and thus cannot be understood without systematic study of the contextual molding that gives it foundation in particular cultures and societies."
>
> Mertz[39]

In 1998, Karl Klare warned about the formalistic legal culture which prevailed in South Africa and the implications thereof for a transformative constitutional project.[40] Formalism remains deeply embedded in South African legal culture,[41] even two

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[36] J. Christopher Rideout, "Ethos, Character and Discoursal Self in Persuasive Legal Writing", *The Journal of The Legal Writing Institute*, 21, 2016, pp. 42-43.

[37] *Volks v. Robinson*, para. 57.

[38] *Ibid.* para 58. Also see para. 59, where Justice Skweyiya switches to the first person and says: "I have sympathy."

[39] Elizabeth Mertz, "Inside the Law Classroom: Towards a New Legal Realist Pedagogy", *Vanderbilt Law Review*, 60, 2007, p. 513.

[40] Karl E. Klare, "Legal Culture and Transformative Constitutionalism", *South African Journal on Human Rights*, 14, 1998, p. 146.

[41] Martin Chanock, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice*, (Cambridge: Cambridge University Press, 2001).

decades into constitutional democracy.[42] In this there is striking similarity to an approach which has gained traction in the United States where rule-based analysis is increasingly deemed to be "the dominant form of reasoning" found in legal arguments made to judges. This preference for appeals to logic and legal principles stems from formalist notions that assume judges primarily make decisions grounded in logic and law. Thus, an advocate must appeal to logic and law when attempting to persuade a judge. Thus, Justice Antonin Scalia and Bryan Garner state: "Good judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities […] The world does not expect logic and precision in poetry or inspirational pop philosophy; it demands them in the law."[43] Chief Justice Roberts expressed similar formalist sentiments: "Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply the law."[44]

This paper has attempted to utilise the techniques employed in the field of rhetoric to analyse the manner in which a judgment asserts its own authority and self-contained justifications in the text and the manner in which the judge composing the text does so in a neutral style yet by way of a coercive idiom ("it cannot be denied", "it is common cause"). The judgment represents an act of closure, a cutting off of alternative realities as well as treating any opposing voice as employing non-legal language.[45] Its style and process of reasoning is reflective of the dominant South African legal culture, which not only fashions the manner in which the judgment is written, but is directed to the key audience insofar as the Court is concerned, which is the legal community that views the "law" through the same cultural prism. The manner in which the majority attributes innate legal consequences to marriage, refusing to interrogate the manner in which law is itself a social construct, is illustrative of a legal culture that eschews the challenge of legal transformation posed by the introduction of the Constitution in terms of which all legal rules need to be interrogated to test whether they pass constitutional muster.

The result of the majority judgment is to entrench the concept of marriage above all other forms of relationship. Pierre de Vos has described this judgment as moralistic and sexist, correctly highlighting this passage:

> "the law may distinguish between married people and unmarried people …. In the context of certain laws there would often be some historical and logical justification for discriminating between married and unmarried persons and the protection of the institution of marriage is a legitimate area for the law to concern itself with …. The law may in appropriate circumstances accord benefits to married people which it does not accord to unmarried people."[46]

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[42] See Catherine Albertyn and Dennis Davis, "Legal Realism, Transformation and the Legacy of John Dugard", *South African Journal on Human Rights*, 26, 2010, p. 188.

[43] Antonin Scalia and Bryan Garner, *Making your Case: The Act of Persuading Judges,* (St. Paul: Thomson/West, 2008), p. 32.

[44] As cited in Adam Todd, "An Exaggerated Demise: The Evidence of Formalism in Legal Rhetoric in the Face of Neuroscience", *Legal Writing,* 23, 2019, p. 90.

[45] Harrington, Series and Ruck-Keene, "Law and Rhetoric: Critical Possibilities", p. 305.

[46] Pierre de Vos, "Moralistic View of Marriage Leaves Unmarried Couples Unprotected", *Constitutionally Speaking*, 5 December 2016. Retrieved from: https://constitutionallyspeaking.co.za/moralistic-view-of-marriage-leaves-unmarried-couples-unprotected/ [Accessed 22 October 2019].

The passages in which the majority employ *pathos* to recognise the vulnerability experienced by women in cohabitation relationships is itself reflective of the linkages between *logos*, *pathos* and *ethos*. There is a general refusal to attribute legal consequences to this social reality, and to the extent that the majority may be so inclined, it holds that this is a function for the legislature, which is illustrative of its narrow conception of the judicial role in a constitutional state where the court is asked to interrogate all law as developed prior to the constitutional moment.

By invoking the rhetorical tool box, it is possible to peer behind the text of the judgment to see how law performs its own authority in the speech employed in the text seeking to adopt a neutral style to effect closure, notwithstanding the fact that the reasoning and conclusion of the judgment is saturated by a conservative morality that privileges the institution of marriage above a multitude of cohabitation relationships.

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