Chapter 32
Interpretation

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(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

39 Interpretation of Bill of Rights

(1) When interpreting the Bill of Rights, a court, tribunal or forum —

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.
When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

32.1 Introduction:

Treatises on statutory interpretation in South Africa, and in other jurisdictions where Interpretation of Statutes is a legal discipline in its own right, most often start by posing the question 'what is statutory interpretation?'. They then proceed to proffer a working definition of some sort to get further discussion going. These treatises assume that statutory interpretation is a readily describable, interpretative analysis of enacted law, guided by common- and statute-law canons of construction that manifest as rules and presumptions.

A similar introduction to the chapter on 'Interpretation' in this four volume treatise on South African constitutional law would be inadequate and inappropriate. Certain reading strategies in constitutional interpretation do require the use of some of the conventional canons of statutory interpretation. And constitutional interpretation also involves an analysis of the written constitutional text to determine meaning. However, constitutional interpretation is also an enterprise that goes much further than any other form of legal interpretation. It is a practice emanating from, rooted in and part of the shaping of a constitutional democracy. Its most distinctive and consequential feature as an interpretive endeavour is its ability to underwrite

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1 See, for example, LC Steyn Die Uitleg van Wette (5th Edition, 1981) 1:

[W]at is wetsuitleg? ... Dit is om die wils- en gedagte-inhoud van die wetgewer vas te stel ... aangewese op die woorde wat die wetgewer gebruik het om daardie wils- en gedagte-inhoud te openbaar. ['What is statutory interpretation? ... It is to determine the content of the legislature's will and thinking ... relying on the words that the legislature employed to reveal its will and thinking.'].

For a similar approach, see P Langan Maxwell on the Interpretation of Statutes (12th Edition, 1976) 1. See also LM du Plessis The Interpretation of Statutes (1986) 1:

The subject Interpretation of Statutes is concerned with the principles, rules, methods and techniques which jurists employ in order to understand statutes, i.e. legal precepts deriving from legislative activity, and to apply their provisions to concrete, practical situations.


constitutional supremacy, warding off unconstitutional action, halting the abuse of power, or providing redress for the adverse consequences of unconstitutional conduct. Constitutional interpretation, as mediated by the courts and other political actors, can also use supreme constitutional authority either to undo existing law inconsistent with the Final Constitution, or to keep impugned law intact, but then to develop it so that it conforms with the dictates of the Final Constitution. Constitutional interpretation also activates — and gives content to — the values that underlie and pervade a democratic, constitutional state (*Rechtsstaat*). 3

The first section of this chapter surveys some of the major notions of constitutional interpretation evident in the case law in the decade or so preceding the advent of constitutional democracy in South Africa on 27 April 1994. These shortcomings in the South African courts’ pre-1994 jurisprudence on constitutional interpretation gave rise to the inclusion of interpretive directives in two consecutive written constitutional texts and helped to transform judicial attitudes towards constitutional interpretation shortly after the commencement of the Interim Constitution (IC) in 1994.

The second main section of the chapter focuses on the authorized interpreters of the Final Constitution. The third main section considers the possible relevance of various theories of interpretation to constitutional interpretation. Conventional theories of statutory interpretation are inadequate — though not wholly irrelevant — for purposes of constitutional interpretation. I explore developments associated with the *linguistic turn* in legal thinking, on issues of interpretation, to see if they can help us address some of these inadequacies. In the past (almost) decade and a half of constitutional democracy in South Africa, no clearly discernible theories of constitutional interpretation have emerged. However, several *leitmotivs*, traceable to theoretical positions on constitutional interpretation, have guided our constitutional interpretation in a particular direction.

The fourth main section of this chapter identifies the aids and the waymarks to the interpretation of the Constitution-in-writing that are present in the written text itself, while the fifth main section is devoted to a discussion of methods of and reading strategies in constitutional interpretation.

(a) Aspects of Bill of Rights interpretation in pre-1994 case law

[T]he Court has a particular duty as guardian of liberty, but it has to exercise its powers of controlling legislation with a scalpel and not with a sledgehammer. 4

The admonitory metaphor in this *dictum*, dating from 1984, foreshadowed the need eventually to include provisions such as FC ss 7 and 39 in the Final Constitution some twelve years later. 5 Hiemstra CJ, then Chief Justice of the ‘homeland’ 6 Bophuthatswana, intended the *dictum* as a slap on the wrist for another court whose

3  See Chapter 1 (the ‘founding provisions’) of the Constitution of the Republic of South Africa, 1996 (‘Final Constitution’ or ‘FC’).

4  *Smith v Attorney-General Bophuthatswana* 1984 (1) SA 196 (B), 200C (‘Smith’).

5  IC ss 35(1) and (3) contained provisions akin to those provisions present in FC s 39. See § 32.1(b) and § 32.4(c)(i)(ff) infra. IC s 35(1) and (3) were thus in essence retained in the Final Constitution. FC s 7 had no predecessor in the Interim Constitution. No provision akin to IC s 35(2) was included in the Final Constitution. See § 32.5(b)(ii) infra.
over-zealous (and, in Hiemstra’s view, less than graceful) implementation of Bophuthatswana’s justiciable Constitution in an earlier case compromised thoughtful constitutional adjudication.

In *S v Marwane*, 7 Hiemstra CJ in the court a quo 8 was first called upon to test the constitutionality of a provision of the notorious (South African) Terrorism Act 9 on the basis of Bophuthatswana’s justiciable Constitution. 10 Section 93(1)(a) of that Constitution provided that ‘[s]ubject to the provisions of this constitution’ all laws in operation in any district of Bophuthatswana immediately prior to 6 December 1977, the date of commencement of the Constitution, would continue to apply except in so far as such laws were superseded by any applicable law of Bophuthatswana or amended or repealed by Bophuthatswana’s legislature. The South African Terrorism Act thus continued to apply in Bophuthatswana. Section 7(1) of the Constitution proclaimed the Constitution to be the supreme law of Bophuthatswana while s 7(2) provided that any statutory provision inconsistent with any constitutional provision — and enacted after the date of commencement of the Constitution — would be void to the extent of such inconsistency. For Hiemstra CJ the decisive question in *Marwane* was largely a ‘technical’ one, namely, whether South African legislation received in Bophuthatswana by virtue of s 93(1)(a) could be reviewed and voided on constitutional grounds. Answering this question in the negative, he concluded that the court lacked jurisdiction to pronounce on the constitutional validity of the impugned provisions of the Terrorism Act.

At the time the Appellate Division of the Supreme Court of South Africa in Bloemfontein was still the final court of appeal for Bophuthatswana. *Marwane* then proceeded to South Africa’s highest court to have (among other things) a statute of South African origin declared invalid on substantive, constitutional grounds 11 — something which the then South African Constitution (of 1983) 12 precluded any South African court from doing.

A majority of the Appellate Division negotiated with relative ease the technical hurdle over which Hiemstra CJ had stumbled. It then proceeded to test the impugned provision of the Terrorism Act and held it to be unconstitutional. The majority was, as a matter of fact, appreciably more enthusiastic and activist than the circumstances required. They pronounced on provisions of the Terrorism Act which they — and the court a quo — were not even called upon to consider.

6  ‘Homeland’ here understood as defined in FC schedule 6, item 1.

7  1982 (3) SA 717 (A) (‘Marwane’).

8  *S v Marwane* 1981 (3) SA 588 (B) (‘Marwane a quo’).

9  Act 83 of 1967 s 2(1)(c) read with s 2(2).


11  *Marwane* (supra).

12  See Republic of South Africa Constitution Act 110 of 1983 s 34(3).
Hiemstra CJ's scalpel and sledgehammer metaphor, quoted above, was meant to depict the constitutional over-indulgence of the majority in the Marwane appeal. His dictum comes from Smith v Attorney-General Bophuthatswana. Smith reflects the virtues of judicial self-restraint and a display of 'carefully balanced constitutional adjudication'.

The number of constitutional cases before high courts in Southern Africa increased during the late 1980s and early 1990s. This increase flowed directly from the growth in the number of 'independent' homelands (with justiciable constitutions) to five, and the presidential proclamation of a justiciable 'interim constitution', with entrenched fundamental rights, for Namibia in anticipation of its independence. In some instances, courts in the homelands (especially the former Ciskei), as well as the Supreme Court in pre-independence Namibia, handed down judgments in constitutional cases that indeed reflected a nuanced understanding of the ethos of constitutionalism. In Bophuthatswana, on the other hand, constitutional jurisprudence after Smith went down the road to perdition. This lasted until Friedman J, in Nyamakazi v President of Bophuthatswana, relying on a wide range of authorities and quoting extensively from miscellaneous sources,

13 Smith (supra) at 200C.


16 The 'TBVC states' were Transkei, Bophuthatswana, Venda and Ciskei.

17 Schedule 1 to Proclamation R101 of 17 June 1985.

18 See, for example, African National Congress (Border Branch) & Another v Chairman, Council of State of the Republic of Ciskei & Another 1992 (4) SA 434 (CkGD); Bongopi v Chairman of The Council of State, Ciskei & Others 1992 (3) SA 250 (CkGD); Bongopi v Chairman, Ciskei Council of State & Others 1993 (3) SA 494 (CkA).

19 See, for example, Ex Parte Cabinet for the Interim Government of South West Africa: In Re Advisory Opinion in terms of s 19(2) of Procl R101 of 1985 (RSA) 1988 (2) SA 832 (SWA); Namibian National Students' Organisation and Others v Speaker of the National Assembly for South West Africa & Others 1990 (1) SA 617 (SWA).

20 See LM du Plessis & JR de Ville 'Prognostic Observations' (supra) at 200-202 and 205-209.

21 See Government of the Republic of Bophuthatswana v Segale 1990 (1) SA 434 (BA); Monnakale & Others v Republic of Bophuthatswana & Others 1991 (1) SA 598 (B)(‘Monnakale’) and Lewis v Minister of Internal Affairs & Another 1991 (3) SA 628 (B)(‘Lewis’).
sought to formulate proper guidelines for 'progressive' constitutional interpretation in the South African context.

The then Appellate Division in South Africa exchanged its controversial boldness in *Marwane* for a wariness to face up to constitutional issues. It often avoided them on technical grounds and deprived litigants of the optimal protection of their constitutional rights. It also denied South African courts an early jump on the inevitable demands of constitutional interpretation in South Africa's post-apartheid constitutional order. Within the territory of what was the Union of South Africa after 1910 and the Republic of South Africa since 1961, substantive (as opposed to formal or manner and form) judicial review of (original) legislation was not possible. With the constitutional debacle of the 1950s, manifesting in what became known as the 'Harris cases' and resulting in the disenfranchisement of coloured voters, even manner and form review proved to be controversial.

Mindful of this state of affairs, a number of interpretive waymarks (recognizable as such) were included in the text of the Interim Constitution. Such provisions were ratified over the protests of senior members of the judiciary. For the most part these provisions reappeared in the text of the Final Constitution.

Under the respective headings 'Rights' and 'Interpretation of the Bill of Rights', FC s 7 and FC s 39 count among the more important operational provisions (read 'interpretive aids') of the Bill of Rights (Chapter 2 of the Constitution). In other words, these sections are provisions that facilitate the realization of rights guaranteed in the Bill of Rights by giving, through various modes of interpretive reasoning, content, shape and direction to them — and placing limits on them.

Other such operational provisions, pertaining to the Bill of Rights in particular, occur in FC s 8 (application of the Bill of Rights), FC s 36 (limitations of rights entrenched in the Bill of Rights), FC s 37 (derogations from rights in states of emergency) and (arguably also) FC s 38 (enforcement of rights). In addition, FC s 7 plays, in respect of the Bill of Rights, an anchoring, depictive and interpretive role akin to that of the founding provisions in FC s 1.

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22 1992 (4) SA 540 (BGD), 1994 (1) BCLR 92 (B).

23 See, for example, such pre-independence Namibian cases as: *Tussentydse Regering vir Suidwes-Afrika en 'n Ander v Katofa* 1987 (1) SA 695 (A); *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) and *Cabinet for the Territory of South West Africa v Chikane & Another* 1989 (1) SA 349 (A).

24 See *Harris & Others v Dönges NO & Another* 1951 (4) SA 707 (C); *Harris & Others v Minister of the Interior & Another* 1952 (2) SA 428 (A) (‘*Harris v Minister of the Interior*’); *Minister of the Interior & Another v Harris & Others* 1952 (4) SA 769 (A) and *Collins v Minister of the Interior & Another* 1957 (1) SA 552 (A).

25 The then Chief Justice, for instance, thought that it was inadvisable to lay down rules for interpretation of the Bill of Rights. Interpretation is a question of common sense based on judicial experience, he thought, and there was evidence that South African judges sitting in constitutional cases in 'other divisions' had appropriated the well-known rules for interpretation 'developed worldwide', to a point where full confidence in their ability to apply just and equitable rules of interpretation was warranted. See L du Plessis & H Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 119.
FC ss 7 and 39 also have repercussions for both private law and public law. These two sections may engender transformative readings of all existing law in a manner somehow associable with the protection of the rights entrenched in the Bill of Rights, and with the promotion of the constitutional values embodied in and engendered by those rights. Such readings, provided that they are duly restrained, may also call attention to the received wisdom enshrined in the existing law. As I shall later discuss in full, this constrained transformative mode of interpretation often goes by the name of 'subsidiarity' and takes full advantage of the wording of FC s 39(2).  

That said, neither FC s 7 nor FC 39 exhausts the tools available for interpretation of the Final Constitution, in general, and the Bill of Rights in particular.

(b) Bill of Rights interpretation as depicted in (early) post-1994 constitutional jurisprudence

Pre-1994 South African constitutional law was informed mainly by the English common law and the commitment to parliamentary sovereignty. English common law and the commitment to parliamentary sovereignty sit somewhat uncomfortably with a preference for constitutional (as opposed to parliamentary) supremacy to secure democracy and to promote the ideals of the constitutional state. As long as there is accountable government and due observance of the rule of law, deference to the sovereignty of Parliament, as the incarnation of the highest will of the people, is thought to be consistent with safeguarding individual rights and liberties. Of course, the real source of the problem with human rights in South Africa from 1910 to 1994 was not English common law and the commitment to parliamentary sovereignty: it was colonialism and apartheid. It was, in the first place, the century's long denial of the humanity and dignity of the majority of South Africans under white minority rule - not the absence of a supreme constitution - that must be blamed.

The precedence of legislative authority in common-law systems manifests in a wariness to entrust courts with overly extensive powers of review. Statute law is, as a rule, drafted in detail, endeavouring to cater for as many eventualities as possible and to avoid loopholes — lest the sovereign legislature be 'misunderstood'. This style of draftsmanship, characterized by long-windedness, encourages a literalist reading of statutes.

26 See also Roux 'Democracy' (supra) at 10-32-10-34.

27 See § 32.5(b)(iii) infra.


29 See VP Sarathi The Interpretation of Statutes (3rd Edition, 1986) 2 (Claims that 'one of the maxims of British jurisprudence is optima est lex minimum relinquit arbitrio judicis, optimus judex qui minimum sibi - that system of law is best which confides as little as possible to the discretion of the judge; that judge is the best, who relies as little as possible on his own opinion'.)

In civil-law legal systems, on the other hand, the wording of enacted law (that is, all law laid down by a designated law-maker of some sort) is characteristically open-ended: '[T]he expansive terms which are the universal language of constitutional texts' and which enumerate the fundamental rights of people in legal systems worldwide are commensurate with the characteristically broad and indeterminate manner in which enacted precepts in civil-law systems are phrased. Adjudicators working with such expansively and indefinitely couched precepts in specific cases are expected to give concrete expression to them in accordance with a reasoned 'sense of justice'.

Moving from conventional common-law 'interpretation of statutes' to fully-fledged constitutional interpretation calls for a strategic break with a default interpretive assumption, namely, that the most acceptable answers to questions of interpretation are, by and large, 'the obvious ones'. In other words, a constitutional order calls for a departure from the inclination to read the text in a strictly literal and technical manner.

A number of British jurists, in anticipation of the commencement of their country's new Human Rights Act, made some rather instructive observations about the nature and effects of the repositioning mentioned above. The Human Rights Act enjoins courts to read statutes 'so far as possible' to be compatible with fundamental rights guaranteed by the European Convention on Human Rights. If such a reading is not possible, a court may declare legislation to be 'incompatible' with Convention rights. Thereafter, the executive may initiate and Parliament may avail itself of a fast-track procedure to pass remedial legislation. Lord Irvine of Lairg who, as Lord Chancellor, played a key role in shepherding the Human Rights Act through Parliament, reflected on the previously mentioned repositioning as follows:

Interpretation is, at root, an exercise in textual analysis. It is, therefore, the words of a bill of rights with which judges must primarily be concerned as they seek to adjudicate in cases which engage fundamental norms. Although many eminent judges held that

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31 Civil law systems are also referred to as 'Romano-Germanic' or 'Continental' legal systems.

32 For a further explication of the terms 'enacted law' and 'enacted law-texts' see § 32.3(e)(i)(ee) and § 32.5(c)(iii) infra.


34 David & Brierly (supra) at 95-97.

35 1998 c 42.


38 Lord Irvine of Lairg (supra) at 352.
the judicial function entailed nothing other than this literal approach to construction, this declaratory theory long ago gave way to more open recognition that law-making – within certain limits – is an inevitable and legitimate element of the judge’s role. Acceptance of this truism reveals the real nature of the interpretative process. In particular it indicates that, when construing a statutory provision, the judge may well have to choose between competing meanings by reference, for instance, to the underlying rationale of the legislative scheme.

The Human Rights Act professes to leave the sovereignty of the Westminster Parliament intact, \(^{39}\) and effects an incomplete incorporation of European human rights law into domestic law. \(^{40}\) The South African Final Constitution, as the fully justiciable, supreme law of the Republic, goes quite some distance further and has thereby placed issues of constitutional interpretation at the apex of discussions prominently on the agenda of legal interpretation in this country. \(^{41}\)

In the early days of constitutional adjudication, South African courts (and the Constitutional Court in particular) made several attempts to depict interpretation of the Bill of Rights (Chapter 3 of the IC) as an exceptional mode of legal interpretation. Even though the Interim Constitution — like any statute law — was adopted and 'passed' by a demonstrable law-maker, the courts repeatedly emphasized that 'ordinary' statutory interpretation and rights interpretation are essentially distinct. The latter calls for a less restrictive — and thus more generous — reading in favour of those whose rights enjoy constitutional protection: \(^{42}\)

Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law. \(^{43}\)

_Dicta_ from two specific foreign cases were frequently quoted in support of such a generous approach to constitutional interpretation: \(^{44}\)

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39 Grosz, Beatson & Duffy (supra) at 30-33.


42 See, for example, _S v Gumede & Others_ 1998 (5) BCLR 530, 542B (D).

43 _Attorney General v Moagi_ 1982 (2) Botswana LR 124, 184 (Kentridge AJ).

44 See _S v Zuma & Others_ 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) (‘Zuma’) at paras 14 and 15 (Kentridge AJ).
on the constitutions of former colonies of the British Commonwealth, he said that these called for 'a generous interpretation . . . suitable to give to individuals the full measure of the fundamental rights and freedoms referred to', and that the Constitution called for 'principles of interpretation of its own'. He went on to say:

This is in no way to say that there are no rules of law which should apply to the interpretation of a constitution. A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and the usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the constitution commences. 45

In R v Big M Drug Mart Ltd, Dickson J said, with reference to the Canadian Charter of Rights:

The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view 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 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. The interpretation should be . . . a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and the securing for individuals the full benefit of the Charter's protection. . . . 46

Both Lord Wilberforce and Dickson J emphasised that regard must be paid to the legal history, traditions and usages of the country concerned, if the purposes of its constitution are to be fully understood. 47

Four conclusions about the distinctive nature of rights interpretation can be drawn from the above quotations. First, rights interpretation is essentially distinct from conventional statutory interpretation because it is overtly value-laden. 48

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45 See S v Marwane 1982 (3) SA 717 (A), 748–9. See also Minister of Defence, Namibia v Mwandinghi 1992 (2) SA 355 (NmS), 362.


47 Zuma (supra) at para 15.

48 See Matiso & Others v The Commanding Officer, Port Elizabeth Prison & Others 1994 (3) SA 592 (SE), 597B-597H (SE), 1994 (3) BCLR 80, 87B-87H (SE)('Matiso'). Froneman J wrote:

In a constitutional system based on parliamentary sovereignty it makes good sense to start from the premise of seeking 'the intention of the Legislature' in statutory interpretation, because the interpreting Judge's value judgment of the content of the statute is, theoretically at least, irrelevant. As long as the Legislature remains civilised and is broadly representative of the population of the country, the system should work satisfactorily . . .

The interpretative notion of ascertaining 'the intention of the Legislature' does not apply in a system of judicial review based on the supremacy of the Constitution, for the simple reason that the Constitution is sovereign and not the Legislature. This means that both the purpose and method of statutory interpretation in our law should be different from what it was before the commencement of the Constitution on 27 April 1994. The purpose now is to test legislation and
Second, it requires judicial exponents of constitutional rights to pass value judgments on a text couched in inclusive and open-ended language. From a common-law point of view this means investing the judiciary with law-making authority that depart from systems committed to parliamentary sovereignty. Third, rights interpretation is thought of as characteristically purposive. The notion of 'purposive (constitutional) interpretation' will be dealt with more fully at a later stage. Finally, (purposive) rights interpretation is generous (or 'liberal') in that it seeks to optimise safeguards against interference with constitutionally entrenched rights.

Constitutional interpretation is, however, not unrestrained. The following cautionary note sounded by Kentridge JA in S v Zuma & Others has been the met with considerable support within the judiciary:

While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean . . .

administrative action against the values and principles imposed by the Constitution. This purpose necessarily has an impact on the manner in which both the Constitution itself and a particular piece of legislation said to be in conflict with it should be interpreted. The interpretation of the Constitution will be directed at ascertaining the foundational values inherent in the Constitution, whilst the interpretation of the particular legislation will be directed at ascertaining whether that legislation is capable of an interpretation which conforms with the fundamental values or principles of the Constitution. Constitutional interpretation in this sense is thus primarily concerned with the recognition and application of constitutional values and not with a search to find the literal meaning of statutes.

Froneman J's observations on the role of the 'intention of the legislature' in statutory interpretation are untenable in the light of contemporary insights into the nature of legal interpretation associated with the 'linguistic turn'. See § 32.3(b)(ii) infra.

49 See Matiso (supra) at 597I-598B:

The values and principles contained in the Constitution are, and could only be, formulated and expressed in wide and general terms, because they are to be of general application. In terms of the Constitution the Courts bear the responsibility of giving specific content to those values and principles in any given situation. In doing so, Judges will invariably 'create' law. For those steeped in the tradition of parliamentary sovereignty, the notion of Judges creating law, and not merely interpreting and applying the law, is an uncomfortable one. Whether that traditional view was ever correct is debatable, but the danger exists that it will inhibit Judges from doing what they are called upon to do in terms of the Constitution. This does not mean that Judges should now suddenly enter into an orgy of judicial law-making, but that they should recognise that their function of judicial review, based on the supremacy of the Constitution, should not be hidden under the guise of simply seeking and giving expression to the will of the majority in Parliament. Judicial review has a different function, but it is still subject to important constraints. And recognition of those constraints is the best guarantee or shield against criticism that such a system of judicial review is essentially undemocratic.

50 See § 32.3(a)(v), (b)(iii) and (c)(iii) infra.

51 See § 32.3(a)(i) infra.
[E]ven a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination . . . I would say that a constitution 'embodying fundamental rights should as far as its language permits be given a broad construction'.

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In S v Gumede & Others Magid J recognised that FC s 39(1)(a) particularly requires 'a liberal interpretation' of the Bill of Rights, but does not:

permit or encourage courts to ignore the actual language used in the Constitution. If it were felt that the rights of detained persons should be extended, this should be achieved by means of legislative action and not by means of judicial activism, or by interpretation which read words into provisions which were not there or excised words which were. 53

The assumption that language as such could restrain an over-generous reading of provisions entrenching rights is controversial. Magid J therefore quite rightly deployed separation of powers (or trias politica) considerations as means of judicial restraint. Similarly, Froneman J in Matiso & Others v The Commanding Officer, Port Elizabeth Prison & Others, warned that judges should not 'enter into an orgy of judicial law-making' and that '[j]udicial review . . . is . . . subject to important constraints', the recognition of which 'is the best guarantee or shield against criticism that . . . a system of judicial review is essentially undemocratic'. 54

(c) Rights interpretation and/as constitutional interpretation

In Kalla v The Master, 55 Van Dijkhorst J maintained that 'obviously' the construction of clauses of the Bill of Rights 'which set out broad principles' had to take place 'in the spirit of the Constitution': however, such broad principles would 'surely' be unnecessary when a constitutional provision providing for Bloemfontein as the seat of the Appellate Division 56 had to be construed. His suggestion that value-laden Bill of Rights interpretation and the interpretation of the other (especially more technical and mundane) provisions of the Constitution are largely dissimilar draws too definite and superficial a distinction. First, quite a number of the non-Bill of Rights provisions of the Final Constitution are designed to have an immediate 'value impact' and they obviously animate 'the spirit of the Constitution'. One only need review the founding provisions in FC ss 1 to 6 (Chapter 1), FC ss 40 and 41 (Chapter 3) on co-operative government, FC s 59 on public access to and involvement in law-making by the National Assembly, FC s 165 on judicial independence, FC s 195 on the basic values and principles governing public administration, and FC s 237 on the diligent performance of obligations to see that 'broad principles' are required for their construction.

52 Zuma (supra) at paras 17 and 18.

53 1998 (5) BCLR 530, 542A-C (D).

54 Matiso (supra) at 598A-B.


56 See IC s 106(1). The 'Appellate Division' referred to in that section is presently the Supreme Court of Appeal.
Second, even seemingly technical, merely formal (or mundane) provisions of the Final Constitution often make significant value or policy statements when considered in context and read purposively. The constitutional definition of 'organ of state' in FC s 239, for instance, excludes 'a court or a judicial officer'. It thereby affirms the democratic value of judicial independence in atypical value language, and supplements and supports the more conspicuously value-couched provisions on judicial independence in, for instance, sub-ss (2) to (4) of FC s 165. It is indeed hard to conceive of any constitutional provisions (even the most technical ones) in a vacuum of value-neutrality and devoid of 'the spirit of the Constitution'.

The place name 'Bloemfontein' in the Interim Constitution, at any rate, referred not just to a city (and the district in which it is situated), but also to the political compromise made manifest in 1909 in the then South Africa Act, the first Constitution of the Union of South Africa. This political decision — plagued by controversy — meant that while Bloemfontein would be the judicial capital of the Union of South Africa, Cape Town and Pretoria would operate as the legislative and administrative capitals respectively. 'Bloemfontein' in any successor to the South Africa Act — even one as distant in time as the Interim Constitution — would never be just a 'spiritless' or value-neutral indication of locality, but also a reminder, in the (continuing) spirit of the 1909 Constitution, that politics (and, in negotiating the Interim Constitution, transitional politics in particular) largely determined the designation of a seat for (what used to be) South Africa's highest court. By the same token the omission of 'Bloemfontein' from the text of the Final Constitution is more than just a formal or 'technical' oversight or non-action: it is a decided and measured silence.

The following is another example of how and why the construction of 'technical' or 'formal' constitutional provisions require the deployment of constitutional values and objectives. FC s 46(1) provides that the National Assembly consists of no fewer than 350 and no more than 400 men and women. Presumably, a National Assembly consisting of 360 men only (or 360 women only) will not meet this requirement because this legislative body must consist of men and women. However, in the light of the Final Constitution's overwhelming insistence on gender equality, a national assembly consisting of, for example, 355 men and 5 women will probably also be 'unconstitutional'. To take it further: if members of

OS 06-08, ch32-p13

57 FC s 165(2) to (4) reads as follows:

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

See also § 32.4(c)(ii) infra.

58 9 Edward VII, Ch 9.


60 See L du Plessis Re-Interpretation of Statutes (2002) 146-147.
the National Assembly resign or are killed in an accident, and their numbers drop to
below 350, will the remaining members still constitute 'the National Assembly' — at
least for the time being? And does it make a difference whether the numbers have
dropped below the minimum due to resignations or due to an accident? These
questions can be resolved, but they will have to be addressed contextually and
purposively, that is, with reference to where and how they fit into the scheme of the
Final Constitution as a whole, and with further reference to the constitutional
objectives they seek to achieve and the values they were designed to promote. No
algorithm provides an easy answer to any of the previous questions.

No South African court has as yet said, in so many words, that the interpretation
of the Bill of Rights and the interpretation of non-Bill of Rights provisions of the Final
Constitution are in fact inextricably connected. But some courts have suggested that
the general approach to Bill of Rights interpretation is very much the same as the
approach to the interpretation of other parts of the Final Constitution. The notion of
'purposive interpretation/construction' has been relied on to make the link. In the
minority judgment in S v Mhlungu & Others 61 Kentridge AJ, for instance, said that a
purposive construction of IC s 241(8) — requiring proceedings that were pending
immediately before the commencement of that Constitution to be dealt with 'as if
this Constitution had not been passed' — would be appropriate given the
'fundamental concerns of the Constitution' and its 'spirit and tenor'. In a similar vein,
the Constitutional Court, in two later judgments, contended for a purposive
interpretation of the functional areas of provincial legislative competence (in
Schedules 4 and 5 of the Constitution) so as to 'enable the national Parliament and
the provincial legislatures to exercise their respective legislative powers fully and
effectively'. 62

Finally, in Executive Council, Western Cape Legislature & Others v President of
the Republic of South Africa & Others, one of the Constitutional Court's earliest
landmark judgments, the Court insisted that an important objective of constitutional
interpretation is to establish respect for the supremacy of the Constitution. 63 This
means that courts with the necessary jurisdiction must always to live up to their
duty to 'test' legislation and executive action for consistency with the Constitution,
and to declare law and conduct not passing muster invalid.

Is there a need to distinguish between Bill of Rights interpretation and
interpretation of the rest of the Constitution? Certainly not, if such a distinction
suggests that the 'broad principles' of the Bill of Rights have to be interpreted

62 See Western Cape Provincial Government & Others: In re DVB Behuising (Pty) Ltd v North West
Provincial Government & Another 2001 (1) SA 500 (CC), 2000 (4) BCLR 347 (CC) at para 17. See
also Mashavha v President of the Republic of South Africa 2005 (2) SA 476 (CC), 2004 (12) BCLR
1243 (CC) at para 32.
63 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 100. For an appreciative evaluation of this
judgment, see H Klug 'Introducing the Devil: An Institutional Analysis of the Power of Constitutional
'in the spirit of the Constitution', but other constitutional provisions do not. 64 However, Bill of Rights interpretation is mostly (though not invariably) rights interpretation that 'takes the rights and freedoms [entrenched in the Bill of Rights], and the general rules derived from them, as . . . [a] point of departure for determining whether law or conduct is invalid'. 65 The interpretation of provisions in the rest of the Final Constitution is norm interpretation. The outcome of both rights interpretation and norm interpretation is normative (regulatory, prescriptive). However, their starting points differ: the former starts with rights and derives particular, concrete norms from them; the latter starts with a general norm that is then concretized. Because these two forms of interpretation are so similar in outcome, the general distinction between them must be treated with circumspection, and one must remain mindful of three things.

First, there are provisions in the Bill of Rights that do not entrench rights and therefore do not lend themselves to rights interpretation. The conditions for and procedures that must be observed during a state of emergency as set out in FC s 37 (excluding FC s 37(5) — see below), for instance, call for norm interpretation, and so does FC s 39(2), for it requires, without any specific reference to entrenched rights, judicial interpretation of existing statute, common and customary law to promote certain designated values. Subsections (1) and (3) of FC s 39 are not in the same category: they stipulate how rights ought to be construed and are therefore operational provisions, normative in nature, that facilitate the realization of Chapter 2 rights, and give content, shape and direction to them. Other normative Bill of Rights provisions set standards for rights interpretation (and were previously also identified as operational provisions): the limitations clause (FC s 36), the application clause (FC s 8), FC s 37(5) that deals with derogations from rights during a state of emergency (and is therefore a provision akin to FC s 36) and the enforcement clause (FC s 38).

Second, rights interpretation and norm interpretation, though decidedly different in kind, can be mutually supportive. Rights can be protected effectively — and conditions conducive to their protection can be created and enhanced — by giving effect to constitutional norms that are not part of the Bill of Rights. Meaningful protection and enforcement of rights will, for instance, not be possible if the FC s 165 provisions dealing with the independence of the judiciary or the FC s 171 provisions granting the courts certain powers in constitutional matters are not properly construed and duly observed. The political rights entrenched in FC s 19 (which forms part of the Bill of Rights) will also ring hollow in the absence of elections actually held and conducted in accordance with properly construed constitutional norms dealing with such elections (for instance, FC ss 46, 105, 157 and Schedule 3).

Finally, rights interpretation is not more value-laden or value-driven than norm interpretation. Both forms of interpretation instantiate constitutional interpretation which, in its turn, instantiates (and requires) the realization of constitutional values and an understanding and implementation of the Final Constitution that best promotes such values through efficient and accountable government. Certain provisions in the Final Constitution, both in the Bill of Rights and the rest of the Constitution, articulate values in an 'objective' (norm-like as opposed to a rights-like)


manner. Such provisions are mostly to be found among the interpretive waymarks in the written constitutional text that will be discussed at a later stage. In *Carmichele v Minister of Safety and Security & Another*, the Constitutional Court contended that:

> [o]ur Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system.

This phrase — fraught as it is — means that Bill of Rights provisions enshrining fundamental rights do not only safeguard those rights as individual, subjective rights, but also embody an objective value system applicable to all areas of the law and serving as a guiding principle and stimulus for the legislature, executive and judiciary.

FC s 39(2) is a similar guiding principle designed to promote the spirit, purport and objects of the Bill of Rights when interpreting existing law. But is there then still any point in distinguishing between (subjective) rights interpretation and (objective) norm interpretation? A majority of the Constitutional Court in *Barkhuizen v Napier* seemingly thought that there is not. The Court was called upon to test a time limitation clause in a short-term insurance policy against an insured claimant’s fundamental right of access to court, entrenched in FC s 34. The impugned clause prevented the claimant from instituting legal action if summons was not served on the insurance company within the time limit set out in the clause. The majority of the court preferred not to go the rights route. Instead, by appealing to FC s 39(2), it determined the constitutionality of the impugned clause with reference to public policy informed with constitutional values (including the values in the Bill of Rights).

Stu Woolman objects to such an approach because, in his view, the Bill of Rights and rights interpretation appear to vanish from the scene of constitutional interpretation. He suggests that this troubling approach seems to have become a

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66 See § 32.4(c)(i) infra.

67 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) (‘Carmichele’) at para 54 confirming a dictum to a similar effect in *Du Plessis & Others v De Klerk & Another* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC) (‘De Klerk’) at para 94.

68 See BVerfGE 39, 1 (‘First Abortion Decision’) 41.

69 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC).

70 Ibid at para 30.

71 See Woolman ‘The Amazing, Vanishing Bill of Rights’ (supra) at 762.
trend in some recent majority judgments of the Constitutional Court. Rights interpretation, according to Woolman, is the correct approach when law or conduct is challenged on the basis that it infringes a fundamental right or rights enshrined in the Bill of Rights, and norm interpretation à la FC s 39(2) may be resorted to if rights interpretation proves to be incapable of rendering a viable result. FC s 39(2) at any rate requires norm interpretation as a constant reminder to judicial interpreters of the Final Constitution that all law must be brought in line with the spirit, purport and objects of (and thereby the objective, normative value system embodied in) the Bill of Rights. Woolman’s observations confirm that rights interpretation and FC s 39(2) norm interpretation are two distinct interpretive procedures: each occupies its own rightful place in constitutional interpretation.

(d) The scope of constitutional interpretation

What is a constitution? And what does its interpretation entail? Much has been (and will still be) written about these two questions. However, mindful of the nature and structure of the collective work of which this chapter forms part, these vexed questions will be answered provisionally, for the time being, not so much taking account of all the topics that may possibly be included in a treatise on constitutional interpretation, but rather accounting for the exclusion from the limited account in this chapter of some eminently possible (and relevant) topics. Both questions posed above are decidedly philosophical, and some of the theoretical concerns involved in dealing with them will be considered in due course.

Two texts from classical antiquity, one probably by Aristotle (384–322BC) or a student of his, and the other attributed to Xenophon (ca. 431–355 BC) (but not by him), are both entitled Athenaion Politeia: The Constitution of the Athenians or The Athenian Constitution. Classicists cannot agree on any one English word or phrase adequately rendering ‘politeia’. ‘Republic’, ‘polity’, ‘system of government’, ‘state organisation’, ‘form of government’ and even ‘régime’ are all regarded as candidates — each with its own merits and demerits — and then of course ‘constitution’ is considered to be quite a feasible option too. ‘Constitution’ as ‘politeia’ (translated into English) is not just a written document, authored and carried into

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72 See Woolman ‘The Amazing, Vanishing Bill of Rights’ (supra) at 762 (Woolman shows how in NM & Others v Smith & Others 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC) and Masiya v Director of Public Prosecutions & Others 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 (CC) (‘Masiya’) a similar approach was adopted.)

73 Woolman ‘The Amazing, Vanishing Bill of Rights’ (supra) at 769. See also Carmichele (supra) at para 54 and Thebus & Another v S 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC).

74 Woolman traces the Constitutional Court’s failure to recognize and to maintain this distinction and to afford rights interpretation its rightful place — at least in the cases he discusses — to an unwillingness to apply the Bill of Rights directly to relationships between private (‘non-state’) actors. This matter will be returned to later. See § 32.4(c)(i)(dd) infra.

75 See § 32.3(b)(ii) infra.

76 See, for example, Aristotle The Athenian Constitution (1984).
effect by duly designated constitution-makers, and embodying a nation's binding memorandum of understanding — a 'linguistic datum', 77 in other words — but also includes 'the constitutional dispensation', as it has become known in South African constitutional vocabulary. 78

However, the default and dominant mindset among both jurists and lay citizens in South Africa (and probably in most countries with a written constitution as highest law) is to associate the signifier 'constitution' — especially when verbalized unreflectively — with a linguistic datum manifesting as a document in writing. On the other hand, in a jurisdiction like the United Kingdom, whose constitution is not embodied in a single written document, but is spread over a large number of Acts of Parliament and 'constitutional conventions', 79 constitution and constitutional dispensation are probably more readily equatable and interchangeable.

The Final Constitution as a written document is clearly a part of the contemporary South African constitutional psyche. The concreteness of the linguistic datum is a tangible, 'readable' reminder of the respect owed to the supremacy of the Final Constitution, as antidote to potential emasculations of constitutional democracy and its institutions. 80 In expositions of constitutional interpretation (such as this chapter) the 'constitutional document' may serve as a lookout onto, an access into and an orientation unto whoever explores the politeia.

The Constitution-in-writing is frequently referred to as 'the constitutional text'. 81 However, this turn of phrase may nowadays be confusing due to the many meanings and meaning possibilities that the word 'text' has acquired in postmodern (and, in particular, poststructuralist) discourse on language, meaning and interpretation. The implications of this development for legal and constitutional interpretation will be considered in due course, 82 and until then any reference to the Constitution as 'text' without further ado will be deferred. The Constitution as linguistic datum will mostly be called 'the Constitution-in-writing', 'the written Constitution' or 'the written constitutional text'.

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77 See F Müller ‘Basic Questions of Constitutional Concretisation’ (1999) 10 Stellenbosch Law Review 269, 269. See also § 32.3(e)(ii)(aa) infra.

78 For the implications of a broad conception of 'constitution' for constitutional interpretation, see WF Murphy, JE Fleming & SA Barber American Constitutional Interpretation (2nd Edition, 1995) Chapters 1, 5 and 6.


82 See § 32.3(b)(ii) and (iv) infra.
Together with a high esteem for the Constitution-in-writing and its pivotal positioning in a democratic constitutional dispensation, crucial caveats need to be observed. Most important among these warnings is that one ought not to invest the Constitution as linguistic datum with a degree of autonomy sufficient to isolate and, indeed, declare it independent from the *politeia*: separation of the written Constitution and the constitutional dispensation is simply unacceptable! It is a looming pitfall, though, given the fact that conventional approaches to statutory interpretation (which have had an impact on constitutional interpretation too) are premised on the assumption that the interpretation of a statute or statutory provision essentially entails a retrieval or exhumation of meaning — intended and encoded by its law-making author — from the instrument. This belief entails that a provision to be construed has an appreciably independent life of its own, and that a knowledgeable interpreter who heeds the rules of the particular genre of encoding will retrieve from the written provision (and from it alone) the meaning intended by its author. This is then regarded as the 'best' or 'most correct' meaning of the provision in question. Various objections to this key tenet of conventional statutory interpretation will be considered below. However, it is enough for now to point out that the notion of an enacted instrument as bearer of meaning implies that it is by and large autonomous in passing on that meaning. This implication, in turn, kindles the belief that the role of the instrument as conveyer of meaning may be considered in isolation from the sometimes messy 'environment' in which it obtains. If such a bearer and conveyer of meaning is also 'the supreme law of the Republic', it becomes difficult to resist the temptation of placing it on a pedestal somewhere above (and removed from) the day-to-day activities of the 'constitutional dispensation'. One way of countering — or at least minimizing the effects of — such a separationist move is to uphold 'constitution' in its classical signification, thereby contending that a constitution-in-writing is meaningless in isolation from the *politeia*. This move entails, among other things, the presentation and the development of cogent arguments for contextual interpretation — an interpretive strategy that features prominently in this chapter.

Conventional approaches to statutory interpretation also underwrite rather thin conceptions of 'constitutional interpretation' — they assume the possibility of observance and application of predetermined canons of construction to retrieve meaning from the (autonomous) written Constitution. The theoretical tenability

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83 See § 32.3(a)-(b) infra.

84 See § 32.3(b)(i)-(iii) infra.

85 For a further explication of the terms 'enacted law' and 'enacted law-texts', see §§ 32.3(e)(i)(ee) and 32.5(c)(iii) infra.

86 FC s 2.

87 See §§ 32.3(a)(iv), (b)(ii) and (e) and § 32.5(c)(ii) infra.

88 For a crude articulation of this notion, see *Government of the Republic of Bophuthatswana v Segale* 1990 (1) SA 434 (BA), 448F-G (Galgut AJA):
of this idea will be challenged more fully when dealing with the unity of interpretation and application (and the notion of interpretation as concretization).  

At this stage, it is enough to note that on the broad understanding of constitutional and Bill of Rights interpretation contended for in this chapter, what were previously referred to as ‘operational provisions’ of the Bill of Rights form part of the arsenal of means and strategies of constitutional interpretation and could therefore quite appropriately have been dealt with under the heading constitutional and/or Bill of Rights interpretation. Constitutional interpretation indeed has everything to do with the realization of constitutional provisions — and in particular Bill of Rights provisions in which rights are guaranteed — by giving them content, shape and direction. However, issues regarding the application of the Bill of Rights, limitations of rights entrenched in the Bill of Rights, derogations from rights in states of emergency, and the enforcement of rights are sufficiently specialized, complex and wide ranging also to warrant their treatment in separate chapters.

Constitutional interpretation is about employing generally applicable principles, procedures and strategies to read and apply the Constitution, starting with and centred on the Constitution-in-writing. However, especially in the context of Bill of Rights interpretation, specialist readings of the various provisions entrenching different rights are also required. Rights differ in nature because they refer to dissimilar interests and entitlements. For the interpretation of certain rights, unique principles, procedures and reading strategies may apply, or general principles, procedures and strategies may have to be invoked in special ways. In principle the various manifestations of specialized rights interpretation do belong under the heading of constitutional interpretation. However, this treatise is sufficiently broad enough in scope — 76 chapters — to allow for the analysis of different rights in discrete chapters.

The task of the courts is to ascertain from the words of the statute in the context thereof what the intention of the legislature is. If the wording of the statute is clear and unambiguous they state what the intention is. It is not for the courts to invent fancied ambiguities and usurp the functions of the legislature.

89 See § 32.3(b)(ii) and § 32.3(d) infra.

90 See § 32.1(a) and also § 32.1(c) supra.


It is debatable whether interpretive procedures and strategies for the interpretation of existing statute and common law, but necessitated by the exigencies of construing existing law subject to the supreme Constitution, could be referred to as procedures and strategies of constitutional interpretation. Reading in conformity with the Constitution (sometimes also referred to as 'reading down' or 'the presumption of constitutionality') is a telling example of such a procedure.  

FC ss 7 and 39 — quoted at the beginning of this chapter — certainly fall squarely within the scope of constitutional (and, in particular, Bill of Rights) interpretation. But they are not primarily what constitutional interpretation is all about. With the exception of FC s 39(2) (and perhaps FC s 39(1)(b) and (c)), FC ss 7 and 39 have to date not been thoroughly and systematically analyzed in the constitutional case law. They have been relied on, instead, as ad hoc rhetorical stratagems. The role of FC ss 7 and 39(1)(a) and (3) as sources of interpretive waymarks in the written constitutional text will be considered together with sources of other such waymarks below. The focus will be on the courts' articulation of how they understand these sections and the possibility of a comprehensive and coherent ('model') construction of them. FC s 39(2) will feature in several 'capacities' in this chapter, but especially as a source of a new canon of statutory interpretation and as part of the subsidiarity landscape. FC s 39(1)(b) and (c) will be dealt with under the heading of comparative interpretation (or transnational contextualization) towards the end of this chapter.

(e) The mechanics of rights analysis

As a general matter, the Bill of Rights offers two different ways in which to undertake rights analysis: direct application and interpretation (and potentially limitation) of a specific substantive right and indirect application of the spirit, purport and object of the Bill of Rights to the legal dispute that confronts a court. Although I shall make the case that subsidiarity — a particular form of indirect application — is often to be

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95 See § 32.5(b)(ii) infra.

96 The absence of thorough and systematic analyses of FC sections 7 and 39 is a definite shortcoming in our constitutional jurisprudence. But I do not mean to suggest that reliance on rhetorical stratagems in constitutional interpretation and jurisprudence is impermissible. It is in fact unavoidable. See WJ Witteveen De Retoriek in het Recht: Over Retorika en Interpretatie, Staatsrecht en Demokratie (1988) 149; Du Plessis 'Re-reading Enacted Law-texts' (supra) at 282-283.

97 See § 32.4(c)(ii)(cc) and (ff) infra.

98 See § 32.3(b)(i) infra.

99 See § 32.5(b)(iii)(bb) infra.

100 See § 32.5(c)(v) infra.
preferred to direct application, it is important to know how each form of interpretation operates.

(i) Direct application and interpretation of a specific substantive right

As Woolman and Botha write:

As a general matter, constitutional analysis under a specific substantive provision in the Bill of Rights takes place in two stages. First, the applicant must demonstrate that the exercise of a fundamental right has been impaired, infringed, or, to use the Final Constitution's term of art, limited. This demonstration itself has several parts. To begin with, the applicant must show that the conduct or the status for which she seeks constitutional protection is a form of conduct or status that falls within the ambit of a particular constitutional right. If she is able to show that the conduct or the status for which she seeks protection falls within the value-determined ambit of the right, then she must show, in addition, that the law or the conduct she seeks to challenge impedes or limits the exercise of the protected activity. If the court finds that a challenged law infringes the exercise of the fundamental right, the analysis may move to a second stage. In this second stage of analysis, the party that would benefit from upholding the limitation will attempt to demonstrate that the infringement of a fundamental right is justifiable. This second stage of analysis occurs, generally speaking, not within the context of the fundamental right or freedom, but within the limitation clause.  

Woolman in his chapter on 'Application' and Woolman and Botha in their chapter on 'Limitations' provide fuller, more nuanced accounts of the stages of — and justifications for — direct application and interpretation of a specific substantive right that need not be rehearsed here.

(ii) Subsidiarity and indirect application as preferred modes of interpretation

On one account, indirect application must occur where no specific substantive right applies directly to a specific dispute, but the spirit, purport and object of the Bill of Rights requires a court to view or to interpret the law — and potentially re-make the law — in light the general values which animate FC Chapter 2 and the Final Constitution as a whole. But the commitment to subsidiarity means that we look at such matters somewhat differently. As I shall contend at greater length below, a host of good reasons exist for using existing bodies of non-constitutional law — be they statute, common law or customary — to adjudicate disputes before we turn to specific provisions of the supreme law for relief. That said, subsidiarity is not to be confused with avoidance. For when one relies on non-constitutional law as the source of relief, one still invites constitutional interpretation. That invitation extends primarily to recasting — where necessary — non-constitutional forms of law in light of constitutional desiderata. Subsidiarity — so understood — draws simultaneously upon the richness and depth of existing bodies of law while recognizing that our basic law — the Final Constitution — is the 'text' from which all other law derives its power.

101 Woolman & Botha 'Limitations' (supra) at 34–3–34-6.

102 See also Woolman 'Application' (supra) 31-1–31-136.
32.2 Interpreters of the constitution

According to *The Shorter Oxford English Dictionary* one of the meanings of ‘interpreter’ is ‘[a] person who interprets laws, texts, etc., in an official capacity’. Peter Häberle contends that a constitution is a ‘public process’ (*öffentlicher Prozeß*) in the interpretation of which an open society (*offene Gesellschaft*) participates. ‘Offen’ means ‘open’ as well as ‘public’ and indicates the space for the concrete realization of the Constitution not only within the sphere of authority of the state, but in civil society too:

All organs of state, all public powers and all citizens and groups are potentially involved in the processes of constitutional interpretation. There is no fixed number of constitutional interpreters!

The South African Constitution proclaims its own supremacy as follows:

> The Constitution is the supreme law of the Republic; law or conduct inconsistent with it, is invalid, and the obligations imposed by it must be fulfilled.

All those who are obliged by and who somehow benefit from this statement of supremacy — not only (or even primarily) the courts of law (with the Constitutional Court at the helm) — are *authorized* readers and therefore *interpreters* of the Constitution. Other organs of state, organs of civil society, citizens and other individuals under the authority (and protection) of the South African state are potential constitutional interpreters.

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106 P Häberle (supra) at 156 (present author’s translation):

> In die Prozesse der Verfassungsinterpretation sind potentiell alle Staatsorgane, alle öffentlichen Potenzen, alle Bürger und Gruppen eingeschaltet. Es gibt keinen numerus clausus der Verfassungsinterpreten!

He continues:

> Constitutional interpretation has up to now, *consciously* and with but a scant sense of reality, too much been made into a matter for a ‘closed, guild-like community’ of juristic interpreters of the Constitution and for *formal* participants in the constitutional process. In reality it is much more a matter for an open community (in other words all public powers in so far as they are *material* participants) because constitutional interpretation always co-constitutes this open community anew and is itself constituted by it. Its criteria are as open as the community is pluralistic.


107 FC s 2.
equally important interpreters of the basic law. This contention is commensurate with the doctrine of shared constitutional interpretation, \(^{108}\) which, properly understood, also recognizes authorized readers of the Final Constitution that fall outside our expressly political domain. \(^{109}\) The following important interpreters contribute to and enrich the open process of constitutional interpretation in the politeia: \(^{110}\)

(a) Constitution-makers

Proximity in time to a major constitution-making process has made South African constitutional scholars privy to how original authors of a constitutional text cultivate their own confident (though by no means unanimous) understandings of what their 'creation' says — and will say, according to them, in time to come. Authorial interpretations of a written constitution-in-the-making may come from those actually drafting and writing it (a technical committee of experts, for instance), from authorized constitution-makers debating the draft (in committees or bilateral discussions or plenary deliberations, for instance) and from members of the deliberative body (a constitutional assembly, for instance) that eventually have to agree to and pass the written text. Interpretations of a constitution in the course of deliberations preceding its adoption are significant because these interpretations anticipate possible meanings that can be attributed to constitutional provisions. This results in specific formulations and preference for certain inclusions in (and exclusions from) the written constitutional text — formulations and preferences most often negotiated by the constitution-makers among themselves. Traditionally, preceding deliberations were not regarded as sources readily available to aid the subsequent interpretation of any enacted text. \(^{111}\) However, the Constitutional Court in \textit{S v Makwanyane & Another} \(^{112}\) (\textit{per} Chaskalson P) held that ‘[b]ackground evidence may . . . be useful to show why particular provisions were or were not included in the Constitution’.\(^{5}\)

The process agreed on for the adoption of the Final Constitution furthermore yielded an interpretive aid of considerable significance. According to IC s 71, the Final Constitution could come into effect only after the Constitutional Court had certified that the proposed text complied with the 34 Constitutional Principles agreed on by the multi-party negotiators responsible for drafting the Interim Constitution. \(^{114}\)

\(^{108}\) For a discussion of the doctrine of shared constitutional interpretation, see Woolman & Botha 'Limitations' (supra) at 34-7-34-8. See also Woolman 'Application' (supra) at 31–90.


\(^{110}\) For the meaning of 'politeia', see § 32.1(d) supra.

\(^{111}\) LM du Plessis \textit{The Interpretation of Statutes} (1986) 133-134. For a further explication of the terms 'enacted law' and 'enacted law-texts' see §§ 32.3(e)(i)(ee) and 32.5(c)(iii) infra.


\(^{113}\) For reliance on travaux préparatoires in constitutional interpretation, see § 32.5(c)(iv) infra.
There were two Certification Judgments. The Constitutional Court referred the first text submitted for certification back to the Constitutional Assembly after holding, in First Certification Judgment that the text did not comply, in 9 discrete respects, with the 34 Constitutional Principles. In the Second Certification Judgment the Court thereafter certified a text that met and satisfied its initial objections.

In the First Certification Judgment, the Constitutional Court held that where one of the permissible meanings of a particular provision of the new text did comply with the Constitutional Principles, but another did not, it would ‘adopt the interpretation that gives to the new constitutional text a construction that would make it consistent with the Constitutional Principles’. 115 The First Certification Judgment Court explained the further significance of this reading strategy for the interpretation of the Final Constitution as follows:

Such an approach has one important consequence. Certification based on a particular interpretation carries with it the implication that if the alternative construction were correct the certification by the Court in terms of [the interim Constitution] s 71 might have been withheld. In the result, a future Court should approach the meaning of the relevant provision of the [new constitutional text] on the basis that the meaning assigned to it by the Constitutional Court in the certification process is its correct interpretation and should not be departed from save in the most compelling circumstances. 116

(b) Courts

South Africa’s Constitution was meant to be justiciable, and was, indeed, required in terms of the Constitutional Principles to be justiciable. 117 The constitutional text therefore, in several ways, waymarks the exercise of a judicial testing right that derives from and crucially depends upon the supremacy of the Final Constitution. FC s 1(b) proclaims the ‘[s]upremacy of the Constitution and the rule of law’ to be among the values on which the Republic of South Africa as ‘one, sovereign, democratic state’ is founded. FC s 172 deals with the powers of courts in constitutional matters and enjoins a ‘court deciding a constitutional matter within its powers’ to ‘declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency’ (‘a court . . . must declare . . . ’ — emphasis added). 118 To this end, FC s 165 Constitution vouchsafes the independence of the judiciary. FC s 165(2) states: ‘[t]he courts are independent and subject only to

114 These principles were included in Schedule 4 to the Interim Constitution.

115 First Certification Judgment (supra) at para 42. See also Dawood v Minister of Home Affairs 2000 (1) SA 997 (C), 1033C–G.

116 First Certification Judgment (supra) at para 43.

117 See, in particular, Constitutional Principles I and IV in Schedule 4 to the Interim Constitution. See also § 32.1(a) supra.

118 FC s 172(1)(a). FC ss 167(3)-(7), 168(3), 169(a) and (by implication) 170 indicate the extent to which constitutional matters are within the powers of the Constitutional Court, the Supreme Court of Appeal, High Courts and magistrates’ courts respectively.
the Constitution and the law, which they must apply impartially and without fear, favour or prejudice’. FC s 165(5) makes ‘[a]n order or decision issued by a court’ binding on ‘all persons to whom and organs of state to which it applies’.

Issues of constitutional interpretation that come before courts are pronounced upon in a conventionally judicial manner, both in terms of style and consequence. *Stare decisis*, as conventionally understood in the case law, has moreover also been preached and practised in our constitutional jurisprudence since 1994. 119 A court judgment is meant to end a particular dispute, but its *ratio decidendi* may also, in cases to come, provide binding, 'model' answers to general or specific questions of constitutional interpretation. The authority of a particular court's answers will largely depend on its ranking in the *stare decisis* hierarchy. A Constitutional Court judgment on an issue of constitutional interpretation can, for instance, wield considerable authority — both as an exercise of consequential constitutional power at a particular time, and as a binding precedent in time to come. But this still does not mean that courts, with the Constitutional Court at the pinnacle, are the only *de facto*, competent and authentic interpreters of the Constitution. Non-judicial interpreters understand and construe the constitutional text from day to day, and only a small number of questions of constitutional interpretation are eventually adjudicated upon in court.

Courts are thus, in terms of the Constitution, powerful and consequential interpreters of the Constitution. In litigation, they are often, with regard to certain particular constitutional issues, final interpreters of the Constitution. However, to look upon them as the only constitutional interpreters of consequence will be to impoverish constitutionally based life in the *politeia*.

**c) Legislative and executive organs of state**

Among the most significant non-judicial interpreters of the Constitution are legislative and executive organs of state. 120 A former American president, Andrew Jackson, pointed out in 1832, in his veto of a bank bill, that every public official takes an oath to uphold and support the US Constitution, but not the Supreme Court's interpretation of it. 121 He thereby emphasized his own responsibility to construe the US Constitution in order to be able to discharge the presidential duties and responsibilities it imposes. There are ample examples of the South African Constitution imposing a particular responsibility on various executive and legislative organs of state to construe the Final Constitution in order to be able to discharge their constitutional duties and responsibilities.

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119 See, eg, *Shabalala & Others v Attorney-General, Transvaal, & Others; Gumede & Others v Attorney-General, Transvaal* 1995 (1) SA 608 (T), 618D–H, 1994 (6) BCLR 85, 95B–F (T); *Ex Parte Minister of Safety and Security & Others: In Re: S v Walters & Another* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC) (‘Walters’) at paras 55-61. See also § 34.5(b)(i) infra.


121 See Murphy, Fleming & Barber (supra) at 267, 313-314.
A constitutional injunction to uphold, defend and respect the Final Constitution as the supreme law of the Republic, 122 for instance, prefaces the South African Constitution's entrustment of the president with various distinctive head-of-state powers and functions. 123 The presidential oath of office includes a solemn undertaking to 'obey, observe, uphold and maintain the Constitution and all other law of the Republic'. 124 The oaths of office of other executive office-bearers (such as the deputy president, 125 ministers, 126 deputy ministers, 127 and the premiers and members of the executive councils of provinces 128) include a similar undertaking. Public administration must be governed by 'the democratic values and principles enshrined in the Constitution' — and these principles are spelt out in more detail in FC s 195(1). 129 These provisions require knowledge and understanding — and thus authorize interpretation — of the Final Constitution to inform the exercise of executive authority in every sphere of government. This interpretive authority exists with respect to the security services, 130 other constitutional institutions such as the Public Service Commission, 131 the Central Bank 132 and, in particular, the Chapter 9 'State Institutions Supporting Constitutional Democracy' 133 (for example, the Public

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122 FC s 83(b).
123 FC s 84.
124 FC Schedule 2(1).
125 FC Schedule 2(2).
126 FC Schedule 2(3).
127 FC Schedule 2(3).
128 FC Schedule 2(5).
129 FC s 195(1).
130 Established in terms of FC Chapter 11.
131 FC s 196.
132 FC ss 223-225.
133 See, in general, FC s 181.

Legislatures in the three spheres of government (national, provincial and local) are under a duty to pass legislation consistent with the Final Constitution — otherwise, they will find themselves in breach of the undertaking in their oath of office to 'obey, respect and uphold the Constitution'. 137 More importantly, their legislation is likely to be found constitutionally infirm. 138 The National Assembly is 'elected to represent the people and ensure government by the people under the Constitution'. 139 Provincial legislatures are bound by the national Constitution (and their own provincial constitutions where these have been adopted). 140 Municipal councils are required to comply with a number of constitutional objects. 141 Legislatures in all three spheres of government thus bear responsibilities which they can fulfil only if they understand the Constitution — pursuant to an implicit authorization (and duty) to construe it.

(d) Citizens and other non-state organs protected, empowered and obliged by the Constitution

A Constitution, founding the type of state South Africa professes (and wishes) to be, invites all those it protects and empowers (citizens and non-citizens alike) to understand and put its promises to the test — and this, in turn, calls for interpretation of the Constitution. Constitutional litigation (begetting consequential constitutional jurisprudence on key issues) often springs from citizens' and other beneficiaries' (concrete, existential) understandings of the Constitution.

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137 FC Schedule 2(4).

138 See FC s 2.

139 FC s 42(3).

140 FC s 104(3).

141 FC s 152.
The Constitution is furthermore particularly amenable to civil involvement in public processes such as law-making and public administration. To be of optimal consequence, such involvement has to be informed with knowledge of what the Constitution says, and the need for such knowledge once again emphasizes the legitimacy of ‘civil interpretations’ of the Constitution.

Within the open community of constitutional interpreters in the politeia, various civil society actors constantly engage in a process of defining rights and entitlements peculiar to spheres of activity that matter to them. Labour, religious, business, cultural and sports organizations are all examples of such actors. Their endeavours sometimes result in specialist written declarations of rights. Two examples are the Business Charter of Social, Economic and Political Rights adopted by the South African Federation of Chambers of Industry in 1986 and a Declaration of Religious Rights and Responsibilities adopted by representatives of various religious communities at a National Inter-faith Conference in 1992. Any court called upon to construe provisions of the Final Constitution affecting the rights of such interest groups would do well to take into account the persuasive force of such focused declarations of rights.

Citizens’ and other beneficiaries’ initial, mostly ‘non-expert’ readings of the Final Constitution, in response to the exigencies of states of affairs in everyday politeia life, may have a profound effect on our constitutional jurisprudence. A non-expert interpretation of the Constitution may generate an interpretive endeavour rich in ‘public’ consequence even if, in the expert view of the court finally deciding the issue, such an interpretation is ‘wrong’. Non-expert understandings of the Final Constitution may moreover result in extra-judicial political action or may initiate administrative or legislative action.

Specialist interpretations of the Constitution are not inevitably ‘better’ than or superior to non-specialist interpretations. The active involvement of any authorized interpreter — specialist and non-specialist alike — co-determines (at the very least) ‘what the Constitution eventually says’.

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142 FC ss 59, 72 and 118. The Constitutional Court’s judgments in two recent cases demonstrates how immensely important public participation in law-making is. See Doctors for Life v Speaker of the National Assembly & Others 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) (‘Doctors for Life’); Matatiele Municipality & Others v President of the Republic of South Africa & Others 2007 (1) BCLR 47 (CC) (‘Matatiele’).

143 FC ss 195(1)(e), (f) and (g).

144 The Final Constitution, at least by implication, seems to lend support to the idea of producing such documents, in that FC s 234 provides that Parliament may adopt Charters of Rights consistent with the provisions of the Constitution ‘[i]n order to deepen the culture of democracy established by the Constitution.’


146 See § 32.3(b)(ii) infra.
That said, specialist readings of the Final Constitution (as with other genre texts such as literary texts, philosophical texts, religious texts and other law texts) have something of a leg-up on non-specialist readings. The expert usually has knowledge and experience of the different reading strategies prevalent in his or her field of expertise as well as of the techniques that authors use to produce texts, and of the tradition of the subject matter from which the text derives. Such skill and training should enable the specialist to reveal the text's full richness of meaning and to explore various avenues of dealing with interpretive issues and controversies. However, expertise can also blinker an interpreter's perspective and thereby result in a failure to take account of 'realities' beyond the 'technical' facets of the text. Some legal experts, for instance, maintain that they can, effortlessly and correctly, deduce meaning from a provision couched in 'ordinary, clear and unambiguous language'. Specialist readings of constitutional provisions should, by contrast, be alert to the plurality of meanings that can be attributed to a provision due to the expansiveness, elasticity and thus perpetual openness of the natural language in which it is couched.

### 32.3 Theories of interpretation and their relevance for constitutional interpretation

In legal parlance, the word 'theory' is used rather loosely. Sometimes it is a synonym for 'rule' or 'precept'. The 'expedition theory' in the law of contract, for instance, actually is a rule stipulating that a contract concluded by mail comes into existence the moment that the written acceptance of an offer is posted. In a more conventional sense a 'theory' is, on the one hand, an 'explanation' or 'explication'. The *consensus theory* in the law of contract, for instance, explains that a contract is based on a *conclusus animorum* of the parties involved. On the other hand, a theory can also be an idea accounting for a situation or, especially in law, justifying a certain course of action. The theory then advances the principles on which the practice of an activity is based. The *consensus theory* in the law of contract will, for instance, account for (and justify) a finding that, in the absence of evidence of a *conclusus animorum*, the parties have not concluded a contract. Thus, theories of interpretation are explanatory and justificatory at the same time and can also be referred to as 'interpretative approaches'.

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147 As to the meaning of 'law-texts' see §§ 32.3(b)(ii) and (e)(i)(aa) infra.

148 For criticism of this position, see § 32.3(b)(ii) infra.


152 Pearsall (supra) at 1922.
(a) Common-law theories of statutory interpretation 154

The six conventional theories of statutory interpretation that will briefly be discussed under this heading have evolved and taken shape over time in England, the motherland of common law, but have also spread to other common-law jurisdictions (including South Africa). Broadly speaking, however, the first three theories (literalism, intentionalism and literalism-cum-intentionalism) are usually regarded as representing the more or less 'conventional' positions in interpretive legal thinking while the last three (contextualism, purposivism and objectivism) are mostly associated with more recent developments. 155 These latter three interpretive developments maintained a rather subdued presence in statutory interpretation in South Africa prior to 1994, playing second fiddle to especially literalism-cum-intentionalism. Since 1994, they have gained greater prominence in the case law — even if they have not yet displaced entirely the three conventional approaches.

(i) Literalism maintains that the meaning of an enacted provision can and must be deduced from the very words in which the provision is couched, regardless of consequences. 156 Clear language is placed on the same footing as plain or ordinary language, 157 in other words, the language that a native speaker would use and understand. 158 However, experience has shown that ordinary language as 'natural language' is not characteristically clear and unambiguous, and strict adherence to the words of a provision may produce results that are absurd and repugnant to 'common sense'. Thus developed the golden rule 159 of interpretation, of which Lord Wensleydale's dictum 160 is the classical exposition:

[T]he grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the


154 For a more elaborate discussion of these theories, see Du Plessis Re-Interpretation of Statutes (supra) at Chapter 5.

155 Among the latter category of theories there are, however, also some that have antecedents in the distant past. The mischief rule, as a manifestation of purposivism, for instance, dates back to Heydon's Case in the late sixteenth century. See § 32.3(a)(v) infra. See also JMT Labuschagne 'Die Opkoms van die teleologiese Benadering tot die Uitleg van Wette in Suid-Afrika' (1990) 107 South African Law Journal 569 (Provides a succinct depiction of the evolution of theories of statutory interpretation in South Africa as described above.)


159 DV Cowen 'The Interpretation of Statutes and the Concept of "The Intention of the Legislature"' (1980) 43(4) THRHR 374, 379 (Refers to the golden rule as 'the second canon of literalism'.)
words may be modified, so as to avoid the absurdity and inconsistency, but no farther.

Crude literalism has 'probably reached its apogee and is on the wane'. However more nuanced versions are alive and kicking — in South African constitutional law too. Kentridge JA, for instance, in a previously cited dictum from the Constitutional Court case of S v Zuma & Others, contended that 'the Constitution does not mean whatever we might wish it to mean' and that as a legal instrument its language must be respected. The language used by the lawgiver may therefore not be ignored 'in favour of a general resort to "values"' lest interpretation turns into divination. Kentridge JA's contentions have been regularly relied upon to justify resort to literalism in constitutional interpretation.

In S v Mhlungu & Others the Constitutional Court disagreed on precisely how strictly to abide by the very language in which the apparently 'technical'

IC s 241(8) was couched. The minority understood the above-cited dictum from Zuma to be a narrowly tailored prescription to the effect that — however important it may be not to ignore 'fundamental concerns' or 'the spirit and tenor of the Constitution' — a court's interpretive conclusion may never amount to rewriting or reformulating the ipsissima verba of the written

160 See Grey v Pearson [1843-60] All ER Rep 21 (HL) 36. The golden rule is well established in South African case law. See, eg, Venter v R 1907 TS 910, 914-915 ('Venter'); Principal Immigration Officer v Hawabu & Another 1936 AD 26, 30-31; S v Toms; S v Bruce 1990 (2) SA 802 (A), 807H-J; Van Heerden v joubert 1994 (4) SA 793 (A), 795E-G; Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape 2001 (3) SA 582 (SCA) at paras 10-13.


163 See § 32.1(b) supra, for the full quotation.

164 S v Zuma & Others 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at paras 17-18 (Kentridge AJ) ('Zuma').

165 See, for example, Standard Bank (supra) at 811A-D. See also JD van der Vyver 'Constitutional Free Speech and the Law of Defamation' (1995) 112 South African Law Journal 572, 574-575 ('[T]he South African Constitutional Court in its first judgment clearly endorsed the view that the rules of interpretation pertaining to the Chapter on Fundamental Rights [in the Interim Constitution] do not authorize the courts to go beyond the wording of the instrument itself.')

166 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC)('Mhlungu').

167 Mhlungu (supra) at paras 72-80 (Kentridge AJ).

168 Ibid (supra) at para 77.
constitutional text. The majority, on the other hand, after identifying constitutional objectives beyond the 'ordinary meaning' of the *ipsissima verba* of the provision in question, was comfortable to fill gaps in the wording of IC’s 241(8). They arrived at this conclusion to prevent the denial of 'the equal protection of fundamental rights guaranteed by [IC] Chapter 3' to 'a substantial group of people'.

(ii) *Intentionalism* claims that the paramount rule of statutory interpretation is to discern and give effect to the real intention of the legislature:

The governing rule of interpretation — overriding the so-called 'golden rule' — is to endeavour to ascertain the intention of the law-maker from a study of the provisions of the enactment in question.

What is actually stated in this classical *dictum* is not a rule, but a fundamental (theoretical) assumption or premise about the interpretation of enacted law to which most South African jurists traditionally (and often with a rhetorical lack of reflection) subscribe. As it stands, it is too general and unspecific to be a rule — let alone the *paramount rule* of statutory interpretation. The designation 'intention of the legislature' has become a rhetorically malleable device lending weight to judicial pronouncements on the meaning of enacted law. Instead of averring that a provision 'means X or Y', a court will typically assert that 'the legislature intended X or Y'.

Intentionalism in practice cannot be understood in isolation from its alliance with literalism (*literalism-cum-intentionalism*) and purposivism (*intentionalism-cum-purposivism*).

(iii) Premised on a combination of literalist and intentionalist assumptions, *literalism-cum-intentionalism* has traditionally been the dominant theory of statutory interpretation in South Africa. The principal purpose of interpretation is said to be determining the intention of the legislature. The legislature couches or encodes its intention in the language of the statutory text.
provision to be construed. When the words used for this purpose are clear and unambiguous, their literal, grammatical meaning must prevail and they must be given their ordinary effect. This, it is believed, will disclose and convey, without further ado, the true intention of the legislature and thereby the 'correct' meaning of the provision construed.

Literalism-cum-intentionalism is more literalist than intentionalist. First, it assumes that there is a grammatical structure that allows for a fixed and stable 'ordinary effect' of language. Second, it assumes that the 'correct' (both auctorial and interpretive) use of language — honouring the ordinary meaning of its words, its grammatical structure and its rules — will make the intention inherent in a statutory text equally clear to all users of the language. On these two assumptions an 'objective' determination of the meaning of a provision seems unproblematic. Only when the language used is ambiguous or obscure to some extent will it be practicable to consider resort to interpretive aids other than those associated with ordinary language, literally understood, in order to determine the intention of the legislature.

The default approach to statutory interpretation just described has attracted criticism from legal scholars who claim that it does not accord with recent developments in interpretive theory at all. First, statutory language is natural and not formal language. The same applies to the language of the Constitution. Natural language is always open-ended and makes for a proliferation of meanings.

Second, linguistic form and clear language cannot neutralize or dilute our pre-understanding which thoroughly, inevitably and decisively shapes and shepherds our understanding of anything. Kentridge AJ's dictum in S v Zuma & Others — about respecting the language of the Interim Constitution when

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176 For a classical articulation of this theory, see Venter (supra) at 913 (Innes J). For recent examples of the Supreme Court of Appeal's continued adherence to this approach, see Randburg Town Council v Kerksay Investments (Pty) Ltd 1998 (1) SA 98 (SCA), 107A-B; Public Carriers Association & Others v Toll Road Concessionaries (Pty) Ltd & Others 1990 (1) SA 925 (A), 942I-J; Manyasha v Minister of Law and Order 1999 (2) SA 179 (SCA), 185B-C; Commissioner, SA Revenue Service v Executor, Frith's Estate 2001 (2) SA 261 (SCA), 273G-I.


179 ‘Not only is its meaning constantly in flux, but also ever and again in conflict — especially so with law that has to regulate massive and mostly antagonistic conflicts’. See F Müller 'Observations' (supra) at 432. See also P Cilliers Complexity and Postmodernism: Understanding Complex Systems (1998) 37-47.

180 Zuma (supra) at paras 17 and 18. See also § 32.1(b) supra.
construing it — was accompanied by an acknowledgement (albeit in passing) that as a judge engaged in constitutional interpretation it is not easy ‘to avoid the influence of one’s personal intellectual and moral preconceptions'. 181 This remark unsettles the belief that deference to linguistic form guarantees objective interpretation, uninfluenced by interpreters’ inarticulate premises, but is not an outright renunciation of the idea that language can be clear. Stanley Fish, however, challenges the very notion of ‘clear and unambiguous language’:

Meanings only become perspicuous against a background of interpretive presumptions in the absence of which reading would be impossible. A meaning that seems to leap off the page, propelled by its own self-sufficiency, is a meaning that flows from interpretive assumptions so deeply embedded that they have become invisible. 182

What can be clear to an interpreter of a statutory provision is, in other words, not the language or meaning of the text (‘objectively’ speaking), but the interpreter’s subjective understanding of what the provision in question stipulates with regard to a given concrete situation. This understanding is determined not just by the language in which the provision is couched, but very much by ‘personal intellectual and moral preconceptions’ too, and by the interpreter’s familiarity with (and the embeddedness of her or his faculties of understanding in) the context.

Third, the advent of constitutional democracy in South Africa and the linguistic turn in legal interpretation have led to diagnoses of ailments weighing on literalism and literalism-cum-intentionalism in interpretive practice. These two relatively recent phenomena and their impact on legal interpretation will be examined more fully in due course. 183

(iv) Contextualism is the theory of statutory interpretation that holds that the meaning of an enacted provision and its words and language can only be determined in light of its context or ‘background conditions’. 184 Actually, contextualism and purposivism, the theory that will be discussed next, 185

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181 Zuma (supra) at para 17. See also SACCAWU v Irvin & Johnson Ltd (Seafoods Division Fish Processing) 2000 (8) BCLR 886 (CC) at para 13.


183 See §§ 32.3(b)(i) and (ii) infra.

184 See West Rand Estates Ltd v New Zealand Insurance Co Ltd 1925 AD 245, 261; Secretary for Inland Revenue v Brey 1980 (1) SA 472 (A), 478A–B, Makwanyane (supra) at para 10; Ferreira v Levin NO; Vryenhoek v Powell NO 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC)(‘Ferreira’) at paras 52, 54, 57 and 70 (Ackermann J) and para 170 (Chaskalson P); S v Motshari 2001 (2) All SA 207 (NC) at para 8.

185 See § 32.3(a)(v) infra.
share a family resemblance. Both are post-literalist-cum-intentionalist positions, though some versions of contextualism, such as the classical ex visceribus actus canon of statutory interpretation (invoked in constitutional interpretation too) do not really contradict literalism, but seek to augment and enrich it instead.

The South African locus classicus on the significance of context in statutory interpretation is Schreiner JA’s seminal articulation (in a minority judgment in Jaga v Dönges NO & Another; Bhana v Dönges NO & Another) of an interpretive strategy that honours the exigencies of both language and context. The approach he suggests does not represent a decided break with literalism-cum-intentionalism, but it does go beyond ‘an excessive peering at the language to be interpreted without sufficient attention to the contextual scene’. This judgment is one of the most frequently cited minority judgments in the history of South African case law. Its broadmindedness (compared to crude

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186 See Ferreira (supra) at para 46 (Ackermann J) and para 172 (Chaskalson P).

187 See S v Looij 1975 (4) SA 703 (RA), 705C–D. See also New Mines Ltd v Commissioner for Inland Revenue 1938 AD 455; Hleka v Johannesburg City Council 1949 (1) SA 842 (A), 852–853; City Deep Ltd v Silicosis Board 1950 (1) SA 696 (A), 702; Soja (Pty) Ltd v Tuckers Land and Development Corp (Pty) Ltd 1981 (3) SA 314 (A), 321H; Principal Immigration Officer v Bhula 1931 AD 323, 335 (This approach also facilitates the harmonisation of ostensibly conflicting provisions of one and the same statute on the assumption that ‘the legislature is . . . consistent with itself.’) See also Le Roux v Provincial Administration (OFS) 1943 OPD 1, 4; S v Diambini; S v Dladla; S v Joubert; S v Schietekat 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC) (‘Diambini’) at para 84.

188 See Makwanyane (supra) at paras 115 and 278; Mhulungu (supra) at paras 15, 45, 105 and 112; Zantsi v Council of State, Ciskei & Others 1995 (10) BCLR 1424 (CC) (‘Zantsi’), 1995 (4) SA 615 (CC) at para 35; Executive Council of the Western Cape Legislature & Others v President of the RSA & Others 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) (‘Executive Council of the Western Cape 1995’) at para 204; S v Rens 1996 (1) SA 1218 (CC), 1996 (2) BCLR 155 (CC) at paras 17–21; Du Plessis & Others v De Klerk & Another 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC) at para 123; S v Lawrence; S v Negal; S v Solberg (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) at para 148; Harksen v Lane NO & Others 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 116; De Lange v Smuts NO & Others 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) (‘De Lange’) at para 30; Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party 1998 (4) SA 1157 (CC), 1998 (7) BCLR 855 (CC) at paras 43-46 and 59; National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) (‘National Coalition 1999’) at para 87.

189 Examples of dicta that allow for a departure from the ‘plain meaning’ of the words of a statute if compelled by the context of a provision do exist. See, for example, Naboomspruit Munisipaliteit v Malati Park (Edms) Bpk 1982 (2) SA 127 (T), 133F; Oertel v Direkteur van Plaaslike Bestuur 1983 (1) SA 354 (A), 370D–G; Reynolds Bros Ltd v Chairman, Local Transportation Board, Johannesburg 1984 (2) SA 826 (W), 828G.

190 1950 (4) SA 653 (A), 662D–667H (‘Jaga’).

191 Du Plessis Re-interpretation of Statutes (supra) at 113-114.

192 Jaga (supra) at 664H.
literalism-cum-intentionalism, for instance) seems to appeal to judges who seek to justify a mode of interpretive reasoning that goes beyond linguistic formalism. Unsurprisingly, *dicta* from this judgment have been cited with approval in South African constitutional jurisprudence. 194

Schreiner JA in *Jaga v Dönges* intimated that 'context' does not only include the language of the rest of the statute, but also its matter, its apparent purpose and scope and, within limits, its background. 195 'Background', understood as 'history', is a contextual element that in the case law has been taken into account for interpretive purposes 196 especially where vague language shrouds 'the intention of the legislature' in obscurity. 197 The Constitutional Court has also emphasized the importance of construing constitutional provisions in context, holding that this includes the history of and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions entrenching fundamental rights (IC Chapter 3 and FC Chapter 2). 198 The role of the history of a constitution's making in its subsequent interpretation will be considered at a later stage. 199

(v) A proponent of *purposivism*, looking at a particular legislative provision as part of a more encompassing instrument, will attribute meaning to such a provision in the light of the purpose or object it has (most probably) been designed to achieve. Where 'clear language' and purpose are at odds, the latter supposedly has to have the upper hand. Judicial interpreters of statutes in South Africa have not always agreed on this *sequitur*. As will be shown below, the more accepted view seems to have been that only vague and ambiguous (as

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193 See for example *Secretary for Inland Revenue v Sturrock Sugar Farm (Pty) Ltd* 1965 (1) SA 897 (A), 903G–H; *S v Radebe* 1988 (1) SA 772 (A), 778D–G; *University of Cape Town v Cape Bar Council and Another* 1986 (4) SA 903 (A), 913l–914E; *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710 (A), 726H–J; *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA), 1044A–B; *Fei Lui and Others v Commanding Officer, Kempton Park & Others* 1999 (3) SA 996 (W), 1005G–C; *Standard Bank (supra) 810G–811H; Paltex Dyehouse (Pty) Ltd v Union Spinning Mills (Pty) Ltd* 2000 (4) SA 837 (BHC), 852C–E; *Thoroughbred Breeders’ Association v Price Waterhouse 2001 (4) SA 551 (SCA) at para 12 (Marais JA, Farlam JA and Brand AJA); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC)('Bato Star Fishing') at paras 89 and 90.

194 See, for example, *Makwanyane* (supra) at para 10; *Bato Star Fishing* (supra) at paras 89 and 90.

195 *Jaga* (supra) at 662G–H.

196 *S v Nel* 1987 (4) SA 276 (O), 290F–J.

197 See *Santam Insurance Ltd v Taylor* 1985 (1) SA 514 (A), 527C and 527A–B. See also JR de Ville 'Legislative History and Constitutional Interpretation' (1999) Tydskrif vir Suid-Afrikaanse Reg 211, 212–214 (De Ville quite correctly observes, that it is not history 'out there' that is invoked by an interpreter, but his or her interpretation of history: '(s)he creates a text with which the statutory text is then approached.'

198 *Makwanyane* (supra) at para 10; *Ferreira* (supra) at para 172 (Chaskalson P).

199 See § 32.5(c)(iv) infra.
opposed to clear and unambiguous) language may play second fiddle to statutory purpose.

How can 'purpose' be discerned? According to the classical version of purposivism in the common-law tradition, the so-called mischief rule in Heydon, \(^{200}\) the prime purpose of enacted law is to suppress mischief. A court interpreting a provision is constrained to ask four questions: first, what the common law was before the enactment of the provision; second, what the mischief and defect were for which the common law did not provide; third, what remedy Parliament resolved and appointed 'to cure the disease of the commonwealth'; and, fourth, the true reason for the remedy:

> The office of all judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy according to the true intent of the makers of the Act pro bono publico.

The last sentence of the *dictum* implies that the true intention of the legislature (to remedy mischief) and the purpose of the Act (to be instrumental in this remedial endeavour) can hardly be at odds — and this creates room for a notion of *intentionalism-cum-purposivism*.

The mischief rule has been applied in South African case law and was (re-) stated in *Hleka v Johannesburg City Council*, \(^{201}\) This line of reasoning likewise informs constitutional interpretation: it holds that the 'previous constitutional system of this country was the fundamental "mischief" to be remedied by the application of the new Constitution'. \(^{202}\) Looked at in this way, the Final Constitution is a remedial measure that must be construed generously in favour of redressing the mischief of the past and advancing its own objectives for the present and the future.

It has long been recognized in South African case law on statutory interpretation that giving effect to the policy or object or purpose of legislation is an accepted strategy of statutory interpretation. \(^{203}\) However, as was suggested above, it has also been made clear that this strategy is appropriate only if the language of a provision is insufficient. \(^{204}\) The purposive approach has, in other words, mostly run a distant second to the literalist-cum-
intentionalist approach: as a rule, 'ordinary' or 'clear and unambiguous language' has trumped other indicia of policy, object or purpose.  

In some cases, however, purposivism is understood to be an ally of especially the intentionalist leg of literalism-cum-intentionalism. As in Heydon, the intention of the legislature and the purpose of an Act are then understood to be identical. This version of purposivism-cum-intentionalism usually goes together with a readiness on the part of a judicial officer to proceed beyond the literal form of a provision that stands to be construed and to 'go by the design or purpose which lies behind it'. Much is made of, for instance, the preamble to an Act as well as explicit statements of purpose in the body of the written text. Preambles, traditionally reserved for legislation of a formal and solemn nature and therefore only exceptionally and sparingly used, have become a feature of post-1994 legislation, while statements of purpose, which were previously unheard of, are quite readily included, especially in Acts with potentially far-reaching policy effects. Statutes enacted with the specific aim of promoting constitutional values or fulfilling constitutional duties or obligations are often construed with reference to the preambulatory and other value statements in the Constitution itself.

With purposiveness fast becoming a substitute for clear language (and authorial intent) as a primary consideration in constitutional interpretation, caution is warranted. As will be argued below, glib purposivism cannot be allowed to dominate constitutional interpretation in the same manner and to the same extent that literalism-cum-intentionalism has conventionally been dictating statutory interpretation.

204 See Goldberg NO v P J Joubert Ltd 1960 (1) SA 521 (T), 523D.

205 See Dadoo Ltd & Others v Krugersdorp Municipal Council 1920 AD 530, 543 (Relied on in Standard Bank (supra) at 810C-G as the classic exposition of purposivism). There are, however, also examples of manifest differences among judges on the appropriate relationship between language and purpose. See Ebrahim v Minister of the Interior 1977 (1) SA 665 (A)(Manifold differences in the interpretive modes employed in the majority and minority judgments.)

206 Konyn & Others v Special Investigating Unit 1999 (1) SA 1001 (Tk), 1007H-1008B.

207 James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd [1977] 1 All ER 518, 522j–523b cited with approval in Baloro & Others v University of Bophuthatswana 1995 (8) BCLR 1018, 1061H-J (B); Dulabh & Another v Department of Land Affairs 1997 (4) SA 1108 (LCC)('Dulabh') para 48. See also MV Golden North Governor and the Company of the Bank of Scotland v Fund Constituting the Proceeds of the Judicial Sale of the MV Golden North (Maritime Technical Co Ltd Intervening) 1999 (1) SA 144 (D), 152A–B.


209 See Du Plessis Re-Interpretation of Statutes (supra) at 239-244.

210 See, for example, Dulabh (supra) at paras 52 and 53.
(vi) **Objectivism** is intended as an antidote to the (apparent) subjectivism of intentionalism. Its proponents contend that once a law has been enacted the legislature has had its say and the text assumes an existence of its own. Objectivism entrusts the concretizing of enacted law to the courts.

JMT Labuschagne has propounded quite a far-reaching variant of objectivism, with substantial merit, premised on the assumption that a statutory provision acquires meaning only once it is interpreted and applied in a concrete situation. This contention echoes Hans-Georg Gadamer’s seminal insight about the oneness of interpretation and application. According to Labuschagne a statute as promulgated is only a *structure statute*: it contains merely a ‘structure norm’ and only becomes ‘real’ or ‘complete’ (ie a *function statute*) once it is applied to a specific case, thereby effecting its outcome. Since the ‘function norm’ operates with reference to a particular, unrepeatable, concrete situation only, it is unique and legal norms (qua ‘function norms’) can therefore not conflict with one another. The legislative process, according to Labuschagne, proceeds from the generality of the structure norm to the particularity of the function norm.

According to Labuschagne, ‘interpretation’ as an independent concept has too mechanical a connotation — and has thus become increasingly inappropriate — to depict the realization of the law in day-to-day situations where legal norms are not just *interpreted* but actually *formed* (he speaks of ‘regsnormvorming’).

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212 See § 32.3(b)(iv) infra.

213 For a discussion of this approach, see DV Cowen ‘Prolegomenon to a Restatement of the Principles of Statutory Interpretation’ (1976) *Tydskrif vir Suid-Afrikaanse Reg* 131, 156-158; Devenish *Interpretation of Statutes* (supra) 50–51.


217 See Labuschagne ‘Regsdinamika: Opmerkinge oor die Aard van die Wetgewingsproses’ (supra) at 426.
iconic (authoritarian) to communicative (egalitarian) justice. In most contemporary legal systems, judicial action inevitably co-constitutes legal norms and the judges have inevitably become part of the legislative process.

Objectivism, generally speaking, reminds the interpreter that statutes ought to be construed with reference to the continuing time frame within which they function. Regard should accordingly be had to the policies that existed at the time when a statute became law as well as to the changes that may have been made to these policies in the interim. "Application" is a continuing process and the application of a provision in a particular case is only one step in a journey. DC du Toit speaks of the dimension of futurity in the law. Subscribing to a key tenet of objectivism, he rejects the idea that statutory interpretation merely involves discovering the 'past intention' of a legislature. The interpretation of a text (and of a statute) is the 'present realisation' of the meaning possibilities contained in the original draft instead. 'Past meaning' must, in other words, be transposed into present terms, while 'present meaning' opens up vistas of futurity. Understanding a statute is tantamount to its existential application.

Judicial or free theories of statutory interpretation constitute a theoretical position closely associative with objectivism. In moderate form, these theories recognize and justify judicial activism. In a more radical form, they strongly...
advocate judicial activism: this conclusion is predicated upon the belief that judges have a creative role to play in the interpretation and application of statute law. 'Moderate free theorists' contend that determining the intention of the legislature necessarily entails the filling in of gaps in an enactment, making sense of an open-ended provision. A 'wait and see' attitude with regard to legislative reform is deemed inappropriate. The judiciary, with the help of the common law, must intervene in order to remedy defects in statute law, since legislative processes are not sufficiently expeditious and streamlined to cope with deficiencies that show up in day-to-day practice.

More radical adherents of judicial activism do not reject the tenets that inform the moderate approach. But they do take the piercing of the veil of ostensible judicial objectivity further. The interpretation of enacted law is seen not as a science, but as an art that essentially involves the making of choices. Interpretation is not really guided by 'objective' canons of construction. Instead the exigencies of an intuitively arrived at or desired interpretation, induce preferential reliance on certain preferred canons of construction to justify a particular interpretive result.

Constitutionalism and constitutional interpretation are quite amenable to objectivist and free-theory forms of adjudication. However objectivist and free-theory forms of adjudication do not generally constitute self-sufficient theoretical positions, but usually give momentum and direction to contextualist and purposivist reasoning in both statutory and constitutional interpretation.

(b) Constitutional interpretation and the inadequacy of common-law theories of statutory interpretation

The advent of constitutional democracy in South Africa more or less coincided with a modest but mounting realization among South African jurists, and legal scholars in particular, that conventional theories of statutory interpretation, and especially the dominant literalist-cum-intentionalist approach, are insufficient to the task of constitutional interpretation. Since the mid-1980s, for example, all South African monographs on statutory interpretation, written by legal scholars for use by academics, students, judicial officers and legal practitioners, have been critical of literalism-cum-intentionalism as a theoretical position and have questioned its basic

227 See Magor and St Mellons Rural District Council v Newport Corp 1950 (2) All ER 1226, 1236 (CA).

228 See Shaw v Director of Public Prosecutions 1961 (2) All ER 446, 452–453 (HL).


230 For an explanation of the meaning of 'theoretical position' when used in this chapter, see § 32.3(c) (i) and (ii) infra.

231 See, for example, In re Former Highlands Residents: Sonny v Department of Land Affairs 2000 (2) SA 351 (LCC); Nxuza v Permanent Secretary, Department of Welfare, Eastern Cape 2001 (2) SA 609 (E), 2000 (12) BCLR 1322 (E)('Nxuza'); Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter 200 (2) SA 1074 (SE)('Peoples' Dialogue').
propositions and assumptions. The disenchantment with conventional theories of interpretation deepened as, in anticipation of constitutional democracy, their shortcomings were exposed in an emerging literature predicting that, with a supreme constitution in place, interpretive business would be unable to proceed 'as usual'. The de facto and de jure onset of constitutional supremacy dealt the reign of 'clear and unambiguous statutory language' in legal and statutory interpretation a decided blow. Key insights associated with the linguistic turn started winning credence and increasingly informed the emerging discourse on legal interpretation. These developments have manifested in growing support for a purposive interpretation of, firstly and definitely, the Constitution, as a distinctive linguistic datum with a far-reaching impact on the whole legal system, but also of statutes and other laws.

(i) Constitutional democracy and the end of the dominance of literalism-cum-intentionalism

It is difficult to reconcile constitutionalism — the '-ism' of constitutional supremacy and justiciability at the heart of constitutional democracy — with literalist-cum-intentionalist (constitutional and statutory) interpretation. That said, intentionalism and its place in constitutional interpretation remains a live issue in the world's oldest constitutional democracy: in the United States of America, originalists have maintained that the US Constitution must be read and understood as faithfully as possible in accordance with the original intent of its framers. Indeed, it is fair to say that in some form or another, original intent is endorsed by a plurality if not a majority of the US Supreme Court. The main objection to this viewpoint is that originalist intentionalism does not allow either for the interpretive growth engendered by radically different circumstances or the desirability of limited readings for antiquated provisions. Constitutional interpretation, the objectors maintain, is not about finding and giving effect to the original intent of the 'founding fathers' more than two centuries ago, but about attributing present-day meaning, significance and relevance to constitutional provisions rooted far back in history.

232 See LM du Plessis The Interpretation of Statutes (1986); C Botha Statutory Interpretation (4th Edition, 2005); Devenish Interpretation of Statutes (supra); JR de Ville Constitutional and Statutory Interpretation (2000); L du Plessis Re-Interpretation of Statutes (2002). See also EA Kellaway Principles of Legal Interpretation: Statutes, Contracts and Wills (1995)(Kellaway's positions may be the exception to the norm — but not clearly so.)


234 For a fuller description, see § 32.3(e)(ii) infra.

In quite a number of South African Constitutional Court cases reference has been made to what the framers of both the Interim and Final Constitutions would (or would not) have thought or foreseen or ‘intended’. These conjecture-like assertions, reminiscent of intentionalist-speak in statutory interpretation, have in most instances been invoked to justify the court’s specific understanding of a provision in a particular situation and/or with reference to a specific issue, still clutching at trusted literalist-cum-intentionalist sentiments along the unbeaten track of constitutional interpretation. Such conventionalism is not to be mistaken for embracing the theory of originalism, however, for the court itself has voiced its rejection of ‘the doctrine of original intent’ in no uncertain terms. In South African Association of Personal Injury Lawyers v Heath & Others, Chaskalson P, for instance, held that there are perfectly valid and operative constitutional provisions not directly discernible from visible linguistic signifiers occurring in the written constitutional text (unexpressed provisions, in other words). By analogy with unexpressed but operative terms of a contract, the Court, however, drew a distinction between tacit and implicit/implied provisions of the Constitution. It explained its preference for the adjective(s) ‘implicit / implied’ to depict such provisions as follows:

In the law of contract a distinction is drawn between tacit and implied terms. The former refers to terms that the parties intended but failed to express in the language of the contract, and the latter, to terms implied by law. The making of such a distinction in this judgment might be understood as endorsing the doctrine of original intent, which this Court has never done. I prefer, therefore, to refer to unexpressed terms as being ‘implied’ or ‘implicit’.

The trend in constitutional jurisprudence to bring ‘what the framers of the Constitution had in mind’ into arguments on the interpretation of constitutional provisions can thus not be a reconfirmation of allegiance to intentionalism as it has always functioned in statutory interpretation, for the intention of the legislature, conventionally regarded as the prime force that must be given effect to in statutory interpretation, has irrevocably been toppled by the supremacy of the Constitution.

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237 See, for example, S v Makwanyane & Another 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC)(Makwanyane) at para 392; S v Mhlungu 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at paras 100, 102 and 105; Ferreira (supra) at para 15; Bernstein & Others v Bester & Others 1996 (4) BCLR 449 (CC) at para 53; De Klerk (supra) at para 45; Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development of the RSA; Executive Council of KwaZulu-Natal v President of the RSA 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) (‘Executive Council of the Western Cape’ 1999) at paras 39-41; S v Twala (Human Rights Commission Intervening) 2000 (1) SA 879 (CC), 2000 (1) BCLR 106 (CC) at paras 9-17.

238 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at para 19.

This is clear from FC s 39(2)’s interpretive injunction that a statutory provision is firstly and most importantly to be understood in conformity with the Constitution, and not necessarily in accordance with what its (supposedly) clear and unambiguous language conjures up. The decisive question of statutory interpretation can therefore not be what the legislature intended a provision to mean, but which one of its possible meanings is most compatible with the Constitution and most conducive to the promotion of its objectives and values. The ‘intention of the legislature’ plays second fiddle at best:

The interpretative notion of ascertaining ‘the intention of the Legislature’ does not apply in a system of judicial review based on the supremacy of the Constitution, for the simple reason that the Constitution is sovereign and not the Legislature.

All statutes must be interpreted through the prism of the Bill of Rights.

This means that FC s 39(2) actually establishes a new canon of statutory interpretation, namely, that legislation must be construed to promote the spirit, purport and objects of the Bill of Rights. This canon cannot be overridden by ‘legislative intent’ couched in (allegedly) ‘clear and unambiguous language’. The ‘intention of the legislature’, in all its possible significations, is always subject (and second) to the Constitution, and not only when a statute is allegedly inconsistent with a provision or provisions of the Constitution. An interpretive strategy known as reading in conformity with the Constitution, which will be discussed below, helps to give specific effect to this new canon of statutory interpretation in s 39(2).

The Constitutional Court’s decided rejection of original intent as a guiding force in constitutional interpretation rules out the possibility that the notion of the dominant intention of the legislature, as conventionally understood and deferred to in statutory interpretation, could rear its head in constitutional interpretation too. Any reference to the intention of the framers of the Constitution in the jurisprudence of the Constitutional Court is then to be understood as, at most, a rhetorical gateway to

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240 See § 32.5(b)(ii) infra.

241 Matiso & Others v The Commanding Officer, Port Elizabeth Prison & Others 1994 (3) SA 592 (SE), 597B-597H, 1994 (3) BCLR 80, 87B-87H (SE) (‘Matiso’). For fuller dictum, see § 32.1(b) supra.


243 See Investigating Directorate (supra) at para 21. The Investigating Directorate Court described the canon of statutory interpretation derived from FC s 39(2) as follows:

All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens and includes all in the process of governance. As such, the process of interpreting the Constitution must recognize the context in which we find ourselves and the Constitution’s goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterizes the constitutional enterprise as a whole.

244 See § 32.5(b)(ii) infra.
From a stylistic perspective the value-laden Constitution-in-writing has also unsettled the notion of 'clear and unambiguous language', the prime partner of intentionalism in constituting the South African judiciary's conventional literalist-cum-intentionalist position on the interpretation of enacted law. Crucial constitutional provisions, such as statements of values in the Preamble, previously referred to sections of the Final Constitution, and the Bill of Rights in its entirety, are couched in all but clear and unambiguous language — and deliberately so. Rights and values can hardly be expressed categorically or conclusively. The Final Constitution is furthermore meant to be durable and its expansively formulated provisions have been designed to cater for an inestimable array of exigencies.

The open-endedness of the constitutional text makes the inevitable role of the judicial interpreter's pre-understanding in construing constitutional provisions more visible. Froneman J, in an unprecedented dictum in Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape was, for instance, quite upfront about the fact that his pre-understanding had co-determined his construction of FC s 38 of the Constitution in relation to subjects' standing in constitutional litigation. Similarly Horn AJ, in Port Elizabeth Municipality v Peoples' Dialogue on Land and Shelter, discouraged an overly legalistic approach to the construction of crucial provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, as 'a piece of welfare legislation formulated upon humanitarian lines'.

(ii) The linguistic turn

Meaning is not discovered in (and retrieved from) a construable text, but is made in dealing with the text. This key tenet of the linguistic or hermeneutical turn in legal interpretation has been enhanced by the advent of constitutional democracy in South Africa. Language cannot 'carry' or 'produce' perspicuous, clear and unambiguous (one and only) meaning(s), but it does determine the meaning that an interpreter ultimately attributes to construable constitutional and statutory

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245 See § 32.5(c)(iv) infra.

246 See § 32.1(c) supra.

247 See § 32.3(a)(iii) supra. For a further explication of the terms 'enacted law' and 'enacted law-texts' see §§ 32.3(e)(ii)(ee) and 32.5(c)(iii) infra.

248 See, for example, the founding provisions in FC s 1, FC ss 40 and 41 on co-operative government, FC s 165 on judicial independence, FC s 195 on the basic values and principles governing public administration and FC s 237 on the diligent performance of obligations.

249 Ngxuza (supra) at 619F–620F, 1327I-J.

250 'Peoples' Dialogue' (supra) at 1081F–G.


252 Peoples' Dialogue (supra) at 1080E.
provisions in a decisive and most pervasive way — and does so amid (and pursuant to) a dynamic interplay of multifarious meaning-generative forces and phenomena.

The South African judiciary is rather unfamiliar with linguistic-turn reasoning and very rarely will a ‘respectable’ court admit that it construes a constitutional or a statutory provision by attributing meaning to it, rather than finding meaning in it. Rarely is not, however, never — this is evident from a dictum of Gildenhuys J in the judgment of the Land Claims Court in *In re: Former Highlands Residents: Sonny v Department of Land Affairs* 255. The court depicts the statutory interpretation in which it engaged as giving meaning to a statutory provision rather than finding pre-given meaning in it. 256 The following dictum of Lord Denning MR aptly demonstrates how down-to-earth judicial rhetoric (and reasoning) can be commensurate with embracing the theoretical ramifications of the linguistic turn without mentioning it by name:

So once again we have here the problem of statutory interpretation. It vexes us daily. Not only us. But also the House of Lords. Even the simplest words give rise to acute differences between us. Half of the judges think the interpretation is clear one way. The other half think it is clear the other way.

To get rid of these continuous conflicts, we should throw aside our traditional approach and adopt a more liberal attitude. We should adopt such a construction as will promote the general legislative purpose . . .

Put quite simply, perhaps too simply, whenever you have a choice between two interpretations, the choice is a matter of policy for the law: Which gives the more sensible result? It is not a semantic or linguistic exercise. Nine times out of ten you will find that judges will agree on what is the sensible result, even though they disagree on the semantic or linguistic result. 257

The linguistic turn has its origin in theoretical reflections on language, meaning and interpretation in general. Contemporary developments associated with this reflection and with the discourse occasioned by it will be considered in due course. 258 For now it is enough to point out that linguistic-turn discourse emphasizes, from a broad, interdisciplinary perspective, two truisms of considerable importance for constitutional, statutory and, indeed, legal interpretation in general. First, it assumes


254 Du Plessis Re-Interpretation of Statutes (supra) xv.

255 2000 (2) SA 351 (LCC) at para 10 (Gildenhuys J).

256 Ibid at para 11 (Gildenhuys J).

257 *R v Sheffield Crown Court, Ex parte Brownlow* [1980] QB 530 (CA) 538.

258 See § 32.3(d) infra.
that language is an open, complex system in which the context of an utterance is a pivotal determinant of meaning. Second, it emphasizes that the dynamics of (natural) language always leave an interpreter with the responsibility to decide on one of several possible (semantic) meanings of a provision as the best or 'most sensible' (as Lord Denning would have it) response to a problem entertainable by law.

(iii) 'Politics': predicament or prospect?

Endemic to the mainstream culture of adjudication in South Africa has been the belief that adjudication ought to remain neutral in the sense that adjudicators are required to abstain from interpretations or orders that have decided 'political' (or 'policy' or socio-economic) significance and consequences. A classic statement of this belief came from Holmes JA, almost five decades ago, in *Minister of the Interior v Lockhat & Others*, observing that the politically very controversial Group Areas Act represents a colossal social experiment and a long-term policy. It necessarily involves the movement out of Group Areas of numbers of people throughout the country. Parliament must have envisaged that compulsory population shifts of persons occupying certain areas would inevitably cause disruption and, within the foreseeable future, substantial inequalities.

Acquiescence in the consequences of this 'colossal social experiment', the court thought, would be the most proper judicial demeanour:

> The question before this Court is the purely legal one whether this piece of legislation impliedly authorises, towards the attainment of its goal, the more immediate and foreseeable discriminatory results complained of in this case. In my view . . . it manifestly does.

In *S v Adams*, King J explained the court's political dilemma in relation to — and its apparent powerlessness in the face of — the same Act as follows:

> [A]n Act of Parliament creates law but not necessarily equity. As a Judge in a Court of Law I am obliged to give effect to the provisions of an Act of Parliament. Speaking for myself and if I were sitting as a Court of Equity, I would have come to the assistance of the appellant.

Prior to the advent of constitutional democracy in South Africa, courts did not maintain impeccable political neutrality and more often than not enforced harsh apartheid legislation. The mixed success with which South African courts handled constitutional adjudication prior to 1994, and especially the tendency to detract

259 M Pieterse `What Do We Mean When We Talk about Transformative Constitutionalism?' (2005) 20(1) *SA Public Law* 155, 164-165.

260 1961 (2) SA 587 (A), 602D–E.

261 Act 77 of 1957.

262 1979 (4) SA 793 (T), 801A–B.

263 See *Rossouw v Sachs* 1964 (2) SA 551 (A), 562E-H.
attention from substantive constitutional law issues and concentrate on technicalities and formalities instead, can at least partly be attributed to their attempts to hand down politically neutral judgments. This does not mean that those judgments were politically neutral in fact — and nor were the earlier Lockhat and Adams judgments. A judgment upholding a political status quo may in effect be every bit as 'political' as a transformative judgment challenging and overruling it. Courts operating under apartheid quite consciously enforced the law of the apartheid state.

With the exception of objectivism and judicial or free theories of interpretation, all the traditional common-law theories of statutory interpretation previously discussed are largely silent on the political and politicized nature of the interpretation of enacted law. However, some of the presumptions of statutory interpretation, for instance, the presumption that statute law is not unjust, inequitable and unreasonable, and that legislation promotes public interest, may bring to bear 'matters political' upon the interpretation of enacted law. But then again, presumptions have traditionally not ranked high among the canons of construction and have been relied on only as a last resort (as 'tertiary grounds of deduction'). Presumptions and whatever politics they may entail have thus mostly and conveniently been kept out of interpretation, as long as there is sufficient scope for reliance on other more 'neutral' canons of construction. In short, the conventional theories and canons of statutory interpretation are such that the interference of politics in interpretation has been perceived mostly as a predicament.

Generally speaking, constitutional interpretation in South Africa since 1994 seems to have been accompanied by an awareness of the judiciary's unavoidable political involvement in the broad sense of the word. Evidence of this awareness is Kentridge AJ's unprecedented acknowledgement, in S v Zuma, of the fact that it is not easy for a judge 'to avoid the influence of one's personal intellectual and moral preconceptions'. The Constitutional Court has produced numerous dicta acknowledging the political nature of constitutional adjudication:

• In S v Makwanyane & Another Kriegler J in effect confirmed Kentridge AJ's observation in Zuma without referring to it by name:

264 See § 32.3(a)(vi) supra.

265 See Du Plessis Re-interpretation of Statutes (supra) at 154-164.

266 Ibid at 165-168.

267 HS Celliers 'Die Betekenis van Vermoedens by Wetsuitleg' (1962) 79(2) South African Law Journal 189, 195. See also § 32.3(b)(i) supra.

268 S v Zuma & Others 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC)('Zuma') at para 17. See also § 32.1(b) supra.

269 Makwanyane (supra) at para 207.
It would be foolish to deny that the judicial process, especially in the field of constitutional adjudication, calls for value judgments in which extra-legal considerations may loom large.

- In *Brink v Kitshoff NO* 270 O'Regan J attributed the different approaches to equality of courts in different national jurisdictions not only to different textual provisions and different historical circumstances, but also to different jurisprudential and philosophical understandings.

- In *President of the RSA v SA Rugby Football Union* 271 the judges of the Constitutional Court were challenged to put their political affiliations on the table and to deal with allegations of their political bias. The Court did not shy away from the fact that its members do have (and have shown) political preferences and predilections, and the court accepted, in so many words and with reference to several authorities, that out-and-out neutrality on the part of a judicial officer cannot be achieved. 272 The Court then proceeded to consider how best to deal with such a-neutrality in order to ensure that justice is done (and also seen to be done).

- Froneman J openly acknowledged, in *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape*, 273 that his view of 'the social context in which the law is applied to a particular set of facts' had co-determined his interpretation of s 38 of the Constitution (on the issue of standing in a constitutional action).

However, the Constitutional Court has quite often intimated that it can decide controversial issues in a 'legal' as opposed to a 'political' manner. 274 Thus Sachs J in *S v Makwanyane & Another* opined:

> Our function is to interpret the text of the Constitution as it stands. Accordingly, whatever our personal views on this fraught subject [capital punishment] might be, our response must be a purely legal one. 275

And perhaps the best known effort of the Constitutional Court to avoid, ostensibly, a political exercise of its powers by falling back on the canard that it is exercising purely a judicial function, appears in the *First Certification Judgment*:

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270 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 39.

271 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC).

272 *President of the RSA v SA Rugby Football Union* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) at paras 42-44.


274 See, for example, *Executive Council of the Western Cape & Others v President of the RSA & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC)('Executive Council of the Western Cape 1995') at paras 116-122.

275 *Makwanyane* (supra) at paras 349.
First and foremost it must be emphasised that the Court has a judicial and not a political mandate. Its function is clearly spelt out in IC 71(2): to certify whether all the provisions of the NT comply with the CPs. That is a judicial function, a legal exercise. Admittedly a constitution, by its very nature, deals with the extent, limitations and exercise of political power as also with the relationship between political entities and with the relationship between the state and persons. But this Court has no power, no mandate and no right to express any view on the political choices made by the CA in drafting the NT, save to the extent that such choices may be relevant either to compliance or non-compliance with the CPs. Subject to that qualification, the wisdom or otherwise of any provision of the NT is not this Court’s business.  

No judge will find it particularly flattering to learn that her or his judicial work reflects association with particular party political sentiments or genuflections to incumbent powers. At the same time no judge can convincingly plead political innocence. The Constitutional Court, in the first two cases in which it was called upon to give effect to socio-economic entitlements guaranteed in FC ss 26 and 27, made it clear that it would not refrain from setting aside policy (also read: ‘political’) decisions simply because they were decisions of the executive. The Court nonetheless refrained from second-guessing the policies informing these decisions, but demonstrated a willingness to test the decisions against the standards of the Constitution — which is what a vigilant judiciary is expected to do. The Constitutional Court has also indicated that ‘a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively’. However, when called upon to adjudicate state action necessary to provide relief to those in desperate need, the Constitutional Court — in keeping with constitutional injunctions enjoining the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of socio-economic or ‘second generation’ entitlements — has assumed an uncommonly activist role in ordering or supporting the procurement of such relief. The court's judgment in Minister of Health & Others v Treatment

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277 See, for example, Executive Council of the Western Cape 1995 (supra) at paras 116-122.

278 Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) (‘Soobramoney’) and Government of the Republic of South Africa & Others v Grootboom & Others 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) (‘Grootboom’).

279 Premier of the Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools, Eastern Transvaal 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC) at para 41.

280 For example, FC ss 26(2) and 27(2).

281 Grootboom (supra) at paras 40, 52 and 96; Minister of Public Works v Kyalami Ridge Environmental Association 2001 (7) BCLR 652 (CC), 2001 (3) SA 1151 (CC) at paras 38–39.
Action Campaign & Others 282 is a case in point. Both the court a quo and the Constitutional Court found that, at certain state hospitals, the Department of Health unreasonably prevented the administration of the drug, Nevirapine, with its proven record of efficacy and safety in reducing the risk of mother-to-child transfer of HIV, to HIV-positive women and their small children. The government furthermore failed to design and implement a comprehensive national programme to prevent such transfers. The Court — not prevaricating about its power to review the implementation of the government policies involved, especially where compliance with constitutional duties stood to be compromised — made both declaratory and mandatory orders against the state, compelling it to fulfil its constitutional mandate.

The examples of judicial intervention in matters political just mentioned, have been of instances where policy decisions and their implementation resulting in administrative action were impugned. The same reasoning, however, applies mutatis mutandis to policy decisions resulting in the adoption of legislation. Not only constitutional interpretation, but statutory interpretation too, is thoroughly political. A court exercising its testing right in respect of legislation is enjoined to assess the policies (or politics) underlying and informing impugned legislation in relation to the Constitution, and then to assign a 'political meaning' to such legislation under, in conformity with and/or informed with the values of the Constitution. This obligation may, among other things, require 'a court to negotiate the shoals between the Scylla of the old-style literalism and the Charybdis of judicial law-making'. 284

Rationality review could arguably help to 'depoliticize' a judicial assessments of the constitutionality of legislative or administrative exercises of public power.

Rationality is a requirement of the rule of law functioning as a safeguard against arbitrariness or caprice in the exercise of public power. It requires a rational link between a legitimate governmental objective sought to be achieved, and the means adopted to achieve it. Often the rationality requirement allows for more than one way of achieving the said objective. Preference for a particular way of doing so is then regarded as a policy question to be decided by a politically authorised and accountable (legislative or administrative) organ of state, and it is not competent for a court of law to second-guess such a preference once it has passed the rationality muster. 285

282 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) (‘TAC’).


284 Govender v Minister of Safety and Security 2001 (4) SA 273 (SCA) (‘Govender’) at para 11 (Olivier JA).

285 See Merafong Demarcation Forum & Others v President of the Republic of South Africa & Other 2008 (10) BCLR 969 (CC) at paras 62-64,110-115, 166-192, 260-286. See also Bel Porto School Governing Body & Others v Premier, Western Cape and Another 2002 (3) SA 265 (CC), 2002 (9) BCLR 893 (CC) at para 45; The Pharmaceutical Manufacturers Association of SA. In re: The Ex parte Application of the President of the RSA 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) (‘Pharmaceutical Manufacturers’) at paras 68, 85 and 90; Promotion of Administrative Justice Act 3 of 2000 s 6(2)(f)(ii).
A South African court may sometimes be faced with the dilemma of having to consider the perpetuation of some politically controversial and probably unconstitutional pre-1994 legislative measures which, their racially biased pedigree notwithstanding, could nowadays hold some advantage for at least some of the very people against whom they were initially designed to discriminate. In Moseneke v Master of the High Court Sachs J described the court’s dilemma in such instances as follows:

To keep a manifestly racist law on the statute books is to maintain discrimination; to abolish it with immediate effect without making practical alternative arrangements is to provoke confusion and risk injustice. Such a dilemma is inherent in transition. The Black Administration Act, as its very name indicates, both reminds us of South Africa’s shameful and ‘disgraceful’ past and continues to make invidious and wounding distinctions on grounds of race. It survives, however, because it has become encrusted with processes of great practical, day-to-day importance to a large number of people.

In other cases, courts had to decide to what extent and with what political consequences political powers may pursue politics of transformation using statute law. In S v Baloyi (Minister of Justice Intervening) the Constitutional Court per Sachs J cautioned against undue judicial activism in certain socially sensitive areas, where the legislature (as political decision-maker) is best left with a ‘reasonable degree of latitude or margin of appreciation’. In casu the court, considering the constitutionality of s 3(5) of the Prevention of Family Violence Act, observed as follows:

One may accept that insistence on rigid and inflexible rules would be inappropriate in this developing area, with its complex nuances and new procedures. Provided it remains within constitutionally appropriate limits, the Legislature must enjoy a reasonable degree of latitude or margin of appreciation in choosing appropriate solutions to a grave social ill, particularly when the need for special law enforcement procedures has become manifest. In the present case this requires a construction of s 3(5) that is sensitive to its context and seeks to balance out the interests of all concerned in the fairest manner possible.

The involvement of courts in determining the final outcome of overtly political disputes makes judges susceptible not only to criticism of the ‘legal’ techniques and justifications on which they rely to sustain their decisions, but also to criticism of

See, for example, Western Cape Provincial Government & Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government & Another 2001 (1) SA 500 (CC), 2000 (4) BCLR 347 (CC); Moseneke v Master of the High Court 2001 (2) 18 (CC), 2001 (2) BCLR 103 (CC) (‘Moseneke’).

Mosenke (supra) at para 25.

See Pretoria City Council v Walker 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) (‘Walker’). In this case the empowering act itself was not challenged, but the Court had to deal with the policy implications of legislation read in the light of the Interim Constitution.

2000 (1) BCLR 86 (CC), 2000 (2) SA 425 (CC) (‘Baloyi’).

Act 133 of 1993.

Baloyi (supra) at para 30.
their (actual or supposed) political motivation for reaching a decision. In *S v Mamabolo (E TV, Business Day and Freedom of Expression Institute intervening)* 292 the Constitutional Court said that, in a constitutional democracy, politically inspired criticism of the judiciary is not improper *per se*, and that the conventional common-law offence of scandalizing a court simply by criticizing its decisions on political grounds cannot survive constitutional scrutiny. Vocal public scrutiny of the courts' performance may serve as 'a democratic check on the judiciary', 293 and ideally robust and informed public debate about judicial affairs promotes peace and stability, by convincing those who have been wronged that the legal process is preferable to vengeance; by assuring the meek and humble that might is not right; by satisfying business people that commercial undertakings can be efficiently enforced; and, ultimately, as far as they all are concerned, that there exists a set of just norms and a trustworthy mechanism for their enforcement. 294

Finally, theoretical accounts assessing and determining trends in constitutional adjudication make much of the impact of socio-political realities on determining specific outcomes in such adjudication. Far from being perceived as an interpretive predicament, politics, in these accounts, aids an understanding of why constitutional decisions — in general and in specific instances — go a certain way. More will be said about theoretical accounts of constitutional adjudication later on. 295

(iv) *Purposive interpretation as the increasingly preferred alternative to literalism-cum-intentionalism*

Purposive interpretation is slowly supplanting (or has already supplanted, some may claim) literalism-cum-intentionalism as the leading approach to especially constitutional interpretation. 296 The supremacy of authorial intent as alleged prime determinant of meaning is also on unsteady ground. In statutory interpretation 'the intention of the legislature' has, as was pointed out before, 297 been toppled by the supremacy of the Constitution. In constitutional interpretation, original intentionalism has been suspect right from the outset. 298 A key assumption of literalism-cum-intentionalism, namely, that natural language can be clear and unambiguous, is also increasingly being questioned. 'Purpose', in constitutional and statutory interpretation, has probably not and will hopefully not become a prime force akin to 'intention of the legislature' (best expressed in clear and unambiguous language) as it used to reign supreme in mainstream statutory interpretation.

292 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC)('Mamabolo').

293 Ibid at para 30.

294 Ibid at para 31.

295 See § 32.3(c)(v) infra.

296 See § 32.3(b)(i) supra.

297 See § 32.3(b)(i) supra.

298 See § 32.3(b)(i) supra.
Constitutional and legislative purpose can nonetheless pilot interpretive endeavours and outcomes decidedly, as is powerfully illustrated by the majority judgment of the Constitutional Court in *African Christian Democratic Party v The Electoral Commission & Others*. 299

Section 14(1)(b) of the Municipal Electoral Act 300 requires a party contesting a municipal election to pay a deposit equal to a prescribed amount by means of a bank guaranteed cheque submitted to the office of the local representative of the Electoral Commission by a stipulated cut-off date. A notice of a party’s intention to contest the election and its party lists must also be submitted together with the cheque. 301 The African Christian Democratic Party (ACDP), proposing to contest an election in the Cape Town Metro Municipality, submitted their notice and party lists to the Cape Town office of the Electoral Commission, but did not pay the prescribed deposit of R3000,00 in the manner s 14(1)(b) requires. Instead, it submitted a bank guaranteed cheque to the central office of the Electoral Commission in Pretoria, including in one amount all the deposits payable in respect of all the municipalities in which the party wished to contest the election. A list of these municipalities was submitted together with the cheque, but as a result of an administrative oversight the Cape Town Metro was omitted from the list, and the bulk amount did not include a deposit for the election in Cape Town. The party discovered the mistake after the deadline for the payment of deposits had passed and after it had decided not to contest elections in certain of the municipalities initially included in its list. This meant that the Commission held a surplus amount of money in favour of the ACDP, who then requested the Commission to use that credit (or part of it) as deposit for the election in the Cape Town Metro. The Commission refused to do so, contending that the prescribed procedure and deadline for party registrations were peremptory, and that the ACDP’s failure to comply fully with both could not be condoned.

On appeal against this decision, the Electoral Court agreed with the Commission, and the ACDP thereupon turned to the Constitutional Court for relief. The majority of the Court held that payment of the deposit in Pretoria for participation in respect of the election in municipalities subsequently uncontested by the ACDP sufficed as payment of the deposit for the Cape Town Metro election. The Court emphasized that it was not condoning the ACDP’s non-compliance with peremptory registration requirements. Rather, the Court concluded, by doing what the ACDP did the party was indeed complying with these requirements. 302 Actual compliance was thus not required to be compliance in accordance with the letter of the law: circuitous and


300  Act 27 of 2000.

301  Section 14(1)(a).

302  *African Christian Democratic Party* (supra) at para 34.
arguably even unintended compliance, duly serving the purpose of the provision in question, sufficed. This conclusion meant reaping the greatest possible advantage from the elasticity of the language of s 14(1) to achieve optimum realization, first, of the immediate purpose of the provision itself, namely 'to ensure that a deposit is paid by a political party to establish that they have a serious intention of contesting the election'; second, of the purpose of the Act as a whole, namely to encourage and facilitate participation in (rather than allow exclusion from) municipal elections; and, third and ultimately, of a core purpose of the Constitution, namely, to sustain multi-party democracy through free and fair elections. This core purpose is articulated, as an assertion of values key to multi-party, democratic government, in FC s 1(d). The purposive picture painted by the Court displaces the literal statutory arrangement that a deposit must be paid at a particular designated place (or, for that matter, before the expiration of a stipulated deadline).

Wessel le Roux neatly depicts the Court's modus operandi — and the decided shift from literalism to purposivism that it involved — as follows:

The Court resolves the case, not by asking what the phrase 'office of the Commission's local representative' means linguistically, but by asking what the purpose of that phrase is within the context of election law. The Court is not pursuing an abstract definition but an operative effect. The concern with the linguistic meaning of the phrase is at the same time dismissed as an ‘unduly narrow’ (read textualist or literalist) approach to statutory interpretation. By contrast, the broader (read purposive) approach which the Court favours includes the following distinct steps: (i) establish the central purpose of the provision in question; (ii) establish whether that purpose would be obstructed by a literal interpretation of the provision; if so, (iii) adopt an alternative interpretation of the provision that 'understands' (read promotes) its central purpose; and (iv) ensure that the purposive reading of the legislative provision also promotes the object, purport and spirit of the Bill of Rights.

Laudable as this shift is, however, it should not to be construed as a panacea for all the ills that attach to conventional (literalist and formalist) approaches to constitutional interpretation. The following cautionary reminder by Gildenhuys J still holds:

Important as the purpose of legislation may be, elevating it to the prevailing factor of interpretation will not, in my view, always provide the key to unlock meaning.

303 Ibid at para 27.

304 Ibid at paras 15, 20 and 31-33.

305 Le Roux ‘Directory Provisions’ (supra) at 386.


Similar words of circumspection were sounded by Kroon and Froneman JJ slightly more than two months after the onset of constitutional democracy in South Africa:

[1] It serves little purpose to characterise the proper approach to constitutional interpretation as liberal, generous, purposive or the like. These labels do not in themselves assist in the interpretation process and carry the danger of introducing concepts or notions associated with them which may not find expression in the Constitution itself.  

Purposive interpretation, as these judges would agree, has the potential to turn into a rather unruly horse if three caveats are not heeded.

First, the processes involved in constitutional and statutory interpretation are too complex to be captured in one essential(-ist) or predominant catchword. A sensible word of advice to all construing the Final Constitution will thus be to resist this temptation.

Second, it must be realized (and recognized) that a generous or broad interpretation of the Final Constitution, and the Bill of Rights in particular, as envisaged by, among others, the Constitutional Court, 309 is not necessarily tantamount to construing the Constitution purposively; purposive interpretation can also be restrictive, precisely because a purpose can be restrictive.  

Third, purposive interpretation can at any rate not simply begin (and end) by giving effect to the (alleged) purpose of a provision to be construed, because the purpose of a provision can simply not be known prior to interpretation. 'Purpose' can be established only through interpretation. The interpretation of enacted law is by its very nature purpose-seeking.  

The attempted determination of a constitutional or legislative purpose undisciplined by studious interpretation too easily seduces an interpreter to read a purpose or object into a provision prematurely, and therefore in an arbitrary manner, shedding the responsibility to justify or, at least, explain his or her preference.  

In pre-1994 South African case law optimum effect was sometimes given to harsh statutory provisions, gratuitously interfering with fundamental rights, precisely because they were construed 'purposively'. Some writers therefore argue that purposive interpretation should enjoy the status of a

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308 Oozoleni v Minister of Law and Order 1994 (3) SA 625 (E), 633G, 1994 (1) BCLR 75, 80D (E) (‘Oozoleni’). See M Sachs (ed) Grundgesetz Kommentar (3rd Edition, 2002) 17 (Contends that teleological interpretation is ‘nicht ein Synonym für die Auslegung überhaupt, sondern meint die weitergehende, verfeinerte Berücksichtigung eines anderweitig festgestellten Regelungsziels in den jeweiligen Spezialzusammenhängen’ ['not a synonym for interpretation as such, but refers to a further, refined consideration of a regulative objective determined in another way within the particular context of the subject-matter'] thereby confirming the sentiments expressed in the two dicta here cited.)

309 See Zuma (supra) at para 14; National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 1 SA 6 (CC), 1998 (12) BCLR 1517 (CC)('National Coalition 1999') at para 21. See also § 32.1(b) supra.

310 See Soobramoney (supra) at para 17; SA National Defence Union v Minister of Defence 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at para 28. See also § 32.1(b) supra.

311 See L du Plessis & H Corder Understanding South Africa’s Transitional Bill of Rights (1994) 85. For a further explication of the features of ‘enacted law’, see §§ 32.3(e)(i)(ee) and 32.5(c)(iii) infra.
secondary (as opposed to a primary) mode of interpretation. Similarly, some South African scholars, mindful of the pitfalls of unrestrained purposive interpretation, have put forward what they call a teleological approach to constitutional interpretation in particular. This approach, while still thoroughly purposive, takes us beyond ad hoc purposivism, and aspires in the interpretation of individual constitutional (and statutory) provisions, to realize the 'scheme of values' on which the constitutional order is premised. This 'value-activating interpretation', in other words, goes beyond the design or purpose that lies behind an individual provision and invokes the entire scheme of values said to inform the legal and constitutional order in its totality. Teleological interpretation has not yet been explained in the case law in quite this way. However, there have been dicta in cases dealing with constitutional interpretation where the line of reasoning that informs the teleological approach, or a line of reasoning akin to it, has been approved. In African Christian Democratic Party v The Electoral Commission & Others, the majority of the Constitutional Court convincingly showed how the immediate purpose of a particular provision (in casu s 14(1) of the Municipal Electoral Act) can be construed as feeding into the broader purpose of the Act as a whole, and eventually, through its effectual embeddedness in the Act, into constitutional core values informing (even) the founding provisions in the Final Constitution. In casu the

312 Judicial observations to the effect that 'a purposive approach to interpretation does not do away with the ordinary rules of statutory interpretation') must probably be understood as words of caution. See Richtersveld Community v Alexkor Ltd 2001 (3) SA 1293 (LCC) at para 51 n 115. See also Minister of Land Affairs v Slamdien 1999 (4) BCLR 413 (LCC) at para 16.


315 'Purposive' and 'teleological' are largely synonyms, but see § 32.5(c)(iii) infra.

316 See Mureinik 'Administrative Law in South Africa' (supra) at 623-624.


319 See, for example, Coetzee v Government of the Republic of South Africa, Matiso & Others v Commanding Officer, Port Elizabeth Prison & Others 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC)('Matiso 2') at para 46 (Sachs); Du Plessis & Others v De Klerk & Another 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC)('De Klerk') at para 181 (On the role of the Constitution in the legal order in a constitutional democracy); Gardener v Whitaker 1995 (2) SA 672 (E), 684D-E, 1994 (5) BCLR 19, 30F-G (E).
The immediate purpose of the provision in question, namely to procure payment of a deposit establishing that a political party has a serious intention to contest an election, was held to feed into the purpose of the Act as a whole, namely to encourage and facilitate (rather than discourage and hinder) participation in municipal elections, and ultimately, through its effectual embeddedness in an Act designed to promote constitutional objectives, into constitutional core values sustaining multi-party democracy through free and fair elections. These core values are bold assertions of the founding provisions in s 1(d) of the Final Constitution. The modus operandi of the majority of the Constitutional Court strikingly illustrates that teleological interpretation is an enriched version of purposive interpretation and moves from the effectual acknowledgement of the purpose of a particular provision to the realization and fulfilment of values and purposes key to the legal and constitutional order as a whole.

Can purposive interpretation as teleological interpretation then indeed be proffered as an alternative to conventional literalist-cum-intentionalist interpretation? The answer to this question is not a simple 'yes' or 'no'. That the former has contributed significantly to the demise of the primacy traditionally bestowed upon the latter has been all to the good. However, this recent turn of events still does not justify affording one interpretive approach pride of place among the others. It is preferable and possible to work towards a meaningful and creative coexistence of various interpretive approaches (qua reading strategies) that sustain and enrich one another.

(c) Theories of, theoretical positions on, and leitmotivs in constitutional interpretation

The word 'theory' is used rather loosely in legal parlance and in connection with constitutional interpretation too. After almost a decade and a half of constitutional democracy and constitutional jurisprudence in South Africa, it is still not possible to catalogue comprehensively the theories of constitutional interpretation developed and/or named by the courts. It is of course not part of the primary business of courts to proclaim theories of constitutional (or any other form of) interpretation by name, and to attend to the sustained and systematic development of such theories. 320 Theory-building is rather what legal scholars do when they observe and try to explain what is happening when role players in various contexts and capacities engage with the Constitution-in-writing. Constitutional scholars focus and reflect mostly on how the Constitution is construed in practice (and mostly by the courts). In South Africa scholarly work on theories of constitutional interpretation has mostly been anticipatory in nature, considering comparative examples of what could in time gain currency as fully-fledged theories of constitutional interpretation in this country. 321 In a similar vein the discussion that follows will explore the possibility and desirability of the development of typical South African theories of constitutional interpretation, and the relevance of the hitherto crystallized (and


previously discussed\(^{322}\)) common-law theories of statutory interpretation in the process. It will also be argued that (and shown how), in the absence of fully-fledged theories of constitutional interpretation in South Africa, theoretical positions on constitutional interpretation have been manifest in interpretive leitmotifs, in other words, in recurring keynote or defining ideas, motifs or topos, that have to an appreciable extent guided constitutional interpretation in practice.

(i) Three comparative examples

Given the breadth of experience with constitutional interpretation in other jurisdictions, it is worth briefly canvassing how ‘theory’ features in constitutional interpretation in Germany, Nigeria and the USA. The jurisprudence in these states will serve as a preface to a discussion of the (possible) place and role of ‘theory’ in South African constitutional interpretation.

German constitutional interpretation is not so much concerned with theories of interpretation as such, but with theories of fundamental rights (Grundrechtstheorien) instead. \(^{323}\) Five such theories have been discernible in the jurisprudence of the Federal Constitutional Court:

(aa) The classical liberal theory of fundamental rights emphasizes the primacy of constitutional guarantees of civil rights and liberties crucial to the realization of the freedom of the individual in the constitutional state (Rechtsstaat). This is believed to be best achieved by holding the powerful state at bay.

(bb) The institutional theory of fundamental rights focuses not so much on safeguarding ‘a sphere of individual and social liberty in which individuals, legally speaking, may do as they subjectively wish. They [the fundamental rights] are more like objective organisational principles for the sphere of rights they protect. They emerge and are realised in normative provisions of an institutional nature that are upheld by the idea of order enshrined in the basic rights and as such mould living-conditions.’ \(^{324}\)

(cc) The value theory of fundamental rights holds fundamental rights to be elements and instruments in the creation of the state as (ideally) a community of shared experience, culture and values. The fundamental rights standardize a system of values or commodities lending a ‘material status’ to individuals increasingly integrated as a people and a distinct nation. \(^{325}\)

(dd) The democratic-functional theory of fundamental rights contends for a reading of these rights from the perspective that they fulfil a public, political function. The existence and functioning of free processes in the democratic state (for

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\(^{322}\) See § 32.3(a) supra.


\(^{324}\) Böckenförde State, Society and Liberty (supra) at 184.

\(^{325}\) Ibid at 189.
example, freedom of expression, freedom of assembly and association) indeed constitute such a state, lend meaning to fundamental rights and are therefore to be safeguarded. There is no room for the notion of innate rights, that is, rights preceding the existence of the democratic state. 326

(ee) The welfare-state theory of fundamental rights emphasizes the impossibility of a duly fulfilled safeguarding of 'classical' fundamental rights (and 'freedom rights' in particular) as long as socio-economic needs have not been duly attended to:

It is [the] gulf between legal and actual liberty as enshrined in the basic rights that the welfare-state theory of those rights seeks to bridge . . . [B]asic rights no longer have a purely negative, delimiting character; they also give individuals certain claims upon the state in respect of social services. The thing to be guaranteed is no longer seen as simply an abstract legal liberty but as real liberty. 327

None of the theories aforesaid enjoys pre-eminence in the jurisprudence of the Federal Constitutional Court, and the FCC, in particular cases, chooses freely — too freely to the taste of some, it would seem 328— the theory upon which it will rely. This free choosing, which Michael Sachs 329 positively depicts as theoretical multi-functionality (Multifunktionalität), is commensurate with the kind of state envisaged in s 20(1) of the German Basic Law — a state which is simultaneously a pluralistic party-state, a constitutional state, a competitive democracy, a social state and a federal state. 330

The theories of fundamental rights as significant determinants of interpretive outcomes are distinguished from the methods of (constitutional) interpretation (Methoden der Verfassungsinterpretation). 331 In a nutshell, these methods are, first, the classical hermeneutical method in which FC von Savigny's four 'methods' of interpretation — grammatical, systematic, teleological and historical interpretation — hold a central place. This Von Savigny Quartet will figure prominently towards the end of this chapter. 332 Second, there is the method of interpretation known as the

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326 See § 32.4(c)(i)(cc) infra, for an opposite view. For an explanation of this theory, see Böckenförde State, Society and Liberty (supra) at 192.

327 See Böckenförde State, Society and Liberty (supra) at 195-196.

328 Ibid at 198-203.

329 See Sachs (supra) at 55.

330 See § 32.4(c)(i)(bb) infra.


332 See § 32.5(c) infra.
hermeneutical concretization of norms through rational arguments. Third, the topical method focuses on interpretation as problem solving through free and open argumentation rather than strict adherence to the (supposed) meaning of provisions gleaned from the Constitution-in-writing. Finally, what is known in German as the *wirklichkeitswissenschaftlich orientierte Methode* orients itself toward the meaning and reality of the Constitution rather than its wording and dogmatic conceptuality.

While, as 'ways of doing', the methods of constitutional interpretation can themselves not appropriately be described as 'theories of interpretation', they do reflect discernible theoretical orientations or positions. In addition to the theories and methods of constitutional interpretation the Germans also rely on *principles of constitutional interpretation* (such as reading the Constitution as a whole and giving optimal effect to its norms) and canon-like interpretive means (*Auslegungsmittel*) closely associable with the Savignian quartet of reading strategies.

In Nigerian constitutional jurisprudence — as presented by Chucks Okpaluba — much is made of the essential dissimilarity between constitutional interpretation, as an interpretive genre *sui generis*, and ordinary statutory interpretation. Principles of constitutional interpretation have been laid down in the constitutional jurisprudence of courts at the highest level, but no explicit mention is made of theories of interpretation. Of course, the principles of constitutional interpretation articulated by the courts do, to some extent at least, manifest theoretical orientations. The Nigerian example is eye-catching in that, with a few exceptions, the formulated principles of constitutional interpretation are equally applicable to constitutional and statutory interpretation and do not really reflect a stance *sui generis* on many of the vexed theoretical questions encountered when reading a constitution. The Nigerian Constitution is to a large extent construed with reliance on the conventional canons of statutory interpretation, including the golden and mischief rules, and rules of restrictive and extensive interpretation, such as the *eiusdem-generis* and the *expressio unius* rules respectively. Far be it for me to suggest that the Nigerian model reflects an untenable state of affairs. Relevant to note for the present discussion and for the moment, though, is that the approach just mentioned has not given rise to a clearly discernible, theory oriented discourse and reflection on *constitutional interpretation* in particular.

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333 See Davis, Chaskalson & de Waal (supra) at 103-120.

334 See Von Münch (supra) at 13.

335 See Sachs (supra) at 15-18.


337 Ibid at 8-17. Questions regarding the appropriate relationship between constitutional and statutory interpretation will be dealt with more fully at a later stage. See § 32.4(a) infra.

In the eye of the South African beholder, the theories of constitutional interpretation in US constitutional jurisprudence and scholarship share a pedigree with English common-law theories of statutory interpretation. US constitutional scholars and adjudicators generally agree on the features and broad categorization of theories of constitutional interpretation. There is, however, no unanimity on exact appellations and detailed classifications. According to a comprehensive yet discerning catalogue of theories of constitutional interpretation, propounded by Walter F Murphy, James E Fleming and Sotirios A Barber, the following types of and specific theories dominate US jurisprudence:

(A) **Textualism.** Theories of this type all somehow assume that provisions of the Constitution-in-writing (autonomously) bear meaning which is readily discernible through a straightforward and uncontroversial reading of words and phrases:

Most basically, textualists are readers; their principal tools are dictionaries and grammars. The process is not unlike translating from one language to another, a project that requires talent as well as knowledge.

One version of textualism is *clause bound*, and focuses on the various parts of the Constitution-in-writing. *Structuralist* textualism, on the other hand, is alert to the coherent wholeness of the Constitution-in-writing. *Purposive* textualism may be complementary to the other two versions, but it is also different. It professes to be able to establish, through straightforward and uncontroversial reading, the purpose or goal of either any specific provision of the Constitution or of the Constitution as a whole, and then to give effect to such a purpose or goal. Textualism smacks of literalism — probably due to their shared formalist traits — but it also goes well beyond literalism without, however, shedding its formalism. Faith in the written Constitution's ability to be an autonomous source and bearer of meaning is thus not incompatible with — or a decided obstacle to — a contextualist and purposive reading of it, but the contextualism and purposivism involved will inevitably be attenuated.

To call a type of theory — mostly narrow and formalist in its conception and implementation — 'textualism' is in line with what is to be expected in mainstream thinking on constitutional interpretation. However, broad and post-formalist understandings of the word 'text' in contemporary theories of language and interpretation open the possibility for 'textualism' to denote the exact opposite of narrowness and formalism.

(B) **Originalism** typically maintains that the Constitution must be read and understood as faithfully as possible in accordance with the original intent of its framers. This means that provisions of the Constitution-in-writing must be construed as they were supposedly understood at the time of their adoption.

339 WF Murphy, JE Fleming & SA Barber *American Constitutional Interpretation* (2nd Edition, 1995) 385-414. The authors point out that approaches to constitutional interpretation in the US are often expressed as distinctions or even dichotomies, for example, strict versus liberal construction, judicial activism versus judicial self-restraint, substance versus proceduralism and interpretivism versus non-interpretivism. Though they briefly discuss these four distinctions, they do not find them very useful because they ‘lead into blind analytic alleys’. Ibid at 414–418. For further alternative catalogues of theories of constitutional interpretation in the US, see Davis, Chaskalson & de Waal (supra) 11-19.

340 Murphy, Fleming & Barber (supra) at 386.
There are two major varieties of originalism, the one focusing on the understanding and the other on the intentions of the Constitution's 'founders' or 'founding generation', in other words, either the people of 1787 to 1789, or the people of the time when the amendment that stands to be construed was adopted.

(C) **Doctrinalism.** Doctrinalists profess to work with a developing rather than a static Constitution, searching out past interpretations relating to specific problems and then trying to organize them into a coherent whole and fit the solution of current issues into that whole: 'In the style of the common law, the object is to preserve continuity even if affecting change.' 341 The Constitution-in-writing is silent on a number of quite significant constitutional doctrines that have been developed through constitutional interpretation, for example, direct and indirect effects, 'separate but equal' and 'liberty of contract'. Doctrinalism is alert to these 'provisions' of the 'wider Constitution' and draws particular attention to them.

(D) **Developmentalism** is a historical approach, but unlike originalism it does not see history as a snap shot of the past, frozen in time. Instead it values history as an ongoing process, 'a moving picture which continues into and beyond the present'. 342 It thus combines elements of both doctrinalism and textualism to reap interpretive benefit from broader historical events, for example, informal practices, usages and even political culture.

(E) **Philosophic approach.** This approach draws attention to the fact that the moral and political theory to which an interpreter subscribes engenders assumptions crucial to shaping her or his interpretation of the Constitution. This will happen whether or not such assumptions are openly acknowledged or even if the interpreter is not aware of them. The philosophic approach encourages interpreters to 'theorize', starting with an acknowledgement that her or his interpretive endeavours are inevitably co-determined by often far-reaching theoretical assumptions, and then to engage in philosophical discourse seeking and pursuing the meaning of vital words and phrases 'through an open and open-minded exchange of reasons that other people can respect'. 343

(F) **Systemic and transcendent structuralism.** As was pointed out in paragraph (A) above, structuralist textualism capitalizes on the coherent wholeness of the Constitution-in-writing for interpretive purposes. **Systemic structuralism** does the same with the coherent wholeness of the legal system, seeking out its inner unity and the common end to which its various segments aim. **Transcendent structuralism** involves including moral and political theories in that wholeness and reflecting on how they can help 'bring the text, practices, traditions, and interpretations into a coherent whole with the normative demands of the relevant . . . theories'. 344

341 Murphy, Fleming & Barber (supra) at 394.

342 Ibid at 395-396.

343 Murphy, Fleming & Barber (supra) at 398.
Purposivism. In addition to purposive textualism, Murphy, Fleming and Barber, under the heading 'systemic purpose', distinguish five versions of non-textualist purposivism closely connected with developments peculiar to constitutional interpretation in the USA. The first is a prudential approach conceiving of constitutional interpretation as statecraft. It is premised on the assumption that the goal of the Constitution-in-writing and the polity that has developed from it is that the USA must endure and must do so as a constitutional democracy. The second version of purposivism is 'the doctrine of the clear mistake' which 'seeks to maintain a political system that is both democratic and constitutionalist by apportioning interpretive authority in ways congruent with the duality of that objective'. Third, 'reinforcing representative democracy' as a form of purposive analysis 'stresses judges' obligations to support open political processes'. Third, 'reinforcing representative democracy' as a form of purposive analysis 'stresses judges' obligations to support open political processes'. A fourth version of a purposive approach, "protecting fundamental rights", operates from the premise that, insofar as the broader constitution embraces constitutionalism, it requires interpreters, particularly judges, to be especially protective not only of rights to political participation but also of substantive rights against threats by officials who were fairly chosen through open elections.', Finally, the aspirational approach 'takes the nation's ideals very seriously and uses them to structure constitutional interpretation'. It sees the Constitution not just as a set of rules for government but, in a very deep sense, as seeking to show the USA how to become a particular kind of society.

Balancing conceives of constitutional interpretation as a process of striking an equilibrium between opposing claims in society. It received its impetus from sociological jurisprudence prominent in the USA during the early years of the previous century.

The aforesaid authors refer to the theories they discuss as 'approaches'. To them an approach to interpretation, put simply, refers 'to the intellectual path an interpreter follows to seek meaning from that "thing" to be interpreted'. The path itself is a theoretical construction, made of the explanatory qualities of theory, and maintained by theory as justification. In this context 'theory' and 'approach' may thus, it would seem, be used interchangeably. The authors also state that the theories overlap and interact with one another and that none of them, nor a

344 Ibid at 400.
345 Ibid at 400-409.
346 Ibid at 403.
347 Ibid at 404.
348 Murphy, Fleming & Barber (supra) at 406.
349 Ibid at 408.
350 Ibid at 383.
combination of them, can turn constitutional interpretation into an exact science. They do not, however, elaborate on this statement.) This implies that a constitutional interpreter never really pledges exclusive allegiance to any one theory. All interpreters, for instance, work with a constitution-in-writing and this means textualism in some form is an inevitable building-block of all 'intellectual paths' associable with constitutional interpretation.

Frank Michelman, relying on a leaner and less detailed (and more 'conventionally American') list of theories of or approaches to constitutional interpretation, makes a similar point which is worth noting in the South African context, where no theories of constitutional interpretation have so far really crystallized. First on Michelman's 'kind of standard list of interpretative approaches or methods available to constitution adjudicators — from which, it's sometimes imagined, a judge chooses one (or perhaps just falls into one)' — is literalism, which applies 'the text to the case according to the ordinary meaning of the words, as . . . a Martian would construe them who was fluent in the country's standard language usages'. Second is intentionalism, 'applying the clause as one judges the writer of it would have done', and third is purposivism, 'applying the clause in the way that one judges will best accomplish the lawmaker's primary or higher or transcendent purpose, even if the concrete results would somewhat surprise the lawmaker'. Fourth, '[i]nstrumentalism is determining the sense of the application of a legal text or doctrine's application to a particular case by first comparing the predicted social consequences of applying it in one or the other sense, and then preferring the sense that has the preferred consequences, as measured by a kind of ad hoc or pragmatic common sense'. Finally, '[m]oralism is determining concrete applications by reference to a high-level, substantive moral theory supposed to be

351 It was pointed out earlier that in legal interpretation the so-called theories of interpretation (and especially theories of statutory interpretation) are explanatory and justificatory at the same time and can also be referred to as 'interpretative approaches'. See § 32.3 supra.

352 See Murphy, Fleming & Barber (supra) at 383-384 (The authors support the proposition without exactly saying so.)

353 Ibid at 383-384.

354 Ibid at 383.

355 See FI Michelman 'A Constitutional Conversation with Professor Frank Michelman' (1995) 11 South African Journal on Human Rights 477 (The seminar upon which this article is based took place at the Centre for Applied Legal Studies from 23 to 25 January 1995 and was organised to discuss critical issues relating to the Bill of Rights (Chapter 3) in South Africa's Interim Constitution.)

356 Michelman 'A Constitutional Conversation' (supra) at 482.

357 Ibid at 482.

358 Ibid at 482.

359 Ibid at 482.
instantiated by the Constitution as a whole'. How does a judge (or any other constitutional interpreter for that matter) choose between these approaches? Michelman is adamant that he or she does not choose and in actual fact cannot choose: the approaches cannot be alternatives among which a judge chooses; they are multiple poles in a complex field of forces, among which judges navigate and negotiate. I don't believe that any responsible constitutional adjudicator will end up, over any interesting run of cases ignoring any of the factors: perceived verbal significations, perceived concrete intentions, perceived general purposes, perceived and evaluated social consequences, perceived and intuited normative theories or unifying visions.

For argument's sake, Michelman assumes that the five '-isms' above can broadly be classified into two groups that 'may seem to stand on opposite sides of an important divide', namely objectivist approaches (literalism, intentionalism and purposivism) and non-objectivist (instrumentalist and moralist) approaches. This distinction reflects a popular view which Michelman then criticizes by pointing out that objectivism is by no means a more reliable point of reference to distinguish between interpretive approaches: objectivism more often than not draws on profoundly subjective preferences of the interpreter, while the non-objectivist approaches can quite comfortably be dressed up in the objectivist uniforms of 'external authority'. This observation leads Michelman to the following conclusion:

On the constitutional level, legal interpretation succeeds by construing legal words, intentions and purposes, yes, but by construing them decidedly in the light of consequences, and by appraising consequences decidedly in the light of an emergent national sense of justice to which the interpretations are themselves, recursively, contributing.

Michelman's observations provide an opportunity to reconsider the role of theories in interpretation, that is, the conventional common-law theories of statutory interpretation, emerging theories of constitutional interpretation and the undeniable affinities between the two. At least Michelman's three 'objectivist' approaches to constitutional interpretation are found among conventional common-law theories of statutory interpretation in South Africa, with perhaps contextualism — that is, determination of meaning by reading words or language or a provision as a whole in context — as a local contender to be added to the list. Judicial flirtation with decidedly 'non-objectivist' approaches to statutory interpretation (such as

360 Ibid at 482.

361 Ibid at 483.

362 The 'objectivism' that Michelman here has in mind is the polar opposite of the objectivism previously discussed as an interpretive theory. This theory (also known as the delegation theory) is associated with the freedom for judges to complete and augment the provisions of enacted law through interpretation. See § 32.3(a)(vi) supra.

363 Michelman 'A Constitutional Conversation' (supra) at 483.

364 Ibid at 485.

365 See § 32.3(a)(iv) supra.
instrumentalism and moralism) has been rare in South Africa since, as was shown before, the interpretation of enacted law has traditionally been thought of as an apolitical and morally neutral procedure. It was also shown previously how some legal scholars have advocated seemingly (in Michelman's terms) 'less objectivist' approaches to statutory (and, by implication, also constitutional) interpretation, notably the delegation theory and other judicial or free theories of interpretation.

These theories recognize and justify judicial activism, premised on the belief that judges have a creative role to play in the realization or concretization of enacted law. Constitutionalism and constitutional interpretation, associated with increased and increasing demands on the judiciary to make and to help ensure the implementation of policy decisions, have thus been conducive to the onset and growth of such 'non-objectivist' theories.

Since a theory is explanatory and justificatory at the same time, a legal interpreter's theory of interpretation may cause him or her to relate, intentionally or intuitively, issues of interpretation in a concrete situation, to broader questions regarding, among others, the role and function of language in law and the possibility of justice through the reading and realization of written law. An interpretive theory also situates an interpreter's interpretive endeavours in a legal and constitutional tradition with its prevailing understandings of matters of interpretive consequence, such as the nature and division of power (as reflected in, for example, *trias politica*) and the role appropriate to authorized (judicial and other) interpreters of the law in the system. An approach to interpretation is premised on and shaped by theoretical assumptions about the matters just mentioned and by numerous other matters too. In constitutional interpretation these matters may, for instance, manifest in what Michelman called 'an emergent national sense of justice to which . . . interpretations . . . recursively' contribute.

What a theory of constitutional interpretation is and entails can also be shown by developing the previously referred to 'path metaphor' on which Walter, Fleming and Barber base their straightforward description of an interpretive approach. Someone's approach to or theory of constitutional interpretation may then be described as the intellectual path he or she follows to seek meaning from the

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366 See § 32.3(a)(i)-(iii) and (v) supra.

367 See § 32.3(b)(iii) supra.

368 See § 32.3(a)(vi) supra.

369 Note once more that in the scheme (and terminology) of the discussion in § 32.3(a)(vi) supra, that the 'objectivism' discussed there would probably be described by Michelman as a 'non-objectivist theory'.

370 See § 32.2 supra.

371 Michelman 'A Constitutional Conversation' (supra) at 485.

372 Murphy, Fleming & Barber (supra) at 383.
This path is a theoretical construction, made or built of theory as explanation, and maintained by theory as justification.

When the notion of a 'theory of constitutional interpretation' is thought of as a position based on assumptions about the crucial matters previously referred to, or as the complexly constructed path just described, it becomes clear why one-word depictions and one-sentence definitions — all parading as 'theories' of or 'approaches' to constitutional interpretation — are by themselves wholly inadequate explanations or explications of and justifications for the doings that constitute 'constitutional interpretation'. Neither literalism, maintaining that the meaning of an enacted provision can and must be deduced from the very words in which the provision is couched, regardless of consequences, nor intentionalism, claiming that discerning and giving effect to the real intention of a law-making author is the paramount rule of interpretation, nor contextualism, making meaning crucially dependent on context, can, for instance, really be a theory of constitutional or statutory interpretation. They can at most help determine a theoretical position.

(ii) Theoretical position(s) in relation to interpretive leitmotiv(s)

A theoretical position is constituted by the assumptions referred to above and reflected in the previously described theoretically constructed path that the constitutional interpreter travels to come to understand and implement the Constitution. As Michelman correctly points out, it is a constitutional interpreter's theoretical position, rather than any specific, conventional approach to constitutional interpretation on which he or she may rely, that determines interpretive outcome. Making an assumption involves making a choice. Theoretical positions on constitutional interpretation emanating from choices thus made therefore order and rank interpretive preferences — as Michelman rightly suggests.

A theoretical position, which is a theoretical disposition at the same time, cannot just be rationally or even consciously decided on, and also emanates from, for instance, intuitive perception. Covert and subconsciously held theoretical assumptions, as a matter of fact, precisely because of an interpreter's uncritical unawareness of them, often have a more decisive impact on interpretive outcome than overt and consciously reasoned assumptions. Jurists in practice (including judicial officers), in particular, do not habitually devote time to reflect specifically on

373 Ibid at 383.

374 See § 32.2(a)(i) supra.

375 See § 32.2(a)(ii) supra.

376 See § 32.2(a)(iv) supra.

377 See § 32.3(c)(i) supra.

378 Michelman 'A Constitutional Conversation' (supra) at 484-485. See also § 32.3(c)(i) supra.

379 Ibid at 484-485. See also § 32.3(c)(i) supra.
(and explain or justify) their theoretical positions, which mostly become visible in the
arguments they use to justify specific interpretive outcomes. 381 A theoretical
position may nonetheless be reflected on, contested, defended, explained and
(consciously) changed. It may also, to at least some extent, be shared with others
although, due to the uniqueness of each individual, no two theoretical positions can
be identical in detail.

A judiciary as a whole therefore does not 'decide' on a particular theoretical
position on constitutional or statutory interpretation, and the theoretical position of a
particular judge may, in fact, vary from case to case, depending on the exigencies of
each case and the measure of latitude that the law and the canons of construction
allow for deciding the specific issues involved in that case. 382 However, it is possible
that, within a given jurisdiction or tradition, a certain kind of theoretical impulse can
become so dominant that, in time, it falls into place as a template for positions on
and approaches to interpretation. 383 As was shown before, literalism-cum-
intentionalism, blending literalism and intentionalism into an approach with
elements of both, has for a long time held such a dominant position in statutory
interpretation in South Africa, 384 with contextualism and purposivism mostly in
auxiliary roles.

Since the advent of constitutional democracy in South Africa, the dominant
discourse suggests that purposivism has displaced literalism-cum-intentionalism as
template for theoretical positions on constitutional (and statutory) interpretation.
The present discussion again questions the soundness of this proposition,
challenging the misapprehension that reliance on a single preferred approach to
constitutional or statutory interpretation can eventually 'make all the difference'.
Since 1994 it has mainly been 'an emergent [new] national sense of justice' (à la
Michelman) 385— and not any particular interpretive approach — that has navigated
constitutional and statutory interpretation in South Africa along previously
unexplored paths.

Because a theoretical position is so complex, a full picture of it can hardly be
given, and it is most often recognized, quite piecemeal, as it were, by effects or
consequences in which it manifests (aspects of) itself, and not as a holistic picture of

380 See S Fish Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Legal

381 Ibid at 483-485.

382 See, for example, Public Carriers Association & Others v Toll Road Concessionaries (Pty) Ltd &
Others 1990 (1) SA 925 (A), 943C–944A.

383 See L du Plessis 'The (Re-)systematization of the Canons and Aids to Statutory Interpretation'
(2005) 122 South African Law Journal 591. (Showed how such a template position in South Africa
occasioned the development of a hierarchical order of primacy involving the canons of and aids to
statutory interpretation.)

384 See § 32.2(a)(iii) supra.

385 Michelman 'A Constitutional Conversation' (supra) at 477, 485.
some sort. Theoretical positions, or aspects of them, can and do, for instance, manifest in *interpretive leitmotivs* detectable as recurring keynote or defining ideas, motifs or *topoi* lending direction to specific instances of constitutional interpretation. The same leitmotiv can be a manifestation of aspects of different theoretical positions on constitutional interpretation, but it is hardly conceivable that contradicting or conflicting theoretical positions will manifest in a significant number of similar or corresponding leitmotivs.

Conventional approaches to the interpretation of enacted law, such as literalism-*cum*-intentionalism or purposivism, are not really *leitmotivs* because they do not present ideas. The two interpretive leitmotivs that will be discussed below, namely, *transitional* and *transformative constitutionalism*, are of purposive purport, conceiving of the objectives they pursue as directional ideas. Leitmotivs moreover often manifest as images in metaphors, 386 as is apparent from the two variants of transitional constitutionalism in South Africa. To the one the Constitution is a bridge to a culture of justification. The other works with the Constitution as *memory and promise*, picturing it as both a *memorial* and a *monument*. And as will be seen in due course, transformative constitutionalists criticize the ‘bridge version’ of transitional constitutionalism with an alternative depiction and explanation of the very metaphor!

### (iii) Transitional constitutionalism

The Interim Constitution concluded with an unusual Postamble (or Postscript), an exhibition of efflorescent language, entitled *National Unity and Reconciliation* and decreed 387 to form part of the substance of the Constitution. The Postamble anticipated that the Constitution would provide ‘a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex’. It furthermore verbalized a quest for

> ‘the pursuit of national unity, the well-being of all South African citizens and peace' requiring 'reconciliation between the people of South Africa and the reconstruction of society'. 388

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387 IC s 232(4).

388 It continued as follows:

> 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 aims 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.
The Postamble found its way into the Interim Constitution as an attempt to break a deadlock in the negotiations. The deadlock turned on the constitution-makers' inability to agree, in precise terms and in time for the adoption of the Constitution, on how to deal with 'gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge' inherited from colonial and apartheid rule. 389 The Postamble thus envisaged, in broad terms, the eventual adoption of cut-off dates and 'mechanisms, criteria and procedures' for amnesty 'in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past'. 390 The Promotion of National Unity and Reconciliation Act 391 was subsequently enacted, stipulating conditions for such amnesty, and laying down the relevant application procedures.

Much of the spirit and tenor of the Postamble has survived in the Preamble to the FC — with implications for the latter as a possible source of transitional constitutionalism as interpretive leitmotiv. 392

(aa) The Constitution as bridge: Justificatory constitutionalism

'What is the point of our Bill of Rights?' Etienne Mureinik asked in one of the earliest commentaries on South Africa's first Bill of Rights. 393 He then set out to answer this question, exploring the bridge metaphor in the Postamble to the Interim Constitution as follows: 394

If this bridge is successfully to span the open sewer of violent and contentious transition, those who are entrusted with its upkeep will need to understand very clearly what it is a bridge from, and what a bridge to. What the bridge is from is a culture of authority . . . an indispensable nursery for the feature of apartheid that most people would consider its defining characteristic: the reduction to law of racial discrimination — differentiation on the ground of race that is not justified. Without a culture of authority it is difficult to imagine how its gardeners could have cultivated the forest of apartheid statutes whose most distinctive feature was their want of justification.

389 For more on the nature of the compromise the parties reached, see D Dyzenhaus Truth, Reconciliation and the Apartheid Legal Order (1998) 1-6.

390 The following guidelines were laid down:

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.


392 See § 32.4(c)(i)(aa) infra.

393 IC Chapter 3.

If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification — a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.

If the Constitution is to be a bridge in this direction, it is plain that the Bill of Rights must be its chief strut. A Bill of Rights is a compendium of values empowering citizens affected by laws or decisions to demand justification . . . The point of the Bill of Rights is consequently to spearhead the effort to bring about a culture of justification. That idea offers . . . a resource with which to resolve the interpretive questions that it [Chapter 3 of the Interim Constitution] raises.

Justification and transition-as-a-bridge are not intrinsically related, but combining them presented an unusually powerful image of the 'culture of justification' that many — like Mureinik — believed to be the quintessence of the new constitutional dispensation in South Africa. To this day Mureinik's articulation of (especially) what 'the new Constitution' clearly 'must be a bridge to' has been cited with approval and appreciation by South African courts and the Constitutional Court in particular, and has thereby indeed established itself as an interpretive leitmotiv of consequence, more aptly depicted as justificatory rather than transitional constitutionalism.

Many administrative law issues that fall within the precincts of 'the culture of justification' have since 30 November 2000 been subject to the regulative authority of the Promotion of Administrative Justice Act. PAJA is original legislation required by FC s 33(3) and enacted to give specific effect to the fundamental right to administrative justice entrenched in the Bill of Rights. Some Constitutional Court judgments have, however, also contributed substantially to establish a culture of justification as the benchmark for administrative action.

Perhaps the finest example of justificatory constitutionalism appears in Pharmaceutical Manufacturers Association of SA & Another: In re ex parte President of the RSA & Others. The Constitutional Court, for instance, proclaimed the essential unity of the Constitution and administrative common law in dealing with


396 Act 3 of 2000.

397 FC s 33(1).
the exercise of public power. 399 It rejected a suggestion — of the Supreme Court of Appeal in Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennie Group Ltd trading as Renfreight 400—that any common law from an era predating the onset of a constitutional culture of justification could survive undisturbed. The judgments in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others 401 and Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amicus Curiae), 402 duly accounting for the effects of the Promotion of Administrative Justice Act, have also contributed significantly to the culture of justification in administrative law.

Justificatory constitutionalism is of course not only of consequence in relation to administrative justice. The Constitutional Court’s judgment in First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 403 developed a set of guidelines for determining when a deprivation of property is arbitrary and hence unjustified. Despite academic criticism, FNB looks on its face to be the kind of contribution to justificatory Mureinik must have anticipated when he spelt out his understanding of crossing the bridge of transition in South Africa. Adjudicative determination of the issue of arbitrariness was overdue and necessary for the peace of mind of propertied beneficiaries under FC s 25 (the property clause) and to promote legal certainty. The advantages of this landmark judgment have, however, been eroded to some extent in Mkontwana v Nelson Mandela Metropolitan Municipality & Another; Bissett & Others v Buffalo City Municipality; Transfer Rights Action Campaign & Others v MEC for Local Government and Housing, Gauteng & Others. 404 The flexible and context-sensitive manner in which the FNB 405 guidelines, as conceptual distinctions, were converted into a multi-factor balancing

398 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC).

399 See also §§ 32.4(c)(ii)(ff) and 32.5(b)(iii)(bb) infra. The judgment predates the commencement of the Promotion of Administrative Justice Act.

400 1999 (8) BCLR 833 (CC), 1999 3 SA 771 (SCA).

401 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC).

402 2006 (2) SA 311 (CC), 2006 (1) BCLR 1 (CC) (‘New Clicks’).

403 2002 (7) BCLR 702 (CC), 2002 (4) SA 768 (CC) (‘FNB’) at para 100.

404 2005 (1) SA 530 (CC), 2005 (2) BCLR 150 (CC) (‘Mkontwana’). For a critical discussion of this case, see AJ van der Walt ‘Retreating from the FNB Arbitrariness Test already? Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng (CC)’ (2005) 122 South African Law Journal 75.

405 FNB (supra) at para 100.
test in *Mkontwana* 406 probably paved the way for deviation from them in *Mkontwana*. 407

If *FNB* has the potential to ensure property owners’ peace of mind, 408 then the Constitutional Court judgment in *Alexkor Ltd & Another v The Richtersveld Community & Others*, 409 and the preceding judgment of the Supreme Court of Appeal in the same case, 410 certainly have the potential to kindle the aspirations of the landless, prospective beneficiaries of FC s 25 – especially communities and individuals dispossessed under a colonial and apartheid culture of authority. 411 The *Richtersveld* judgments have gone a long way in bringing the common law on indigenous title within the ambit of justificatory constitutionalism — just as *FNB* has accomplished a similar end with respect to Roman-Dutch based common law of property. 412

A high threshold of justification applies when legislative and administrative action, likely to compromise the rudiments of constitutional democracy, is up for constitutional review. In the course of such review South Africa's two highest courts have emerged as staunch guardians of, for instance, participatory democracy in law-making. Both the Supreme Court of Appeal, in *King & Others v Attorneys Fidelity Fund Board of Control & Another*, 413 and the Constitutional Court, in *Doctors for Life v Speaker of the National Assembly & Others* 414 and *Matatiele Municipality & Others v President of the Republic of South Africa & Others*, 415 required the National Assembly's meticulous compliance with its constitutional obligations 416 to facilitate public involvement in its legislative and other processes, and in its committees, and

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407 See AJ van der Walt ‘Retreating from the *FNB* Arbitrariness Test Already?’ (supra) at 75-89.

408 *FNB* (supra) at para 100.

409 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC).

410 *Richtersveld Community & Others v Alexkor Ltd & Others* 2003 (6) BCLR 583 (SCA). See, in particular, the Land Claims Court judgment *Richtersveld Community v Alexkor Ltd* 2001 (3) SA 1293 (LCC).

411 See Mureinik ‘A Bridge to where?’ (supra) at 32.

412 *FNB* (supra) at para 100.

413 2006 (1) SA 474 (SCA), 2006 (4) BCLR 462 (SCA)('King').

414 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC)('Doctors for Life').

415 *Matatiele* (supra).

416 FC s 59(1).
to conduct its business in an open manner. The absence of thorough compliance with these obligations, it was held, renders legislative action and legislation ensuing from it null and void. 417 *African Christian Democratic Party v The Electoral Commission & Others* can also be described as an instance of guarding the rudiments of popular democracy — in this instance, however, not by strictly enforcing procedural requirements, but by relaxing them (through purposive interpretation) in order to ‘promote enfranchisement rather than disenfranchisement and participation [in] rather than exclusion’ from municipal elections. 418

**(bb) The Constitution as memory and promise: memorial constitutionalism**

A constitution both *narrates* and *authors* a nation's history. A constitution as *memory* 419 and *promise* memorialises the past, but is also a monument triumphantly shedding the shackles of what went before, and setting the nation free to take responsibility for the future. Memorial constitutionalism, like justificatory constitutionalism, is *transitional constitutionalism*, and in particular then the *transitional constitutionalism of memory*, in a South Africa (still) coming to terms with its notorious past, but eventually also a constitutionalism of *promise* along the way of (still) coming to grips with the future. The 'still' in brackets suggests that the transition cannot be likened to a non-recurrent crossing of a bridge, from a culture of authority to a culture of justification, for instance, and this means that, in vital respects, memorial constitutionalism comes closer to transformative than to justificatory constitutionalism — as will appear from the discussion below. 420

Memorial constitutionalism as interpretive leitmotiv calls attention to and affirms the power of the unspectacular, non-monumental Constitution as vital (co-)determinant of constitutional democracy in the South Africa of memory and promise. The memorial Constitution does not replace the monumental Constitution, but co-exists with it. The image of the Constitution as monument and memorial emerged from legal scholars’ engagement with the work of the South African philosopher, Johan Snyman, on the politics of memory.421 Memorial constitutionalism kindles the hope that duly and simultaneously acknowledged, the co-existence of the Constitution's monumental and memorial modes of being — which, at a glance, may seem to be at odds — will be mutually inclusive, constructive and invigorating.

417 The Supreme Court of Appeal in *King* (supra) could of course not make a declaration of invalidity because adjudication of the National Assembly's fulfilment of this obligation is, in terms of FC s 167(4)(e), within the exclusive jurisdiction of the Constitutional Court.


419 For an exploration of the 'constitution as memory metaphor', see M Bishop 'Transforming Memory Transforming' in W le Roux & K van Marle (eds) *Law, Memory and the Legacy of Apartheid: Ten Years after AZAPO v President of South Africa* (2007) 33.

420 See § 32.3(c)(iv) infra.
Monuments and memorials have memory in common, but exercise it in distinct ways: a monument celebrates; a memorial commemorates. The difference in the (potential) meaning(s) of the two may be subtle, and some dictionaries may even indicate that 'celebrate' and 'commemorate' are synonyms. However, according to memorial constitutionalists they are not really or, at least, not exactly synonymous. Heroes and achievements can be celebrated or lionised. The same does not apply to anti-heroes, failures and blunders: they may be remembered, but they can hardly be celebrated. 'Commemorate' is a feasible synonym for 'remember', while 'celebrate' is an exultant or jubilant mode of remembering. The closeness in meaning of 'celebrate' and 'commemorate' need not be lamented, however. On the contrary, their actual connotations allows for their co-existence. The German Denkmal and Mahnmal capture the same tension. A Denkmal can celebrate (and may even commemorate), but a Mahnmal inevitably also warns (and may even castigate).

Monuments and memorials are aesthetic creations, and memorial constitutionalism contends that a constitution may, with interpretive consequences, be thought of as such a creation too. Memorial constitutionalism as both transitional and aesthetic constitutionalism manifests what Wessel le Roux refers to as 'the aesthetic turn in post-apartheid constitutional rights discourse':

\[ T \]he aesthetic turn in post-apartheid constitutionalism could be interpreted as a direct response to the need for a non-scientific and non-formalised style of public reasoning. That the rejection of science as a model of constitutional law should have resulted in a turn towards art (traditionally regarded as the direct opposite of science) is not at all surprising.\(^{422}\)

The Final Constitution as product of intense constitution-making deliberations over a period of more than three years can, its plain language notwithstanding, hardly be described as 'a modest text'. Its predecessor, the Interim Constitution, was not such a text either. Both constitutions are monumental 'linguistic data' \(^{423}\) and it is possible to 'tour their provisions', awestruck by how they evince a diverse and divergent South African nation's most extraordinary, peaceful transition to a non-racial democracy after more than three centuries of oppressive racial and racist aristocracy. The unprecedented Postamble to the Interim Constitution verbalized this transition in monumental language \(^{424}\) and was then echoed (with interpretive implications) by the Preamble to the Final Constitution. \(^{425}\) The monumental

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\(^{422}\) W le Roux 'The Aesthetic Turn in the Post-apartheid Constitutional Rights Discourse' 2005(1) Tydskrif vir die Suid-Afrikaanse Reg 101, 107.

\(^{423}\) See § 32.1(d) supra (Constitution as linguistic datum.)

\(^{424}\) See § 32.3(c)(iii) supra.

\(^{425}\) See § 32.4(c)(ii)(aa) infra.
flare of the Final Constitution furthermore manifests in its affluent enactment of operational democratic and constitutional values meant to help ensure the continued existence of constitutional democracy in South Africa. 426

Some monumental constitutional judgments have also been handed down by the Constitutional Court, the Constitution's own most significant new creature. Foremost among these decisions was the epoch-making S v Makwanyane & Another 427 in which the each of the 11 judges handed down a separate judgment, but all unanimously declared capital punishment unconstitutional. 428 These judgments were remarkably imbued with value statements dealing not only with the rudiments of human rights as enshrined in South Africa's first Bill of Rights, but also with global human rights standards. 429 A number of other remarkable judgments too have, on the superior strength of the nation's monument to its new-found reconciliation, given short shrift to the remnants of long-cherished, undemocratic preconceptions and prejudices, such as denying accused persons access to police dockets, 430 reverse onuses in criminal proceedings, 431 an obligation to answer incriminating questions during liquidation proceedings, 432 civil imprisonment, 433 stereotyped gender roles 434

426 See § 32.4(c)(i) infra. FC s 1 decrees and depicts the (new) polity as 'one sovereign, democratic state', and then continues to locate human dignity, equality and freedom (among others) at its foundation. § 32.4(c)(i)(bb) infra. FC s 7 delineates the features and functions of the Bill of Rights (§ 32.4(c)(i)(cc) infra), while FC s 36 prescribes the value-sensitive manner in which constitutional rights may be limited (§ 32.4(c)(i)(ee) infra). Section 39, with similar sensitivity, marks the way to interpreting these rights (§ 32.4(c)(i)(ff) infra). Chapter 3 verbalises the high values of co-operative government (§ 32.4(c)(i)(gg) infra) and Chapter 10 those values that ensure proper public administration (§ 32.4(c)(i)(hh) infra).

427 S v Makwanyane & Another 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC) (‘Makwanyane’).

428 For further discussion of this case, see § 32.3(e)(iv) infra.

429 For a discussion of the monumental moments of Makwanyane, see 32.3(e)(iv) infra.

430 See Shabalala v Attorney-General, Transvaal 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC) (‘Shabalala’).

431 See S v Zuma & Others 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) (‘Zuma’).

432 See Ferreira v Levin; Vryenhoek v Powell 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) (‘Ferreira’).


434 See Harksen v Lane NO 1998 (1) SA 300 (CC), 1997 11 1489 (CC)(Sachs J). See also AJ van der Walt & H Botha ‘Coming to Grips with the new Constitutional Order: Critical Comments on Harksen v Lane’ (1993) 13 SA Public Law 16, 33.
and parental roles, as well as anti-gay and anti-lesbian bigotry. On the strength of the entrenchment of rights of access to certain commodities and services mentioned in FC ss 26 and 27, the South African Constitutional Court has also, with monumental flair, flexed its judicial muscle, making it clear to organs of state that their failure to provide these basic services will result in more than just a judicial slap on the wrist.

A democrat and constitutionalist, recalling the oppression of the past, can hardly be cynical about the monumental achievements of South Africa’s two supreme constitutions since 1994. But he or she also dare not become complacent about these achievements. One of the key tenets of memorial constitutionalism therefore is that while the Constitution is indisputably the supreme law of the Republic of South Africa, it is not (also) an overarching, all-encompassing, super law. The restrained Constitution is the Constitution as memorial — a written law-text that does not profess to constitute the moral high ground of justice all by itself; instead it reminds the nation of their pledge (and provides them with appropriate legal means) to achieve social justice. The human obligation to do justice cannot, however, ultimately be assigned to any law-text, not even the supreme Constitution, and memorial constitutionalism as interpretive leitmotiv is a reminder, first, that constitutional minimalism and constitutional absolutism are equally unacceptable, and, second, that, on balance and in the long run, restrained constitutionalism is the most propitious mode of deference to constitutional supremacy.

As Mahnmal constitutionalism, memorial constitutionalism has resounded, in post-apartheid South Africa, the ’Nicht wieder!’ (‘Never again!’) that inspired constitutionalism in a post-Holocaust Germany too. On the strength of Mahnmal constitutionalism, memorial constitutionalism has resounded, in post-apartheid South Africa, the ‘Nicht wieder!’ (‘Never again!’) that inspired constitutionalism in a post-Holocaust Germany too.  

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435 See Fraser v Children’s Court, Pretoria North & Others, 1997 (2) SA 261 (CC), 1997 (6) BCLR (CC). But see President of the Republic of South Africa & Another v Hugo 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC).


437 See Government of the Republic of South Africa & Others v Grootboom & Others 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)(‘Grootboom’); Treatment Action Campaign & Others v Minister of Health & Others (1) 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC)(‘TAC’). For a fuller discussion of these cases, see § 32.3(c)(iv) infra.

438 According to FC s 2: ‘law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled’.

439 Whether minimalist constitutionalism (as opposed to constitutional minimalism) is acceptable, is a different question raised by, amongst others Iain Currie. See I Currie ‘Judicious Avoidance’ (1999) 15 South African Journal on Human Rights 138. The concept of ‘minimalist constitutionalism’ will briefly be looked at in § 32.5(b)(iii)(bb) infra.

constitutionalism, human dignity as a value has gained an upper hand in our constitutional project in general, and in our constitutional equality jurisprudence in particular. The 'never again!' motif, for instance, underlies groundbreaking judgments that interrogate issues of identity and difference. A resoluteness not to repeat the injustices of the past has resulted in the affirmation of the status and dignity of several vulnerable groups and categories of persons who, under the culture of apartheid authority, had been marginalized and stigmatized for their non-compliance with 'mainstream' morality and its preconceptions about how societal life is best organized. Emblematic of the Court's affirmative endeavours is the confidence and forthrightness with which, unperturbed by the conventional public-private divide, it has addressed deficiencies in laws regulating intimate relationships. 441

*Minister of Home Affairs & Another v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others*, the Constitutional Court judgment in which the statutory and common-law exclusion of same-sex life partnerships from the ambit of 'marriage' was held to be unconstitutional, constitutes a high-water mark in the evolution of constitutional jurisprudence on issues of identity and difference. Sachs J, handing down the majority judgment, erected the following verbal memorial to 'the right to be different':

> The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation. 442

Commenting on religious objections to gay marriages, the Court thought that

> [t]he hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and life styles in a reasonable and fair manner. 443

In *MEC for Education: KwaZulu Natal & Others v Pillay & Others*, Langa CJ emphasized that our constitutional project does not only affirm diversity, but actively promotes and celebrates it:

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441 Landmark judgments that come to mind in this regard are *National Coalition 2000* (Court read words into a statutory provision to extend immigration benefits enjoyed by 'spouses' of South African nationals to same sex life-partners); *Satchwell v President of the Republic of South Africa & Another* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC)(Words were read into a statutory provision conferring financial benefits on a judge's 'surviving spouse' so as to extend such benefits to a same sex life-partner); *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC)('Daniels')('Surviving 'spouse' reaping benefits from a legislative provision for maintenance was held to include a partner in a Muslim marriage).

442 2006 (3) BCLR 355 (CC), 2006 (1) SA 524 (CC)('Fourie').

443 *Fourie* (supra) at para 95.
[O]ur Constitution does not tolerate diversity as a necessary evil, but affirms it as one of the primary treasures of our nation... [N]either the Equality Act nor the Constitution require (sic) identical treatment. They require equal concern and equal respect.

The Chief Justice's assertions amount to proclaiming, with some monumental flair, a concern stemming from memorial constitutionalism. Thus, the Constitution as monument and the Constitution as memorial can profitably co-exist if the Constitution as monument is not allowed to overpower the Constitution as memorial, and the Constitution as memorial does not enervate the Constitution as monument.

The restrained Constitution as memorial, infused with moral values such as ubuntu, has vindicated 'very ordinary citizens' in low profile (non-Constitutional Court) cases, upholding and/or restoring their dignity in an unspectacular but most powerful way. Thus in Du Plooy v Minister of Correctional Services & Others the Pretoria High Court, exploring the memorial potential of the Constitution to protect the 'underdog', ordered the release of a prisoner sentenced to 15 years' imprisonment for armed robbery, when within the first year of his imprisonment it came to light that his chronic myeloid leukaemia was developing into acute leukaemia. He was terminally ill and his life expectancy was drastically shortened. He also needed palliative care which was not available in prison. Finding the prison authorities' reasons for not wanting to release the applicant irrational and unreasonable, Patel J remarked as follows:

The applicant is critically ill. He is dying. Imprisonment is too onerous for him by reason of his rapidly deteriorating state of health to continue remaining in jail and to be treated at a prison hospital. What he is in need of is humanness, empathy and compassion. These are values inherently embodied in Ubuntu.

In Scott-Crossley & Others v National Commissioner of South African Police Service & Others the applicants, charged with murder, sought to stay the burial of the remains of a deceased who they allegedly assaulted and whose body they then threw to a pride of white lions in an encampment. What remained of the deceased for the funeral were a skull, broken bones and a finger. The applicants claimed that the funeral had to be postponed because they needed a pathologist to examine those remains in order to assess forensic evidence eventually to be adduced at the criminal trial. Members of the deceased's extended family opposed the application, claiming that in view of certain ritual preparations that had already been made, their

444 Ibid at para 92.


446 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC)('Pillay') at 103.

447 [2004] 3 All SA 613 (T). For a discussion of this judgment as an instance of memorial constitutionalism, see L. du Plessis 'Die Grondwet as Gedenkteken en die Werkdadigheid van onopvallende, grondwetlike Kragte' (2005) 70 Koers 535.

448 Du Plooy v Minister of Correctional Services & Others [2004] 3 All SA 613 (T)('Du Plooy') at para 29.

449 Ibid.
custom and belief impelled the burial of the deceased at the precise date, time and place that had been determined for this purpose before the application was brought. Looking at the situation clinically, the Court had to weigh the religious and cultural rights and beliefs of the family against the applicants' right to a fair trial. Patel J found that, in the circumstances of the case, both the deceased's and his relatives' right to human dignity trumped the applicants' right to a fair trial, and he advanced ubuntu as the raison-d'être for the refusal of the application, explaining that:

Ubuntu embraces humaneness, group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, humanity, morality and conciliation.

The Court's judgment sought to reclaim humanity for the deceased (posthumously, as it were) and for his extended family, in spite of (and beyond) the gruesome events which reduced him, as a human being, to a plastic bagful of bones, and bereft his family in a most barbaric way. The Court did this by invoking their right to human dignity — infused with ubuntu — in a powerful yet unspectacular (memorial) manner. The applicants' right to a fair trial was taken seriously, but not treated as an entitlement of monumental proportions overpowering the deceased's and the family's rights from beginning to end.

(iv) Transformative constitutionalism

Some critical legal scholars have questioned justificatory constitutionalism's use of the bridge metaphor to depict transition as a one-off, linear progression from 'the old dispensation' to 'the new', and thus from a culture of authority to a culture of justification. André van der Walt contends for a metaphor perceiving law, as a system of tension, to be a bridge which links a concept of reality to an imagined alternative:

The bridge metaphor . . . allows for another interpretation where the bridge is not simply an instrument for getting out of one place and into another, but an edifice that is inherently related to the abyss which it spans. Here, the focus is not on the two spaces on either side of the abyss, but on the abyss itself — the bridge is functionally and inherently linked to and obtains its significance from the abyss beneath it, so that the bridge is not a temporary instrument for a single crossing, one way, but allows and invites multiple crossings, in both directions, since there is no inherent value attached to being one side of the bridge rather than the other. In this alternative interpretation of the bridge metaphor the danger is to stay on one side, while the bridge allows us to connect one side with the other.

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450 As intimated previously, it was actually not really necessary for the court to make a finding in this regard because it had already found against the applicants on the issue of urgency. However, Patel J did express a view on the constitutional issue.

451 Ibid at para 18. As pointed out previously, the word ‘ubuntu’ appeared in the Postamble to South Africa’s Interim Constitution. It was used there to buttress the contention that a new South Africa required a commitment to national reconciliation and a desire — through mutual understanding – to overcome the atrocities and the divisions of the past. See § 32.3(c)(iii) supra.

452 See, for example, Du Plooy (supra) at paras 11-13 for the court’s consideration of this right and a discussion of the possibilities for realising it for purposes of the criminal trial.
Wessel le Roux adds that it is not the bridge itself which is significant, but the act of bridging, of linking the past and the future, reality and imagination, in order to create new ideas in the present. 454 Memorial constitutionalism as transitional constitutionalism of memory and promise makes very much the same point: South Africa is still coming to terms with its notorious past along the way of still getting to grips with the future. 455 The past cannot and should not be left behind — there is in other words no one-off crossing of the bridge — and the promise of the future gains much of significance from engagement with the past. 456

Michael Bishop calls the bridge that Van der Walt and Le Roux metaphorically envision, 'a transformative bridge', and explains the significance of this bridge as follows:

[V]an der Walt and le Roux offer a space in which dialogue and transformation are truly possible, in which new ways of being are constantly created, accepted and rejected and in which change is unpredictable and constant. I would call this a transformative bridge because it envisions constant change and re-evaluation without end, rather than a move from one point to another . . . [T]he transitional bridge is a path, while the transformative bridge is a space. 457

What emerges from the discussion so far is that transformative constitutionalism has the potential to affect constitutional (and, more generally, legal) interpretation profoundly and comprehensively, steering, as leitmotiv, both the interpretive mindset (also read: theoretical positions) and the interpretive style (also read: modus operandi) of especially judicial interpreters of the Constitution in an irrevocably new direction. 458 South Africa's Constitution is furthermore thoroughly transformative in character and, as was pointed out earlier, in FC s 7(2) it invites (and arguably compels) optimum realization of the rights entrenched in the Bill of


455 See § 32.3(c)(iii)(bb) supra.

456 See Van der Walt 'Dancing with Codes' (supra) at 296:

The linear interpretation of the bridge metaphor of transformation unnecessarily restricts both the past and the future of constitutional democracy in the post-1994 era. The first fallacy is to think that we can rid ourselves of the legacy of the past as easily as crossing a bridge, leaving our accepted version of the past (and the possibility of other versions) behind us decisively. The second fallacy is to think that we should be eager to get to the other side of the bridge and get the whole thing behind us, leaving no room for imagining alternative futures.

457 M Bishop 'Transforming Memory Transforming' in W le Roux & K van Marle (eds) Law, Memory and the Legacy of Apartheid: Ten Years after AZAPO v President of South Africa (2007) 37.

Rights. According to Theunis Roux there are ‘two ways of going about the business of transformation’:

first, by prohibiting past practices that are deemed to conflict with society’s new conception of justice, and, second, by specifying new governing norms as a guide to future conduct.

Karl Klare, in an article on transformative constitutionalism in which he pays tribute to Etienne Mureinik, the principal proponent of justificatory constitutionalism, typifies the South African Constitution as ‘post-liberal’ because it simultaneously entrenches the conventional hallmarks of liberal democracy and the basic tenets of (and normative preconditions to) an all-out transformation of the South African society — both of which are facets of what Roux would refer to as South African ‘society’s new conception of justice’. According to Klare,

[...]transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase ‘reform,’ but something short of or different from ‘revolution’ in any traditional sense of the word. In the background is the idea of a highly egalitarian, caring, multicultural community, governed through participatory, democratic processes in both the polity and large portions of what we now call the ‘private sphere.’

Distinctive traits of the transformative South African Constitution are said to be (among others) ‘the attainment of substantive equality, the realisation of social justice, the infusion of the private sphere with human rights standards and the cultivation of a culture of justification in public law interactions’. Pius Langa, South Africa’s Chief Justice, in an extra-curial writing, conceives of such traits as challenges posed by the transformative Constitution, namely to procure equal access to justice for all, to educate law students who will be able to meet the demands of the kind of legal and social order envisaged in the Constitution, to rid the legal culture of its formalism and to create a climate for and, indeed, encourage national reconciliation. The transformative nature of the Constitution has far-reaching implications for its interpretation and necessitates a decisive makeover of legal culture, especially as it manifests in the conventional manners (and assumptions) of adjudicative reasoning pertinent to the interpretation and implementation of enacted law. Klare writes in this regard, with reference to constitutional interpretation, as follows:

The Constitution invites a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals. By implication, new conceptions of judicial role and responsibility are contemplated. Judicial mindset and


460 Klare (supra) at 153. See also M Pieterse (supra) at 163-164.

461 Klare (supra) at 150.

462 Pieterse (supra) 161. See also Langa (supra) at 353-354.

463 See Langa (supra) at 354-359.
methodology are part of the law, and therefore they must be examined and revised so as to promote equality, a culture of democracy and transparent governance. 464

According to Klare, the drafters of the Constitution, having dramatically reworked substantive constitutional foundations and assumptions, could not have intended the new Constitution to be interpreted with reliance on conventional legalist methods of interpretation, thereby having its transformative qualities restrained by 'the intellectual instincts and habits of mind of the traditional common or Roman-Dutch lawyer trained and professionally socialized during the apartheid era'. 465 Transformative constitutionalism thus inspires a preference for non-formalist, non-legalist and non-literalist approaches to constitutional interpretation 466 and, very importantly, it explodes the myth that a-political or non-political legal interpretation — and constitutional interpretation, in particular — is achievable.

The Constitutional Court has, however, tended to rely on a rather conventional formalist, legalist and literalist approach to constitutional interpretation. 467 Whether their conservative approach dashes Klare's hopes that transformative constitutionalism would go together with an innovative mode of constitutional interpretation, turns on whether the notion of a 'transformative constitutionalism' amounts to nothing more than, as Theunis Roux has it, 'a distinction without a difference'. 468

The Constitutional Court judgments most directly and conspicuously inspired by transformative constitutionalism as an interpretive leitmotiv are probably those dealing with the state's obligation to implement socio-economic rights. Government of the Republic of South Africa & Others v Grootboom & Others 469 heralded a wholehearted judicial acceptance of the justiciability of the socio-economic entitlements enshrined in the Bill of Rights (in ss 26 and 27 in particular). 470 It furthermore emphasized competent courts' responsibility to enforce these entitlements by carefully crafting appropriate 'orders with teeth' to redress the disinclination and/or incapacity of government authorities to procure access to the commodities to which the said entitlements pertain. Grootboom blazed the trail for the bold and far-reaching declaratory and mandatory orders in Minister of Health &

464 Klare (supra) at 156.

465 Klare (supra) at 156.

466 Whether this last proposition always holds will be considered more fully in § 32.3(d) infra.

467 See § 32.5(d)(iii)(bb) infra.

468 For a critique of Klare's notion of transformative constitutionalism, see T Roux 'Transformative Constitutionalism: A Distinction without a Difference (Unpublished manuscript on file with author, paper given at Conference on Transformative Constitution: Stellenbosch University, 8 September 2008.)

469 Grootboom (supra).

470 See Grootboom (supra) at para 20. See also § 32.4(c)(i)(cc) infra.
**Others v Treatment Action Campaign & Others**, 471 compelling fulfilment of the state's constitutional mandate (and obligation) to supply and administer Nevirapine to HIV-positive women and their babies.

**(v) Theoretical accounts and assessments of constitutional adjudication**

According to Jacques de Ville, 472 writing in 2000 with reference to the body of constitutional jurisprudence that had accumulated until then, the general approach of the Constitutional Court (and other courts) to constitutional interpretation, at the time, was still very much 'traditionally hermeneutic' (read: 'conventionally legalist'). 473 De Ville took courage, however, from seven developments in the Constitutional Court's jurisprudence on constitutional interpretation. First, 'certain judges have explicitly elaborated on the constitutional theory that informs their interpretation of constitutional provisions'. Second, 'the impact of the governmental structures on individuals and communities is taken account of'. Third, 'the interests of marginalised groups in society play a crucial role in determining the meaning of constitutional provisions'. Fourth, 'the need to attain substantive equality and eradicate deeply entrenched patterns of inequality infuses the interpretation that is given to various constitutional provisions'. Fifth, there is a willingness 'to take the perspective of those marginalised by the law in deciding whether legislative or executive action is unconstitutional'. Sixth, 'the Court undertakes interpretation (and the determination of values) with the realities of South Africa's social, economic and political circumstances and the specific context which is under scrutiny in mind'. And finally, 'the importance of the development of constitutional principles in the light of which cases should be decided is acknowledged'. 474

De Ville's impressions, even if accurate, did not add up to a theoretically rigorous account and assessment of adjudicative performance in constitutional matters, since criteria to systematically test — and verify or falsify — his 'findings' were missing from his description. However, De Ville's tacit assumption that there are affinities between constitutional interpretation, broadly understood, and (tendencies in) outcomes of constitutional adjudication, posits a point of departure for a theoretical discourse that is indeed not absent from the academic literature on constitutionalism in South Africa.

An 'international group of scholars . . . studying the role of courts in new democracies' has, for instance, asked why the Land Claims Court, a 'pro-poor' institution established under the Restitution of Land Rights Act 475 to oversee the reversal of 80 years of state-orchestrated land dispossession, during the first ten

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471 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) (‘TAC’).


473 See § 32.3(c)(iv) supra.

474 De Ville *Constitutional and Statutory Interpretation* (supra) at 41-45 (Provides elaborate reference in footnotes to sources and examples supporting his claims.)

years of its existence, played no really meaningful role in the land restitution process and indeed contributed to a new version of land dispossession.\textsuperscript{476} In other words, the jurisprudence of the ‘pro-poor court’ has yielded ‘anti-poor outcomes’. A number of judgments of the Land Claims Court were analyzed, on the assumption that the capacity of courts to act as agents of social transformation is influenced by institutional indicators, indicators of the voice of poor groups, resource indicators and indicators of access to justice barriers. The group concluded that the influence of legal formalism in the professional legal culture of South Africa adequately explained the anti-poor outcomes in most of the cases studied. In a climate of formalism, social transformation legislation, enacted as detailed, prescriptive rules, is more likely to be successful than legislation couched in general, discretion-conferring language.

Theunis Roux has offered an account and assessment of the adjudicative performance of the Constitutional Court, not based on a fully-fledged theory of constitutional adjudication (yet), but with all the makings of a solid and rigorous theoretical endeavour nonetheless.\textsuperscript{477} His point is that by striking a judicious balance between principle and pragmatism in its judgments, the South African Constitutional Court has secured for itself a position of relative institutional security, even though it is lacking in public support. The court has moreover built up an enviable reputation for its ‘legitimacy in the legal sense’, that is the technical quality of its jurisprudence. He explains this position by analyzing some Constitutional Court judgements with reference to the grid-like (rather than linear) relationship between legal legitimacy, public support and institutional security. Theoretical analyses and explanations of this sort are particularly helpful in showing how attitudinal and strategic patterns in adjudicators’ approach to various kinds of issues manifest in interpretive outcomes, and feed into ‘more conventional’ theoretical reflection on constitutional interpretation as ‘working with the Constitution-in-writing’. The assumption that legal and, in particular, constitutional language has the inherent capacity to constrain and rein in the proliferation of meaning has become tenuous, in the light of contemporary theoretical accounts of the power of language to generate meaning. This has appeared from the demise of literalism as described in this chapter so far\textsuperscript{478} and as will further be elaborated on under the next heading.\textsuperscript{479} One of the principal merits of Roux’s work is that it accounts for non-linguistic restraints on the proliferation of meaning in constitutional interpretation and, in particular, for socio-political restraints.\textsuperscript{480} On the strength and limits of this aspect of his work — and on a need for further reflection — Roux has the following to say:


\textsuperscript{478}  See, for example, §§ 32.3(b)(i), (ii) and (iv) supra.

\textsuperscript{479}  See § 32.3(d) infra.

\textsuperscript{480}  See Roux ‘Principle and Pragmatism’ (supra) at Part 3.
Political science accounts of constitutional adjudication in new democracies have much to teach legal theorists. The limitation of such accounts, however, is that they lack any real conception of legal legitimacy, and consequently have little appreciation for the restraining influence of legal doctrine on the behaviour of constitutional courts. The problem with currently available theories of judicial review, on the other hand, is that none of them is directed at constitutional courts in new democracies. What is required, therefore, is a new account, drawing on some of the political science insights, but expressed in terms of acceptable legal theory.481

Elsewhere I explained that interpretations of enacted law are justified in the course of complex processes of reasoning constituting and sustained by a matrix of interpretive legitimacy.482 This matrix is enriched and extended by interpretive argumentation. (It may of course also be impoverished when such argumentation is lacking or of a poor quality.) The advent of constitutional democracy and constitutional interpretation in South Africa has enriched this matrix to such an extent that interpretive reasoning and outcomes that would previously have been unacceptable are now accepted as legitimate, even if they are sometimes energetically contested. The notion of a matrix of interpretive legitimacy is on all fours with Roux's theoretical explanations for the outcomes of constitutional interpretation. It is important to note that legal doctrine — and not just legal and constitutional language — feeds into the matrix too, and has a restraining effect on interpretive outcomes, and that politics in general can have a similar effect. In Roux's account, politics, conventionally experienced as an interpretive predicament, especially in statutory interpretation,483 has become a significant ally in enhancing our understanding of why courts — and the Constitutional Court in particular — decide controversial cases in a certain manner. A monumental judgment like S v Makwanyane & Another, going against public opinion and therefore lacking public support was, for instance, politically possible (without compromising the institutional security of the Constitutional Court), because the power elite within the ruling party, elected with a considerable majority in South Africa's first democratic election in 1994, supported the abolition of the death penalty.484 Subsequently, in for instance Minister of Home Affairs & Another v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others, handed down ten years after Makwanyane, the Constitutional Court, according to Roux,485 showed sensitivity to public attitudes not only in the way it justified its decision in the latter case, but also in the remedy it gave. On the other hand, in Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amicus Curiae), Roux contends, it was politically feasible for the Constitutional Court to go quite boldly against the will of the ruling elite (also without putting its institutional security at risk) because, in the circumstances of that case, this option enjoyed considerable public support.486

481 Ibid.


483 See § 32.3(b)(iii) supra.

484 For further reference to this case and a discussion of aspects of it, see § 32.3(e)(iv) infra.

485 Roux 'Principle and Pragmatism' (supra).
In short, then, constitutional interpretation as 'working with the Constitution as written text' makes no sense in isolation from a theoretical understanding of how adjudicative performance and interpretive outcomes are shaped by factors and forces not inherent in the written text itself, but present and powerfully operative in the social and political context in which the adjudicative interpreter operates. These factors and forces to a large extent determine a constitutional interpreter's theoretical position which, in its turn, may be reflected in the interpretive approach he or she chooses and in a ranking of interpretive preferences.487

(d) Contemporary developments: linguistic-turn thinking and the new textualism

Meaning is not discovered in (and retrieved from) a construable text, but is made in dealing with the text.488 In South Africa the philosophical thinking sustaining this turn — sometimes also referred to as 'reader response theory' — began to take hold only in apartheid's waning moments. Linguistic-turn thinking is associated with postmodernism, post-structuralism and deconstruction, all philosophical appellations (or vogue words, some would say) whose scope, contents and point are contested. Such thinking is controversial among jurists in particular, because it rigorously challenges confidence in the stabilizing ability of language to 'carry' or 'produce' perspicuous, clear and unambiguous meanings, and it saddles the legal interpreter with the ultimate responsibility to work with language in order to attribute or impute meaning to construable law — and this can make for dilemmatic choices.489 The linguistic-turn discourse moreover focuses on the destabilizing properties of language as an all pervasive, disruptive force. Such an orientation does not sit very comfortably with jurists who count on readily construable law to procure certainty and stability, and who at any rate bemoan the esotericism of a discourse which claims the opposite and is regarded by some as divorced from reality. However, linguistic-turn thinking unleashes explanatory potential which, harnessed with due contemplation, offers the promise of an enhanced understanding of vexed issues of constitutional interpretation in a still youthful democracy. Therefore, though this new position has remained a contested minority position, it has, in South African constitutional literature, asserted a presence substantial enough to belie its modest following.490

486 2006 (1) BCLR 1 (CC), 2006 (2) SA 311 (CC). See also § 32.3(c)(iv) supra.


488 See § 32.3(b)(ii) supra.

489 Du Plessis Re-Interpretation of Statutes (supra) at xv.

According to Jacques Derrida, the openness of language is an incidence of a free interplay of signifiers.\textsuperscript{491} Linguistic \textit{signifiers} do not signify and give meaning to things, events, concepts, phenomena \textit{et cetera} (in other words, \textit{signifieds}) 'out there'. Derrida rejects a \textit{metaphysics of presence} and with that also the distinction between a signifier and the signified. Signifieds do not exist — they are not \textit{present}. Meaning results from a complex to-and-fro movement, an action and reaction, of non-constant, non-lasting and non-metaphysical \textit{signifiers} which all contain traces of one another. The one gives meaning to the other, but then only incompletely and provisionally so. Meaning is never, at any given point in time, a fixed and stable presence. The interplay of signifiers constitutes it over and over again, and diverts and shifts it as often. And very important: because meaning depends on the breathtaking yet incomplete interplay of signifiers, the meaning of X is always a meaning with reference to Y and Z and ABC \textit{and therefore meaning-in-context}.

The possibilities for meaning-in-context are boundless. Language is the hyper-complex, open system that makes such a proliferation of meaning inevitable. Meaning is relativized; but language \textit{as generator of meaning} (and only in this capacity) is not. But note: meaning is \textit{open} and not \textit{arbitrary}. It has a context. Moreover, language as generator of meaning is hyper-complex, but it is still a \textit{system} and, most importantly, it is very powerful.\textsuperscript{492} In legal interpretation, for instance, preference for one meaning to the exclusion of others may well be described as an act of violence.\textsuperscript{493} It is important nonetheless to emphasize that the legal interpreter cannot escape the responsibility to decide on a meaning lest a failure 'to call a halt to the infinite play of the applicable text'\textsuperscript{494} is seen as licensing a counterproductive attitude of 'anything goes'.\textsuperscript{495} The responsibility to decide is always momentous and may even be abysmal. It can never be 'doing the obvious' because a decision-maker must cross the abyss of indecision in order to decide.\textsuperscript{496}

\textit{Meaning (in its openness and complexity) always presents itself as (a) text.} This is an insight as significant as the insight that a text does not bear or encode or transfer meaning. The conventional meanings of 'text'\textsuperscript{497} all somehow indicate that a text is an entity with an existence of its own. A text can, for instance, be a \textit{thematic version} of some kind with a message, tantamount to its meaning, encoded in it. This idea


\textsuperscript{492} See CM Yablon 'Forms' in D Cornell, M Rosenfeld & D Gray Carlson (eds) \textit{Deconstruction and the Possibility of Justice} (1992) 258-262.

\textsuperscript{493} See RM Cover 'Violence and the Word' (1986) 95 \textit{Yale Law Journal} 1601.

\textsuperscript{494} Davis 'A Challenge to the "Business as Usual" Approach' (supra) at 711.

\textsuperscript{495} Cilliers (supra) at 115.


\textsuperscript{497} Du Plessis \textit{Re-Interpretation of Statutes} (supra) at 5-7 for a summary of these meanings.
probably underpins the use of the word 'text' in the Final Constitution. FC s 240, for instance, provides that 'in the event of an inconsistency between different texts of the Constitution, the English text prevails'. 'Text' here refers to a rendering of the Constitution in a specific language, in other words, a version of the Constitution. The Interim Constitution required the 'new constitutional text' passed by the Constitutional Assembly to comply with the Constitutional Principles contained in Schedule 4 to (and to be adopted in accordance with Chapter 5 of) that Constitution.498 and to be certified by the Constitutional Court.499 'Text' here signified 'the (written) version of the Constitution agreed on' — the Final Constitution-in-writing, in other words.500

Conventionally, a text (preferably, but not inevitably, a written piece as opposed to the spoken word) is also thought of as being textured, in other words, coherent or structured with a 'logic' of its own. The Latin texere, from which 'text' derives, actually means 'to weave, braid, join or piece together in an artistic manner'. The conventional text breathes a spirit of authenticity or originality — it is not a translation, an annotation, a commentary, marginal notes etc — and it wields authority. That is why 'text' is frequently used in connection with religious writings or passages from them or as synonym for 'textbook' which, in its turn, denotes a standard and thereby an authoritative exposition of a topic or subject. Finally, the conventional text is thought to be traceable to the creative efforts of a demonstrable author expressing his or her thoughts in and through the medium of the text.

In linguistic-turn thinking 'a book, poem, ad poster, television program, or anything else that appears to convey information' is a text: '[A]ll events, all phenomena, are texts.'501 A text is neither an entity nor a bearer of meaning. It also does not belong to its author and its meaning is by no means tantamount to the intention of the author. Derridathus claims:

There is nothing outside of the text [there is no outside text; il n'y a pas de hors-texte].502

'Text' and 'meaning' are intimately related. Whatever is intelligible and therefore interpretable is a text, but it does not necessarily follow that a text is an autonomous bearer of meaning even though it has most often intentionally been authored to convey meaning. An author of a text cannot control its meaning, for the text as signifier, in a complex interplay with other texts as signifiers and depending on the way it is read, incessantly generates or produces meaning. As linguistic signifier a text is also not (and cannot be) an autonomous entity built of language — even though language may be its life and soul. Since meaning is only possible in the

498 IC s 71(1).
499 IC s 71(2).
500 See § 32.1(d) supra.
to-and-fro play of signifiers, the latter are dependent on one another for meaning. Their traces are to be found in one another mutually and reciprocally.

This interweaving results in each ‘element’ — phoneme or grapheme — being constituted on the basis of the traces within it of other elements of the chain or system. This interweaving, this textile, is the text produced only in the transformation of another text.\(^{503}\)

A text itself is, in other words, just like each individual linguistic signifier that generates meaning, a compound\(^{504}\) signifier in interaction with other signifiers — a writing that refers reciprocally to other writings.\(^{505}\) This perception of a text has far-reaching implications for grasping what happens when jurists (and others) construe law-texts. Interpretation or construction means working with texts. Jacques de Ville argues this convincingly, contending that the use of linguistic aids in seeking to stabilize the meaning of a law-text (in order to 'understand' it) must fail, because the aids themselves are texts incessantly open to interpretation.\(^{506}\) Pierre de Vos further elaborates on the consequences of this view and takes a critical look at especially the Constitutional Court’s exposition, for interpretive purposes, of a 'grand narrative' of the recent history of South Africa's transition from apartheid to democracy and constitutionalism.\(^{507}\)

Linguistic-turn thinking has thus yielded the new textualism that was referred to earlier in this chapter, in passing, when textualism as a conventional approach to constitutional interpretation in the USA was described.\(^{508}\) Traditionally 'text' or 'textual', in discourses on legal interpretation, denotes a narrow and formalistic approach to interpretation which typically manifests in confinement of interpretive doings to an analysis of linguistic signifiers in a text-in-writing as they appear ‘on paper’. These signifiers are believed to bear a predefined meaning, derived from an authoritative source such as a dictionary, and they are trusted to be able to convey that meaning because as linguistic givens they are bearers or instruments of meaning.

As appears from the discussion so far 'text' or 'textual' in linguistic-turn discourse signifies just about the opposite. Texts are open, elastic, malleable. They do not have a metaphysical presence, but exist because of and dependent upon an interplay of signifying forces, the one lending meaning to the others partly by showing traces of and partly by distinguishing itself from the others. This new textualism encourages


\(^{504}\) In contradistinction to uncompounded signifiers such as words, *compound* signifiers such as texts are necessarily complex.

\(^{505}\) See M Rosenfeld ‘Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptation of the New Legal Formalism’ in Cornell, Rosenfeld & Carlson (supra) at 153.


\(^{508}\) See § 32.3(c)(ii)(A) supra.
jurists, working mainly and primarily but not exclusively with law-texts, to rethink what working with these texts demands and to get clarity about what a law-text is and how various kinds of law-texts are to be distinguished.

Legal interpretation is much more than just invoking recognized rules or canons of construction to determine the meaning of a contested provision. It also goes beyond subsuming facts under appropriate legal norms. It involves working actively with law-texts instead, and this vindicates theories of legal interpretation that understand the construction of enacted law, such as the Constitution or statutes, as a process of concretization or even the completion of legal norms. These are mainly the theories in the objectivism-delegation theory camp.

Friedrich Müller's strukturierende Rechtslehre ('structuring theory of law') is a nuanced version of objectivism endeavouring to give an accurate account of the 'realities' of day-to-day practices of adjudication by invoking post-positivistic, linguistic-turn thinking. The salient message of strukturierende Rechtslehre is that legal interpretation is working with texts of various kinds, in different manners and at different levels to bring legal norms to fulfilment. Müller himself explains the rudiments and aims of his theory as follows:

Since the mid-1960s, structuring legal theory has . . . developed a new, post-positivistic concept of legal theory according to which the legal norm (Rechtsnorm) has not already been written into legislation. Enactments are but norm-texts (Normtexte), that is formulations that precede legal norms, and they differ significantly from the eventual, 'actual' legal norms generated, constructed or completed for each successive concrete case in order to arrive at a judgment. In addition to this, the normative domain (Normbereich) of legislation constitutes the eventual legal norm. The legal norm is, in other words, a complex phenomenon composed of a norm-programme (Normprogramm) as well as a normative domain (Normbereich). 'Concretisation' no longer means that a general legal norm, found in a statute book, is made 'more concrete'. Realistically seen and reflected on, concretisation is the step by step construction of legal norms (Rechtsnormkonstruktion) for each individual case through which working elements within the text become ever 'more concrete'.

This emphasises the dynamic nature of the efforts of jurists, moving between norm and case. Realistically understood concretisation is a time-bound process involving:

- the text of the case as a narrative and the norm-texts in the codification (or statute book(s));
- the text of the norm-programme and that of the normative domain, and
- the text of the legal norm and that of the decision-norm (being the tenor of a judgment).


511 F Müller 'Basic Questions of Constitutional Concretisation' (supra) at 273.
As pointed out earlier, a judicial interpreter of enacted law (including the Final Constitution), faced with a plethora of linguistically possible meanings, cannot escape the responsibility to decide on one meaning (the best, in her or his judgment) befitting the case she or he is adjudicating. The case itself acts a check upon judicial licence. There is another check similar in purpose, but deriving from a different consideration, namely, democracy and, in particular, the horizontal division of powers in the state (or trias politica). The judicial interpreter of any enacted law (including the Constitution), partaking in the construction of a legal norm or norms for an individual case, is not an alternative or additional law-maker: she or he is under an obligation to work with and attach due weight to the specific law (possibly) applicable in a given situation, that is to say, the text as worded by the authorized author of the law. The wording of an enacted law-text bounds the judiciary (and actually all state authority) for trias politica purposes: some German authors speak of der Wortlaut als Grenze der Staatsgewalt ('the wording as limit to state power'). Amendment of the ipsissima verba of the text ('woordwysigende uitleg') is not precluded per se, but 'should be an exercise in circumspection and restraint with due deference to one of the cornerstones of constitutional democracy, namely the horizontal division of powers in the state'.

The Final Constitution and statutes as enacted law are made and intended (or meant) to be of effect and their provisions must therefore also be construed to be of effect: 'verba ita sunt intelligenda ut res magis valeat quam pereat' ['the words of an instrument are to be so construed that the subject-matter may rather be of force than come to naught']. In this sense the makers of the Final Constitution or a statute have an intention — an intention that what is enacted shall be of force and shall apply. Enacted law is, in other words, effect-directed. This is not just an effect-directedness in the abstract: a provision is also enacted for a reason, and in the case of a constitutional provision this reason may be either to preserve or to transform the legal status quo.

Its effect-directedness makes an enacted law-text — a constitution-in-writing or a statute-in-writing — very much like a piece of sheet music. It cannot be grasped sufficiently simply by reading it. Its 'execution' or 'performance' must also be experienced or at least imagined. The full effect of, for example, a constitutional

512 For a further explication of the terms 'enacted law' and 'enacted law-texts' see § 32.3(e)(i)(ee) infra.


514 See Du Plessis Re-Interpretation of Statutes (supra) 229. See also JR de Ville Constitutional and Statutory Interpretation (2000) 135.


516 See T Roux 'Continuity and Change in a Transforming Legal Order: The Impact of Section 26(3) of the Constitution on South African Law' (2004) 121(2) South African Law Journal 466, 467
provision cannot be gauged simply from reading and attaching meaning to the signifiers that appear on paper in the Constitution-in-writing, but rather from the manner in which the provision is (or could be) \textit{construed and applied} in a real-life situation. Someone who reads music well can also 'hear' the music when reading a score. The interpreter of enacted law-texts, especially someone with experience, reads that text in a similar way. She or he can imagine what a provision will 'sound' like in a concrete, real-life situation. This could be because she or he is seeking a solution to an actual problem or because she or he hypothesizes (and thus 'conceives of') potentially problematic situations. Actual or potential applications of any law, including provisions of enacted law and also the Constitution, determine their construction decisively: there is a unity in the duality of what has traditionally been known (and distinguished) as interpretation and application.

This discussion of contemporary developments associated with linguistic-turn thinking is not meant to undermine or destabilize (or, for that matter, denigrate) language and its pervasive capacity to generate meaning. It does, however, challenge conventional theories of language that rely, unreflectively, on the supposed stability of language. It goes without saying that constitutional interpretation or any other form of interpretation irrespective of or beyond language is unthinkable because it is unsayable — unsignifiable. Conventional canons of construction consistent with an actual acknowledgement of the Final Constitution as complex linguistic datum are therefore unavoidable and, indeed, necessary. What the linguistic turn does do is to reflect both 'contemporary developments' in theories of language and underscore the need for the reformulation or, in some instances, reconceptualization of accepted canons of constitutional (and statutory) interpretation.

\textbf{(e) The Constitution as text \textit{sui generis} among law-texts}

It is trite that different reading conventions and strategies apply to, for example, a statute, a poem, a novel, a court case, an article in a scholarly journal and a Biblical or Quranic text. To put it differently: the text genre determines the manner in which text is read and understood. This is because text \textit{genre} has a generative (or productive) and not merely a taxonomic (or classificatory) function. It co-constitutes textual meaning and therefore also the manner in which such meaning is to be determined. For interpretation purposes it is thus vital to establish the genre to which law-texts in general — and the Constitution in particular — belong.

However, the Final Constitution is not just a genre text. Within its genre it is also a unique law-text rendering constitutional interpretation a distinctive mode of legal interpretation and more than just a technique-driven analysis of the provisions of the Constitution-in-writing in order to determine their meaning. Constitutional

\begin{itemize}
\item For a further explication of the terms 'enacted law' and 'enacted law-texts', see §§ 32.3(e)(i)(ee) and 32.5(c)(iii) infra.
\item See Du Plessis 'Re-reading Enacted Law-texts' (supra) at 295.
\item NJC van den Bergh 'Wetsuitleg: quo vadis?' (1982) 15 \textit{De lure} 154, 158 ('Genre het 'n generatiewe funksie en nie 'n taksonomiese funksie nie. Die wetsteksgenre is betekeniskonstitueerend.ENDORSET:Genre has a generative and not a taxonomic function. Law-text genre constitutes meaning.ENDORSET:}')
\end{itemize}
interpretation is a consequential practice, an observance, sustaining constitutionalism in a democratic, constitutional state (Rechtsstaat) founded on and maintained by a supreme Constitution of the sort envisaged in FC ss 1(c) and 2.\(^\text{521}\)

The Final Constitution can be depicted as:

(i) a law-text and, more particularly, a prescriptive, abstractly normative, enacted law-text;

(ii) highest law ie the most decisively and the ultimately prescriptive law-text pervading the legal system;

(iii) a negotiated and negotiating law-text.

Point (i) above pertains to the Final Constitution as genre text (the genre being enacted law) and points (ii) and (iii) above refer to the Final Constitution in its uniqueness. Points (i) to (iii) above all have decided implications for the interpretation of the Final Constitution.

(i) **The Constitution as prescriptive, abstractly normative law-text**

(aa) **Law as text and text(s) as law**

Law-texts are compound linguistic signifiers conventionally recognized as 'texts having to do with the law'. In a dynamic and complex interplay with one another (and with other signifiers) these texts render 'law' intelligible and therefore interpretable. Law-texts themselves do not 'bear' meaning and do not tell us 'what the law says'; nor do they express the meaning of legal phenomena 'out there'. Instead, they provide linguistic data to generate meaning in order to deal with the law's business and to find out what the law can be understood to say about the solution of concrete issues or problems. Speaking and thinking about the law are possible only because of law-texts: lawspeak is text and a particular kind of textspeak is law.\(^\text{522}\) Random examples of law-texts are constitutions, statutes, reported precedents, contracts in writing, wills, international treaties, heads of argument, pleadings in civil proceedings and so on. These are all texts in writing, but they exist alongside and interact with oral or spoken law-texts, such as ex tempore judgments of courts, oral contracts, the first-hand testimony of a witness in court, oral argument and so on.

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520 See J de Waal, I Currie & G Erasmus *The Bill of Rights Handbook* (3rd Edition, 2000) 7 ('Constitutionalism is the idea that government should derive its powers from a written constitution and that its powers should be limited to those set out in the constitution.') See also WF Murphy, JE Fleming & SA Barber *American Constitutional Interpretation* (2nd Edition, 1995) 3 (Describes 'constitutionalism' as 'a theory that accepts the necessity of both government and limited government. It contends that all power, even that of the people, must be limited.\(')

521 See § 32.3(e)(iii) infra.

The function of the supreme Constitution as law-text is, in a nutshell, to establish and sustain constitutional democracy in South Africa and to render all law relating thereto intelligible and therefore interpretable and realizable. This it does in a dynamic and complex interplay with other law-texts (and texts other than law-texts).

(bb) Narrative and normative law-texts

Law-texts can be characteristically narrative or normative. Narrative law-texts profess to be linguistic accounts of (factual) occurrences pertinent to the functioning of (the) law. 'Normative' could mean (i) establishing, (ii) relating to or (iii) deriving from a norm as prescriptive (general) standard. Normative law-texts, predicated mainly on signification (i) above, verbalize a characteristically law-like expectation that diverse future occurrences, sharing certain predefined attributes, will be entertained in a predictably regular or typical manner.

Jurists engaged in untangling questions of law do not actually work with 'concrete facts' or 'concrete norms', but with linguistic renditions of what they understand to be facts and norms pertaining to 'the law', in other words, narrative and normative law-texts (that they construct). The distinction between narrative and normative law-texts is by no means watertight since all law-texts are always both narrative and normative to some extent. The operational gist or functional thrust of a law-text determines whether to call it 'narrative' or 'normative'. A statutory provision, for example, is to some extent an implicit narrative of the process through which (as part of the more inclusive instrument in which it is contained) it came to exist, and also of factual situations for which it potentially caters, but it is a normative law-text nonetheless because it characteristically purports to provide for the factual situations in a predictably consistent, regular or typical (in other words, a norm-like) manner. An evidentiary narrative, such as the 'story' of a witness during litigious proceedings, on the other hand, has to be adapted, for adjudicative use, to the predictably regular or typical normative standards of, among others, the law of evidence, and then it can exert normative power that co-determines the outcome of the proceedings. It remains a legally processed 'story', nonetheless, and its predominant story-likeness makes it a narrative law-text. A narrative law-text can be a rendition of either an actual or an imaginary (hypothetical) 'story'. Some law-texts are difficult to classify. A contract, oral or in writing, as an account of what the parties agreed to is, for instance, a narrative law-text. However, the contract as a legal instrument activates norms of the law of contract, and its very terms are standards that cater, in a predictably regular or typical manner, for premeditated eventualities, making the contract a normative law-text too.

Law-texts need not be classified rigidly as exclusively narrative or normative. They often have to be named, from case to case, in accordance with their (contingent) mode of operation as co-determined by the peculiarities of the situation in which they are of effect. A distinctive feature of all kinds of law-texts is that they
can be and indeed strive to be of effect, because they are resolution-oriented.\textsuperscript{525} Any resolution of a legal issue always draws on both narrative and normative law-texts. Normative law-texts are devoid of actual, operational significance in isolation from narrative law-texts, and vice versa.

\textbf{(cc) Prescriptive and persuasive (normative) law-texts}

Narrative and normative law-texts proclaim their efficacy in distinct ways. The efficacy of a narrative law-text depends on how effectively it poses questions called forth by the exigencies of the situation it narrates. A normative law-text can suggest a solution to a problem in mainly one of two manners: prescriptively or persuasively. In the first instance the text is expected to 'have effect' because it is 'officially' backed by some authority of consequence. In the second instance the effect of the text depends on its power of persuasion in particular circumstances (and on specific conditions). Prescriptive, normative law-texts ('prescriptive texts' for short) are traditionally perceived as instruments or media calling positive law into existence, in other words, as sources of origin of legal rules or norms.\textsuperscript{526} In South Africa statutes and the Constitution (\textit{enacted law} for short), precedent and custom are recognized as such sources of origin. The prescriptivity of enacted law can evidently and directly be attributed to a readily identifiable author-with-authority while custom and precedent and some old Roman-Dutch writings (all belonging to the genre of \textit{common law}) may acquire prescriptive authority once they have been found to meet certain criteria.

What sets prescriptive, normative law-texts apart is the status formally assigned to them: they are recognized as (and therefore understood to be) the most obvious contenders among normative law-texts to be of effect in a given situation. It is legitimate to argue that what prescriptive texts can be understood to say about a particular situation or issue takes precedence over what other normative law-texts can be understood to say about the same situation or issue. The supreme Constitution, in its turn, ranks highest among prescriptive, normative law-texts.

A persuasive, normative law-text ('persuasive text' for short) will be of effect in the same manner as any prescriptive text \textit{if}, on account of its persuasive force, its authority as normative text, establishing general standards for dealing with diverse occurrences, is accepted by a decision-making organ of state authorized to concretize law, for instance, an adjudicative forum. Furthermore, if the decision of the said forum has binding force, the persuasive text henceforth becomes a prescriptive text. Statements in textbooks or other writings professing to expound 'the law as it stands', \textit{obiter dicta} in court judgments, the \textit{ratio decidendi} in a non-binding judgment, oral or written argument in litigious proceedings and heads of argument are all examples of persuasive law-texts. Courts often accept the authority of persuasive texts, especially judicial precedents, without referring to their status and ranking in the order of normative law-texts.

\textbf{(dd) Abstract and concretized normative law-texts}

Normative law-texts can be either \textit{abstract} or \textit{concretized} or, to put it in another way, a law-text can be of force in an abstractly normative or concretely normative

\textsuperscript{525} See § 32.1(d) supra and § 32.5(c)(ii) infra.

manner.\textsuperscript{527} An abstract, normative law-text is what is usually referred to as a legal rule or precept, that is, a law-text envisaging — and indeed providing — that multifarious eventualities, sharing certain attributes, will be entertained in a predictably regular or typical manner. A concretized, normative law-text, on the other hand, is designed to cater for the exigencies of and/or regulate a particular, concrete situation and can also be either prescriptive or persuasive. When it is prescriptive such a text must be given effect to on account of the official authority that its author wields. An order of court is an example of a prescriptive, concretized, normative law-text. So is a decision of a duly authorized organ of the executive, pursuant to a discretion to 'apply the law' in concrete instances. On the other hand, contentions in legal argument in a specific case for a court order in certain terms, a legal opinion proposing a normative answer to a specific problem or normative solutions proposed for hypothesized (specific) cases, are persuasive, concretized, normative law-texts.

\textbf{(ee) The Constitution as genre text}

The distinctions aforesaid aid (but do not rigidly prescribe) a broad depiction (and not a watertight compartmentalization) of various kinds of law-texts. The permeability of law-texts and the complexity of the interaction among them preclude the calibration of either a rectilinear (or even a more ingenious and complex grid-like) scale according to which the normativity or narrativity, the prescriptiveness or persuasiveness and the concreteness or abstractness of a law-text can be measured.

Plotting the Constitution on such a scale is helpful in determining its genre, but not decisive in depicting it in its exceptionality. In the light of the discussion so far, the Constitution is a prescriptive, abstractly normative law-text, but of course not only the Constitution is distinctively that. Statute law is also that — as are rules of the common law and binding \textit{rationes decidendorum} in case law. Statute law and the Constitution have in common a feature absent from common and case law, namely that they are \textit{enacted law}. They have, in other words, been laid down by an authorized 'maker' to whom the business of officially making and carrying into effect law or a Constitution has been assigned. Statute law and the Constitution as enacted (or legislative or legislated) law-texts have consciously, intentionally and authoritatively been authored to be of effect and to this extent there is an authorial intent sustaining them, in other words, an intention of the legislature or of the founding generation of the Constitution.\textsuperscript{528} However, 'intention' here does not denote what used to be regarded as the prime determinant of meaning in conventional literalist-cum-intentionalist statutory interpretation,\textsuperscript{529} but the \textit{operational intent} (or \textit{effect-directedness}) characteristic of enacted law-texts such as the Constitution and statutes, and key to a purpose-consciousness interpretation of such law-texts.\textsuperscript{530}

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\textsuperscript{527} The notion of concretization is borrowed from Friedrich Müller’s \textit{Strukturierende Rechtslehre}. See § 32.3(d) supra.

\textsuperscript{528} See § 32.5(c)(iii) infra. For the notion of a ‘founding generation’ of a constitution, see § 32.3(c)(i) supra.

\textsuperscript{529} See § 32.3(b)(i) and (ii) supra.
Having located the Constitution within a particular law-text genre, the next step is to try to depict it in its exceptionality, and to this end one must honour the status of the Constitution as supreme (decisively and ultimately prescriptive) law and as a product of negotiation involving constitution-makers (or a founding generation\textsuperscript{531}), coming from the various strata of a profoundly pluralistic nation with often divergent aspirations, interests and identities.

(ii) The Constitution as supreme law

The Final Constitution declares its own supremacy in two ways. In FC s 1(c), the Republic of South Africa is said to be founded on the values of 'supremacy of the constitution and the rule of law'. In FC s 2 it is stated that the Constitution 'is the supreme law of the Republic' and that 'law or conduct inconsistent with it, is invalid'. Obligations imposed by the Final Constitution must also be fulfilled. One of Frank Michelman's salient contentions in Chapter 11 of this treatise is that constitutional supremacy is a value and not just a rule.\textsuperscript{532} The founding statement in FC s 1(c) proclaims this value status, causing the Final Constitution to pervade all law in the legal system and to direct it towards the pursuit and realization of the values the Final Constitution espouses.\textsuperscript{533}

In the 'plain and simple' or 'trumping sense' supremacy of the Constitution (as proclaimed in FC s 2) means that if any law conflicts with a constitutional provision, the latter is given precedence. In this straightforward sense the Constitution has had a decisive impact on the conventional hierarchy and status of legal rules and especially legislation in South Africa. Laws of Parliament that, until the commencement of the Interim Constitution on 27 April 1994, used to sit atop the legal hierarchy and enjoyed a status of non-reviewability by the courts as to their substance, are now subject to a higher law and to full judicial review. In terms of FC s 43(c), municipal councils, that used to be delegated legislatures, have been elevated to the status of original legislatures\textsuperscript{534} whose legislation is no longer reviewable in terms of the common-law standards of review for legislative administrative action,\textsuperscript{535} but, as far as matters of substance are concerned, only in terms of the Final Constitution.

The relevance of recognizing constitutional supremacy as both a value and a trumping force will be dealt with later on when adjudicative subsidiarity is

\textsuperscript{530} See § 32.5(c)(iii) infra.

\textsuperscript{531} For the use of this terminology see § 32.3(c)(i) supra.


\textsuperscript{533} See also Michelman 'The Rule of Law' (supra) at 11-36-11-41 and § 32.5(b)(iii)(bb) infra.

\textsuperscript{534} \textit{Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council} 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC)('\textit{Fedsure Life Assurance}') at para 26.

discussed. For the moment some implications of the supremacy of the Constitution as a founding value in terms of FC s 1(c) call for further elaboration, for they determine and direct interpretive dealings with the Constitution in its distinctiveness. The supreme Constitution has been designed and enacted to found and uphold a particular kind of politeia (or constitutional dispensation) in South Africa. About the potential of the Constitution, as construable highest law, to help establish and sustain the politeia for which it was intended, the following three observations are apposite:

(aa) The Constitution as 'supreme law' is the long-lasting, enacted law-text at the apex of the legal system and is the nation's solemn and consequential memorandum of agreement. It is also just a written document, however: a law-text-in-writing among others or 'a linguistic datum'.\(^{537}\) The FC is the supreme law of the Republic of South Africa, but it is not an overarching, all-encompassing,\(^{538}\) omni-regulative, super-law.\(^{539}\) Whoever invokes the protective and remedial powers of the supreme Constitution must treat it as a scalpel and not as a sledgehammer.\(^{540}\) The fact that the Constitution enjoys precedence among normative law-texts does not mean that it totally overpower other law-texts and takes their place without further ado.

Courts are moreover required to exercise self-restraint when they summon up the powerful, supreme Constitution because decisions of institutions not accountable to an electorate may not simply engulf deliberative decision-making susceptible to the discipline of democratic accountability. This is a predicament of constitutional review also known as the counter-majoritarian difficulty/dilemma. The demand for judicial self-restraint encourages circumspect modes of interpretation such as reading in conformity with the Constitution or deference to subsidiarity.

(bb) The Constitution is justiciable, in other words, a standard for the assessment of the validity of both 'law' and 'conduct' in every legislative and executive echelon of government. As was shown earlier,\(^{541}\) the Constitution, pursuant to the founding provision in s 1(c) (and the binding Constitutional Principles\(^{542}\) in the IC) provides for its own justiciability. Section 172(1)(a), in a mandatory mood, enjoins any court 'deciding a constitutional matter within its

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536 See § 32.5(b)(iii)(bb) infra.

537 See Müller 'Basic Questions of Constitutional Concretisation' (supra) at 269. See also § 32.1(d) supra.

538 On the notion of an 'all-encompassing Constitution', see § 32.5(b)(iii)(bb) infra.


540 Smith v Attorney-General Bophuthatswana 1984 (1) SA 196 (B), 200C. See also § 32.1(a) supra.

541 See § 32.2(a) supra.

542 See Constitutional Principles I and IV in Schedule 4 to the Interim Constitution. For a brief historical background, see § 32.1(a) supra.
power' to declare 'law or conduct' inconsistent with the Constitution invalid to the extent of such inconsistency. As a check on this power of review, so potently proclaimed, s 172(1)(b) leaves room for a just and equitable reining in of the consequences of declarations of invalidity in terms of s 172(1)(a), and it is in the discretion of the court making the declaration to exercise such restraint. This is how, in one of its early landmark judgments\textsuperscript{543} that was previously referred to,\textsuperscript{544} the Constitutional Court verbalized its understanding of courts’ duties or obligations under s 171(1)(a) and the relationship between this provision and s 171(1)(b):

Constitutional cases cannot be decided on the basis that Parliament or the President acted in good faith or on the basis that there was no objection to action taken at the time that it was carried out. It is of crucial importance at this early stage of the development of our new constitutional order to establish respect for the principle that the Constitution is supreme. The Constitution itself allows this Court to control the consequences of a declaration of invalidity if it should be necessary to do so. Our duty is to declare legislative and executive action which is inconsistent with the Constitution to be invalid, and then to deal with the consequences of the invalidity in accordance with the provisions of the Constitution.

The Constitution also provides for and indeed sustains its own justiciability \textit{by necessary implication}, with s 165, for example, vouching for the independence of the judiciary, and s 165(2), maintaining with supreme authority that the courts are subject \textit{only} to the Constitution and the law. That this is not a toothless proposition is borne out by s 165(5), which make court orders binding, in a comprehensive manner, on ‘all persons to whom and organs of state to which it applies’. It is significant that especially organs of state are mentioned, for justiciability and powers of constitutional review make sense only if non-judicial authorities cannot and do not undo court orders and/or their consequences.

\textbf{(cc)} The Constitution verbalizes and, indeed, proclaims, in characteristically broad, inclusive and open-ended language, certain values and beliefs associated with democracy and the constitutional state (\textit{Rechtsstaat}) to be law. The kind of language in which the Constitution is couched, distinctive both in form and content, instantiates the uniqueness of the Constitution as enacted law-text. It was shown before how the distinctive style of the Constitution has contributed to an uneasiness with and, in time, a questioning and even a growing dismissal of conventional approaches to statutory interpretation, and has encouraged the blazing of new interpretive trails.\textsuperscript{545}

\textbf{(iii) The Constitution as negotiated and negotiating text}

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\textsuperscript{543} \textit{Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others} 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 100 (‘Executive Council of the Western Cape 1995’).
\end{flushleft}

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\textsuperscript{544} See § 32.1(c) supra.
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\textsuperscript{545} See § 32.3(b) supra.
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The Final Constitution is a product of negotiation and deliberation; so too is legislation passed by constitutionally authorized legislative bodies. However, the Interim Constitution and the Final Constitution played an essential role in brokering a peaceful transition from the racist, white minority apartheid regime to a genuine universal multiparty democracy: they are, at bottom, peace treaties. That said, the Final Constitution is a comprehensive memorandum of agreement designed to last. Its negotiationary origins are thus quite conspicuous — more so than is mostly the case with other enacted law — and these origins show especially in ideological tensions traceable in the written text, and always pertaining to it and to its interpretation.\textsuperscript{546}

In the phrase ‘ideological tensions’, ‘ideology’ does not denote an abstract system of ideas, but rather the means by which people ‘give meaning to all things and events which they encounter, and all feelings which they experience’ in response to the exigencies of a particular environment.\textsuperscript{547} ‘Ideology’ not only denotes someone’s ‘personal philosophy’, but can also be ‘a shared (world-) view’ in terms of which, for example, political groupings perceive the political interests they seek to promote.

The first ideological tension that becomes visible when the Constitution-in-writing is analyzed — and which also often arises in constitutional interpretation — is that between populism and constitutionalism, rooted in the polarity of participatory (or ‘popular’) and constitutional democracy, and of legislative and administrative over and against judicial decision-making. Populism denotes rule by the (majority of the) people through voting and thereafter through their elected (and accountable) representatives, and the people’s participation in law-making and administrative processes. Constitutionalism ‘is the idea that government should derive its powers from a written constitution, and that its powers should be limited to those set out in the constitution,’ and furthermore that there must be an independent authority, the judiciary, enforcing limitations to government powers.\textsuperscript{548} The tension between populism and constitutionalism is there, in a supreme constitution, simply because that Final Constitution is the highest law and is justiciable, and the said tension raises the spectre of the previously mentioned counter-majoritarian difficulty.\textsuperscript{549} The competence of unelected judges to assess the constitutional tenability of laws made by democratically elected, deliberative legislatures and then to strike down whatever (in the courts’ view) is inconsistent with the Final Constitution, possibly (but not inevitably) runs counter to the horizontal differentiation of legislative, executive and judicial authority in a modern-day, democratic state—hence the call to the judiciary for self-restraint.\textsuperscript{550}


\textsuperscript{549} See § 32.3(e)(i)(aa) supra.
The tension just described is between powers that in terms of *trias politica* are ideally separated *horizontally*. The Final Constitution also reflects a tension between *centralism* and *federalism* pertaining to the *vertical* division of powers.  

Historical realities precluded the fullest and purest possible form of federalism in post-1994 South Africa, but this did not result in a total exclusion of everything federalist from the Final Constitution. The Constitution does not establish classical federalist structures, but in ss 146 to 150, dealing with conflicting laws in the various *spheres* of government, provision is made for procedures bolstering centrifugal forces that determine the relationship between central government and the nine provinces. These centrifugal forces are subject to centripetal checks and balances which do not, however, totally exclude the attainment of a relatively clearly pronounced federalist state. The arrangements in FC s 146 to FC s 150, read with FC Chapter 3 on co-operative government, makes of South Africa a *co-operative* as opposed to a *competitive* federation.

One of the most prominent ideological tensions in the South African Constitution—and probably in most national and international systems of human rights protection worldwide—is that between *freedom* and *equality* or, in ideological terms, between *libertarianism* and *egalitarianism*. This tension shows up most clearly in the written constitutional text in the triumvirate value statements—in the founding provisions, and in the Bill of Rights—proclaiming human dignity, equality and freedom to be crucial guiding values in the interpretation of the Final Constitution, and the Bill of Rights in particular, and in the limitation of rights. In comparable provisions of the Interim Constitution reference was made to *freedom* and *equality* only. Human dignity entered the picture in the Final Constitution for the first time.


554 For the meaning of 'triumvirate value statements', see 32.4(c)(i)(cc) infra.

555 FC s 1(a). .

556 FC ss 7(1), 36(1) and 39(1)(a). See § 32.1(d) supra.

557 See IC ss 33(a)(ii) and 35(1).
For the freedom-centric libertarian a supreme constitution (and a bill of rights) must basically keep the state at bay, limiting its action vis-à-vis the doings of the autonomous individual, to ensure optimal freedom for the latter. Equality-centric egalitarianism, on the other hand, insists that a constitution and bill of rights must essentially help ensure optimal parity among individuals, and positive state action redressing disadvantage is therefore unavoidable. Libertarians experience such state action, impacting directly on the (re-)distribution of means among citizens, as threatening to their freedom. The counter-argument of egalitarians is that freedom can be, and often is, (ab-)used to perpetuate the prosperity rift and other inequalities between the 'haves' and the 'have-nots' and that the state thus has to intervene to procure a more equal access to the resources needed for the enjoyment of a decent life.

In South Africa, liberation movements that represented the political and economic aspirations of the traditional have-nots were by origin egalitarian, while the 'have parties' that somehow benefited from apartheid's unequal distribution of material means (and this includes the previous regime's liberal opponents) were natural libertarians. For many years (up until about 1986) the previous regime was not even libertarian because it turned a blind eye to human rights in its political thinking and planning, and afforded them no special institutional protection.

The Constitution-in-writing holds out the possibility to alleviate the seemingly perennial tension between freedom and equality, for the crucial triumvirate value statements referred to above allow for reliance on human dignity to negotiate the tension between freedom and equality.

The last ideological tension of note is that between traditionalism and modernism. 'Modernism' roughly denotes the 'enlightened' frame of mind from which the idea and practice of constitutional democracy — as typically modernist phenomenon — emerged. Individualism is a pillar of this liberal modernism which, in South Africa, has come up against manifestations of communitarian traditionalism in customary law, religion and gender issues (manifesting in the last instance as an ideological tension of feminism versus patriarchy). The written Constitution itself caters for possible tensions in these areas. FC a 211, for instance, recognizes the institution, status and role of traditional leadership according to customary law and, in broad terms, authorizes traditional authorities to function, subject to applicable legislation and customs 'which includes amendments to, or repeal of, that legislation or those customs'.\(^{558}\) FC s 211(3) enjoins courts to apply customary law 'when that law is applicable'. However, FC s 211 as a whole is significantly and explicitly made subject to the rest of the Final Constitution. And FC s 39(2) of course also requires development of customary law in a manner promoting the spirit, purport and objects of the Bill of Rights.

Some examples of how the three pairs of ideological tensions just described manifest in constitutional jurisprudence will, by way of illustration, now briefly be looked at. These tensions are actually or potentially present in just about every constitutional precedent, which means that the compilation of a full catalogue of examples would be a mammoth undertaking. The counter-majoritarian difficulty, for instance, looms (larger or smaller) in every case of constitutional review, and with it

\(^{558}\) FC s 211(1).

\(^{559}\) FC s 211(2).
the ideological tension between populism and constitutionalism too. In *S v Makwanyane & Another*\(^{560}\) the Constitutional Court, called upon to sit in judgment on the constitutionality of capital punishment, was faced with the prospect of having to make a decision with consequences for which, in the view of a connoisseur constitutionalist, a democratically authorized law- or constitution-maker should rather have been made responsible and held accountable.\(^{561}\) The written text of the Interim Constitution made no reference to the issue of capital punishment, and this omission was deliberate:\(^{562}\) the constitution-makers left it to the Constitutional Court to resolve this controversial issue. At first glance it may seem as if the constitution-makers thereby addressed the counter-majoritarian difficulty — and eased possible tensions between populism and constitutionalism — by authorizing the Court to cast the die on capital punishment. This, however, is not quite how the Constitutional Court saw it. Mahomed and Sachs JJ, in their separate concurring judgments, were at pains to point out that the Court was not deciding on the *desirability*, political or otherwise, of capital punishment as a possible sentence for the most serious offences, but on its *constitutionality*. Mahomed J especially made a point of distinguishing a decision reached by the Constitutional Court as a judicial organ from a political choice by a legislative organ.\(^{563}\)

The ideological tension between populism and constitutionalism is also visible in the way in which Chaskalson P dealt with the state's contention that what is cruel, inhuman or degrading treatment was dependent on attitudes within society, and that South African society did not regard the death sentence for extreme cases of murder as a cruel, inhuman or degrading form of punishment. The gist of the Court's response to this contention was this:

> The question before us . . . is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence.

> Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication.\(^{564}\)

Thus the Court, mindful of the tension between populism and constitutionalism, asserted its authority to do what the Interim Constitution required of it and refused to acquiesce in the 'wisdom' of public opinion.

Given the tenacity of the ideological tension between populism and constitutionalism, authorized adjudicators of constitutional matters cannot just take their authority for granted, but must establish their legitimacy by asserting and exercising their authority in a particular manner. Heinz Klug explains:

\(^{560}\) 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC)("Makwanyane").

\(^{561}\) For previous references to this case, see § 32.3(c)(iii)(aa) and (v) supra.

\(^{562}\) *Makwanyane* (supra) at paras 5 and 25.

\(^{563}\) Ibid at paras 266 and 349 respectively.

\(^{564}\) Ibid at paras 87 and 88.
Particular histories and contexts — both international and local — play a significant part in setting the stage upon which judicial review is introduced. While its ability to build legitimacy through its formal judicial role is a source of strength, the comparative institutional weakness of the judicial branch . . . requires the judiciary to be circumspect in its exercise of authority over the more resourced and powerful arms of government. In asserting its constitutional powers the judiciary constantly recognizes its ultimate reliance on both the executive and legislative branches to enforce its holdings on one hand and to protect its independence on the other.\textsuperscript{565}

Klug reminds us that in \textit{Marbury v Madison},\textsuperscript{566} the US Supreme Court asserted, without being granted, a testing right, having earned it through a carefully crafted judgment inspired by an exemplary display of judicious politics. While \textit{S v Makwanyane & Another} was a judicial \textit{tour de force} — a 'bold assertion of constitutional rights and powers' — the Constitutional Court's judgment in \textit{Executive Council, Western Cape Legislature & Others v President of the Republic of South Africa & Others} struck Klug as possessing greater parallels to \textit{Marbury v Madison}.\textsuperscript{567}

The particularly sensitive and contentious issue that the Court had to deal with in \textit{Executive Council, Western Cape} concerned a lively interplay of the conflicting forces of populism and constitutionalism (and centralism and federalism). The case concerned power allocation between the central government, where the African National Congress wielded the sceptre, and the provincial government in the Western Cape, where the 'new' National Party, a remnant of the previous apartheid regime, still dominated the scene. The case was brought by the National Party, which sought to quash presidential action of the popular and respected Nelson Mandela. In the end the \textit{Executive Council, Western Cape} Court declared the statutory authorization for the President's impugned action unconstitutional, thereby undoing the action itself but without pointing a reproving finger at the President. According to Klug the upshot of this judgment was that the Court 'successfully traversed the dangers of conflicting powers and managed to insinuate itself as an honest broker by avoiding the claim for regional autonomy, while simultaneously disciplining and empowering the national institutions of democracy'.\textsuperscript{568} And the President publicly praised this judgment, mentioning appreciatively the Constitutional Court's assistance to both the government and society 'to ensure constitutionality and effective governance'.\textsuperscript{569}

The issue of direct, horizontal application of the Bill of Rights, as dealt with in the constitutional jurisprudence of especially the Constitutional Court, exemplifies an ideological tension between freedom and equality. This issue will be brought up again in more detail at a later stage and in a different context,\textsuperscript{570} and it is also dealt


\textsuperscript{566} 5 US (1 Cranch) 137 (1803).

\textsuperscript{567} Klug (supra) at 194.

\textsuperscript{568} Klug (supra) at 201.

\textsuperscript{569} Ibid at 198.
with extensively in Chapter 31. For present purposes, just a few cursory remarks are necessary.

IC ss 7 (1) and (2), read together, left room for either a restrictive understanding of the operation of the Bill of Rights or a reading that permitted direct, horizontal application. In Du Plessis & Others v De Klerk & Anothert the Constitutional Court opted for the former, more restrictive understanding. However, IC s 7(1) and (2) was thereafter replaced by FC s 8(1) to (3), which provides (in s 8(2) in particular) for the direct application of ‘a provision of the Bill of Rights’ to ‘a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the rights and the nature of any duty imposed by the right’. In Khumalo & Others v Holomisa, the Court confirmed that there is room for the direct, horizontal application of at least certain rights in the Bill of Rights in certain circumstances. However, according to Stu Woolman, the Constitutional Court has in the recent past shown an unwholesome keenness to avoid the direct horizontal application of the Bill of Rights. It is sufficient, for the time being, to point out that the direct horizontal application of the Bill of Rights remains controversial because it tends to pit freedom and equality against each other. A libertarian, maintaining that the most crucial function of a supreme bill of rights is to keep the state at bay and limit state action vis-à-vis the doings of the free and autonomous private individual or entity, will see in the horizontal application of the Bill of Rights an uncalled for threat to ‘private freedom’. An egalitarian, on the other hand, will insist that there is no reason why the Bill of Rights cannot be applied to rectify endemic inequalities in ‘horizontal relationships’ so as to optimize parity among ‘private’ individuals and entities.

The tension between the Final Constitution’s classically liberal provisions and radical egalitarian norms reveals itself in case after case. Recently, in Molimi v The State, the Court refused to accept as evidence statements containing solid but inadmissible allegations against an accused person strongly suspected of involvement in a botched armed robbery. The following (freedom-friendly) dictum explained the Court’s refusal:

570  See § 32.4(c)(ii)(dd) infra.


572  1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC).

573  For the full account, see Woolman ‘Application’ (supra) at 31-16–31-33.

574  2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at para 33.


576  Woolman analyzes three cases as representative of this interpretive turn: Barkhuizen v Napier 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC), NM & Others v Smith & Others 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC) and Masiya v Director of Public Prosecutions & Others 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 (CC)(‘Masiya’).

577  2008 (3) SA 608 (CC) (‘Molimi’) at paras 52-54.
This Court has said that the right to a fair trial requires a substantive rather than a formal or textual approach and that 'it has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.' Proceedings in which little or no respect is accorded to the fair trial rights of the accused have the potential to undermine the fundamental adversarial nature of judicial proceedings and may threaten their legitimacy.

In *Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole & Others; SA Human Rights Commission & Another v President of the RSA & Another*, the ideological tension between traditionalism and modernism came to the fore. At issue was the constitutionality of the customary law rule of male primogeniture and statutory provision for the applicability of a customary law regime of intestate succession to black people only. Both challenges were based on equality claims, with gender equality prominent in the primogeniture challenge. In its majority judgment, the *Bhe* Court upheld both challenges and further held that the rule of primogeniture was not capable of being developed to bring it in line with constitutional values: it had to be struck down. Such a head-on confrontation of primogeniture with the Final Constitution's modernist equality demands had a far-reaching and wide ranging impact on traditional customary law. In a minority judgment Ngcobo J therefore proposed to soften the severity of the blow by not striking down the rule of primogeniture, but by developing it instead to bring it in line with the Bill of Rights' demand for gender equality. According to Ngcobo J, the rule of primogeniture thus had to be construed to include women as intestate heirs.

What then does the constitutional interpreter do once awareness of these unavoidable ideological tensions arises?

Henk Botha, writing about the counter-majoritarian difficulty, concludes that there is no point in trying to resolve this dilemma, and that living with it instead may be wholesome, because the tensions it generates could be creative (rather than destructive) in sculpting the constitutional order. These tensions may, for instance, help to keep an institutionally mediated dialogue between the legislature and the judiciary alive. Botha's advice on how to deal with the counter-majoritarian difficulty, as manifestation of the ideological tension between populism and constitutionalism, is equally sound counsel for dealing with other ideological tensions too. A reconciliation or synthesis of opposing forces in a higher unity might bring closure, for the time being, but this will be a closure devoid of the invigorating and enervating power of contradiction and tension, and vulnerable to an essentialism that inclines toward oversimplified solutions for complex issues.

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579 *Molimi* (supra) at para 42.

580 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC).


It helps if an interpreter of the Final Constitution is aware of the inevitability of the ideological tensions discussed above. This awareness prompts an identification of forces beyond ostensibly 'neutral' procedures of interpretation, pulling vigorously against one another each towards an interpretive outcome best suited to its concerns. The said awareness furthermore aids a pinpointing of actual issues and contestations involved in a particular episode of constitutional interpretation, while it kindles an understanding of why opposing trends and tendencies, describable in terms of the ideological tensions previously mentioned and briefly discussed, can meaningfully co-exist in the constitutional text and jurisprudence of a country.

Finally, the Constitution-in-writing, keeping alive the tensions that have shaped it, is not just a negotiated, written law-text; it has also remained a negotiating text — a perennial negotiant. The written text of the Constitution was, in other words, not formulated to suggest that once its wording had been agreed upon, ideological tensions among the constitutional negotiators were settled, and that the negotiators were desirous for the written constitutional text to reflect such a settlement. Agreement on a written text was possible only on the condition that the ideological tensions would remain — and visibly so — to be negotiated and renegotiated every time the text is reread with an interpretive eye.

32.4 The enacted constitution-in-writing

It will probably have become clear by now that constitutional interpretation involves quite a bit more than just working with a tangible, readable, written constitutional text in hand (and at hand), but of course it also involves that. How to deal interpretively with the concrete Constitution-in-writing, given its distinctive structural features and peculiar style, is a matter of considerable significance which will now be discussed. First, from the perspective that the supreme Constitution has a far-reaching impact on statute law as existing law, structural and stylistic differences and similarities between the constitutional text and statutory texts will be looked at, also to consider to what extent constitutional interpretation (working with the Constitution-in-writing) and statutory interpretation (working with legislation-in-writing) are similar (and dissimilar) procedures. Next the interpretive value of the availability of versions of the written Constitutional text in more than one language will be discussed. Finally, attention will be drawn to the presence of interpretive indicia in the constitutional text and their possible role in constitutional interpretation. Some of these indicia are quite visible and readily available for use. Other less obvious ones have to be searched out in the written text, as will be shown.

(a) The Constitution and the construction of enacted law

The nature, operation and effect of — as well as the limits to — constitutional supremacy were dealt with earlier in this chapter, and the ramifications of constitutional supremacy as a value are dealt with by Frank Michelman in Chapter 11. The judicially construed Final Constitution has a decided and far-reaching impact on statute law and its interpretation. Constitutional interpretation is in this way inextricably linked to statutory interpretation. Not only are statutes subject to the Final Constitution, but they also have to be read in the light of the Final Constitution in several ways. First, FC s 39(2) requires a mode of statutory interpretation that promotes the spirit, purport and objects of the Bill of Rights. Meaning has to be attributed to this section in accordance with the procedures of constitutional
interpretation, but whatever meaning is placed upon it, it is bound to have a decisive impact on the manner in which legislation is construed. The Supreme Court of Appeal's judgment in *Cape Killarney Property Investments (Pty) Ltd v Mahamba*, for instance, illustrates how a constitutional injunction for the protection of a fundamental right can prompt a rights-friendly reading of a statutory provision.

The court held that s 4(4) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act must be read in a manner affording a respondent in eviction proceedings the maximum benefit of effective notice of such proceedings, since s 4(4) 'has its roots' in FC s 26(3). This constitutional provision states that 'no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances'.

Second, constitutional interpretation, in the course of a court's exercise of its testing right, sparks off an interplay between the constitutional text and an impugned statutory text. The scope and effect of the one has to be considered in the light of the other and since the Constitution is supreme, it determines the parameters within which meaning can be attributed to the statute and not vice versa. Third, some aspects of constitutional interpretation as mode of interpretation can, over the course of time, be assimilated into statutory interpretation, especially as differences in style and language between the constitutional text and statutory texts start dwindling.

Finally, if there is a possibility that statutory interpretation can in time be assimilated into constitutional interpretation, then there must certainly always have been vital similarities between these two instances of interpretation. To what extent then can constitutional interpretation be said to be like statutory interpretation — and vice versa?

Statutory and constitutional interpretation are both instances of legal interpretation and, to be more exact, instances of construing enacted law-texts. Since text genre co-constitutes textual meaning and therefore co-determines the manner in which the text is to be read and understood and eventually applied,
similarities between statutory and constitutional interpretation — at least to the extent that statutes and the Final Constitution belong to the same sub-genre of law-texts — are to be expected. Not all constitutional theorists, however, subscribe to this proposition.

Some authors emphasize the similarity and others the dissimilarity of constitutional and statutory interpretation as modes of interpretation. In South Africa the latter view currently prevails. A dictum from the Canadian case Hunter et al v Southam Inc — which highlights the distinctive otherness of constitutional interpretation — has met with approval in South African case law:

The task of expounding a constitution is different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new, social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind.

The differences between constitutional and statutory interpretation have much to do with the uniqueness of the written constitutional text. To briefly recapitulate:

(i) The Constitution, as supreme law, is a long-lasting, enacted law-text at the apex of all legal norms within the legal order.

(ii) The Constitution is justiciable and therefore a standard for the assessment of the validity of both 'law' and 'conduct' in every legislative and executive echelon of government.

(iii) The Constitution verbalizes, in characteristically broad, inclusive and open-ended language, values and beliefs associated with democracy and the constitutional state (or Rechtsstaat).


595 See § 32.3(e)(ii) and (iii) supra.
(iv) The Constitution is a product of intense negotiation, harbouring ideological tensions of significance.

It is hopefully becoming ever clearer, as this chapter is proceeding, that constitutional interpretation is indeed, as was stated at the outset, an observance emanating from, rooted in and shaping constitutional democracy, and an activator of the values underlying a democratic, constitutional state. It has far-reaching implications for statutory interpretation, in particular, because the supreme Constitution has a comprehensive impact on ‘the intention of the legislature’. The Final Constitution constitutes the foundation upon which all ordinary legal rules are to be interpreted.

Constitutional interpretation certainly calls for a novel interpretive approach, but precisely this means that statutory interpretation too can no longer make do with just the conventional methods and canons of construction:

The constitutional theory which inspires the interpretation of the Constitution should . . . also inform statutory interpretation. The principles for the interpretation of statutes are to be derived from the Constitution.

Structurally the Final Constitution and statutes share many features. This is unsurprising because as prescriptive, abstractly normative law-texts they constitute a further sub-genre, namely enacted law-texts. They are products of conscious, planned and deliberative norm-making by a demonstrable, authorized constitution-maker or law-maker. A constitution and statutes are therefore meant or intended to be of effect. By replacing statutes and, in particular, Acts of Parliament as highest normative authority, South Africa’s two supreme Constitutions since 1994 have not deprived legislation of its worth, status or force, but have given it new direction and dimension. The Final Constitution and statutes also show similarities both in formal and operational style which makes it appropriate to rely on broadly similar reading strategies (conventional canons of statutory interpretation included) for their interpretation. In constitutional interpretation these strategies can be overridden by more pressing constitutional concerns. This is not really new. Traditionally, reading strategies for statutory interpretation as encapsulated and expressed in the canons of construction have not always and necessarily determined interpretive outcomes:

See § 32.1 supra.


See JR de Ville Constitutional and Statutory Interpretation (2000) 60, n 292 (Finds support for his contention in S v Dlamini; S v Dladi; S v Joubert; S v Schietekat 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC) at paras 2-15 and 55; Minister of Land Affairs v Slamdien 1999 (4) BCLR 413 (LCC); and Dulabh & Another v Department of Land Affairs 1997 (4) SA 1108 (LCC).)

For an explication of the terms ‘enacted law’ and ‘enacted law-texts’, see § 32.3(e)(i)(ee) supra.

See § 32.3(d) supra.
'more pressing concerns' may in certain situations also trump an interpretation resulting from painstaking implementation of canons of construction.601

Courts have since 1994 explicitly — but not too frequently — relied on canons of statutory interpretation to construe the two Constitutions. The Constitutional Court has mostly summoned up presumptions (as opposed to rules) of statutory interpretation to act as canons of constitutional interpretation. First among these presumptions is that enacted law is not unjust and inequitable.602 It is rather surprising that the Court relied on this presumption, because the standards for just and equitable laws contained in the Final Constitution, and the Bill of Rights in particular, obtain with supreme force and are more to the point than those conventionally embodied in and associated with the presumption. However, the presumption may still cater for some concerns not so directly addressed in the Final Constitution and the Bill of Rights.603 Second, the Constitutional Court has presumed that the Constitution, like statute law, is not invalid or purposeless.604 Third, the same Court, in *S v Mhlungu & Others*, considered the applicability, in constitutional interpretation, of the presumption that an enacted instrument does not apply with retroactive and retrospective effect.605 Some members of the Court voiced doubt about such applicability, but the court as whole did not come to a clear-cut conclusion. The presumption that statute law does not violate international law is a fourth presumption that has been recognized in constitutional interpretation.606 Finally, the 'principle of interpretation' — that where two subsections deal with the same subject matter they are usually read together — has been afforded similar recognition.607

In *Betta Eiendomme (Pty) Ltd v Ekple-Epoh*608 Flemming DJP assumed that FC s 26(3) should, like any statutory provision, be construed to alter the existing law or interfere with existing rights only to the extent clearly apparent from and allowed by the words used. This reliance on a conventional presumption of statutory


602 See *Du Plessis & Others v De Klerk & Another* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC)('De Klerk') at para 123; *Mhlungu (supra)* at para 36.

603 See *Du Plessis Re-Interpretation of Statutes* (supra) at 154-164.

604 See *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party* 1998 (4) SA 1157 (CC), 1998 (7) BCLR 855 (CC) at para 52.

605 *Mhlungu (supra)* at paras 37, 38 and 66-68.


607 *Executive Council of the Western Cape v Minister for Pro vincial Affairs and Constitutional Development of the RSA; Executive Council of KwaZulu-Natal v President of the RSA* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC)('Executive Council of the Western Cape 1999').

608 2000 (4) SA 468 (W).
interpretation constitutes an approach inappropriate to interpretation of the supreme Constitution\textsuperscript{609} (and actually inappropriate to statutory interpretation in a constitutional democracy too). It is also not really an instance of reliance on any conventional canons of statutory interpretation such as the rules that the words of s 16(3) must be afforded their ordinary meaning (but that 'evict/eviction' and 'order of court' — and 'arbitrary' — must be construed as having a technical legal meaning); that the words 'no one' must be understood in their general signification, or that each word of the provision must be afforded a meaning.\textsuperscript{610}

Other instances in which courts, and the Constitutional Court in particular, have been clutching at trusted literalist-cum-intentionalist straws in constitutional interpretation\textsuperscript{611} can also not be classified as examples of reliance on any of the conventional canons of statutory interpretation. These instances, just like \textit{Betta Eiendomme}, testify to the hold that literalist-cum-intentionalist statutory interpretation — as an approach to the interpretation of enacted law and not as a canon of construction — still has over judges engaged in constitutional interpretation. However, the fact that, in constitutional interpretation, many courts rely on conventional canons of statutory interpretation and resort to commonplace, interpretive rhetoric, does not warrant either an assimilation of literalist-cum-intentionalist assumptions into constitutional interpretation. I am strenuously arguing the opposite position.\textsuperscript{612} It is time for such assumptions to go.

Under the stylistic influence of the Final Constitution, statutes are increasingly couched in expansive and open-ended language,\textsuperscript{613} and aids to statutory and constitutional interpretation that were not high up in the traditional hierarchy of primacy nowadays fulfil a most basic function in the interpretive doings of the courts and are relied on unqualifiedly right from the outset. Preambles, for example, used to occur in statutes quite infrequently.\textsuperscript{614} But they have now become regular inclusions in statutory texts, and they are often amplified by other statements of an introductory nature, such as statements of purpose or explicit guidelines to interpretation.\textsuperscript{615} The courts often rely on these aids to attribute meaning to specific statutory provisions without even asking whether the language

\textsuperscript{609} See Roux 'Continuity and Change' (supra) at 479.

\textsuperscript{610} FC s 26(3) reads as follows: 'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.' The rules of statutory interpretation mentioned as examples above all fit under the heading 'grammatical interpretation' in § 32.5(c)(i) infra.

\textsuperscript{611} See § 32.3(b)(i) supra.

\textsuperscript{612} Ibid.


\textsuperscript{614} For the interpretive significance of the constitutional Preamble, see 32.4(c)(i)(aa) infra.

\textsuperscript{615} Du Plessis \textit{Re-Interpretation of Statutes} (supra) at 239-244.
of such provisions is clear and unambiguous. These developments, occasioned mainly by the advent of constitutional supremacy, undermine whatever was left of the credibility of the conventional order of primacy of canons of statutory interpretation. Why? Again, because they unsettle the notion of clear and unambiguous language.

A growing body of statute law has, especially over the last decade, augmented and given fuller and more detailed effect to constitutional provisions. Provision is made in the Final Constitution — and with reference to certain rights in the Bill of Rights in particular — for the enactment of such legislation. FC 9(4), for instance, obliges the national legislature to enact legislation 'to prevent or prohibit unfair discrimination'. FC s 33(3), in a similar mandatory vein, requires the national legislature to enact legislation to give specific effect to aspects of the right to just administrative action. The Promotion of Equality and Prevention of Unfair Discrimination Act and the Promotion of Administrative Justice Act, respectively, have been enacted to comply with the constitutional obligations in ss 9(4) and 33(3). The Labour Relations Act ('LRA') was enacted ‘to give effect to and regulate the fundamental rights conferred by section 27 of the [Interim] Constitution’. FC s 23(5) and (6) envisages and authorizes, in a permissive vein, legislation to regulate collective bargaining and to recognize union security arrangements contained in collective agreements respectively. National legislation giving specific effect to constitutional provisions may thus have been enacted either pursuant to a constitutional obligation or a permissive authorisation to do so, or of the legislature's own accord.

From an interpretive perspective there is a special relationship between the Constitution and statutes giving specific effect to its provisions, irrespective of whether these statutes have been enacted pursuant to an obligatory or permissive constitutional authorization, or of a legislature's own accord. First, when action is taken because an infringement of a constitutional right or rights to which a statute gives specific effect is alleged, a litigant cannot circumvent the statute 'by attempting to rely directly on the constitutional right'. To do so would be to 'fail to recognise the important task conferred on the legislature by the Constitution to

616 See 32.3(b)(i) supra.

617 Act 4 of 2000 required by FC s 9(4).

618 Act 3 of 2000 required by FC s 33(3).

619 Act 66 of 1995, another statute in this category, envisaged in FC ss 23(5) and (6).

620 LRA s 1(a).

621 See KwaZulu-Natal MEC for Education & Others v Pillay 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC)(‘Pillay’) at para 40. See also Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amicus Curiae) 2006 (1) BCLR 1 (CC), 2006 (2) SA 311 (CC)(‘New Clicks’) at paras 96 (Chaskalson CJ) and 434-437 (Ngcobo J); South African National Defence Union v Minister of Defence & Others 2007 (5) SA 400 (CC), 2007 (8) BCLR 863 (CC) (‘SANDU’) at para 51; NAPTOSA & Others v Minister of Education, Western Cape & Others 2001 (2) SA 112 (C), 123I-J, 2001 (4) BCLR 388, 396I-J (C).
respect, protect, promote and fulfill the rights in the Bill of Rights’. 622 Second, the provisions of a statute giving specific effect to constitutional provisions must, like any other statute, be construed to promote the spirit, purport and objects of the Bill of Rights, and also the specific provision of the Bill of Rights to which the particular statute gives detailed effect. 623 This special nature of such legislation does not, however, mean that the statute must simply be treated as a restatement of the constitutional right, as long as it does not decrease the protection that the constitutional right affords or does not infringe another right. 624 Third, on the two conditions aforesaid, a statute giving specific effect to constitutional provisions ‘may extend protection beyond what is conferred by’ the particular Bill of Rights and other constitutional provisions to which it gives specific effect. 625

Can a constitutional provision be understood in the light of a provision or provisions of a statute, and a statute giving specific effect to such constitutional provisions in particular? The rule of thumb is that legislation is to be read in the light of the supreme Constitution and not vice versa. However, statutes and, in particular, statutes giving specific effect to constitutional provisions together with jurisprudence on their interpretation, could (and should be allowed to) shape constitutional interpreters’ understanding of some of the expansive and open-ended provisions of the Final Constitution in much the same way as the (subordinate) Interpretation Act626 may shed interpretive light on provisions of the Final Constitution. 627 However, meanings attributed to words and phrases in legislation dating from the apartheid era ought not to be allowed to dictate the attribution of meaning to the same words and phrases when they are used in the Final Constitution. 628

(b) Multilingualism

Up to 27 April 1994 South Africa had two official languages, Afrikaans and English, but with the commencement of the Interim Constitution nine more were added: Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, isiNdebele, isiXhosa and isiZulu. 629 Significant for the interpretation of enacted law in a multilingual state is the availability of versions of the Constitution and statutes in various languages. This is a potentially problematic situation because the various versions of a text may

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622 SANDU (supra) at para 52. See also New Clicks (supra) at para 96. SANDU can be read as an instance of (adjudicative) subsidiarity: a subordinate, less encompassing and more specific legal norm is relied on to adjudicate certain cases in preference to a superordinate, more encompassing and general constitutional norm. See § 32.5(b)(iii)(bb) infra.

623 FC s 39(2).

624 Pillay (supra) at para 43.

625 Ibid.

626 Act 33 of 1957.

627 See § 32.4(c)(i)(ii) infra and Ross v South Peninsula Municipality 2000 (1) SA 589 (C), 599A–B.

628 See Ex parte President of the RSA. In re: Constitutionality of the Liquor Bill 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC) at para 59.
differ or may even conflict. It is also a potentially profitable situation, however, because comparison of different versions, each with its own nuances and emphases, can serve as an aid to interpretation. South African Constitutions between 1910 and 1994 each had a 'conflict provision' to cater for the potentially problematic dimension of statutory bilingualism. These provisions held that when the English and Afrikaans versions of a statute were in conflict, the version signed by the State President prevailed. The courts worked quite creatively with the opportunities bilingualism offered, and did not readily conclude that different versions of a statute were in conflict. Generally speaking, when the occasion arose, profitable use was made of differences between the Afrikaans and English versions of statutes for reciprocal clarification. The Interim Constitution contained — and the Final Constitution still contains — conflict provisions relating to statutes, still giving prevalence to the signed version of a statute in the event of conflict. A novelty in both Constitutions has been the inclusion of conflict provisions dealing with the different versions of the written constitutional text itself. Section 15 of the Constitution of the Republic of South Africa Amendment Act added a conflict provision to the Interim Constitution stating that, notwithstanding the fact that the Afrikaans version of the Interim Constitution was signed by the then State President, its English version had, for the purposes of its interpretation, to prevail as if it were the signed version. FC s 240 provides that 'in the event of an inconsistency between different texts of the Constitution, the English text prevails'.

Jurisprudence on the conflict provisions pertaining to either of the new Constitutions has been rather sparse. In *Du Plessis & Others v De Klerk & Another*, with the Interim Constitution still in place, the Constitutional Court concluded, with s 15 of the 1994 Constitution Amendment Act in mind, that the English phrase 'all law in force' in IC s 7(2) had to be understood extensively with reference to the Afrikaans version 'alle reg wat van krag is'. 'All law in force' can be read as a reference restricted to statute law. The more inclusive Afrikaans word 'reg', however, indicated that 'law' must embrace common law as well as statute law. This connotation of 'reg' was clear from the Afrikaans wording of other sections. In IC ss 8(1) and 33(1) 'reg' was used as the Afrikaans equivalent for 'law'. In Kentridge AJ’s interpretation, IC s 7(2) of the Afrikaans version thus in effect ‘prevailed’ in spite of the s 15 requirement that, for purposes of the interpretation of the Interim

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630 See 1909 South Africa Act (9 Edw 7 c 9) s 67; Republic of South Africa Constitution Act 32 of 1961 s 65; Republic of South Africa Constitution Act 110 of 1983 s 35.

631 *Du Plessis Re-Interpretation of Statutes* (supra) at 215-218.

632 See IC s 65.

633 See FC s 82 in respect of national legislation and FC s 124 in respect of provincial legislation.


635 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC) (*Du Plessis*).
Constitution, the English text had to prevail. Preference for the Afrikaans version, Kentridge JA thought (relying on a ‘well-established rule of interpretation’), was possible because there was no conflict between the two versions:

If one text is ambiguous, and if the ambiguity can be resolved by the reference to unambiguous words in the other text, the latter unambiguous meaning should be adopted. There is no reason why this common-sense rule should not be applied to the interpretation of the Constitution. Both texts must be taken to represent the intention of Parliament.

Kentridge AJ finally justified his conclusion on the basis that Afrikaans had remained an official language with undiminished status in terms of IC s 3. Post-Du Plessis, no more than oblique reference to the Afrikaans versions of both Constitutions has been on offer.

(c) Interpretive waymarks in the written constitutional text

A waymark, according to the The Shorter Oxford English Dictionary, is ‘a conspicuous object which serves as a guide to travellers’. There are statements in the Preamble to and in certain provisions and other textual components of the Constitution-in-writing that explicitly present themselves as such to constitutional interpreters travelling the road to a better understanding of the Final Constitution (or aspects of it). Some conspicuous waymark provisions will first be identified and discussed.

To track or to spoor is also a way of travelling, but the guides to the journey are inconspicuous — and therefore not readily noticeable — but not invisible, and therefore not undiscoverable. The vigilant constitutional interpreter may detect these inconspicuous waymarks, for they are really and effectually there, in the written constitutional text, and they are discoverable. Examples of inconspicuous waymarks will be looked at after the discussion on conspicuous waymarks.

Interpretive waymarks seem to occur in provisions of the Constitution in an injunctive, directive or permissive mood. Here are three examples:

• The s 39(1) requirements that a court interpreting the Bill of Rights must promote certain values and must consider international law are, on the face of it, injunctive though the latter requirement — not really requiring a court to apply international law, but just to consider it — is arguably rather directive.

• The basic principles governing public administration in s 195 are directive.

• The s 39(1)(c) commendation of foreign law is permissive.

636 Du Plessis (supra) at para 44.

637 Langemaat v Minister of Safety and Security 1998 (4) BCLR 444, 448J (T); Wittman v Deutscher Schulverein, Pretoria 1998 (4) SA 423 (T), 449C, 1999 (1) BCLR 92, 115H (T).


639 See § 34.2(c)(ii) infra.
Not much of interpretive significance, however, turns on a distinction between injunctive, directive and permissive waymarks. The prescriptivity of the language in which a waymark provision is couched may enhance or reduce the initial conspicuity of the waymark, but this will no longer really matter once the waymark is followed.

Waymarks are not typical 'black-letter' legal rules, though, not even those couched in injunctive language. Theunis Roux suggests that the founding values in s 1 of the Constitution must be seen as interpretive guidelines, 'presumptions almost, which favour a certain way of understanding the South African constitutional project and . . . the nature of the democracy which that project seeks to promote'. To treat value statements as 'presumptions almost' is to honour their normative ubiquity in constitutional interpretation. These 'presumptions' are substantive legal norms which do not obtain in an all-or-nothing manner, but carry sufficient weight to determine interpretive outcomes one way or the other. Conventional wisdom about presumptions in statutory interpretation, namely that they are 'last resorts' or 'tertiary grounds of deduction' to which the interpreter turns if all other interpretive strategies (and especially the literalist-cum-intentionalist ones) have failed, is wholly inappropriate to constitutional interpretation (and is under siege in statutory interpretation too).

Constitutional values as presumptions (as well as value-laden presumptions of statutory interpretation) call to mind Ronald Dworkin’s distinction between rules of law obtaining in an all-or-nothing manner and principles whose application is less definite though they carry demonstrable weight in the determination of legally reasoned outcomes. The presumptions aforesaid exert whatever interpretive influence they have in a principle-like manner, rather than in a rule-like manner, even though they can probably not be described as fully-fledged principles in a Dworkinian sense.

(i) Conspicuous waymarks

(aa) The Preamble to the Constitution

In statutory interpretation, preambles were traditionally recognized as statements setting out the objects of statutes. They were not frequently included in statutes and introduced mainly statutory texts of a solemn nature, for example, Constitution Acts or private Acts such as University Acts. It was admissible to consult a preamble to shed interpretive light on the meaning of the provisions of the legislative instrument that they prefaced, but then only where individual provisions that stood to be construed were ambiguous or uncertain due to deficient

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641 Du Plessis Re-Interpretation of Statutes (supra) at 149-154; L du Plessis 'The (Re-)systematization of the Canons and Aids to Statutory Interpretation' (2005) 122 South African Law Journal 591, 598.


formulations. However, the attitude of the courts regarding the interpretive value of the preambles to the Interim Constitution and the Final Constitution (and the Interim Constitution's unprecedented Postamble too) has been open and positive right from the outset. Sachs J, for instance, said the following about the Preamble to the Interim Constitution:

The Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes.

The Constitutional Court and, to a lesser extent, high courts have shown a readiness to rely on constitutional preambles for interpretive purposes without imposing the qualification that such reliance is warranted only where the language of the Constitution is ambiguous and/or unclear. A good example of comprehensive (interpretive) reliance on the Preamble to the Constitution, seeking out the democratic substance in the introductory statements, can be found in Theunis Roux's Chapter 10 entitled 'Democracy'.

See Du Plessis Re-Interpretation of Statutes (supra) at 240.

See Mhlungu (supra) at para 112.

See S v Makwanyane & Another 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC)('Makwanyane') at paras 130, 155, 156, 262, 278, 307, 514 and 363; Mhlungu (supra) at paras 64, 112 and 132; Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC)('Executive Council of the Western Cape 1995') at paras 30, 39 and 61; Shabalala v Attorney-General, Transvaal 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC)('Shabalala') at paras 25 and 35; Ferreira v Levin; Vryenhoek v Powell 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC)('Ferreira') at para 255; Bernstein & Others v Bester & Others NNO 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at para 150; Ex parte Gauteng Provincial Legislature. In re: Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995 1995 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC) at para 52; Du Plessis (supra) at paras 75, 123, 125–126, 132, 157 and 159; Key v Attorney-General, Cape Provincial Division 1996 (6) BCLR 788 (CC), 1996 (4) SA 187 (CC) at para 13; Brink v Kitchoff NO 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at paras 33 and 44; Fraser v Children's Court, Pretoria North, & Others 1997 (6) BCLR (CC), 1997 (2) SA 261 (CC) at para 20; Minister of justice v Ntuli 1997 (3) SA 772 (CC), 1997 (6) BCLR 677 (CC) at para 32; Fose v Minister of Safety and Security 1997 786 (CC), 1997 (7) BCLR 851 (CC) at para 94; Prinsloo v Van der Linde 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 21; Harksen v Lane NO & Others 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 123; Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC)('Soobramoney') at para 9; Pretoria City Council v Walker 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC)('Walker') at para 108; New National Party of SA v Government of the RSA 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at para 119; First National Bank of SA Ltd v/ Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd v/ Wesbank v Minister of Finance 2002 (7) BCLR 702 (CC), 2002 (4) SA 768 (CC)('FNB') at para 50; Kaunda & Others v President of the RSA & Others (2) 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC)('Kaunda') at paras 218-221; Minister of Finance and Another v Van Heerden 2004 (6) 121 (CC), 2004 (11) BCLR 1125 (CC) at para 23.


The Interim Constitution also included a Postamble which, just like the Preamble to the Interim Constitution, was relied on in an unqualified manner for interpretation purposes. Much of the spirit and tenor of that Postamble has survived in the Preamble to the Final Constitution. The latter, for instance, among other things, recognizes 'the injustices of our past' and honours 'those who suffered for justice and freedom in our land', and furthermore reiterates the need for healing 'the divisions of the past' and for building a 'united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations'. Even the monotheistic confession of faith, gleaned from South Africa's national anthem, which concluded the Interim Constitution's Postamble, has remained in the Final Constitution's Preamble: *Nkosi Sikelel' iAfrika* (God bless Africa). The Postamble, it will be remembered, was the textual peg on which two versions of transitional constitutionalism as interpretive leitmotiv — the one picturing the Constitution as a bridge and the other conceiving of it as a monument and a memorial — were first hung. The similarities between the Postamble and the present Preamble buttress the claim that textual support for transitional constitutionalism as interpretive leitmotiv still exists – even though explicit reference to the 'bridge' is no longer made. The more unqualified use of preambles in constitutional interpretation has met with response in statutory interpretation too and it seems to have become a rule of thumb for statutory drafters to include preambles in statutes dealing with a variety of matters.

**(bb) The Founding Provisions**

FC s 1, reminiscent of article 20 of the German Basic Law, sets out the rudiments of the kind of state (*politeia*) the Final Constitution is meant to found in South Africa. These provisions are therefore arguably the most fundamental and most salient interpretive waymarks in the written constitutional text. Their extraordinary status is underscored by the requirement that an enhanced majority of 75 per cent in the National Assembly, and the support of six out of the nine provinces in the National Council of Provinces, are needed for the amendment of FC s 1. The whole of Chris Roederer’s Chapter 13 is devoted to a discussion of the founding provisions and their ramifications.

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650 On this Postamble, see § 32.3(c)(iii) supra. As pointed out previously, this Postamble was designed to pave the way for mechanisms and procedures to 'deal with the past' in a manner that best promoted national unity and reconciliation. By virtue of a provision in the Final Constitution itself, namely FC s 232(4), the Postamble was 'deemed to form part of the substance' of the Interim Constitution.

651 See *Shabalala* (supra) at para 25; *AZAPO* (supra) at paras 12–14; *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 73; *S v Lawrence*; *S v Negal*; *S v Solberg* (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) at para 147; *Walker* (supra) at paras 46, 102 and 108.

652 See §§ 32.3(c)(ii)(a) and (bb) supra.

653 FC s 74(1).

(cc) FC s 7 (Rights)

FC s 7 has, to date, mostly been relied on as an *ad hoc* rhetorical stratagem. This is unfortunate. FC s 7 contains provisions that amplify the meaning of the Bill of Rights and that are very similar to FC s 1 and its founding provisions for the Final Constitution.

Sceptics may object to the depiction of the provisions of FC s 7 as interpretive waymark provisions. Only FC s 7(3) serves as reminder that the fundamental rights in Chapter 2 are subject to limitations contained in FC s 36 or elsewhere in the Bill of Rights — and thus satisfies the desiderata of a typical interpretive instruction. FC s 7 is, admittedly, not an 'interpretation clause' in the same sense as FC s 39. However, it embodies weighty assertions about the Bill of Rights as a cornerstone of democracy in South Africa (FC s 7(1)) and the manner in which the state is required to make good on the promise of the specific substantive rights found in Chapter 2 (FC s 7(2)). The statements in these two subsections will remain abstract ideals if not concretized through interpretation. No extraordinary insight is required to realize that lofty constitutional values and ideals will come to naught if they are not invoked to shepherd and shape the way in which authorized interpreters of the Final Constitution (and the Bill of Rights) give effect to the provisions of the country’s supreme law. The value statements in FC s 7 are, like those in FC s 1, essentially presumptions that indicate that some understandings of the Bill of Rights are to be preferred to others.655

A triumvirate of values, 'human dignity, equality and freedom', affirmed in FC s 7(1), decisively informs four crucial value statements in the Constitution — one among the founding provisions656 in FC s 1657 and three in the Bill of Rights.658 The fundamentality and centrality of the triumvirate values informing s 7(1) rightly raised expectations that case law pronouncements on this provision would abound. The contrary is true. The case law offers few examples of FC s 7(1)-centred assertions of the triumvirate values and, in general, of systematic analyses of their nature, content and scope, as well as measured assessments of their potential impact. Courts have cited FC s 7(1) to affirm the centrality of human dignity as a constitutional value, but have mostly combined this with simultaneous references to the triumvirate value assertions elsewhere in the Final Constitution.659

The possible meanings and effects of the triumvirate values have mostly been considered in the course of limitations reasoning centred on s 36(1). In paragraph (ee) below it will be explained why the systematic and comprehensive discussions of

655 See Roux 'Democracy' (supra) at 10-26.

656 See FC Chapter 1.

657 See FC s 1(a).

658 See FC s 7(1)(States that the Bill of Rights affirms these democratic values); FC s 36(1), the general limitation clause; and FC s 39(1)(a), the interpretation clause.

659 See, for example, Dawood & Another v Minister of Home Affairs & Others; Shalabi and Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at paras 34-35; Pillay (supra) at para 49.
these values in Stu Woolman and Henk Botha's chapter on 'Limitations'660 and Theunis Roux's chapter on 'Democracy'661 suffice (also) for purposes of the present chapter.

The wording of FC s 7(2) admits of and, indeed, invites optimum realization of the rights entrenched in the Bill of Rights. The view that a bill of rights may be relied on to respect and protect fundamental rights against interference by the state has traditionally enjoyed wide acceptance in the context of domestic human rights protection. However, to add to this obligation that the state is also enjoined to take positive action to promote and fulfil rights entrenched in a bill of rights will probably raise many a traditionalist eyebrow. And yet, FC s 7(2) has been cited in support of such positive state action.

In S v Baloyi (Minister of Justice Intervening)662 the Constitutional Court, on a combined reading of FC ss 7(2) and 12(1) — the latter entrenching the right to freedom and security of the person — concluded that the state is obliged to protect the right of everyone to be free from private or domestic violence, even if it meant (preventative and pre-emptive) state intrusion into the privacy of family life. Legislation authorizing such intrusion663 was therefore held to be constitutional because the intrusion for which it provides fulfils the state's constitutional obligation. In its landmark judgment in Carmichele v Minister of Safety and Security & Another, the Constitutional Court laid down guidelines for the development of the common law so as to promote the spirit, purport and objects of the Bill of Rights.664 Considered in casu was the development of the common law of delict on state liability for injuries suffered by a claimant at the hand of a third party, due to the failure of protective state agencies to take adequate precautionary action. The case originated in the Cape High Court which, on the strength of the 'undeveloped' common law, had previously granted absolution from the instance. The Constitutional Court, having concluded that there was scope for the development of the common law in this area (through FC s 39(2)), referred the case back to the Cape High Court 'so that the trial may continue'.665 Chetty J, in the latter court, thereupon handed down a judgment in which he applied the Constitutional Court's guidelines for the development of the common law and construed the duties of the state and, in particular, the police and prosecution services, in an activist vein


662 S v Baloyi (Minister of Justice Intervening) 2000 (1) BCLR 86 (CC), 2000 (2) SA 425 (CC)('Baloyi') at para 11.


664 Carmichele v Minister of Safety and Security & Another 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC)('Carmichele').

665 Carmichele (supra) at para 84.
with reference to, among others, the wording of FC s 7(2). In Modder East Squatters & Another v Modderklip Boerdery (Pty) Ltd; President of the RSA & Others v Modderklip Boerdery (Pty) Ltd{66} the Supreme Court of Appeal, once again citing FC s 7(2) and FC s 1, emphasized that the extended scope of individuals' entitlement to state protection against harmful action imposes a positive duty on the part of the state to protect every citizen from damaging acts perpetrated by private (third) parties.

In Government of the Republic of South Africa & Others v Grootboom & Others the Constitutional Court confirmed that the explicit (yet somewhat restrained) entrenchment of certain socio-economic rights in the Bill of Rights, read with the state’s FC s 7(2) duty to promote and fulfil the rights entrenched in Chapter 2, have put beyond question the issue of whether socio-economic rights are justiciable. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. The Constitutional Court has also held that the legislature’s previously referred to responsibility to enact legislation giving fuller and more detailed effect to fundamental rights entrenched in the Final Constitution is a duty imposed upon it by FC s 7(2).

In Kaunda & Others v President of the RSA & Others (2), a conservative and cautionary construction of FC s 7(2) was held not to authorize the exterritorial application of the Final Constitution. The Court thought that the positive duties that FC s 7(2) imposes on the state do not extend beyond the borders of the Republic per se, and that an answer to the question of whether South African

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666 Ibid at para 30.


668 Socio-economic rights are entrenched in FC ss 26 and 27 not as entitlements to the commodities mentioned in those sections (to wit housing, health care, food, water and social security), but as entitlements to have access to the commodities in question. On the construction of socio-economic rights, see S Liebenberg ‘The Interpretation of Socio-Economic Rights’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, OS, December 2003) Chapter 33.

669 Grootboom (supra) at para 20.

670 The Court’s (arguably still somewhat tentative) view on the justiciability of socio-economic rights as expressed in First Certification Judgment (Ex parte Chairperson of the Constitutional Assembly In re: Certification of the Constitution of the Republic of South Africa, 1996, 1996 (10) BCLR 1253 (CC), 1996 (4) SA 744 (CC) at para 78) was hereby (also) confirmed, in what may be described as a modestly activist judgment induced by FC s 7(2).

671 For examples of such legislation, see § 34.2(a) supra.

672 See SANDU (supra) at para 52. See also New Clicks (supra) at para 96.

673 2004 (10) BCLR 1009 (CC), 2005 (4) SA 235 (CC) at para 32.
nationals’ constitutionally entrenched rights attached to them outside of South Africa is co-dependent on whether the Final Constitution can be construed as having extra-territorial effect. As Stu Woolman notes, the Kaunda Court — with a simple errant reading of a preposition — arrived at the wrong conclusion. 674

Finally, in Doctors for Life International v Speaker of the National Assembly & Others the Constitutional Court considered the nature of the duties FC s 7(2) imposes on the state, in order to determine which remedies would be available to someone prejudiced by a breach of such duties. 675 The Court suggested that these duties do not count among the ‘constitutional obligations’ contemplated in FC s 167(4)(e) and on the fulfilment of which the Constitutional Court has exclusive jurisdiction to adjudicate. Instead, the Court thought that non-compliance with FC s 7(2) duties has to be regarded (and treated) as similar to non-compliance with any other duties imposed by the Bill of Rights. These remarks seem to indicate that FC s 7(2) is justiciable — not as a right, but as a source of duties!

From the somewhat disparate treatment of FC s 7 there so far there emerges a picture of reasonably frequent — but by no means unimpeachable — reliance on FC s 7(2) to impose positive duties on the state. However, a coherent account of the triumvirate values, taking its cue from s 7(1), is by and large still wanting. And even if FC s 7(3) had indeed been designed as general authorization for limitations to Chapter 2 rights only in accordance with FC s 36 or other relevant provisions of the Bill of Rights, the constitutional case law has actually ignored such status. Limitations jurisprudence, since the commencement of the Constitution, has predominantly hinged on the construction of the provisions of FC s 36 676 or, to a lesser extent, Bill of Rights provisions containing or referring to specific limitations.

‘This Bill of Rights is a cornerstone for democracy in South Africa’. A coherent and context-sensitive account of FC s 7, going beyond ad hoc explanations of it in the case law so far, presumably has to begin with this crucial opening statement in s 7(1). And yet, judged by the paucity of case law references, this statement seems to be overlooked quite easily. But it does appear, and do some work, now and then. In De Lange v Smuts NO & Others the Constitutional Court, for instance, held it to be one of the constitutional indicia compelling ‘a clear separation of powers between the legislature, executive and judiciary’. 677 This reliance on FC s 7(1) forges an inextricable link between rights and democracy on the one hand, and democracy and rights, on the other. If ever a constitution could be found to expressly deny the contermajoritarian problem as a problem, then such a denial is to be found in FC s 7(2). Theunis Roux, in Chapter 10 (‘Democracy’) rightly

forges a link between the FC s 7(1) cornerstone statement and the rudiments of (constitutional) democracy. He suggests that a democracy with a bill of rights as cornerstone is one in which constitutional review by the courts is afforded its due, to


676 See Woolman & Botha ‘Limitations’ (supra).

677 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 44.
the point of recognising that 'there will be at least some occasions when the vindication of a right at the expense of majoritarian wishes will not be undemocratic'. The notion of the Bill of Rights as cornerstone of democracy furthermore presupposes a particular mode of constitutional review. The primary characteristics of this mode of review appear in FC s 36(1) procedures and conditions for limiting rights.

HM Cheadle, DM Davis and NR Haysom attempt to offer a coherent account of FC s 7 based on the assumption that the section as a whole accomplishes five important objectives:

(i) First, it proclaims the Bill of Rights as a cornerstone of our democracy. It is not the only such cornerstone — FC s 1, for instance, fulfils a similar role — but the status of FC s 7 as cornerstone has profound implications for how the rights contained in the Bill of Rights engage with the democratic governance of the Republic. FC s7 is furthermore entwined with FC s 1 to such an extent that, according to the authors, a dilution of the former will inevitably offend the basis of the latter.

(ii) Second, FC s 7 proclaims that the Bill of Rights enshrines the rights of all who live in the country. That means that such rights pre-exist their inclusion in the Final Constitution. They are, in other words, innate rights as contemplated in the American Declaration of Independence which contains the following phrase (included at the behest of Thomas Jefferson):

We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

The Final Constitution is therefore not the source or the origin of the rights that it enshrines, but a record of already existing rights.

(iii) Third, FC s 7 affirms a value system on which the Bill of Rights rests. According to the authors the affirmation of these (what were previously referred to as) triumvirate values provides a basis for the Constitutional Court’s claim in Carmichele v Minister of Safety and Security & Another that the Constitution is not merely a formal document regulating public power, but that ‘[i]t also embodies, like the German Constitution, an objective, normative
The authors are, however, critical of what they perceive to be a skewed development in the Constitutional Court’s jurisprudence of the triumvirate values and its over-emphasis of human dignity.

(iv) Fourth, FC s 7 requires the state to take affirmative measures to respect, protect, promote and fulfil the rights contained in the Bill of Rights. Under this heading — with comparative reference to foreign jurisprudence — the authors endorse the previously described activist trend in South Africa’s constitutional jurisprudence. FC s 7(2) saddles the state with certain ‘positive’ duties.

(v) Fifth, FC s 7 recognizes that the rights in the Bill of Rights may be limited, but only in the manner set out in the Bill itself.

Bringing together what Roux says about the Bill of Rights as cornerstone of democracy, the contentions of Cheadle, Davis and Haysom, and Woolman and Botha’s analysis of the role of FC 7(1) in rights interpretation and limitations analysis, it appears that FC s 7 plays, in respect of the Bill of Rights, an anchoring, depictive and interpretive role analogous to that of the founding provisions in FC s 1. FC ss 1 and 7 also complement and sustain each other. The democratic procedures mentioned in s 1 mainly pertain to populist democracy: universal adult suffrage, voters' rolls, regular elections, multi-party democracy and accountable, open and responsive government are the matters and concerns raised in FC s 1(d). In FC s 7 the emphasis is, as Roux rightly argues, on constitutional democracy. The ideological tension between populism and constitutionalism reveal itself when FC ss 1 and 7 are read together. But the tension between them remains. This tension, kept alive, has the potential to release creative (interpretive) energy that could enrich the construction of both populist- and constitutionalist-inclined provisions in the Final Constitution.

(dd) Section 8 (Application)

Application of the Bill of Rights, as provided for primarily in FC s 8, has been dealt with extensively by Stu Woolman in Chapter 31 and there is no need to revisit or to expand upon that exhaustive discussion here. However, it must be pointed out pertinently, in the present chapter dealing with interpretation, that FC s 8 embodies significant waymarks to the interpretation of the Bill of Rights. This is unsurprising, given the unity in the duality of what has conventionally been known (and distinguished) as interpretation and application. Dealing with the

684 See also § 32.1(c) supra.

685 Cheadle, Davis & Haysom (supra) at 2-2-2-4.

686 Ibid at 2-4-2-6.

687 ‘Democracy’ (supra) at 10-34–10-37.

688 Woolman & Botha ‘Limitations’ (supra) at Chapter 34.

689 Woolman ‘Application’ (supra) at Chapter 31.

690 See §§ 32.3(a)(vi) and 32.3(d) supra.
overriding question of to whom and to what the Bill of Rights applies, FC s 8 significantly demarcates the ambit and determines the impact of the Bill of Rights on the existing law, the functions of the legislature, the executive, the judiciary and organs of state, and on natural persons and on juristic persons. It goes without saying that such an impact is a matter of fundamental interpretive significance.

However, no application issue illustrates the interpretive ramifications of FC s 8 better than the s 8(2) provision for the direct application of 'a provision of the Bill of Rights' to 'a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the rights and the nature of any duty imposed by the right'. FC s 8(1), it will be remembered, introduces the application clause by making the Bill of Rights applicable to 'all law' and binding upon the legislature, the executive, the judiciary and all organs of state. FC s 8(3), in order to effect the direct or 'horizontal' application of a right as envisaged in FC s 8(2), provides for the application or, in a manner reminiscent of s 39(2), the development of the common law. It also authorizes the limitation of such a right 'provided that the limitation is in accordance with section 36(1)’ FC (the limitations clause).

IC s 7 sub-ss (1) and (2), predecessors to FC s 8(1) to (3), were agreed on after an intense tug of war between enthusiastic proponents and resolute opponents of the horizontal application of the transitional Bill of Rights. These two subsections, read together, left room for either a restrictive understanding of the operation of the Bill of Rights or a more extensive understanding allowing for its direct, horizontal application. In the then landmark (and now obsolete) Constitutional Court judgment of Du Plessis & Others v De Klerk & Another the die was cast in favour of the former, more restrictive understanding of sub-ss (1) and (2) of FC s 7. These two provisions were thereafter replaced by FC ss 8(1), 8(2) and 8(3). In Khumalo & Others v Holomisa, the Court acknowledged the explicit, unmistakable, written constitutional basis for direct, horizontal application of the Bill of Rights.
Ten years after the commencement of FC ss 8(1), 8(2) and 8(3), and five years after 
Khumalo, the Du Plessis v De Klerk scepticism about the direct, horizontal 
application of the Bill of Rights has either persisted or has been revived. This, at 
least, seems to be the most feasible conclusion to be drawn from Stu Woolman's 
'Amazing Vanishing Bill of Rights'. Woolman revives the debate about application 
by looking closely at three 2007 judgments of the Constitutional Court: 
Barkhuizen v Napier, NM & Others v Smith & Others and Masiya v Director of Public 
Prosecutions & Others. Woolman's consistent objection is that in all three cases 
rights interpretation gave way to the more amorphous FC s 39(2) process of norm 
interpretation in circumstances where the former process was logically and 
pragmatically to be preferred. Going the inappropriate norm route deprived the 
Constitutional Court's interpretive reasoning, in all three judgments, of both 
analytical rigour and nuance. According to Woolman, the root cause of the court's 
inappropriate interpretive strategy is its reluctance, if not downright unwillingness, 
to apply rights provisions in the Bill of Rights directly to the action of (non-state) 
'natural or juristic persons' as envisaged in FC s 8(2) and in Khumalo. Woolman's 
analysis demonstrates how an issue of application can decisively determine a 
strategy of constitutional interpretation. That alone gives Woolman's objections 
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(ee) FC s 36 (Limitation of rights)

In this case, the applicants are members of the media who are expressly identified as bearers of 
constitutional rights to freedom of expression. There can be no doubt that the law of defamation 
does affect the right to freedom of expression. Given the intensity of the constitutional right in 
question, coupled with the potential invasion of that right which could be occasioned by persons 
other than the State or organs of State, it is clear that the right to freedom of expression is of 
direct horizontal application in this case as contemplated by s 8(2) of the Constitution. The first 
question we need then to determine is whether the common law of defamation unjustifiably limits 
that right. If it does, it will be necessary to develop the common law in the manner contemplated 
by s 8(3) of the Constitution.

698 For a full discussion and analysis of this case, see S Woolman 'Application' (supra) at 31-42-31-56 
and 31-62-31-74.

See also § 32.1(c) supra.

700 Barkhuizen v Napier 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC).

701 NM & Others v Smith & Others 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC).

702 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 (CC)('Masiya').

703 See § 32.1(c) supra.

704 Woolman 'The Amazing, Vanishing Bill of Rights' (supra) at 769.

705 Ibid at 762-763.

706 Khumalo (supra) at para 33, for example.
FC s 36 is probably the explicitly articulated interpretive waymark provision in the Bill of Rights (and the Constitution as a whole) relied on most frequently and most openly in constitutional interpretation, for it embodies the operational provisions that set constitutionally passable limits to rights. Rights interpretation will be impossible without (constitutional) provision for the measured limitation of the rights construed. Because of its eminence, the topic 'Limitations' is discussed exclusively in Chapter 34. In that chapter Stu Woolman and Henk Botha extensively consider and canvass the meaning possibilities of — and the meaning(s) attached by the courts to — the value-laden phrase 'an open and democratic society based on human dignity, equality and freedom'. A FC s 36(1) limitation of rights may be effected 'to the extent that the limitation is reasonable and justifiable' in such a society. Theunis Roux, in his discussion of democracy in Chapter 10, reflects incisively, with reference to the written constitutional text and the case law, on the possible meanings of the value-laden phrase above and on its ramifications for democracy. In this chapter, an exercise akin to what Woolman, Botha and Roux have ably and amply undertaken will at best be duplicative. The value-laden phrase above with its incorporation of the triumvirate values can be accessed, in part, in FC s 7(1) and in whole, through FC s 39(1) too. In paragraph (cc) above only case law references accessing the phrase via FC s 7(1) were briefly considered and in paragraph (ff) below the same will be done with references going the FC s 39(1) route. For more detailed discussions of the phrase and the triumvirate values the reader is referred to Chapters 10 and 34.

(ff) FC s 39 (Interpretation of the Bill of Rights)

FC s 39, like FC s 7, has to date also not thoroughly and systematically been analyzed in the constitutional case law. A coherent and context-sensitive construction of the section and its subsections is therefore also still wanting. However, FC s 39(2) is an exception in this regard because, especially since Carmichele v Minister of Safety and Security & Another, it has become a prominent, normative launching pad for the development of existing law to promote the spirit, purport and objects of the Bill of Rights. FC s 39(2) is, in other words, and has fast become, a far-reaching provision dealing with the impact of the Bill of Rights on the interpretation and development of existing law. This topic will be dealt with more fully at a later stage under the heading 'subsidiarity'.

707 Woolman & Botha 'Limitations' (supra).
708 Ibid at 34-6734-126.
709 Roux 'Democracy' (supra) at 10-34–10-37 and 10-65–10-77.
710 See § 32.4(c)(i)(cc) supra.
711 See § 32.1(d) supra.
712 Carmichele (supra).
713 See § 32.5(b)(iii)(bb) infra.
The heading to FC s 39 explicitly states that this operational provision deals with the interpretation of the Bill of Rights though, as was suggested earlier, the section does not encapsulate Bill of Rights interpretation in its entirety. It begins by prescribing the promotion of certain values 'when interpreting the Bill of Rights' and continues by prescribing, in a peremptory vein, reliance on international law and allowing, in a directory vein, reliance on foreign case law in Bill of Rights interpretation. Reliance on these two transnational sources will be dealt with as comparative interpretation (or transnational contextualisation) at a later stage.

Finally FC s 39(3) provides that the Bill of Rights does not entail a denial of existing rights and freedoms deriving from — and provided for in — other sources of law. For present purposes some observations on how ss 39(1)(a) and 39(3) have featured in interpretive constitutional jurisprudence will be appropriate.

FC s 39(1)(a) envisages 'an open and democratic' society based on the triumvirate values, namely, human dignity, equality and freedom, and it enjoins judicial interpreters of the Bill of Rights to promote the values that underlie such a society. This same aspirational society is prefigured in FC s 36(1). As pointed out in paragraph (ee) above there are, with reference to FC s 36(1), accounts in the case law of what this model society might look like. The values that underlie such a society have also been catalogued methodically in the in Chapters 34 and 10 of this treatise.

Nothing remotely resembling the accounts and the methodical catalogue just referred to, exists in respect of FC s 39(1)(a) in the case law. The courts mainly cite the description in this provision of the model society based on the triumvirate values for rhetorical rather than analytical purposes, and most often in order to lend force to what a judicial interpreter has already concluded, with reference to an issue at hand, an ideal state of affairs in a democratic South Africa should be. In Soobramoney v Minister of Health, KwaZulu-Natal Sachs J, for instance, in justifying the Constitutional Court's refusal to interfere with an executive decision not to provide life-saving medical treatment to an ailing applicant, opined (with reference to FC s 39(1)(a)) that:

[i]n all the open and democratic societies based upon dignity, freedom and equality with which I am familiar, the rationing of access to life-prolonging resources is regarded as integral to, rather than incompatible with, a human rights approach to health care.
In Christian Education SA v Minister of Education the same judge observed that '[t]here can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important'.

In S v Gumede & Others it was stated as a general proposition that FC s 39(1)(a) 'enjoins the court to apply a liberal interpretation to the Bill of Rights; in other words, where possible, to apply a wider rather than a narrower interpretation thereof'.

This then, presumably, is the desired approach to Bill of Rights interpretation in 'an open and democratic society'. If FC s 39(1)(a) can be understood to prescribe, as it were, a preferred approach to Bill of Rights interpretation, then it certainly also authorizes reliance on methods of and reading strategies for constitutional interpretation accepted and brought into play in open and democratic societies. This possibility has not been canvassed eo nomine in the case law.

FC s 39(1)(a) has, from time to time, been cited in the case law, mostly ad hoc and in conjunction with the triumvirate value statements in FC ss 1(a), 7(1) and 36(1), and as point of contact for observations on the meaning and effect of the triumvirate values. Among these observations a remark by the Constitutional Court in S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening) is worth noting. The Mamabolo Court stated emphatically that the Constitution 'proclaims three conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom'. This dictum is striking because of its even-handed treatment of the triumvirate values — human dignity, for example, is not singled out for special treatment or mention. Langa CJ, in MEC for Education: KwaZulu Natal & Others v Pillay & Others, endorsed the Mamabolo approach, holding that the triumvirate values 'are not mutually exclusive but enhance and reinforce each other'. He did not refer back to Mamabolo though, but to a dictum from the minority judgment of Ackermann J in Ferreira v Levin NO; Vryenhoek v Powell NO.

In S v Makwanyane & Another, Mokgoro J, considering the constitutional significance of the concept of ubuntu, made an interesting move: she placed ubuntu on a level with concepts like 'humanity' and 'menswaardigheid' ('human dignity')

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721 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC) at para 36.

722 1998 (5) BCLR 530, 542B (D). See § 32.1(b) supra.

723 But see De Lange v Smuts NO & Others 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC)('De Lange') at para 85.

724 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC)('Mamabolo') at para 41.

725 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC)('Pillay') at para 63.

726 Ferreira (supra) at para 49:

Human dignity has little value without freedom, for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.
and then stated that '[i]t is values like these that [FC s 39(1)(a)] requires to be promoted'. This move was referred to with approval in *Port Elizabeth Municipality v Various Occupiers* and was said to require 'the court to infuse elements of grace and compassion into the formal structures of the law'.

In *S v Dzukuda & Others; S v Tshilo* the Constitutional Court, with reference to FC s 39(1)(a), among others, pointed out that reliance on the triumvirate values — or the 'foundational values of our Constitution' as the court called them — is essential to discover what 'lies at the heart of a fair trial in the field of criminal justice'. In *S v Dodo*, also in the context of criminal justice, but this time with reference to the notion of 'cruel, inhuman or degrading' punishment as it occurs in s 12(1)(e) of the Constitution, s 39(1)(a) was cited alongside the other constitutional provisions verbalizing the triumvirate values, in support of the contention that the s 12(1)(e) litmus test is whether impugned punitive acts involve 'the impairment of human dignity, in some form and to some degree'.

As to the meaning of FC s 39(3), in *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the RSA*, the Constitutional Court stated that the purpose of this provision is to ensure, together with FC s 39(2), 'that the common law will evolve within the framework of the [Final] Constitution consistently with the basic norms of the legal order that it establishes'. This purpose presupposes that the Final Constitution is the supreme law against which all other law must be tested:

Section 39(3) should not be taken to establish a legal apartheid with two separate systems of law, only one of which is effected by the rules and principles of the Constitution.

Cheadle, Davis and Haysom are of the opinion that '[FC] s 39(3) embraces what might be termed a presumption of constitutionality'. Thus far, the case law dealing with FC s 39(1) and (3) offers little more than *ad hoc* judicial wisdom — though not without some persuasive force. For systemic and comprehensive accounts of the meaning of 'an open and democratic society based upon human dignity, equality and freedom' the reader should, as previously


728 2004 (12) BCLR 1268 (CC) at para 37 n 36.

729 Ibid at para 11.

730 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC) at para 35.

731 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 49.


733 Ibid at 33-4–33-5.
intimated, look to the more speculative readings of Woolman and Botha in Chapter 34 and Roux in Chapter 10 of this treatise.\textsuperscript{734}

\textbf{(gg) FC Chapter 3 (Co-operative government)}

FC Chapter 3 demonstrates that South Africa is a co-operative federal state\textsuperscript{735} as opposed to a competitive federation.\textsuperscript{736} Chapter 3 and FC ss 40 and 41 embody interpretive waymarks of considerable significance for the construction of FC ss 146 to 150 which set out, with remarkable specificity, how conflicts between laws in the various spheres of government, in this co-operative federation, are to be resolved.\textsuperscript{737}

\textbf{(hh) FC s 195 (Basic values and principles governing public administration)}

FC s 195 embodies vital waymarks for the interpretation of constitutional provisions dealing with public administration.\textsuperscript{738}

\textbf{(ii) FC s 239 (Definitions)}

The Final Constitution, like many conventional statutes, has a definition clause with explicit directives as to how certain words and phrases occurring throughout the written text ought to be understood.\textsuperscript{739} There are actually only three definitions: of 'national legislation', of 'organ of state', and of 'provincial legislation'. The constitutional definition clause is relied on regularly (most often for its definition of 'organ of state')\textsuperscript{740} and it is used in much the same way as definition clauses in ordinary statutes. Its definitions obtain 'unless the context indicates otherwise' or unless some sound reason for their exclusion can be shown to exist.

Definitions in the Interpretation Act\textsuperscript{741} have been used for constitutional interpretation much in the same way they have been used for statutory interpretation.\textsuperscript{742} The use of the Act's definitions to assign meaning to constitutional

\footnotesize{\textsuperscript{734} See, for example, Roux 'Democracy' (supra) at 10-31–10-32 and 10-35–10-36.}


\footnotesize{\textsuperscript{736} I Currie & J de Waal \textit{The New Constitutional and Administrative Law Volume I} (2001) 119-124.}

\footnotesize{\textsuperscript{737} For a discussion of these provisions, see V Bronstein 'Conflicts' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) \textit{Constitutional Law of South Africa} (2nd Edition, OS, July 2006) Chapter 16. On the fundamental significance of co-operative government especially between the central and provincial governments, see \textit{Doctors for Life v Speaker of the National Assembly & Others} 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC)('Doctors for Life') at para 81 and \textit{Matatiele Municipality & Others v President of the Republic of South Africa & Others} 2007 (1) BCLR 47 (CC)('Matatiele') at para 41.}


\footnotesize{\textsuperscript{739} FC s 239.}
provisions is precluded, however, if their use would have the effect of subordinating the Final Constitution to the Act.

The Final Constitution has been held to be ‘a law’ as envisaged in the Interpretation Act. Section 1 of the Citation of Constitutional Laws Act,\textsuperscript{743} however, affirms the uniqueness of the Final Constitution by authorizing one reference only, namely ‘Constitution of Republic of South Africa, 1996’. A reference such as ‘Constitution of the Republic of South Africa, Act 108 of 1996’ is therefore not only inappropriate, but statutorily proscribed. The prescribed mode of reference honours the status of the Final Constitution, as amidst enacted law, the only one of its kind. It is an interpretive waymark of considerable consequence even though it does not appear in the written text of the Final Constitution.

(ii) Inconspicuous waymarks

Inconspicuous interpretive waymarks in the Constitution-in-writing are not immediately traceable, but they are there, nonetheless, available for use, and they have the same force that conspicuous waymarks have. The matters they deal with are also by no means less significant than those that the conspicuous waymarks bring to the fore.

A matter as vital as the separation of powers (or \textit{trias politica})\textsuperscript{744} is, for instance, not explicitly mentioned in the written text of the Final Constitution, and as an unexpressed or implicit provision,\textsuperscript{745} it is detectable with the help of, among others, inconspicuous waymarks in the written constitutional text. Such waymarks may present themselves as, amongst others, inferences drawn from the structure of the


\textsuperscript{741} Act 33 of 1957. See also \textit{Magano v District Magistrate, Johannesburg} (2) 1994 (4) SA 172 (W), 177C.

\textsuperscript{742} See \textit{Zantsi v Council of State, Ciskei & Others} 1995 (10) BCLR 1424 (CC) (‘Zantsi’), 1995 (4) SA 615 (CC) at paras 36–37; \textit{Ynuico Ltd v Minister of Trade and Industry} 1996 (3) SA 989 (CC), 1996 (6) BCLR 798 (CC) at para 7; \textit{President of the Republic of South Africa & Another v Hugo} 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 97.

\textsuperscript{743} Act 5 of 2005.

written constitutional text and/or from its explicit provisions.\textsuperscript{746} In \textit{South African Association of Personal Injury Lawyers v Heath & Others}\textsuperscript{747} the Constitutional Court \textit{per} Chaskalson P explained:

I cannot accept that an implicit provision of the Constitution has any less force than an express provision. In \textit{Fedsure}, this Court held that the principle of legality was implicit in the interim Constitution, and that legislation which violated that principle would be inconsistent with the Constitution and invalid.

The constitutions of the United States and Australia, like ours, make provision for the separation of powers by vesting the legislative authority in the legislature, the executive authority in the executive, and the judicial authority in the courts. The doctrine of separation of powers as applied in the United States is based on inferences drawn from the structure and provisions of the Constitution, rather than on an express entrenchment of the principle. In this respect, our Constitution is no different.

In the \textit{First Certification Judgment} this Court held that the provisions of our Constitution are structured in a way that makes provision for a separation of powers . . . There can be no doubt that our Constitution provides for such a separation, and that laws inconsistent with what the Constitution requires in that regard, are invalid.\textsuperscript{748}

Interpretive waymarks in the written constitutional text — and especially the inconspicuous ones — do not constitute a \textit{numerus clauses}, and where pressing interpretive exigencies necessitate a meticulous reading of the text, there is always a possibility that 'new' waymarks may be detected.

The explicit and implicit waymarks in the written text do not function in isolation from one another — but often, when read in conjunction, strengthen the force of one another. Guarantees of judicial independence in the written constitutional text offer an apt illustration of this thesis.\textsuperscript{749} In the Final Constitution FC s 165 underwrites most conspicuously and directly the independence of South Africa’s courts:

\textbf{165 Judicial authority}

(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

\textsuperscript{745} See \textit{South African Association of Personal Injury Lawyers v Heath & Others} 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) (‘Heath’) at para 19.

\textsuperscript{746} See \textit{First Certification Judgement} (supra) at paras 106-113.

\textsuperscript{747} Heath (supra) at paras 20-22.

\textsuperscript{748} \textit{Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council} 1999 (1) SA 374, 1998 (12) BCLR 1458 (CC) (‘Fedsure Life Assurance’) at para 58.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

While FC s 165 is undoubtedly a (if not the) leading waymark provision on how powers of the judiciary, given its independence, are to be construed, other implicit (and no less potent) guarantees of judicial independence exist in the Final Constitution:

(aa) FC s 173's entrenchment of higher courts' 'inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice' presupposes the independence of those courts.

(bb) FC s 1(c) proclaims the '[s]upremacy of the Constitution and the rule of law' to be two of the values on which the Republic of South Africa is founded. These two founding values, each on its own but especially also in conjunction with each other, are consistent only with a constitutional dispensation in which the independence of the judiciary prevails.750

(cc) The 'open and democratic society' identified in the interpretation751 and limitation752 of rights in the Bill of Rights can hardly be secured without independent courts.

(dd) FC s 37(3) of the Constitution entrusts 'any competent court' with the power to review the declaration and an extension of — as well as legislation and administrative action consequent upon — a state of emergency. This is a far-reaching constitutional acknowledgment of the independence of the judiciary, particularly in difficult times.

(ee) FC s 233 decrees preference for a reasonable interpretation of legislation consistent with international law over any interpretation not thus consistent. This makes for an observation of international law standards which, in its turn, is likely to result in constitutional interpretation conducive to judicial independence.

(ff) Oddly — and significantly — the definition clause in the Constitution753 expressly provides that 'a court or a judicial officer' is not an 'organ of state' — even though 'organ of state' also means any functionary or institution exercising a (public) power or performing a (public) function in terms of the Constitution, a provincial constitution or legislation. Not putting courts and

750 FC s 74(1).

751 FC s 39(1)/(a).

752 FC s 36(1).

753 FC s 239.
judicial officers on a par with other organs of state is most likely an instance of precautionary, definitional deference to judicial independence.

The six textual indicia above prompt the conclusion that, just like trias politica, the independence of the judiciary may also be deduced from the structure and provisions of the Final Constitution.

Finally, choice of words may also function as interpretive waymark. Having a right to freedom and security of the person (s 12(1)) or to a basic education (s 29(1)(a)) is presumably an entitlement of a different order compared to a right to have access to adequate housing (s 26(1)) or health care (s 27(1)(a)), or not to be denied the right to enjoy one’s culture (s 31(1)(a)).

32.5 Methods of constitutional interpretation

(a) Method(s) as doing(s)

The concept 'method', in the context of constitutional interpretation, previously came into the picture briefly when theories of constitutional interpretation were discussed. The different methods of constitutional interpretation which German scholars have formulated with reference to the constitutional jurisprudence of their Bundesverfassungsgericht have been briefly assayed, and passing mention was made of the extent to which such methods reflect discernible theoretical orientations or positions. For present purposes the focus will not be this method-theory relationship, but method as a mode or manner of doing as such. 'Method', like 'theory', is used loosely among jurists. However, the dictionary meanings of the word, apposite to the present discussion, are rather to the point. 'Method', in one of its generic significations is, the Shorter Oxford English Dictionary on CD-ROM tells us, a 'procedure for attaining an object', and one possible more specific meaning under the generic heading is 'a mode of procedure, a (defined or systematic) way of doing a thing, esp. . . . in accordance with a particular theory or as associated with a particular person'. To this it may be added that the procedure is purposive or goal-directed and conscious planning has gone into designing it. However, a method which has become mere routine will mostly obfuscate such conscious planning.

A synonym for 'method' is 'technique' which, in constitutional interpretation, designates a skilful engagement with the Constitution-in-writing to explore its meaning possibilities. Interpretive method-as-technique can also be described as a reading strategy. Preference will be given to the term 'reading strategy' when reference is made to method as interpretive doing, because the word 'method' itself could be understood as a reference to methods of constitutional interpretation as they occur in, for instance, the German context, and it is not these methods (or phenomena akin to them) that will be discussed in the rest of this chapter.

(b) Reading strategies

754 See § 32.3(c)(i) supra.

South Africa’s legal system is a hybrid: rather like Romano-Germanic civil law in some respects and like English common law in others. The common-law phenomenon of *stare decisis*, introduced through colonial British rule, has been the key to the survival and growth of (civil-law oriented) Roman-Dutch law (and all other common law) in South Africa. In respect of content, the South African common law shows traits of both Roman-Dutch and English common law. Traditionally English influence has been strongest in (and English law has actually dominated) areas of the law most closely related to the exercise of political power (constitutional and administrative law), the administration of justice (law of criminal and civil procedure and evidence) and business and industry (company law, bills of exchange, insolvency law). For present purposes the influence of English law in public law and the law of procedure is particularly significant because the idea of having a written constitution as highest law is not indigenous — and arguably even inimical — to English public law.

The discussion of the reading strategies that now follows must be seen against the background just sketched since all of these strategies somehow engage existing law in constitutional interpretation. The strategies themselves are not typically or exclusively 'constitutional'. Reliance on precedents for interpretation purposes, for instance, the first strategy that will be discussed, is apt for the interpretation of all enacted law in a case law system, and for an understanding and development of the common law. The second reading strategy to be considered, namely reading in conformity with the Final Constitution, is a manner of ensuring that existing statute law coheres with the Final Constitution and avoiding unnecessary findings of constitutional invalidity. Much the same applies to the strategy of subsidiarity.

**(i) Construing the Constitution in a case-law context**

As is the case with statute law, the day-to-day application of provisions of the Final Constitution mostly does not emanate from studious interpretive efforts, because the normal rules of *stare decisis* apply and sustain meanings that courts handing down binding judgments have previously attributed to such provisions. Courts equal in status can depart from an earlier court’s judgment only when the earlier court is deemed to have clearly erred. The same rules apply to constructions placed upon constitutional provisions by the Constitutional Court and the Supreme Court of Appeal.

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757 ‘English public law’ in itself is, historically speaking at least, somewhat of a misnomer in the absence of an effectual distinction between private law and public law which has always been of fundamental significance in civil-law legal systems and in South African law too.

758 *Collett v Priest* 1931 AD 290, 297; *R v Du Preez* 1943 AD 562, 583; *Robin Consolidated Industries Ltd v Commissioner for Inland Revenue* 1997 (3) SA 654 (SCA), 666F–H.
Unfortunately, the *stare decisis* jurisprudence of especially the Supreme Court of Appeal and the Constitutional Court over the last number of years seems to have compromised the capacity of high courts to develop the common law in terms of FC s 39(2). As matters stand after *Afrox Health Care Bpk v Strydom*, 760 *Ex Parte Minister of Safety and Security and Others: In Re: S v Walters and Another* 761 and *Govender v Minister of Safety and Security*, 762 High Courts must abide by Supreme Court of Appeal, Appellate Division and Constitutional Court decisions where clear precedent exists — unless the challenge to pre-constitutional common law judgments is articulated in terms of a direct application of a substantive provision of the Bill of Rights. 763 These developments are discussed and criticized in Woolman’s chapter on ‘Application’ (Chapter 31), and there is no need to repeat discussion of the issue here. 764 It is enough to say that the advantages of developing constitutional interpretation in a *stare decisis* context are lost if the rules of *stare decisis* are employed in too rigid a manner. 765

(ii) Reading in conformity with the Constitution

Interpretation of legislation in conformity with a justiciable constitution (*Verfassungskonforme Auslegung* in German) is a widely adhered to reading strategy associated with constitutional interpretation. 766 It gives specific expression to the

759 *Ex parte President of the RSA In re: Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC) at para 20.

760 2002 (6) SA 21 (SCA)(*'Afrox Health Care'*).

761 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC)(*'Walters'*) at paras 36-39.

762 2001 (4) SA 273 (SCA)(*'Govender'*)


765 Iain Currie and Johan de Waal contend that while developments in the Supreme Court of Appeal’s *stare decisis* jurisprudence may have an adverse impact on the high courts’ ability to promote the spirit, purport and objects of the Bill of Rights *when developing the common law*, the same does not necessarily apply to achievement of these FC’s 39(2) objectives *when interpreting legislation*, because the jurisprudence in question deals explicitly just with the former and not with the latter. See I Currie & Johan de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 71. However, it is difficult to read *Afrox Health Care* and *Govender* as distinguishing common law rules from statutory provisions for the purpose of reading down.

'new canon of statutory interpretation', traceable to FC s 39(2), that legislation must be interpreted 'through the prism of the Bill of Rights'.

Reading in conformity with the Final Constitution is sometimes also referred to as a presumption of constitutionality. A prima facie unconstitutional (and by that token potentially impugnable) provision will survive constitutional scrutiny if it is reasonably possible to read it in conformity with the Final Constitution without distorting or unduly straining its 'plain meaning'. Such a reading is mostly believed to be narrower or more restrictive than other possible readings. It is, in other words, a reading down. A more extensive, non-distortional reading of an impugned provision (or a reading that eliminates ambiguity) to the same end is, however, not precluded.

A generous reading could, for instance, sustain and enhance provisions of statutes giving specific effect to constitutional provisions, and designed and enacted to promote constitutional imperatives, such as the achievement of equality and the prohibition of unfair discrimination, access to information, or just administrative action. In Daniels v Campbell NO & Others
the Constitutional Court understood the term 'spouse' in the Maintenance of Surviving Spouses Act extensively to include partners in a Muslim marriage which had not officially been solemnized in terms of the Marriage Act. The majority of the Daniels Court thought that such an extensive reading (or ‘reading up’) was necessary to vouch for the constitutionality of a provision that would otherwise have to be struck down.

Where one of two conflicting interpretations of a statutory provision better promotes the spirit, purport and objects of the Bill of Rights than the other one, the former is to be preferred.

By the same token, where two conflicting interpretations of a statutory provision could both be said to be reflective of the relevant structural provisions of the Constitution as a whole, read with other relevant statutory provisions, the interpretation which better reflects those structural provisions should be adopted.

The Interim Constitution explicitly authorized the reading down of impugned ‘laws’ both in relation to the provisions of its Chapter on Fundamental Rights and other constitutional provisions. The Final Constitution contains no similar provision(s). Reading down, and reading in conformity with the Final Constitution in general, are nonetheless valid and, in fact, required reading strategies. They ought not to be confused with FC s 39(2)’s requirement that existing law must be ‘developed’ in light of the spirit, purport and objects of the Bill of Rights. And they are certainly not equivalent to the remedy of reading in.

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779 Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and the Registrar of Deeds, Cape Town (Trustees of the Hoogekraal Highlands Trust and SAFAMCO Enterprises (Pty) Ltd as Amici Curiae; Minister of Agriculture and Land Affairs Intervening) [2008] ZACC 12 at para 46.

780 Ibid at para 47.

781 IC s 35(2). This provision read as follows:

No law which limits any of the Rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used prima facie exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.

782 IC s 232(3).

783 De Lange (supra) at para 85.

784 AAA Investments (supra) at para 72.
Govender v Minister of Safety and Security provides a good example of reading down a statutory provision in order to sustain its constitutionality. The provision in question in that case was s 49(1) of the Criminal Procedure Act:  

If any person authorized . . . to arrest or to assist in arresting another, attempts to arrest such person and such person —  

(a) resists the attempt and cannot be arrested without the use of force;  

or  

(b) flees when it is clear that an attempt to arrest him is being made, or resists such attempt and flees;  

the person so authorized may, in order to effect the arrest, use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.

The Supreme Court of Appeal thought that the use of a firearm or similar weapon to effect an arrest may be warranted — with due regard to an arrested person's constitutional rights — only if the person authorized to arrest has reasonable grounds for believing  

1. that the suspect poses an immediate threat of serious bodily harm to him or her [that is, the person authorized to arrest], or a threat of harm to members of the public; or  

2. that the suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm.  

These conclusions can follow only from a reading down of s 49(2).

In Govender, the Supreme Court of Appeal per Olivier JA remarked as follows on its interpretive modus operandi and then set out a formula for dealing with constitutional challenges to legislation:  

With the enactment first of the Interim Constitution and later of the Constitution and the vast changes it brought about to the juristic landscape, came a need for a method of interpreting legislation in a manner new to South African lawyers. . . This method of interpreting statutory provisions under the Constitution requires a court to negotiate the shoals between the Scylla of the old-style literalism and the Charybdis of judicial law-making. This requires magistrates and judges  

(a) to examine the objects and purport of the Act or the section under consideration;  

(b) to examine the ambit and meaning of the rights protected by the Constitution;  

(c) to ascertain whether it is reasonably possible to interpret the Act or section under consideration in such a manner that it conforms with the Constitution, ie by protecting the rights therein protected;  

(d) if such interpretation is possible, to give effect to it, and  

785 Govender (supra) at para 24. Ibid at paras 19–21.  

786 Act 51 of 1977.
if it is not possible, to initiate steps leading to a declaration of constitutional invalidity.\textsuperscript{787}

In \textit{Ex Parte Minister of Safety and Security and Others: In Re: S v Walters and Another}\textsuperscript{788} the Constitutional Court endorsed the Supreme Court of Appeal's approach in \textit{Govender}\textsuperscript{789} to interpretation in conformity with the Final Constitution, as an instance of restrained constitutionalism wary of over-reliance on the written constitutional text as supposed super law.\textsuperscript{790} As has appeared from the discussion so far, this reading strategy can result in either a restrictive or extensive understanding — a 'reading down' or a 'reading up' — of an impugned statutory provision \textit{in order to prevent it from being struck down because it is unconstitutional}.

There are also judicially more 'activist' ways of either restricting or extending the scope of a statutory provision, namely \textit{severance} and \textit{reading-in} respectively. Both of these \textit{constitutional remedies} are dependent upon finding a statutory provision to be inconsistent with the Final Constitution. Through severance the unconstitutional parts (literally: words and phrases) of impugned legislation are severed or cut off from the rest of the legislation, and struck down, in order to preserve the constitutionally consistent remainder. Reading in refers to the opposite of severance, namely an insertion of words and/or phrases into an impugned legislative provision to render it constitutional, thereby averting a declaration of invalidity. The latter \textit{modus operandi} has been followed in a number of cases dealing with legislation on intimate relationships and the 'meaning of spouse' issue in particular.\textsuperscript{791} Again, severance and reading-in are \textit{constitutional remedies} — as opposed to \textit{reading strategies} — provided for in FC s 172(1)(b).\textsuperscript{792}

It is not obvious when a court should decide to read impugned legislation in conformity with the Final Constitution or when it should rather grant one of the two aforementioned remedies. Much depends on a court's perception of what a 'reasonably possible', 'non-distortive' and/or not 'unduly strained' reading in conformity with the Final Constitution in a particular case can be. A court inclined to read legislation in a literalist way — assuming that language is the bearer of uncontested, pre-given meaning — will generally speaking be reluctant to read in conformity with the Constitution and will tend rather to grant remedial relief. Wessel

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{787} \textit{Govender} (supra) at paras 10-11. The \textit{Govender} court cited in support of its approach \textit{De Lange} (supra) at para 85; \textit{National Coalition 2000} (supra) at paras 23-24 and \textit{S v Bhulwana; S v Gwadiso} 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at para 28.
\item \textsuperscript{788} \textit{Walters} (supra) at paras 36-39.
\item \textsuperscript{789} \textit{Govender} (supra) at paras 10-11.
\item \textsuperscript{790} The idea of restrained constitutionalism as manifested in subsidiarity is further explained in § 32.5(b)(iii)(bb) infra.
\item \textsuperscript{791} See § 32.3(c)(iii)(bb) supra.
\end{enumerate}
\end{footnotesize}
le Roux is of the opinion that the Constitutional Court, because of some of its judges' 'extremely reactionary approach to constitutional and statutory interpretation', has predominantly opted for remedial activism in preference to interpretive flexibility, especially in its (judged by outcomes) rather progressive jurisprudence on intimate relationships. The basis for this preference is a narrow understanding of 'interpretation' which excludes the alteration of words from its scope. According to Le Roux this narrow view is also an 'unsound political limitation of the democratic process'.

The problem is that the constitutional remedies (unlike the interpretive techniques) are reserved for use by the Constitutional Court itself, or under its direct supervision only . . . The centralising tendencies that are built into this distinction pose a threat to the democratisation of legal meaning in post-apartheid South Africa. In fact, the centralised control of meaning in the apartheid state is perfectly mirrored by the juricentric approach to legal interpretation in its post-apartheid successor.

Moseneke J, however, in Daniels v Campbell NO & Others, quite candidly advanced the following institutional (and by that token political) motivation for preferring the remedial rather than the interpretive route to bring statutes in conformity with the Final Constitution:

Another important consideration relates to the rule of law. The problem of readily importing interpretations piecemeal into legislation is the precedent it sets. Courts below will follow the lead and readily interpret rather than declare invalid statutes inconsistent with the Constitution. However, constitutional re-interpretation does not come to this Court for confirmation. The result may be that high courts develop interpretations at varying paces and inconsistently. This makes for an even more fragmented jurisprudence and would have deleterious effects on how people regulate their affairs. It is highly undesirable to have an institution as important as marriage recognised for some people in some provinces and not in others. The rule of law requires legal certainty.

With both Le Roux's and Moseneke J's remarks in mind, it is hard to escape the conclusion that the choice between reading a statute in conformity with the Final Constitution or remedially rectifying it is at least as much determined by institutional politics as by 'purely interpretive' or 'legally technical' considerations.

(iii) Subsidiarity

I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.

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794 Ibid at 548.

795 Ibid at 547.

796 Daniels (supra) at para 104.

797 See § 32.3(c)(v) supra.
This *dictum* comes from the minority judgment in *S v Mhlungu & Others*, one of the earliest judgments of the South African Constitutional Court. Though it is not often cited (both in the literature and the case law) it seems to articulate a 'principle' of significance or a 'salutary rule'. Some authors refer to it as the *principle of avoidance* according to which (it is said) 'constitutional issues should, where possible, be avoided':

The principle requires the court first to try and resolve a dispute by applying ordinary legal principles, as interpreted or developed with reference to the Bill of Rights, before applying the Bill of Rights directly to the dispute.

This principle is also understood as complementing (and, indeed encouraging preference for) the indirect application of the Bill of Rights, assuming that 'the Bill of Rights respects the rules and remedies of ordinary law, but demands furtherance of its values mediated through the operation of ordinary law'.

The *dictum* in *Mhlungu* cited above can also be read as instantiating (albeit rather crudely) *subsidiarity*, a phenomenon hitherto largely unnamed (but arguably not unused) in constitutional interpretation in South Africa. 'A principle of avoidance', invoked to avoid *constitutional absolutism*, could readily lead to *constitutional minimalism*. Both constitutional absolutism and constitutional minimalism are unacceptable, and their excesses are best prevented by properly invoking subsidiarity as a constitutional reading strategy.

'Subsidiarity' has sporadically been mentioned by name in the South African case law — and but once in a constitutional case — as a rather 'slender' phenomenon

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798 *S v Mhlungu & Others* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) (‘Mhlungu’) at para 59 (Kentridge AJ). See also *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 898 (CC), 1997 (6) BCLR 692 (CC) at para 21; *National Coalition 2000* (supra) at para 21; *Minister of Education v Harris* 2001 (4) SA 1297 (CC), 2001 (11) BCLR 1157 (CC) at para 19.

799 *Mhlungu* (supra) at para 59.


801 *Zantsi* (supra) at para 2. Ibid at para 8.

802 Currie & De Waal *Handbook* (supra) 25.

803 Ibid at 32.

804 *Mhlungu* (supra) at para 59.


806 See 32.3(c)(iii)(bb) supra.
fulfilling the limited function of designating reliance on an exceptional or 'last resort' (subsidiary) norm in instances where no other legal norm enjoying priority is available.807 Here are three good examples of such a restricted use: (1) in *Absa Bank Ltd t/a Bankfin v Stander t/a CAW Paneelkloppers*808 Van Zyl J agreed with two legal scholars' assertion that, in German law, the availability of an action for indirect enrichment only when an action for direct enrichment is not possible or enforceable constitutes a 'subsidiarity principle'; (2) in *Ex Parte Minister of Safety and Security & Others: In Re: S v Walters & Another*809 the permissibility of force to make an arrest only where there are no lesser means of achieving the arrest was said to be an instance of 'subsidiarity' and (3) in *AD & DD v DW & Others: The Centre for Child Law (Amicus Curiae) and the Department of Social Development (Intervening Party)* dealt with a subsidiarity principle concerning child adoption:

If a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a family.810

The distinctive 'designating' ability of subsidiarity can be harnessed, in the context of constitutional interpretation, in two ways: first, to designate an appropriate person or forum to construe and implement the Final Constitution in a particular instance; and, second, to sustain preference for an appropriate norm or configuration of norms in a particular instance where existing law stands to be construed under the authority of and in relation to the supreme Constitution, and especially pursuant to FC s 39(2). Section 39(2), it will be remembered, requires that legislation be interpreted and that common and customary law be developed to 'promote the spirit, purport and objects of the Bill of Rights'.811 It is arguable that, in its second, norm-designating capacity, subsidiarity is not really a reading strategy in constitutional interpretation, but rather a mode of constitutional application. The latter proposition does not exclude the former, however, due to the unity of interpretation and application.812

Before taking a closer look at possible manifestations of subsidiarity in constitutional interpretation and application, the functioning of subsidiarity in other contexts must briefly be sketched out. *The New Oxford Dictionary of English* describes subsidiarity 'in politics' as 'the principle that a central authority should

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807 See H Tilch & F Arloth (eds) *Deutsches Rechts-Lexikon* Vol 3 (3rd Edition, 2001) 4065 refers to subsidiarity as ‘die Nachrangigkeit (der Geltung)’ ['being in force at a lower rank']. A subsidiary norm ‘kommt . . . nur zur Anwendung, wenn kein vorrangiger Rechtssatz vorhanden ist’ ['is applied only when no legal norm higher in rank is at hand'].

808 1998 (1) SA 939 (C), 947B.

809 *Walters* (supra) at para 22.


811 See §§ 32.1(a), (b) and (d), 32.3(b)(i), 32.4(a) and (c)(ii)(ff) supra.

812 See §§ 32.3(a)(vi) and (d) supra.
have a subsidiary function, performing only those tasks which cannot be performed at a more local level. This dictionary definition implies that subsidiarity — a principle tracing its origins to Roman Catholic social thought and, more particularly, Pope Pius XI’s encyclical Quadragesimo Novarum — from the year 1931 — centrifugalizes the power of social institutions or bodies functioning within the ambit of the same social sphere.

According to Stefan Ulrich Pieper, 'logical subsidiarity' (as he calls it) is a methodological criterion designating one of two competing legal norms for application in a given situation, and preferring, as a rule of thumb, the specific to the general norm. The latter ought to be applied only when the former is not applicable. Elsewhere Pieper refers to this criterion as 'the lex specialis rule'. This reminds us that subsidiarity does not only apply when actors (people or entities) in a hierarchy of more and less encompassing social institutions are to be designated, but also when, from a hierarchy of more and less encompassing norms, appropriate norms for problem solving in a particular instance must be decided on. Subsidiarity designating institutional actors is institutional subsidiarity, and subsidiarity designating norms for decision-making is strategic subsidiarity.

Institutional subsidiarity, as a force in societal life, constrains any more encompassing or superordinate institution (or body or community) to refrain from taking power or authority over matters that more particular subordinate institution (or body or community) can appropriately dispose of, irrespective of whether the latter is an organ of state or of civil society. As a legal principle institutional

815 Pieper (supra) at 30.
816 Ibid at 142.
817 PC Bibliothek. *Meyers Lexikon: Das Wissen A-Z* (1993). In describing Subsidiarität, I envision a situation in which several legal norms are as such applicable, but an explicit legal directive — or a directive established through interpretation — excludes one of the (contending) legal norms from consideration for application in that particular situation — the said norm has to 'step down', as it were. Subsidiarity, in other words, manifests as the law's preference for legal norms A and B and C — and the exclusion of legal norm X from — for possible application in a given situation. Subsidiarity is defined as 'das Zurücktreten einer von mehreren an sich anwendbaren Rechtsnormen kraft ausdrückl. oder durch Auslegung zu ermittelnder gesetzl. Anordnung' [‘the retreat of one of a number of legal norms, applicable as such, by virtue of an explicit legislative directive or a directive determined through interpretation’].

818 See EWM Benda & H Jochen Vogel (eds) *Handbuch des Verfassungsrechts II* (2nd Edition, 1995) 1051 (‘Nach diesem Prinzip soll das, was die kleineren und untergeordneten Gemeinwesen leisten und zum guten Ende führen können, nicht für die weitere und übergeordnete Gemeinschaft in Anspruch genommen werden.’ [‘According to this principle a comprehensive, superordinate community ought not to take for its account any matter that a smaller, subordinate community can deal with and bring to a good end.’]). See also Pieper (supra) at 86.
subsidiarity is well established (and readily relied on) in, among others, the law of the European Union and German constitutional law. In European law, for instance, it helps determine whether an organ of the Union or rather an organ of a member state should dispose of a matter. It has, in this format and at the behest of (among others) Germany (the German Länder in particular and Britain, been incorporated into Article 3b of the Maastricht Treaty. In German constitutional law, institutional subsidiarity has had a decisive effect on federalism. Dawid van Wyk is of the opinion that subsidiarity is an implied (or implicit) constitutional value 'at the root of an open and democratic South African society', and he argues that measured reliance on it (can) largely compensate for the dearth of eye-catching federalist markers in South Africa's written constitutional texts.

Strategic subsidiarity engages concrete decisions or issues. In Mhlungu, the Constitutional Court was asked to deal with the nature of referral of cases to it under IC s 102(1). A case could only thus be referred if it involved adjudication of a constitutional issue – and it was with this scenario in mind that Kentridge J briefly dealt with the notion of 'reaching a constitutional issue'. Deciding, with due deference to constitutional supremacy, on less invasive constitutional norms or other conventional legal norms to deal with a question of law in the course of contentious proceedings is therefore (and will henceforth be treated as) an instance of strategic and, more particularly, adjudicative subsidiarity in constitutional interpretation.

**(aa) Jurisdictional subsidiarity**

*Jurisdictional subsidiarity*, in the context of constitutional interpretation, is concerned with the apportionment of power and responsibility to adjudicating fora to deal with the interpretation and application (that is, the concretization) of the Constitution in particular instances. It is, for all intents and purposes, an issue of the jurisdiction of courts in constitutional matters, discussed in detail in Chapter 4. However, a discourse on constitutional interpretation will be poorer if the identification and designation of authorized interpreters of the Constitution are not considered (albeit briefly) also *from a subsidiarity point of view.*

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820 See Van Wyk ‘Subsidiariteit as Waarde’ (supra) at 253.

821 Ibid at 254-259.

822 See Benda & Vogel (supra) at 1051–1052.

823 See L du Plessis Re-Interpretation of Statutes (2002) 76.

824 A 'waarde wat die oop en demokратiese Suid-Afrikaanse gemeenskap ten Grondslag lê' [a' value that underlies the open and democratic South African society'].

825 See also § 32.3(e)(iii) supra.

826 Mhlungu (supra) at para 59.
In German constitutional jurisprudence considerations of institutional, and more particularly, jurisdictional subsidiarity preclude the Bundesverfassungsgericht, the highest court in constitutional matters, from adjudicating cases with which other fora can deal.\textsuperscript{829} The South African Constitutional Court has made a similar ruling, holding in Amod v Multilateral Motor Vehicle Accident Fund,\textsuperscript{830} for instance, that the Supreme Court of Appeal was the more appropriate forum to develop the common law in a manner contemplated in IC s 35(3) (the predecessor to FC s 39(2)).\textsuperscript{831} Here institutional subsidiarity informed an answer to the jurisdictional question of which court should be designated to read and work with the Constitution given the particular issue at hand (and for the time being). The adjudicator-reader thus designated must be in a position to dispose of the matter, but does not have to do so as a forum of final instance. The fact that it may be an authorized reader for the time being in the sense that some of its findings may be subject to appeal, does not detract from — or reflect adversely on — its authority as adjudicator-reader.\textsuperscript{832} In Carmichele v Minister of Safety and Security,\textsuperscript{833} the Constitutional Court laid down guidelines for strategies to develop the common law.\textsuperscript{834} As a result, the Constitutional Court in Amod v Multilateral Motor Vehicle Accident Fund cannot be understood to have said that a forum like the Supreme Court of Appeal has a more pivotal say in developing the common law than the


\textsuperscript{828} See § 32.2 supra.

\textsuperscript{829} See K Hesse Grundzüge des Verfassungsrecht der Bundesrepublik Deutschland (19th Edition, 1993) 143.

\textsuperscript{830} 1998 (10) BCLR 1207 (CC), 1998 (4) SA 753 (CC)(‘Amod’).

\textsuperscript{831} These provisions enjoin any court developing the common law to ‘promote the spirit, purport and objects of the Bill of Rights’. FC s 39(2).

\textsuperscript{832} In Amod, an appeal would not have been possible. The Constitutional Court referred the case to the Supreme Court of Appeal to dispose of it.

\textsuperscript{833} Carmichele v Minister of Safety and Security & Another 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC)(‘Carmichele’).

\textsuperscript{834} The Carmichele Court held that a court is always under an obligation to develop the common law and ‘this duty upon judges arises in respect both of the civil and criminal law, whether or not the parties in any particular case request the court to develop the common law under section 39(2) [of the Constitution],’ Ibid at para 36. This obligation is not discretionary, but implicit in FC s 39(2) read with FC s 173. Ibid at para 39. When a litigant contends that, in the light of the Final Constitution, the common law has to be developed beyond existing precedent, a court is obliged to undertake a two-stage enquiry:

The first stage is to consider whether the existing common law, having regard to the section 39(2) objectives, requires development in accordance with these objectives. This inquiry requires a reconsideration of the common law in the light of section 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the section 39(2) objectives.
Constitutional Court itself has. Rather the Court must be understood as stating that — consistent with subsidiarity — the Supreme Court of Appeal was the more appropriate forum first to deal with the matter. Similarly, in *Carmichele v Minister of Safety and Security*, the Constitutional Court did not end up developing the common law itself. The case was referred back to the court of first instance with a very clear and compelling message about that court's duty to develop the common law and, in the particular case, with clear indications of the relevant constitutional dictates that had to be honoured in doing so. This outcome is quite compatible with the exigencies of jurisdictional subsidiarity: the higher, more comprehensive judicial authority provides lower, more localized doer-authorities with justificatory ammunition empowering them to square up to the task of developing the common law. The term 'subsidiarity', however, has not, as yet, been part of the Constitutional Court's lexicon.

The Constitutional Court has since *Carmichele v Minister of Safety and Security* indicated that the Supreme Court of Appeal is still primarily responsible for the development of the common law, and arguments that the common law has to be brought in line with the Bill of Rights have to be considered first by the Supreme Court of Appeal, before going to the Constitutional Court. However, the Constitutional Court is prepared to consider entertaining appeals from the Supreme Court of Appeal when the latter does not consider the possible impact of the Bill of Rights on the existing law in question. The Constitutional Court will do this even if none of the parties has raised the issue in the Supreme Court of Appeal. Given that every court must consider the impact of the Bill of Rights on the matter before it, Sebastian Seedorf rightly notes that every case in which the application of the common law is considered is potentially subject to appeal to the Constitutional Court: So while the Supreme Court of Appeal retains the primary responsibility for developing the common law, the Constitutional Court — as the court of final constitutional jurisdiction — is able to dangle 'a sword of Damocles' over every court seized with a potential constitutional matter.

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Ibid at para 40. Generally speaking, *Carmichele* holds that courts have an obligation to develop the common law in the light of constitutional values and to do so in an activist vein. This injunction is reminiscent (without explicitly citing) the constitutional injunction that the 'state must respect, protect, promote and fulfil the rights in the Bill of Rights', verbalised in FC s 7(2). See § 32.4(c)(i) (cc) supra.

835 See, for example, *Brisley v Drotsky* 2002 (4) SA 1 (SCA), 2002 (12) BCLR 1229 (SCA) at paras 2-3; *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA), [2002] 4 All SA 346 (SCA) at para 8; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at para 18; *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA), 2003 (11) BCLR 120 (SCA) at para 36.

836 *S v Bierman* 2002 (5) SA 243 (CC), 2002 (10) BCLR 1078 (CC) at para 7.


839 See also Woolman 'Application' (supra) at 31-80–31.82.
The Constitutional Court's contradictory indications of when it will entertain appeal cases dealing with the application of the common law, has brought about further uncertainty. In *Phoebus Apollo Aviation v Minister of Safety and Security*, the Court could find no convincing argument why the common law on vicarious liability needed development and consequently declined to deal with the issue of vicarious liability on appeal. In *K v Minister of Safety and Security*, on the other hand, the same court held that vicarious liability may have a 'policy laden character . . . imbued with social policy and normative content', and that the common law in this regard and its application needed development to bring it fully in line with the spirit, purport and objects of the Bill of Rights. In *Minister of Safety and Security v Luiters* the Constitutional Court indicated that when a litigant has explicitly contended for a development of the common law from the outset, the Constitutional Court is forced 'to consider constitutional rights or values' in order to assess, as final court of appeal, the need for such a development.

While FC s 167(4) gives the Constitutional Court exclusive jurisdiction in some matters, the Constitutional Court has frequently stated that it relies on judgments a quo to maximize the quality of its own adjudicative performance:

It is . . . not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgement is based, and of reconsidering and refining arguments previously raised in the light of such judgement.

The Constitutional Court moreover sometimes prefers to refrain from ruling on the constitutionality of a statutory provision until such time as experienced judges in other fora have had the opportunity to assess the consequences of either retaining or striking down an impugned provision. However, the Constitutional Court does not rigidly insist that even appeal cases must come before it only via the Supreme Court of Appeal. In *MEC for Education: KwaZulu Natal & Others v Pillay & Others*, the Court, for instance, thought that where the issues in a case had been fully

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840 2003 (2) SA 34 (CC), 2003 (1) BCLR 14 (CC).

841 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC)('K') at paras 22-23.

842 For a fuller discussion of these two cases, see Seedorf 'Jurisdiction' (supra) at § 4.3(d)(i).

843 2007 (2) SA 106 (CC), 2007 (3) BCLR 287 (CC) at para 23.

844 *Bruce v Fleecytex Johannesburg CC* 1998 (2) SA 1143 (CC), 1998 (4) BCLR 415 (CC) at para 8. See also *S v Bequinot* 1997 (2) SA 887 (CC), 1996 (12) BCLR 1588 (CC)('Bequinot') at para 15; *Christian Education SA v Minister of Education* 1999 (2) SA 83 (CC), 1998 (12) BCLR 1449 (CC) at paras 8 and 12; *Dormehl v Minister of Justice* 2000 (2) SA 987 (CC), 2000 (5) BCLR 471 (CC) at para 5 and *Carmichele (supra)* at para 50–53. The Supreme Court of Appeal has expressed similar sentiments. See *King & Others v Attorneys Fidelity Fund Board of Control & Another* 2006 (1) SA 474 (SCA), 2006 (4) BCLR 462 (SCA)('King').

845 See *Bequinot* (supra) at para 14.
canvassed in both an equality and an equality appeal court a quo, and the Constitutional Court had the benefit of comprehensive argument, presented by the parties and three amici curiae, it would not be in the interest of justice 'to require the parties to incur the additional expense of [first] going to the Supreme Court of Appeal'.

In Masiya v Director of Public Prosecutions & Others the Constitutional Court dealt with the power of the magistrates' courts to develop the common law, first, in terms of FC s 8(3), in order to provide for the direct horizontal application of the Bill of Rights, and, second, in terms of FC s 39(2) in order to promote the spirit, purport and objects of the Bill of Rights. The Court held that magistrates' courts do not have such a power because FC s 173 confers the power only on the Constitutional Court, the Supreme Court of Appeal and High Court. This conclusion follows from a rather superficial reading of FC s 173. FC s 173 provides for the higher courts' inherent power to develop the common law (and regulate their own processes). The section in no way intimates that only higher courts have the straightforward (as opposed to inherent) power to develop the common law. FC s 8(3) empowers 'a court' and s 39(2) 'every court, tribunal or forum' to develop the common law. Again, nothing in FC ss 8(3) or 39(2) prevents magistrates' courts from doing so.

The Masiya Court furthermore referred to s 110 of the Magistrates' Court Act, precluding magistrates' courts from pronouncing on the validity of any law or conduct of the President, to substantiate its view that it is not competent for magistrates' courts to develop the common law. It is not clear why the Constitutional Court did not at the outset (in relation to s 110) rely on the superordinate FC s 170 to come to the same conclusion. Be that as it may, neither s 110 of the Magistrates' Court Act nor FC ss 170 or 173 of the Constitution excludes the power of magistrates' courts to develop the common law.

To conclude: jurisdictional subsidiarity undeniably — but not rigidly or dogmatically — designates authorized readers of the Final Constitution in particular instances, and delineates their authority. It contributes to making constitutional interpretation and adjudication a sensible team effort and plays an important role in empowering a judiciary (and a legal community in general), for whom reading and applying a supreme constitution came as both a novelty and a challenge within the past decade and a half ago.

(bb) Adjudicative subsidiarity

Adjudicative subsidiarity as an instance of strategic subsidiarity is connected with the adjudication of substantive issues of law. This version of subsidiarity is present in

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846 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC) (‘Pillay’) at para 31.

847 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 (CC) (‘Masiya’) at paras 64-69.

848 Ibid at para 66.

849 Ibid at para 66.

850 Act 32 of 1944.
the *dictum* in *S v Mhlungu & Others*.\(^{851}\) Kentridge J referred, albeit by implication, to an adjudicator’s responsibility to opt for an *appropriate norm* (or configuration of norms, one might add) to decide an issue which could also be understood to be ‘constitutional’.

Adjudicative subsidiarity is centred on issues: it suggests a preference for an indirectly (or not strictly) constitutional mode of adjudication over a directly (or strictly) constitutional mode of adjudication whenever the solution of a legal question admits of the former (and does not of necessity require the latter). The authority of the Final Constitution is, in other words, not to be overused to decide issues that can be disposed of by invoking specific, subordinate and non-constitutional legal norms, *on the crucial condition, of course, that the solution arrived at, as well as the norm putting it forward, can withstand constitutional scrutiny*.

In *Zantsi v Council of State, Ciskei*, Chaskalson P explained that the strategy of adjudication just described can allow the law to develop incrementally, and that such incrementalism is desirable in view of the far-reaching implications that attach to constitutional decisions.\(^{852}\) Adjudicative subsidiarity moreover discourages court rulings ‘in the abstract on issues which are not the subject of controversy and are only of academic interest’\(^{853}\) and also contributes to an appropriate demarcation of the respective spheres of authority of the legislature and the judiciary.\(^{854}\) Constitutional over-adjudication, especially in reviewing legislation, could, according to the Chaskalson P, deprive the legislature of the opportunity to deal with an issue of its own accord, in its own distinctive manner and in response to its mandate from the electorate. Here Chaskalson P’s argument draws on the standard view of the separation of different kinds of power between the legislative, the executive and the judicial arms of government which is not an instance of subsidiarity. Subsidiarity engages the apportionment of authority and decision-making responsibility among unequal, ‘higher’ (more comprehensive) and ‘lower’ (less comprehensive) authorities, all exercising the same kind of power as organs of the same arm of government.

Bland and unthoughtful overreliance on adjudicative subsidiarity may compromise the supremacy of the Final Constitution, and the Constitutional Court has thus, on occasion, found it necessary to limit reliance on this reading strategy. In *Zantsi*, Chaskalson P observed that the Constitutional Court will constitutionalize an issue whenever it *is necessary* to dispose of a matter on appeal.\(^{855}\) He added that adjudicative subsidiarity cannot stand in the way of ‘the interest of justice’. In *Harksen v Lane NO*, Goldstone J also made it clear that there is no ‘hard and fast rule to the effect that in no case should referrals be made to this Court where non-

\(^{851}\) *Mhlungu* (supra) at para 59.

\(^{852}\) 1995 (10) BCLR 1424 (CC), 1995 (4) SA 615 (CC) (‘*Zantsi*’) at para 5.

\(^{853}\) Ibid at para 7.


\(^{855}\) *Zantsi* (supra) at para 4.
constitutional remedies have not been exhausted'. Adjudicative subsidiarity cannot justify an interpretive preference in any way inconsistent with the Final Constitution. Where there are several normative options equally consistent with the Final Constitution, adjudicative subsidiarity can, at best, advise preference for the option also most consistent with the existing non-constitutional law.

In *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the RSA*, the Constitutional Court rejected the conclusion of the Supreme Court of Appeal in *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennie Group Ltd trading as Renfreight* that the review of administrative action has to a large extent remained a procedure determined primarily by common law. Chaskalson P, in no uncertain terms, affirmed the supremacy of the Final Constitution where and whenever the exercise of any form of public power becomes susceptible to judicial assessment:

> The control of public power by the courts through judicial review is and always has been a constitutional matter... The common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts.

*Pharmaceutical Manufacturers* reflects the Constitutional Court's response to the Supreme Court of Appeal's claim that facially constitution-related issues could be disposed of in an 'enlightened', rights-friendly manner without reference to (let alone reliance upon) the Final Constitution. Thus, the South African common law on defamation could conceivably be developed without direct reliance on the 'right' to free speech. The Supreme Court of Appeal did just that in *National Media Ltd v Bogoshi*. That judgment expressly professed not to draw on constitutional resources. Similarly, the law of evidence relating to sexual offences was also 'modernized' in *S v Jackson* — by abolishing the so-called cautionary rule of evidence in rape cases — without mentioning 'the Constitution' even in passing.

On the one hand, some may say that such a tendency is an outcome of profitable reliance on adjudicative subsidiarity, giving effect to a preference of the

856 *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 26.

857 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*).

858 1999 (8) BCLR 833 (CC), 1999 3 SA 771 (SCA).

859 See, for example, *Pharmaceutical Manufacturers* (supra) at paras 17, 20, 27, 33, 44 and 45.

860 Ibid at para 33.

861 Ibid.

862 1998 (4) SA 1196 (SCA).

863 1998 (1) SACR 470 (SCA).
Constitutional Court itself (that is, the preference verbalized in the *dicta* in *S v Mhlungu & Others*<sup>864</sup> and in *Zantsi v Council of State, Ciskei*<sup>865</sup>). On the other hand, others may object that the Final Constitution is not meant simply to function as a silent background norm whenever the common law needs to be 'liberalized'. The Supreme Court of Appeal's enlightened judgments on free speech and the cautionary rule in sexual offences would most probably not have been handed down had it not been for the existence of the Final Constitution and its Bill of Rights. Does it become any court to allow itself to be influenced by the Final Constitution and then not acknowledge it? The Constitutional Court in *Pharmaceutical Manufacturers* suggested that it does not — especially not when the exercise of public power enters the picture.

In response to the two sentiments just juxtaposed, what the Constitutional Court said in the *Pharmaceutical Manufacturers* case must again be emphasized:

> There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.<sup>866</sup>

The 'one system of law' embraces statute law, common law and customary law — all geared towards the pursuit of justice guided by an all-pervasive Constitution.<sup>867</sup> To speak of a *principle of avoiding* constitutional issues, where possible, is thus inappropriate: all issues of law are ultimately constitutional issues and there is no way of avoiding them or the constitutional dimension to them. Equally inappropriate and unacceptable will be a manner of reliance on subsidiarity promoting constitutional minimalism. Subsidiarity is based on the idea of *restrained* (memorial) constitutionalism,<sup>868</sup> appropriate to a constitutional jurisprudence of restraint,<sup>869</sup> which is wholeheartedly committed to the Constitution as supreme law of the Republic. Nonetheless, subsidiarity sounds a word of caution about venerating the Final Constitution as an overarching, all-encompassing, omni-regulative, super-law. The Final Constitution certainly enjoys precedence among normative law-texts, but does not overwhelm or totally overpower them or simply take their place.<sup>870</sup> Since both constitutional absolutism and constitutional minimalism are equally

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<sup>864</sup> *Mhlungu* (supra) at para 59.

<sup>865</sup> *Zantsi* (supra) at para 5.

<sup>866</sup> *Pharmaceutical Manufacturers* (supra) at para 44.


<sup>868</sup> See § 32.3(c)(iii)(bb) supra. See also L du Plessis 'The South African Constitution as Memory and Promise' (2000) 11 Stellenbosch Law Review 385.


<sup>870</sup> On the notion of an 'all-encompassing Constitution', see § 32.5(b)(iii)(bb)(A) infra.
unacceptable, on balance and in the long run, restrained constitutionalism is the most propitious mode of give effect to constitutional supremacy.

This conclusion entails, first, the acceptance of the truism that the Final Constitution does not have readymade answers to all legal problems. It could, of course, be assumed that it is logically possible to bring, through subsumption, every conceivable legal problem within the prescriptive ambit of the generally formulated norms of the Final Constitution and then deduce answers to specific questions from these norms. (It must be noted, however, that the Bill of Rights is limited to 26 specific substantive provisions. The Final Constitution itself expressly recognizes that it is not meant to apply to all possible legal disputes: we have a right to housing, but not a right to transport.\textsuperscript{872}) But why rely on logical deduction, in the abstract as it were, to find an answer,\textsuperscript{873} when somewhere in the legal system there already exists a tried and tested answer — or at least some indicia suggesting one? Subsidiarity, then, suggests preference for first seeking the latter type of answer. Of course, if this answer cannot survive constitutional scrutiny, it is susceptible not only to rejection, but also to nullification. On the other hand, if the answer is by constitutional standards inadequate, development of the law proffering the answer — instead of the downright nullification of such law — is, in terms of subsidiarity reasoning and in terms of the Final Constitution, the required route to follow. Memorial constitutionalism sustains this mode of reasoning: on the way to the future, what was so blatantly offensive in the apartheid legal system of the recent past must be eliminated, if needs be, but at the same time the (continued) existence of the system and its effects must be recognized with due deference to — and in a manner honouring the values and ideals of — the Final Constitution. This recognition may include a slow but sure 'upgrading' of the system by, for instance, developing multifarious aspects of it.

Adjudicative subsidiarity also stands to facilitate compliance with the FC s 39(2)'s constitutional injunction to promote the spirit, purport and objects of the Bill of Rights when developing the common law and customary law.\textsuperscript{874} FC s 39(2) — which most writers see not as an interpretation provision, but as an (indirect) application provision instead\textsuperscript{875} — is thus bound to come up in any discussion of adjudicative subsidiarity as an interpretive reading strategy. FC s 39(2) is, however, not dealt with in all its ramifications in this chapter. Extensive analysis of this provision occurs in Woolman's chapter on 'Application' —Chapter 31\textsuperscript{876}— Seedorf's chapter on

\textsuperscript{871} See § 32.3(e)(ii) supra.


\textsuperscript{874} FC s 39(2) constitutes a new canon of statutory interpretation. See §§ 32.3(b)(i) and 32.5(b)(ii) supra.

\textsuperscript{875} Currie & De Waal Handbook (supra) at 161.
A court, with prudent reliance on existing law, can often resolve an issue in a manner quite consistent with — and indeed conducive to — constitutional values (and the spirit, purport and objects of the Bill of Rights), without deducing the particular answer directly from the provisions of the Final Constitution. A case in which the Supreme Court of Appeal could have done so, but failed to do so, was Afrox Health Care Bpk v Strydom. Here the question of law was whether an exemption clause in a written standard contract, indemnifying a private hospital against any claim for damages or injury to a patient, even when the hospital or its personnel was negligent, was enforceable against the patient. The Afrox Court gave optimum effect (and recognition) to the parties' freedom of contract, taking it to be an incarnation of the prominence which freedom and human dignity enjoy as guiding values in the Final Constitution, and consequently refused to interfere with terms of an agreement which free-willing parties had entered into consciously. The exemption clause was thus held to indemnify the hospital against all negligence short of gross negligence.

The patient relied upon FC s 27(1)(a)'s right of access to health care to challenge the exemption clause. However, both parties and the Afrox Court failed to notice that the even more obvious constitutional right at stake in this case was a patient's right to the security of her or his person, entrenched in IC s 11(1) (which applied at the time) and presently guaranteed in FC s 12(1). A patient going to a hospital typically puts her or his physical (and psychological) well-being in the hands of the hospital and its personnel because she or he needs special and specialist care. A contractual exemption clause construed with due regard to the spirit, purport and objects of the 1993 Bill of Rights could thus hardly indemnify a hospital against negligent non-performance of precisely that which the patient sought to

876 Woolman 'Application' (supra) at 31-77–31-100.


878 F Michelman 'The Rule of Law' (supra) at Chapter 11.

879 Mhlungu (supra) at para 59.

880 2002 (6) SA 21 (SCA)('Afrox Health Care').

881 Ibid at para 8.


883 Afrox Health Care (supra) at paras 15-16 and 19-20.
procure by contracting with the hospital, namely diligent and expert care for the
security of her or his person.

Tjakie Naudé and Gerhard Lubbe show that it also follows from sound and solid
law-of-contract reasoning that it should not be possible to conclude a contract which,
via an exemption clause, negates its own essence.\textsuperscript{885} Advocates of adjudicative
subsidiarity would endorse an argumentative strategy like that of Naudé and Lubbe
as appropriate for a case such as Afrox Health Care Bpk v Strydom. But this
stratagem does not mean that the Final Constitution and constitutional values exit
the picture. On the contrary, the conclusions of Naudé and Lubbe are sustainable
precisely because they are in conformity with the ‘constitutional conclusion’ that the
exemption clause in the hospital’s standard contract is inconsistent with the
protection afforded and the value attached to a patient’s constitutional right to
security of his or her person. For a court to mention this assessment in support of a
finding that the exemption clause should not be enforced would not be tantamount
to ‘reaching a constitutional issue’.\textsuperscript{886} It would rather be a judicial intimation (and a
recognition of the fact) that the law of contract, in this particular case, is susceptible
to an inherent development that will promote the spirit, purport and objects of the
Bill of Rights.

In contrast with Afrox Health Care Bpk v Strydom,\textsuperscript{887} the Supreme Court of Appeal in
Permanent Secretary, Department of Welfare, Eastern Cape and Another v
Ngxuza and Others\textsuperscript{888} prudently developed the common law in response to a
constitutional exigency, without using the Final Constitution as the source of the law
needed to resolve the actual issue in question. FC s 38(c) confers standing in
constitutional (and, in particular, in Bill of Rights) litigation on ‘anyone acting as a
member of, or in the interest of, a group or class of persons’. IC s 7(b)(iv) first
anticipated (and authorized) the use of class actions in constitutional litigation in the
same explicit terms as FC s 38(c) presently does. It thereby created an expectation
that the existing common law of civil procedure in respect of this

traditionally underutilized mode of litigation would occur in the South African
context.\textsuperscript{889} Ngxuza\textsuperscript{890} provided, first, the Eastern Cape Division of the High Court and
subsequently, on appeal, the Supreme Court of Appeal\textsuperscript{891} with an opportunity to
break fresh ground in this regard.

\textsuperscript{884} IC s 35(3).

\textsuperscript{885} T Naudé & G Lubbe ‘Exemption Clauses — a Rethink Occasioned by Afrox Healthcare Bpk v

\textsuperscript{886} Mhlungu (supra) at para 59 (Kentridge AJ).

\textsuperscript{887} Afrox Health Care (supra).

\textsuperscript{888} 2001 (4) SA 1184 (SCA) (‘Ngxuza SCA’).

\textsuperscript{889} Cameron JA refers to of class actions as envisaged in the Constitution as ‘an innovation expressly
mandated by the Constitution’. Ibid at para 22.

\textsuperscript{890} Ibid.
One of the questions that had to be answered was whether potential litigants, identifiable as members of a class but residing outside the area of jurisdiction of the Eastern Cape High Court, could be recognized as members of a class of plaintiffs bringing an action against the Eastern Cape Department of Welfare consequent upon withholding their disability grants unlawfully. The manner in which both courts dealt with this specific question significantly illustrates proper and prudent reliance on adjudicative subsidiarity. Froneman J explained the court a quo's position as follows:

Even if the members of the class residing outside the area of jurisdiction of this Court but elsewhere in South Africa are not parties to the action in the strict sense of the word as used in s 19(1)(b) of the Supreme Court Act, they may still be regarded as members of the class in the action in this Court . . . The ratio jurisdictionis connecting them to the case is the class action itself. If this amounts to a development of the common law, I am of the view that such a development is justified and permissible by virtue of ss 172(1) and 173 of the Constitution. In Estate Agents Board v Lek 1979 (3) SA 1048 (A) at 1063F it was stated that the question whether a court has jurisdiction 'depends on (a) the nature of the proceedings, (b) the nature of the relief claimed therein, or (c) in some cases, both (a) and (b)'. Having regard to these factors it is perhaps not even necessary to call ss 172(1) and 173 of the Constitution in aid (compare also s 19(1)(a)(iii) of the Supreme Court Act 59 of 1959).

This dictum comes from a constitutional adjudicator who, first, deferred to the constitutional exigency to develop the existing law regarding class actions for purposes of constitutional litigation and, second, resorted to a strategy of adjudicative subsidiarity, finding in the existing case law (and not in the written constitutional text) a point of contact (and a catalyst) to get the constitutionally required development going. This strategy led to the conclusion that it may perhaps not even be 'necessary to call . . . the Constitution in aid' to effect the actual development. The Final Constitution as catalyst or agent for (and ' overseer' of) the development of the existing law is therefore not necessarily also the source of the specific norm or configuration of norms that effects the development.

In the judgment on appeal a similar modus operandi was followed. Cameron JA held as follows:

We are enjoined by the Constitution to interpret the Bill of Rights, including its standing provisions, so as to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. As pointed out earlier we are also enjoined to develop the common law — which includes the common law of jurisdiction — so as to 'promote the spirit, purport and objects of the Bill of Rights'. This Court has in the past not been averse to developing the doctrines and principles of jurisdiction so as to ensure rational and equitable rules. In Roberts Construction Co Ltd v Wilcox Bros (Pty) Ltd693 this Court held, applying the common-law doctrine of cohesion of a cause of action (continentia causae), that where one court has jurisdiction over a part of a cause, considerations of convenience, justice and good sense justify its exercising jurisdiction over the whole cause. The partial location of the object of a contractual performance (a bridge between two provinces) within the jurisdiction of one court therefore gave that court jurisdiction over the whole cause of action. The Court expressly left open the

891 Ibid.

892 Ngyuza v Permanent Secretary, Department of Welfare, Eastern Cape 2001 (2) SA 609 (E), 628G-629H, 2000 (12) BCLR 1322, 1336F-I (E).

893 1962 (4) SA 326 (A).
further development and application of the doctrine of cohesion of causes. The present seems to me a matter amply justifying its further evolution. The Eastern Cape Division has jurisdiction over the original applicants and over members of the class entitled to payment of their pensions within its domain. That, in my view, is sufficient to give it jurisdiction over the whole class, who, subject to satisfactory 'opt-out' procedures, will accordingly be bound by its judgment.\textsuperscript{894}

Once again a constitutional injunction inspired development of the existing common law on class actions, but \textit{continentia causae}, a recognized legal notion from within the existing law, gave content to it. \textit{Ngxuza} offers a clear example of adjudicative subsidiarity-in-action.

Subsidiarity-induced preference for not 'reaching a constitutional issue'\textsuperscript{895} is not an attempt to deny or eliminate constitutional issues or to ignore the Final Constitution whenever possible. As was pointed out in \textit{Pharmaceutical Manufacturers}, there are certain issues, for instance, the exercise of public power, which are inevitably and only constitutional issues, and whose resolution depends on a proper \textit{construction} of the \textit{written constitutional text} as the prime source of \textit{constitutional law}.\textsuperscript{896} The Final Constitution is, however, not just a source of constitutional law. It is ubiquitous. As an ever-present trump, on the one hand, it scouts out 'bad law' that needs to be invalidated. As an all-pervasive source of values, on the other hand, it is providently ubiquitous, enabling and, where appropriate, developing 'good law' to achieve the ends towards which the Constitution encourages and indeed enjoins us to aspire. Subsidiarity, in the context of constitutional adjudication, is a strategy — not a principle (although a principle of devolution of authority can be said to underlie it).

In conclusion, four miscellaneous observations can be made:

(A) Allowance for the all-pervasiveness of the Final Constitution does not require genuflection to an absolutist constitution. The Final Constitution fulfills certain functions (as trump and 'provider of values') for which its considerable power as highest law must from time to time be summoned. This power ought not, however, turn it into an \textit{über-law} that overwhelms and dislodges all other law in the legal system. Nor is the Final Constitution a 'super source' of law from which answers to all legal issues can be deduced. To pervade all law is also not the same as encompassing and engulfing it. The Final Constitution (like any enacted law — or any other legal norm) can of course and does of course encompass other enactments and legal norms. A good example of such laws are the statutes that have been adopted to give specific effect to constitutional provisions and objectives.\textsuperscript{897} The point, however, is that the Final Constitution does not (and should not be seen to) encompass all law \textit{per se}.

(B) While constitutional minimalism — based on a 'principle' of avoidance — is unacceptable, there may, in certain situations and circumstances, be merit to a

\textsuperscript{894} \textit{Ngxuza SCA} (supra) at para 22.

\textsuperscript{895} See \textit{S v Mhlungu & Others} 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC)('\textit{Mhlungu}') at para 59.

\textsuperscript{896} \textit{Pharmaceutical Manufacturers} (supra) at para 33.

\textsuperscript{897} See §§ 32.4(a) supra and 32.5(b)(bb)(D) infra.
restrained constitutionalism that results (in constitutional adjudication) in a judicious avoidance of: (1) decisions that do not have to be made; (2) first-order reasoning when decisions can be made on a deductive or analogical basis, and (3) large-scale theorizing when substantive decision-making is unavoidable.\textsuperscript{898}

(C) The written text of the South African Constitution is 'subsidiarity-friendly'. As becomes a supreme constitution, the Final Constitution (in FC ss 2 and 172(1)) makes the necessary provision for doing away with law (and conduct) inconsistent with it, but then also makes ample provision (in FC ss 8(3) and 173 and then, of course, most notably in s 39(2)) for the development of existing law under the auspices and authority of the Final Constitution. Provision for the development of existing law especially paves the way for adjudicative subsidiarity.

(D) Finally, the introduction of legislation giving specific effect to constitutional provisions occasioned a new version of adjudicative subsidiarity in our constitutional jurisprudence. In litigation dealing with issues for which such legislation caters, a litigant cannot circumvent the relevant statute ‘by attempting to rely directly on the constitutional right’.\textsuperscript{899} To do so would be to ‘fail to recognise the important task conferred on the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights’.\textsuperscript{900} A subordinate, less encompassing and more specific statutory norm thus has to be relied on in preference to a superordinate, more encompassing and general norm of the Final Constitution — a telling example of adjudicative subsidiarity.

**Method(s) as canon(s) and canon(s) as method(s) (of construction): Canon-guided reading strategies**

Back in 1973, HR Hahlo and E Kahn intimated a preference for a more modern attitude toward statutory interpretation. They called for due consideration of the textual or literal, the contextually logical, the teleological and the historical aspects of a statutory text being interpreted.\textsuperscript{901} Actually, this attitude is not all that modern. It corresponds with the 'methods of interpretation' advanced by FK Von Savigny\textsuperscript{902} for the interpretation of pandectaerian Roman law (also known as the 'Von Savigny

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\textsuperscript{899} See MEC for Education, KwaZulu-Natal v Pillay 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC) (‘Pillay’) at para 40. See also Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign & Another as Amici Curiae) 2006 (1) BCLR 1 (CC), 2006 (2) SA 311 (CC)(‘New Clicks’) at paras 96 (Chaskalson CJ) and 434-437 (Ngcobo J); South African National Defence Union v Minister of Defence & Others 2007 (5) SA 400 (CC), 2007 (8) BCLR 863 (CC) (‘SANDU’) at para 51; NAPTOSA & Others v Minister of Education, Western Cape & Others 2001 (2) SA 112 (C), 123I-J, 2001 (4) BCLR 388, 396I-J (C).

\textsuperscript{900} SANDU (supra) at para 52. See also New Clicks (supra) at para 96.

\textsuperscript{901} See HR Hahlo & E Kahn The South African Legal System and its Background (1973) 180.

\textsuperscript{902} See F Savigny System des heutigen Römischen Rechts I (1840) 206.
These methods are canon-like reading strategies that are accepted today, mainly on the European continent, for the interpretation of codifications of the law, statutes and constitutions. This quartet has also met with a reasonably positive academic response in South African writings on constitutional interpretation.

The methods or modes of interpretation or, also, canon-guided reading strategies — Labuschagne speaks of 'invalshoeke' (angles of incidence) — modelled on a slightly adapted version of the Savignian model, are the following:

- First, grammatical interpretation which concentrates on ways in which the conventions of natural language can assist the interpretation of enacted law and can help to limit the many possible meanings of a provision.
- Second, systematic interpretation, as a manifestation of contextualism, which calls for an understanding of a specific provision in the light of the text or instrument as a whole and of indicia outside the written text.

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904 See, for example, P Côté The Interpretation of Legislation in Canada (1984) 193-350.

905 PB Cliteur Inleiding in het Recht (1992) 196-202; Labuschagne 'Die dinamiese Regslandskap (supra) at 46.


908 Labuschagne 'Die dinamiese Regslandskap' (supra) at 46.

909 For a summary, see L du Plessis 'The Jurisprudence of Interpretation' (supra) at 8.

910 L du Plessis Re-Interpretation of Statutes (2002) 111-115. See also § 32.3(a)(iv) supra.
• Third, *purposive interpretation* which sheds light on the possible meanings of a provision with reference to its purpose or *ratio*. The deepened version of purposive interpretation is *teleological interpretation*. 912

• Fourth, *historical interpretation* which situates a provision in the tradition from which it emerged and allows qualified recourse to information concerning the genesis of the written text in which the provision occurs (and the provision itself), as well as bigger historical events of which the coming into being of the written text was part.

• In the course of time a fifth 'method' was added to the Von Savigny quartet, namely, *comparative interpretation*, which facilitates the understanding of a provision, first, in the light of standards of international law and, second, in comparison with counterparts in other domestic legal systems — transnational contextualization, in other words.

I believe that the augmented Savignian model provides a feasible point of departure for the systematic classification and, indeed, implementation of (where necessary, refurbished) canons of construction employable in constitutional as well as statutory implementation. 913

(i) **Grammatical interpretation**

Grammatical interpretation concentrates on ways in which the conventions of natural language 914 can assist and direct the interpretation of an enacted (statutory or constitutional) provision and helps to contain the proliferation of the possible meanings of such a provision. *Natural language* is language used for everyday purposes, and its dynamism makes for a proliferation of meaning. 915 *Formal language*, by contrast, is artificial language — for example, arithmetic, the predicate calculus and COBOL 916 — created for exclusive use by, for instance, mathematicians, logicians and computer scientists. The meaning of its symbols is precisely defined and the symbols are finite. The system is therefore 'closed' and meaning possibilities limited on account of the qualities of the kind of language itself.

'Legal language', though interspersed with technical terms, is not formal language, but *natural language* whose meanings are constantly in flux — thence the 'difficulty

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911 On interpretive purposivism, see du Plessis *Re-Interpretation of Statutes* (supra) at 115-119.

912 See § 32.3(a)(v) supra.

913 See § 32.4(a) supra.


inherent in the nature of language' that Innes J spoke of in Venter v R.917 Grammatical interpretation actually cautions the interpreter to heed the meaning-generative qualities of natural language and of enacted texts as linguistic signifiers.918 The importance of language as prolific generator of meaning is at odds with any belief in the possibility of ‘clear and unambiguous language'. Such a belief in point of fact truncates and downplays the actual role of language in communication and, eventually, interpretation. Clarity and unambiguousness are not attributes of language as such, but of a reader’s assessment of the quality of the language of a given text in certain given circumstances, and this assessment, in its turn, is co-determined by the reader’s presuppositions and pre-understanding.919

It was pointed out previously that the rights and value language of the Final Constitution is expansive and indefinite because rights and values can hardly be expressed categorically or conclusively. Secondly, the Final Constitution is meant to be a long-lasting text and its expansively formulated provisions must have the quality of being able to cater for an inestimable number of unpredictable situations.920 The Final Constitution by its very nature thus unsettles the assumption of clear and unambiguous language.

The conventional canons of and aids to grammatical interpretation, heeding conventions in the use of language, limit the plethora of (possible) meanings that the language of an enacted instrument can generate. An example of such a convention is that the author of the instrument is assumed to use ‘ordinary language’,921 hence the classical rule in statutory interpretation that ‘the language of the Legislature should be read in its ordinary sense’ — a rule applied in constitutional interpretation too.922 It is further assumed that technical language has a technical connotation,923 that the same word or phrase is meant to mean the

917 Venter v R 1907 TS 910, 913:

[N]o matter how carefully words are chosen, there is a difficulty in selecting language which, while on the face of it expressing generally the idea of the framer of the measure, will not, when applied under certain circumstances, go beyond it, and, when applied under other circumstances, fall short of it.

918 See S v Zuma & Others 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) (‘Zuma’) at paras 17 and 18 (Kentridge J emphasises that the language of the constitutional text must be respected and such ‘respect’ is best understood as a word of caution to take the language of the text seriously in the sense just explained.)

919 S Fish Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Legal Studies (1989) 358. See also Zuma (supra) at para 17.

920 See § 32.3(b)(i) supra.

921 Union Government (Minister of Finance) v Mack 1917 AD 731, 739 (Solomon JA) (Usually cited as the standard authority for this rule which has found extremely wide recognition in the case law and is still recognised as a basic rule of construction.) See also Mayfair South Townships (Pty) Ltd v Jhina 1980 (1) SA 869 (T), 879; HMBMP Properties (Pty) Ltd v King 1981 (1) SA 906 (N), 909; Nyembezi v Law Society Natal 1981 (2) SA 752 (A), 757; S v Du Plessis 1981 (3) SA 382 (A), 403; S v Henckert 1981 (3) SA 445 (A), 451.
same throughout one and the same enacted law-text\textsuperscript{924} et cetera. The Interpretation Act\textsuperscript{925} and definition clauses in individual enactments\textsuperscript{926} fulfil a similar limiting function and so too do interpretive precepts in the Constitution - even though they are couched in expansive and open-ended language.

If the canons of grammatical interpretation are understood in the sense just explained, they no longer function as incarnations of literalist-cum-intentionalist expectations and the status of some of them (and especially the ordinary-meaning rule) as the most basic or primary rules of statutory interpretation in accordance with the conventional order of primacy, is quite rightly undermined.\textsuperscript{927}

As was remarked at an earlier stage, classification of the canons of construction in accordance with the Savignian model is not watertight and some canons of grammatical interpretation overlap with canons under the headings 'systematic' and 'purposive interpretation'. The canons of systematic statutory interpretation dealing with adapting, restricting or stretching language (in accordance with the scheme of an Act) can, and have been applied in constitutional interpretation.\textsuperscript{928} The rule that provisions framed in general terms must be understood generally expresses a grammatical truism about the use of inclusive language too.\textsuperscript{929}

(ii) Systematic interpretation

Systematic interpretation contextualizes. First, individual provisions of an enacted instrument-in-writing, that is, the Constitution or a statute, are understood in relation

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\textsuperscript{922} See, eg, \textit{S v Makwanyane and Another} 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC) (‘Makwanyane’) at paras 26 and 278; \textit{Mhlungu} (supra) at paras 76–77; \textit{Zantsi} (supra) at para 37; \textit{Ynuico Ltd v Minister of Trade and Industry} 1996 (3) SA 989 (CC), 1996 (6) BCLR 798 (CC) at para 7; \textit{Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council} 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) (‘Fedsure’) at para 42; \textit{Ex parte President of the RSA. In re: Constitutionality of the Liquor Bill} 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (CC) at paras 55 and 57.

\textsuperscript{923} \textit{Beedle & Co v Bowley} (1895) 12 SC 401,402; \textit{Lonrho v Salisbury Municipality} 1970 (4) SA 1 (R), 4; \textit{Association of Amusement and Novelty Machine Operators and Another v Minister of Justice and Another} 1980 (2) SA 636 (A), 660.

\textsuperscript{924} \textit{Principal Immigration Officer v Hawabu and Another} 1936 AD 26, 33; \textit{Minister of the Interior v Machadodorp Investments (Pty) Ltd and Another} 1957 (2) SA 395 (A), 404; \textit{S v Fazzie and Others} 1964 (4) SA 673 (A), 680; \textit{Sekretaris van Binnelandse Inkomste v Raubenheimer} 1969 (4) SA 314 (A), 319; \textit{S v Ffrench-Beytagh} (1) 1971 (4) SA 333 (T), 334; \textit{Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others} 1990 (1) SA 925 (A), 949; \textit{S v Diadla}; \textit{S v Joubert}; \textit{S v Schietekat} 1999 (7) BCLR 771 (CC), 1999 (4) SA 623 (CC) at para 47; \textit{Skhosana v Roos} \textit{v Roos se Oord} 2000 (4) SA 561 (LCC) at para 9.

\textsuperscript{925} 33 of 1957.

\textsuperscript{926} Du Plessis \textit{Re-Interpretation of Statutes} (supra) at 204-205.

\textsuperscript{927} On the conventional order of primacy see § 32.3(b)(i) above.

\textsuperscript{928} See § 32.5(c)(ii) infra.

\textsuperscript{929} See § 32.5(c)(iii) infra.
to and in the light of one another and of other components of the more encompassing instrument of which they form part, drawing on the 'system' or 'logic' or 'scheme' of the written text as a whole.\textsuperscript{930} Von Savigny referred to such \textit{intra-textual} contextualization as \textit{logical interpretation}\textsuperscript{931}. Second, systematic interpretation requires cognisance of the ('extra-textual') \textit{macro-text} too - of meaning-generative signifiers beyond but in the 'environment' of the written text that comprises the provision that is to be construed.\textsuperscript{932} According to Von Savigny the very task of systematic interpretation is to forge links with this 'extra-' or, rather, 'macro-text'.\textsuperscript{933}

Tribe and Dorf, writing about constitutional interpretation in particular, see intra-textual, systematic interpretation as a process of text-integration and warn against two opposite fallacies.\textsuperscript{934} \textit{Dis-integration}, on the one hand, turns a blind eye to the systematic interconnectedness of text-components and then tries to understand them in splendid isolation from one another. \textit{Hyper-integration}, on the other hand, links text-components which, according to the scheme of the text, are not inherently coherent.

Systematic interpretation depends on the logical or systematic scheme of the written text, of which much is made nowadays, especially in constitutional interpretation.\textsuperscript{935} As far as the conventional canons of construction are concerned, intra-textual, systematic interpretation sustains a restrictive or extensive interpretation of a constitutional (or statutory) provision in certain circumstances, invoking interpretive canons such as the \textit{eiusdem-generis} rule\textsuperscript{936} and the rule \textit{cessante ratione legis cessat et ipsa lex}\textsuperscript{937} (restrictive interpretation) or analogical interpretation, \textit{ex consequentibus} and the rule \textit{expressio unius est exclusio alterius} (extensive interpretation).\textsuperscript{938} Restrictive or extensive reading may take place in accordance, first, with the scheme of the specific provision that stands to be construed, second, with a logical scheme generally attributed to provisions of the same kind and, third, with an assumed authorial mode of reasoning associated

\textsuperscript{930} See, for example, \textit{Janse van Rensburg v The Master} 2001 (3) SA 519 (W) at para 7.

\textsuperscript{931} See F Von Savigny \textit{System des heutigen Römischen Rechts I} (1840) 320.

\textsuperscript{932} For judicial recognition of both manifestations of systematic interpretation, see \textit{Richtersveld Community v Alexkor Ltd} 2001 (3) SA 1293 (LCC) at para 88.

\textsuperscript{933} See Von Savigny (supra) at 262.


\textsuperscript{935} See JR de Ville \textit{Constitutional and Statutory Interpretation} (2000) 143-145 (Provides a detailed yet succinct explanation of schematic constitutional interpretation.)

\textsuperscript{936} Du Plessis \textit{Re-Interpretation of Statutes} (supra) at 234-236.

\textsuperscript{937} ‘Where the reason for the existence of a law ceases, the law itself also ceases’. Ibid at 233-234.

\textsuperscript{938} ‘Expressly mentioning the one, is excluding the other’. Ibid at 236-239.
with the making of provisions of that kind. Intra-textual, systematic interpretation furthermore lays the basis for relying on textual elements such as the preamble, schedules to and the long title of an enacted instrument in the interpretation of any of its specific provisions.

The common-law equivalent of intra-textual, systematic interpretation is the ex visceribus actus rule that requires any particular provision of an enacted instrument (the Constitution or a statute) as a whole to be understood as part of that encompassing instrument in which it has been included. Treating constitutional and statutory language as language-in-context is an intra-textual, systematic reading strategy.

In Matatiele Municipality & Others v President of the Republic of South Africa & Others, Ngcobo J explained the need for and significance of systematic (or contextual) constitutional interpretation as follows:

Our Constitution embodies the basic and fundamental objectives of our constitutional democracy. Like the German Constitution, it ‘has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit [our] Constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate.’ Individual provisions of the Constitution cannot therefore be considered and construed in isolation. They must be construed in a manner that is compatible with those basic and fundamental principles of our democracy. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole.

The process of constitutional interpretation must therefore be context-sensitive. In construing the provisions of the Constitution it is not sufficient to focus only on the ordinary or textual meaning of the phrase. The proper approach to constitutional interpretation involves a combination of textual approach and structural approach. Any construction of a provision in a constitution must be consistent with the structure or scheme of the Constitution. This provides the context within which a provision in the Constitution must be construed.

Another truism confirmed by Ngcobo J’s observations is that systematic and purposive (or teleological) interpretation are interlinked. A purposive or purposeful reading of the Final Constitution and statutes (and their individual provisions) must

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939 Ibid at 239-246.

940 S v Looij 1975 4 SA 703 (RA), 705C-D; Transvaal Consolidated Land and Exploration Co Ltd v Johannesburg City Council 1972 (1) SA 88 (W), 94F-G. See also New Mines Ltd v Commissioner for Inland Revenue 1938 AD 455; Hleka v Johannesburg City Council 1949 (1) SA 842 (A), 852-853; City Deep Ltd v Silicosis Board (supra) City Deep Ltd v Silicosis Board 1950 (1) SA 696 (A), 702; Soja (Pty) Ltd v Tuckers Land and Development Corp (Pty) Ltd 1981 (3) SA 314 (A).

941 1950 (4) SA 653 (A), 662F-663A (Schreiner JA).

942 Matatiele Municipality & Others v President of the Republic of South Africa & Others 2007 (1) BCLR 47 (CC) (‘Matatiele’) at paras 36-37.

943 Ngcobo J also suggested this connection in an earlier dictum in Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development of the RSA; Executive Council of KwaZulu-Natal v President of the RSA. 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) (‘Executive Council of the Western Cape 1999’) at para 52.
be a holistic (and historically sensitive) reading. The preamble to and long title of the Constitution or a statute, for instance, play a recognizable role in the interpretation of individual provisions, because a systematic reading of individual provisions, in the context of the written text as a whole, requires the broadest possible spectrum of textual elements to be taken into account. The preamble and the long title are, however, also statements of purpose and this then goes to show how systematic and purposive interpretation can join forces.

But it goes further than that. There may be other less explicit statements of purpose in the written text — part of the inconspicuous interpretive waymarks previously dealt with, for instance — which, only on being read together with other such statements (or other explicit statements), say something purposeful. The purposive potential of all such provisions can only be opened up through a systematic reading of a provision to be construed in the context of the instrument as a whole, and thereby in interaction with the provisions whose purposive potential stands to be released.

The coalescence of systematic and purposive/teleological interpretation furthermore highlights the essential unity of interpretation and application. The interpreter is called upon to make sense of a provision in a purposeful manner catering for the exigencies of an actual or hypothetical concrete situation. The situation poses a question, as it were. An instrument (the Constitution or a statute) is construed to find a possible answer - on the assumption that it can assist finding and formulating an answer. The written text read systematically in relation to the particular situation (and in the expectation that it is purposeful) does not generate any meaning in isolation from the question(s) that the concrete situation poses. Actual or potential applications of a constitutional or legislative provision determine its construction decisively. The provision acquires no meaning in isolation from or irrespective of either its de facto or its conceivable (or hypothesized) realization in specific situations where legal solutions and decisions are called for. 'The jurist makes sense of a law from out of a given case and for the sake of the given case.'

This method of reading was also suggested, with reference to statutory interpretation, in Olitski Property Holdings v State Tender Board & Another. 2001 (3) SA 1247 (SCA) at para 12 (Supreme Court of Appeal stated that statutory interpretation 'requires consideration of the statute as a whole, its objects and provisions, the circumstances in which it was enacted, and the kind of mischief it was designed to prevent.') The judgment of Kriegler J in Minister of Defence v Potsane; Legal Soldier (Pty) Ltd provides a telling example of a simultaneously systematic/contextual, teleological and historical(-ly sensitive) reading of a constitutional provision (in casu section FC s 179(1)). 2002 (1) SA 1 (CC), 2001 (11) BCLR 1137 (CC) at paras 26-42. The Court's articulate reading strategy makes it clear how and why 'excessive peering at the language to be interpreted without sufficient attention to the contextual scene' can actually undermine longer-lasting value and policy objects of a constitutional or a statutory provision that stands to be construed. Ibid quoting Jaga v Dönges NO & Another; Bhana v Dönges NO & Another 1950 (4) SA 653 (A), 664H.

See § 32.4(c)(ii) supra.

See § 32.4(c)(ii) supra.

See also §§ 32.3(a)(vi) and (d) supra.

Friedrich Müller prefers the appellation *Konkretisierung* ('concretization') to *Auslegung* ('interpretation') for this process of bringing to life normative provisions in concrete situations.\(^949\)

The Supreme Court of Appeal, in *Sefalana Employee Benefits Organisation v Haslam*, expressed a similar line of thinking (referring to statutory interpretation in particular):

When interpreting a statute one is not obliged, of course, to conjure up all manner of fanciful and remote hypotheses in order to test the implications of a construction which one is considering placing upon it. However, where readily conceivable and potentially realistic situations spring immediately to mind it is a salutary practice to test the proposed construction by applying it to such situations. If the exercise produces startling (as opposed to merely anomalous) results, it may become clear that the proposed construction is not correct. This, in my view, is just such a case.\(^950\)

It may happen (and the *dictum* just quoted leaves room for the possibility) that a purposeful concretization of an enacted (constitutional or statutory) provision concludes that the provision in question has nothing or nothing meaningful to say about the specific concrete situation. The interpreter must then consider, first, whether the provision indeed applies in that situation; second, whether the written text perhaps contains a *casus omissus*; and, third, whether an interpretive alteration of the *ipsissima verba* of the provision may be appropriate.\(^951\) Concretization may also bring up the possibility of extending ('stretching') or restricting ('shrinking') the meaning(s) that the provision generates - according to the previously referred to procedures of extensive and restrictive interpretation respectively.

Intra-textual, systematic interpretation overlaps with grammatical interpretation, first, insofar as a systematic reading of the written text causes the meaning attributed to linguistic signifiers in, for instance, a definition clause to be spread throughout the written text. The presumption that the same words and phrases in an enacted law-text bear the same meaning throughout fulfils a similar, meaning-distributive function. Second, insofar as recourse to diverse textual elements such as the preamble, long title, and schedules facilitate the attribution of meaning to linguistic signifiers, systematic interpretation sustains grammatical interpretation.\(^952\)

Extra-textual contextualization takes place with reference to meaning-generative signifiers (themselves texts) in the textual environment. There are a great many such signifiers beginning, in constitutional and statutory interpretation, first, with other legal norms and institutions as well as the legal system as a whole. The Final Constitution and statutes are, for instance, always construed as forming part of a wider network of enacted law\(^953\) and other normative law-texts such as


\(^{950}\) *Sefalana Employee Benefits Organisation v Haslam & Others* 2000 (2) SA 415 (SCA) at para 6.

\(^{951}\) See Du Plessis *Re-Interpretation of Statutes* (supra) at 228-232.

\(^{952}\) See § 32.5(c)(i) supra.

\(^{953}\) See Du Plessis *Re-Interpretation of Statutes* (supra) at 262-264.
Second, the political and constitutional order, society and its legally recognized interests and the international legal order are all consciously taken account of in constitutional and statutory interpretation. Existing common-law canons of construction do provide for and indeed require cognisance of the 'non-legal' macro-text, for example, the presumption that enacted law promotes the public interest. Actually, it is impossible to separate the written text and macro-text, especially since the macro-text is the 'source of concrete situations' without which, as was argued above, the interpretation of enacted law (the Constitution and statutes) is just not possible. The distinction between intra-textual and extra-textual contextualization is therefore merely a convenient one facilitating a systematization of the canons of construction.

Finally, in order to avoid an enervation of apparently conflicting constitutional provisions, the Constitutional Court has laid down guidelines for dealing — in a systematic and context sensitive manner — with such provisions. First, an attempt must be made reasonably to reconcile the apparently conflicting provisions, and to construe them in a manner giving full effect to each. Second, where two provisions in the Final Constitution, one general and the other specific, deal with the same subject, the general provision must ordinarily yield to the specific provision.

The specific provision must be construed as limiting the scope of the application of the more general provision. Therefore, if a general provision is capable of more than one interpretation and one of the interpretations results in that provision applying to a special field which is dealt with by a special provision, in the absence of clear language to the contrary, the special provision must prevail should there be a conflict.

(iii) Teleological interpretation

The topic of purposive/teleological interpretation has so far been brought up on three occasions. First, in the survey of early post-1994 constitutional case law it was shown how the courts thought of rights interpretation as characteristically purposive and how they associated purposive interpretation with generous interpretation.

954 See § 32.5(b)(i) supra.

955 See Du Plessis Re-Interpretation of Statutes (supra) at 165-168.

956 See, generally, Doctors for Life v Speaker of the National Assembly & Others 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC)(‘Doctors for Life’) at paras 48-49.

957 Matatiele (supra) at para 51. See also S v Rens 1996 (1) SA 1218 (CC), 1996 (2) BCLR 155 (CC) at para 17 (Constitutional Court held that ‘[i]t was not to be assumed that provisions in the same constitution are contradictory’ and that ‘[t]he two provisions ought, if possible, to be construed in such a way as to harmonise with one another.’)


959 Doctors for Life (supra) at para 49.

960 See § 32.1(b) supra.
Second, purposive interpretation was considered when purposivism as common-law theory of statutory interpretation was discussed and, third, it came quite prominently to the fore when teleological interpretation as a possible substitute for conventional literalist-cum-intentionalism interpretation as prime approach to constitutional and statutory interpretation was considered. The time has now arrived to consider purposive interpretation as an interpretive method or mode or reading strategy in constitutional interpretation, mindful of a word of warning that was sounded earlier, namely to desist from affording purposivism pride of place among approaches to constitutional interpretation. In this chapter purposive interpretation is for the most part understood as teleological interpretation attributing meaning to a provision mindful of its possible objective(s) or ratio, and, beyond that, of the fulfilment of aspirational values upholding the system of constitutional democracy as such.

Purpose-consciousness is necessary in constitutional interpretation in order to honour the operational intent (or effect-directedness) of the Final Constitution belonging to the genre enacted law. The interpreter of an enacted provision (of the Constitution or of a statute) starts with the assumption that the provision has a purpose (ratio legis) that will emerge in the course of interpretation, in other words, as he or she attributes meaning to the provision (relying inter alia on canons of and aids to construction associated with the different modes of interpretation comprising the Von Savigny quartet). This purpose has to be taken seriously (and must eventually, if at all possible, be realized) because it is assumed that an authorized law-maker had intended the provision to be of effect — there is ‘an intention of the legislature’ in this sense. This assumption informs the previously referred to mischief rule and the presumption that enacted law is not invalid or purposeless.

The ratio legis that emerges as interpretation proceeds can eventually be developed into a response to the exigencies of an actual or hypothetical concrete

961 See § 32.3(a)(v) supra.

962 See § 32.3(b)(iv) supra.

963 See § 32.3(b)(iv) supra.

964 What teleological interpretation is, was explained with reference to the majority judgment in African Christian Democratic Party v Electoral Commission. 2006 (3) SA 305 (CC), 2006 (5) BCLR 579 (CC) (‘African Christian Democratic Party’). See § 32.3(b)(iv) supra.

965 For more on ‘enacted law’ as distinct law-text genre, see § 32.3(e)(i)(ee) supra.

966 The purpose of especially a statutory provision can of course not be realised if, for instance, it is unconstitutional or at odds with higher-ranking values of the legal system as a whole. Invalidity of a provision — especially in an all or nothing sense — is, however, not readily assumed. See L Du Plessis Re-Interpretation of Statutes (supra) at 187-188.

967 See § 32.3(a)(v) supra.

968 Du Plessis Re-interpretation of Statutes (supra) at 187-191.
situation. Purposive and, beyond that, teleological interpretation join forces with systematic interpretation to emphasize the unity of interpretation and application. The partnership of systematic interpretation and purposivism is not insignificant for the determination of a *ratio legis* in accordance with the scheme of an enacted instrument as a whole, thereby reining in the preferences and prejudices of the interpreter. These 'subjective factors' can of course not be totally banned from the interpretive arena. However, they might be left unchecked if a purposive reading in the abstract is acceded to without question — a consequence as delusive as denying the effects of an interpreter’s 'inarticulate premises' on interpretive outcomes. What may follow in both instances is what Kentridge AJ, in *S v Zuma*, 970 called ‘divination’ as opposed to ‘interpretation’ — and then not necessarily a divination of values (against which Kentridge AJ warned), but of the inarticulate premises of the interpreter. The rule *iudices est ius dicere sed non dare* 971 (reminiscent of the counter-majoritarian difficulty and the tension between populism and constitutionalism associated with it) as well as the rule enjoining an interpreter of enacted law to give general effect to provisions framed in general terms 973 are both canons of teleological interpretation and seek to counter such a divination of the interpreter’s preferences and prejudices. The latter of the two canons can also be understood as an injunction to observe the ordinary (grammatical) meaning of a provision. 974

Teleological interpretation is forward-looking interpretation based on what can be learnt from past experience. While this characterization is a general way of restating the mischief rule, 975 it is also another way of saying that the Final Constitution ought to be construed heedful of the continuing time frame within which it obtains. 976 This observation provides a link between teleological interpretation and historical interpretation.

From Wessel le Roux’s depiction of the interpretive modus operandi of the majority of the Constitutional Court in *African Christian Democratic Party v The

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970 *Zuma* (supra) at para 18 quoted at § 32.1(b) supra.

971 See, eg, *Seluka v Suskin and Salkow* 1912 TPD 258, 270; *Union Government (Minister of Mines) v Thompson* 1919 AD 404, 425; *R v Tebetha* 1959 (2) SA 337 (A), 346G; *S v Khanyapa* 1979 (1) SA 824 (A), 835.

972 See § 32.3(e)(iii) supra.

973 See § 32.5(c)(i) supra.

974 See § 32.5(c)(i) supra.

975 See § 32.3(a)(v) supra.

Electoral Commission & Others the following guidelines adapted for teleological constitutional interpretation may be deduced.977

(aa) establish, through recognized procedures of interpretation, the central purpose of the provision in question;

(bb) establish whether that purpose would be obstructed by a literal interpretation of the provision, and if so

(cc) opt rather for an alternative interpretation of the provision that 'understands' or promotes its core purpose;

(dd) ensure that the purposive reading of the constitutional provision is consistent with other constitutional provisions and with the value system of the Constitution and that constitutional values are indeed promoted with optimal effect.

Purposive interpretation can also be understood as 'purpose driven or actuated interpretation' ('doelgedrewe uitleg'). Here interpreters of the Final Constitution and statutes must mind their p's and q's. The purpose of a provision is to be determined through interpretation and should therefore not drive or actuate interpretation. On the other hand, purposive interpretation can also be 'purposeful or purpose directed interpretation' ('doelgerigte uitleg') because it directs interpretation in such a way that a purpose is eventually arrived at (and understood) without the interpreter knowing or surmising such purpose right from the outset.

(iv) Historical interpretation

The historical interpretation of enacted law attributes meaning to a provision, and/or the instrument of which it forms part, in the light of its coming into being as a historical event at a particular point in time. According to Von Savigny, historical interpretation requires the interpreter to enter into and identify with the historical situation from which a law emerged.978 The spirit of this history is more significant than the 'historical facts' (in other words, the events connected with the genesis of such law). From the 'spirit of history' much can be deduced about the ratio legis. Teleological interpretation lacking a historical foundation is in fact empty. The mischief rule, for instance, as manifestation of teleological interpretation,979 shows alertness to the historicity of an enacted law-text. The provision to be construed is perceived as a response to a mischief that existed as a historical given, and that situation, as well as the law as it then stood, must be appreciated in order fully to apprehend the effects of the provision as the measure aimed at redressing the mischief.980 The 'new Constitution' has also been described as the remedy to a

977 See Le Roux 'Directory Provisions' (supra) at 386.


979 See § 32.3(a)(v) supra.

980 See Thoroughbred Breeders' Association v Price Waterhouse 2001 (4) SA 551 (SCA)(Good example of a judicial endeavour to rectify a particular mischief.)
fundamental tripartite mischief in South Africa's history, namely colonialism, racism and apartheid.\footnote{981}

In \textit{De Klerk & Another v Du Plessis & Others} the Transvaal High Court \textit{per} Van Dijkhorst J regarded the drafting history of the Interim Constitution as \textit{irrelevant} to its interpretation.\footnote{982} However, in \textit{S v Makwanyane & Another}\footnote{983} the Constitutional Court allowed the clear, undisputed and relevant reports of a technical committee (which advised the drafters of the Interim Constitution) as evidence of why no specific reference to capital punishment was included in the Interim Constitution. Reference to a report in writing, the equivalent of \textit{travaux préparatoires} in international law, is of course not the same as relying on the \textit{ipse dixit} of individual constitutional negotiators participating in the making of a constitution. The latter is not an acceptable interpretive aid. Since \textit{Makwanyane} there have been other instances where interpretive reliance was placed on written background materials shedding light on the genesis of constitutional provisions.\footnote{984}

The Final Constitution as remedy to a fundamental mischief in South Africa's history, namely white minority rule under apartheid system,\footnote{985} is inevitably part of a political history that can, to a considerable extent, help determine the meaning and significance of many a constitutional provision, not only in the Bill of Rights, but also provisions concerning, for instance, the structure of government.\footnote{986} However, as Pierre de Vos\footnote{987} makes clear in critical assessment of the Constitutional Court's 'master narrative' of the recent history of South Africa's transition from apartheid to constitutional democracy, one's choice of narrative must avoid a shallowness and exclusivity that results in an overly narrow reading of the Final Constitution. Reliance on various accounts of history in constitutional interpretation, he contends, will counter the inference that only certain interpretive choices are historically inevitable.

\footnote{981}{\textit{Qozoleni v Minister of Law and Order} 1994 (3) SA 625 (E), 634I-635C, 1994 (1) BCLR 75, 79D-E (E) ("\textit{Qozoleni}") (Kroon and Froneman JJ, referring to the Interim Constitution.)}

\footnote{982}{1995 (2) SA 40 (T), 1994 (6) BCLR 124 (T).}

\footnote{983}{\textit{Makwanyane} (supra) at para 17-18.}

\footnote{984}{\textit{Ferreira v Levin; Vryenhoek v Powell} 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) ("\textit{Ferreira}") at para 46, for example.}

\footnote{985}{\textit{Qozoleni} (supra) at 634I-635C, 81G-H (Kroon and Froneman JJ)(Referring to the Interim Constitution.)}

\footnote{986}{See \textit{Executive Council of the Western Cape} 1999 (supra) at para 44. Two telling Bill of Rights examples are \textit{Shabalala v Attorney-General, Transvaal} 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC) ("\textit{Shabalala}") at para 26 and \textit{Brink v Kitshoff NO} 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 40. For reference to other examples, see I Currie & J de Waal \textit{The Bill of Rights Handbook} (5th Edition, 2005) 152 n 33.}

(v) Comparative interpretation (or transnational contextualisation)

According to FC s 39(1) 'when interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law' (section 39(1)(b)) and 'may consider foreign law' (section 39(1)(c)). With these provisions, the Final Constitution acknowledges that the Bill of Rights and the Final Constitution as a whole are embedded also in a transnational constitutional reality that helps determine their meaning in the domestic constitutional reality.

When considering the constitutionality of capital punishment with reference to the kind of transnational (re-)sources envisaged in IC s 35(1) of the Interim Constitution— the predecessor to FC ss 39(1)(b) and (c) — Chaskalson P in S v Makwanyane and Another laid down pertinent and consequential guidelines for reliance on international and foreign law in constitutional interpretation. He wrote:

In the course of the arguments addressed to us, we were referred to books and articles on the death sentence, and to judgments dealing with challenges made to capital punishment in the Courts of other countries and in international tribunals. The international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how Courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention. They may also have to be considered because of their relevance to s 35(1) of the Constitution.

Customary international law and the ratification and accession to international agreements is dealt with in s 231 of the Constitution, which sets the requirements for such law to be binding within South Africa. In the context of s 35(1), public international law would include non-binding as well as binding law. . . International agreements and customary international law accordingly provide a framework within which chap 3 [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments. . . may provide guidance as to the correct interpretation of particular provisions of chap 3.

In dealing with comparative law we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution . . . We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.

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988 The relevant provisions of IC s 35(1) read as follows:

In interpreting the provisions of this chapter a court. . . shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this chapter, and may have regard to comparable foreign case law.


990 ‘Having regard to’ international and foreign (case) law in the language of IC s 35(1) and ‘considering’ international and foreign law in the language of FC ss 39(1)(b) and (c).

991 Makwanyane (supra) at para 34.

992 Ibid at para 35.

993 Ibid at para 39.
These *dicta* boil down to the following significant points:

First, in construing the Final Constitution, it is competent for a South African court to consider international and foreign authorities (Chaskalson P mentioned them in one breath) *regardless of FC s 39(1)*. Such authorities may be considered because they are of value in their own right. Since FC ss 39(b) and (c) refer only to *interpretation of the Bill of Rights*, Chaskalson P in actual fact laid down a binding precedent effectively granting constitutional authorisation to consider international and foreign law when interpreting constitutional provisions not found in the Bill of Rights. He does not, however, explicitly say whether, in the interpretation of such provisions, a court is *enjoined* to consider public international law. Given the language in which the *dictum* is couched, it is probably not *specific* enough to read it as imposing such an *injunction*. It is thus highly advisable (but optional nonetheless) to consider international law in constitutional interpretation, except when, in terms of the 'black-letter' provisions in FC ss 231 and 232 or the presumption in FC s 233 international law must not just be *considered* but indeed *observed* as binding with respect to municipal law.994

Second, and of far-reaching significance, is the observation that binding as well as 'non-binding' international law995 provides a *framework* within which the Bill of Rights 'can be evaluated and understood'.996 The implications of this 'framework' *dictum* will be considered more fully when the role of international law in constitutional interpretation is discussed below.997

Third, the Court in *Makwanyane* articulated a warning that, in the post-*Makwanyane* case law, has been echoed repeatedly: namely that in the interpretation of the Final Constitution — with its own structure and language — transnational authorities must be relied on with due regard to the uniqueness of our Constitution, our history and our circumstances. Though assistance may be derived from both international law and foreign law, a court, according to Chaskalson P, is in no way bound to follow either of them. A court must of course always be alert to the possibility that it is indeed bound to follow certain international law.998 By not distinguishing between the two bodies of law, Chaskalson P overlooked a critical difference between international law and foreign law for the purposes of constitutional interpretation. International law *must* be considered. Foreign law *may* be considered.

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994 On the status of international law, see § 32.5(c)(v)(aa) infra.

995 See § 32.5(c)(v)(aa) infra: 'non-binding' international law is strictly speaking a misnomer.

996 *Makwanyane* (supra) at para 35.

997 See § 32.5(c)(v)(aa) infra.

998 See § 32.5(c)(v)(aa) infra.
In *Sanderson v Attorney-General, Eastern Cape* Kriegler J observed, in passing, that ‘[b]oth the [I]nterim and the [F]inal Constitutions. . . indicate that comparative research is either mandatory or advisable’. Of course only comparative research is advisable. It is consideration of international law that is mandatory. What Kriegler J in effect did was to label both ‘(public) international law’. Again, in doing so, he too conflated the mandatory injunction to consider international law and the interpretive suggestion to consult foreign jurisprudence. This error may explain the persistent lack of engagement with international law and the Court’s apparent preference for drawing upon case law in other jurisdictions.

The constitutionalization of international law as well as the internationalization of constitutional law, both of which are manifestations of a globalisation of public law, have rendered the strict boundaries between domestic constitutional law, foreign constitutional law and international law somewhat permeable. However, Kriegler’s conflation fails to appropriately acknowledge that the Final Constitution is talking about distinct bodies of law and recognizing their different status: many instruments and kinds of international law bind South Africa; foreign jurisprudence does not. In other words, foreign law, in the domestic context, is *persuasively* normative while international law may well (but will not inevitably) be *prescriptively normative*. The fact that the latter may have the same, normative binding force as domestic law thus sets international law apart from foreign constitutional law — and that difference must be reckoned with in constitutional interpretation.

(aa) **International law**

A hundred years prior to the advent of constitutional democracy in South Africa a court in the former *Zuid-Afrikaanse Republiek* declared that the municipal law of that republic

(OS 06-08, ch32-p174)

must be interpreted in such a way as not to conflict with the principles of international law . . . ‘[T]he state which disclaims the authority of international law places herself outside the circle of civilized nations.’ It is only by a strict adherence to these recognized principles that our young state can hope to acquire and maintain the respect of all civilized communities, and so preserve its own national independence.

This *dictum* signals a resolve to play a constructive role in international affairs which South Africa, during the first half of the twentieth century, as a faithful member of the League of Nations and as a founding member of the United Nations, indeed did. Since the mid-1940s, however, South Africa increasingly came under attack

*CC Maynard et alii v The Field Cornet of Pretoria* (1894) 1 SAR 214, 223.

1001 For the distinction between the prescriptive and persuasive normativity of law-texts, see § 32.3(e)(i)(cc).

because of its racist minority rule politics, and became, in obviously quite an unintended and indirect manner, a major contributor to the development of post-World War II international law. Apartheid helped international lawyers and organisations to crystallize and concretize a new body of treaties and customary law designed to promote human rights and racial equality.\textsuperscript{1004}

South Africa’s resolve during the 1990s to negotiate a peaceful and a decided transition to constitutional democracy manifested in, amongst others, an openness to ‘influences from outside’ and, in particular, a positive attitude towards international law as a potentially formative and informative force in the legal order of a new South Africa. This change in attitude started occurring within the judiciary as well.\textsuperscript{1005}

A feature of most of the ‘newer’ constitutional texts in the world today is that their drafters had drawn heavily on international instruments — especially human rights declarations and covenants — in formulating their provisions. For comparative purposes a distinction between ‘old constitutions’ — predating important international instruments such as the European Convention on Human Rights and Fundamental Freedoms of 1950, the International Covenant on Economic, Social and Cultural Rights of 1966 and the International Covenant on Civil and Political Rights of 1966 — and ‘new constitutions’ drafted with heavy reliance on these instruments, may ‘be particularly fruitful, even if it might be unfamiliar’.\textsuperscript{1006}

The South African Constitution, and its Bill of Rights in particular, reflects the influence of a wide range of international human-rights law instruments:

international declarations, covenants and conventions.\textsuperscript{1007} The Constitutional Court in its certification of the written text of the Final Constitution considered Constitutional Principle II\textsuperscript{1008} which required, amongst other things, that ‘[e]veryone shall enjoy all universally accepted fundamental rights, freedoms and liberties’. The court

\textsuperscript{1004} See Dugard (supra) at 21 (‘While apartheid undermined and discredited the law of South Africa, it succeeded, perversely, in injecting notions of racial equality, self-determination and respect for human rights into an international legal order that in 1945 had few developed rules on these subjects.’)


\textsuperscript{1006} See B-O Bryde ‘The Constitutional Judge and the International Constitutionalist Dialogue’ (2005) 80 Tulane Law Review 203, 208(‘Constitutionalist Dialogue’).

\textsuperscript{1007} In addition to the instruments already mentioned, the Court has freely used the Universal Declaration of Human Rights of 1948, the American Convention on Human Rights of 1969, the African Charter on Human and Peoples’ Rights of 1981, the International Covenant on the Elimination of all Forms of Racial Discrimination of 1966, the Convention on the Elimination of all forms of Discrimination against Women of 1979 and the Convention on the Rights of the Child of 1989 (CRC). See Du Plessis (supra) ‘International Law’ (supra) at 313.

\textsuperscript{1008} For more on this certification process in terms of the 34 Constitutional Principles in the Interim Constitution, see § 32.2(a) supra.
concluded that the text complied with this standard as a minimum and in some instances even goes beyond it.\textsuperscript{1009}

The inclusion in a nation's supreme constitution of provisions derived from international documents and instruments is a direct and most powerful way of incorporating international (human-rights) law into the municipal law of that nation. It gives rise to a somewhat curious situation: constitutional provisions with their origins in \textit{international law}, are required to be construed considering \textit{international law}. Recognised procedures for and aids to the construction of international law — for instance, Articles 31-33 of the Vienna Convention on the Law of Treaties — may be relied on to determine what 'international law' in a given situation and/or with reference to a specific issue is. However, the Final Constitution and Bill of Rights themselves by no means have to be interpreted as if they were forms of international law. They are to be construed in accordance with recognised procedures and reading strategies for the interpretation of domestic highest law.\textsuperscript{1010} In the South African context a constitutional provision derived from an international law source could thus be found to have a meaning or construction different from its accepted meaning at international law.

FC s 39(1)(b) and (c) are provisions not commonly included in constitutions — and reliance on international and foreign law in constitutional interpretation is, of course, possible without such constitutional authorisation. More commonly and typically, constitutions provide for the recognition — and incorporation into domestic law — of (treaty and customary) international law. The black letter provisions of the Final Constitution geared to achieve these effects (and referred to in passing before) are ss 231 and 232. These provisions are discussed by Strydom and Hopkins in Chapter 30 above.\textsuperscript{1011} International law thus recognised and incorporated is often referred to as 'binding' international law to distinguish it from 'non-binding' international law. As a result, the vast body of international law is not brought directly to bear on the domestic legal system by virtue of FC ss 231 and 232.

What then to make of Chaskalson P's observation in \textit{S v Makwanyane and Another}\textsuperscript{1012} that 'non-binding' international law was 'public international law' for purposes of IC s 35(1) — and thus FC s 39(1) too? The constitutional injunction to consider international law in Bill of Rights interpretation makes all international law 'binding', but not in the sense that it must be observed as law. It is binding at least to the extent that due regard must be had to it. The presumption in FC s 233, which will be discussed below, could have a similar effect. Chaskalson P's framework \textit{dictum} — that international law thus broadly conceived provides a framework within

\begin{itemize}
  \item \textsuperscript{1010} But see \textit{Makwanyane} (supra) at para 16.
  \item \textsuperscript{1012} See \textit{Makwanyane} (supra) at para 35.
\end{itemize}
which the Bill of Rights 'can be evaluated and understood'\textsuperscript{1013}— has earned the South African Constitutional Court a complimentary reputation for its "universalist interpretation" of constitutional rights, in a series of judgments relating mostly to criminal processes'. \textsuperscript{1014}

Neville Botha and Michéle Olivier\textsuperscript{1015} contend that Chaskalson P's reliance on the writing of John Dugard – which he cited in support of his framework \textit{dictum} – was not correct. What Dugard, according to the authors, probably had in mind were the (less than 'free for all') 'traditional sources of international law' recognised in Article 38(1) of the Statute of the International Court of Justice. Dugard has apparently confirmed this latter reading in a subsequent article.\textsuperscript{1016} Chaskalson P thus misread the source on which he relied and laid down binding (that is, \textit{prescriptive}) case law \textit{per errorem}. This piece of judge-made law has nonetheless turned out to be of considerable consequence in the evolution of South Africa's domestic human rights law drawing on sources of international law in a distinctly direct and monistic manner.\textsuperscript{1017} As will be shown below, the Constitutional Court in \textit{Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others} actually retreated from its \textit{Makwanyane} position, but in time this turned out to be an \textit{ad hoc} deviation, and openness to and generous reliance on international law has mostly been the default (judicial) disposition in constitutional interpretation in South Africa.\textsuperscript{1018}

Another example of the Constitutional Court's generous predisposition towards international law when undertaking constitutional interpretation is Chaskalson P's justification for recourse to \textit{travaux préparatoires} for a better understanding of (certain aspects of) the Interim Constitution. Capital punishment was a profoundly controversial issue among the negotiators and drafters of South Africa's Interim Constitution. They eventually opted for the 'Solomonic solution'\textsuperscript{1019} of not mentioning capital punishment in that Constitution at all, and leaving it entirely up to the Constitutional Court to cast the die on its constitutionality.\textsuperscript{1020} Chaskalson P thus thought it necessary in \textit{Makwanyane} to take cognisance of the genesis of the text of the Interim Constitution so as to come to grips with the interpretive implications of the constitution-makers' silence on the issue of capital punishment. However, in

\textsuperscript{1013} Ibid. Mokgoro J, in a similar vein, held that the Interim Constitution 'requires courts to proceed to public international law and foreign case law for guidance in constitutional interpretation, thereby promoting the ideal and internationally accepted values in the cultivation of a human rights jurisprudence for South Africa'. Ibid at para 304.

\textsuperscript{1014} See Peters, (supra) at 300-301.


\textsuperscript{1018} 1996 (8) BCLR 1015 (CC), 1996 (4) SA 671 (CC)('AZAPO').

\textsuperscript{1019} \textit{Makwanyane} (supra) at paras 22 and 25.
seeking to justify his reliance on 'preceding deliberations', Chaskalson P was faced with a South African common law on statutory interpretation prone to pit itself against reliance on preparatory material in the interpretation of enacted law.\textsuperscript{1021} Proceeding beyond conventional common-law restraints, he argued that reliance on \textit{travaux préparatoires} is appropriate in constitutional interpretation, because it is accepted in other 'countries in which the Constitution is . . . supreme law'.\textsuperscript{1022} 'The European Court of Human Rights and the United Nations Committee on Human Rights,' Chaskalson P then continued, 'all allow their deliberations to be informed by \textit{travaux préparatoires}.\textsuperscript{1023} He cited Article 32 of the Vienna Convention on the Law of Treaties of 1969 as authority for the contention that \textit{travaux préparatoires} may thus be relied on — also in constitutional interpretation. This Vienna 'Convention on Conventions' is 'international law' as contemplated in IC s 35(1) (and FC s 39(1)(b)), but Articles 31-33 of the Convention is international law applicable (only or, at least, primarily) to the interpretation of international documents and instruments ('treaties') \textit{and not} to the interpretation of a domestic Constitution. However, since the Constitutional Court, as South Africa's highest court in constitutional matters, has held, albeit probably also \textit{per errorem}, that the 'Convention on Conventions' may be relied on to guide interpretation of South Africa's Constitution and Bill of Rights, this has become the law (of interpretation) as it stands in South Africa — an entirely persuasive international law-text, turned into prescriptive domestic law through judicial law-making.

On 25 July 1996, one year, one month and nineteen days after \textit{Makwanyane},\textsuperscript{1024} the Constitutional Court's handed down judgment in the politically controversial Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others.\textsuperscript{1025} Save for the absence of Kentridge AJ in AZAPO, the panels of concurring judges in the two cases were identical. Not only did AZAPO retreat from \textit{Makwanyane}'s generous reliance on international law in constitutional interpretation, but arguably also reversed the court's position on international law as a framework within which the Bill of Rights 'can be evaluated and understood'.\textsuperscript{1026} AZAPO was, of course, not written so as to have such adverse effects for

\begin{itemize}
\item \textsuperscript{1020} See also § 32.3(e)(iii) supra. Capital punishment is not referred to in the Final Constitution either. However, the reason for this 'silence' is that \textit{Makwanyane} is taken to be the authority that has excluded the possibility of capital punishment once and for all.
\item \textsuperscript{1021} See \textit{Makwanyane} (supra) at para 14. See also L du Plessis \textit{Re-Interpretation of Statutes} (2002)268-269.
\item \textsuperscript{1022} Ibid at para 16.
\item \textsuperscript{1023} Ibid.
\item \textsuperscript{1024} \textit{Makwanyane} (supra) at para 16.
\item \textsuperscript{1025} On the politically controversial dimensions of this case, see L du Plessis 'AZAPO: Monument, Memorial. . .or mistake?' in W le Roux & K van Marle (eds) \textit{Law, Memory and the Legacy of Apartheid: Ten Years after AZAPO v President of South Africa} (2008) 51.
\item \textsuperscript{1026} See \textit{Makwanyane} (supra) at paras 35 and 304.
\end{itemize}
international law in South Africa. Its primary concern was the constitutionality of granting amnesty for the perpetration of atrocities by both erstwhile protagonists and antagonists of apartheid.

The Postamble to the Transitional Constitution emphasised the need for national reconciliation and a healing of the divisions of the past, and required amnesty to be granted 'in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past'. The Promotion of National Unity and Reconciliation Act\(^{1027}\) was subsequently enacted, stipulating conditions — and putting in place procedures to apply — for amnesty. An Amnesty Committee was authorised to grant perpetrators of human rights violations immunity from both criminal prosecution and civil liability, provided that their acts of violation could be associated with a political objective (as defined in the Act) and that all relevant facts about such acts were fully disclosed. Section 20(7) of the Act provided that individual immunity against criminal and civil liability would be consequent upon a successful application for amnesty, and discharged the state — and other bodies, organisations or persons — from (vicarious) civil liability for acts thus amnestied. AZAPO, the Applicant, challenged the constitutionality of Section 20(7) alleging that it breached every person's right (guaranteed in IC s 22) 'to have justiciable disputes settled by a court of law or . . . another independent and impartial forum'.\(^{1028}\) AZAPO contended that a state is required by international law, and a series of Geneva Conventions in particular, to prosecute the perpetrators of gross human rights violations, and that section 20(7) thus breached international law.\(^{1029}\) In terms of the said Conventions:

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches.

The Constitutional Court thought that '[t]he issue which falls to be determined in this Court is whether section 20(7) of the Act is inconsistent with the Constitution' and 'the enquiry as to whether or not international law prescribes a different duty is irrelevant to that determination'.\(^{1030}\) IC s 35(1) — the predecessor of FC s 39(1)(b) — the Court thought, directs it 'only to 'have regard' to public international law if it is applicable to the protection of the rights entrenched in the chapter' [ie the IC Bill of Rights].\(^{1031}\) That is, international law would have to be 'binding' in terms of black-letter constitutional law qualified to be '(public) international law' as envisaged in IC s 35(1) and FC s 39(1). This finding attenuates, if not reverses, the legal effect of Chaskalson P's framework dictum in Makwanyane.\(^{1032}\) Mahomed DP in AZAPO did

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1027 Act 34 of 1995.

1028 FC s 34.

1029 See AZAPO (supra) at para 25.

1030 AZAPO (supra) at para 26.

1031 Ibid at para 27.

1032 Makwanyane (supra) at paras 35 and 304.
not treat 'binding' as well as 'non-binding' international law as a framework within which the Bill of Rights 'can be evaluated and understood'. This reading of AZAPO renders provisions like IC s 35(1) or FC s 39(1)(b) largely superfluous. For if a court, tribunal or forum is at any rate bound to follow 'binding' international law, there is no need for any additional provisions to push it to do so.

AZAPO illustrates how domestic political pressures can put a court's (and in casu particularly the Constitutional Court's) otherwise favourable and generous dealings with international law under pressure. AZAPO touched a raw political nerve. Amnesty was central to the politically negotiated truth and reconciliation process in South Africa and held the key to a 'new' democracy memorialising the past without allowing it to eclipse the future. Had the Constitutional Court in AZAPO relied on international law to the same degree as it did in Makwanyane, it would have had to conclude that section 20(7) of the Promotion of National Unity and Reconciliation Act was unconstitutional. Had it then, pursuant to this finding, struck down the impugned provision, the truth and reconciliation process would certainly have ground to a halt, with potentially ghastly consequences for the more vital project of a closely negotiated, peaceful transition to constitutional democracy in South Africa.

History has shown that AZAPO did not irreversibly derogate from the Constitutional Court's 'universalist' attitude towards international law in constitutional interpretation. In Government of the RSA and Others v Grootboom and Others, the meaning of FC s 26's right to housing (in the form of passable basic shelter) was at issue. In construing the section, which guarantees everyone's right to adequate housing and enjoins the state to take reasonable legislative and other measures within its available resources to achieve the realisation of this right, the Court considered, amongst others, sources of international law. Yacoob J quoted Chaskalson P's framework dictum in Makwanyane, but added a significant qualification:

The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.

The Grootboom Court thus honoured — and, bearing AZAPO in mind, indeed restored — the distinction between international law binding on South Africa, and other sources of international law that must, in addition to binding law, be considered in the interpretation of the Bill of Rights. The Grootboom Court concentrated its inquiry mainly on Articles 11.1 and 2.1 of the International Covenant on Economic, Social

1033 See Peters (supra) at 300-301.
1034 2000 (11) BCLR 1169 (CC), 2001 (1) SA 46 (CC)(‘Grootboom’).
1035 Section 26(1).
1036 FC s 26(2).
1037 Makwanyane (supra) at para 35.
1038 Grootboom (supra) at para 26.
and Cultural Rights (ICESCR) and pointed out differences of interpretive significance between the formulation of the provisions of the Covenant and section 26 of the South African Constitution.\footnote{1039} However, the Court also thought that the relevant general comments issued by the United Nations Committee on Economic, Social and Cultural Rights regarding the interpretation of the ICESCR ‘constitute a significant guide to the interpretation of section 26’.\footnote{1040} The \textit{Grootboom} Court allowed itself to be guided by the Committee’s general comments in order to determine what the notion of ‘a minimum core’ of socioeconomic rights entails. By doing so, the \textit{Makwanyane} standard on recourse to non-binding international law was not just restored. The standard was further developed to authorise common sense reliance on an applicable text without making that text prescriptive as \textit{international law}.

\textit{Makwanyane}, AZAPO and \textit{Grootboom} constitute a particular (and probably the leading) storyline in the case law narrative of the Constitutional Court's reliance on international law in constitutional interpretation. Not exactly within — but nonetheless supporting — this storyline, are a handful of judgments of the court evincing a certain adjudicative mindset in dealing with human rights issues which are prominent in international law.

The minority judgment of Sachs J in \textit{Ex parte Gauteng Provincial Legislature. In re: Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995}\footnote{1041}, with which the majority of the Constitutional Court did not disagree, demonstrated how measured reliance on (relevant) international law can contribute to the resolution of a controversial issue or issues in domestic politics. The petitioners in the case alleged that draft provincial legislation fell foul of guarantees of school learners' right to instruction in the language of their choice,\footnote{1042} and of a right to establish educational institutions based on a common culture, language or religion.\footnote{1043} Sachs J considered the petitioners' contentions in the broad domestic historical and constitutional context\footnote{1044} and made four assumptions in their favour. He then contextualised these assumptions and counterbalanced them with reference to three significant considerations highlighted by the Interim Constitution.\footnote{1045} This analysis was followed by an assessment of the actual constitutional provision in terms of six universally accepted principles gleaned from various sources of international law on the protection of minorities.\footnote{1046} Having duly contextualised the interaction of international and municipal human rights law on

\begin{itemize}
\item \textit{Ex parte Gauteng Provincial Legislature} (supra) at para 28.
\item \textit{Ex parte Gauteng Provincial Legislature} (supra) at para 29.
\item 1996 (4) BCLR 537 (CC), 1996 (3) SA 165 (CC)('\textit{Ex parte Gauteng Provincial Legislature}').
\item This right was guaranteed in IC s 32(b).
\item The right was subject to the proviso that there shall be no discrimination on the ground of race. This right was guaranteed in IC s 32(c).
\item \textit{Ex parte Gauteng Provincial Legislature} (supra) at para 45.
\item \textit{Ex parte Gauteng Provincial Legislature} (supra) at para 50.
\end{itemize}
the issues in dispute, Sachs J concluded that the petitioners' misgivings regarding minority rights and education were unfounded.

International law looms large where the protection of the rights of vulnerable individuals finding themselves on foreign soil is at issue. In *Mohamed and Another v President of the RSA and Others* the Constitutional Court dealt with the unlawful handing over of a foreign national to the United States of America to be prosecuted for his alleged involvement in the bombing of the United States Embassy in Tanzania. The *Mohamed* court strongly condemned this extradition disguised as the deportation of an unlawful immigrant and adamantly (though alas belatedly) insisted on meticulous compliance with due process in such instances, which *in casu* would have had to include procuring an undertaking from the US government that the foreign subject would not be executed if eventually convicted in the US.

*Kaunda and Others v President of the RSA and Others (2)*, on the other hand, was, like *AZAPO*, a politically sensitive matter. Sixty-nine applicants, all South African nationals, arrested and detained in Zimbabwe and then charged with various offences related to their alleged complicity in a plot to overthrow the government of Equatorial Guinea, sought the South African government's intervention on their behalf to secure their release or their extradition to South Africa, and to protect them against assault and detention in atrocious conditions while still in Zimbabwe (and the risk of a death penalty if eventually extradited to Equatorial Guinea). A majority of the Constitutional Court, citing FC s 232 in order to signal reliance on customary international law, narrowly construed the right to diplomatic protection of these South African nationals on foreign soil:

> traditionally, international law has acknowledged that States have the right to protect their nationals beyond their borders but are under no obligation to do so.

The Court attached considerable weight to the opinion of a Special Rapporteur of the International Law Commission on the meaning of 'diplomatic protection', concluding that under current (customary) international law diplomatic protection is not recognised and cannot be enforced as a human right. Diplomatic protection remained the prerogative of the state to be exercised at its discretion.
The Constitutional Court’s atypical restraint in drawing on (and its narrow construction of) international law sources in *Kaunda*,1053 is directly proportionate to the controversy of the political issues that were involved. The controversy flowed from fear of possible interference not only with the affairs of, but especially also with the due process of law in a neighbouring state. This judgment was another sobering reminder that political realities can decisively shape reliance on international law in constitutional interpretation.

In FC s 233 a long-standing, common-law presumption of statutory interpretation is constitutionalised:1054 ‘Every court’ interpreting legislation is required to ‘prefer any reasonable interpretation . . . consistent with international law over any alternative interpretation that is inconsistent with international law’. Erasmus correctly points out that FC s 233, unlike the conventional presumption, is of effect even where there is no ambiguity in the language of the legislation to be construed — all that is needed for the section to take effect is the existence of international law on the topic or issue under consideration against which alternative interpretive outcomes can be assessed.1055 Though it is a rather helpful and significant interpretive aid, FC s 233 has, since the commencement of the Final Constitution, only been referred to twice: almost in passing by Sachs J in *S v Baloyi*1056 to justify his preferred interpretation of a legislative provision, and by Chaskalson CJ in *Kaunda and Others v President of the RSA and Others (2)*.1057 FC s 233 explicitly mentions the interpretation of legislation (only), but the Constitutional Court, in the latter judgement, had little difficulty finding that the presumption it creates ‘must apply equally to the provisions of the Bill of Rights and the Constitution as a whole’.1058 The *Kaunda* Court set FC s 233 on par with FC s 39(1)(b) — and that can only be done if ‘international law’ means the same thing in both sections. The effect of FC s 233 will then be that, in the interpretation of the Final Constitution (including the Bill of Rights), due regard to ‘non-binding’ international law will never be optional: such law will, as a matter of fact, apply whenever the presumption is not rebutted! (‘Binding’ international law, of course, applies at any rate.) One effect of this far-reaching interpretation is that FC s 39(1)(b) could be rendered superfluous, since FC s 233 applies to the Bill of Rights too. There are three possible ways of avoiding this consequence. (I) First, section 233 can be understood to refer to ‘binding’ international law only. (II) Second, the section can be understood as applying to the interpretation of legislation only (and not to interpretation of the Final Constitution too). (III) Third, and by virtue of the maxim *generalia specialibus non derogant*,1059 FC s 39(1)(b) can be understood as a specific prior provision, pertaining to the Bill of Rights (only), and therefore left

1053  Ibid

1054  See Du Plessis *Re-Interpretation of Statutes* (supra) at 173.


1057  See *Kaunda* (supra) at para 33.

1058  Ibid at para 33.
unaffected by FC s 233, a general provision similar in substance but pertaining to the Final Constitution as a whole. What the Constitutional Court said about FC s 233 in *Kaunda* rules out (II), does not rule out but also does not strongly support a possibility as restricted as (I) above, and is most likely to be understood as suggesting a preference for (III).

FC s 233 can of course be invoked only where, in construing legislation (or the Final Constitution), there is indeed international law against which alternative interpretive outcomes can be assessed. On the other hand, not to observe the presumption, when such international law is at hand, is an error in law as Gerhard Erasmus' quite correctly points out in his critique of *A M Moola Group Ltd and Others v Commissioner, South African Revenue Service and Others*. Given the paucity of references to FC s 233 in the case law, there is every reason to suspect that South African courts commit this error on a regular basis.

**(bb) Foreign law**

The South African Constitution not only reflects the influence of a wide range of international human rights law instruments: it is fair to say that it in some vital respects it has also been modelled on an array of foreign constitutions, eg the German Basic Law, the Canadian Charter, the US Constitution and Indian Constitution. South African courts (and the Constitutional Court in particular) have furthermore been open to persuasion by comparative (foreign) authorities. O'Regan J in *K v Minister of Safety and Security* eloquently reflected on this openness as follows:

> There can be no doubt that it will often be helpful for our courts to consider the approach of other jurisdictions to problems that may be similar to our own. Counsel for the respondent argued that because our common-law principles of delict grew from the system of Roman-Dutch law applied in Holland, a province of the Netherlands, in the 17th century, we should not have regard to judgments or reasoning of other legal systems. He submitted that the conceptual nature of our law of delict, based as it is on general principles of liability, is different from the casuistic character of the law of torts in common-law countries. These differences, he submitted, render reliance on such law dangerous. Counsel is correct in drawing our attention to the different conceptual bases of our law and other legal systems. As in all exercises in legal comparativism, it is important to be astute not to equate legal institutions which are not, in truth, comparable. Yet in my view, the approach of other legal systems remains of relevance to us.

It would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems' grappling with issues similar to those with which we are confronted. Consideration of the responses of other legal systems may enlighten us in analysing our own law, and assist us in developing it further. It is for this very reason that our Constitution contains an express provision authorising courts to consider the law of other countries when interpreting the Bill of

1059 See Du Plessis *Re-Interpretation of Statutes* (supra) at 73-74.

1060 Erasmus ‘The Incorporation of Trade Agreements’ (supra) at 157, 175.

1061 2003 (6) SA 244 (SCA).

1062 See § 32.5(c)(v)(aa) supra.
Rights. It is clear that in looking to the jurisprudence of other countries, all the dangers of shallow comparativism must be avoided. To forbid any comparative review because of those risks, however, would be to deprive our legal system of the benefits of the learning and wisdom to be found in other jurisdictions. Our courts will look at other jurisdictions for enlightenment and assistance in developing our own law. The question of whether we will find assistance will depend on whether the jurisprudence considered is of itself valuable and persuasive. If it is, the courts and our law will benefit. If it is not, the courts will say so, and no harm will be done.1063

The disposition evinced by these dicta stands in stark contrast to parochial sentiments that are made manifest in an intense recent debate that has raged in the United States of America over the use of foreign law in constitutional interpretation and adjudication. Cheryl Saunders, taking the pulse of this debate, thus remarks:

> The practice [ie the use of foreign law] remains a topic of fierce debate among scholars . . . and among judges writing extra-judicially. It has been the subject of critical comment in the press. It has attracted the attention of Congress, spawning a series of proposed resolutions seeking, in one way or another, to discourage judicial reference to foreign constitutional experience, with impeachment a veiled threat in the background.1064

Denunciation of 'the practice of comparison' professes to be principled on two accounts. First, reliance on foreign authority is thought to be necessarily at odds with the original intent of the 'the founding generation' responsible, in the first and final instance, for the making of a constitution believed to be in no need of an interpretive adaptation to 'present circumstances'.1065 Second, it is claimed that foreign law is not an authoritative source of law for (domestic) judges, and those among them who invoke it assume a legislative function which is at odds with the horizontal separation of powers (or trias politica).1066 They moreover import the ideas of foreign judges, over which the people of the US have no control, into American (constitutional) law, and that is, ostensibly, counter-democratic.

This debate is not particularly relevant in any constitutional democracy where constitutional comparison as interpretive endeavour is practiced, encouraged and, as in South Africa, explicitly authorised by the Final Constitution. The first objection above is premised on an exploded theory of constitutional interpretation (rejected by the South African Constitutional Court in no uncertain terms1067 and by South African scholars too1068). As to the second objection, the US opponents of the use of foreign law in domestic adjudication are about the only constitutional interpreters in the world today who see constitutional comparativism as an inevitable and (apparently)

1063 2005 (9) BCLR 835 (CC), 2005 (6) SA 419 (CC)('K') at paras 34-35.


1065 See § 32.3(b)(i) and § 32.3(c)(i)(B) supra. See also J Murkens 'Comparative Constitutional Law in the Courts: Reflections on the Originalists' Objections' (2008) 41 Verfassung und Recht in Übersee 32, 34.

1066 See Murkens (supra) at 34.

1067 See § 32.3(b)(i) supra.
insurmountable threat to the separation of powers (and democracy). In no jurisdiction where it is allowed to aid constitutional interpretation is foreign law looked upon and invoked as binding law (this is actually one of its strengths\footnote{1069}) and courts do not consult it with a ‘legislative frame of mind’ or with deference to the opinions of foreign legal authorities. Comparative constitutional jurisprudence, in the presence of powerful constitutional mechanisms and reading strategies safeguarding the separation of powers,\footnote{1070} is a very unlikely candidate to be the Achilles heel of trias politica.

Some commentators, in their account of the use of foreign law in constitutional interpretation so far, tend to describe Constitutional Court judges as comparative constitutional law enthusiasts.\footnote{1071} What then should one make of Kriegler J’s cautionary remark in \textit{Fose v Minister of Safety and Security}\footnote{1072} that he declines ‘to engage in a debate about the merits or otherwise of remedies devised by jurisdictions whose common law relating to remedies for civil wrongs bears no resemblance to ours and whose constitutional provisions have but a passing similarity to our section 7(4)(a)’ as both a questioning of ‘the value of foreign law’ and expression of an opinion in opposition to Ackermann J’s readiness to take foreign legal authority into account? Justice Emeritus Laurie WH Ackermann,\footnote{1073} writing extra-judicially,

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has pointed out, with reference to relevant passages from Constitutional Court cases, that Kriegler J was not really a sceptic when it came to the use of foreign law and that references to foreign authority indeed occur in Constitutional Court judgments authored by him. For instance: in \textit{S v Mamabolo (E TV, Business Day and Freedom of Expression Institute intervening)}, Kriegler J explicitly expressed appreciation for the usefulness of ‘comparative study’:
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particularly where Courts in exemplary jurisdictions have grappled with universal issues confronting us. Likewise, where a provision in our Constitution is manifestly modelled on a particular provision in another country’s constitution, it would be folly not to ascertain how the jurists of that country have interpreted their precedential provision.\footnote{1074}
\end{quote}

\begin{thebibliography}{99}
\bibitem{1069} LWH Ackermann ‘Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jörg Fedtke’ (2005) 80 \textit{Tulane Law Review} 169, 183-184. See also \textit{Makwanyane} (supra) at para 39.
\bibitem{1070} See eg § 32.3(e)(ii)(aa), § 32.4(b)(i)(cc) and (ii) and § 32.5(b)(iii)(bb) supra.
\bibitem{1072} 1997 (7) BCLR 851 (CC), 1997 (3) 786 (CC) at para 90.
\end{thebibliography}
Kriegler J’s reluctance to refer to foreign law in certain (over-)publicised instances, stemmed from what he perceived to be his own insufficient, personal mastery of foreign material or his belief that he could concur in a colleague’s conclusion without reliance on foreign material.\textsuperscript{1075} Two observations apropos Kriegler J’s dictum above will help to take the present discussion further.

First, the dictum reminds us that — as was pointed out above — not only international law sources, but also the domestic constitutional texts of other jurisdictions have had a definite impact on the making the South African Constitution. Such comparative constitution-making inevitably results in a globalisation of constitutional law which, in its turn, begets and conduces comparative constitutional interpretation.\textsuperscript{1076}

Second, Kriegler J acted as the sentinel among his peers, constantly on the lookout for uses of foreign law that he thought might flout Chaskalson P’s admonition in \textit{S v Makwanyane and Another} that ‘we must bear in mind that we are required to construe the South African Constitution . . . with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution’.\textsuperscript{1077} A sentiment that weighed heavily with Kriegler J was his profound appreciation for the unique manner in which a political and constitutional settlement in South Africa had been reached through (the give and take of) negotiations and sustained by a ‘Damascene about-turn from executive directed parliamentary supremacy to justiciable constitutionalism’, about which he said the following in \textit{Du Plessis and Others v De Klerk and Another}.\textsuperscript{1078}

Nowhere in the world that I am aware of have enemies agreed on a transitional coalition and a controlled two-stage process of constitution building. Therefore, although it is always instructive to see how other countries have arranged their constitutional affairs, I do not start there. And when I conduct comparative study, I do so with great caution. The survey is conducted from the point of view afforded by the South African Constitution, constructed on unique foundations, built according to a unique design and intended for unique purposes.

Later in the judgment Kriegler J sounded a (further) word of caution, namely that the advent of a new constitution did not warrant ‘the wholesale importation of foreign doctrines and precedents’.\textsuperscript{1079} With constitutional democracy in South Africa still in its infancy at the time, such caution was opportune, for the paucity of home-grown

\textsuperscript{1074} 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC) (‘Mamabolo’) at para 133.

\textsuperscript{1075} LWH Ackermann ‘Comparative Constitutionalism’ (supra) at 186. See also \textit{Bernstein & Others v Bester & Others NNO} 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at para 132-133.


\textsuperscript{1077} 1995 (6) BCLR 665 (CC), 1995 (3) SA 391, 1995 (2) SACR 1 (CC) (‘Makwanyane’) at para 39.

\textsuperscript{1078} 1996 (5) BCLR 658 (CC), 1996 (3) SA 850 (CC) (‘Du Plessis’) at para 127.

\textsuperscript{1079} \textit{Du Plessis} (supra) at para 144.
constitutional jurisprudence posed the danger of overreliance on the jurisprudence of others or of reliance on inappropriate foreign sources.

Kriegler J's word of caution, coupled with the last sentence of his dictum above, raises the spectre of unreflective reliance on substantive foreign law, regardless of the peculiar structural environment in which it occurs and/or the distinctive procedural matrix in which it took shape. The Chaskalson P admonition in S v Makwanyane and Another already hinted at the need for vigilance in this regard. Mark Tushnet, for instance, has shown why and how structural and procedural factors inhibit profitable reliance by US courts and comparativists on much of the (exemplary) substantive law on affirmative action in some other jurisdictions.

Difference in context, however, in the light of the previously quoted dicta of O'Regan J in K v Minister of Safety and Security, seems to be no insurmountable impediment to the comparison of the constitutions and constitutional law of two systems. Where the differences between systems go to their historical and conceptual roots, one must simply be careful to avoid the dangers of shallow comparativism and determine — on the merits — whether the foreign jurisprudence is valuable and persuasive.

Comparative constitutional interpretation has since 1994 featured quite prominently in our constitutional jurisprudence and not least of all the jurisprudence of the Constitutional Court. Laurie WH Ackermann drafted a list of no less than 26 instances and areas in which reliance on foreign law substantially codetermined interpretive and adjudicative outcomes in Constitutional Court cases.

1080 Makwanyane (supra) at para 39, see the introductory paragraph to 32.5(c)(v) supra.

1081 See Cheadle et al (supra) at 33-3:

Great care must be taken to ground comparative borrowing, both within the context of the texts from which that authority emanates and as the nature and purpose of our text. For example, the absence of a general limitation clause in the United States Constitution or the fact that the European Convention of Human Rights is an instrument governing the conduct of national states, has a considerable bearing on the nature of the jurisprudence of the United States Supreme Court and the European Court of Human Rights. To borrow uncritically from these jurisdictions, without considering the appropriate context, is an exercise fraught with danger, a fact which was acknowledged by Chaskalson P in Makwanyane.

See also Sanderson v Attorney-General, Eastern Cape 1997 (12) BCLR 1675 (CC), 1998 (2) SA 38 (CC)('Sanderson') at para 26.


1083 K (supra) at paras 34-35.

1084 Ibid at para 35.

1085 Ackermann (supra) at 187-190.
Constitutional comparativism has demonstrable practical value besides and beyond lip-service recognition of the actualities of constitutional globalisation and of the embeddedness of one’s own constitution and constitutional dispensation in a transnational reality. At the level of mundanity it makes constitutional interpreters aware of law, and especially foreign precedents, that can be invoked to justify their decisions. Brun-Otto Bryde, speaking from his experience as a constitutional judge, points out that such authority can be particularly helpful in lending additional legitimacy to findings and decisions dealing with difficult issues that might go against public opinion:

Even an old court with much self-confidence can profit from pointing to persuasive foreign precedents.\(^{1086}\)

Bryde moots the possibility of distinguishing between the interpretive uses of foreign law as inspiration and as legal argument in constitutional adjudication.\(^{1087}\) In the first instance a foreign source is looked at because the way in which it deals with a certain issue ‘is interesting’ to the same extent (and in the same manner) as the opinion of, for instance, a law professor will be ‘interesting’. In this sense there is no \textit{numerus clausus} of persuasive sources of law and it is mostly broad principles (as opposed to particular rules or norms) that are assessed. Even a foreign text misunderstood or taken out of context can, according to Bryde, be inspirational. When relied on as a legal argument, however, a judge must get the foreign law right. Such an argument can draw on foreign experience in the application of national standards, the application of international standards in foreign (domestic) jurisdictions and transnational constitutionalist principles limiting domestic constitutional law.

Constitutional comparativism fulfils, according to Constitutional Court Justice Emeritus Laurie WH Ackermann, two vital functions. First, it features prominently in the identification of the actual problem or problems in a particular case, in other words, the accurate recognition of issues at hand.\(^{1088}\) Ackermann contends that the formulation of a problem is often more essential than its solution. Foreign law, precisely because it is not binding and therefore does not exert any pressure ‘to be of effect’,\(^{1089}\) creates room for ‘creative imagination’ and ‘to raise new questions, new possibilities, [and] to regard old problems from a new angle’.\(^{1090}\)

At a critical stage of judicial reasoning, namely where the judge has arrived at a preliminary conclusion or hypothesis, reference to comparative examples assists him or her in vital (and necessary) attempts to falsify such a conclusion or hypothesis.\(^{1091}\)

\(^{1086}\) Bryde (supra) at 207-208.

\(^{1087}\) Bryde (supra) at 213-219.

\(^{1088}\) See LWH Ackermann 'Comparative Constitutionalism' (supra) at 183-185.

\(^{1089}\) On the distinctive ‘effect-directedness’ of prescriptive law-texts, see § 32.3(d) and (e)(i)(bb), § 32.4(a) and § 32.5(c)(iii) supra.

\(^{1090}\) LWH Ackermann 'Comparative Constitutionalism' (supra) at 185 (Quoting Albert Einstein).

\(^{1091}\) Ackermann ‘Comparative Constitutionalism’ (supra) at 185.
Second, the comparative legal approach enables the judge to interrogate his or her own prejudices\textsuperscript{1092} and to engage in a most crucial dialogue with herself or himself, 'in the course of which hypotheses emerge . . . intellectual, cultural and other predispositions compete' and 'critical rationalism can come into play to test and adapt hypotheses':

\begin{center}
It is at this stage, consciously or not, that one's philosophical, economic and jurisprudential Gestalt enters the picture. At this stage I have found comparative legal concepts to be most helpful.\textsuperscript{1093}
\end{center}

Another useful perspective on the value of constitutional comparativism is that of AJ van der Walt. He writes:

\begin{center}
Seen as a study of a collection of histories, comparative analysis of foreign property clauses and case law draws our attention to the inevitable and inescapable contextuality of the law and of constitutional property adjudication. As a history of errors, comparative study shows us a range of fallacious doctrines, theories and arguments that have already been discredited and should be avoided. As a history of possibilities, comparative study shows us that certain doctrines, theories and arguments could still be used as possible explanations of or solutions for individual problems. As a history of examples, comparative study shows us the methods, techniques and approaches that are available to us. Like the historical study of law, the comparative study of law liberates us from what we need not do; it cannot and should not enslave us by telling us what we have to do.\textsuperscript{1094}
\end{center}

Two major challenges face constitutional comparativism (and constitutional comparativists) in South Africa. The first challenge is to account for the comparative significance of South Africa among a number of 'new' constitutional democracies with 'new' constitutions in an era of ever increasing globalisation. 'Newness', as was previously pointed out, can relate to having a Constitution drafted with reference to and drawing on post-World War II international human rights instruments.\textsuperscript{1095} However, 'newness', alluding to a North-South distinction in comparative constitutional law, can also relate to renewed processes of democratisation and constitution-making worldwide, referred to by some as 'the third wave of democratisation'.\textsuperscript{1096} Bryde writes:

\begin{center}
This process started with the disappearance of the last right-wing dictatorships in Southern Europe, was followed by the breakdown of communism in Eastern Europe and
\end{center}

\textsuperscript{1092} Ibid at 191:

No judge is a 'Hercules' or an 'Athena'. The best one can do is to strive consciously to become aware of all one's prejudices, to be aware that, this exercise notwithstanding, one will still have subliminal predispositions, and to toil as honestly as one can in the vineyard.

\textsuperscript{1093} Ibid at 191-192.

\textsuperscript{1094} Van der Walt (supra) at 38.

has become a world-wide phenomenon most remarkably in Latin America but also in Africa and Asia. While setbacks are common the overall process is significant.1097

This perspective brings with it an awareness of historical possibility (as Van der Walt1098 would have it) or promise (in the idiom of memorial constitutionalism1099). Looking forward is distinctively part of a new beginning. At the same time the said perspective evokes memory (à la memorial constitutionalism1100). Memory is also a 'history of errors' (à la Van der Walt) and serves equally as reminder of the achievements and blunders of other constitutional experiences. The unusual success achieved in South Africa with its peaceful transition — and rightly referred to by Kriegler J in Du Plessis and Others v De Klerk and Another1101 with hardly disguised pride and appreciation — is no cause for complacency. Constitutional triumphalism is always premature: for a 'history of errors' looms (and may again be in the making). The call to alertness does of course not apply to 'new' democracies only (oldness and smugness are comfortable companions too), but where constitutional democracy is tried anew or for the first time, it is of existential urgency that jurisdictions engaged in the endeavour should learn from one another's positive and negative experiences, and share with one another their expectations of future possibilities and promises.

The second challenge is to harness the theoretical strengths and possibilities of (practical experiences of) constitutional comparison and to design and develop a methodology (or methodologies) of comparative constitutionalism.1102 How does the constitutional comparativist, for instance, decide that, as O'Regan J has it in the previously cited dictum from K v Minister of Safety and Security,1103 a certain version

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1098 See AJ van der Walt Constitutional Property Clauses (1999) 38.

1099 See § 32.3(c)(iii)(bb).

1100 See § 32.3(c)(iii)(bb).

1101 1996 (5) BCLR 658 (CC), 1996 (3) SA 850 (CC) at para 127.

1102 See Saunders (supra) at 119-126 (Convincingly argues that it is important for courts also to take comparative methodological issues to heart.) See also F Venter Constitutional Comparison. Japan, Germany, Canada and South Africa as Constitutional States (2000); VC Jackson, & M Tushnet (eds) Defining the Field of Comparative Constitutional Law (2002) Both texts attempt to deal with issues of comparative methodology.

1103 2005 (9) BCLR 835 (CC), 2005 (6) SA 419 (CC) at para 35.
of comparativism is 'shallow' or that foreign jurisprudence considered in a particular case 'is of itself valuable and persuasive'? As to Chaskalson P's\textsuperscript{1104} directional and Kriegler J's\textsuperscript{1105} constant reminders that 'we must bear in mind that we are required to construe the South African Constitution', what are the criteria and conditions that make interpretive reliance on comparative materials at all possible and when are two systems of constitutional law (and/or aspects of them) sufficiently compatible to be comparable for interpretive purposes? How is a 'wholesale importation of foreign doctrines and precedents' to be distinguished from prudent reliance on whatever (legitimate) instructive value these doctrines and precedents might have?\textsuperscript{1106} Is the debate about the 'transplantation' versus the 'migration' of foreign law relevant in the South African context?\textsuperscript{1107} As to the suggestion of Bryde about the distinction between the use of foreign sources of law as inspiration and as legal argument, how is it to be decided where the one ends and the other begins? Bryde suggest that for the former mode of reliance 'there are few normative or methodological requirements' while for the latter mode 'the methodology has to be more thorough'.\textsuperscript{1108} Apart from suggesting that a thorough methodology entails 'getting it right' as far as a judge's understanding of relevant foreign law is concerned, Bryde is silent on the essential difference between the two methodologies — and it will certainly be worthwhile for reliable constitutional comparativism to get that right!

### 32.6 Constitutional interpretation in a constitutional state

Are there, I ask rhetorically, reliable interpretive formulas or recipes upon which a constitutional interpreter can time and again rely? The answer of the preceding pages is a resounding 'no'!

The text of the Constitution-in-writing is open-ended and generates more and more — instead of being limited to only certain — meanings. Methodological pluralism manifesting as multiple strategy interpretation is preferable to methodological monism seeking to establish a one and only correct manner in which to arrive at 'the best' or the 'most correct' interpretation of the Constitution (and, more specifically, any one or more of its provisions).

This 'moreness' or proliferation of meaning does not mean that anything goes or that a distinction between better and worse answers to interpretive questions do not exist. A constitutional state (Rechtsstaat), where legal precepts bind all members of the (legal) community in the same way, is a more vital requirement

\begin{footnotes}

\footnote{1104} Makwanyane (supra) at para 39.

\footnote{1105} Du Plessis (supra) at paras 127 and 144; Sanderson (supra) at para 26.

\footnote{1106} Du Plessis (supra) at para 144.


\footnote{1108} Bryde 'Constitutionalist Dialogue' (supra) at 214.
\end{footnotes}
for 'good interpretation' than the availability of 'the right' interpretive methods or techniques. According to Hans-Georg Gadamer, a leading exponent of philosophical hermeneutics, a Rechtsstaat is a prerequisite to legal hermeneutics:

In an absolutist state, where the will of the absolute ruler is above the law, hermeneutics cannot exist, 'since an absolute ruler can explain his words in a sense that goes against the rules of general interpretation'... There is a need to understand and interpret only when something is enacted in such a way that it is, as enacted, irremovable and binding.\footnote{1109}

The will of a despot can blatantly overtrump the interpretation of authorised legal interpreters such as judges. More subtly, however, legal interpreters themselves can evade their hermeneutic responsibility — in law most clearly manifested as a judicial responsibility — by hiding behind the 'clearly expressed will' of the sovereign. In the latter instance the 'objective adjudicator' assumes that she or he dares not limit or broaden the legislative will, lest she or he lands up in the murky waters of politics. Hermeneutic responsibility, Gadamer argues, requires from the legal interpreter, especially the judge, a concretisation of the legal norm (Konkretisierung des Gesetzes) which includes its application, and which often requires its completion through augmentation (Rechtsergänzung).\footnote{1110} Judicial decisions may be justified on the strength of either legal dogma or legal hermeneutics, that is to say, either by simply subsuming legal problems under generally applicable legal norms and principles or by concretising normative texts interpretively. Gadamer assigns priority to the latter mode of judicial problem solving and, eventually, decision-making. Interpretive responsibility requires the judicial decision-maker to hermeneuticize rather than simply to dogmatise.

From Gadamer's contentions it follows that, in constitutional interpretation, the intensity of interpretive engagement with the constitutional text, and other relevant sources, determines the quality of the answers to the initial questions posed. They are mostly not the easy (or readily arrived at) answers. A claim that the language of a constitutional provision or its readily discernable purpose clearly manifests its meaning is suspect. Serious interpretive engagement with a provision will, in addition to considerations of its language and purpose, also entail consideration of its context and its coherence with other law in as well as outside of the Constitution, its history and its relationship to transnational sources of law. Language, purpose, context, history and transnational context, as well as interpretive waymarks in the written text of the Constitution, however, constitute but the hallway to the meaning possibilities of constitutional provisions. Constitutional interpretation in the fullest sense have taken place only when the distinctive interpretive demands of a constitutional democracy, such as the observation and activation of constitutional values, judicial self-restraint, subsidiarity and reading in conformity with the Constitution have been brought into play. Meaning in constitutional interpretation is never given. It has to be decided upon. And before the feet of the decision-maker, Jacques Derrida explains, there is always a gaping abyss of uncertainty simply because he or she is faced with making a decision about something which was not certain beforehand. If you already know what you are going to (or should) do, then there is no need for a decision. The decision-maker therefore has to take full responsibility for the leap he or she makes into (and

\footnote{1109} H-G Gadamer \textit{Truth and Method} (1975) 294.

\footnote{1110} Ibid at 312-313.
hopefully across) the abyss, starting from the very point where, with incomplete and even deficient knowledge at his or her disposal, he or she considers a decision, and might then end up at a point where, on the other side of the abyss, he or she has made an own decision:

You have to go through an ordeal of undecidability in order to decide . . . Something must remain incalculable for a decision to be a decision.  

Each and every authorised interpreter of the Final Constitution (and not only the courts or organs of state) bears interpretive responsibility when and wherever he or she construes the country's highest law, for each and every interpretation of the Final Constitution contributes to (the quality of) constitutional democracy, the very precondition to sustained constitutional interpretation. Ultimately, therefore, constitutional interpretation is not just about reading the Final Constitution. It is about doing it.