

UNIVERSITY OF KWAZULU-NATAL

**THE IMPACT OF THE CONSTITUTION ON TRANSFORMING
THE PROCESS OF STATUTORY INTERPRETATION IN
SOUTH AFRICA**

A SINGH

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A thesis in fulfilment of the academic requirements for the degree of the Doctor of
Philosophy in the School of Law,

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CERTIFICATE

I, the undersigned, hereby declare that the work contained in this thesis is, unless specifically indicated to the contrary in text, my own original work which has not been submitted before in whole or in part at any other University for a degree.

SIGNED ON THIS 12th DAY OF DECEMBER 2014 AT DURBAN, SOUTH AFRICA

A SINGH

DECLARATION

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During the past three years and the hundreds of hours of engaging intensely with the rules, theories, techniques and maxims on the complex, yet fascinating subject of *Interpretation of Law*, I was often bemused by the remark that:

‘Making innumerable statutes, men merely confuse what God achieved in ten.’

- Humbert Wolfe

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CHAPTER 1

INTRODUCTION AND BACKGROUND

1.1 Introduction

In reflecting on the subject of statutory interpretation, William Eskridge describes the field as the ‘Cinderella of legal scholarship’,¹ but adds further that:

‘Once scorned and neglected, confined to the kitchen, it now dances in the ballroom. Although the interpretation of statutes has been an ongoing topic of interest since the colonial period, only since the 1980’s have American legal academics become intensely excited about statutory interpretation as an object of theoretical interest.’²

Although the author in his examination of the subject, refers to the state of the discipline in the United States of America – the description quite aptly mirrors the state of the discipline in South Africa prior to the new constitutional dispensation.³

For a good many years, the attitude to statutory interpretation was haphazard and fragmented, and generally ‘not regarded as a subject meriting thorough research, or serious academic exposition.’⁴ As the subject itself is concerned primarily with rules and principles, it was unfortunate that during the apartheid era and particularly as a result of the system of parliamentary sovereignty, a number of these rules and principles could be

¹ Eskridge *Dynamic Statutory Interpretation* at 1.

² Ibid.

³ Du Plessis *Re-Interpretation of Statutes Prolegomenon* at x.

⁴ Bennion *Statutory Interpretation* xxvii.

easily rebutted by the legislature. The result was that a number of important libertarian rules and principles were disregarded and relegated to a third-rate status by the courts.⁵

The position changed significantly with the advent of the new constitutional dispensation, first by the Interim Constitution in 1994 and thereafter by the Final Constitution in 1996⁶, which heralded a new era of constitutionalism and a paradigmatic shift from parliamentary sovereignty to constitutional supremacy. Cameron J succinctly summed up the impact of the Constitution in a single statement:

‘The Constitution has changed the “context” of all legal thought and decision-making in South Africa.’⁷

Almost instantaneously, everything changed forever – all law and conduct, all traditions, dogmas, perceptions, rules and procedures, and all theories, canons and maxims of interpretation were all subject to and influenced by the Constitution.⁸ This essentially encapsulates the basis of this thesis, which is poised at the crossroads of statutory interpretation and constitutional law. It is significant for two reasons:

Firstly, it elucidates the effect of the impact of the Constitution⁹ on the process of statutory interpretation;¹⁰ and

⁵ Botha *Statutory Interpretation* (2nd edition) at 50. Botha has subsequently updated his book, however in an earlier edition of the book, 2nd edition, he makes the point that in a system of parliamentary sovereignty that the common-law rules and principles could be easily rebutted by legislation.

⁶ In this thesis reference to the Constitution, or the ‘new’ Constitution refers to the Final Constitution of RSA of 1996, unless otherwise indicated.

⁷ *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W).

⁸ Botha *Statutory Interpretation* (5th edition) at 100.

⁹ While reference is made to a number of constitutional provisions, for purposes of this thesis the following constitutional provisions, for example, section 1, section 2, section 7, section 35(2), section 39, section 232(2) and section 172, are examined more closely. Even though reference is made to the Constitution throughout the thesis, **Chapter 3** specifically examines the principles which underlie constitutional interpretation.

¹⁰ Reference to the ‘process of interpretation’ involves an examination of case-law as a result of the impact of section 39 on the various rules, canons and maxims of interpretation.

Secondly, it attempts through judicial precedents to establish how the Constitution has transformed the theory and methodology of statutory interpretation in South Africa.¹¹

1.2 Research Problem and Hypothesis

The *Research Problem* may be stated as follows:

- Whether the Constitution, and in particular section 39, has transformed the process of interpretation and if so how has this influenced statutory interpretation in South Africa?

As a *Hypothesis* therefore, this would translate into:

- The Constitution has transformed the process of statutory interpretation in South Africa and there has been an emerging jurisprudence that mandates a new methodology. This therefore requires a new theory for statutory interpretation in the era of constitutionalism.

The above hypothesis necessitates a careful consideration of the aims and objectives set out below.

1.3 Aims/Objectives

- (i) To establish what are the commonly accepted theories of statutory interpretation, that have been used by South African courts, and that have underpinned judicial reasoning in South Africa in the past.
- (ii) To examine the relevant constitutional provisions, and in particular section 39, to determine how the application thereof has transformed the approach to statutory interpretation and the way legislation is interpreted in contemporary South Africa.

¹¹ From an examination of relevant case-law, the emerging jurisprudence in the current constitutional era is analysed, to ascertain if there are notable key features that can be identified.

- (iii) To examine the influence of the Constitution on the rules, canons, maxims and presumptions of interpretation – in order to assess their relevance and significance in the democratic constitutional era.
- (iv) To determine how international law and foreign law are applied, and why they have to be considered in the process of interpretation.
- (v) To evaluate the emerging jurisprudence in contemporary South Africa from an examination of judicial precedents, in order to determine whether the traditional theories of interpretation are adequate.
- (vi) To propose and explain a ‘new’ theory of interpretation, with its own particular *modus operandi* – for a transformative South African legal system.

1.4 Background/Overview

In order to understand the relevance of the research undertaken, it is necessary to trace the development of the field of statutory interpretation in South Africa. An examination of some of the ideas of jurists and leading experts, and their contributions to the field of statutory interpretation-are presented.

Cross defines statutory interpretation as the ‘process by which the courts determine the meaning of a statutory provision for the purpose of applying it to the situation before them.’¹² The interpretative process as articulated is therefore two-fold:

- (i) Firstly, it involves the determination of meaning, which is a cognitive function (this is an act of recognition or discovery); and
- (ii) Secondly, the application of the meaning to a particular factual situation, which is a judicially creative function.¹³

¹² Cross *Statutory Interpretation* at 40. Cross in referring to Gray’s definition of interpretation, submits that Gray’s definition calls for some revision. The definition according to Gray is as follows: ‘the process by which a judge (or indeed any person, lawyer or layman, who has occasion to search for the meaning of a statute) constructs from the words of a statute- book a meaning which he either believes to be that of the legislature, or which he proposes to attribute to it.’

According to Devenish, the subject involves a 'kindred trilogy of phenomena':¹⁴

- (i) Firstly, it is concerned with *linguistics*, which in turn concerns itself with semantics, syntax and the rules of logic;
- (ii) Secondly, it involves not only statute law, but also the common law; and
- (iii) Finally it is inextricably intertwined with *jurisprudence* or the philosophy of law.¹⁵

While from the above definition of the subject, one might gain the impression that the interpretation of statutes is concerned mainly with rules and procedures, Devenish hastens to add 'that the interpretation of statutes is not merely a technical procedure but also involves a psychological and imaginative procedure using value judgments.'¹⁶

De Ville submits that in order to understand something, we first have to interpret it. He is emphatic that 'no understanding is possible without interpretation.'¹⁷ Texts do not have a meaning in and of themselves. They only have a meaning in and through the act of interpretation.¹⁸ Understanding is therefore described as a temporary moment when the interpreter decides on the meaning of the text.¹⁹ It is interesting that De Ville makes the point that interpretation is therefore a 'conversation between the current perspective of the interpreter and the textual and historical perspective of the statute.'²⁰ The

¹³ Dickerson *The Interpretation and Application of Statutes* at 21-22.

¹⁴ Devenish *Interpretation of Statutes* at 2.

¹⁵ Cowen 'Prologemenon to a Restatement of the Principles of Statutory Interpretation' (1976) *Tydskrif vir die Suid Afrikaanse Reg* at 136 contends that 'the interpretation of statutes finds a place in the books on general jurisprudence because it raises basic questions concerning the nature of the judicial process and the relation between the legislature and the judiciary.' (Emphasis Added)

¹⁶ Devenish *Interpretation of Statutes* at 2. Devenish's reference to value-judgments cannot be more relevant than in terms of section 39(2) of the Constitution, which requires one to consider the 'values' that underlie an open and democratic society.

¹⁷ De Ville *Constitutional and Statutory Interpretation* at 3.

¹⁸ *Ibid* at 4. See also *Du Plessis Re-Interpretation* at 116. Du Plessis shares De Ville's sentiment and makes the point that the purpose or object cannot be known *prior* to interpretation, but has to be established *through* interpretation. (Emphasis Added)

¹⁹ De Ville *Constitutional and Statutory Interpretation* at 4.

²⁰ *Ibid*.

underlying argument therefore is that every understanding is preceded by ‘pre-understanding.’²¹ Gadamer, whose scholarly works have dominated the field of hermeneutics,²² refers to this pre-understanding as ‘prejudices’²³ or ‘biases’, as a result of being situated in a communal tradition or interpretive community.²⁴ As a result of being inextricably situated in a historical and linguistic reality shapes our experience of the world. In other words, when we interpret a text, we are already influenced by our culture and legal tradition.²⁵

The following key elements form the gravamen of De Ville’s argument:

- (i) no text has a meaning of its own or can be understood without interpretation;
- (ii) the interpretation is always situated within a community of interpreters;
- (iii) legal tradition is contingent and therefore subject to change;
- (iv) prejudices (including the methods of interpretation) should be critically reflected on;
- (v) the context – including the social, political and economic context and context of the case at hand – are important for understanding, as understanding cannot take place in the abstract; and

²¹ Ibid. De Ville supports his statement with the idea that: ‘when we interpret a text we are already influenced by (a specific understanding of) our culture and legal tradition.’

²² ‘Hermeneutics’ is derived from the Greek word *hermeneuein* which means ‘to interpret.’ Hermeneuein is in turn derived from the name Hermes, the messenger god of ancient Greece, who had to explain the messages of the Gods to the mortals of earth. Hermeneutics is therefore a very old discipline, used by the Greeks. Aristotle addressed the science of interpretation in his discourses. Throughout history, it became an important and useful tool in both Christian theology and jurisprudence. Biblical hermeneutics (scriptural exegesis) and legal hermeneutics (interpretation of statutes) developed as separate fields, although they had a great deal in common, since both had very strong normative characteristics. See discussion in Botha *Statutory Interpretation* (5th edition) at 83-84.

²³ De Ville *Constitutional and Statutory Interpretation* at 4.

²⁴ Ibid.

²⁵ Ibid.

- (vi) interpretation is a conversation or dialogue between the interpreter and the text.²⁶

According to Baxter, the science of hermeneutics is concerned with the understanding and explanation, but more specifically it deals with the interpretation of texts, in order to reveal their meaning. He describes contemporary hermeneutics as a synthesis of ideas which have their origins in cognate disciplines such as the philosophy of language, linguistic philosophy, structuralism and semiology.²⁷ The science of hermeneutics makes it clear that words, phrases and sentences – and even texts – can never have intrinsic meanings, since in the process of interpretation the context of the language and the persons involved are always relevant.²⁸ However, what must be emphasized is that hermeneutics is not merely a technical discipline, but is essentially concerned with values.²⁹ The fact is that the science of understanding is not a mechanical exercise, but one that involves value judgments, applied by the interpreter during the interpretation process.³⁰ Baxter points out that an understanding of the science of hermeneutics and the insights provided by the hermeneutic tradition are ‘of profound importance for an understanding of the process of interpretation.’³¹ Nevertheless, Du Plessis explains the relevance of hermeneutics for interpretation of legislation – by drawing an analogy to a circle, or, more accurately, a ‘hermeneutic circle,’³² where:

²⁶ Ibid at 7-8.

²⁷ Baxter *Administrative Law* at 315-316.

²⁸ Goodrich *Reading the Law* 135.

²⁹ Ibid at 144.

³⁰ Botha *Statutory Interpretation* (5th edition) at 85. The value judgments that are referred to also find expression in section 39, which contains a mandate that judges must promote the values that underlie a democracy. Judges are therefore under a moral obligation to ensure that interpretation is in keeping with constitutional values.

³¹ Baxter *Administrative Law* at 318.

³² Botha *Statutory Interpretation* (5th edition) at 85.

‘...every part of a text must be understood in terms of the whole, and in turn, the whole in terms of its parts. This is a continuous process during which both the whole and the parts are progressively explained.’³³

While the contributions made by various authors are by no means an exhaustive examination of the subject of statutory interpretation, they are nevertheless presented here as a starting point of the discussion. What is evident from an analysis of these views and submissions, is that the process of interpretation requires that the interpreter engage with the text. A text cannot be understood without according meaning to the words and the language that is used.³⁴ Therefore the process of interpretation is intricately linked to words and language. Language, in other words, is a medium through which meaning is communicated.³⁵

The very nature of words and language is, however, problematic. Even though words may be regarded as ‘symbols of meaning’, they cannot attain quantitative precision, as is the case with mathematical symbols.³⁶ It is also difficult to express ideas in words with complete accuracy. Furthermore, the more complex the idea, the greater the difficulty.³⁷ This problem appears to be compounded with the drafting of statutes.³⁸ It is often found

³³ Ibid. The idea encapsulated in the quotation is in keeping with that of ‘holism.’ Holism in general terms (whether in science, sociology, economics, linguistics or philosophy), is the idea that all the properties of a given system cannot be determined or explained by its component parts alone, but the system as a whole determines in an important way how the parts behave. Semantic Holism is a doctrine in the Philosophy of Language to the effect that a certain part of language (for examples, a term or a complete sentence) can only be understood through its relations to a (previously understood) larger segment of language. <http://www.philosophybasics.com/branch-holism.html> (Accessed on October 2013)

³⁴ De Ville *Constitutional and Statutory Interpretation* at 3-4.

³⁵ Ibid at 8.

³⁶ See discussion in Devenish *Interpretation of Statutes* at 2-3.

³⁷ Ibid at 3-4. See also *Venter v Rex* 1907 TS 910 at 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.’

³⁸ Staksy *Legislative Analysis and Drafting* (2nd edition) at 14-15. ‘In short, whether statutory language is broad or precise, the courts can rarely, if ever, be reduced to a mechanical role... Further complicating the picture is the nature of the legislative process itself. Most legislatures

that even when statutes are drafted with meticulous legal and linguistic insight, there will always be situations that the draftsman could not have anticipated – and for which the statute does not make provision.³⁹

Prior to the new democratic dispensation, the most pervasive theory of interpretation in South Africa was the literal theory, or that which Botha refers to as the ‘orthodox text-based approach.’⁴⁰ In terms of this theory, the interpreter focused primarily on the literal meaning of the provision. Basically, therefore, the methodology or the *modus operandi* was applied as follows – if the meaning of the text was clear, that was the meaning to be used, irrespective of the consequences.⁴¹ It was rather unfortunate, that over a period of time, that the courts began to regard the clear, literal meaning of the words as being identical to what the legislature intended.⁴² As a result, only ‘lip-service’ was paid to the principle of legislative intent, because courts automatically equated the so-called ‘clear and unambiguous meaning of the words’ to the ‘intention of the legislature.’⁴³

Since the intention of the legislature was to be deduced from the words that were used, it was not surprising that most scholars were critical of the judiciary during apartheid. Cameron J’s most vehement criticism of the role of judges during apartheid was that due to the fact that judges were constrained to apply the law, this often provided them with

consist of hundreds of elected officials who operate in a highly political environment. It is not uncommon for legislation to be passed in a crisis atmosphere where few legislators have the time, interest, or expertise to read and understand everything that they are voting for. Hence, there is no such thing as a collective legislative mind which has a readily identifiable intent accompanying every statute that is passed.’

³⁹ Bell and Engle *Cross Statutory Interpretation* at 2-3.

⁴⁰ Botha *Statutory Interpretation* (5th edition) at 91.

⁴¹ *Ibid* at 93.

⁴² *Ibid*.

⁴³ *Ibid*. See also Phillips *Lawyers Language – How and Why Legal Language is Different* at 107-108, where it is expounded that: ‘The phrase “intention of Parliament,” is not in itself clear cut. The initial complication is that the actual author, the legislature, is collective. In the case of legislation, as with deed, intention is equated with consensus. Therefore it is to be sought in the words which issue forth and not in the statements of *individuals*. The exclusion of the legislative history conforms to the logic of collective intention. Once “intention of Parliament” becomes “legislative intention,” or “intent” or “import,” a subtle charge of significance takes place. The site of the intention then switches from the actual to the hypothetical author.’

the opportunity not only to criticize the proliferation of policies and legislation that were reflective of the apartheid regime, but they were quite well poised to curtail these laws and policies as well. He therefore submits that not only judges but all lawyers who participated in the apartheid system 'legitimated' it. He is therefore quite emphatic that all lawyers and judges irrespective of their personal beliefs and extent of their participation were complicit during apartheid.⁴⁴ David Dyzenhaus in his analysis of the contentious subject, comments quite perceptively, that where there was an attempt to mount the challenge to oppose the government's unpalatable and abhorrent apartheid legislation, it was often argued before courts by lawyers that judges should read statutes in light of the common-law presumptions.⁴⁵ In the absence of a Bill of Rights during apartheid, the common-law presumptions which were based on what was fair and just could have easily operated as a surrogate for the Bill of Rights, to protect individual rights and liberty. Unfortunately however this did not materialize as one would have envisaged.⁴⁶ Cora Hoexter, a strong proponent for transformation of the judiciary notes that the problem was further compounded by the fact that South Africa's highest court was for the most part 'stocked' with a small minority of judges who were all white and who subscribed to the policies of the prevailing National Party government. In limited instances when matters could actually be challenged and taken up on review on grounds of bad faith, bias and irrationality, almost inevitably the decisions of the lower court judges were overruled by the Appellate Division.⁴⁷ Apart from Edwin Cameron, David

⁴⁴ Cameron 'Submission on the role of the Judiciary Under Apartheid' (1998) *South African Law Journal* at 436. Cameron justifies his submission that such lawyers were not only lawyers who supported apartheid and acted for government, but also those lawyers who considered themselves 'politically neutral' and who pursued their commercial and other activities under the apartheid framework.

⁴⁵ Dyzenhaus 'The Past and Future of the Rule of Law in South Africa' (2008) 124 *South African Law Journal* at 734.

⁴⁶ The Role of Presumptions is examined more fully in **Chapter 4**.

⁴⁷ Hoexter 'The Principle of Legality in South African Administrative Law' (2004) *Macquarie Law Journal* at 165. Due to the limitation inherent in the literal theory or with the enquiry for the so-called 'intention of the legislature', courts were bound by the ordinary grammatical meaning of the word. Courts were therefore restricted to the limited grounds of review as provided for in terms of legislation which included bad faith, bias and irrationality. These grounds could not be extended under any circumstances. The literal theory must be compared to the purposive theory which focuses on the purpose for the promulgation of the Act. A purposive methodology is more

Dyzenhaus and Cora Hoexter, John Dugard and Hugh Corder, were also ‘unflattering’ on the tendency of judges to only refer to the so-called ‘will’ or ‘intention of the legislature’ – particularly in respect of harsh, unjust apartheid laws.⁴⁸ However, it was only with the advent of the new democratic constitutional dispensation, and in particular section 39, that there was an upsurge in interest in the role of the judiciary in the process of interpretation.

In terms of section 39 – the interpretation provision in the Constitution – it is provided:

- (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.
- (2) 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.

What is manifest from examination of section 39, is the unmistakable directive that courts and judges in ‘promoting the values that underlie an open and democratic society’ –to assume a far more creative role in the interpretation process.⁴⁹ There has been a paradigmatic shift in emphasis from the literal approach with its focus merely on words, to a more purposive or teleological mode of interpretation, resulting in an emphasis on those seminal values suited to a constitutional democracy.

suited to advance the aims of a transformative constitutional system. An in-depth analysis of the Theories of Interpretation is dealt with in **Chapter 2**.

⁴⁸ Du Plessis *Re-Interpretation of Statutes* Prolegmenon at xi. See also Dugard ‘Courts and the Poor in South Africa: A Critique of Systematic Judicial Failures to Advance Transformative Justice’ (2008) 24 *South African Journal on Human Rights* at 214

⁴⁹ Botha *Statutory Interpretation* (5th edition) at 160-161.

There have been a number of academics who have been instrumental in transforming the notion of purposive interpretation to that of teleological interpretation.⁵⁰ Etienne Mureinik promoted a value-coherent interpretation as one that aspires to the higher ethical coherence of a common law legal system as a whole.⁵¹ Devenish has argued emphatically in favour of a value-laden teleological approach to statutory interpretation.⁵² Christo Botha expounded the merit of a teleological approach to interpretation in the new constitutional era.⁵³

While the transition and shift in emphasis from the literal approach to a more purposive methodology has occurred, it nevertheless still begs the question as to whether the teleological theory is the most appropriate in the current constitutional order in South Africa. From an examination of the field of statutory interpretation – through the eyes of scholarly experts on the subject – what emerges is that ‘the approach of the courts varies according to the judges’ perception of their constitutional role at any given period.’⁵⁴ This perception undoubtedly influences the theory of interpretation that gains dominance in a particular legal system.⁵⁵ What is expected of judges in the current constitutional order, is that they should engage in a moral evaluation of the legislative text. Lord Denning declared that judges should actually believe that they are involved in a moral activity.⁵⁶ It is therefore postulated that the most appropriate theory in interpretation in the South African context, is one that incorporates ethical and moral considerations in the process of reasoning. Such a theory would be deontic in nature and therefore referred to as the deontic theory.

⁵⁰ Du Plessis *Re-Interpretation of Statutes* Prolegomenon at xii.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Devenish *Interpretation of Statutes* at 23.

⁵⁵ Ibid.

⁵⁶ Ibid at 10.

Law as a social science is a discourse that is infused with value judgments.⁵⁷ Such a value-coherent approach is specifically mandated by the Constitution and in particular section 39(2), which requires that in the process of interpretation that one has to consider the values that underlie an open and democratic society. Legal reasoning does not only involve purely rational arguments but also an evaluation of conflicting ethical interests and the making of value judgments.⁵⁸

In actual fact, a solution to a particular legal problem will require both inductive and deductive reasoning.⁵⁹ However, because legal reasoning requires a more complex and specialized reasoning than reasoning in general, legal reasoning in its entirety is not reducible to merely a species of inductive and deductive reasoning, but is in fact a synthesis of *inter alia*, inductive, deductive, deontic logic which involves moral and ethical principles.⁶⁰ The elements identified above which include ethics and morality form the basis of the proposed deontic theory of interpretation. It is therefore

⁵⁷ Black *The Behaviour of Law* at 3-4.

⁵⁸ See Devenish Interpretation of Statutes at 265-266, for that which comprises reasoning. In quoting Greenwood, he describes 'reasoning as a process which is one of a passing from certain propositions already known or assumed to be true... and that all forms of reasoning are reducible to one or the other of the two fundamental processes of reasoning, namely deduction and induction.'

⁵⁹ Ibid at 266. Deductive reasoning – A syllogism is an example of deductive reasoning. In deductive reasoning, the conclusion must follow from the premises, as a matter of logical necessity. If one accepts the premises, then one must accept the conclusion, as a logical follow-up or consequence as a result of accepting the premises. So for example, to use the syllogism that: All men are mortal – major premise. Socrates is a man – minor premise. Therefore it can be inferred deductively that :Socrates is mortal - conclusion
In applying the syllogism to a legal problem, means that the legal rule is the major premise and the determination of the facts is a minor premise. A legal consequence can therefore be inferred deductively from the major and minor premise.
Inductive Reasoning – In a broader sense, it encompasses all kinds of reasoning in which the premises support but do not compel the result or conclusion. An apt illustration or example of such inductive reasoning is proffered by Morris about the eighteenth-century physician Edward Jenner who discovered the cure for smallpox. Jenner found that while nearly all milkmaids contracted cowpox, they very seldom were affected by smallpox, as they were apparently immune to the smallpox germ. As a result of this finding and by applying inductive reasoning, he proceeded to develop and find a vaccine for smallpox.
Likewise a lawyer will have to examine a number of cases, before he can arrive at a finding, based on the major premise which underlies all the cases examined. This form of reasoning and analysis is referred to as inductive reasoning.

⁶⁰ Ibid at 276. See also Gottlieb *The Logic of Choice* at 32.

maintained that the most appropriate theory of interpretation for the current constitutional order, is one that:

- involves deductive and inductive legal reasoning;
- encapsulates ethics and morality; and
- is applied in a pro-active manner.

It is therefore submitted that a theory of interpretation that incorporates all of the above elements, would be most suited to achieve social and economic justice in South Africa.

An exemplary precedent of the pro-active approach is found in the recent Constitutional Court decision of the *MEC for Education v Governing Body of the Rivonia Primary School*.⁶¹ While the case essentially revolved around the admission of a Grade 1 learner, the issue that the court had to decide on, was who had the ultimate authority to decide on matters of capacity of public schools- is it the School Governing Body, the officials from the Provincial Department of Education or should the dispute in actual fact be resolved by a combination of the two, working in co-operation with each other?

The Constitutional Court held that although in terms of the Schools Act,⁶² the School Governing Body may determine the capacity of the school as an important part of the admission policy, the Department always has ultimate control over the implementation. The position maintained by the court was clear that *in casu*, the parties were required to uphold the principles of co-operative government, to attempt to resolve the dispute so as to avoid litigation, in terms of section 40(2)⁶³ and section 41(1)(h)(vi)⁶⁴ of the Constitution. The court therefore emphasized that ‘co-operation’ is pivotal to resolving disputes between the school Governing Body and the Department – and in matters of a

⁶¹ 2013 (12) BCLR 1365 (CC).

⁶² 84 of 1996.

⁶³ Section 40(2) of the Constitution provides: ‘All spheres of government must observe and adhere to the principles of this chapter.’

⁶⁴ Section 41(1) (h) (vi) of the Constitution provides: ‘All spheres of government ...must co-operate in mutual trust and good faith by, avoiding legal proceedings...’ (Emphasis Added)

similar nature that the parties are urged to ‘co-operate’ in an attempt to resolve the matter, to avoid litigation.

While the minority judgment is based on a minimalistic approach,⁶⁵ the majority on the other hand, in giving expression to section 39(2), maintained a more innovative and undoubtedly a more pro-active position on the matter.⁶⁶

It is therefore submitted that a close examination of the field of statutory interpretation has revealed that the most workable theory of interpretation in the democratic era, is a theory which has its genesis in section 39, is based on deontic reasoning, with particular emphasis on ethical and moral considerations, and which must be applied pro-actively. The proposed deontic theory of interpretation and the *modus operandi* that underpins its application, is a theme that pervades the thesis. From an examination of seminal case-law, exactly how the proposed deontic theory of interpretation would apply with regard to the rules of interpretation, the canons, the maxims and the presumptions of interpretation, will be explored.

1.5 Chapter Breakdown

The thesis is structured so that each identified important aspect of statutory interpretation, is dealt with in seriatim in the respective chapters.

Chapter 1 – is the basic introduction. It provides an overview of the field of statutory interpretation in South Africa and the motivation for undertaking the research.

Chapter 2 – interrogates the commonly accepted theories of statutory interpretation. Each of the theories is critically examined to determine their significance and to assess

⁶⁵ See Woolman *The Selfless Constitution – Experimentalism and Flourishing as Foundations of South Africa’s Basic Law* at 580-581, for a discussion on Minimalism vs Judicious Avoidance. A pro-active approach must be contrasted to a minimalistic approach. While pro-active reasoning, would enable a court to make a decision for the future, a minimalist court because it seeks to decide on cases on narrow grounds, would settle a case, but would leave many things undecided.

⁶⁶ In giving expression to section 39 (2), of the Constitution, the court had applied a ‘value-based’ approach. The *Rivonia Primary School* case, as well as other relevant cases will be examined in more detail in subsequent chapters to shed light on the meaning of pro-activism.

how much emphasis courts have placed on them in the process of statutory interpretation.

Chapter 3 – focuses on the Constitution. As suggested by the title, the Constitution is the basis of the thesis. For this reason, the various aspects of the Constitution, which include (but are not restricted to) an understanding of the concept of constitutionalism, a comparison of constitutional law and ordinary statutory law, as well as the relevant statutory provisions – are fully examined. This is to determine firstly, the extent of the influence of the Constitution and secondly, to assess how it has transformed the process of interpretation in South Africa.

Chapter 4 – has at its core the common-law presumptions of interpretation. As it is submitted that a detailed examination of all the common-law presumptions is not necessary for purposes of the research, only a selected number of the common-law presumptions are discussed. In keeping with the approach adopted with regard to the examination of other aspects of interpretation, the chapter essentially seeks to establish the significance of the common-law generally, as outlined in section 39, and specifically in relation to the operation of the presumptions.

Chapter 5 – examines the more popular canons and maxims of interpretations. From an examination of judicial precedents, the relevance and significance of the canons and maxims in the current constitutional era are highlighted.

Chapter 6 – emphasizes the importance of international law and foreign law in the process of interpretation. Because there is a constitutional imperative in terms of section 39 (2) – that international law and foreign law have to be considered in the process of interpretation – this has changed the way legislation is interpreted in South Africa.

Chapter 7 – from a detailed examination of the various aspects of statutory interpretation, as outlined above, the thesis supports the hypothesis that the Constitution has transformed the process of interpretation and has resulted in a jurisprudence that

requires a ‘new’ theory of interpretation. The proposed theory is referred to as a deontic theory of interpretation.

1.6 Definition of Terms and Concepts

The terms and concepts that form part of the glossary are intended to provide clarity on their meaning and to emphasize their significance to the research.

1.6.1 Theory

A theory is defined as a set of reasoned ideas to explain facts or events.⁶⁷ The theories of interpretation are both explanatory and justificatory at the same time.⁶⁸ While the theories of interpretation are also referred to as theoretical or interpretive approaches, or theoretical schools of thought, the most commonly accepted term used by authors, is the word ‘theory’.⁶⁹

Generally, South African courts have favoured the more traditional theories of interpretation, with the emphasis and preference prior to the new democratic constitutional dispensation being on the literal theory or the text-based approach, and with a shift in preference subsequent to the Constitution to the purposive theory which requires a value-orientated approach.⁷⁰ It has been argued, however, that subsequent to the Constitution, the teleological theory or value-based method of interpretation with its emphasis on values, has been regarded as the most legitimate theory of choice amongst judicial officers.⁷¹ Nevertheless, apart from the traditional theories, a number of modern

⁶⁷ The definition of the word ‘theory’ is indicated as per the *Oxford Advanced Learner’s Dictionary* (4th edition) at 1330.

⁶⁸ See **Chapter 2**, for a closer examination of the various theories of interpretation.

⁶⁹ Authors generally prefer the use of the word ‘theory.’ See Botha *Statutory Interpretation* at 91, and Devenish *Interpretation of Statutes* at 25.

⁷⁰ A more detailed examination of the traditional theories of interpretation and their *modus operandi* is found in **Chapter 2**.

⁷¹ The following cases illustrate an application of the teleological theory of interpretation: *Qozeleni v Minister of Law and Order* 1994 (3) SA 625; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism* 2004 (4) BCLR 735 CC; *Baloro v University of*

theoretical schools or post-modern theories have emerged that examine the law together with other disciplines – for example, economics, political science, linguistics, and philosophy. These theoretical schools of thought must be understood in the spirit of post-modernism⁷² and a rejection of a meta-narrative or an all encompassing narrative.

Post-modernism is not a school of thought, but rather an intellectual style, a condition or a spirit of the times. Post-modernism accepts that everything is relative, and in the process it welcomes problems, paradoxes and contradictions. In terms of its application therefore, it defies a complete definition, because post-modernism rejects preconceived ideas, definitions and categories.⁷³

This therefore raises the question on what forms the theoretical basis of a deontic theory – which is postulated as a ‘new’ perspective for understanding statutory interpretation. The ensuing discussion will attempt to address these concerns.

1.6.2 Deontic Theory

Deontology is broadly defined as the ‘science of duty or moral obligation.’⁷⁴ The word deontology has its roots in the Greek word *deon*, which means science. Thus deontology is the ‘science of duty.’ Key questions which deontological ethical systems ask include:

- What is my moral duty?
- What are my moral obligations?
- How do I weigh one moral duty against another?⁷⁵

Bophuthatswana 1995 8 BCLR 1018(CC) and *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC).

⁷² Botha *Statutory Interpretation* (5th edition) at 87.

⁷³ Ibid. Postmodernism is described as a late 20th century style and content in the arts, architecture, and criticism which represents a departure from modernism and is characterized by the self-conscious use of earlier styles and conventions, a mixing of different artistic styles and media, and a general distrust of theories. See definition – <http://www.oxforddictionaries.com/definition/english/postmodernism> (Accessed on October 2014)

⁷⁴ See definition of ‘deontology’ as per *Shorters Oxford English Dictionary* (3rd edition) at 482-483.

The modern development of deontic logic was first initiated in the early 1950's by GH van Wright who coined the term based on the Greek *Seon*, meaning – ‘as it should be’ or ‘duly’.⁷⁶ Deontic logic is the logic of normative concepts which includes morality and ethics. Its major application outside of ethics has been to the philosophy of law.⁷⁷

Due to the fact that law is dynamic in nature and is infused with the value judgments,⁷⁸ it is particularly relevant in the current constitutional order. Horovitz, therefore in looking at the inter-relationship between law, theory, deontic and inductive logic provides that:

‘Because law is socially directive and co-ordinate, it is dependent upon theoretical psycho-sociology and calls for a deontic and inductive logic.’⁷⁹

However, Devenish asserts that legal reasoning in its entirety is not reducible to merely a species of inductive and deductive reasoning, but is in fact a synthesis of *inter alia* deductive, inductive, and deontic logic – which involves moral and ethical principles.⁸⁰ He submits further, in agreement with Gottlieb, that the operation of this kind of reasoning in relation to law and the interpretation of statutes, is essentially ‘to tell sound arguments from unsound ones...’.⁸¹

The task and role of a judge as an interpreter and adjudicator finds expression in the words of the judicial oath – that they have to:

‘administer justice to all persons alike without fear, favour or prejudice’⁸²

⁷⁵ <http://atheism.about.com/od/ethicssystem/a/Deontological.htm> (Accessed on August 2013)

⁷⁶ Lee, Nguyen and Pagnoni ‘Securing Uniqueness of Rights e-Documents: A Deontic Process Perspective’ (2008) 3 *Journal of Theoretical and Applied Electronics Commerce Research* at 19.

⁷⁷ Ibid at 4.

⁷⁸ Black *The Behaviour of Law* at 3-4.

⁷⁹ Horovitz *Law and Logic* at 1.

⁸⁰ Devenish *Interpretation of Statutes* at 278.

⁸¹ Gottlieb *The Logic of Choice* at 31.

⁸² Devenish *Interpretation of Statutes* at 10.

Lord Denning observes that as far as the interpretive function of the judiciary is concerned, in respect of the judicial oath, judges should assume the position that they are engaged in a moral activity.⁸³ It is submitted that Denning's view about the role of the judiciary and the application of the law, forms an important component of a deontic theory, which is proposed as the 'new' theory of interpretation in the current constitutional order. A value-based theory of interpretation – the teleological theory of interpretation – has been most favourably received in the era of constitutional democracy, and highlights the 'values' that are required in an open and democratic society,⁸⁴ while the proposed deontic theory takes heed of the conceptual inadequacy of the teleological theory and reinforces the directive that in the process of interpretation, judges are to engage in an ethical and moral evaluation.

1.6.3 Method/Methodology

A method is defined as a way of doing.⁸⁵ While the theories and theoretical approaches, as discussed above, may be regarded as being synonymous, the method or the methodology – as a result of applying a particular theory – may also be described as the way one would go about applying a theory. This also can be referred to as the *modus operandi* – which basically describes the way in which a thing, in this case a theory, operates.⁸⁶

In effect the method is influenced by the theory. To explain further – a literal theory would result in a qualified contextual or text-based methodology.⁸⁷ The *modus operandi*

⁸³ Ibid.

⁸⁴ In terms of section 39 (2) of the Constitution, it is mandated that the process of interpretation is consistent with a 'value-coherent' approach to interpretation.

⁸⁵ See definition as per the *Oxford Advanced Learner's Dictionary* (4th edition) at 780.

⁸⁶ Ibid at 799.

⁸⁷ Botha *Statutory Interpretation* (5th edition) at 92-93.

or method to be followed in applying the literal theory, proceeds along the following lines:⁸⁸

- (i) The primary rule of interpretation, is that if the meaning of the text is clear, the plain meaning should be applied;
- (ii) If the ‘plain meaning’ of the words is ambiguous, vague or misleading, the wider context or surrounding circumstances are considered, giving rise to the mischief rule.
- (iii) If a strict literal interpretation would result in absurd results, then the court may deviate from the literal meaning to avoid such an absurdity. This is known as the golden rule of interpretation.
- (iv) The court will then turn to the so-called ‘secondary aids’⁸⁹ to interpretation, in order to find the intention of the legislature; and
- (v) Only when the ‘secondary aids’ to interpretation prove insufficient to ascertain intention, will the courts have recourse to the so-called ‘tertiary aids’⁹⁰ to construction.

A purposive or a teleological theory, on the other hand, requires a text-in-context or an unqualified contextual methodology.⁹¹ As the text-in-context approach provides that the purpose or object of the legislation is the prevailing factor in interpretation, the *modus operandi* therefore requires a search for the purpose of legislation – which recognizes the contextual framework of the legislation right from the outset even when the text is clear and not only in cases where a literal or text-based approach has failed.⁹² Likewise, in applying the proposed deontic theory, as postulated above, it would be necessary to follow a method or *modus operandi* that is unique to the theory as presented. The basis

⁸⁸ Ibid at 91-92.

⁸⁹ The secondary aids to interpretation include for example, the long title, the short title, headings, marginal notes, the preamble, sections, sub-sections, paragraphs and sub-paragraphs.

⁹⁰ Tertiary aids refers to the common law presumptions of interpretation.

⁹¹ Botha *Statutory Interpretation* (5th edition) at 97.

⁹² Ibid at 97-98.

of the method of application of a deontic theory is an ‘eclectic method’ or eclecticism. Exactly what an ‘eclectic method’ or ‘eclecticism’ entails is discussed more fully below.

1.6.4 Eclecticism

In earlier decades of behavioural sciences, there was a tendency in many disciplines to identify with only one theoretical position. However, as various theories appeared to come into competition with one another, many behavioural scientists became more and more uncomfortable about the idea of simply ‘allying themselves with a single perspective’⁹³ as an exhaustive theory. The tendency in recent years, therefore, has seen substantial support for the idea of refraining to endorse only one theory as correct, or even as the best theory of human behaviour. The procedure that developed in response thereto was to ‘select in all what appears to be true and good and consequently everlasting.’ Such a school of thought has been described as eclecticism.⁹⁴ It is felt that the optimal ‘strategy’ for understanding human behaviour is to borrow ideas or constructs from *all* reputable theories.⁹⁵ To illustrate further, by way of example:

In attempting to explain love, or interpersonal attraction, a psychologist might say that psychodynamic theory explains some phenomena of attraction, because people do have a strong sexual instinct that they have to gratify. He/she might also believe that people are sometimes conditioned by reinforcements to be attracted to some people and not to others. Further, the psychologist might believe that some, but not all conditioning, occurs automatically, and that sometimes cognitive processes intervene to determine just how stimuli and information produce attraction responses. Finally, the same psychologist might believe that people are also motivated in their loving and attraction by a need or desire for self-actualisation.⁹⁶

⁹³ Slife and Williams *What’s behind the Research? Discovering Hidden Assumptions in the Behavioral Sciences* at 45.

⁹⁴ Kelley ‘Eclecticism and the History of Ideas’ (2001) 62 *Journal of the History of Ideas* at 577.

⁹⁵ Slife and Williams *What’s behind the Research? Discovering Hidden Assumptions in the Behavioral Sciences* at 45.

⁹⁶ *Ibid* at 46.

What we find is that all of the above-mentioned theories may seem to be in operation at the same time (or in particular persons in particular situations). This approach is referred to as eclectic.⁹⁷ Due to the fact that eclecticism allows one to find value or merit in all theories, as alluded to, and therefore to embrace all the positions (or parts of them), it is not surprising that eclecticism has been described as a sort of ‘higher plagiarism.’⁹⁸ What is suggested for its application therefore is an enlightened eclecticism, which requires that all schools borrow from them what they possess of the true and neglect what in them is false.⁹⁹ An eclectic theory however is not new as the counter-narrative indicates.¹⁰⁰ It has been here all along, however it is only over the past few decades that there has been an increase in its popularity and use.¹⁰¹

With regard to the proposed deontic theory, it is suggested that an eclectic method or approach would best suit the *modus operandi*. In terms of its application, therefore, one would initially start the process with the literal approach, and an examination of the text

⁹⁷ The word ‘eclectic’ means that which is composed of elements drawn from various sources. <http://www.oxforddictionaries.com/definition/english/eclectic> ‘Eclecticism’, also referred to above, is a conceptual approach that does not hold rigidly to a single paradigm or set of assumptions, but instead draws upon multiple theories, styles or ideas to gain complementary insights into a subject, or applies different theories in particular cases. Eclecticism was first recorded to have been practiced by a group of ancient Greek and Roman philosophers who attached themselves to no real system, but selected from existing philosophical beliefs whose doctrines seemed most reasonable to them. Out of this collected material, they constructed their new system of philosophy. <http://wikipedia.org/wiki/Eclecticism> (Accessed on August 2013)

⁹⁸ Kelley ‘Eclecticism and the History of Ideas’ (2001) 62 *Journal of the History of Ideas* at 579-580. The *locus classicus* of eclecticism was provided by the second century doxographer, Diogenes Laertius, whose unreflective and gossip-ridden *Lives and Opinions of Imminent Philosophers* defined an intellectual cannon which came to be known as the history of philosophy. Eclecticism became especially entangled in religious thought. The strength of eclecticism was that it tried to accommodate the entire agenda; its weakness was its less-than-critical faith that these goals were in keeping with reason, the new science, and Christian religion.

⁹⁹ Ibid.

¹⁰⁰ Lake ‘Theory is dead, long live theory: The End of the Great Debates and the rise of Eclecticism in International Relations’ (2014) *European Journal of Human Relations* at 572. Lake states that an eclectic theory is the source of some of the most progressive research in our discipline. It represents the future of international relations- not a new future, since it already has a long history, but the future nonetheless.

¹⁰¹ Slife and Williams *What’s behind the Research? Discovering Hidden Assumptions in the Behavioral Sciences* at 46. One of the reasons that the authors suggest for the popularity in the eclectic approach, is because eclecticism allows one to believe in all the positions (or embrace parts of them) and thus not run the risk of missing some truth or value they may have.

to ascertain the *ipsissima verba*, or the exact meaning of the words that are used. The process would thereafter require an examination of the context or the background, which is reflective of the contextual theory. Nevertheless, the process should always seek to find the purpose of the legislation. This is the prevailing factor and is central to the purposive theory. Next it is necessary to determine whether interpretation is compatible with the values and principles enshrined in the Constitution, which is compliant with teleological theory. The process however does not end here. The proposed deontic theory for interpretation incorporates reasoning that is ethical and moral in nature, and in the words of the preamble to the Constitution:

‘ heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights... to improve the quality of life of all citizens...’¹⁰²

What is pivotal to the operation of the proposed theory, is that it has to be applied pro-actively, mindful of the above considerations, so as to achieve social transformation. A pro-active approach must be compared to a minimalistic approach adopted by courts. While pro-active reasoning, would result in an outcome or decision which would be more favourable to what is to be decided for the future, a minimalist court, because it seeks to decide cases on narrow grounds and aims to settle the case before it, leaves many issues undecided.¹⁰³ Therefore a pro-active approach is advocated for application in a transformative democratic state.

The amalgamation of the theoretical positions as indicated above, is clearly an illustration of the eclectic approach that is used and applied in a number of other disciplines. The reason for the choice of an eclectic approach as an interpretive strategy of the proposed deontic theory is based largely on the idea that no single formula can

¹⁰² Reference to the Preamble of the Constitution.

¹⁰³ Woolman *The Selfless Constitution – Experimentalism and Flourishing as Foundations of South Africa’s Basic Law* at 28-30.

capture everything.¹⁰⁴ The eclectic method is therefore ‘borrowed’ from contemporary behavioural science and adapted as a model for statutory interpretation. It is presented as a strategy to provide an explanation for the operation of the proposed deontic theory.

1.7 Conclusion

Du Plessis states resoundingly, that:

‘The Constitution determines and shapes statutory interpretation in an all-pervading manner.’¹⁰⁵

Chapter 1 conceptualises exactly what this means in a democratic constitutional era in South Africa. The background sets the scene, and basically describes the essence of statutory interpretation, and how the process differed prior to and subsequent to the Constitution. The chapter also highlights the motivation for the study and articulates how this will be achieved through the aims and objectives of the research. In acknowledging that the Constitution has indeed influenced the process of interpretation in South Africa, the thesis is structured so as to assess how each component of the statutory process is influenced by the application of section 39. The chapter breakdown is clearly indicative of the key elements that form the basis of this thesis. An examination of judicial precedents will reveal the unfolding of the subject, to prove the hypothesis that the Constitution has transformed the process of interpretation in South Africa, and therefore requires a new theory and methodology for the interpretation of legislation in the current constitutional era.

Since the advent of constitutionalism, ‘there is always room for a transformation of conventional ideas on justice,’¹⁰⁶ to those appropriate for a society reflecting social and

¹⁰⁴ Tebbe ‘Eclecticism’ (2008-2009) 25 *Constitutional Commentary* at 317. In his article on Eclecticism, Tebbe argues that a sound interpretive strategy begins by looking at ground-level conflicts and extrapolating- as far as possible, to more general guidelines.

¹⁰⁵ Du Plessis *Re-Interpretation of Statutes* Prolegomenon at viii.

¹⁰⁶ *Ibid* at xvii.

economic justice. This is the mindset that informs the rationale for the study and which underpins the research undertaken.

CHAPTER 2

AN EXAMINATION OF THE TRADITIONAL THEORIES OF STATUTORY INTERPRETATION APPLIED IN SOUTH AFRICAN COURTS

2.1 Introduction

In the field of statutory interpretation, there are a number of ‘theories’, as they are referred to, that inform the subject. In this chapter, it is intended:

- a) to examine these ‘theories’ more critically to determine their significance; and
- b) to assess their relevance to statutory interpretation in the democratic constitutional era in South Africa.

While an attempt is made to explore these theories fully, it is submitted that this list is by no means exhaustive. The more commonly or widely used theories of statutory interpretation applied in South African courts will form the basis of this chapter.

The word ‘theory’ appears to be used somewhat loosely in the legal parlance.¹ In some instances it is used to describe a ‘rule’ or a ‘precept’. For example, the ‘expedition theory’ in the law of contract is in fact a rule which stipulates ‘that a contract concluded by mail comes into existence the moment that the written acceptance of an offer is posted.’² In a more conventional sense, a ‘theory’ may on the one hand really be an ‘explanation’ or an ‘explication’, and on the other hand,³ it is further submitted that a theory can be an idea accounting for a situation, and

¹ Woolman, Roux Klaaren, Stein, Chaskalson and Bishop *Constitutional Law of South Africa* (2nd edition) at 32-28.

² Hosten, Edwards, Bosman and Church *Introduction to South African Law and Legal Theory* (2nd edition) at 704 - 705.

³ For example, a consensus theory in the law of contract, explains that a contract is based on a *concursum animorum* of the parties. On the other hand, a theory can also be an idea accounting for a situation and as a result justify a certain course of action. See discussion in Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-29.

justifying a certain course of action. The theory would then advance a principle or principles on which the practise of an activity is based.⁴

The theories of statutory interpretation are both explanatory and justificatory at the same time, and may also be referred to as ‘interpretive approaches’.⁵ Michelman speaks of such ‘interpretive approaches’ or ‘methods’ (to use yet additional terminology), which he states a judge either chooses (or perhaps just falls into).⁶ In choosing one of these available ‘interpretive approaches’, the judicial officer would have to resign himself to the consequences that follow as a result of the choice.⁷ While the terms ‘theory’ and ‘approach’ appear to be used interchangeably, the term ‘theory’, it is observed, is more popular and more widely used amongst legal scholars.⁸ Some of the more ‘acknowledged’ theories of statutory interpretation that have been identified and applied by courts, whilst not necessarily always consistently, include the:⁹

⁴ Ibid at 32-29.

⁵ Michelman ‘A Constitutional Conversation with Professor Frank Michelman’ (1995) 11 *South African Journal on Human Rights* at 482. In his article, Michelman concedes that the terminology used is generally not fixed but recognises following as a standard list of interpretive approaches or methods that are available, namely, Literalism, Intentionalism, Purposivism, Instrumentalism and Moralism. Literalism is applying the text to the case according to the ordinary meaning of the words. Intentionalism is applying the clause judges the writer of it would have done. Purposivism is applying the clause in the way that one judges will best accomplish the lawmakers primary or higher or transcendent purpose. Instrumentalism is determining the sense of a legal text’s or doctrine’s application to a particular cases by first comparing the predicted social consequences of applying it in one or the other sense, and then preferring the sense that has preferred consequences, as measured by a kind of ad hoc or pragmatic common sense. Moralism is determining concrete applications by reference to a high-level, substantive moral theory supposed to be instantiated by the constitution as a whole.

⁶ Ibid. The ‘interpretative approaches’ that Michelman refers to bears striking similarity to some of the more commonly accepted theories in South Africa. For example, Literalism compares quite favourably with the literal theory and purposivism and the purposive theory also display a commonality.

⁷ Ibid.

⁸ See for example, Botha *Statutory Interpretation* (5th edition) at 91 and Devenish *Interpretation of Statutes* at 25, where the authors show preference for the term theory.

⁹ See discussion in Devenish *Interpretation of Statutes* at 25-56 and Du Plessis *Re-Interpretation of Statutes* at 89-119 for the more commonly accepted theories of statutory interpretation.

- 1) Literal Theory
- 2) Contextual Theory
- 3) Purposive Theory
- 4) Teleological Theory
- 5) Intention Theory
- 6) Objective Theory; and
- 7) Judicial Theory.

Cowen postulates that each theory of statutory interpretation is characterised by a specific viewpoint on one or more of the following seminal aspects of interpretation:

- a) the nature and functions of language;
- b) the relevance and meaning of the intention of the legislature;
- c) the role of the judiciary, which refers to the extent of judicial discretion; and
- d) the time frame within which statutes operate.¹⁰

What is also significant is that each of the theories tend to operate in terms of their own *modus operandi*. This is unique to a particular theory and is the distinctive feature of a theory that distinguishes it from another. With regard to the manner in which they operate, it is noted that ‘some are conflicting, others are complementary but all tend to overlap to some extent.’¹¹ Nevertheless, in spite of the fact that ‘courts tend to use these theories in a capricious way,’¹² favouring certain theories above others, the obvious ‘degree of merit’¹³ in each of them cannot be overlooked. This will be interrogated more fully in the discussion below, to determine their relevance and significance in the constitutional democracy found in South Africa.

¹⁰ Cowen ‘Prolegomenon to the Restatement of the Principles of Statutory Interpretation’ 1976 *Tydskrif vir die Suid Afrikaanse Reg* at 150.

¹¹ See discussion in Devenish *Interpretation of Statutes* at 25, where it is further submitted that without an articulated *modus operandi*, anchored in a jurisprudentially sound theory, the courts may arrive at inconsistent conclusions. A sound jurisprudential theory will enhance predictability.

¹² Ibid.

¹³ Ibid.

2.2 The Literal Theory

According to this theory, in its ‘crude, unqualified form’, the true meaning of the provisions of the statute can be ascertained from the *ipsissima verba*, or the actual words used by the legislature.¹⁴ Essentially, therefore, in terms of the application of the theory, words should generally be accorded the meaning which the normal speaker of the English language would understand and use.¹⁵ While Devenish refers to this as the ‘literal or ordinary meaning rule’,¹⁶ Botha explains that words are to be given a literal or grammatical meaning, as part of the ‘plain meaning’ approach.¹⁷

The case of *Ebrahim v Minister of Interior*¹⁸ has been quoted as an ‘exemplary’ application of the literal theory.¹⁹ In terms of section 15 of the South African Citizenship Act²⁰, it was provided that a South African citizen would lose his nationality if he acquired a foreign nationality ‘whilst outside the Union’. The majority held that Ebrahim, a South African seaman, who had applied for British citizenship in order to secure employment, did not forfeit his South African citizenship. He had falsely claimed to be resident in the United Kingdom, when he was actually living in Durban. However, on the date when British nationality was

¹⁴ Du Plessis *Re-Interpretation of Statutes* at 93. Du Plessis makes the point that in its crude and unqualified form, the meaning of a statutory provision can (and must) be retrieved from the *ipsissima verba* in which it is couched, regardless of manifestly unjust or even absurd consequences.

¹⁵ Cross *Statutory Interpretation* at 1.

¹⁶ See comments by Devenish as indicated in the *Interpretation of Statutes* at 26, where it is submitted that the clear that the ordinary or the literal meaning of the word is in fact common to all theories of interpretation. The reason offered in support of this, is that the *modus operandi* must always start with the actual words used.

¹⁷ Botha *Statutory Interpretation* (5th edition) at 193. Botha acknowledges that the ‘plain meaning rule’ is an orthodox application of literalism. See also a **Chapter 3 3.6 The Canon-Guided Reading Strategies** for a discussion on Grammatical Interpretation. The obvious overlaps with the Literal Theory and the Grammatical Interpretation, a component of a Von Savigny Quarter are noted. It is stressed however that while there are similarities, a reading strategy does not qualify as a theory.

¹⁸ 1977 (1) SA 665 A.

¹⁹ The application of the literal theory in *Ebrahim’s* case, has been described as an ‘exemplary contemporary application’ of the literal theory. See Devenish *Interpretation of Statutes* at 27.

²⁰ Act 49 of 1949.

conferred on him, he was coincidentally on a ship within South African territorial waters. In giving effect to the literal theory, Joubert JA maintained that if the words of a statute are ‘clear and unambiguous it is the function of a Court of law to give effect thereto.’²¹

Nonetheless, literalism is almost always closely associated with the ordinary meaning rule of statutory interpretation.²² The primary rule that words are to be given their ordinary, grammatical or natural meaning, is the first step in the interpretation process. According to the literal theory, the primary rule may only be deviated from:

- (i) Where it would lead to obscurity or a result which is unjust, unreasonable or inconsistent with the other provisions or repugnant to the general object, tenor or policy of the statute.

This is – in essence – a description of the golden rule.²³

Du Plessis posits that the application of the golden rule is justified in instances where the interpretative result is so absurd and repugnant to ‘common sense’, that the legislature could hardly have intended the outcome.²⁴ Driedger explains further that the absurdity required must be an obvious absurdity. It must be extracted from the

²¹ See discussion of the case in Devenish *Interpretation of Statutes* at 27 - 28. See judge’s comments on the findings of *Ebrahim* case at 680 A. Further support for the literal approach is clearly evidenced in *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 A 520 at 534 where the stance of the court was clear that - ‘*Prima facie* the intention of the legislature is to be deduced from the words which it has used ...’

See also *Union Government v Mack* 1971 AD 713 at 750 where the court held that: ‘We should first of all consider ... what the legislature has actually said in words.’

²² While the comment is made that literalism is closely associated with the ordinary-meaning rule, Du Plessis clarifies this statement that ordinary language is not characteristically always clear and unambiguous. See Du Plessis *Re-Interpretation of Statutes* at 93.

²³ For an illustration of the application of the golden rule, see decisions of *Venter v Rex* 1907 TS 910 at 913 and *Grey v Pearson* [1843 - 60] All ER Rep 21 (HL) 36.

²⁴ Du Plessis *Re-Interpretation of Statutes* at 93 - 94. A classical exposition of the golden rule of interpretation can be found in Lord Wensleydale’s dictum in *Grey v Pearson* [1843-60] All ER Rep 21 (HL) 36 where it was held that ‘The 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 words may be modified so as to avoid the absurdity and inconsistency, but no farther.’

whole instrument and must lie in the words of the statute, rather than in the consequences of the application of the statute to a particular case.²⁵ A criticism that has been levelled at the application of the golden rule, is ‘what seems an absurdity to one man might not necessarily seem absurd to another.’²⁶ Du Plessis advances the argument with a series of questions, for example who and what would determine what an absurdity is and when is an absurdity sufficiently glaring to allow the golden rule to kick in?²⁷ The determination of the exact meaning of the other criteria contained in the golden rule – which include injustice, unreasonableness and inconsistency with the other provisions or repugnancy to the general object of the statute – is also problematic, since ‘they are manifestly open to arbitrary application.’²⁸ The comment that the golden rule is meant to be ‘literalism’s lifeway, not its critical companion’,²⁹ is an interesting one. It is meant to qualify literalism in order to salvage it, not to criticise it.³⁰

The primary rule may also be departed from:

- (ii) where words are ambiguous. Here it is permissible to have recourse to outside sources for the purpose of discovering the true meaning.

²⁵ Driedger *The Construction of Statutes* at 48. The point that is made is that the absurdity must be objective or absolute rather than relative.

²⁶ See Singh ‘The Question of Interpretation in the Nicolson Judgment- Jacob Zuma v The National Director of Public Prosecutions [2009] 1 All SA 54N’ (2009) 30 *Obiter* at 786 – 787.

²⁷ See discussion by Du Plessis *Re-Interpretation of Statutes* at 105, where Du Plessis raises several pertinent question about the unreliability of language in its literal sense. First, what criteria can be trusted to show up an unreliability of language in its literal sense? Second, following from the first question, who or what determines what an absurdity is and when is an absurdity sufficiently glaring to allow the golden rule to kick in? An absurdity is nonsensical and cannot but be glaring. How much nonsense should an interpreter then be expected to stomach before (s)he concludes that an absurdity is ‘utterly glaring’? Finally when the intention of the legislature is brought into the picture, a petition *principia mars* the golden rule. The intention of the legislature can be gleaned from the (clear and unambiguous) language of the provision. How can it happen that an intention contrary to the intention of the legislature can be gleaned from the very language which this supposed to be the *fans etorigo* of the intention of the legislature?

²⁸ See discussion by Devenish *Interpretation of Statutes* at 29, where it is maintained that the distinction between what is absurd and utterly absurd, is, by its very nature, arbitrary.

²⁹ Du Plessis *Re-Interpretation of Statutes* at 94. It is submitted that the operation of the golden rule is not meant to criticise nor to contradict the application of the literal rule.

³⁰ *Ibid* at 94.

This is the third rule of the literal theory, referred to as the mischief rule and is to be applied in instances of ambiguity.³¹

In terms of the application of the mischief rule, the interpreter has to heed the situation prior to and during the passing of the Act – to interpret an obscure or ambiguous provision. First expounded in the old English case of *Heydon*,³² the rule was articulated as follows:

‘That for the sure and true interpretation of all statutes in general ... four things are to be discerned and considered:

- (i) What was the common-law before the passing of the Act;
- (ii) What was the mischief and defect for which the common law did not provide;
- (iii) What remedy Parliament hath resolved and appointed to cure the disease of the Commonwealth; and
- (iv) The true reason of the remedy.

And then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy.’

In the landmark case of *Hleka v Johannesburg City Council*,³³ Van den Heever JA set out the above rules, and called on history to show what facts existed to bring about the relevant statute – namely the War Measure Act.³⁴ To remedy the situation, a number of War Measures were passed, which were amended on a number of occasions.³⁵ With regard to the question of what amounts to ambiguity, from *Ex*

³¹ See application of the mischief rule in Singh ‘The Question of Interpretation – Jacob Zuma v The National Director of Public Prosecutions [2009] 1 All SA 54 N’ (2009) 30 *Obiter* at 787.

³² *Heydon* (1584) 3 Co Rep 7aat 7b. The *Heydon* case was the first case that employed the mischief rule. In terms of the rule, it allows for an examination of the historical circumstances of the statutes, from which the purpose of the legislation can be inferred.

³³ 1949(1)SA 842at852.

³⁴ 18 of 1947.

³⁵ From the findings of *Hleka’s* case, the War Measure Act 18 of 1947 was enacted to ensure that persons who were removed to any place (in accordance with War Measure Act 31 of 1944), could again be removed from that place, if the magistrate or native commissioner was satisfied ‘that the said place provides no suitable accommodation elsewhere, or that they have no proper employment within a reasonable distance from that place.’

Parte Slater, Walker Securities (SA) Ltd,³⁶ the court described ambiguity as that which ‘would appear to include lack of clarity or uncertainty.’³⁷ It has to be conceded that what may be ‘clear or reasonable to one person may be obscure or absurd to another’.³⁸ Therefore, in practice, the application of the golden and mischief rules have been criticised in that ‘they appear to be capricious’³⁹ and are bound to result in uncertainty. Although generally when applying the three rules of the literal theory, the proponents of literalism tend to apply the literal rule first, followed by the golden and mischief rules thereafter, this is somewhat artificial and unnatural since the process of interpretation is not hierarchical, but integrated and complementary.⁴⁰

2.2.1 The Introduction of the Literal Approach into the South African Legal System

The doctrine of legal positivism influenced the adoption of the literal approach in England. The positivistic ideology expounded by John Austin that the essence of the law is to be found in the ‘command or decree’ established by a ‘sovereign’ – gained prominence, especially in the 19th Century.⁴¹ The literal theory (more specifically the plain meaning approach and golden rule) came to be introduced into the South African legal system in a ‘roundabout way from English law’.⁴²

³⁶ 1974(4) SA 657(W).

³⁷ Ibid. In the case *Ex Parte Slater, Walker Securities (SA) Ltd*, there was a difficulty experienced in interpretation of sufficient magnitude to warrant reference to the history of the section (in dispute) in aid of construction.

³⁸ See the discussion in Singh ‘The Question of Interpretation in the Nicholson Judgment – Jacob Zuma v The National Director of Public Prosecutions [2009], All SA 54 N’ (2009) 30 *Obiter* at 786 – 787, for the criticisms that have been levelled against the golden rule and the mischief.

³⁹ Ibid.

⁴⁰ Pearce *Statutory Interpretation in Australia* at 14. According to Pearce, in the ascertainment of the meaning of legislation, courts have chosen to break up the process of comprehension into components, commonly known as the literal rule, the golden rule and the mischief rule. To say the least, this has been unfortunate because it has often resulted in the use of only one of the elements of comprehension instead of it being recognized that they are all part of a process.

⁴¹ Johnson, Pete and Du Plessis *Jurisprudence - A South African Perspective* at 72 - 75.

⁴² See discussion in Botha *Statutory Interpretation* (5th edition) at 92 - 93.

In *De Villiers v Cape Divisional Council*,⁴³ Chief Justice de Villiers made a controversial decision with far-reaching consequences – which was that legislation adopted after the British had taken over the Cape, should be interpreted in accordance with the English rules of statutory interpretation.⁴⁴ This decision manifestly affected all legal jurisprudence in the realm of judicial law-making for more than a hundred years. In terms of English law, a conquered territory continued to apply its own legal system.⁴⁵ In the case of the Cape, the prevailing system was Roman-Dutch law even after the British seizure of the Cape. As a result of De Villiers' decision, the Roman-Dutch law which was more purposive approach was replaced by the literal approach of English law.⁴⁶

The literal approach, as a result was applied rather mechanically by courts. In construing the meaning of the statute, courts automatically equated the ordinary or literal meaning as being identical to what the legislature intended.⁴⁷ In the earlier reported decisions of *Union Gort v Mack*⁴⁸ and *Farrar's Estate v CIR*,⁴⁹ the court erroneously held that the intention of the legislature was equivalent to the words used in the legislation. More recent cases have mirrored this position, for example *Ensor v Rensco Motors (Pty) Ltd*⁵⁰ and *Engels v Allied Chemical Manufacturers (Pty) Ltd*,⁵¹ where the approach of the court was that if the legislature had a specific intention, it

⁴³ 1875 Buch at 50.

⁴⁴ See discussion in Botha *Statutory Interpretation* (5th edition) at 92.

⁴⁵ *Campbell & Hall* (1774) 1 Cowp.204, 98E.R. 1045 (KB). The island of Grenada was taken by the British arms, in open war from the French King. In accordance with the articles of capitulation, the island of Grenada surrendered, was by reference to the capitulation upon which the island of Martinique had before surrendered. It was further held:- A country conquered by the British arms becomes a dominion of the King in the right of his crown; and, therefore, necessarily subject to the Legislature, the Parliament of Great Britain.

⁴⁶ Botha *Statutory Interpretation* (5th edition) at 92.

⁴⁷ *Ibid.* The reason that the courts automatically equated the ordinary or the literal meaning as being identical to what the legislature intended, is due to the 'pre-dominance of the word,' and the intention of the legislature was demoted to the status of the literal meaning of the text.

⁴⁸ 1917 AD 731.

⁴⁹ 1926 TPD 501.

⁵⁰ 1981(1)SA 815(A).

⁵¹ 1993(4)SA 45(NM)160.

would be reflected in the clear and unambiguous words of the text.⁵² The result of the application of the literal theory in the afore-mentioned manner, meant that where the language was clear and unambiguous one had to give effect to it irrespective of how harsh or unjust the outcome of the literal interpretation. This had prejudicial consequences in South Africa during the pre-democratic constitutional era. In accordance with the *iudicis est ius dicere sed non dare* rule, which, when translated, means that it is the province of judges to expound the law and not to make it,⁵³ the courts declared that they had no choice or discretion but to give effect to harsh, unjust and abhorrent apartheid legislation.⁵⁴ This position is clearly reflected in the dictum of *R v Sachs*,⁵⁵ where Centlivres CJ made the point that:

‘Courts of law do scrutinise such statutes with the greatest care but where the statute under consideration in clear terms confers on the executive autocratic powers over individuals, courts of law have no option but to give effect to the will of the legislature as expressed in the statute.’

This has been described as being ‘par excellence the position in South Africa’ during the apartheid era – where courts adopted the view that they had no choice but were ‘obliged to give effect to notorious racial and draconian security legislation.’⁵⁶

It was only the advent of the new democratic era that ushered in a marked paradigmatic shift away from the literal approach – towards a more purpose-orientated approach.⁵⁷ In spite of this transition, some courts have nevertheless still

⁵² See discussion in Botha *Statutory Interpretation* (5th edition) at 93.

⁵³ Du Plessis *The Interpretation of Statutes* at 39. In keeping with the maxim of the *iudicis est ius dicere sed non dare*, it is usually said that ... ‘judges proceed to give meticulous effect to what they regard to be the will, and wishes of the legislature.’

⁵⁴ See Devenish *Interpretation of Statutes* at 28. The point is made that where the language is clear, irrespective how harsh the interpretation may be, the courts had no choice or discretion but to apply it.

⁵⁵ 1953(1) SA 392(A). See Also *Volschenk v Volschenk* 1946 TPD 487 at 487 – where it was held that ‘The cardinal rule of construction is that words must be given their ordinary, literal, grammatical meaning.’ Further, in *Ebrahim v Minister of Interior* 1977 (1) SA 665 (AD), Joubert AJA commented at 678 A, that ‘if the words (of a statute) are clear and unambiguous, then effect should be given to their ordinary ... literal and grammatical meaning.’

⁵⁶ Devenish *Interpretation of Statutes* at 162.

⁵⁷ The purpose-orientated methodology is discussed in more detail in this chapter. Refer to **2.4 The Purposive Theory**, for an analysis of the purposivism.

continued to apply the literal approach. In *Public Carriers Association v Toll Road Concessionaries (Pty) Ltd*,⁵⁸ Smalberger JA in giving effect to the intention of the legislature, maintained that:

'it must be accepted that the literal interpretation principle is firmly entrenched in our law and I do not seek to challenge it'.

Further support for the literal school of thought can be seen in a more recent judgment of *Swanepoel v Johannesburg City Council*,⁵⁹ where it was provided that:

'The rules of statutory (exegesis) are intended as aids in resolving any doubts as to the Legislature's true intention'.

Such an intention-based approach to statutory interpretation is favoured by Ekins who advocates that the notion of the legislature's intention is to be propounded as a proper standard of statutory interpretation. In ascertaining the 'intention of the legislature', Ekins argues that the legislative process does not constitute merely aggregations of intentions of individual legislators but that the process is more aptly described as determining the collective intentions which are structured so as to further its legislative purpose.⁶⁰ Nevertheless despite the robust defence of the intention-based approach to statutory interpretation in some quarters, such a mechanical approach to statutory interpretation in *Kalla v The Master*,⁶¹ *Commissioner SARS v Executor Friths Estate*⁶² and *Geyser v Msunduzi Municipality*⁶³ has attracted much criticism.⁶⁴ The application of the literal approach

⁵⁸ 1990(1)SA 925(A).

⁵⁹ 1994(3)SA 789(A).

⁶⁰ Ekins *The Nature of Legislative Intent* at 219. Ekins develops his account of legislative intent in three stages. First, he argues that the intention of the legislature need not be understood, as it standardly is, as the aggregate or sum of the intentions of individual legislators. Instead, it should be seen as the joint intention of a rational group agent. Second, he offers an account of how a well-formed legislature would operate. Finally, he defends a concept of legislative intent with the aim of showing both why it is the proper standard of statutory interpretation and how it avoids standard objections to intentionalist theories.

⁶¹ 1995(1)SA 261(T) at 269 C - G.

⁶² 2001(2)SA 261(SCA)273.

⁶³ 2003(5)SA 19(N)32 D - E.

by courts, clearly reveals the limitations inherent in the approach. The submission that the ‘intention theory is a denial of the creative role which the judiciary can and ought to play’ is well received.⁶⁵ In respect of the above cases, we note that in applying the literal theory, not only do judges give effect to an outmoded and discredited approach to interpretation, but the theory of literalism is clearly in conflict with section 39(2) – the interpretation clause of the Constitution.⁶⁶

2.2.2 Criticisms of the Literal Theory

In examining the literal theory, the defects inherent in the theory become obvious. One of the main criticisms of the literal approach is that the *modus operandi* with regard to the application of the theory is flawed. This is because words do not have ‘intrinsic meaning in language,’ since ‘their meaning is invariably determined by a concatenation of contextual factors.’⁶⁷ Therefore placing too much emphasis on the preponderance of the word only is problematic, in that the ‘crucial role of the context of the legislative text’ is ignored or minimised – in that it is ‘reduced to a mere inanity.’⁶⁸ As a result, the internal and external aids which are normally used to determine the contextual meaning, do not apply. Furthermore, the significance of the common-law presumptions during the interpretation process is also undermined – and reduced to a ‘last resort’ aid to interpretation, to be applied only if the text is

⁶⁴ Botha *Statutory Interpretation* (5th edition) at 104 – 105. Botha is critical of the approach adopted with regard to the above-mentioned cases, namely, *Kalla v The Master, Commissioner SARS v Executor Friths Estate* and *Geysler v Msunduzi Municipality*, that the traditional rules of statutory interpretation still form part of the law. Contrary to the demands of the Constitution, the court nevertheless still applied the primary rule of interpretation and gave effect to the ordinary or the grammatical meaning of legislation.

⁶⁵ Du Plessis *The Interpretation of Statutes* at 36. Du Plessis makes the point that a judge should not merely be ‘his masters voice,’ charged with carrying out and giving effect to the wishes of the legislature. This sentiment is shared by Dugard and re-iterated in his article entitled, ‘The Judicial Process, Positivism and Civil Liberty’ 1971 *South African Law Journal* at 182-183 and 186–187.

⁶⁶ See Singh ‘The Question of Interpretation in the Nicholson Judgment – Jacob Zuma v The National Director of Public Prosecutions [2009] All SA 54 N ’ (2009) 30 *Obiter* at 788 – 789, where the author is critical of the application of the literal theory, on the basis that it is in conflict with section 39(2) of the Constitution.

⁶⁷ Devenish *Interpretation of Statutes* at 26. Devenish qualifies his statement that words do not have intrinsic meaning with the submission that the relationship between words and their meaning is not mathematical or quantitative but is variable.

⁶⁸ Botha *Statutory Interpretation* (3rd edition) at 30 - 31.

ambiguous.⁶⁹ The point here is that the context and presumptions are given some prominence and become a ‘necessary’ part of the process of statutory interpretation *only* when the text seems ambiguous.⁷⁰ While generally a good dictionary often provides an exhaustive list of possible meanings of words,⁷¹ it certainly is not sufficient, particularly when regard has to be made to the context or the background of the enacted text – for the purposes of interpretation. This stance was reflected in the dictum of *Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd*,⁷² where the position of the court was clear, that:

‘The task of interpretation is not always fulfilled by recourse to a dictionary definition, for what must be ascertained is the meaning of the word in its particular context in the enactment.’

The case of *Jaga v Dönges*,⁷³ was a landmark case in the interpretation of statutes in South Africa, where the dissenting judgment of Schreiner JA – as early as the 1950’s – was seen to move beyond the literal meaning of the word to embrace the wider context of the legislation. Nevertheless, in spite of this, the transition proved to be

⁶⁹ Ibid at 30.

⁷⁰ Ibid. (Emphasis Added)

⁷¹ In the *Minister of Interior v Machadodorp Investments* 1957(2)SA 395(AD) at 402, Steyn JA referred to The Shorter Oxford English Dictionary and to The Standard Dictionary of the English Language to interpret the meaning of the word ‘tribe.’ In *Association of Amusement and Novelty Machine Operators and Another v Minister of Justice and Another* 1980 (2) SA 636 (AD), the appellants owned ‘pinball machines,’ which they claimed were not prohibited in terms of the Gambling Act 51 of 1965. In court, the parties on each side resorted to unconventional methods to establish the meaning of ‘pin-tables’ and ‘pinball machines.’ The appellants for example tendered the evidence of persons who ‘professionally engaged’ in the ‘amusement machine business’ and of a person who ‘habitually plays on the apparatus concerned.’ The opinion evidence of a language expert was tendered on each side. The researchers of each embraced a number of dictionaries. See Cockram *The Interpretation of Statutes* (3rd edition) at 37-39.

⁷² 1984 (3) SA (WLD) at 846 G. A similar stance was maintained by the Court in the case of *Stellenbosch Farmers Winery Ltd v Distillers Corporation (SA) Ltd* 1962(1)SA 458(AD) at 476, where it was maintained that: ‘It is the duty of the court to read the Section of the Act which requires interpretation sensibly, that is with due regard, on the other hand to the meaning which permitted grammatical usage assigns to the words used in the section in question, and on the other hand, to, the contextual sense ...’ See Cockram *The Interpretation of Statutes* (3rd edition) at 40-41.

⁷³ 1950(4) SA 653(AD) at 662 - 664.

painstakingly slow – with the advent of the ‘new’ constitutional dispensation marking the first real paradigmatic shift from literalism to purposivism.⁷⁴

Arguably, the most well-known criticisms of the literal approach in academia have to be those of Davis,⁷⁵ in his analysis of the decision of *S v Mhlungu*.⁷⁶ This essentially revolved around the question of the interpretation of section 241(8) of the interim Constitution. The section that was subject to scrutiny, provided that:

‘All proceedings which immediately before the commencement of the Constitution were pending before any court of the law [...], exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this Constitution had not been passed.’

What emerged in the interpretation of the afore-mentioned section, saw the Constitutional Court sharply divided on the issue of whether Mhlungu was entitled to the protection offered by the Constitution. While the dissenting (advocated by Chaskalson and Kentridge J) maintained that the Constitution and the protection it afforded did not apply to Mhlungu, the majority court (advocated by Mahomed J), was clearly not in agreement. The Court’s interpretation and analysis of section 241(8) meant that although the old apartheid courts should complete the cases before them, it did not mean that the substantive law that had to be applied in these cases after 27 April 1994, was unaffected by the Constitution. As a result the Constitution had to be applied to Mhlungu, and the evidence against him had to be excluded.

What is clear is the stark contrast between the approaches of the minority and majority judgments in the case. While the support for the literal approach was clearly reflected by the minority judgment and the noticeable adherence to the Westminster approach to the interpretation of statutes,⁷⁷ the stance of the majority court seems to

⁷⁴ An analysis of the contextual, the purposive and the teleological theories is conducted in this chapter. See discussion in **2.3 The Contextual**, **2.4 The Purposive Theory** and **2.5 The Teleological Theory**.

⁷⁵ Davis ‘The Twist of Language and the Two Fagans: Please Sir May I Have Some More Literalism!’ (1996) 12 *South African Journal on Human Rights* at 541.

⁷⁶ 1995 (3) SA 867 (CC).

⁷⁷ Davis ‘The Twist of Language and the Two Fagans: Please Sir May I Have Some More Literalism!’ (1996) 12 *South African Journal on Human Rights* at 509

extend beyond purposivism. The view adopted by the majority court was that the rules of interpretation – which should inform the process of interpretation – are a result of a ‘new grundnorm’⁷⁸ heralded by the new constitutional order, such that it might develop a jurisprudence that represents a ringing break from the past.⁷⁹ The judgment in *Mhlungu*, not only represents a clash between two forms of legal communication,⁸⁰ but also speaks directly to the traditional theories of interpretation. The point was soundly made that the advent of the new constitutional era promised the creation of a new legal community – for ‘constitutionalism is a far more challenging enterprise than that required of ordinary legislative interpretation.’⁸¹ Indeed, what is required, therefore, in the process of interpretation in the democratic era, accentuates the role of judges so that they think ‘in ways beyond the ordinary meaning of the words’⁸² and fulfil a moral or ethical function.

2.3 The Contextual Theory

Contextualism – or the contextual approach – basically means that the meaning of a provision is determined either by reading its words, language or the provision itself – in context.⁸³ To put it another way, contextualism is a theory of statutory interpretation which in essence provides that the meaning of an enacted provision and its words and language, can only be determined in light of its context or ‘background conditions.’⁸⁴ In examining the principles of contextualism from case-law, the obvious overlaps with purposivism are unmistakable. From the *dictum* of

⁷⁸ Ibid at 508.

⁷⁹ Ibid at 512.

⁸⁰ Ibid at 509. The two forms of legal communication that Davis refers to in his article essentially deals with the literal and the purposive theory.

⁸¹ Ibid at 508.

⁸² Ibid.

⁸³ The contextual approach was applied in *Secretary for Inland Revenue v Brey* 1980 (1) SA 472 (A) at 478 A-B, where it was stated that for purposes of ascertaining the meaning of the words in a legal document like a contract, a will or a statute, the words will have to be examined in their contextual setting. See also *S v Motshari* 2001 (2) All SA 207 (NC) par 8.

⁸⁴ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-32. The contextual approach has been affirmed in plethora of more recent cases. See for example, *Ferreira v Levin NO*; *Vryenhoek v Powell* 1996(1)SA 984(CC) and *S v Makwanyane* 1995 (6)BCLR 665(CC).

Secretary for Inland Revenue v Brey,⁸⁵ there is support for the idea that contextualism and purposivism often go ‘hand in hand.’⁸⁶

Rumpff CJ stated that:

‘For purposes of ascertaining the meaning of words in a legal document like a contract, a will or a statute, a court never looks at the words in stark isolation. It looks at words in their setting, and the context in which the words are used and at the purpose for which the words are intended.’

It is not surprising, therefore, that the terms ‘contextualism’ and ‘purposivism’ are often used interchangeably – even though the use of the terms may not be entirely accurate or appropriate. Nevertheless, even though both are considered as ‘post-literalist approaches’,⁸⁷ it has to be emphasized that the purposive theory must be understood as a concept separate to that of contextualism. The case of *Jaga v Dönges*⁸⁸ is one of the first cases in South African jurisprudence that applied the contextual approach. It is also regarded as one of the first manifest efforts to acknowledge the wider context, and to attempt to move away from the plain-meaning approach of the literal theory.⁸⁹

The dissenting judge Schreiner JA maintained that:

⁸⁵ 1980 (1) SA 472 (A) 478 A-B.

⁸⁶ Du Plessis *Re-Interpretation of Statutes* at 111. Du Plessis draws from the *dictum* of the *Secretary for Inland Revenue v Brey* 1980 (1) SA 472 (A) to support the idea that contextualism and purposivism go ‘hand in hand.’

⁸⁷ *Ibid* at 112.

⁸⁸ 1950(4)SA 653(A).*In casu*, the court had to decide what meaning was to be accorded to the term ‘sentenced to imprisonment.’ The reason that the term was brought into contention was because Jaga had received a suspended prison sentence and the question had arisen whether he could be deported on the grounds that he had been ‘sentenced to imprisonment.’ The majority court adopted a textual method of interpretation and were of the view that a suspended sentence was a sentence of imprisonment and that Jaga was to be deported. The view of the minority court, was influenced by a contextual method of interpretation and therefore concluded that a suspended sentence was not a sentence of imprisonment and that Jaga could not be deported. From the findings of the case however, Jaga was ordered to leave South Africa permanently. The case is significant because it highlights the implications of the far-reaching consequences of the court electing to adopt a literal approach instead of a contextual approach.

⁸⁹ Botha *Statutory Interpretation* (5th edition) at 98. Botha succinctly sets out the guidelines that were identified by Schreiner JA in the application of a contextual approach.

‘Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that must be interpreted in light of their context. But it may be useful to stress two points in relation to the application of the principle. The first is that ‘the context’, as used here, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the inquiry into two parts and concentrate, in the first instance, on finding out whether the meaning confining a consideration of the context only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together.’

From an analysis of the approach applied in the above-mentioned case, the guidelines that ought to steer the interpretive process can be articulated as follows:

- (i) Right from the outset, the interpreter has to consider the wider context of the provision (in other words, its ambit and purpose);
- (ii) Irrespective of how clear or unambiguous the grammatical meaning of the legislative text, the relevant ‘contextual’ factors – which include the history or background – must be heeded;
- (iii) This wider context may even be more important than the legislative text; and
- (iv) Once the meaning of the text and the context is ascertained, it must be applied.
- (v) This meaning has to be accorded, irrespective of one’s opinion regarding the legislature’s intention.⁹⁰

In his analysis of the judgment and findings in the *Jaga* case, Du Plessis is perceptive in that while the first way or approach mentioned by Schreiner JA *supra* has qualified

⁹⁰ Ibid.

regard for the context, the second way or approach *always* requires simultaneous consideration of language and context. The end results of the two approaches therefore only *always* coincide, if one is prepared to accept that the ‘clear language’ *always* dominates.⁹¹ He is therefore critical of the ‘literalist assumption’ underlying the approach. Because both the ‘context and the language enjoy equal status, his description of the court’s approach in maintaining a stance that is ‘post-literalist’ without being ‘anti-literalist’ is therefore quite apt.⁹² Nevertheless, the minority judgment in *Jaga’s* case did have a certain ‘appeal’ among judges – who were keen to go beyond the ordinary meaning of the word.⁹³ It is observed that the Constitutional Court has emphasized the importance of the ‘context’, requiring that when considering legislation, due regard is to be given to the history and background of the legislation.⁹⁴ In examining South African case-law, it is observed that the contextual approach has been met with approval in a host of decisions.⁹⁵ In *University of Cape Town v Cape Bar Council*,⁹⁶ the approach of Rabie JA – in examining all the contextual factors in ascertaining the intention of the legislature – irrespective of whether the words of the provision were clear or not, is unmistakably an application of the contextual approach.⁹⁷ Further support for the approach is evident in *Mjuqu v Johannesburg City Council*,⁹⁸ where Jansen JA gives due recognition to the entire spectrum of available aids and surrounding circumstances –

⁹¹ See Du Plessis’s analysis about the findings of the courts decision with respect to *Jaga’s* case in the *Re-Interpretation of Statutes* at 114.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ *Jaga’s* case has been relied on by a number of judgments decided subsequently. See for example – *S v Radebe* 1988 (1) SA 772 (A), *University of Cape Town v Cape Bar Council* 1986 (4) SA 903 (A) and *Thoroughbred Breeders Association v Price Waterhouse* 2001 (4) SA 551.

⁹⁵ Cases that have applied the contextual approach include - *S v Makwangane and Another* 1995(6) BCLR 655 (CC); *Ferreira v Levin* NO 1996(1)SA 984 (CC) and *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1)SA 765(CC).

⁹⁶ 1986 (4) SA 903 A.

⁹⁷ Botha *Statutory Interpretation* (5th edition) at 98.

⁹⁸ 1973(3)SA 421 A.

to determine the purpose of the legislation under consideration. This has been described as a ‘model of the contextual approach.’⁹⁹

Because South Africa’s political history has affected every aspect of South African society,¹⁰⁰ its importance of the interpretation of the Constitution and ordinary legislation cannot be disregarded. The use of the historical context is therefore well illustrated in case-law.¹⁰¹ In *Brink v Kitshoff*,¹⁰² the position suggested by the Constitutional Court was that:

‘... The deep scars of this appalling programme are still visible in our society. It is in light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted.’

What is therefore evident is that the context or the determination of the context is ‘crucial’ for the interpretation of any text – whether this is a contract or the provisions of the statute, or the Constitution.¹⁰³ Contextual interpretation has also been compared to as ‘systematic interpretation’.¹⁰⁴ This gives due recognition to the fact that the Constitution is a document as a whole and therefore cannot be read as if it consists merely of a series of individual provisions read in isolation.¹⁰⁵ Its

⁹⁹ See commentary on the application of the contextual approach in the *Mjugu’s* case, in an earlier edition of Botha’s book. See Botha *Statutory Interpretation* (4th edition) at 52.

¹⁰⁰ De Waal and Currie *The Bill of Rights Handbook* (6th edition) at 141. The authors describe the Constitution as a consequence and a reaction to South Africa’s history.

¹⁰¹ In the following cases the court acknowledged the significance of the historical background when construing legislation - *S v Mhlungu* 1995(3) SA 391(CC); and *Shabalala v Attorney General of the Transvaal* 1996(1)SA 725(CC)

¹⁰² 1996(4) SA 197 (CC).

¹⁰³ De Waal *et al* *The Bill of Rights Handbook* (6th edition) at 143-144. The authors submit that in keeping with the idea of systematic interpretation, that there is a duty to read the provisions against the context of the Constitution, and to harmonise the various provisions and to give effect to them. In *United Democratic Movement v President of the Republic of South Africa* 2003 (1) SA 495 (CC), it was held that ‘where there was tension, the courts must do their best to harmonise the relevant provisions and give effect to all of them.’

¹⁰⁴ See also **Chapter 3-3.6.2 Systematic or Contextual Interpretation** and **3.6.4 Historical Interpretation** for a discussion of the Canon-Guided Strategies. A Contextual Theory as presented, with a consideration of the contextual framework or historical context compares quite favourably with Systematic and Historical Interpretation which comprises the Von Savigny Quarter. While the similarities are noted, it is provided that a reading strategy is not the equivalent of a theory of interpretation.

¹⁰⁵ *Ibid.* The fact that the constitution (and in fact all legislation) cannot be read in isolation is an interesting idea is raised by the authors. In philosophy, the principle of Holism, was

application in the decision of *Soobramoney v Minister of Health, Kwazulu-Natal*,¹⁰⁶ has been described as one of the ‘most controversial’ use of the contextual interpretation.¹⁰⁷ *In casu*, the Constitutional Court held that the right to life (section 11),¹⁰⁸ did not impose a positive obligation on the State to provide life-saving treatment to a critically ill patient. The Court’s findings, in a nutshell, were that the positive obligations of the State to provide medical treatment were expressly spelled out in section 27,¹⁰⁹ and that the court could not interpret the right to life to impose additional obligations that were inconsistent with section 27.¹¹⁰

2.3.1 Criticisms of the Contextual Approach

Even though contextual interpretation has proven to be beneficial in the process of interpretation – shown by the courts’ application of the methodology in the array of cases discussed above – it has to be used with caution.¹¹¹

The first danger is that courts tend to use contextualism to limit rights instead of interpreting them.¹¹² Another danger is that contextual interpretation may be used as

described by Aristotle as ‘The whole is more, than the sum of its parts.’ It had its origin in Greek meaning ‘holos’, ‘all’ or ‘total.’ The term ‘holism’ was only introduced into language by the South African statesman Jan Smuts in 1926. In essence what is provided, is that language can only be understood through its relations with the larger segment of language. In 1884, Gottlob Frege formulated his Contextual Principle, according to which – it is only within the context of a proposition or sentence that a word acquires its meaning. <http://www.philosophybasics.com/branch - holism.html> (last accessed October 2013)

¹⁰⁶ 1998 (1) SA 765 (CC).

¹⁰⁷ De Waal *et al The Bill of Rights Handbook* (6th edition) at 145.

¹⁰⁸ Section 11 of the Constitution provides that: ‘Everyone has the right to life.’

¹⁰⁹ Section 27 of the Constitution, is the right to health care, food, water and social security and provides that:

‘(1) Everyone has the right to have access to -

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including if they are unable to support themselves and their dependants with appropriate social assistance,

(2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No-one may be refused emergency medical treatment.’

¹¹⁰ De Waal *et al The Bill of Rights Handbook* (6th edition) at 145. See also the cases of *S v Makwanyane and Another* 1995 (6) BCLR 655 (CC) and *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC), where the court made extensive use of contextual interpretation.

¹¹¹ De Waal *et al The Bill of Rights Handbook* (6th edition) at 145.

a shortcut to eliminate ‘irrelevant’ fundamental rights. Contextual interpretation should not be used to identify and focus on ‘the most relevant right’.¹¹³ The more important consideration should be the attainment of social justice. In giving effect to what is fair and just would obviate some of the concerns highlighted above in terms of applying the contextual approach.

2.4 The Purposive Theory

In terms of the purposive theory, the focus is not dependent exclusively on the literal meaning of the words; it requires that the interpreter move beyond the manifested intention of the legislation.¹¹⁴ While the quest for the subjective intention of the legislature is said to be elusive, and may perhaps even be regarded as being ‘a fiction’ because it is unascertainable,¹¹⁵ the search for the purpose or the object of a statute is considered as being a very real exercise.¹¹⁶ The determination of the purpose of the legislation requires a purpose-orientated approach, which gives due consideration to the contextual framework right from the outset, and not only in

¹¹² Ibid. See also for example *Bernstein v Bester* 1996 (2) SA 751(CC). In considering the right to privacy meant that it only applied to the inner sanctum of a person, his or her family life, sexual preference and home environment.

¹¹³ De Waal *et al The Bill of Rights Handbook* (6th edition) at 145. See also *Osman and Another v Attorney-General, Transvaal* 1998 (4) SA (CC). Due to the fact that the appellants did not rely on a specific fundamental right in the High Court, it was not open to them to raise it before the Constitutional Court.

¹¹⁴ Devenish *Interpretation of Statutes* at 36. According to the purposive methodology, the interpreter has to endeavour to infer the design or purpose which lies behind the legislation. In order to do so, the interpreter has to make use of an unqualified contextual approach, which allows an unconditional examination of all internal and external sources. See also *S v Mhlungu and Others* 1995 (3) SA 867 (CC) at 916, where Sachs J in quoting Lord Denning stated that ‘... Judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit – but not the letter – of the legislation, they solve the problem by looking at the design and purpose of the legislature – at the effect it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means that they fill in the gaps, quite unashamedly, without hesitation. They ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation...’

¹¹⁵ Du Plessis *Re-Interpretation of Statutes* at 96. According to Du Plessis, ‘fiction’ is meant somewhat negatively, because it stands for what is unreal. However, he explains further that in the legal discourse, fictions as ‘accepted untruths’ often help explain complex phenomena.

¹¹⁶ Driedger *Construction of Statutes* at 252.

cases where the literal approach has failed.¹¹⁷ In terms of such a purpose-orientated (or-text-in-context) approach, the purpose or object of the legislation is the overriding consideration.¹¹⁸ It seems appropriate then to describe the legislative function as a ‘purposive activity’.¹¹⁹

The question that arises when analysing the purposive methodology, is how does one ascertain the ‘purpose’ of legislation?¹²⁰ According to the classical version of purposivism in the common-law tradition, the prime purpose of enacted law is to suppress the mischief.¹²¹ The mischief rule which was first expounded in the *Heydon’s* case, comprises an enquiry of four questions to be answered in interpreting a provision.¹²² In *Hleka v Johannesburg City Council*,¹²³ Van den Heever JA set out the rules articulated in *Heydon’s* case and then proceeded to discuss what the law was before the Act in contention – the War Measure Act¹²⁴ – was passed and how the legislature sought to remedy the existent problematic state of affairs.¹²⁵ In more recent case-law, it is evident that purposivism seems to be fast becoming a substitute for ordinary language or ‘clear language’ as the primary consideration in constitutional interpretation.¹²⁶ In *Qozeleni v Minister of Law and Order*,¹²⁷ the court

¹¹⁷ Botha *Statutory Interpretation* (5th edition) at 97-98. Botha also refers to this approach as the text-in-context approach. In terms of the text-in-context approach, there has to be a balance of the grammatical and the contextual meaning.

¹¹⁸ *Ibid* at 97.

¹¹⁹ *Ibid*. See also **Chapter 3-3.6.3 Teleological Interpretation of Purposive Interpretation** for a discussion of Canon Guided Reading Strategies. The similarities of a purposive theory with a focus on the search for the purpose or the object of the statute and Purposive Interpretation, which is an element of the Von Savigny Quarter are noted. It has to be emphasised however that a reading strategy does not qualify as a theory of interpretation.

¹²⁰ Du Plessis *Re-Interpretation of Statutes* at 96.

¹²¹ *Ibid*.

¹²² See discussion at **2.2. Literal Theory** in this chapter, for an analysis of the four-tiered test expounded in *Heydons* case.

¹²³ 1949 (1) SA 842 A.

¹²⁴ 18 of 1947.

¹²⁵ See Devenish *Interpretation of Statutes* at 130 – 131, for the application of the mischief rule in *Heydons* case and *Hleka’s* case. Some of the other reported cases that have illustrated the use of the mischief rule, include, for example, *S v Conifer (Pty) Ltd* 1974(1)SA 651(A), *Reek NO v Registrateur Van Aktes Transvaal* 1969 (1) SA 589 (T) and *Glen Anil Development Corporation Ltd v Secretary for Inland Revenue* 1974 (4) SA 715(A).

¹²⁶ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-37. There are a plethora of cases that have applied a more purposive approach to interpretation since the advent of the democratic order. See for example, *Matiso v Commanding officer, Port Elizabeth Prison and*

held that ‘the previous constitutional system of this country was the fundamental “mischief” to be remedied by the application of the Constitution’. The argument was that the ‘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.’¹²⁸ Nevertheless, in spite of its popularity in more recent case-law,¹²⁹ a note of caution is to be heeded – that purposive interpretation is not to be regarded as the ‘Open Sesame!’¹³⁰ or the end all and be all with regard to the approach to statutory interpretation.

2.4.1 Criticisms of the Purposive Approach

A criticism of the purposive interpretation is that sometimes the purpose of a statute may not be easily and clearly discernible.¹³¹ This is usually the case where the purpose or reason for the Act itself is the subject of controversy. This may result in difficulty in ascertaining the true meaning of the provision.¹³²

Mureinik notes further that ‘if the policy of a statute is iniquitous, a purposive interpretation may well foster iniquity’.¹³³ This was indeed the position in South Africa during the apartheid era when courts were reluctant to challenge harsh, unjust and discriminatory legislation.¹³⁴ As alluded to, what is evident from an examination of case-law, is that purposiveness seems to be replacing the ordinary language or

Another 1994 (4) SA 592 (SE); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC); and *Hoërskool Ermelo and Another v Head, Department of Education, Mpumalanga and Others* 2009 (3) SA 422 (SCA).

¹²⁷ 1994 (3) SA 625 (E).

¹²⁸ Du Plessis *Re-Interpretation of Statutes* at 117 - 118.

¹²⁹ See the courts clear endorsement of the purposive approach with regard to - *Potgieter v Kilian* 1995 11 BCLR 1498 (N) at 1515 B - F; *In Re: Former Highlands Residents: Sonny v Department of Land Affairs* 2000 (2) SA 351(LCC) and *Sefalana Employee Benefits Organisation v Haslam* 2000 (2) SA 415 (SCA).

¹³⁰ Du Plessis *Re-Interpretation of Statutes* at 116.

¹³¹ Dickerson *The Interpretation and Application of Statutes* at 91.

¹³² Devenish *Interpretation of Statutes* at 38.

¹³³ Mureinik ‘Administrative Law in South Africa’ (1986) 103 *South African Law Journal* at 624.

¹³⁴ Devenish *Interpretation of Statutes* at 38.

‘clear language’ approach to statutory interpretation.¹³⁵ This applies to both constitutional and non-constitutional legislation. Nevertheless, in spite of its appeal amongst judges – particularly in the current constitutional era¹³⁶ – a cautionary note is sounded, that purposive interpretation is not to be regarded as the ‘the panacea for ills of the literalist-cum-intentionalist’.¹³⁷

In terms of its application, purposive interpretation in the abstract, and by itself, can even be counter-productive.¹³⁸ Hence, the suggestion that ‘purposiveness and contextualism best go hand in hand,’ makes sense.¹³⁹ There is a danger in assuming that the interpretive process is to start off as an exercise in giving expression to the purpose or the object of a statutory provision. The reason is that the purpose or the object cannot possibly be known prior to interpretation. This can only be established ‘through’ interpretation.¹⁴⁰ If not so, Du Plessis argues that this could open wide the door to surmise and conjecture.¹⁴¹ Eskridge also emphasises that purposivism cannot be accepted as a general theory to statutory interpretation, since it neglects critically important values.¹⁴²

Generally, a teleological theory which is a more value-coherent approach, is regarded as a theory which embraces the values that the purposive theory tends to neglect or even negate. Nevertheless, its application will be tested to determine its relevance in the democratic era in South Africa.

¹³⁵ See Davis Cheadle and Hayson *Fundamental Rights in the Constitution* at 11 - 13.

¹³⁶ See *Derby Lewis v Chairman, Amnesty Committee of the Truth and Reconciliation Committee* 2001 (3) SA 1033 (C) at 1055 H - I where the court applied the purposive methodology and distinguished between legislative purpose and legislative intent.

¹³⁷ Du Plessis *Re-Interpretation of Statutes* at 247.

¹³⁸ See discussion in Singh ‘An Illustration of Teleological Interpretation Par Excellence – Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd 2007 (6) SA 199 (CC),’ (2009) 72 *Journal of Contemporary Roman-Dutch Law* at 342-343, for a critique of the purposive approach.

¹³⁹ Du Plessis *Re-Interpretation of Statutes* at 247.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² Eskridge and Frickey ‘Statutory Interpretation as Practical Reasoning’ *Stanford Law Review* at 337.

2.5 The Teleological Theory

The teleological theory is also described as a value-coherent, value-orientated or a value-activating method of interpretation. This theory reflects Aristotle's teachings 'that all laws ... must be tempered by equity'.¹⁴³ Even though some authors refer to the teleological method of interpretation as purposive,¹⁴⁴ this is not entirely accurate, since in terms of its application, teleological interpretation 'seeks to proceed beyond ad hoc purposivism.'¹⁴⁵ It also needs to be stressed that the *modus operandi* is not 'merely purposive' – but what is central to its operation, is the element of equity or fairness.¹⁴⁶

Crawford acknowledges the philosophical component to the teleological theory.¹⁴⁷

'Under the equitable or philosophical theory of interpretation, the bounds of "genuine interpretation" are considerably extended.'

It is appropriate that the teleological theory has also been referred to in some quarters as 'philosophical interpretation.'¹⁴⁸ However, the American scholar, Singer, qualifies the concept of equity used here. Singer draws attention to the fact that in this context, equity is unrelated to fairness or the historic division of judicial power between law and equity. Instead, it is submitted that it is more or less equated with or synonymous with that which is referred to as the 'spirit' or 'principle'.¹⁴⁹ This comment is particularly interesting when analysing section 39, the interpretation clause of the Constitution. What is clear, is that the section 'demands'¹⁵⁰ an

¹⁴³ Corry 'Administrative Law and the Interpretation of Statutes' 1937 *University of Toronto Law Journal* at 294.

¹⁴⁴ De Waal *et al The Bill of Rights Handbook* (3rd edition) at 119. In the earlier edition of their book, the authors have submitted that: 'The Constitutional Court has on several occasions committed itself to an interpretation of the Bill of Rights which is usually referred to as "purposive" but sometimes also as "value-orientated" or "teleological".'

¹⁴⁵ Du Plessis *Re-Interpretation of Statutes* at 119.

¹⁴⁶ Devenish *Interpretation of Statutes* at 39-40.

¹⁴⁷ Crawford *The Construction of Statutes* at 243.

¹⁴⁸ Devenish *Interpretation of Statutes* at 41 - 42.

¹⁴⁹ *Ibid* at 42.

¹⁵⁰ De Waal *et al The Bill of Rights Handbook* (6th edition) at 146. It is interesting that the authors prefer the use of the word 'demands,' since in an earlier edition of their book, see De Waal *et al The Bill of Rights Handbook* (5th edition), they use the 'requires,' but revert to the

interpretation that promotes the ‘values’ or ‘principles’ which underlie an open and democratic society, and mandates that in the process of interpretation the courts must promote the ‘spirit’, purport and objects of the Bill of Rights.¹⁵¹ It should be noted that the wording is undoubtedly pro-active. This, in essence, encapsulates a teleological or a value-coherent method of interpretation. Denning, a strong protagonist of the teleological approach, explains the *modus operandi* of the approach as follows, ‘Whenever there is a choice, choose the meaning which accords with reason and justice.’¹⁵² Dugard – who advocated support for a value-orientated method of interpretation – describes this as a ‘realist-cum-value-oriented approach’.¹⁵³ It is suggested that Dworkin’s theory of constructive interpretation is also in essence teleological, and is based on his perception of ‘law as integrity’.¹⁵⁴ Of all the above-mentioned protagonists, Mureinik has endeavoured to go further than merely identifying a teleological or a value-coherent method of interpretation as a ‘superior conception of interpretation’.¹⁵⁵ In South Africa during the apartheid era, the rights and liberties of individuals were severely curtailed by harsh discriminatory legislation. Mureinik’s bold and perceptive assertion was that, in apartheid South

use of the word ‘demands’ in the later edition of their book. The word ‘demands’ is more in-keeping with the idea of a moral obligation that is imposed on judges to give expression to the values of the Constitution.

- ¹⁵¹ Section 39 of the Constitution provides that: -
 ‘(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
 (2) 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.’
- ¹⁵² Denning *The Discipline of Law* at 22.
- ¹⁵³ Dugard *Human Rights and the South African Legal Order* at 400. Dugard asserts that even though the realists and those who belong to the school of natural law are seen as irreconcilable enemies, the two schools do in fact have much in common. He quotes Harry W Jones in this regard: ‘In leeway situations, the positive law is not a command but, at most, an authorization of alternative decisions. The choice between alternatives, the selection of the path to be pursued, cannot but be influenced by the decision – makers *ought to be*. Legal realism, with its emphasis on the inevitability of choice and discretion in the life of the law, casts its vote – though for very different reasons – with the tradition of natural law, and against Austin and the positivists, on the old issue of the complete analytical separateness of the law that *is* from the law that *ought to be*.’
- ¹⁵⁴ Devenish *Interpretation of Statutes* at 46.
- ¹⁵⁵ Mureinik ‘Administrative Law in South Africa’ (1983) 3 *South African Law Journal* at 623.

Africa that a value-coherent approach to interpretation was to be regarded as the judge's chief weapon against legislative injustice.¹⁵⁶ It is indeed quite remarkable that even before the advent of the new constitutional dispensation, he foresaw the merits of a value-coherent method of interpretation.

While generally prior to the current constitutional era, courts were reluctant to apply the teleological method of interpretation, however, the guidelines contained in section 39 of the Constitution have changed this position dramatically. This is succinctly summed up in *Holomisa v Argus Newspapers*,¹⁵⁷ as follows:

‘The Constitution has changed the “context” of all legal thought and decision-making in South Africa.’

Since the inception of the new constitutional dispensation, a myriad of case-law has surfaced that has shown a decisive inclination by courts to adopt either a purposive or a value-based approach.¹⁵⁸ The court's application of a value-coherent methodology in *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*,¹⁵⁹ is undoubtedly an illustration of teleological interpretation par-excellence. In this case, the court had to ascertain whether the Popela community - all former tenants of the land of Goedgelegen Tropical Fruits – were a ‘community’ dispossessed of a right in land as a result of past racially discriminatory laws or practices. The land in issue was the farm Boomplaats, which had been subsequently consolidated into the farm Goedgelegen Tropical Fruits (Pty) Ltd. The applicant's contention that they formed a community formed the crux of the dispute. They therefore sought to achieve the constitutional aims of land restitution and land reform. The respondent in the matter opposed the claim.

¹⁵⁶ Ibid at 623 -624.

¹⁵⁷ 1996 (2) SA 588 (W).

¹⁵⁸ See cases for example *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E); *Baloro v University of Bophuthatswana* 1995 (8) BCLR 1018 (B) and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism* 2004 (4) BCLR 687 (CC).

¹⁵⁹ 2007 (6) SA 199 (CC).

In deciding on whether the Popela community constituted a ‘community’ for the purposes of the Act,¹⁶⁰ Moseneke DCJ reasoned that ‘a generous notion of what constitutes a community fits well with the wide scope of the rights in land.’¹⁶¹ As a result of employing a broad, purposive or a teleological method of interpretation in his jurisprudential analysis, Moseneke DCJ deduced that the Popela community were undoubtedly a community at the time they had been dispossessed.¹⁶² What is observed is that a value-coherent interpretation which requires that the purpose of legislation must be measured against the values of the Constitution, forms the underlying basis of Moseneke DCJ’s jurisprudential analysis.¹⁶³

With regard to whether the individual claimants were dispossessed ‘as a result of’ past discriminatory laws and practices, Moseneke DCJ maintained that the term ‘as a result of’ was to be interpreted to mean no more than ‘as a consequence of’ and not ‘solely as a consequence of.’ According to this interpretation, Moseneke DCJ maintained that there had to be a reasonable connection with the discriminatory laws and practices on the one hand, and dispossession on the other. As a result, it was necessary to consider the context and historical background of the legislation.¹⁶⁴

In applying a value-orientated method of interpretation which is founded on a ‘moral evaluation’¹⁶⁵ of the circumstances and the plight of the claimants, the judge – in attaching ‘less than the usual weight to linguistic and purposive considerations and more than the usual weight to general legal values’¹⁶⁶ – found in favour of the applicants and awarded them restitution in terms of the Restitution Act.¹⁶⁷ It is noted

¹⁶⁰ A ‘Community’ in terms of the Definition Section of the Restitution of the Land Rights Act 22 of 1994 is - ‘unless the context indicates otherwise ... any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group and indicates part of any such group.’

¹⁶¹ 2007 (6) SA 199 (CC) at para 41.

¹⁶² See Singh ‘An Illustration of Teleological Interpretation Par Excellence – Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd 2007 (6) SA 199 (CC),’ (2009) 72 *Journal of Contemporary Roman-Dutch Law* at 339 – 340 for an examination of the term ‘community’ as provided in terms of the Restitution of the Land Rights Act 22 of 1994.

¹⁶³ *Ibid* at 344.

¹⁶⁴ *Ibid* at 341.

¹⁶⁵ Devenish *Interpretation of Statutes* at 47.

¹⁶⁶ Mureinik ‘Administrative Law in South Africa’ (1983) 3 *South African Law Journal* at 624.

¹⁶⁷ 22 of 1994.

that a moral evaluation, as embarked on by Moseneke J, was at the heart of the decision-making. In adopting this stance, Moseneke J was able to fulfil the aims of social justice sought in the case. It is stressed, therefore, that an ethical and moral assessment of the factors, has to form the central or core consideration by courts.

The case of the *African Christian Democratic Party v the Electoral Commission*¹⁶⁸ is also relevant. In this case, the Constitutional Court was called upon to determine whether the African Christian Democratic Party (hereinafter referred to as ACDP), the applicant in the matter, had complied with sections 14 and 17 of the Local Govt: Municipal Electoral Act.¹⁶⁹ In terms of these provisions, it was specifically required of parties that ward candidates who intended to contest an election, lodge with the Electoral Commission a deposit as prescribed by legislation, together with a notice of intention to contest the election.¹⁷⁰ While the applicant had lodged an application clearly indicating its intention to oppose, it had, however, not lodged a separate deposit in respect of the Cape Metropolitan area. The view of the Electoral Commission was that the applicant had not complied with the provisions of the statute, and, as a result, this disqualified the ACDP from participating in elections. Because the Electoral Court upheld the decision of the Electoral Commission, the ACDP sought relief from the Constitutional Court.¹⁷¹

The view of the Constitutional Court differed from that espoused by the Electoral Court. While the Electoral Court maintained that the ACDP had not complied with the relevant provisions, O' Regan J was of the view that the ACDP had, in fact, met the registration requirements of the Electoral Act.¹⁷²

¹⁶⁸ 2006 (5) BCLR 579 (CC). See also discussion by Singh 'An Illustration of Teleological Interpretation Par Excellence – Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd 2007 (6) SA 199 (CC)' (2009) 72 *Journal of Contemporary Roman-Dutch Law* at 340 on the rationale and findings of the Constitutional court in the *African Christian Democratic Party* case.

¹⁶⁹ 27 of 2000.

¹⁷⁰ Singh 'An Illustration of Teleological Interpretation Par Excellence – Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd 2007 (6) SA 199 (CC)' (2009) 72 *Journal of Contemporary Roman-Dutch Law* at 340-341.

¹⁷¹ Ibid.

¹⁷² Ibid.

It is evident from the judgment, that O’ Regan J’s reasoning and findings were as a result of construing the provisions in ‘light of their purpose’¹⁷³ This view reflects ‘the general trend away from the strict legalistic to the substantive’.¹⁷⁴ What is therefore quite clear from the judgment, is that O’ Regan J’s approach to statutory interpretation was unmistakably ‘purposive and value-based rather than literal’,¹⁷⁵ and may indeed be regarded – as submitted by Le Roux – as being an ‘emphatic example of the teleological approach to statutory interpretation’.¹⁷⁶

2.5.1 Criticisms of the Teleological Theory

One of the criticisms of the teleological approach, is that it leads to unpredictability. However, exponents of the teleological theory claim that the approach is much more objective than the literal approach.¹⁷⁷ Another inherent problem with the approach is that as an individual’s perception of what is just and fair would differ from that of others, and so too would a particular judge’s perception of justice.¹⁷⁸

De Waal *et al* are of the view that a purposive or teleological interpretation is indeed quite helpful, in that it acknowledges that the interpretation of the Bill of Rights involves value judgments. However, the authors are critical that it does not prescribe how such a value judgement is to be made.¹⁷⁹ This submission, however, is not entirely correct, since the guidelines for the interpretation of the Bill of Rights are explicitly articulated in section 39 of the Constitution. Section 39(1) clearly

¹⁷³ Devenish ‘African Christian Democratic Party v Electoral Commission: The New Methodology and Theory of Statutory. Interpretation’ 2006 123 *South African Law Journal* at 403.

¹⁷⁴ Le Roux ‘Directory Provisions - Section 39 (2) of the Constitution and the ontology of Statutory law - *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC)’ (2006) 21 *South African Public Law* at 388.

¹⁷⁵ Devenish ‘African Christian Democratic Party v Electoral Commission: The New Methodology and Theory of Statutory. Interpretation’ 2006 123 *South African Law Journal* at 402.

¹⁷⁶ Le Roux ‘Directory Provisions - Section 39 (2) of the Constitution and the ontology of Statutory law - *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC)’ (2006) 21 *South African Public Law* at 400.

¹⁷⁷ Devenish *Interpretation of Statutes* at 47.

¹⁷⁸ *Ibid.*

¹⁷⁹ De Waal *et al The Bill of Rights Handbook* (6th edition) at 138. The point is made that value judgments are central to the exercise of interpreting the Bill of Rights.

prescribes that for purposes of interpretation, a court must promote ‘values’ which underlie an open and democratic society, which is based on freedom and equality. From the plethora of cases that have been decided subsequent to the adoption of the interim Constitution, it is obvious that the application of section 39 by our courts has resulted in findings that are certainly much more than purposive.¹⁸⁰ Of all the theories that have been applied, it seems that the teleological theory with a value-based methodology or *modus operandi*, offers the most jurisprudentially sound option thus far. However, it begs the question whether the theory is adequate for addressing the needs of social transformation.

2.6 The Subjective Theory or Intention Theory

Steyn, a strong proponent of the intention theory, postulates that the determination of the real intention of the legislature is of paramount importance in the process of statutory interpretation, and that once discerned, it must be given effect to.¹⁸¹ While overlaps with this theory are noted, the point of departure is that while the literal theory focuses on the ordinary, literal and grammatical meaning of the word, the intention theory draws a distinction between the language on the one hand and ideas and thought on the other.¹⁸² In South Africa, it would appear that the particular version of the intention theory that developed has its origin in literal theory reasoning.¹⁸³

Because the theory does not equate the ‘expressed intention’ to the ‘authentic intention’ of the legislature (as does the literal theory), it is submitted that the intention theory is actually ‘intellectually and jurisprudentially more sound’.¹⁸⁴ Given that ascertainment of the ‘intention of the legislature’ is a highly subjective

¹⁸⁰ See for example *S v Makwanyane and Another* 1995 (3) SA 391 (CC) and *S v Zuma* 1995 (4) BCLR 401 for the application of section 39 - the interpretation provision of the Constitution.

¹⁸¹ Du Plessis *Re-Interpretation of Statutes* at 94.

¹⁸² Devenish *Interpretation of Statutes* at 33.

¹⁸³ Du Plessis *Re-Interpretation of Statutes* at 95.

¹⁸⁴ Devenish *Interpretation of Statutes* at 33.

enquiry, it makes sense that the intention theory has been referred to, and is often described as, the subjective theory.¹⁸⁵

2.6.1 Criticisms of the Intention Theory

Steyn's advocacy and support of the intention theory is based on the idea that the intention of the law is a reconstruction of the thinking inherent in it.¹⁸⁶ The problem with the application of this theory, as presented above, is with the question of 'locating' the intention of the legislature.¹⁸⁷ In terms of the legislative processes, there are a number of factors that come into play. For example, the persons who draft legislation and who pass legislation are not the same, the draft legislation is also extensively debated and there is sometimes widespread disagreement about the final legislation – which is usually a product of compromise. This questions whose thinking is demonstrated in the expressed intention of the legislature.¹⁸⁸

Another criticism of the subjective and intention theories is that the determination of the 'intention of the legislature' – which is central to the theory – is in itself elusive and problematic. As a result, most commentators and jurists who resort to using the phrase, 'intention of the legislature' do so without being able to furnish a complete or detailed explanation of exactly what it means.¹⁸⁹ The effect of the application of the intention theory, in practice, has been literalism in the guise of intentionalism.¹⁹⁰ What has resulted, is an amalgam of the literal and the subjective theories – referred to as intentionalism-cum-literalism.¹⁹¹

Even though the application of the theory in the manner described is discredited the 'integrity and merit' of a purely subjective theory,¹⁹² that has emerged in South

¹⁸⁵ Ibid.

¹⁸⁶ Du Plessis *Re-Interpretation of Statutes* at 94.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ In *Public Carriers Association v Toll Road Concessionaries (Pty) Ltd* 1990 (1) SA 925 (A), the 'intention of the legislature' was emphasized as the primary rule of interpretation.

¹⁹⁰ Du Plessis *The Interpretation of Statutes* at 31.

¹⁹¹ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-31.

¹⁹² Devenish *Interpretation of Statutes* at 35.

African law, particularly prior to the current constitutional dispensation, has been a predilection of the courts to use this particular combined methodology.¹⁹³ Generally, South African courts appear to have previously accepted the underlying basis of the intention theory and it is observed that it has been applied in case-law ‘with little, if any, sensitivity to its numerous pitfalls’.¹⁹⁴

With the paradigmatic shift from parliamentary sovereignty to constitutional supremacy, ‘the legislative will of parliament can no longer be sovereign’,¹⁹⁵ as it is now subject to the Constitution and its values. The resultant effect of this, is that the intention theory – which was very popular prior to the era of constitutional supremacy – ‘can no longer be the paramount rule of statutory interpretation’.¹⁹⁶

2.7 The Objective Theory

The objective theory is regarded as an antidote to the subjectivism of the intention theory.¹⁹⁷ According to the way the theory works, it is provided that once a statute has been promulgated, it brings to an end the task of the legislature – and the legislative text assumes an existence of its own.¹⁹⁸ This theory is also known as the delegation theory – a name that was probably derived when considering the role of the courts in the process of interpretation. In carrying out their function, courts are said to be ‘acting as the legislature’s delegates’.¹⁹⁹ The American scholar Curtis makes the point that when construing legislation, the words in a statute are to be

¹⁹³ The following cases have affirmed adherence to the intention theory - *S v Weinberg* 1979 (3) SA 89 A at 98 - 99; *S v Ngwenya* 1979 (2) SA 96 (A) at 100 – 101; and *S v Yolelo* 1981 (1) SA 1002 A at 1011.

¹⁹⁴ Du Plessis *The Interpretation of Statutes* at 35. According to Du Plessis to list all South African precedents in which this approach has been used, recognized or referred to, would require quite an extensive table of cases.

¹⁹⁵ See Du Plessis *Re-Interpretation of Statutes* at 95-96, for a criticism of the intention theory. The problem with focusing on the ‘intension of the legislature,’ is whose thinking constitutes the ‘intention of the legislature’? The idea that is created, may be alleviated by arguing that the ‘intention of the legislature’ is not what the legislature actually had in mind, but rather what it meant to say.

¹⁹⁶ Ibid.

¹⁹⁷ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-37.

¹⁹⁸ Cowen ‘Prolegomenon to a Restatement of the Principles of Statutory Interpretation’ (1976) *Tydskrif vir die Suid-Afrikaanse Reg* at 157.

¹⁹⁹ Du Plessis *Re-Interpretation of Statutes* at 98.

regarded as ‘delegations’ to the courts to interpret ‘within their authority’.²⁰⁰ He explains further that ‘the more imprecise the words are, the greater is the delegation.’²⁰¹

In terms of the *modus operandi* of the theory, it is submitted that when interpreting legislation, the interpreter has to do so – being mindful of the time frame within which they function.²⁰² This process would therefore require the interpreter to consider the policies that existed at the time a statute became law – as well as changes that might have occurred as a result of implementation of such policies.²⁰³

2.7.1 Criticisms of the Objective Theory

The obvious flaw inherent in the objective theory is that statutory interpretation does not only involve an acknowledgement of the ‘past intention’ of the legislature.²⁰⁴ It is a ‘continuous process’, in terms of which the ‘present realization’ is just as, if not more relevant, when interpreting a text.²⁰⁵ Du Toit is vehemently opposed to the application of the objective theory. He bases his argument on what he calls ‘dimension of futurity in law.’²⁰⁶ It is maintained that ‘past meaning’ must be transposed into present terms, and the consideration of ‘present meaning’ opens up vistas of futurity bearing in mind that the law as a social science is a dynamic

²⁰⁰ Devenish *Interpretation of Statutes* at 50.

²⁰¹ Ibid. Curtis explains his theory as follows: ‘Words in legal documents are simply delegations to others of authority to be given them meaning by applying them to particular things or occasions ... Words mean not what their author intended them to mean, or even what meaning he intended, or expected reasonably or not, others gave to them. They mean, in the first instance what the person to whom they are addressed makes them mean.’

²⁰² Dias *Jurisprudence* (5th edition) at 170.

²⁰³ Ibid. The author describes ‘application’ as a continuing process and the ‘application of a provision’ in a particular case is only one step in a journey.

²⁰⁴ Du Toit ‘The Dimension of Futurity in the Law: Towards a Renewal of the Theory of Interpretation’ (1977) *Journal for Juridical Science* at 11.

²⁰⁵ Ibid at 16.

²⁰⁶ Ibid at 11.

phenomenon and not static.²⁰⁷ It is understandable why objectivism has not met with approval in South African courts.²⁰⁸

When considering the interpretive guidelines outlined in section 39 of the Constitution, which require that courts, tribunals and forums promote the values that underlie an open and democratic society, as well as give due consideration to international law and foreign law, it is submitted that this analysis is a far cry from the application of the theory, as discussed above. Our courts are now specifically mandated to consider both past and present legislation and make a value-judgment with respect to the matter under consideration. In its pristine form, therefore, the objective theory does not have relevance in the current South African legal system.

2.8 The Judicial Theory

The judicial or ‘free theory’, as it is termed, basically recognizes the creative role played by the judiciary in the process of interpretation and application of the law.²⁰⁹ It acknowledges the ‘freedom’ that judges have in choosing one rule of interpretation over another.²¹⁰ The theory – as presented above – can be perceived as being a reaction to primitive literalism, since it has at its core the ‘element of subjectivity’

²⁰⁷ Ibid at 16-19.

²⁰⁸ Du Plessis *Re-Interpretation of Statutes* at 98.

²⁰⁹ Du Plessis *The Interpretation of Statutes* at 34. See also Dugard *Human Rights and the South African Legal Order* at 382, where Dugard recognizes the creative powers of judges in the process of interpretation: ‘Once there is a clear recognition of the creative powers of the judiciary in the interpretation of statutes, it will be easier for judges to be guided by accepted legal values, rather than by subconscious preferences, in their law-making task. Of course, ...judges should be guided by legal values and policy... The legal principles should be employed to guide judicial policy... and to form part of the South African legal heritage.’ At the time that Dugard made the above submission, South Africa did not have a democratic Constitution and a justiciable Bill of Rights. With the advent of the current democratic dispensation, the role of judges has changed substantially. Judges are now mandated and obliged to give effect to the fundamental values which forms the basis of the democratic order. It is therefore submitted that judges are under a moral obligation to give effect to the values and principles of the Constitution.

²¹⁰ Devenish *The Interpretation of Statutes* at 49. See also *Zimnat Insurance Co Ltd v Chawanda* 1991 (2) SA 825 (ZSC) at 832 H-I, where the position of the court was that: ‘... judges have a certain amount of freedom or latitude in the process of interpretation and application of the law.’

which judges adopt when interpreting legislation.²¹¹ This, in essence, supports the more radical form of the theory. The moderates however contend that in ascertaining the intention of the legislature, judges are only able to make sense of a particular enactment by filling in the gaps where necessary.²¹² Their role, therefore, might also extend to ‘remedying’ defects’ in statutes and deficiencies that sometimes arise in practice.²¹³

The impression created in the exposition of this theory, as provided above, that ‘the law of statutory interpretation has become a bag of tricks from which courts can pull respectable sounding rules to justify any possible result the judge desires’,²¹⁴ is a gross distortion of the judicial theory and of the role of the judiciary in the process of interpretation.

2.8.1 Criticisms of the Judicial Theory

While there is merit in the argument that a judge’s character, upbringing and education play a role in the decision-making process,²¹⁵ this is where the level of subjectivity starts and ends. It has to be understood that the process of interpretation involves a ‘rule-bound evaluation’²¹⁶ that is guided by ‘objective’ canons of construction.²¹⁷ It is not simply a ‘capricious choice’,²¹⁸ but an ‘evaluation’ which

²¹¹ Devenish *Interpretation of Statutes* at 49.

²¹² Du Plessis *Re-Interpretation of Statutes* at 97. Du Plessis uses an interesting term to describe the judicial or the free theory. He refers to the judicial theory as ‘judicial activism.’

²¹³ Ibid.

²¹⁴ Devenish *Interpretation of Statutes* at 48 - 49.

²¹⁵ See Dugard *Human Rights and the South African Legal Order* at 379-380, where the author quotes FN Broome, Judge President of Natal from 1951 to 1960, shortly after his retirement : ‘The judges mental make-up must necessarily influence his judgement, and the influence is of course nearly always subconscious. Nearly every judge who has anything of a judicial personality ... may be placed in one or other of two categories which are difficult to describe precisely but which may be broadly called the conservative and the liberal ...’

²¹⁶ Devenish *Interpretation of Statutes* at 49.

²¹⁷ Du Plessis *Re-Interpretation of Statutes* at 98, where it is maintained that while the canons of construction are used to justify the interpretive result, the outcome is actually predetermined by the interpreting judge’s pre-understanding. De Ville is also in agreement with the idea of a judge’s pre-understanding in the interpretive process. See De Ville *Constitutional and Statutory Interpretation* at 6, where he submits that: ‘Only by being aware of one’s prejudices can they be critically reflected on. A judge who holds that “the text is clear” can

involves ‘both linguistic and non-linguistic considerations’.²¹⁹ What is evident in the interpretation and application of section 39(2), is that not only does the section mandate a purposive methodology, but it also undoubtedly unlocks the creative powers of judges. While the parameters of the functions of judges extend outside the scope of the research undertaken, it is quite clear that the application of section 39 (2) implores that judges in their interpretation and application of legislation, fulfil the role of ‘guardians of constitutional values’.²²⁰ Put another way, in the current constitutional order, it is fundamental that judges heed the ethical and moral considerations as part of the process of interpretation and decision-making. A judicial theory and the possibilities that it holds for the new constitutional order, must – in light of the above submissions – be revisited.

2.9 An Appraisal of the Theories Presented

An analysis of the theories of statutory interpretation, precipitates some interesting results. While the South African courts have applied in one way or other almost all the theories examined, there has certainly not been a ‘consistent approach’ to the interpretation of statutes.²²¹ However, with the advent of the new constitutional era, this position is notably different. Subsequent to the Constitution, it is apparent that there has been a distinct shift from literalism to purposivism.²²² In spite of this, it is unfortunate, however, that even though the Constitution clearly mandates a value-

hardly be said to have reflected on her prejudices. That the text is clear is a finding a judge can only make after having interpreted the text. Such a finding is usually made without justification and thus without critically reflecting, on one’s pre-understanding.’

²¹⁸ Frankfurter ‘Some Reflections on the Reading of Statutes’ (1963) *Essays on Jurisprudence from the Columbia Law Review* at 50.

²¹⁹ Devenish *Interpretation of Statutes* at 49.

²²⁰ Botha *Statutory Interpretation* (5th edition) at 102-103. In terms of the official oath of judicial officers (Item 6 (1) of Schedule 2 of the Constitution, judges are under an obligation to uphold and protect the Constitution and the human rights in it. This means that judges will have to make value-judgments based on morality.

²²¹ Devenish *Interpretation of Statutes* at 52.

²²² The case-law examined indicate a distinct shift away from literalism to purposivism. Some of these cases include for example: *S v Makwanyane* 1995 (6) BCLR 665 (CC); *S v Zuma* 1995 (4) BCLR 401 SA; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR at 687 (CC); and *S v Mhlungu and Others* 1995 (3) SA 867 (CC).

based approach to the process of interpretation, some courts and judges have been slow to embrace this challenge – with the result that a number of judges still apply an outmoded literal approach to interpretation.²²³ While, perhaps, the ‘exigencies of each case’ and the ‘measure of latitude’ accorded to judges may result in a particular theoretical position being favoured by a particular judge, this does not detract from the role and the responsibility of judges in the current constitutional order. As illustrated, what is expected of judges in a transitional constitutional democracy, is that they give expression to the values that underlie an open and democratic society, and conduct an ethical and moral evaluation of all of the factors under consideration. It is therefore submitted that while some of the more popular theories – for example the purposive and the teleological theory – tend to embrace external factors, there is no theory that explicitly requires that the interpreter give expression to a moral code and reasoning and embodies pro-activism as part of its *modus operandi*. A deontic theory of interpretation, which is based on ethics and morality, involves reasoning other than inductive and deductive reasoning and an analysis that is consistent with the emerging jurisprudence in South Africa, in that it is to be applied in a pro-active manner, is proposed in response to all of the inadequacies or shortfalls identified in the theories that have been examined.

The question that emerges following examination of the theories of statutory interpretation, is whether a particular approach or approaches can be singled out to as a ‘one size fits all’ solution when deciding on issues of statutory or constitutional interpretation. This is indeed a vexatious question, and one that has plagued scholars well versed in the field of statutory interpretation, for many a year.

Cowen has suggested that the following factors are to be taken into consideration in the process of interpretation, which are the:

²²³ See Davis and Klare ‘Transformative Constitutionalism and the Common and Customary Law’ (2010) 26 *South African Journal on Human Rights* at 403. The authors argue that as a consequence of judges and legal practitioners applying old methodologies to interpretation, three problems have resulted include:-

- 1) A reluctance to interrogate the distributive consequences of private law rules on lived experiences;
- 2) The emergence of a neo-liberal strand in the application of the Constitution; and
- 3) The lack of critical sharpness when it comes to issues related to the separation of powers.

- (i) literal text;
- (ii) subject matter of the statute;
- (iii) general historical context;
- (iv) legal history of the enactment;
- (v) purpose of the enactment, and its mischief;
- (vi) practical consequences of the various interpretations, bearing in mind that the legislature must be presumed to have intended a sensible, fair and workable result; and
- (vii) common law expressed in the presumptions.²²⁴

While the clarity of the language in the literal text must be taken into account in the process of interpretation, the approach requires that due consideration must also be given to the context. Cowen, however, does not refer to the methodology outlined above, by name – for example, a purposive or a contextual approach. What is apparent though, is that the theory or the approach suggested – which requires a ‘weighing-up’ of all of the elements enumerated²²⁵ – is akin to a teleological evaluation. Even before the advent of constitutional democracy, Devenish postulated the need for a justiciable Bill of Rights with a provision ‘authorizing’ or prescribing a teleological method or theory of interpretation,²²⁶ which involved an unqualified contextual weighing up of linguistic, legal and jurisprudential consideration, and which would place the process of interpretation on a ‘sounder jurisprudential footing’.²²⁷

Du Plessis, in his attempt to present the most appropriate method of interpretation, has propounded what has been referred to as a ‘practically inclusive method of interpretation’. Initially suggested as a technique for constitutional interpretation, Du Plessis suggested that the methodology is suitable and can be applied to statutory interpretation as well.²²⁸ The five ‘reading strategies’ that are central to the approach,

²²⁴ Cowen “Prolegomenon to a Re-Statement of the Principles of Statutory Interpretation’ (1976) *Tydskrif vir die Suid Afrikaanse Reg* at 159 - 160.

²²⁵ Devenish *Interpretation of Statutes* at 53.

²²⁶ *Ibid* at 54-55.

²²⁷ *Ibid*.

²²⁸ Du Plessis and Corder *Understanding South Africa’s Transitional Bill of Rights* at 73 - 74.

include grammatical interpretation, systematic (or contextual interpretation), teleological interpretation, historical interpretation, and comparative interpretation.²²⁹ The *modus operandi* of the methodology is that the above-mentioned reading strategies are complementary and inter-related, and should be applied in conjunction with one another.²³⁰ The operation of the different reading strategies working in conjunction with one another – which is endorsed by Du Plessis – compares favourably with an eclectic methodology proposed as the *modus operandi* for the operation of a deontic theory of interpretation. Basically, what is suggested, is that a deontic theory of interpretation, would require an amalgamation of the methodologies of the various theories of interpretation, and is to be applied proactively, to give effect to the constitutional aims of transformation and restoration.

2.10 Conclusion

What is evident is that the advent of the new constitutional era and the application of section 39 in particular, mandates the process of interpretation of legislation. The Constitution reinforces the values that have to be given expression to – which include liberal values and socio-economic values. The emerging jurisprudence, therefore, in giving expression to and upholding the values that underpin the democratic order, is notably one that requires a methodology for a transformative constitutional order. With the shift away from literalism to purposivism, our jurisprudence is also evolving. The emerging jurisprudence, which is a distinct move away from positivism, appears to be akin to natural law – with the Constitution as the supreme law. Therefore, the way one would approach the process of interpretation subsequent to the adoption of the interim Constitution, is different. The emerging jurisprudence requires a ‘new’ theory, and a new theory requires a ‘new’ methodology.

The proposed deontic theory, which has its genesis in section 39, suggests that the most decisive way that courts and judges can give expression to the values of the Constitution, is by conducting an ethical and moral evaluation of the provision under

²²⁹ See Botha *Statutory Interpretation* (5th edition) at 192-195 for a discussion of the five techniques of interpretation.

²³⁰ *Ibid* at 58. A more detailed analysis of the five techniques identified above or the ‘reading strategies,’ as they are also referred to, will be conducted in **Chapter 3**.

consideration. Such reasoning and analysis is consistent with deontic reasoning that forms the basis of the proposed deontic theory of interpretation. With its own particular *modus operandi*, which requires an eclectic methodology, and a pro-active approach to the interpretation and application of legislation, it is maintained, that for the reasons submitted, a deontic theory of interpretation – which embraces all of the elements identified above, provides a more holistic approach²³¹ to the process of interpretation.

²³¹ Kim *Statutory Interpretation – General Principles and Recent Trends* at 1-2. The author shows support for the holistic approach alluded to. The point made is that: ‘A cardinal rule of construction is that a statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in the manner that furthers statutory purposes. Justice Scalia, who has been in the vanguard of efforts to re-direct statutory text ... has aptly characterized this general approach – as follows “statutory construction ... is a holistic endeavor.’

CHAPTER 3

THE SOUTH AFRICAN CONSTITUTION – ITS ROLE, SIGNIFICANCE AND INFLUENCE ON CONSTITUTIONAL AND STATUTORY INTERPRETATION

3.1 Introduction

Since the advent of the new constitutional dispensation, the Constitution has manifestly affected every aspect of South African life and also influenced the development of law.¹ The emerging jurisprudence as a result of the Constitution has seen a paradigmatic shift away from positivism to that which may be considered as being akin to natural law. The aim of Chapter 3 is intended to explore fully how the Constitution has influenced both constitutional interpretation and statutory interpretation and to determine the nature of the emerging jurisprudence in the constitutional era in South Africa. For this reason, the approach with regard to the examination of the subject in this chapter is to carefully consider;

- a) the principles that underlie constitutional interpretation; and
- b) the relevant constitutional provisions, which include, section 1, section 2, section 39, and section 172,² that inform the process of interpretation in the current constitutional order.

¹ See *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC) at para 21, where Langa DP explains that: 'Section 39 (2) of the Constitution means that all statutes must be interpreted through the prism of the Bill of Rights ... As such, the process of interpreting 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. The spirit of transition and transformation characterizes the constitutional enterprise as a whole.'

² It is submitted that while **Chapter 3** focuses mainly on the sections referred to, the other chapters of the thesis also make reference to and discuss other relevant sections of the Constitution, where necessary.

3.2 The Constitution as a Founding Document

Since the inception of the new democratic era in 1994,³ the Constitution has become ‘the frame of reference within which everything must function, and against which all actions must be tested’.⁴ Gaining its authority from the supremacy provision set out in section 2, which provides that:

‘The Constitution is the Supreme Law of the Republic; law or conduct inconsistent with it is invalid,’⁵

it affirms that the Constitution is not merely another legislative instrument, but the supreme law of the land or the *lex fundamentalis*.⁶ A constitutional state with a supreme constitution has two essential components that form the basis of the structure. This includes a formal element (including aspects such as the separation of powers, checks and balances on government and the principle of legality), and a material or a substantive element – which refers to a state bound by a system of fundamental values such as *inter alia* justice and equality.⁷

The Constitution declares its own supremacy – that operates in a manner that can be described as being two-fold. Firstly, in terms of section 1 (c), the Republic of South Africa is said to be founded on the values of the supremacy of the Constitution. In essence, therefore, the founding statement affirms that this ‘value status’ is guaranteed and is expected to pervade *all law* in the legal system.⁸

³ This refers to the situation initially with the Interim Constitution of 1993 and thereafter with the Final Constitution of 1996.

⁴ Botha *Statutory Interpretation* (5th edition) at 184. See also *Investigating Directorate Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC).

⁵ Section 2 of the Constitution provides that: ‘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.’

⁶ Botha *Statutory Interpretation* (5th edition) at 185. A supreme Constitution is not merely another legislative document, but the supreme law or the *lex fundamentalis* of the land.

⁷ Ibid.

⁸ Woolman, Roux, Klaaren, Stein, Chaskalson and Bishop *Constitutional Law of South Africa* (2nd edition) 32-97. In *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 (4) SA 592 (SE), at 597 G-H, Froneman J explained that: ‘The interpretation of the Constitution will be directed at ascertaining the foundational values inherent in the Constitution...’

Secondly, in terms of section 2 of the Constitution, it is stated that the Constitution 'is the Supreme law of the Republic' and that 'law or conduct inconsistent with it, is invalid.' This 'trumping sense'⁹ supremacy of the Constitution, basically means that if any law conflicts with a constitutional provision, the constitutional provision will take precedence. The resultant effect of the operation of a Constitution is that the Constitution has a 'decisive impact on the conventional hierarchy and status of *all* legal rules and legislation in South Africa.'¹⁰ The most distinctive feature of South Africa's post-apartheid constitutional system, is that of constitutional supremacy,¹¹ and the decision to make the Constitution supreme has had far-reaching implications.¹² Section 1 is of profound importance, as it sets out some of the most important values on which the South African Constitution is founded.¹³ Section 1 provides:

'The Republic of South Africa is a one sovereign, democratic state founded on the following values -

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a rational common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.'

The Constitution does not only set out the values, processes and structures that place a limit on governmental power, but the Constitution also expresses the ideal to which, as a society, most South Africans aspire to. The idea that South African society should be based on the values of human dignity, equality and freedom has resulted in a value-based democratic order.¹⁴ The theory of interpretation that seems

⁹ Ibid.

¹⁰ Ibid. (Emphasis Added)

¹¹ De Vos and Freedman *South African Constitutional Law in Context* at 54.

¹² Ibid at 55.

¹³ Ibid at 57.

¹⁴ Ibid at 58.

to most favour a value-based methodology is a broad purposive or a teleological theory of interpretation. Even though recent Constitutional Court decisions have shown an inclination to favour a value-based methodology or a teleological theory of interpretation,¹⁵ it begs the question about the applicability of the teleological theory in the new constitutional dispensation, in South Africa.

It is submitted that the Constitution as a memorial ‘serves to remind the nation of their pledge (and provides them with the appropriate legal means) to achieve social justice’.¹⁶ It is described as both a memorial (which commemorates) and a monument (which celebrates). While the difference in meanings is subtle, the terms are not, however, synonymous.¹⁷ According to Du Plessis, while heroes and achievements are generally celebrated, the same does not apply to anti-heroes and disasters. It is provided that while they may be remembered, they can hardly be celebrated. An appropriate term, therefore, would be to ‘commemorate’ or to ‘remember’ the incident or perhaps the victims involved.¹⁸

Additional popular imagery used by academics to capture the ‘special status’¹⁹ ascribed to the supremacy of the Constitution, has been the bridge metaphor. While Mureinik describes the Constitution as forming ‘a bridge in a divided society’,²⁰ Van der Walt argues that the bridge metaphor allows for another interpretation whereby ‘the bridge is not simply an instrument for getting out of one place and into another,

¹⁵ Ibid at 59.

¹⁶ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-76.

¹⁷ See Snyman ‘Interpretation and the Politics of Memory’ (1998) *Acta Juridica* at 317-321.

¹⁸ See Du Plessis ‘The South African Constitution As Memory and Promise’ (2000) 3 *Stellenbosch Law Review* at 385-386, where the author distinguishes between the terms ‘celebrate’ and ‘commemorate.’ He draws a comparison with the German words *Denkmal* and *Mahnmal* and explains that while a *Denkmal* can celebrate (and may even commemorate), a *Mahnmal* on the other hand warns, and may even castigate.

¹⁹ Botha *Statutory Interpretation*, (5th edition) at 187.

²⁰ Mureinik ‘A Bridge to where? Introducing the Interim Bill of Rights (1994) *South African Journal on Human Rights* at 32. In-keeping with the bridge metaphor, Mureinik submits that: ‘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 of its decisions, not the fear inspired by the force at its command. The new order must be built on persuasion, not coercion.’

but an edifice that is inherently related to the abyss which it spans.’²¹ Le Roux adds that ‘it is not the bridge itself that 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’.²² Commenting on the metaphorical bridge that both Van der Walt and Le Roux describe, Michael Bishop refers to such a bridge as a ‘transformative bridge’.²³ He maintains that such a ‘transformative bridge envisions constant change and re-evaluation’ rather than a ‘move from one point to another.’²⁴ In keeping with the analogy, he makes the point that ‘the transitional bridge is a path, while the transformative bridge is a space’.²⁵

In drawing on this analysis, it would seem that such a bridge has indeed paved the way for transformative constitutionalism. Specific features of the transformative South African Constitution have been identified as ‘the attainment of *inter alia* substantive equality, the infusion of the private sphere with human rights and a culture of justification in public law interactions’.²⁶ To determine how the transformative nature of the Constitution has the potential to ‘profoundly and comprehensively’²⁷ affect constitutional interpretation, will be explored more fully in this and subsequent chapters.

3.2.1 Understanding the Transformative Nature of the Constitution

It is submitted that the South African Constitution has often been aptly described as a ‘transformative Constitution’. De Vos *et al* have attempted to unpack what this means by contextualizing the South African Constitution. The authors submit that the

²¹ Van der Walt ‘Dancing with Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State’ (2001) 118 *South African Law Journal* at 258.

²² Le Roux ‘Bridges, Clearings, Labyrinths: The Architecture of Post-Apartheid Constitutionalism’ (2004) *South African Public Law: Public Law in Transformation* at 634.

²³ Woolman *et al Constitutional Law of South Africa* (2nd edition) 32-80.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Pieterse ‘What do We Mean When We Talk about Transformative Constitutionalism’ (2005) 20 *South African Public Law* at 161.

²⁷ Woolman *et al Constitutional Law of South Africa* (2nd edition) 32-80.

Constitution was written in response to the urgent need for social, economic, legal and political transformation.²⁸ Davis further explains that South African constitutionalism therefore should transform South African society *from* a deeply divided legacy of a racist and unequal past *into* a society based on democratic principles of social justice, equality, dignity and freedom.²⁹ In elucidating the idea of ‘transformative constitutionalism’, the former Chief Justice Pius Langa stressed that the objective of transformative constitutionalism was to create a truly equal society and ‘to heal the wounds of the past and to guide us to a better future’.³⁰ Langa, in a legal sense, therefore describes ‘transformation’ as:

‘...a social and an economic revolution ... The provision of services to all and the leveling of economic playing fields that were so drastically skewed by the apartheid system must be absolutely central to any concept of transformative constitutionalism’.³¹

It is not surprising, therefore, that the idea of a transformative Constitution, has been reflected in a plethora of Constitutional Court judgments.³² In furthering the agenda of social transformation, the Court in *S v Makwanyane and Another* held that the Constitution attempts to provide ‘a transition from these grossly unacceptable features of the past to a conspicuously contrasting future’.³³ In *Mhlungu* the Constitutional Court was adamant that ‘the new constitutional order might develop a jurisprudence that represents a ringing break from the past’.³⁴ In *Du Plessis and*

²⁸ De Vos *et al South African Constitutional Law in Context* at 27.

²⁹ Davis *Democracy and Deliberation: Transformation and the South African Legal Order* at 44. (Emphasis Added)

³⁰ Langa ‘Transformative Constitutionalism’ Prestige Lecture delivered at Stellenbosch University on 9 October 2006.

³¹ *Ibid.*

³² See for example *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (2) BCLR 150 (CC) at para 81 and *Soobramoney v Minister of Health (Kwazulu Natal)* 1997 (12) BCLR 1696 at para 80, amongst others.

³³ *S v Makwanyane and Another* 1995 (6) BCLR 665 at para 262.

³⁴ Davis ‘The Twist of Language and the Two Fagans : Please Sir May I Have Some More Literalism!’ (1996) 12 *South African Journal on Human Rights* at 507. In *S v Mhlungu* 1995 (3) SA 867, Mohamed DP is quite emphatic in his assertions that : ‘... the new Constitution represented a ringing break with the past which perpetuated inequality and irrational discrimination and arbitrary governmental and executive action.’

others v De Klerk, the Court went further and asserted that the Constitution ‘is a document that seeks to transform the status quo ante into a new order’.³⁵ What can be garnered from an examination of case-law, is that the process of interpretation of a transformative Constitution in South Africa, requires looking both backward and forward.³⁶ It is necessary to look backward at the history of South Africa to determine which negative aspects of the past the Constitution as a document seeks to redress and transform. At the same time, the process of interpretation has to be ‘forward-looking’ to improve the prevailing situation – to achieve economic, political and social transformation.³⁷

A new South African jurisprudence that has emerged has been described as post-liberal and transformative in nature.³⁸ It therefore raises the question about the role of judges in interpreting the constitutional text. While the earlier discussions on the theories of interpretation³⁹ have revealed a definite shift from literalism to purposivism with regard to ordinary statutory interpretation, it is safe to say that the courts have indeed also recognized the significance of a value-based system with regard to constitutional interpretation. Nevertheless, in spite of this, it would seem that even though the notion of establishing an ‘objective normative value system’ would appear to be important to the process of constitutional interpretation, the subject has unfortunately not received sufficient attention from the courts and judges.⁴⁰ In *Carmichele and Geldenhuys v Minister of Safety and Security*, the court affirmed that the content of this normative system does not only depend on an abstract philosophical inquiry, but rather also upon an understanding that the Constitution mandates that ‘our constitutional dispensation had to be instilled with a

³⁵ 1996 (5) BCLR 658 (CC) at para 157.

³⁶ De Vos *et al South African Constitutional Law in Context* at 28.

³⁷ Ibid. See also De Vos ‘A Bridge Too Far? History as context in the Interpretation of the South African Constitution’ (2001) 17 *South African Journal on Human Rights* at 1-33.

³⁸ Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* at 146.

³⁹ See **Chapter 2** for an indepth analysis of the theories of interpretation.

⁴⁰ De Vos *et al South African Constitutional Law in Context* at 59.

new operational vision based on foundational values of our constitutional system'.⁴¹ This reflects a pro-active methodology which brings about social justice.

The *dictum* above has to be considered in light of the earlier submissions made,⁴² that the difficulty in establishing an 'objective normative value-system' relates directly to the fact that the theories of interpretation, as presented, are inadequate. It is submitted that the emerging jurisprudence – as a result of the transformative nature of the Constitution – requires a 'new operational vision based on foundational values'.⁴³ It is submitted that the proposed deontic theory which requires that judges – in the process of interpretation – provide a more philosophical enquiry by giving due consideration to the moral and ethical dimension in the process of legal reasoning and in so doing, to achieve the vision of a transformative Constitution that is holistic in nature.

3.3 The Differences and Similarities Between Constitutional Interpretation and Ordinary Statutory Interpretation

3.3.1 Similarities

Acknowledging that there are both similarities and differences between constitutional and 'ordinary' statutory interpretation, it is acknowledged that the similarities are not to be under-estimated and that the differences are not to be over-emphasised.⁴⁴

Structurally, it has been observed that the Constitution and 'ordinary' statutes have many similar features.⁴⁵ As enacted law texts, they are both subject to what is

⁴¹ In *Carmichele and Geldenhys v Minister of Safety and Security and Another* 2002 (4) SA 719 (CC) at 728 G-I, the court maintained that the 'objective normative value system seeks to establish a society based on human dignity, equality and freedom ...'

⁴² See discussion and submissions made in **Chapter 2** relating to the theories of interpretation.

⁴³ The position has been affirmed in *Carmichelle and Geldenhys v Minister of Safety and Security and Another* 2002 (4) SA 719 at 728, where it was maintained that the development of South African society required a new operational vision based on foundational values of our constitutional system.

⁴⁴ Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* at 88.

⁴⁵ Some of the structural similar features include for example preambles, headings, sections, sub-sections, paragraphs and schedules, which are clearly evident when examining both legislative texts.

referred to as ‘legal interpretation’.⁴⁶ Because ‘text genre co-constitutes textual meaning and therefore co-determines the manner in which the text is to be read and understood’⁴⁷ or put in another way that ‘both are members of the same broad interpretive family’,⁴⁸ it is to that extent that the similarities are important.

De Ville also shows support for this contention. He maintains that:

‘The constitutional theory which inspires the interpretation of the Constitution should ... also inform statutory interpretation.’⁴⁹

From an analysis of section 39(2),⁵⁰ which clearly mandates a broad value-based purposive interpretation of the Constitution, it follows that this value-based or value-orientated methodology should also guide the process of ‘ordinary’ statutory interpretation.⁵¹ Because the Constitution and ‘ordinary’ statutes have similarities in both the ‘formal and operational style’,⁵² it allows for both to depend on similar reading strategies⁵³ for interpretation. In his analysis of these reading strategies of interpretation, Du Plessis submits that in constitutional interpretation, such strategies can be overridden by ‘more pressing constitutional concern’,⁵⁴ which also re-inforces the idea of the supremacy of the Constitution.

⁴⁶ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-109.

⁴⁷ Ibid.

⁴⁸ Botha *Statutory Interpretations* (5th edition) at 184.

⁴⁹ De Ville *Constitutional and Statutory Interpretation* at 60. Support for this approach can be found in both constitutional as well as judgments of the Land Claims Court. See for example *Minister of Land Affairs and Another v Slamdien and Others* 1999 (4) BCLR 413 (LCC); and *Dulabh and Another v Department of Land Affairs* 1997 (4) SA 1108 (LCC).

⁵⁰ Section 39 (2) provides:-
‘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.’

⁵¹ Botha *Statutory Interpretation* (5th edition) at 184.

⁵² Du Plessis *Re-Interpretation of Statutes* at 123-128.

⁵³ The reading strategies that are referred to are the conventional canons of statutory interpretation, which are examined in greater detail in this chapter. **See 3.6 Canon-Guided Reading Strategies.**

⁵⁴ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-111.

3.3.2 Differences

While the debate between the similarity and the dissimilarity continues, the idea of the distinctiveness of constitutional interpretation among South African scholars is a popular topic. In drawing attention to the unique features of the Constitution, Du Plessis also highlights the differences between constitutional and statutory interpretation.⁵⁵ In essence therefore, it is noted:

- The Constitution, as supreme law, is a long-lasting, enacted law-text at the highest point or the ‘apex’ of all legal norms within the legal order;
- The Constitution provides for justiciable laws and therefore mandates a standard for assessment of the validity for both ‘law’ and ‘conduct’;
- The Constitution verbalizes characteristically broad, inclusive and open-ended language values and beliefs that are consistent with a democracy within a constitutional state; and
- The Constitution is a product resulting from a culmination of intense negotiation and encapsulates the ideological aspirations of the democratic society.

What is evident in identifying the above-mentioned features, is that the main reason for the distinctiveness between constitutional interpretation and ‘ordinary’ statutory interpretation – can be attributed to the supremacy of the Constitution. A direct consequence of constitutional supremacy, is the obligation to declare invalid law or conduct that is inconsistent with the Constitution. The relevant provision in this regard is section 172(1)(a) of the Constitution, which basically provides that:

‘a court must declare that any law or conduct that is inconsistent with the constitution is invalid to the extent of the inconsistency.’

⁵⁵ Ibid.

When it is alleged that a statutory provision is *prima facie* constitutionally invalid, a court will first attempt to interpret the impugned provision, so as to make it constitutionally valid. This is generally known as a reading-down process.⁵⁶ If reading-down is not possible, the court will have to declare a law invalid. However, to prevent a law from being declared completely invalid, a court may attempt to ‘limit the substantive impact of the declaration’, by either severing the offending words, or reading in new words to ‘cure’ the constitutional defect.⁵⁷ This is also referred to as ‘modifying’ or ‘adapting’ legislation to keep it constitutional and ‘alive.’⁵⁸ *The Minister of Home Affairs and Another v Fourie and Another*,⁵⁹ is an excellent illustration of the stance of the Constitutional Court in effecting the reading-in of words into legislation to make it constitutionally valid. The *Fourie* Court found that the common-law and section 30(1) of the Marriage Act⁶⁰ were inconsistent with section 9 of the Constitution, in that they made no provision for same sex persons to enjoy the same status as heterosexual persons. As a result of the incompatibility of the common-law and the Marriage Act with the Constitution, O’Regan J’s approach to resolving the matter was exemplary. She makes the submission that:

‘Before I conclude this judgment I must stress that it has dealt solely with the issues directly before the court. I leave open for appropriate future legislative consideration or judicial determination the effect, if any of this judgment on decisions this court has made in the past concerning same-sex life partners who did not have the option to marry. Similarly, this judgment does not pre-empt in any way appropriate legislative intervention to regulate the relationships (and in particular, to safeguard the interests of vulnerable parties of those living in conjugal or non-conjugal family units, whether heterosexual or gay or lesbian, not at present receiving legal protection... What ever comprehensive legislation governing all domestic partnerships may be envisaged for the future, the applicants have established the

⁵⁶ De Vos *et al South African Constitutional Law in Context* at 394.

⁵⁷ Ibid.

⁵⁸ Botha *Statutory Interpretation* (5th edition) at 195.

⁵⁹ 2006 (3) BCLR 355 (CC).

⁶⁰ 25 of 1961.

existence of clearly identified infringements of their rights, and are entitled to specific appropriate relief.

In keeping with this approach it is necessary that the orders of this Court, read together, make it clear that if Parliament fails to cure the defect within twelve months, the words “or spouse” will automatically be read into section 30(1) of the Marriage Act. In this event the Marriage Act will, without more, become the legal vehicle to enable same-sex couples to achieve the status and benefits coupled with responsibilities which it presently makes available to heterosexual couples.’⁶¹

O’Regan J’s submission where it is provided that ‘...I leave open for appropriate future legislative consideration...’ and ‘... whatever comprehensive legislation governing all domestic partnerships may be envisaged for the future ...’, is clearly reflective of a more innovative and pro-active approach in dealing with the matter of same-sex persons wishing to enter into marriage.

Reading-down, reading-in, and severance are discussed more fully hereunder.

3.4 Reading-in, Reading-down, Severance and Reading in Conformity with the Constitution

3.4.1 Reading-Down

While the Interim Constitution – in terms of section 35(2) and section 232(2) – explicitly authorized the reading-down of legislation which was unconstitutional, the 1996 Constitution does not contain a similar provision.⁶² Nevertheless, reading-down and reading-in techniques are a valid and necessary part of constitutional review.⁶³

A good illustration of reading-down of a statutory provision in order to prevent it from being unconstitutional, is evident in *Govender v Minister of Safety and*

⁶¹ *Minister of Home Affairs and Another v Fourie and Another* 2006 (3) BCLR 355 (CC) at 414 para 160.

⁶² *Botha Statutory Interpretation* (5th edition) at 195.

⁶³ *Woolman et al Constitutional Law of South Africa* (2nd edition) at 32-139.

Security.⁶⁴ The provision in contention was section 49(1) of the Criminal Procedure Act,⁶⁵ which basically provided:

‘If any person authorized ... to arrest or to assist in arresting another, attempts to arrest such a person and such person –

- (a) resists the attempt and cannot be arrested without the use of force;
- (b) flees when it is clear that an attempt to arrest him is being made, or resists such an 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’⁶⁶

As a result of the reading-down of section 49(2), the Supreme Court of Appeal maintained that the use of a firearm or similar weapon to effect an arrest may be warranted, only if the person authorized to carry out the arrest has reason to believe that the suspect:

- 1) poses an immediate threat to him or her, or a threat of harm to members of the public; or
- 2) has committed a crime involving the infliction or threatened infliction of serious bodily harm.⁶⁷

In respect of the afore-mentioned decision, Olivier JA provided that the criteria that have to be considered by courts during the reading-down process, to keep legislation constitutional, are:

- ‘(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;

⁶⁴ 2001 (4) SA 273 (SCA).

⁶⁵ 51 of 1977.

⁶⁶ The provision in dispute was section 49(1) and (2) of the Criminal Procedure Act 51 of 1977.

⁶⁷ See Du Plessis’ comments about *Govender’s* case in Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-140.

- (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, i.e. by protecting the rights therein protected;
- (d) if such interpretation is possible, to give effect to it, and
- (e) if it is not possible, to initiate the steps leading to a declaration of constitutional invalidity⁶⁸

What is therefore evident from the above *dictum*, and is often the case in practice, is that reading-down is not always possible. A court can only read-down a legislative provision if the provision is reasonably capable of a constitutional interpretation.⁶⁹ Reading-down is therefore strictly speaking not a remedy, as is reading-in and severance, but has been described as a mandatory rule of interpretation which is used to avoid the invalidity of a provision.⁷⁰ Reading-down must therefore be distinguished from reading-in. While reading-in is applied only where a court has made a finding of invalidity, with reading-down the finding of invalidity is prevented as a result of reading-down the impugned provision.⁷¹ It has far reaching consequences. It necessitates that a judge has a moral function to fulfill in the interpretation of the law. Reading-down reflects deontic reasoning in that it is a technique involving moral reasoning rather than merely inductive or deductive reasoning, which would normally apply. Once again this is an example of deontic reasoning.

3.4.2 Reading-In

With regard to reading-in, words are literally read into an unconstitutional legislative provision in order to salvage it or to render it constitutional.⁷² Reading-in is a more drastic measure used by courts to change legislation – in order to render it

⁶⁸ In *Ex Parte Minister of Safety and Security and Others : In Re- S v Walters* 2002 (4) SA 613 (CC), the Constitutional Court endorsed the Supreme Court of Appeals approach in *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA).

⁶⁹ De Vos *et al South African Constitutional Law in Context* at 396.

⁷⁰ *Ibid* at 395.

⁷¹ *Ibid* at 396.

⁷² Botha *Statutory Interpretation* (5th edition) at 197.

constitutionally alive.⁷³ In such circumstances, the court will effectively ‘read’ or insert something into a provision in order to ensure its validity. Because a court does actually ‘change the legislation’ in question, the reading-in process is to be applied with caution.⁷⁴ Therefore, before words are read into a statute, a court has to ensure:

- *first*, that the newly created provision to which words have been added is consistent with the Constitution; and
- *second*, that the result achieved would interfere with the laws adapted by the legislature as little as possible.⁷⁵

It is noted that reading-in is the opposite of severance.⁷⁶ While severance allows for the impugned parts of the legislation to be severed or cut-out from the rest of the legislation, reading-in refers to the insertion of words or phrases to the affected legislative provision to ensure that it is in keeping with the Constitution.⁷⁷

3.4.3 Severance

The term severance basically refers to the process which allows for the severing or cutting out of the parts of the provision that are unconstitutional. The test used to effect severance is whether ‘the good is not dependent on the bad’ and whether the inconsistency can be separated from the rest of the statute.⁷⁸ The manner in which the court would apply severance, therefore, is to determine whether, after the parts have been cut-off due to invalidity, the part remaining will still be able to give effect to the object of the statute. The test therefore has two parts – to determine:

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ De Vos *et al South African Constitutional Law in Context* at 399.

⁷⁶ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-141.

⁷⁷ Ibid. Reading-in must also be distinguished from reading-up. Reading-up occurs when there is more than one possible reading of the legislative text, and as a result a more extensive reading is adopted to keep the legislation constitutional. In *Daniels v Campbell* 2004 (5) SA 331 (CC), the court held that a person who is a party to a monogamous Muslim marriage does not qualify as a ‘spouse’ in terms of the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990. In order to avoid unconstitutionality of the legislation, the court applied a more extensive or broad interpretation, so as to include persons married according to Muslim rites.

⁷⁸ De Vos *et al South African Constitutional Law in Context* at 396.

- *first*, whether it is possible to sever or cut-off the invalid provisions, and
- *second*, if so, does what remains give effect to the purpose of the legislation?

What has been observed, however, is that it may not always be possible to separate the good from the bad and still give effect to the purpose of the impugned provision. Where this occurs, the court has no option but to declare the provision as a whole invalid.⁷⁹ Severance, however, must be distinguished from notional severance. While similar to severance, it allows for the unconstitutional parts to be removed, leaving certain parts unaffected. The difference, however, is that the section is given a particular meaning, which would only apply to certain cases or in certain circumstances.⁸⁰

In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*,⁸¹ the Constitutional Court maintained that the following principles are to be applied with regard to reading-in or severance:

- The results of the reading-in or severance must be consistent with the Constitution and its values;
- The result achieved must interfere with the existing law as little as possible;
- The courts must be able to define – with sufficient precision – how the legislative meaning ought to be modified to comply with the Constitution; and
- The remedy of reading-on ought not to be granted where this would result in an unsupportable budgetary intrusion.⁸²

⁷⁹ Ibid at 396-397.

⁸⁰ A good illustration of notional severance was evident in *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (5) BCLR 433. The Constitutional Court found that a regulation which prohibited the broadcasting of material that was ‘likely to prejudice relations between sections of the population.’ The Court declined to strike down the relevant portion quoted above, because ‘a dangerous gap would result.’ As a result thereof, the Court decided that national severance was the only just remedy.

⁸¹ 2000 (2) SA 1 (CC).

⁸² See discussion in Botha *Statutory Interpretation* (5th edition) at 195-196, for the factors that the Court will take into consideration to effect reading-in or severance.

3.5 An Observation about the Constitutional Remedies

Unlike reading-in and severance which are generally regarded as constitutional remedies granted to litigants who successfully raise a constitutional complaint, reading-down as explained above is a method of statutory interpretation that is mandated by section 39(2). The process of reading-down or reading statutes ‘in conformity with the constitution’, basically means that:

‘...all statutes must be interpreted through the prism of the Bill of Rights. [and] All law-making authority must be exercised in accordance with the Constitution’.⁸³

Therefore, in giving effect to the values of the Bill of Rights in the process of interpretation, requires that:

‘judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not ...’.⁸⁴

In so doing, judges are expected to embrace the challenge to effect economic, political and social justice for transformation– by reading-down legislation in conformity with the Constitution. This would therefore require that judges – in-keeping with section 39(2) which mandates a value-orientated approach to interpretation – give particular consideration to morality and ethics in the process of reasoning. Such reasoning is therefore not only concerned with inductive and deductive techniques but with moral and ethical considerations. This process resonates with deontic reasoning and is central to the deontic theory of interpretation that is postulated.⁸⁵ The mechanism of reading-down has changed the nature of statutory interpretation. All statutes must be interpreted and applied to ensure that

⁸³ The constitutional foundation for the new methodology to statutory interpretation, was explained by Langa DP in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC) at para 21.

⁸⁴ De Vos *et al South African Constitutional Law in Context* at 395.

⁸⁵ A deontic theory which is proposed as a new theory for interpretation, has its origin in the classical philosophy of ethics. Deontology is therefore defined as the ‘science of duty or moral obligation.’ See discussion of a deontic theory presented in **Chapter 1, 1.6.2 Deontic Theory**.

substantive justice is done in each case. This involves deontic reasoning, where moral and ethical values are used as a method of legal reasoning.

3.6 The Canon-Guided Reading Strategies

First propounded by Von Savigny, these ‘methods of interpretation’ commonly referred to as the ‘Von Savigny Quartet’, have also been adapted for use by Labuschagne who describes the methods or modes of interpretation as *invalshoeke* or angles of approach.⁸⁶ Originally suggested for constitutional interpretation, these methods or modes of interpretation have also been applied for statutory interpretation.⁸⁷ While these canon-guided reading strategies seem to have received a ‘reasonably positive’ response among South African academics,⁸⁸ a closer inspection of the quartet is necessary in order to assess its relevance for constitutional interpretation. Because these canon-guided reading strategies encompass grammatical interpretation, teleological interpretation, historical interpretation, and comparative interpretation – each of which is discussed in detail hereunder – it is not surprising that the term that has been coined to describe this technique for constitutional interpretation as a ‘practical inclusive method of interpretation’,⁸⁹ which facilitates an eclectic methodology. Although this method incorporates what was to some extent discussed under theories, it is the synthesis involved in the ‘practical inclusive method’ that deserves attention.

⁸⁶ Du Plessis ‘The (Re-)Systematization of the Canons of and Aids to Statutory Interpretation’ (2005) *South African Law Journal* at 600.

⁸⁷ Botha *Statutory Interpretation* (5th edition) at 192.

⁸⁸ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-159.

⁸⁹ See Botha *Statutory Interpretation* (4th edition) at 58-60, where the author uses the term ‘practical inclusive method of interpretation.’ In the later edition, Botha refer to this approach as a ‘comprehensive methodology.’ See Botha *Statutory Interpretation* (5th edition) at 192-195.

3.6.1 Grammatical Interpretation

This aspect of the quartet acknowledges the importance of the role of the language of the legislative text.⁹⁰ The focus is on the linguistic and grammatical meaning of the words, phrases, sentences and other structural components of the text, and also the rules of syntax. It is, however, emphasized that grammatical interpretation does not require of the interpreter to focus exclusively on the literal theory and the orthodox ‘ordinary or plain meaning of word’ approach. It merely reveals the importance of the legislative text in the complex process of interpretation.⁹¹

In examining the Constitution, what is evident is that the language of the Constitution is expansive and open-ended and can hardly be ‘expressed categorically or conclusively’.⁹² There is a convincing reason for this. The Constitution is intended to be a long-lasting text and its provisions are expansively formulated so as to allow for an inestimable number of unpredictable situations. Therefore, it is obvious that the Constitution – by its very nature – defies the assumption of clear and unambiguous language. What is apparent, therefore, is that the canons of grammatical interpretation, in not placing emphasis on the ordinary or plain meaning of the word rule, cannot be regarded as ‘incarnations of the literalist-cum-intentionalist’ approach.⁹³

In heeding the conventions in the use of language, what is obvious is that the canons of and aids to grammatical interpretation tend to limit the plethora of possible meanings that the language of a legislative instrument can generate. Examples of such conventions are that the legislature will use ordinary language, which is in keeping with the rule that the language should be read in its ordinary sense, and that technical language is meant to have a technical connotation, and that the same word or phrase is meant to mean the same throughout one and the same statutory text.⁹⁴ It

⁹⁰ Ibid at 192.

⁹¹ Ibid.

⁹² Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-161.

⁹³ Ibid at 32-161.

⁹⁴ Ibid.

is therefore evident that the Interpretation Act⁹⁵ and the definition clauses contained in legislative texts and interpretive precepts of the Constitution, even though they are worded in expansive and open-ended language, fulfill the limiting function outlined above.⁹⁶

As already alluded to, as with other classifications of the canons of construction, in accordance with the Savignian model, this categorization is not watertight and the overlapping is inevitable – as is the case with grammatical interpretation and systematic and purposive interpretation.⁹⁷ Language is always relevant. The critical issue, is the extent to which it influences meaning.

3.6.2 Systematic Interpretation (or Contextual Interpretation)

Systematic interpretation amounts to contextualization⁹⁸ which facilitates the ascertainment of the meaning of a particular legislative provision in relation to the legislative text as a whole. Therefore the emphasis is on the ‘wholeness’ of the text.⁹⁹ This process may be described as being two-fold. Firstly, it must be emphasized that in principle, words, phrases and as a result provisions, cannot be read in isolation. The provision has to be understood in relation to and in light of the other components of the legislative text of which it forms part. This therefore requires a drawing on the

⁹⁵ 33 of 1957 (As Amended).

⁹⁶ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-161 – 32-162.

⁹⁷ Du Plessis ‘The (Re-) Systematization of the Canons of and Aids to Statutory Interpretation’ (2005) *South African Law Journal* at 603.

⁹⁸ *Ibid.*

⁹⁹ In *Ferreira v Levin* 1996 (2) SA 984 (CC), the Constitutional Court used the structure of the Interim Constitution, as well as the formulation of the fundamental rights, to interpret the right to freedom of the person. In philosophy, any doctrine that emphasizes the priority of a whole over its parts is holism. Alternatively, a ‘holistic’ definition of holism denies the necessity of a division between the function of separate parts and workings of the ‘whole.’ <http://en.wikipedia.org/wiki/holism> (Accessed on October 2013) The idea of ‘holism’ which is discussed throughout the thesis, is used to illustrate the basis of the deontic theory and the eclectic methodology that underpins its operation. The emphasis is on the idea that the various theories of interpretation would operate in conjunction with each other to facilitate the operation of the eclectic methodology. An eclectic methodology embraces the various theories of interpretation, working together holistically, to interpret the legislative text.

‘system’ or ‘logic’ or the ‘scheme’ of the text as a whole – hence the reference to this particular method as systematic interpretation.¹⁰⁰

A systematic interpretation also requires that the macro-text is considered in the process. The focus is not only restricted to the other provisions and parts of legislation, but also requires extra-textual or contextual considerations to be taken into account in a holistic manner.¹⁰¹ Such considerations are, for example, the social and political environments in respect of which the legislation operates.¹⁰² Von Savigny asserts that the very task of systematic interpretation is to forge links with this ‘extra’ or ‘macro-text’.¹⁰³

Intra-textual, systematic interpretation overlaps with grammatical interpretation, in so far as a systematic reading of the text causes the meaning attributed to linguistic signifiers – in, for example, a definition clause – to be spread throughout the text.¹⁰⁴ Extra-textual contextualization takes place with reference to meaning-generative signifiers (also texts) in the textual environment.¹⁰⁵ In statutory interpretation, as far as the signifiers are concerned, the focus is firstly on other legal precepts and institutions and on the legal system as a whole. Legislative enactments (and the Constitution) are always construed as forming part of a wider network of legislation – in which the Interpretation Act,¹⁰⁶ holds a particular position for interpretive purposes and other law-texts such as precedents.

In respect of the political and constitutional order (referred to above), society and its legally recognized interests and the international legal order are all consciously taken account of in respect of both constitutional and statutory interpretation. This requires

¹⁰⁰ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-162.

¹⁰¹ See *Janse van Rensburg v the Master* 2001 (3) SA 519 (W) at para 7; and *Richtersveld Community v Alexkor Ltd* 2001 (3) SA 1293 (LCC) at para 88, for the courts recognition of systematic interpretation. See also Smuts *Holism and Evolution* where Smuts defines holism as: ‘the tendency in nature to form wholes that are greater than the sum of the parts through creative evolution.’ See also the critique by Mowatt on ‘Holism and the Law’ (1991) 108 *South African Law Journal* at 343.

¹⁰² Botha *‘Statutory Interpretation’* (5th edition) at 193.

¹⁰³ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-162.

¹⁰⁴ *Ibid* at 32-166.

¹⁰⁵ *Ibid*.

¹⁰⁶ 33 of 1957 (As Amended).

cognizance of the macro-text and the existing common-law canons of construction. The logic that flows from the above, therefore, is that it is impossible to separate the text and the macro-text, especially since the macro-text tends to provide the ‘source of concrete situations’ – without which statutory interpretation is impossible.¹⁰⁷

In the case of *Matatiele Municipality and Others v President of the Republic of South Africa*,¹⁰⁸ the court highlighted the process of the systematic (contextual) interpretation in constitutional interpretation, as follows:

‘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 and structural approaches. 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.’

The overlaps between systematic and purposive (or teleological) interpretation are confirmed in case-law.¹⁰⁹ It is clear that the preamble and long title of a legislative text play a distinctive role in the interpretation of its individual provisions. This is because a systematic reading of individual provisions, in the context of the text as a whole, requires the broadest possible spectrum of textual elements to be taken into account.¹¹⁰ A purposive interpretation is conducted 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’ is to be ascertained.¹¹¹ This purposive or teleological interpretation is examined more closely below.

¹⁰⁷ Du Plessis ‘The (Re-) Systematization of the Canons of and Aids to Statutory Interpretation’ (2005) *South African Law Journal* at 606.

¹⁰⁸ 2007 (1) BCLR 47 (CC) at para 36- para 37.

¹⁰⁹ See for example *Executive Council of the Western Cape v Minister of Provincial Affairs and Constitutional Development of RSA* 2000 (1) SA 661 (CC).

¹¹⁰ Du Plessis ‘The (Re-) Systematization of the Canons of and Aids to Statutory Interpretations’ (2005) *South African Law Journal* at 605.

¹¹¹ *Ibid* at 605.

3.6.3 Teleological Interpretation or Purposive Interpretation

Teleological interpretation has been described as purposive interpretation attributing meaning to a provision – mindful both of its (possible) objective(s) or ratio, and of the aspirational values of the legal system as a whole.¹¹² This method of interpretation emphasizes fundamental constitutional values and is often referred to as ‘value-coherent’, ‘value-orientated’ or ‘value-activating’.¹¹³ The emphasis on values – more specifically constitutional values – emanates from section 39(2), in respect of which it is established that for purposes of interpretation, the values that underlie a democracy must be heeded.¹¹⁴ It is therefore mandated that the aim and purpose of legislation must be ascertained against the background of these fundamental values. This purposefulness or purpose-consciousness is identified as the key in both statutory and constitutional interpretation, and is necessary to ‘honour the operational intent (or effect-directedness) of the enacted law’.¹¹⁵ However, purposive interpretation in the abstract and by itself can in fact be counter-productive as explained *supra*. It has to be understood that the interpretive process cannot start off (and proceed) as an exercise giving effect to the purpose or objects of a provision, for the simple reason that the purpose or object cannot be known prior to interpretation. It has to be established and determined ‘through interpretation’.¹¹⁶

It is cautioned that if this process is not followed in the said manner, it would cause the interpreter to surmise and ‘conjecture in the process of interpretation to be wide open’.¹¹⁷ The interpreter of the enacted provision has to start off with the assumption

¹¹² Ibid at 608.

¹¹³ Du Plessis *Re-Interpretation of Statutes* at 119. A good illustration of teleological interpretation can be seen in *Matiso v Commanding officer, Port Elizabeth Prison* 1994 (4) SA 592 (SE), at para 46, where Sachs J explains the teleological approach as follows: ‘The values that must suffuse the whole process are defined from the concept of an open and democratic society based on freedom and equality ... The notion of an open and democratic society is thus not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply, and the final measure we use for testing the legitimacy of impugned norms and conduct ...’

¹¹⁴ Botha *Statutory Interpretations* (5th edition) at 193.

¹¹⁵ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-168.

¹¹⁶ Du Plessis *Re-Interpretation of Statutes* at 247.

¹¹⁷ Ibid.

that the provision has a purpose (or *ratio legis*) that will surface in the course of interpretation. In so doing, the interpreter attributes meaning to a provision. It is submitted that this purpose has to be taken seriously and would effectually be realized in giving effect to the ‘intention of the legislature’ as it were. The *ratio legis* that emerges as interpretation proceeds, can eventually be developed into a response to the contingencies of an actual or hypothetical concrete situation.¹¹⁸ As discussed under the heading ‘Systematic Interpretation’, the merged effect of the systematic interpretation together with teleological or purposive interpretation reveals how the process of interpretation and application emerges as the *ratio legis*.¹¹⁹

From his analysis of the decision in *African Christian Democratic Party v the Electoral Commission and Others*,¹²⁰ Wessel Le Roux sets out the guidelines for teleological interpretation, as follows:

- ‘(a) establish, through recognized procedures of interpretation, the central purpose of the provision in question;
- (b) establish whether the purpose would be obstructed by a literal interpretation of the provision, and if so
- (c) opt rather for an alternative interpretation of the provision that ‘understands’ or promotes its central purpose;
- (d) ensure that the purposive reading of the constitutional provision also promotes the object, purport and spirit of the Bill of Rights.’¹²¹

The interpretation of the Constitution in the afore-mentioned manner, is another way of saying that the Constitution ought to be interpreted – mindful of the time-frame in

¹¹⁸ Du Plessis ‘The (Re-) Systematization of the Canons of and Aids to Statutory Interpretations’ (2005) *South African Law Journal* at 608.

¹¹⁹ Ibid. See also discussion above in **3.6.2 Systematic Interpretation**. Moseneke DCJ’s reasoning and analysis in *Department of Land Affairs v Goedgelegen Tropical Fruits* 2007 (6) SA 199 (CC), is an exemplary application of a teleological evaluation. In order to determine whether the Popela Community were entitled to restitution in terms of Restitution of the Land Rights Act 22 of 1996, Moseneke DCJ engages in a moral evaluation of the discriminatory legislation identified, namely, the Native Land Act of 1913, the Land and Trust Act of 1936, the Prevention of Illegal Squatting Act of 1951 and the Bantu Laws Amendment Act.

¹²⁰ 2006 (3) SA 305 (CC).

¹²¹ Le Roux ‘Directory provisions – Section 39 (2) of the Constitution and the Ontology of Statutory Law – *African Christian Democratic Party v Electoral Commission*’ (2006) 21 *South African Public Law* at 386.

respect of which it has bearing.¹²² This characterization is also a general way of restating the mischief rule.¹²³ According to the mischief rule as set out in *Hleka v Johannesburg City Council*,¹²⁴ what is evident is that the purpose of interpretation is to suppress the mischief and to promote the remedy designed for its elimination.¹²⁵

The logic that underlies the mischief rule has also found relevance in constitutional interpretation, and basically sees ‘the previous constitutional system’ of the country as the mischief to be remedied by the operation of the new Constitution. In terms of this reasoning, the Constitution is regarded as 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’.¹²⁶ Teleological interpretation is therefore described as a ‘forward-looking interpretation based on what can be learnt from past experiences’.¹²⁷

3.6.4 Historical Interpretation

Historical interpretation refers to the use of the ‘historical context’ of legislation.¹²⁸ Such historical context includes factors such as circumstances which gave rise to the adoption of legislation (mischief rule) and the legislative history (prior to legislation and preceding discussions).¹²⁹ Du Plessis qualifies this further in providing that precepts pertaining to the genesis and demise (i.e. the arrangements regarding the

¹²² Dias *Jurisprudence* (5th edition) at 170. See also Devenish *Interpretation of Statutes* at 51, where the author in referring to the objective theory makes the point that one has to take into account the continuous time frame or the dimension of futurity within which all statutes should operate.

¹²³ Du Plessis ‘The (Re-) Systematization of the Canons of and Aids to Statutory Interpretation’ (2005) *South African Law Journal* at 609. See also discussion of the application of the Mischief Rule in **Chapter 2,2.2 Literal Theory**.

¹²⁴ 1949 (1) SA 842. The mischief rule was explained in *Hlekas* case as follows:-
‘To arrive at the real meaning we have.....to consider,
(1) what was the law before the measure was passed;
(2) what was the mischief or defect for which the law had not provided;
(3) what remedy the Legislator had appointed;
(4) the reason of the remedy’

¹²⁵ Du Plessis *The (Re-) Interpretation of Statutes* at 117.

¹²⁶ *Ibid* at 117-118.

¹²⁷ *Ibid* at 249.

¹²⁸ Botha *Statutory Interpretation* (5th edition) at 194.

¹²⁹ Botha *Statutory Interpretation* (4th edition) at 59.

historical classification) of statute law are all part of what can be used in historical interpretation.¹³⁰ According to Von Savigny, historical interpretation requires the interpreter to enter ‘into and identify’ with the historical situation from which a law emerged. The ‘spirit of this history’ is regarded as being more significant than the ‘historical facts’ – particularly in respect of ascertaining the *ratio legis*.¹³¹

There is merit in the argument that teleological interpretation without a historical foundation, is, in fact, ‘empty’.¹³² While some authors have preferred the use of the word ‘empty’, it is submitted that it is more accurate to describe a teleological evaluation without a historical analysis, as being *incomplete*.¹³³ Nevertheless, this thinking has not always been favourably received. While the Constitutional Court in *S v Makwanyane and Another*¹³⁴ 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, the High Court in *De Klerk and Another v Du Plessis*,¹³⁵ rejected the drafting history of the Interim Constitution on the basis that it was irrelevant to its interpretation.

De Vos is also critical that when considering the recent history of South Africa’s transition (from apartheid to constitutional democracy), one must avoid an ‘exclusivity’ that results in an overtly narrow reading of the Constitution.¹³⁶ What is therefore clear, is that while this particular component of interpretation is important, it cannot be used exclusively,¹³⁷ or decisively,¹³⁸ on its own.

¹³⁰ Du Plessis ‘The (Re-) Systematization of the Canons of and the Aids to Interpretation’ (2005) *South African Law Journal* at 610.

¹³¹ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-170.

¹³² Ibid.

¹³³ Own submission. (Emphasis Added)

¹³⁴ 1995 (6) BCLR 655 (CC).

¹³⁵ 1995 (2) SA 40 (T).

¹³⁶ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-171.

¹³⁷ Ibid.

¹³⁸ Botha *Statutory Interpretation* (4th edition) at 59.

3.6.5 Comparative Interpretation

In examining the classical Von Savigny model, it is evident that Von Savigny did not include comparative interpretation as one of the methods of legal interpretation. However, in South Africa, comparative interpretation has been mandated as part and parcel of the process of constitutional interpretation.¹³⁹

A closer inspection of section 39(1) provides that:

‘when interpreting the Bill of Rights, a court, tribunal or forum ... must consider international law and may consider foreign law,’¹⁴⁰

and confirms that the Bill of Rights and the Constitution as a whole are located in what is referred to as a ‘transnational constitutional reality’,¹⁴¹ which basically assists in determining the meaning of the provision in a local or domestic reality.¹⁴² An illustration of such a ‘transnational evaluation’ is seen in the case of *S v Makwanyane and Another*,¹⁴³ when the court – in considering the constitutionality of capital punishment – had to heed the significance of such transnational sources.¹⁴⁴ In considering the role of international and foreign law in constitutional interpretation, Chaskalson P laid down the following guidelines:

‘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.’¹⁴⁵

¹³⁹ Du Plessis ‘The (Re-) Systematization of the Canons of and the Aids to Interpretation’ (2005) *South African Law Journal* at 610.

¹⁴⁰ Section 39(1) of the Constitution provides:-
‘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 and freedom;
(b) Must consider international law; and
(c) May consider foreign law.’

¹⁴¹ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-171.

¹⁴² *Ibid.*

¹⁴³ 1995 (6) BCLR 665 (CC).

¹⁴⁴ *Ibid* at para 19.

¹⁴⁵ *Ibid* at para 34.

Further to this, he maintains:

‘In dealing with comparative law we are required to construe the South African Constitution, and not an international instrument or the Constitution of some foreign country, and 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.’¹⁴⁶

The stance maintained by the court in *Makwanyane*, that in the interpretation of the Constitution the structure and language or transnational authorities must be relied on with regard to the uniqueness of our Constitution, our history and circumstances have been adopted and reflected in subsequent case-law.¹⁴⁷ A notable flaw in Chaskalson P’s assertion, that even though assistance may be derived from both international and foreign law, a court is in no way bound to follow such law, reveals the critical distinction between foreign law and international law – that foreign law may be considered and that international law must be considered, and in practice appears to be ignored for purposes of constitutional interpretation.¹⁴⁸ The influence of international and foreign authorities will be discussed fully in Chapter 6.

3.7 Some Points to Consider in the Implementation of the Adapted Von Savignian Model as Presented Above

3.7.1 The Von Savignian Model that is adapted by Du Plessis – encourages and pre-supposes reliance on a multiple strategy of interpretation. It recognizes the grammatical, contextual, purposive and historical modes of interpretation, as being equally significant. In effect the strategy that emerges is an eclectic one.

In the process of interpretation, the grammatical, systematic, teleological, historical and comparative considerations must be weighed against one

¹⁴⁶ Ibid at para 39.

¹⁴⁷ See for example, *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC).

¹⁴⁸ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-173.

another to decide on an outcome without, however, attributing a superior status to any of these considerations. While no reading strategy or particular mode of interpretation can ensure a ‘ready-made’ answer, what the classification as outlined above, provides the interpreter with, is a more complete or ‘fuller reading’ of a provision.

- 3.7.2** Another argument in support of the systematization of the canons and aids to construction in accordance with the Von Savigny Quartet, is that the proposed model has stood the test of time in that it is historically credible and legitimate.

Because the Von Savignian model accommodates existing common law canons of construction, it quite easily forges links in the areas of statutory and constitutional interpretation.

- 3.7.3** The proposed systematization also serves a classificatory function. The practical significance of this can be appreciated by those teaching as well as being involved in the day-to-day construction of statutes and the Constitution.

- 3.7.4** The proposed classification also emphasizes the similarities between statutory and constitutional interpretation – clearly indicating that they can be used to invoke similar reading strategies. This means that statutory interpretation can benefit from developments in constitutional interpretation.¹⁴⁹

In terms of the application of the five ‘techniques’ or ‘reading strategies’ outlined in the discussion on the canon-guided reading strategies above, even though they were initially intended to apply to constitutional interpretation, their relevance and application with regard to ordinary statutory interpretation is apparent.¹⁵⁰ Botha describes this mode of interpretation as a practical, inclusive method of interpretation. He submits that the components of a practical methodology are

¹⁴⁹ Du Plessis ‘The (Re-) Systematization of the Canons of and the Aids to Interpretation’ (2005) *South African Law Journal* at 611-613.

¹⁵⁰ Botha *Statutory Interpretation* (5th edition) at 107.

‘complementary and interrelated’, and ‘should be applied in conjunction with one another.’¹⁵¹

With a transformative Constitution, it is expected of judges when interpreting it – to be mindful of what the Constitution seeks to achieve. In the South African context therefore, judges have to consider South Africa’s unique history and to understand that the Constitution was drafted to ensure that the atrocities of apartheid are never repeated.¹⁵² Judges are therefore required to give due consideration to the social, economic and political context within which the Constitution operates, before proceeding to give an interpretation of the provisions of the Constitution.¹⁵³ The duty to fulfill socio-economic rights requires the state to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures. With regard to the implementation of the duties imposed by socio-economic rights, the state must not only act *affirmatively* to realise these rights, but there is also the requirement that the state must act *reasonably* to meet its obligations.¹⁵⁴ As a result thereof, the Constitutional Court has used a reasonable standard of scrutiny which has been applied in the cases of *Soobramoney*,¹⁵⁵ *Grootboom*,¹⁵⁶ *Treatment Action Campaign*,¹⁵⁷ *Khosa*¹⁵⁸ and *Mazibuko*.¹⁵⁹ From an examination of the courts reasoning and analysis with regard to case-law, what is evident is that the Constitutional Court has not been explicit about which factors determine the strictness of its scrutiny.¹⁶⁰ Furthermore, in spite of the fact that the methodology of

¹⁵¹ Ibid.

¹⁵² De Vos *et al South African Constitutional Law in Context* at 32.

¹⁵³ Ibid at 32.

¹⁵⁴ Ibid at 708.

¹⁵⁵ *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC).

¹⁵⁶ *Grootboom v Oostenburg Municipality* 2000 (3) BCLR 277 (CC).

¹⁵⁷ *Treatment Action Campaign v Minister of Health* 2002 (4) BCLR 356 (T).

¹⁵⁸ *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC).

¹⁵⁹ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

¹⁶⁰ De Vos *et al South African Constitutional Law in Context* at 709. See comments about the application of the reasonableness standard of scrutiny in the following cases. In *Soobramoney*, the court refused to grant an order instructing the Addington State Hospital to provide dialysis treatment to the applicant. The grounds for this decision were that the guidelines according to which the hospital decided whether to provide treatment were not unreasonable. In *Grootboom*, the respondent applied for an order declaring the state’s

interpretation reflected in the above case-law, illustrates a value-based methodology, which includes the balancing, harmonization and prioritization, the Constitutional Court has not ‘developed a clear and unambiguous justification to the interpretation of the Constitution.’¹⁶¹

Notwithstanding that the courts have applied the teleological, the purposive and the contextual theories of interpretation,¹⁶² it is submitted that none of the theories seem to offer an in-depth analysis of the statutory provision, as does the proposed deontic theory. The deontic theory of interpretation – which requires a judge to reflect on the ethical and moral legal reasoning, goes beyond merely placing the right in its context and conducting a value-based enquiry. It requires a careful consideration of all of the factors that determine the strictness of scrutiny that have to be considered to achieve social economic and social justice. In order to give effect to the considerations outlined, the proposed deontic theory for interpretation would operate in accordance with an eclectic methodology, that would be applied pro-actively.¹⁶³ As illustrated, the *modus operandi* would require an amalgamation of the literal meaning, an examination of the context, ascertaining the purpose of the legislation, and testing all of the above against the values and principles enshrined in the Constitution. An eclectic methodology or the *modus operandi* for the operation of the proposed

housing programme to be unconstitutional on the grounds that it infringed section 26 (1) which guarantees everyone the right of access to adequate housing. The Constitutional Court granted the order. In the *Treatment Action Campaign (No 2)*, the respondent applied for an order declaring the state’s mother to child transmission (MTCT) of HIV at birth prevention programme to be unconstitutional on the grounds that it infringed section 27 (1) which guarantees everyone the right of access to health services. The Constitutional Court granted the order. In *Khosa*, the applicant applied for an order declaring sections of the Social Assistance Act, which excluded permanent residents from access to social grants, to be unconstitutional on the grounds that they infringed section 27 (1) (cc) which guarantees the right of everyone to have access to social security. The Constitutional Court granted the order. In *Mazibuko*, the applicant applied for an order declaring the City of Johannesburg’s free water policy which provided each household with 6 kilolitres of free water per month to be unconstitutional on the grounds that it infringed section 27 (1) (b) which guarantees everyone the right of access to sufficient water. The Constitutional Court refused to grant the order.

¹⁶¹ Ibid at 31.

¹⁶² See **Chapter 2** for a comprehensive analysis of the various theories of statutory interpretation applied in South African Courts.

¹⁶³ See *MEC for Education v Governing Body of the Rivonia Primary School* 2013 (12) BCLR 1365 (CC), for an illustration of an approach to interpretation which was clearly pro-active application of the law.

deontic theory of interpretation, compares favourably with the practically inclusive method of interpretation¹⁶⁴ discussed above.

3.8 The Principles that Underlie Constitutional Interpretation

A comparison between statutory interpretation and constitutional interpretation yields some interesting results as will be explained in the discussion that follows. While the examination has indicated obvious overlaps between ordinary statutory interpretation and constitutional interpretation, it is maintained that the Constitution is not an ‘ordinary’ statute.¹⁶⁵ As a result, it warrants special consideration. What emerges is that as ‘an exceptional form of statute’, special rules and techniques of construction must apply when interpreting the Constitution.¹⁶⁶ In a comparative study between ordinary statutory interpretation and constitutional interpretation, it was revealed that the following principles of statutory interpretation must apply to constitutional interpretation:

- 1) Every word must be given its true and legitimate meaning and in construction it is improper to omit any word which has a reasonable and proper place in it, or to refrain from giving effect to its meaning.
- 2) That words should not be taken out of their context in the construction of Constitutions, as is also the position with statutes.

However, what is apparent, is that unlike ordinary statutes, most of the rights as contained in the Constitution – and in particular Chapter 2, the Bill of Rights – are couched in broad and open-ended language, which may even be described as abstract language. Dworkin provides that:

‘because the Bill of Rights consists of broad and abstract principles of political morality, (the) ... correct application of these principles depends on moral sense, not linguistic rules’.¹⁶⁷

¹⁶⁴ See *Botha Statutory Interpretation* (5th edition) at 92-95, for a discussion of a more comprehensive method and which has been referred to as a practically inclusive method of statutory interpretation.

¹⁶⁵ Devenish *A Commentary on the South African Bill of Rights* at 585.

¹⁶⁶ *Ibid* at 598.

¹⁶⁷ *Ibid* at 591.

This submission is particularly relevant when determining the principles that ought to apply to constitutional interpretation. While the normal rules or principles of construction with regard to statutory interpretation would apply, they have to be employed in a ‘more flexible, imaginative and subtle way’¹⁶⁸ in constitutional interpretation. It is not without justification that in its interpretation and application with regard to the rights in the Bill of Rights of the Constitution, special rules have evolved with regard to constitutional interpretation. The transformative nature of the Constitution has resulted in a new jurisprudence which requires a new methodology for the process of interpretation. section 39(2) of the Constitution – which clearly mandates a value-based methodology – has been largely instrumental in determining what these rules ought to be. With a transformative Constitution therefore, the role of the judge needs to be more nuanced. In order to achieve social, economic and political justice, these rules and principles must embody moral and ethical considerations and obligations inherent in deontic reasoning. The proposed deontic theory for interpretation, which embraces such elements and requires a pro-active approach by the courts to the process of interpretation,¹⁶⁹ is suggested as a model for both constitutional interpretation and ordinary statutory interpretation.

3.8.1 A Constitution must be interpreted Broadly and Liberally¹⁷⁰

In examining section 39(2) – which provides that one ought to ‘promote the spirit, purport and objects of the Bill of Rights’¹⁷¹ – it is evident is that the section clearly illustrates a decisive shift away from the literal theory.

¹⁶⁸ Ibid at 598.

¹⁶⁹ See for example Moseneke DCJ’s reasoning and analysis in *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (cc) to the approach to interpretation, which may be regarded as pro-active interpretation.

¹⁷⁰ The principle as discussed by Devenish is referred to as: ‘Constitutions must be Interpreted in a Liberal Spirit.’ See Devenish *A Commentary on the South African Bill of Rights* at 598. This has modified for purposes of the research to ‘Constitutions must be Interpreted Broadly and Liberally.’

¹⁷¹ See Section 39(2) of the Constitution which provides that :-
‘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.’

It is however submitted that ‘purposivism’ should not be accepted as a general theory of interpretation¹⁷² in the place of literalism – because the acceptance of purposivism as a general theory may result in certain critically important values and principles not being given due consideration in the process of interpretation. The words ‘spirit’, ‘purport’ and ‘objects’ indicate that the method of interpretation extends beyond a mere purposive approach.¹⁷³ What is therefore required, is a value-activating interpretation, which is reflective of the teleological theory involving deontic reasoning over and above inductive and deductive reasoning. Nevertheless, it is questionable whether the teleological theory operating on its own is capable of achieving the goals of social transformation. The research undertaken seems to suggest otherwise. In order to be able to effectively protect fundamental rights such as life, liberty and property and to promote a ‘liberal spirit’¹⁷⁴ – requires an amalgamation of methodologies. Such an amalgamation of methodologies resulting in the eclectic methodology that characterizes the proposed deontic theory for interpretation.

3.8.2 Context and the Importance of Language¹⁷⁵

Language alone cannot be used to determine the interpretation and application of a provision in a supreme Constitution having a Bill of Rights. A Constitution has to be *always* interpreted within a context, or more specifically ‘in accordance with its semantic and jurisprudential context,’¹⁷⁶ Support for this view is reflected in *S v Zuma*:¹⁷⁷

‘Respect must be paid to the language which has been used and to the traditions and usages which gave meaning to the language.’

¹⁷² Devenish *A Commentary on the South African Bill of Rights* at 600.

¹⁷³ Ibid.

¹⁷⁴ Ibid at 599.

¹⁷⁵ Ibid at 608. The principle as discussed by Devenish which reads : ‘Context and clarity of language;’ has been modified for purposes of the research to ‘Context and the Importance of Language.’

¹⁷⁶ Ibid. (Emphasis Added)

¹⁷⁷ *S v Zuma* 1995 (4) BCLR 401 SA.

This language, particularly with regard to the Constitution, is generally framed in a broad and open-ended manner, which raises the question of the clarity of language.

According to Du Plessis, clear and unambiguous language is a fiction. It quite simply does not exist. His submission that the language of a statute can ... only be said to be clear once its meaning is ascertained from its intra and extra-textual structure,¹⁷⁸ reinforces the idea that the interpretation of the language requires an examination of the contextual setting. This was the pertinent issue in *S v Mhlungu*,¹⁷⁹ where the minority judgment (as per Kentridge J) maintained that when the meaning of the language was clear, the adoption of alternative meaning when considering the broad context of the Constitution placed a strain on the words. The majority judgment (as per Mahomed DP) reflected such interpretation. In its analysis, the Constitutional Court reasoned that if the clear, literal meaning of language gave rise to an acceptable and unjust anomaly, and consequently an alternative interpretive interpretation, was more in-keeping with the values of the Constitution – should be adopted.¹⁸⁰ This is holistic interpretation.

What is obvious from an examination of this case, therefore, is that while the minority regarded the clarity of the language as determinant of the correct meaning, the majority held the view that the language in effect is but ‘one’ of the factors that has to be considered in the process of interpretation.¹⁸¹ It is submitted that the reasoning underpinning the majority judgment in *Mhlungu* compares favourably with an eclectic methodology, as propounded. In giving expression to section 39 (2) of the Constitution which requires the ‘promotion of the values of the Constitution’, it is imperative that courts promote the values and principles that inform the thirteen chapters of the Constitution.’¹⁸² Bishop and Brickhill describe the process as a ‘Herculean task’ which our Constitutional Court has struggled with. In analyzing

¹⁷⁸ See discussion in Du Plessis *Re-Interpretation of Statutes* at 96.

¹⁷⁹ *S v Mhlungu* 1995 (3) SA 867 (CC).

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² Bishop and Brickhill ‘In the Beginning was the Word: The Role of the Text in the Interpretation of Statutes’ (2012) 129 *South African Law Journal* at 685.

five constitutional court judgments namely *South African Police Service v Public Servants Association*,¹⁸³ *Chirwa v Transnet Ltd and Others*,¹⁸⁴ *Bertie Van Zyl (Pty) Ltd v Minister of Safety and Security*,¹⁸⁵ *African National Congress v Chief Electoral Officer of the Independent Electoral Commission*¹⁸⁶ and *Van Vuren v Minister of Correctional Services*,¹⁸⁷ They are critical about the approach to statutory interpretation adopted by each of the courts. While the decision in respect of each of the above mentioned cases, is clearly indicative of a more purposive approach, the authors express their disapproval with the position expounded by the courts which in their opinion ‘leans too far away from the text’¹⁸⁸. In fact the authors go so far as to assert that when construing the relevant statutory provisions the Constitutional Court should have applied a more ‘textually plausible interpretation’.¹⁸⁹

It is submitted that consideration of the text or language is only partly instrumental in assigning a meaning to a provision. The language or the text must be considered with regard to the statute in its entirety – which includes the surrounding circumstances and the universal values of justice and fairness. This idea resonates with the proposed deontic theory of interpretation which identifies the literal or text-based approach as being but only one element in the process of interpretation. A purposive or contextual interpretation with its consideration of the constitutional framework which is specifically mandated by section 39 (2) of the Constitution, is better suited to meet the constitutional aims of a transformative constitution. Such a ‘holistic’ consideration of the factors that entails an evaluation of the text, an examination of the context of the legislative framework, with a focus on morality and ethics comprise the elements of the proposed deontic theory of interpretation. The submission by Bishop and Brickhill that statutory interpretation as a discourse must

¹⁸³ 2007 (3) SA 521 (CC).

¹⁸⁴ 2008 (4) SA 367 (CC).

¹⁸⁵ 2010 (2) SA 181 (CC).

¹⁸⁶ 2010 (5) SA 487 (CC).

¹⁸⁷ 2012 (1) SACR 103 (CC).

¹⁸⁸ Bishop and Brickhill ‘In the Beginning was the Word: The Role of the Text in the Interpretation of Statutes’ (2012) 129 *South African Law Journal* at 701.

¹⁸⁹ *Ibid* at 694.

place more emphasis on the language of the text is a return to ‘arid literalism’¹⁹⁰ which is associated with the literal theory, and cannot be supported as it does not conform with the process of interpretation that is mandated by section 39 (2) of the Constitution. It is the antithesis of the proposed deontic theory necessary for a transformative constitutional order.

3.8.3 Legislative History and Background¹⁹¹

Legislative history has been found to be used extensively in countries like the United States, France and Germany. The *travaux preporatoires*, as they are referred to, are also used extensively for the interpretation of international treaties. In countries such as Germany, Canada, India and the United States, as well as the European Court of Human Rights and the United Nations Committee on Human Rights, it has been observed that legislative history can also be consulted as an aid to interpretation as far as the Constitution is concerned.¹⁹²

A good illustration of a court having regard to the history and background to determine the interpretation of the Constitution, is in *S v Makwanyane*.¹⁹³

The court stated that:

‘The multi-party negotiating process was advised by technical committees, and the reports of these committees or the drafts are the equivalent of the *travaux preparatoires*, relied upon by the international tribunals. Such background materials can provide a context for the interpretation of the Constitution, and where it serves that purpose, I can see no reason why such evidence should be excluded. The precise nature of the evidence, and the purpose for which it may be tendered, will determine the weight to be given to it.’¹⁹⁴

¹⁹⁰ Ibid at 682.

¹⁹¹ See Devenish *A Commentary on the South African Bill of Rights* at 611, where the principle which is discussed by Devenish reads - ‘Legislative History.’ This has been modified for purposes of the research to ‘Legislative History and Background.’

¹⁹² Ibid.

¹⁹³ 1995 (6) BCLR (CC) at 679.

¹⁹⁴ Ibid at paras 17 and 18.

The court then referred to certain background materials which included the reports of various Technical Committees. Provided they were clear and not in dispute, the reports were used to show why particular provisions were either included or excluded in the interim Constitution. In *Makwanyane*, the materials were used to show that – by deliberately allowing the right to life as provided for in terms of the Constitution as, unqualified – those instrumental in drafting the Constitution intended to leave the question of the constitutionality of the death penalty up to the Constitutional Court to decide upon.¹⁹⁵ Yet another controversial decision, where the court had to give due consideration to the historical context and background, was that in the *Soobramoney* case.¹⁹⁶ The case highlighted that in interpreting the provisions of the Constitution, the court had to have an ‘acute awareness’¹⁹⁷ of what factors prevailed. Therefore, a consideration of the factors which included, for example, unemployment, inadequate social security and access to clean water and health services,¹⁹⁸ was essential to the interpretation of the right to health care as provided for in terms of the Constitution.

The idea of placing a right in its context by giving due consideration to the factors that prevailed prior to the Constitution, is fundamental in interpretation of a transformative Constitution. It also speaks directly to the role of judges in the process of interpretation in the current constitutional era. In order to achieve the aims of social transformation and to ‘address the needs of the most vulnerable and marginalized’¹⁹⁹ would require an evaluation of all the ethical and moral considerations and a pro-active stance to the process of interpretation when deliberating – as was evidenced in both *Makwanyane* and *Soobramoney*. This is the operation of a proposed deontic theory of interpretation, which has relevance to both statutory and constitutional interpretation. This theory is also holistic in nature, where the whole is greater than the sum of the parts. Holism as a philosophy has a

¹⁹⁵ De Waal *et al* *The Bill of Rights Handbook* (6th edition) at 142-143.

¹⁹⁶ *Soobramoney v Minister of Health KwaZulu-Natal* 1997 (12) BCLR 1696 (CC).

¹⁹⁷ De Vos *et al* *South African Constitutional Law in Context* at 33.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

peculiarly South African connection, having been expounded by South Africa's philosopher statesman JC Smuts in his book on the subject.²⁰⁰

3.8.4 Interpretation Favouring the Liberty of the Individual²⁰¹

Generally, the approach adopted by the courts in instances of ambiguity in the interpretation of a provision, where the fundamental rights of the individual are at stake, is that a provision must be interpreted in a manner that favours the liberty of the individual. This is the well known maxim known as *favorem libertatis*.²⁰²

Further, where there is a vagueness and flexibility of language, the courts were able to employ greater creativity in the interpretation process. It is therefore interesting that even in relatively early jurisprudence, as reflected in the judgment of *Bhyat v Commissioner for Immigration*,²⁰³ the approach of the Court was that – apart from absurdity, repugnancy, anomaly and inconsistency which are the normal circumstances that would yield an interpretation more favourable to the individual – hardship was also to be considered as factor to be considered. However, it is unfortunate that, in spite of this, our courts in the past under the old order have used this particular criterion as a determining factor with notable reluctance, when an individual's fundamental rights were brought into question.

Nevertheless, as a result of section 39(2) which mandates a value-coherent method of interpretation when individual rights are involved,²⁰⁴ it is clear that the maxim in

²⁰⁰ General Jan Christian Smuts (1870-1950) the fourth Prime Minister of South Africa and a British Commonwealth military leader, statesman and philosopher in his book *Holism and Evolution* (1926) described 'holism' as: 'The tendency in nature to form wholes that are greater than the sum of the parts through creative evolution. This factor called "holism" in the sequel underlies the systematic tendency in the universe, and is the principle which makes for the origin and progress of "wholes" in the universe...this whole-making or holistic tendency is fundamental in nature, that it has a well-marked ascertainable character and that Evolution is nothing but the gradual development of progressive series of wholes, stretching from inorganic beginnings to the highest levels of spiritual creation.'

²⁰¹ See Devenish *A Commentary on the South African Bill of Rights* at 612, where the principle 'Ambiguity and the *in favorem libertatis* principle' is discussed. This has been modified to 'Interpretation favouring the Liberty of the Individual,' for purposes of the research.

²⁰² Ibid.

²⁰³ 1932 AD 125 at 129.

²⁰⁴ Section 39 (2) provides that :

favorem libertatis would automatically apply. It is observed that even though quite early in our jurisprudence there was an attempt by courts to delineate and determinate what factors were significant and therefore required to be considered where an individual's fundamental rights were at stake, this is no longer necessary. An examination of the provisions of the Bill of Rights clearly supports interpretation in *favorem libertatis*.

However, it has to be mentioned that the rights and individual's liberties, as provided in Chapter 2 of the Constitution, are subject to section 36 – the limitation clause. In terms of section 36 (1), 'rights must be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including the:

- a) The nature of the right;
- b) The importance of the purpose of the limitation;
- c) The nature and extent of the limitation;
- d) The relation between the limitation and its purpose; and
- e) The less restrictive means to achieve the purpose.'²⁰⁵

What this in effect means, is that in order to determine whether there has been a violation of a provision of the Bill of Rights, both the section which encapsulates the fundamental right and section 36, must be examined together. The process therefore ensures that in its application – which involves a 'judicious weighting up of competing societal and ethical values'²⁰⁶ – confirms that the maxim in *favorem libertatis* would be applied in a manner so as to ensure that the rights of the individual would not be compromised.

'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.'

²⁰⁵ Section 36 of the Constitution deals with the limitation of rights and is referred to as the Limitation Clause.

²⁰⁶ Devenish *A Commentary on the South African Bill of Rights* at 548.

3.8.5 Reading-down Interpretation In Conformity with the Constitution²⁰⁷

Devenish describes the process which requires reading-down as a process of interpretation conforming with the Constitution, as constituting a ‘presumption of constitutionality’. This presumption arises where a rigid Constitution makes provision for a bill or draft legislation to be scrutinized by a particular statutory body in order to determine its legal compatibility with the Constitution.²⁰⁸ What this means in a constitutional dispensation involving a testing right, is that courts of law will not lightly invalidate an Act of parliament, but instead attempt to interpret a provision in a way that is compatible with the Constitution.²⁰⁹

According to Hogg,²¹⁰ in terms of Canadian constitutional law there are three consequences of the presumption of constitutionality:

- (i) In choosing competing, plausible characteristics of the law, the court should normally choose that one which would support the validity of the law;
- (ii) A finding of fact need not be strictly proved by the government, it is sufficient that there should be a rational basis for the finding; and
- (iii) Where the language of a statute is equally capable of two constructions, one of which would be in conflict with the Constitution and the other compatible with it, the latter should be preferred. This interpretational technique is known as reading-down.

The processes – as articulated by Hogg – clearly comprises the reading-down as interpreting in conformity with the Constitution, explained above.²¹¹

²⁰⁷ Ibid. The principle as discussed by Devenish, namely, ‘The Presumption of Constitutionality,’ has been modified for purposes of the research to ‘Reading in Conformity with the Constitution.’

²⁰⁸ Devenish *Interpretation of Statutes* at 210.

²⁰⁹ Devenish *A Commentary on the South African Bill of Rights* at 601.

²¹⁰ Ibid.

²¹¹ See discussion in **Chapter 3.4 Reading-in, Reading-down, Severance and Reading in Conformity with the Constitution.**

To re-iterate the position in terms of current South African law, where one of two conflicting interpretations of a statutory provision clearly promotes the spirit, purport and objects of the Bill of Rights – then that particular one is preferred over the one that does not do so.²¹² Because the Constitution is a value-laden document, it means that the values ‘must be promoted and nurtured and applied’.²¹³ The promotion and implementation of a rights culture in South Africa, is without a doubt a ‘crucial constitutional function of the judiciary’.²¹⁴ Reading-down or interpretation in conformity with the Constitution, which requires that all laws must be seen through the prism of the Bill of Rights, is consistent with deontic reasoning²¹⁵ and favours the operation of the proposed deontic theory. It is not surprising, therefore, that in terms of both the Interim and the Final Constitution, the reading-down interpretation in conformity with the Constitution is regarded as a fundamentally important technique of interpretation.

3.8.6 Value-Based Interpretation²¹⁶

As already discussed in this and other chapters in this thesis, an examination of section 39 reveals that the methodology of interpretation mandated by this section is a purposive or value-based method of interpretation.²¹⁷ As the supreme law of the land, the Constitution does not only contain provisions that ensure *inter alia* formal checks and balances on state power, but first and foremost, it is a value-laden document. It is underpinned by a number of either express or implied values and norms.²¹⁸

²¹² Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-139.

²¹³ Botha *Statutory Interpretation* (5th edition) at 200.

²¹⁴ *Ibid* at 201.

²¹⁵ See **Chapter 1** for a definition of the terms and a discussion of the origins of Deontology and Deontic Reasoning.

²¹⁶ A value-based methodology is pivotal to the operation of the teleological theory of interpretation. See discussion at **2.5** and **2.5.1** in **Chapter 2**, for an examination of the merits and demerits of the teleological theory.

²¹⁷ This is more aptly referred to as the teleological theory of interpretation.

²¹⁸ Botha *Statutory Interpretation* (5th edition) at 200.

In reflecting on the role of judges, Dworkin asserts that judges are bound when delivering judgment to adjudicate in accordance with the principles derived from political morality, that are ‘presupposed by the laws and institutions of the community’.²¹⁹ He therefore argues that the only ‘acceptable grounds’ are the ‘principles embedded in the body of settled law’.²²⁰ He explains further that when interpreting the provisions of a statute, the statute has to be ‘read against a background of common-law principles’.²²¹ The South African Constitution with its justifiable Bill of Rights and the underlying values and principles can indeed be regarded as providing this background standard, referred to above.

This position is affirmed in *Holomisa v Argus Newspapers Ltd*,²²² where the Court – in referring to the interpretation clause of the Constitution – maintained that it is:

‘not merely an interpretive directive, but a force that informs all legal institutions and decisions with the new power of constitutional values’.

These constitutional values and principles do not only provide the ideals and goals to which South African society aspires, but they form the articulated set of guidelines or the ‘yard stick against which everything is viewed and reviewed’.²²³ It therefore raises the question about how to give effect to the ‘values’ of the Constitution – particularly in a diverse society like South Africa, which has a history of oppression, racism, sexism and discrimination. Tully’s succinct response to the problem is clear – ‘to continue to inform the language of constitutionalism in which the demands are taken up and adjudicated’.²²⁴ In a transformative Constitution, therefore, judges need to embrace this challenge through interpretive discourse, in order to speak for the weak and marginalized groups in South Africa. While the constitutional processes exist, the ‘new’ challenge for constitutional interpretation is not only to give effect to the fundamental constitutional values, but to meet the demands for social

²¹⁹ Devenish *Interpretation of Statutes* at 47.

²²⁰ Ibid.

²²¹ Ibid.

²²² 1996 (2) SA 588 (W).

²²³ Botha *Statutory Interpretation* (5th edition) at 102.

²²⁴ Ibid at 201.

transformation.²²⁵ What is needed is a theory of interpretation that requires one to look beyond the fundamental constitutional values, in order to meet this challenge. It is submitted that the proposed deontic theory which requires an evaluation of ethical and moral considerations including the need for social and economic equality in the interpretation and the pro-active application of the law, is postulated as the theory that would be most suited to meet the ‘new’ challenge in a democratic era.

3.9 The Interpretation and Application of Section 39²²⁶

The ambit of section 39 is not restricted to the interpretation of Chapter 2 of the Constitution but applies to all law.²²⁷ The use of both international law and foreign law is ‘inevitable and sanctioned.’²²⁸ In respect of the process of interpretation, therefore, reference to both international and foreign authorities is necessary. The reference to sources outside of South Africa should be regarded as beneficial for the development of South African law, and should undoubtedly influence our emerging jurisprudence.

Nevertheless, while the obvious benefits or advantages of referring to international and foreign law is apparent in case-law,²²⁹ it must be emphasized that such comparison has to be done ‘with due regard to the uniqueness of our Constitution, our history and our circumstances’.²³⁰ This sentiment is also shared by scholars that

²²⁵ Ibid at 204.

²²⁶ Section 39 of the Constitution provides:-
‘ (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.
(2) 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.
(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.’

²²⁷ Devenish *A Commentary on the South African Bill of Rights* at 620.

²²⁸ Ibid at 617.

²²⁹ See for example *S v Zuma* 1995 (4) BCLR 401 SA and *S v Makwanyane* 1995 (3) SA 391 (CC).

²³⁰ *S v Makwanyane* 1995 (3) SA 391 (CC) at para 39.

while American jurisprudence, for example, can prove to be beneficial and interesting, one has to be aware that the circumstances in South Africa and the United States of America differ considerably, and one should be mindful of this if such a comparison has to be made.²³¹

Section 39(2) also deals with the interpretation of legislation other than the Bill of Rights. An examination of the contents of the section reveals that it does expressly prescribe a purposive or a teleological method of interpretation. Therefore, the fact that this section requires that all courts, tribunals or forums must fulfill the aim and purpose of legislation in light of the Bill of Rights, and therefore ‘authorises a departure from literalism in the interpretation of law.’²³² This section allows for courts to abandon their stale, positivist style of interpretation and employ a ‘value-orientated method of interpretation’.²³³ A case that is worth reflecting on in respect of this, is *Jacob Zuma v The National Director of Public Prosecutions*.²³⁴

Nicholson J’s judgment, is fraught with inconsistencies, incongruities and controversy. While the judgment raises a plethora of political and legal issues, it is not the intention of the writer to venture into a political discourse – but rather to use an analysis of the approach adopted to statutory interpretation which influenced the court’s decision.²³⁵ In considering the relevant provisions, namely section 22(2) (c) of the National Prosecuting Authority Act,²³⁶ Nicholson J found that it was necessary to focus on the ‘intention of the legislature’ (para 76 and para 77). What is obvious from these paragraphs of the judgment, is that Nicholson J adopts an unmistakable literal analysis of the legislation in question. Unfortunately, the

²³¹ Devenish *A Commentary on the South African Bill of Rights* at 618.

²³² *Ibid* at 621.

²³³ *Ibid*.

²³⁴ 2009 (1) All SA 54 N.

²³⁵ Singh ‘The Question of Interpretation in the Nicholson Judgment – Jacob Zuma v The National Director of Public Prosecutions [2009] 1 All SA 54 N’ (2009) 30 *Obiter* at 784.

²³⁶ 32 of 1998. Section 22 (2) (C) of the National Prosecuting Authority Act 32 of 1998 mirrors section 179 (5) (d) of the Constitution.

approach of the judge to interpretation reflects a literal theory of interpretation which is not only jurisprudentially unsound, but also inherently flawed.²³⁷

Nevertheless, while the judge's approach in respect of para 76 and para 77 has been criticized on the basis that it reflects a qualified contextual approach, a more careful analysis of the judgment of Nicholson J reveals an ambivalence on the part of the judge as he also supports a purposive or an unqualified contextual approach to interpretation.²³⁸ In referring to section 39, a value-orientated method of interpretation is given expression to:

'If it is clear that when interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society that is based on human dignity, equality and freedom. The provision of the right to make representations to an accused would pay appropriate tribute to his right to human dignity, given the opprobrium that is normally attendant upon a criminal trial'.

The approach employed in the above paragraph is clearly in keeping with that mandated by the Constitution. It is unclear, therefore, why the judge chose to also support the literal method of interpretation – in other parts of the judgment. The use of the literal theory in the Nicholson judgment is incorrect, on the basis that it gives credence to a discredited and archaic system. With the advent of the new constitutional democracy, South African jurisprudence made a paradigmatic shift away from a system based on parliamentary sovereignty, to a purposive or value-based methodology of interpretation.²³⁹ Nevertheless, notwithstanding that a purposive or a teleological approach is mandated by the Constitution, what can be garnered from an examination of case-law²⁴⁰ is that there are still a number of recent

²³⁷ Singh 'The Question of Interpretation in the Nicholson Judgment – Jacob Zuma v The National Director of Public Prosecutions [2009] 1 All SA 54 N' (2009) 30 *Obiter* at 786.

²³⁸ *Ibid* at 788.

²³⁹ *Ibid* at 789-790.

²⁴⁰ See for example, *Adampal (Pty) Ltd v Administrator* 1989 (3) SA 800; *RPM Bricks (Pty) Ltd v City Tshwane Metropolitan Municipality* 2007 9 BCLR (TPD); and *Swanepoel v JHB City Council* 1994 (3) SA 789 (A).

cases where courts have invoked the orthodox primary rule of interpretation – which reflects a literal theory of interpretation.²⁴¹

Because section 39(2) is a peremptory provision, it means that the section mandates or obliges the interpreter to promote the values and objects of the Bill of Rights.²⁴² As a result, the interpreter is required to consider factors outside the legislation. A consideration of the context is regarded as being an inevitable part of the process of interpretation. It enables the right in question to be put in perspective. The interpretation of statutes must always start with the Constitution and not with the legislative text.²⁴³ This position is affirmed by Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Environment Affairs and Tourism* – who declared that ‘the starting point in interpreting any legislation is the Constitution’.²⁴⁴ What is evident from an examination of case-law, is that South Africa’s history is regarded as being integral to the process of interpretation, since it provides the context for understanding the various provisions in the Constitution. The Constitutional Court therefore attempts to use South Africa’s history as a ‘grand narrative’ to justify its interpretations.²⁴⁵ In so doing, in applying a ‘forward-looking’ approach to interpretation, and giving effect to social transformation, the intention is to ‘prevent a recurrence of the injustices of the past’.²⁴⁶ Indeed, such an approach to interpretation is characteristic of a transformative constitution.

3.10 An Examination of the Seminal Constitutional Court Cases that Illustrate the Emerging Jurisprudence of Transformation – Reflecting Deontic Interpretation

Many of the cases that are discussed below are referred to in this chapter as well as others throughout the thesis. They are expounded in greater detail below to show

²⁴¹ Singh ‘The Question of Interpretation in the Nicholson Judgment – Jacob Zuma v The National Director of Public Prosecutions [2009] 1 All SA 54 N’ 2009 30 *Obiter* at 790.

²⁴² Botha *Statutory Interpretation* (5th edition) at 101.

²⁴³ *Ibid.*

²⁴⁴ 2004 (4) SA 490 (CC) at paras 72, 80 and 90.

²⁴⁵ De Vos *et al South African Constitutional Law in Context* at 32.

²⁴⁶ *Ibid.*

that they reflect the emerging jurisprudence of transformation that supports a deontic theory of interpretation.

In taking their directive from section 39 (2) – to ‘promote the spirit, purport and objects of the Bill of Rights,’ what is evident is that courts are mandated to interpret legislation to give effect to the values and norms that underlie a democratic constitutional order. While there is no exact meaning of what the phrase entails – the interpretation and application of section 39 (2) has seen our courts promote values such as democracy, independence, accountability, responsiveness and openness as well as a ‘myriad of other structural values that inform the Constitution.’²⁴⁷

Taking its cue from the Canadian case – of *R v Big M Drug Mart Ltd* that:

‘The meaning of a right or freedom guaranteed by the Charter is 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 concepts enshrined, and where applicable to the meaning and purpose of the other rights and freedoms with which it is associated within the text of the Charter.’²⁴⁸

the landmark decision of *S v Makwanyane and Another*²⁴⁹ emulates this position. Mahomed J perceptively highlights the factors that ought to inform the process of statutory interpretation. He asserts that:

‘South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic,

²⁴⁷ Bishop and Brickhill ‘In the Beginning was the Word: The Role of the Text in the Interpretation of Statutes’ (2012) 129 *South African Law Journal* at 685.

²⁴⁸ 1985 18 DLR (4th) 321 at 395 – 6.

²⁴⁹ 1995 (6) BCLR 655 (CC); 1995 (3) SA 391 (CC).

universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.’²⁵⁰

The notable shift in emphasis from a literal interpretation with its focus on the ordinary grammatical meaning of the word, to a more encompassing or teleological interpretation with due consideration of the wider context and purpose for the promulgation of legislation, has been favoured by our Constitutional Court for statutory and constitutional interpretation in the current open and democratic constitutional dispensation. From the above *dictum*, it is emphasised that while literal or ordinary grammatical meaning must be taken into account, it is not necessarily conclusive. The literal meaning is but one consideration – and it will only be accepted if it accords with a ‘purposive’ or ‘generous’ interpretation – that ‘gives expression to the values of the Constitution.’²⁵¹ In *S v Mhlungu*,²⁵² which is perhaps one of the most controversial cases to have applied the generous or purposive approach to interpretation, the majority judgment (as per Mahomed) identifies the language as one of the factors in the process of interpretation. This idea that language has to be considered collectively with other factors, which includes an amalgamation of the various methodologies of interpretation, finds resonance with an eclectic methodology which supports the operation of the proposed deontic theory of interpretation.

In *Investigating Directorate Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit NO and Others*²⁵³ the Constitutional Court had to consider whether section 29 (2) of the National Prosecuting Authority Act²⁵⁴ – constituted a limitation to privacy – and to determine further whether the limitation is constitutionally justifiable in terms of the

²⁵⁰ Ibid at para 262.

²⁵¹ Ibid at para 9.

²⁵² 1995 (3) SA 867 (CC). The case is discussed more fully in **Chapter 2 at 2.2.2 Criticisms of the Literal Theory.**

²⁵³ 2001 (1) SA 545 (CC).

²⁵⁴ Section 29 (2) of the National Prosecuting Authority Act provides: ‘Any entry upon or search of any premises in terms of this section shall be conducted with strict regard to decency and order, including – a) a person’s right to, respect for and the protection of his or her dignity; b) the right of a person to freedom and security; and c) the right of a person to his or her personal privacy.’

provisions of section 36 (1) of the Constitution. In his ground breaking judgment Langa DP, in reflecting on the proper approach to statutory interpretation as provided in terms of section 39 (2) states that:

‘When interpreting any legislation, and when developing the common law and customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights,’

that all statutes must be interpreted through the prism of the Bill of Rights. In essence therefore all law making authority must be exercised in accordance with the Constitution. The Constitution is located in history which involves a transition from a society based on division, injustice and exclusion – as such the process must recognise the context in which we find ourselves.²⁵⁵ In the process of interpretation therefore, regard has to be given to the foundational values that underpin the constitutional democracy. Some of these values include – human dignity, the achievement of equality, the advancement of human rights and freedoms, and non-racialism and non-sexism. What this in effect means in the process of interpretation is that in construing the relevant section 29 of the National Prosecuting Authority Act that the search and seizure of property had to be carried out in accordance with the provisions of the Constitution.²⁵⁶

This position is affirmed by Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism and Others*²⁵⁷ who makes a resounding statement that interpretation starts with the Constitution. The interpretation of the Bill of Rights has seen the cardinal values such as human dignity, equality and freedom being applied to specific situations. Exemplary in this regard is the case of *Bato Star* which related to the allocation of quotas in the fishing industry. The amount of fish that could be caught for commercial purposes was restricted by a quota system. The relevant legislation that had to be interpreted was section 2 of the Marine Living

²⁵⁵ *Investigating Directorate Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit NO and Others* 2001 (1) SA 545 (CC) at para 21.

²⁵⁶ *Ibid* at para 39.

²⁵⁷ 2004 (7) BCLR 687(CC).

Resources Act²⁵⁸ - which provided that the Minister ‘must have regard to’, the objectives and principles as provided for in terms of the section when making allocations in terms of the Act. The case therefore depended on the interpretation and application of the phrase ‘have regard to.’ The interpretation of the phrase by the Supreme Court of Appeal gave the words their ordinary grammatical meaning. This meant that the question of equity had to be considered with other factors as it was not necessarily of special concern. The Constitutional Court however, maintained a contrary view point. In applying a purposive methodology the question of interpretation required that equity should be considered as an overriding consideration – and not simply as an element in the process as was decided by the Supreme Court of Appeal.

Ngcobo J articulated his position as follows: -

‘I accept that the ordinary meaning of the phrase “to have regard to” has in the past been construed by the Courts to mean “bear in mind” or “do not overlook”. However the meaning of that phrase must be determined by the context in which it occurs. In this case that context is the statutory commitment to redressing the imbalances of the past, and more importantly, the constitutional commitment to the achievement of equality. And this means that the phrase as it relates to section 2 must be construed purposively to “promote the spirit, purport and objects of the Bill of Rights”. That object is “the achievement of equality”, a foundational value that is affirmed in section 9 (2) of the Constitution.’

Such a purposive value-based methodology was also clearly evidenced in *United Democratic Movement v President of the Republic of South Africa*²⁵⁹ which concerned the constitutionality of four pieces of legislation described as a ‘package’ of legislation.²⁶⁰ In construing the relevant legislation, consideration was given to

²⁵⁸ 18 of 1998.

²⁵⁹ 2003 (1) SA 495 (CC).

²⁶⁰ The four Acts that comprised the ‘package’ were namely: - the Constitution of the Republic of South Africa Amendment Act 18 of 2002; the Constitution of the Republic of South Africa Second Amendment Act 21 of 2002; the Local Government: Municipal Structures Amendment Act 20 of 2002; and the Loss of Retention of Membership of National and Provincial Legislatures Act 22 of 2002.

the founding values of the Constitution – which are provided for in section 1. The Court therefore read the provisions of the legislation against the context of the Constitution – as a whole. In giving effect to a contextual or purposive methodology – which is epitomised by section 39 (2), the approach that was adopted was that:

‘A court must endeavour to give effect to all the provisions of the Constitution. It would be extraordinary to conclude that a provision of the Constitution cannot be enforced because of an irreconcilable tension with another provision. When there is tension, the courts must do their best to harmonise the relevant provisions, and give effect to all of them.’²⁶¹

The directive that section 39 (2) must promote the spirit, purport and objects of the Bill of Rights – is slightly more nuanced in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd*²⁶². where the Constitutional Court took the approach that section 39 (2) requires an interpretation that ‘better’ promotes this spirit, purport and objects of the Bill of Rights²⁶³. Therefore in the Agricultural Land Act²⁶⁴, which had to be construed, the Constitutional Court criticised the approach of the Supreme Court of Appeal that a literal or textual reading was to be attributed to the Act.²⁶⁵ The notion of the ‘legislators intention’ which supports a literal methodology was also challenged on the basis that in trying to establish the ‘intention of the legislature’ the question that arises is for how long was it intended that the position would continue? The enquiry therefore highlights the obvious flaws inherent in the literal theory.²⁶⁶ The position that was maintained was that statutory interpretation must be determined in the context of the statute which includes its purpose and must be read in its entirety,²⁶⁷ which is reflective of teleological interpretation. In light of this meaning, the

²⁶¹ *United Democratic Movement v President of the Republic of South Africa and Others* 2003 (1) SA 495 (CC) at para 83.

²⁶² 2009 (1) SA 337 (CC).

²⁶³ Ibid at para 46. The author acknowledges reference made to the unpublished chapter – by Govender on: ‘Operating the Bill of Rights’.

²⁶⁴ 70 of 1970.

²⁶⁵ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC) at para 65.

²⁶⁶ See discussion in **Chapter 2, 2.2 The Literal Theory**.

²⁶⁷ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC) at para 61. The author acknowledges reference made to the unpublished chapter – by Govender on: ‘Operating the Bill of Rights’.

purpose of the Agricultural Land Act- included the authority accorded to the Minister to exercise the powers anticipated for future acquisition by a provincial government to assume responsibility for the administration of laws falling within the functional area of agriculture.²⁶⁸ Therefore as illustrated in the above mentioned case, the courts are required to adopt an interpretation that best promotes or advances the totality of the rights and values entrenched in the Bill of Rights. This is pro-active interpretation.

In applying the principle that our courts must give expression to the values of human dignity, equality and the advancement of human rights there must be regard to far-reaching consequences in the development and evolution of South African jurisprudence. This has not been more prevalent than in the education sector which has resulted in a plethora of cases being decided by the Constitutional Court on an array of matters pertaining to education. The resultant effect thereof has seen the interpretation, application and enforcement of rights being guided by the constitutional values and principles. The *Höerskool Ermelo*²⁶⁹ case provides an example of the application of these principles. The case dealt with the right to receive education in the official language of ones choice in a public educational system. The medium of instruction at the Höerskool Ermelo was Afrikaans. The main issue before court was whether the HoD may lawfully revoke the function of the governing body at a public school – to determine its language policy and to confer the function on an interim committee appointed by him. The relevant legislation required the interpretation of section 22 and section 25 of the Schools Act.

The approach and values of the High Court mirrored that of *Minster of Education, Western Cape, and Others v Governing Body, Mikro Primary School and Another*²⁷⁰, where the position of the Supreme Court of Appeal was that section 22 of the Schools Act entitled the HoD to revoke the school's language policy and the power of the functions of the school governing body. The HoD was therefore entitled to

²⁶⁸ Ibid.

²⁶⁹ *Head of Department, Mpumalanga Department of Education and Others v Hoerskool Ermelo* 2009 (ZACC) 32.

²⁷⁰ 2006 (1) SA 1 (SCA); 2005 (10) BCLR 973 (SCA).

revoke the power to determine the language policy and to confer the power to an interim committee²⁷¹. The Supreme Court of Appeal reversed the decision of the High Court and found that the HoD had no power whatsoever to revoke the competence of the school to determine the language policy.²⁷² The decision of the Constitutional Court differed markedly from the lower courts. In placing the right in its context, it was maintained that the right to education and to be educated in the language of one's choice, was explicitly provided for in terms of section 29 (2) of the Constitution. In interpreting the Schools Act therefore it was necessary to place the right to education in its context. This required that one had to consider the broader constitutional scheme that education was to be made progressively available and accessible to everyone.²⁷³ In deciding what was fair in the circumstances, it was necessary to take heed of the South African legacy of apartheid and the inequalities and disparities in the education sector.²⁷⁴ It was therefore emphasised that a key consideration and one which should have been given more focus and emphasis was the 'need to ensure that the stranded learners were provided with a school to attend.'²⁷⁵ The basis of the reasoning and analysis of the Constitutional Court was unmistakably a broad purposive or more accurately a teleological method of interpretation.

The *MEC for Education v Governing Body of the Rivonia Primary School*,²⁷⁶ is a further illustration of teleological interpretation applied by the courts. A closer examination of what transpired requires consideration. According to the facts of the case, the Rivonia Primary School refused to admit a Grade 1 learner on the basis that it had reached its maximum capacity of 120 Grade 1 learners. The mother of the child, complained firstly to the Department of Education and thereafter to the MEC of the province. The Department overturned the refusal and instructed the principal

²⁷¹ *Head of Department, Mpumalanga Department of Education and Others v Hoerskool Ermelo* 2009 (ZACC) at para 30 and 31.

²⁷² *Ibid* at para 35.

²⁷³ *Ibid* at para 61.

²⁷⁴ *Ibid* at para 2.

²⁷⁵ *Ibid* at para 8.

²⁷⁶ 2013 (12) BCLR 1365 (CC).

to admit the learner. In February 2011, when the mother brought the child back to school, they still refused to admit the child. What followed thereafter was a controversial sequence of events, to say the least. As a result of the principal not admitting the child, the HoD proceeded to withdraw the principal's admission function, and delegated it to another official. The officials from the Department, thereafter arrived at the school and physically placed the child in a Grade 1 classroom. The fate of the principal was that she was subjected to a disciplinary hearing, for a failure to comply, was given a final warning and had a month's salary deducted.²⁷⁷

The High Court was satisfied that the Department had acted fairly and reasonably. The Supreme Court of Appeal however, overturned the decision, on the basis that the Department did not have the legal power to override the school's admission policy. On having lost in the SCA, the MEC appealed to the Constitutional Court – that had to decide on the contentious issue of how a conflict between the School's Governing Body and the Provincial Education Department was to be resolved.

The Constitutional Court held that although in terms of the Schools Act,²⁷⁸ the School Governing Body may determine the capacity of the school as an important part of its admission policy, the Department always had ultimate control over the implementation of this policy.²⁷⁹ Nevertheless, the manner in which the HoD had exercised his power was not procedurally fair. The court referred to the cases of *Head of Department, Department of education Free State Province v Harmony High School and Another*²⁸⁰ and *Head of Department of Mpumalanga Department of Education and Another v Höerskool Ermelo*²⁸¹ in this regard, where it was noted that

²⁷⁷ Ibid at para 15.

²⁷⁸ 84 of 1996.

²⁷⁹ *MEC for Education v Governing Body of Rivonia Primary School* 2013 (12) BCLR 1365 (CC) at para 81.

²⁸⁰ 2013 (9) BCLR 989.

²⁸¹ 2010 (3) BCLR 177 (CC) at para 56, the Constitutional Court clearly set out what was expected of the relevant role-players in terms of the Schools Act 84 of 1996, as follows: 'An overarching design of the Act is that public schools are run by three crucial partners. The national government is represented by the Minister of Education whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and together with the Head of Provincial Department of Education, exercises executive control

the ‘parties had failed to engage with each other in good faith to uphold principles of co-operative government, and comply with their concomitant duty to avoid litigation.’²⁸² The Court referred to section 40(2) and section 41(h) (vi) of the Constitution, which basically highlights co-operation as being integral to resolving disputes of this nature. The respective sections provide that:-

‘All spheres of government must observe and adhere to the principles of this Chapter’;

and

‘All sphere of government...must co-operate in mutual trust and good faith by, avoiding legal proceedings...’

What is obvious from the above provisions, is that co-operation is pivotal in resolving disputes between school governing bodies and national or provincial government. Unfortunately, from the facts of the case, this did not materialize. This is clearly reflected in the following paragraph where it was asserted that :

‘This case illustrates the damage that results when some functionaries fail to take general obligation to act in partnership and co-operation seriously. In the early stages of the tussle there was some engagement between the parties, albeit tense. The value of that engagement was demonstrated by the understanding between the school and the Department at the end of November 2010.

By contrast, the manner in which the Gauteng HoD thereafter exercised his powers completely upended the process. The heavy-handed approach he used when making his decision raised the spectre that the Department would use its powers to deal with systematic capacity problems in the province with regard to the role of governing in the Schools Act’s carefully crafted

over public schools through principals. Parents of learners and members of the community in which the school is located are represented in the school governing body which exercises defined autonomy over some domestic affairs of the school.’

²⁸² *MEC for Education v Governing Body of Rivonia Primary School* 2013 (12) BCLR 1365 (CC) at para 62.

model. It caused antagonism and mistrust, causing the Rivonia Governing Body to recoil.’²⁸³

What is apparent from the case is that all the relevant role players had to make a concerted effort by co-operation to resolve the matter. Such co-operation is not only optional, but is in fact mandatory. Therefore, in giving effect to section 39(2) which mandates a value-based methodology, the approach of the Court is clearly teleological. However, the stance adopted by the majority in the Constitutional Court as reflected in the above case as well as others discussed above may be described as being pro-active. In *NK v Minister of Safety and Security*²⁸⁴ where the applicant sought damages in delict from the Minister of Safety and Security on the basis that she was raped by three uniformed on-duty policemen, the Constitutional Court had to consider the scope of vicarious liability of the Minister of Safety and Security under the law. The Constitutional Court focused on the mandate to develop the common law to promote the spirit, purport and objects of the Bill of Rights. The Court referred to *S v Thebus and Another*²⁸⁵ where Moseneke J identified the need to develop the common law in at least two instances:

‘The first would be when the rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the “objective normative value system” found in the Constitution.’²⁸⁶

The Court further affirmed the persuasive normative effect of our Constitution that was acknowledged by the court in *Carmichele v Minister of Safety and Security and*

²⁸³ Ibid at para 74 and para 75.

²⁸⁴ 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC).

²⁸⁵ 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) at para 28.

²⁸⁶ 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) at para 16.

*Another*²⁸⁷. The Constitutional Court was unwavering in its assertion that the common law had to be infused with the values of the Constitution – and that such a ‘normative influence of the Constitution – had to be felt throughout the common law.’²⁸⁸ This is clearly a methodology that transcends a teleological evaluation. In a transformative constitution like that in South Africa the overarching consideration is that the ‘spirit of transition and transformation should characterize the constitutional enterprise as a whole.’²⁸⁹ In a transformative constitutional order as is reflective of South Africa presently, the traditional or more commonly accepted theories of interpretation that have been used by South African courts, are not adequate to meet the challenges of an emerging democracy. It is therefore submitted that a deontic theory of interpretation which is based on ethical and moral considerations and incorporates inductive and deductive reasoning and which is to be applied proactively – is most appropriate in a transformative society. The element of proactivism as is highlighted in the Constitutional Court’s approach above, is pivotal to the operation of the proposed deontic theory.

3.11 Conclusion

With its far-reaching consequences, the Constitution has to be regarded as being singularly the most important legal instrument in South African history. This has certain important consequences.

First and foremost, a comparison between the Constitution and ordinary statutes, reveals a striking commonness or commonality.²⁹⁰ This does not, however, come as a surprise, since both ordinary statutes and the Constitution are enacted law texts, which means they actually belong to the same text genre(s). As a result, the logic that

²⁸⁷ 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 54. The author acknowledges reference made to the unpublished chapter – by Govender on: ‘Operating the Bill of Rights’.

²⁸⁸ 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) at para 15.

²⁸⁹ *Investigating Directorate Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd; In Re Hyundai Motor Distributors (Pty) Ltd v Smit NO and Others* 2001 (1) SA 545 (CC) at para 51.

²⁹⁰ See **3.2 Differences and Similarities Between Constitutional Interpretation and Ordinary Statutory Interpretation**, in **Chapter 3**.

follows is that the strategies and justifications for their interpretation will also have much in common.²⁹¹

Nevertheless, as emphasized, statutes and the Constitution are ‘significantly and consequently different’ in certain respects, and this also applies to both statutory and constitutional interpretation.²⁹² Due to its proclamation of supremacy (in terms of section 2), and the interpretation provision (section 39) clearly mandate the purposive or teleological method.

In reflecting on what is needed in a transformative society, it is emphasized that the role of judges needs to more focused on facilitating social justice. It therefore begs the question – what theory of interpretation should underpin the process of interpretation? What is apparent from an examination of case-law, is that simply focusing on a particular theory of interpretation is inadequate. In a transformative Constitution, it is necessary to give effect to the combined operation of the theories and to amalgamate their respective methodologies to be able to fulfil the aims of social justice. It is for this reason that a deontic theory and reasoning through creative and pro-active interpretation with an eclectic methodology is proposed for both constitutional and statutory interpretation in South Africa.

²⁹¹ Du Plessis *The Re-Interpretation of Statutes* at 15.

²⁹² *Ibid.* See comments by Du Plessis in the Prolegomenon at vii.

CHAPTER 4

THE RELEVANCE OF THE COMMON - LAW PRESUMPTIONS OF INTERPRETATION IN THE CURRENT DEMOCRATIC CONSTITUTIONAL ERA IN SOUTH AFRICA*

4.1 Introduction

The focus of Chapter 4 is on an examination of the common-law presumptions of interpretation. The purpose in examining the presumptions of interpretation is:

- a) to assess their significance prior to and subsequent to the current constitutional era in South Africa; and
- b) to determine if in their role as ‘verbalization of values vital to the sustenance of a just and effective legal order,’¹ whether they will continue to contribute to the emerging jurisprudence in South Africa.

As principles of common-law, the presumptions encapsulate fundamental values and inherent principles of justice. Prior to the new constitutional dispensation, the common-law presumptions were in effect a surrogate for the Bill of Rights. The advent of a supreme Constitution has brought about a significant change to the perception and attitude of the traditional role of presumptions.

** In terms of the University Rule DR 8 Submission of Thesis: Every student for a Doctoral degree shall be required to submit:-*

(i) a thesis embodying the results of their research, together with (ii) one (1) published paper or an unpublished manuscript that has been submitted to an accredited journal, arising from the doctoral research...’

To meet the requirements of the above rule, Chapter 4 has been modified and submitted for publication. The article in its published form appears as Singh ‘A Re-Evaluation of the Common-Law Presumptions of Interpretation in Light of the Constitution’ (2012) 75 Journal on Contemporary Roman-Dutch Law at79-100. For this reason the similarities with the contents of Chapter 4 and the above-mentioned article are noted.

¹ Du Plessis *The Re-Interpretation of Statutes* at 151. It is noted that all presumptions, even the most technical ones are verbalisations of values. Some of these diverse values are identified as equity, reasonableness equality (before the law and otherwise), legality, legal certainty and public interest.

In terms of section 39(2) of the Constitution, there is a constitutional imperative to develop the common-law. This sentiment resonates in the Constitutional Court decision of *Carmichelle v Minister of Safety and Security*,² where there is an obligation on courts to develop the common-law. The Court goes so far as to assert that this obligation is mandated and necessary to ensure that the common-law is developed to bring it in line with constitutional values. A failure to do so would not only be contrary to the values and principles enshrined in the Constitution, but could possibly contribute to the diminished status of presumptions and eventually also see the demise of very important principles of statutory interpretation.

Since the inception of the new order, most common-law presumptions have been subsumed into the provisions of the Bill of Rights. Those that are not subsumed are complementary and must be developed in accordance with constitutional principles. It is not surprising, therefore, that the transformative constitutional era has revealed a new classification of presumptions. There are three subdivisions that comprise this categorization. These are presumptions that:

- (i) Have been (or seem to be) subsumed under the Constitution;
- (ii) Seem to be incompatible or inconsistent with the Constitution; and
- (iii) Seem to have been left unaffected by the Constitution.³

In order to achieve the aims as outlined in this chapter, which is to assess the relevance of the common-law presumptions and their role in the constitutional era, it is neither necessary nor practical to examine all of the common-law presumptions that are used.⁴ For purposes of the research, the following presumptions – the state

² 2001 (4) SA 938 (CC) par 39: 'It needs to be stressed that the obligation of Courts to develop the common law, in the context of the S 39 (2) objectives, is not purely discretionary. On the contrary, it is implicit in S 39 (2) read with S 173 that where the common law as it stands is deficient in promoting the S 39 (2) objectives, the Courts are under a general obligation to develop it appropriately.'

³ Du Plessis *The Re-Interpretation of Statutes* at 153. The classification as presented by Du Plessis is not to be regarded as a rigid classification as presumptions may fulfill more than one value-regulative function.

⁴ Among the host of commonly used presumptions are for example 1) The legislature does not intend to alter the existing law more than is necessary; 2) The legislature does not intend absurd or anomalous results; 3) The legislature intends to promote public good; 4) The presumption applies to general and not to particular instances.

is not bound by its own legislation, legislation does not oust or restrict the jurisdiction of the courts, statutes do not contain invalid or purposeless provisions, and the legislature does not intend that which is harsh, unjust or unreasonable – form the basis of the discussion set out below.

The above-mentioned presumptions are discussed in seriatim, below.

4.2 The State is Not Bound by its Own Legislation

One of the reasons that this presumption is generally regarded as more contentious than most of the others, is that the *prima facie*– it appears to allow for ‘unbridled lawlessness by governmental agencies’.⁵ This is obviously a misconception about the understanding and the operation of the presumption. This is, in fact, created by the manner in which the presumption is worded, which is that ‘the state is not bound by statute’. The formulation of this presumption that the formula that ‘the state is not presumed to be bound’, is ‘highly problematic and misleading’ in that ‘it flies in the face of state liability’. It is therefore submitted that the presumption should not be applied in a purely mechanical way.⁶

A closer analysis of the presumption, however, reveals that what the principle allows public officials who are responsible for carrying out their duties are not to be hampered or hindered in any way. Hahlo and Khan explain that:

‘An enactment does not apply to the *state* or its executive arm or to a provincial council, local authority or other public body from which it emanates.’⁷

The above immediately begs the question then – what is meant by ‘state’? It applies to the executive which is tasked with the administrative functions of the state.⁸ In his illustration of examples of practical scenarios revealing instances when the presumption can be invoked, Botha notes that while the driver of a fire engine en

⁵ Botha *Statutory Interpretation* (4th edition) at 90.

⁶ Devenish *Interpretation of Statutes* at 202.

⁷ Botha *Statutory Interpretation* (5th edition) at 139. (Emphasis Added)

⁸ Du Plessis *The Interpretation of Statutes* at 77.

route to a fire may disregard a red traffic light⁹ and an agricultural official who combats stock diseases is not bound by statutory requirements regarding hunting permits,¹⁰ a security official on the other hand – who contravenes a statutory provision outside the scope of his duties – cannot invoke the presumption in his defence.¹¹

The circumstances expressed above are in keeping with Steyn’s viewpoint that the presumption applies to both original and subordinate legislation.¹² Nevertheless, this view was criticised in *Raats Röntgen and Vermeulen (Pty) Ltd v Administrator, Cape, and Others*,¹³ where Van Deventer AJ expounded the view that ‘provisional administrations are bound by laws of Parliament’.¹⁴ This view is actually preferable.¹⁵ What is abundantly clear, therefore, is that whether or not the state is bound, is dependant not only on the legislation in question, but also on the particular circumstances or instances that have to be decided on in light of the prevailing legislation.¹⁶ The suggestion by Labuschagne that the state might be bound by one provision of the legislation but not by another, is echoed by Du Plessis – who submits that this is possible even if the binding and non-binding provisions appear in the same section of the Act.¹⁷

In terms of the application of the presumption, it is interesting that Devenish explains that the presumption should involve a ‘teleological evaluation’. He maintains that a

⁹ See *S v Labuschagne* 1979 (3) SA 1320 T.

¹⁰ The case of *S v Huysen* 1968 (3) SA 490 (GW) being the case in point.

¹¹ See *S v Reed* 1972 (2) SA 34 (RA).

¹² Botha *Statutory Interpretation* (2nd edition) at 60-61. It has been necessary to refer to earlier additions of Botha’s book to gain a more insightful understanding of the application of the law. This has been such an instance.

¹³ 1991 (1) SA 827 (C).

¹⁴ *Ibid.*

¹⁵ Devenish *Interpretation of Statutes* at 204.

¹⁶ Botha *Statutory Interpretation* (5th edition) at 140.

¹⁷ Du Plessis *The Re-Interpretation of Statutes* at 174. Further authority for this contention can be found in *R v Thomas* 1954 (1) SA 185 (SWA) at 187 B-C. See also De Ville *Constitutional and Statutory Interpretation* at 188, where the author drives the point that the fact that the legislative activities of the state *prima facie* relate to a relationship where the state is placed ‘as against’ its subjects and ‘not next’ to them. It is therefore not based on a specific right the state has.

‘concatenation of factors’ are required to be present before the ‘presumption becomes operative’.¹⁸ Such a teleological evaluation is also highlighted by Du Plessis, who submits that the express or implied rebuttal of the presumption can be inferred not only from the language of the provision in question, but also from its nature, and, with a view to surrounding circumstances, its objects and consequences.¹⁹

4.2.1 The Application of the Presumption

It is interesting to note that even prior to the new constitutional dispensation, Wiechers suggested that the reversal of the wording of the presumption would more aptly reflect the optimal operation of the presumption.²⁰ According to Wiechers, therefore, the position is more accurately reflected as follows: the state should always be bound by its own legislation, except in instances where it would be hampered or impeded in the execution of its governmental functions.²¹ Van Deventer AJ’s advocacy for Wiechers’ view is reflected in the judgment in the *Raats Röntgen case*²² – where it was endorsed that:

‘there is much to be said for Wiechers’ view ... that the presumption should be reversed and that the state should presumably be bound by all its laws

¹⁸ Devenish *Interpretation of Statutes* at 202.

¹⁹ Du Plessis *The Re-Interpretation of Statutes* at 174. The presumption was relied on in several cases. The leading ones being *Union Government v Tonkin* 1918 AD 533; *SAR & H v Smith Coasters (Prop) Ltd* 1931 AD 113 and *Evans v Schoeman* 1949 (1) SA 571 (A).

²⁰ Devenish *Interpretation of Statutes* at 202.

²¹ Botha *Statutory Interpretation* (5th edition) at 139. ‘The presumption is first and foremost a functional means to the end of ensuring that the execution of the typical functions of government – in so far as they are aimed at enhancing the public good and welfare – is not unduly hampered.’

²² 1991 (1) SA 827 (C). The Appellate Division listed the considerations to be taken into account when considering the application of the presumption which was summarized as follows at 262: ‘a) The court may take various factors into account in determining whether the presumption is excluded in a particular case, example the language of the enactment, the surrounding circumstances at the time when the statute was passed, the objects of the acts, the mischief it is aimed at preventing, the consequences if the state were exempted or bound (i.e. considerations of public policy) and other common-law presumptions. b) The mere fact that a statute was passed for the public benefit is not a sufficient consideration to conclude that the state was intended to be bound. Before it can be held that the state is bound by an enactment (where it is not expressly provided for), it must be shown that if the state were not bound, the purpose sought to be achieved by the enactment would be frustrated.’

except those which, if the state were to obey them at all times, would impede the proper execution of its functions.²³

The cases of *S v De Bruin*²⁴ and *R v De Beer*²⁵ are particularly relevant to the discussion and the understanding of the presumption. Devenish cites the case of *S v De Bruin* as an exemplary of a case where one could ‘justifiably’ invoke the presumption.²⁶ In this case, the court had to construe the ambit of the speed regulations Act.²⁷ It was maintained that speed regulations should not bind the state. As a result, the accused – De Bruin – a policeman who had contravened the speed limit because he was running late for an on-site inspection on the state’s behalf, was found not to be in contravention of the legislation in question. The court held that the relevant speed restrictions would have hampered the carrying out of his duties, and, on appeal, he had his conviction set aside.

While the court in the case of *S v De Bruin* found in favour of the appellant, a policeman, the court in *R v De Beer* that had to consider the predicament of a postman who had disregarded the speed regulations – but did not arrive at the same outcome. It was felt that the circumstances did not ‘rationally justify’ the operation of the presumption, and therefore the court did not ‘exonerate’ the accused ‘from compliance with the provisions’.²⁸

4.2.2 The Relevance of the Presumption in the Current Constitutional Dispensation

In reflecting on the classification propounded by Du Plessis,²⁹ the question whether the presumption that the state is not bound by its own legislation, is compatible with

²³ Devenish *Interpretation of Statutes* at 203.

²⁴ 1975 (3) SA 56 T.

²⁵ 1929 TPD 104.

²⁶ See Devenish *Interpretation of Statutes* at 203 for a critique of the cases of *De Bruin* and *De Beer*.

²⁷ 89 of 1970.

²⁸ Devenish *Interpretation of Statutes* at 204.

²⁹ See classification as per Du Plessis in *Re-Interpretation of Statutes* at 153.

the Constitution arises. From an examination of the relevant sections of the Constitution, it is obvious that the presumption can no longer be justified.

In terms of section 39(2) of the Constitution – which provides that the rules of common law have to be developed in light of the fundamental rights of the Constitution³⁰ – the operation of this particular presumption would be problematic. In terms of section 2,³¹ the supremacy clause of the Constitution, it is expressly provided that the Constitution is the supreme law of the Republic. It is therefore required that the Constitution should be a yardstick against which all law and conduct must be measured. It is noted that government conduct is certainly not precluded from such scrutiny. Accountability by governmental organs is further endorsed by section 8, which provides that:

‘The Bill of Rights applies to *all law*, and binds the legislature, the executive, the judiciary and *all organs of state*.’³²

The logical conclusion emanating from the above provision is that accountability is mandatory. Botha therefore quite correctly states that it would be ‘illogical and absurd’ if government organs were bound by the Constitution but at the same time not be bound by their ‘own’ legislation, which he reasons, in any event, is subordinate to the Constitution.³³

In upholding the values of the current democratic order – which is based on freedom,³⁴ equality³⁵ and human dignity³⁶ – it is maintained that it is imperative that in a transformative constitutional state or “*Rechtsstaat*” as it is referred to, one should

³⁰ Section 39(2) of the Constitution provides: ‘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.’

³¹ Section 2 provides: ‘This 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.’

³² (Emphasis Added).

³³ Botha *Statutory Interpretation* (5th edition) at 92.

³⁴ Section 12 of the Constitution.

³⁵ Section 9 of the Constitution.

³⁶ Section 10 of the Constitution.

be ‘heedful of the principle of legality’.³⁷ The basic principle of legality and the presumption that the state is not bound by its own legislation, is ‘inherently incompatible’.³⁸

There is further support for this contention in the *dictum* of *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,³⁹ where the Constitutional Court maintained:

‘It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution.’

Even prior to the new constitutional dispensation, Wiechers was opposed to the application of the presumption as formulated in the common-law. His opposition was voiced about a decade ago and clearly reflected his ‘misgivings about the consistency of the presumption with the value of legality’.⁴⁰ Wiechers points out further, that as with the rules of common-law, presumptions have always operated in tandem with existing legislation – to ensure adherence to the principle of legality.

Giving due consideration to the fact that in practice, the state could be hampered in carrying out its functions if it were bound by legislation, Wiechers correctly suggested that the presumption should be applied ‘the other way round’.⁴¹ It is not surprising that – with the current ‘constitutional demand for accountability of the public administration’⁴² – Wiechers’ viewpoint has in fact been vindicated.⁴³ As part

³⁷ Du Plessis *The Re-Interpretation of Statutes* at 177. The author describes a *Rechtsstaat* as a: ‘Democratic state founded on the... values of supremacy of the Constitution and the rule of law.’ See also Müller ‘Basic Questions of Constitution Concretization’ (1999) 3 *Stellenbosch Law Review* at 274.

³⁸ Du Plessis *The Re-Interpretation of Statutes* at 176.

³⁹ 1998 (12) BCLR 1458 (CC) par 58.

⁴⁰ Du Plessis *The Re-Interpretation of Statutes* at 175.

⁴¹ Botha *Statutory Interpretation* (5th edition) at 142.

⁴² Du Plessis *The Re-Interpretation of Statutes* at 177.

⁴³ Botha *Statutory Interpretation* (5th edition) at 142.

of the common-law rules, the principles of justice and fairness that embody the presumptions of statutory interpretation have always been part of our law. Now that most of the principles underlying the common law presumptions have been entrenched in the Constitution, it will be interesting to observe the jurisprudential development of this common-law presumption – to bring it in line with constitutional principles. In spite of this however, it is rather unfortunate that even though the Constitution encapsulates the values that underpin the common-law presumptions, one might find less and less application of some presumptions – to the point that they could possibly also even ‘disappear’ as a result of disuse.⁴⁴

4.3 Legislation Does Not Oust or Restrict the Jurisdiction of the Courts

It is interesting that Steyn suggested that this presumption is an extension of the presumption that statutes do not bind the state. The premise for his argument flows from the fact that while the presumption that the state is not bound by its own legislation pertains mainly to the executive, the presumption that an enactment is not aimed at interfering with or ousting the jurisdiction of the courts, obviously applies to the judiciary. The principle of *trias politica* is used to enunciate this argument.⁴⁵ The doctrine of separation of powers requires that the legislature, the executive, and the judiciary, operate to a greater extent separately of each other. In accordance with the principle underlying this presumption, the legislature has to respect the ‘desired state of affairs’ and not interfere with or oust the jurisdiction of the judiciary (the courts). By the same token, the executive is also expected to maintain a similar ‘attitude’ to the courts. The advent of the 1996 Constitution with a democratically elected government ensures that the principles and values of the doctrine of separation of powers are developed. The Constitution is therefore framed in a manner that establishes a system of checks and balances when dealing with the roles of the legislature, executive and the judiciary. At the same time the system of checks

⁴⁴ Botha *Statutory Interpretation* (2nd edition) at 52-53. Botha submits that: ‘It is ironic that the supreme Constitution should emphasize and entrench the values underpinning the common law presumptions, but at the same time should diminish their importance in future.’

⁴⁵ Du Plessis *The Interpretation of Statutes* at 73.

and balances also affirms the limited power of the legislative and executive authorities which appears to be confined within the constraints of constitutional values and principles.⁴⁶ The Constitution therefore clearly presents an ideal of a democratic society – that is, society in which democracy operates. In order for that ideal society to exist and operate, it specifically requires that the necessary blocks or ‘basic institutional arrangements for a representative/participatory democracy,’ be established and monitored. These include for example, regular elections, democratically elected legislatures at national, provincial and local level and structures, institutions and processes to facilitate participation in decision-making outside these institutions and in between elections.⁴⁷ In *Merafong Demarcation Forum v President of the Republic of South Africa*⁴⁸ Skweyiya J maintained that the majority view that the new democratic dispensation provided voters with ‘powerful methods’ for voters to hold politicians accountable through regular free elections. He makes a resounding statement in support of his contention that:

‘courts deal with bad law but that voters must deal with bad politics. The doctrine of separation of powers to which our democracy subscribes does not allow this court, or any other court, to interfere in the power exercise of powers by the legislature.’⁴⁹

Nevertheless it still begs the question about whether our courts would be acting within their power to grant orders that determine policy. This brings into focus the question of deference. Brand describes the process that courts have through the judicial strategy of deference as that which in effect results in the deferring to other branches of government those questions that they feel that they are incapable of deciding on or where they feel would require of them to violate the principles of

⁴⁶ Ntlama ‘The “Deference” of Judicial Authority to the State’ (2012) *Obiter* at 135.

⁴⁷ Brand ‘Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa’ (2011) *Stellenbosch Law Review* at 623.

⁴⁸ 2008 (10) BCLR 968.

⁴⁹ *Ibid* at para 308.

separation of powers.⁵⁰ In *Mazibuko v City of Johannesburg*⁵¹ deference operated in the formulation of the reasonableness test which focused on procedural or structural rather than substantive terms. The court reasoned that the question of providing social measures should be left to other branches of government – as the role of the court was limited to the process of interpretation only.⁵² In the *Minister of Health v Treatment Action Campaign*⁵³ the court maintained a contrary viewpoint that notwithstanding the fact that all arms of government should respect the doctrine of separation of powers, did not mean that courts could not make orders that impact on policy. Jowell and Steyn provide that, there is no formula to identify the scope of the decision-making body’s discretion. The court must consider whether the context and circumstances of the case require the court to defer on a specific issue. They further submit that courts should repudiate any presumptions that matters of public interest that fall outside their competence. Lenta however, differs from Jowell and Steyn on the basis that courts should be sensitive to legitimate exercises of judgment by other branches, and that judges should allow the elected branches considerable latitude for policy making within constraints of the Constitution.⁵⁴

There is much support for the view that a court should only interfere when it is absolutely necessary to avoid likely irreparable harm and only in the least intrusive manner possible with regard to the interests of others who might be affected by the legislation in question.⁵⁵ From the case of *RJR MacDonald v Canada*⁵⁶ a cautionary note is sounded about how far the notion of deference may be extended. It was provided that:

‘Care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden

⁵⁰ Brand ‘Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa’ (2011) *Stellenbosch Law Review* at 618.

⁵¹ 2010 (4) SA 1 (CC) at para 63- para 65.

⁵² Ibid at para 65 – para 67.

⁵³ 2002 (10) BCLR 1075.

⁵⁴ Lenta ‘Judicial Deference and Rights’ (2006) *Tydskrif vir Suid Afrikaanse Reg* at 460.

⁵⁵ Mclean ‘Towards a Framework for Understanding Constitutional Deference’ (2010) 25 *South African Public Law* at 466.

⁵⁶ (1995) 3 SCR 199.

which the Constitution places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution.⁵⁷

As the individual's right to access justice in a court of law can be regarded as 'one of the cornerstones of institutional justice', political powers by way of the legislature and the executive are not expected to infringe or violate this right in any way.⁵⁸

It is therefore provided – that unless expressly stated or implied in legislation – it is presumed that the legislature does not wish to exclude or restrict the courts' jurisdiction. What this in effect means, is that if it is the intention of the legislature to restrict or oust the jurisdiction of the courts, this must be clearly indicated in the language of the statute being considered. This 'well-recognised rule' in the interpretation of statutes was applied in the case of *De Wet v Deetleefs*,⁵⁹ where Solomon CJ maintained that:

'... in order to oust the jurisdiction of a court of law, it must be clear that such was the intention of the legislature.'

Further support for the rule is observed in the *dictum* of *R v Padsha*, where Innes CJ boldly affirmed that where the rights of an aggrieved person are restricted or inhibited – it has to be done 'in the clearest language'.⁶⁰ Devenish is adamant that the power to oust the jurisdiction of the courts must be done in 'unequivocal language and with unmistakable purpose'. He maintains that where the ousting is 'indirect and elliptical', courts would be more reluctant to give effect to it.⁶¹ The case

⁵⁷ See Edwards comment on deference in *RJR MacDonald v Canada* in *The Modern Law Review* 2002 65(6) at 859.

⁵⁸ Botha *Statutory Interpretation* (4th edition) at 93. The submissions which are made by Botha are not repeated in the later editions of his book.

⁵⁹ 1928 AD 286 at 290.

⁶⁰ 1923 AD 281 at 304.

⁶¹ Devenish *Interpretation of Statutes* at 196.

of *Mathope and Others v Soweto Council* is a case in point.⁶² The court found that section 12 of the Community Councils Act⁶³, did not exclude the jurisdiction of the magistrates court or the supreme court. This judgment is not only unassailable, but is also very progressive in the application of the law. The court in its analysis based its reasoning on an individual's fundamental right to approach the courts. While section 34 of the Constitution⁶⁴ currently entrenches an individual's rights to resolve a dispute in a court of law, this obviously did not apply at the time.

4.3.1 The Application of the Presumption

The Constitution has significantly affected the application of the presumption that legislation does not oust or restrict the jurisdiction of the courts. To fully appreciate the operation and significance of this presumption, it is necessary to consider the application of the presumption both prior to and after the new constitutional dispensation. As a result of South Africa's erstwhile 'notorious domestic policies', the rights and liberties of individuals were curtailed considerably by limiting or ousting the jurisdiction of the courts. Ouster clauses which excluded the jurisdiction of the courts have been identified – as a particularly 'odious feature' of the old order legislation.⁶⁵ As a matter of fact, the use of such ouster clauses to exclude the jurisdiction of the courts at the time, were regarded as the 'usual practise' when dealing with so-called 'emergency legislation'.⁶⁶ Generally, parliament had the power to oust the jurisdiction of the courts where it was deemed to be in the public interest. Innes CJ reiterates the position in *R v Padsha*,⁶⁷ where it was declared that:

'It is competent for Parliament to oust the jurisdiction of courts of law if it considers such a course advisable in the *public interest*.'

⁶² 1983 (4) SA 287 (W) at 289 F.

⁶³ 125 of 1977.

⁶⁴ Section 34 of the Constitution provides that: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

⁶⁵ Devenish *Interpretation of Statutes* at 197. Devenish makes the point that: 'The use of ouster clauses to exclude the jurisdiction of the courts has been a singularly unfortunate and odious feature of our security legislation which sanctioned unlimited detention without trial.'

⁶⁶ Cockram *Interpretation of Statutes* at 112.

⁶⁷ 1923 AD 281 at 304. (Emphasis Added)

What is worth reflecting on in the South African context, is how ‘public interest’ insidiously came to be associated with the ‘interest of state security’ and maintaining the status quo. Of particular significance is the (now defunct) Internal Security Act.⁶⁸ In terms of section 29 of the Internal Security Act, it was expressly stipulated that:

‘No court of law shall have jurisdiction to pronounce upon the validity of any action taken in terms of this section.’⁶⁹

The courts nevertheless maintained that the legislation in question did not totally exclude their jurisdiction. In instances where officials had acted fraudulently or ‘with malice or caprice’ – or if they went ‘beyond the limits of competency’ – the courts could have intervened. The effect of officials not being required to furnish reasons for their actions meant that legislation which had already been considerably whittled down in legal force, had now become a ‘*de facto* nullity’. This problem was further compounded, in that the onus of proof alleging fraud or *mala fides* lay with the person alleging it.⁷⁰ Evidence of the status quo is reflected in *Bunting v Minister of Justice*,⁷¹ where the position is articulated as follows:

‘A court of law could also interfere if it is demonstrated or shown that the Minister had used these powers in a *mala fide* manner ... But the onus of showing that the Minister had not exercised his discretion properly is upon whoever alleges that ...’

In a similar vein, Jansen J in *Stanton v Minister of Justice*⁷² maintained that:

⁶⁸ 74 of 1982.

⁶⁹ The Internal Security Act 74 of 1982 has been repealed by the Internal Security and Intimidation Amendment Act 138 of 1991.

⁷⁰ Further support for this contention can be found in the case of *Stanton v Minister of Justice* 1960 (3) SA 353 (T) 360 A-B.

⁷¹ 1963 (4) SA 531 (C) 533.

⁷² 1960 (3) SA 353 (T) at 360. See also *Stadsraad van Vanderbylpark v Administrateur, Transvaal* 1982 (3) SA 166 (T) at 175 where the court went further and provided that: ‘The alleged unreasonableness must be “inexplicable” except on the assumption of *mala fides* or ulterior motive or that the (official)... did not apply his mind to the matter.’

‘The Minister’s power is ... purely administrative. It is not incumbent on him to give reasons for his decision. The *onus* is on the applicant to establish *mala fides*.’

Due to the high degree of proof required when alleging fraud or *mala fides*, it is not surprising that Holmes JA in the case of *National Transport Commission and Another v Chetty’s Motor Transport (Pty) Ltd*⁷³ described the process as a ‘formidable’ one. Nevertheless, the case of *Hurley and Another v Minister of Law and Order*⁷⁴ arrived at the contrary outcome (to the above-mentioned cases), when construing if the relevant security legislation. The court’s findings in *Hurley* were based on a ‘restrictive interpretation’ of the ouster clause in dispute. In adopting this approach, Devenish maintained that the Court was able to ‘preserve the jurisdiction of the courts in a very contentious branch of South African law’.⁷⁵ This rule – embodied in the ‘Hurley principle’ as it later came to be referred to – has been accepted and applied in subsequent decisions.⁷⁶ Indeed, the *Hurley* judgment is a land-mark decision in the history of South African law.

Under the previous constitutional system which was based on the Westminster paradigm, parliament was sovereign. As a result, everything which was enacted by Parliament – irrespective of how demeaning, offensive or morally repugnant, for example the Group Areas Act⁷⁷ could not be challenged.

⁷³ 1972 (3) SA 726 (AD) at 735.

⁷⁴ 1985 (4) SA 709 (D).

⁷⁵ Devenish *Interpretation of Statutes* at 197-199. See the author’s comments and criticism on the findings of the *Hurley* judgment.

⁷⁶ The decisions in respect of which the so-called ‘Hurley principle’ have been applied include, *United Democratic Front v State President* 1987 (3) SA 296 N; *Nqumba v State President* 1987 (1) SA 456 (E) at 460; and *Radebe v Minister of Law and Order* 1987 (1) SA 586 (W).

⁷⁷ 77 of 1957.

4.3.2 The Relevance of the Presumption in the Current Constitutional Dispensation

Prior to the advent of the new constitutional dispensation, the Supreme Court⁷⁸ possessed an inherent jurisdiction to review administrative action.⁷⁹ While courts generally could review the lawfulness of actions of the administration, parliament was sovereign and its laws could not be invalidated. By the use of ouster clauses discussed above, statute law could prevent and in some cases even prohibit courts from reviewing certain actions. This situation has changed fundamentally with the system of constitutional supremacy.

Because that which is enacted has to be compatible with the values and principles enshrined in the Constitution, parliament has to ensure that the principles encapsulated in the Constitution are given expression to. In respect of the presumption under consideration, these principles are embodied to a large extent in section 34 which deals with the right of access to courts, and to some extent in section 33⁸⁰ which deals with the right to administrative justice, and in section 35 (3)⁸¹ which deals with the right of an accused person to approach a court of law to have his or her matter heard. For the purposes of this chapter, the focus is mainly on section 34.

An examination of the classification referred to above – as articulated by du Plessis⁸² – reveals that the common law presumption that legislation is not to oust or restrict the jurisdiction of the courts, has now been subsumed under the Constitution.⁸³ The

⁷⁸ The Supreme Court is now referred to as the High Court.

⁷⁹ Botha *Statutory Interpretation* (4th edition) at 93. Botha states that: ‘The High Court always had an inherent common-law jurisdiction to review such decisions, for example on the grounds of *mala fides* (bad faith).’

⁸⁰ Section 33(1) of the Constitution provides that: ‘Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.’

⁸¹ Section 35(3) of the Constitution provides that: ‘Every accused person has a right to a fair trial...’

⁸² Du Plessis *The Re-Interpretation of Statutes* at 153.

⁸³ *Ibid* at 170.

relevant section entitling persons access to the courts in terms of section 34 of the Constitution, states:

‘Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’

The three key elements pivotal to the operation of the right that have been identified, are: a) access, b) independence, and c) impartiality and fairness.⁸⁴ Spelt out more explicitly, the right first creates a right of access to a court, tribunal or forum. Secondly, in respect of the legal process, the independence and impartiality has to be observed, and thirdly, it is imperative that the matter is decided in a fair and public hearing.⁸⁵

With the advent of the new constitutional dispensation, a judicial awareness ... that access to court is a fundamental right is clearly reflected in case-law.⁸⁶ The Constitutional Court in the case of *Bernstein v Bester NO*,⁸⁷ boldly affirmed that:

‘In all democratic societies the state has the duty to establish independent tribunals for the resolution of civil disputes ... In a constitutional state that obligation is of fundamental importance and it is clearly recognised as such in our Constitution.’

Further, in the matter of *De Lille v Speaker of the National Assembly*⁸⁸, an ouster clause purporting to place issue of parliamentary privilege beyond judicial scrutiny – relating to the Speaker of the national assembly – was held to be unconstitutional.

It is interesting to note that what emerges from an examination of the above, is that while prior to the new constitutional dispensation ouster clauses were regarded as singularly the most intrusive restraint to accessing justice – with the advent of the

⁸⁴ De Waal, Currie and Erasmus *The Bill of Rights Handbook* (6th edition) at 711.

⁸⁵ Ibid 711-712. See *Montsisi v Minister van Polisie* 1984 (1) SA 619 which is an illustration of when section 34 can be used to challenge the validity of time limitation clauses.

⁸⁶ The case in point is that of *Williamson v Schoon* 1997 (3) SA 1053 (T).

⁸⁷ 1996 (2) SA 751 (CC).

⁸⁸ 1998 (7) BCLR 916 (CC) at para 40.

current constitutional dispensation, it is the costs of litigation that have been identified as the ‘biggest single impediment’ to accessing justice.⁸⁹

Nevertheless, the courts have started to heed the impact of legal costs, and as a result thereof, have declined inappropriate constitutional law cases and making cost orders against losing applicants.⁹⁰ Because the principles underpinning this particular presumption have been incorporated in the Constitution as fundamental rights, it would seem, therefore, that it would no longer be necessary to invoke the presumptions itself. What is necessary, however, is to ensure that the principles embodied therein continue to be developed in accordance with the spirit and objects of the Bill of Rights – to ensure that they are constitutionally sound and continue to be relevant. In the current constitutional era, the underlying jurisprudence is no longer one of legal positivism. It appears to be akin to natural law – with the Constitution as supreme law giving rise to a jurisprudence of constitutional transformation. The rules of natural justice that are embodied in some of the common-law presumptions have now been subsumed in the Bill of Rights. However, where necessary, it is incumbent on judicial officers to apply the presumptions that are compatible with constitutional values – to achieve social, economic and political justice.

4.4 Statutes Do Not Contain Invalid or Purposeless Provisions

What can be gleaned from an examination of the presumption that statutes do not contain invalid or purposeless provisions, is that it is almost always couched in negative language. While one would expect that with regard to a presumption that promotes validity and purposefulness, it would be phrased in more positive terms, this is seldom the case.⁹¹ Nevertheless, a variety of terms are used to describe this

⁸⁹ De Waal et al *The Bill of Rights Handbook* (6th edition) at 714-715. See *Thusi v Minister of Home Affairs* 2011 (2) SA 561 (KZP) at para 104.

⁹⁰ *Ibid* at 715.

⁹¹ Du Plessis *The Re-Interpretation of Statutes* at 187.

particular presumption, which include ‘futile’, ‘nugatory’, ‘unnecessary’, ‘meaningless’, ‘invalid’ and ‘purposeless’.⁹²

On closer inspection, what is obvious about the operation of the presumption, is that it ensures that when interpreting statutes, these must be construed to render it effective, intelligible and valid – rather than in a manner that would render it inoperative and purposeless.⁹³ To re-iterate the position, it is provided that ‘the subject matter should rather be of force that comes to naught.’⁹⁴ It therefore follows that if there are two or more interpretations of a provision, the one that renders the provision valid and meaningful should be given effect to – rather than one that would result in invalidity or confusion.

The case of *South African Transport Services v Olgar*⁹⁵ provides a fitting example of the ‘confusion’ alluded to above. Referring to section 15 of the Road Transport Act⁹⁶, it was noted that paragraph (a) of section 15 (2) of the Act was an illustration of the confusion created by the draftsman attempting to lump together – in a single paragraph – both essential elements and alternative requirements. The result of the shoddy draftsmanship was that the paragraph in dispute⁹⁷ offered two different interpretations. To obviate the problem caused by the ‘confusion’ that had arisen, the Appellate Division held that if a provision is capable of two meanings, it is necessary to give effect to the meaning which is more consistent with the purpose of the legislation in question.⁹⁸ It is therefore provided that where uncertainty, confusion and conflict are likely to arise, the operation of the presumption ought to favour a

⁹² Devenish *The Interpretation of Statutes* at 207. See discussion in Devenish where the author in his analysis of the presumptions uses terms such as ‘futile’, ‘nugatory’, ‘unnecessary’ and ‘meaningless’ to describe the operation of the presumption.

⁹³ Ibid at 207-208.

⁹⁴ Du Plessis *The Interpretation of Statutes* at 61. From the cases of *R v Pickering* 1911 TPD 1054 at 1058 and *R v Correia*, we note that: ‘the words of an instrument are to be so construed that the subject-matter should rather be of force than come to naught’.

⁹⁵ 1986 (2) SA 684 (A) 693 (H).

⁹⁶ 74 of 1977.

⁹⁷ Para (a) of Section 15 (2).

⁹⁸ Botha *Statutory Interpretation* (2nd edition) at 54.

construction eliminating these.⁹⁹ The court in the case of *Esselman v Administrateur SWA*¹⁰⁰ adopted a similar stance.

Where the validity of a provision is being challenged, the tendency is that courts are more inclined towards an interpretation that would render an enactment valid, rather than giving it a meaning so ‘extravagant or wide that it would result in invalidity’.¹⁰¹ Both Du Plessis and Devenish concur that in deciding over two or more possible readings, that such interpretation must first and foremost be *possible*.¹⁰² It therefore follows that the presumption would not apply, if when construing legislation the statutory provision under examination is ‘ostensibly susceptible to being rendered nugatory’.¹⁰³ This presumption also applies to subordinate legislation. The applicable maxim here is the *ut res magis valeat quam pereat* rule, which requires that when interpreting subordinate legislation, the interpreter needs to ensure that the legislation is *intra vires* and valid rather than *ultra vires*.¹⁰⁴

The presumption has also been invoked in instances where the court has had the arduous task of deliberating over the risk of invalidating key provisions of an enactment or of frustrating its objectives.¹⁰⁵ In the case of *Ex Parte Minister of Justice: In re R v Jacobson and Levy*,¹⁰⁶ the application of the presumption that the legislature does not intend legislation which is futile or nugatory – was illustrated in the following extract:

‘If the language of a statute is not clear and would be nugatory if taken literally, but the object and motivation are clear, then the statute must not be reduced to a nullity merely because the language used is somewhat obscure.’

⁹⁹ Du Plessis *The Re-Interpretation of Statutes* at 189.

¹⁰⁰ 1974 (2) SA 597 (SWA). The court stressed that an ‘effective and purposive’ interpretation was to be preferred above one which would defeat the purpose of the provision.

¹⁰¹ Du Plessis *The Re-Interpretation of Statutes* at 189.

¹⁰² Devenish *Interpretation of Statutes* at 209. (Emphasis Added)

¹⁰³ Du Plessis *The Re-Interpretation of Statutes* at 188.

¹⁰⁴ Devenish *Interpretation of Statutes* at 207.

¹⁰⁵ Du Plessis *The Interpretation of Statutes* at 61.

¹⁰⁶ 1931 AD 466 at 477.

The approach of the court in adopting a meaning that furthered the purpose of the statute rather than one that frustrated it, was clearly reflected.¹⁰⁷ The unmistakable purposive methodology of the presumption is clear. It is trite that the most important principle of interpretation, is that courts have to determine the purpose of legislation and give effect to that object or purpose. The presumption that legislation must be effectual and purposeful forms the very essence of contemporary and enlightened statutory interpretation.¹⁰⁸ While Botha's cogent advocacy of the purposive methodology is commendable, prior to the new constitutional dispensation the methodology was generally not favoured by the courts. A predilection by the courts for the literal approach prior to the current constitutional dispensation, is clearly reflected in case-law.¹⁰⁹

4.4.1 The Application of the Presumption

Particular situations or circumstances might warrant the courts having to invoke more than one presumption when deciding on a matter. An analysis of such situations merits attention. In instances where a statute creates an offence, but fails to provide for a specific penalty – in order to prevent the statute in question from being declared invalid or ineffective, the court in such instances has to consider whether an appropriate penalty is to be imposed. It is emphasized that, in its deliberations, the court must consider:

- The manner in which the provision (that creates the offence) is worded; and
- Whether the provision does indeed create an offence.¹¹⁰

In this regard –*R v Forlee, must be examined.*¹¹¹

¹⁰⁷ Devenish *Interpretation of Statutes* at 208.

¹⁰⁸ Botha *Statutory Interpretation* (2nd edition) at 53. It is noted that Botha only discusses the presumption – Statutes do not contain invalid or purposeless provisions in the earlier edition of his book.

¹⁰⁹ The cases of *Public Carriers Association & Others v Toll Road Concessionaires (Pty) Ltd and Others* 1990 (1) SA 925 at 943; *Union Government (Minister of Finance) v Mack* 1917 AD 731 and *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 being the cases in point.

¹¹⁰ Du Plessis *The Re-Interpretation of Statutes* at 188.

¹¹¹ 1917 TPD at 52.

Forlee was found guilty of a contravention of an earlier Union statute, by selling opium. It was argued on his behalf that he had not committed an offence since the Act in question provided no penalty for the selling of opium.¹¹² The court *in casu* invoked the presumption ‘that legislation did not contain futile or meaningless provisions’, and found that a failure to provide a penalty did not render the Act invalid – since the court had the discretion to impose the punishment it deemed appropriate. The decision understandably provoked robust criticism in the legal fraternity. It is maintained that *Forlee* was incorrectly decided.¹¹³ The *nullem crimen* principle, as a whole, reflects the inherent justice of the Roman-Dutch common law based on natural law. It is submitted that the principles, maxims and presumptions of interpretation are not to be applied in an arbitrary manner, but should be applied in accordance with the theory and methodology of interpretation that is consistent with the ethos of Roman-Dutch common law.¹¹⁴ The jurisprudence of the new constitutional dispensation has spawned a new methodology of interpretation. This jurisprudence is akin to natural law characteristic of Roman-Dutch law. It is therefore evident that the values that underlie an open and democratic society – as reflected in the South African Constitution – epitomise the Roman-Dutch principles of what is considered to be fair and just. In the process of interpretation, these values must be given expression. In the new constitutional era, the role of a judge has to be a moral one, based on the morality of the Constitution. There is a responsibility to apply the values of the Constitution to give effect to social justice and transformation. The element of morality is inherent in deontic reasoning and supports therefore a deontic theory of interpretation.

¹¹² Ibid.

¹¹³ Devenish *The Interpretation of Statutes* at 208-209. In the recent case of *Director of Public Prosecutions of Western Cape v Prins* 2012 (2) SACR 183 (SCA), where Mr. Prins was charged in the Regional Court with contravening section 5(1) of the Criminal Law Amendment Act 32 of 2007, he objected to the charged arguing that section 5(1) did not provide for a penalty. The Western Cape High Court held that, as the Act did not specify a penalty clause, section 5(1) of the Act did not create an offense and dismissed the appeal. The Supreme Court of Appeal upheld the appeal on the basis that section 276 of the Criminal Procedure Act 51 of 1977 is a general empowering provision authorizing courts to impose sentences in all cases.

¹¹⁴ Ibid at 24.

The case of *Esselman v Administrateur, SWA*,¹¹⁵ is yet another example where the court – in deciding on the correct approach – found it necessary to invoke the presumption against invalid or purposeless provisions. The court, in its quest for the correct approach, had erred in that it should have adopted a more balanced approach in the application of the presumption that promotes public interest and the presumption against invalid and purposeless provisions. It is not surprising therefore that the findings have been widely criticised. In this case, the applicant petitioned the court for an interdict preventing the respondent from removing sand from his farm – as he contended that he needed the material for his own purposes. The relevant section¹¹⁶ authorised the administration to remove any material for construction and maintenance of roads from private property, without having to compensate the owner. However, in terms of section 30(d), it was required that in exercising its duties, no private owner was to suffer damage. Hoexter J, in his judgment, invoked the presumption against invalid and purposeless provisions and construed section 30(d) of Ordinance of SWA as merely an instruction to minimize damage and rendered the enactment as a whole valid in the circumstances.

It is submitted that this is precisely a case where the presumption that statutes do not contain invalid or purposeless provisions should not have been applied – since clearly the owner was not compensated. What was required, therefore, was that the court should have attempted to ‘weigh up the respective rights of the parties’ so that ‘justice could at least be seen to be done’.¹¹⁷ The applicant bought the farm because he needed the sand for his own purposes. The effect of section 30(d) vested the applicant with at least a *prima facie* right to the sand – which under normal circumstances would not have been protected – but in this particular instance deserved protection. Therefore, the approach of the court *in casu* ought to have invoked the presumption that an enactment promotes public interest as well as the presumption against invalid and purposeless provisions. It is maintained that a more

¹¹⁵ 1974 (2) SA 597 (SWA).

¹¹⁶ Section 30 of Ordinance 17 of 1972 (SWA).

¹¹⁷ Devenish *Interpretation of Statutes* at 209.

balanced application of the presumptions would have undoubtedly led to a ‘more acceptable result’.¹¹⁸

In the absence of a justiciable Bill of Rights, fundamental rights,¹¹⁹ the rights of the owner should have been more energetically protected using the presumptions. Even though the common-law presumptions should have been a surrogate for the Bill of Rights and which should it is submitted, have been invoked when fundamental rights were undermined – prior to the current democratic regime, this was seldom done.

4.4.2 The Relevance of the Presumption in the Current Constitutional Dispensation

Prior to the current constitutional era, the purposive methodology which underpinned the operation of the presumption that statutes do not contain invalid and purposeless provisions, was rarely applied by courts. It is noted that a purposive methodology underpins this particular presumption. It is therefore maintained that there is merit in the argument that the presumption is ‘indeed conducive to purposive interpretation’ and ‘holds its own in the new constitutional dispensation’.¹²⁰

Referring to the three distinct categories of presumptions discussed above,¹²¹ a careful examination of the presumption that legislation does not contain invalid or purposeless provisions, reveals that the presumption does not fall squarely within any of the categories outlined by Du Plessis above. Clearly the presumption has not been subsumed under the Constitution and is also not incompatible with the principles encapsulated in it. The position is, in fact, quite the contrary. However, in respect of the third category which recognises presumptions that are left unaffected by the Constitution, the presumption does have some bearing. This lends itself to a

¹¹⁸ Du Plessis *The Interpretation of Statutes* at 65.

¹¹⁹ The fundamental rights which are referred to are upheld in terms of **Chapter 2** of the Constitution and include the following rights: equality; human dignity; freedom from slavery; servitude and forced labour; privacy; freedom of religion, belief and opinion, freedom of expression; freedom of association; freedom of trade, occupation and profession; adequate health care, food, water and access to social security; and administrative action.

¹²⁰ Du Plessis *The Re-Interpretation of Statutes* at 189.

¹²¹ See classification as per Du Plessis in *Re-Interpretation of Statutes* at 153.

discussion of the interpretation provision of the Constitution and the operation thereof.

Section 39 is a peremptory provision. This means that all courts, tribunals or forums are under an obligation to review the aim and purpose of legislation in light of the Bill of Rights. The so-called plain meaning approach is no longer applicable.¹²² In other words, it is submitted that the current constitutional order requires that there must be a departure from the strictly literal or legalistic approach when dealing with questions of interpretation.¹²³ This sentiment is echoed by Ngcobo J, in a *dictum* in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*,¹²⁴ where he postulates that:

‘legislation must be interpreted purposively to promote the spirit, the purport and the objects of the Bill of Rights ... the emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are not unclear and ambiguous.’

The purposive methodology epitomised in the approach above is also reflected in other recent case-law. This includes *African Christian Democratic Party v The Electoral Commission*,¹²⁵ *Baloro v University of Bophuthatswana*¹²⁶ and the *Department of Land Affairs v Goedgelegan Tropical Fruits (Pty) Ltd*.¹²⁷ The last-mentioned case merits closer attention. In this case, what emerges is that as a result of adopting a purposive or value-orientated method of interpretation, Moseneke J – in the interests of justice – found in favour of the applicants and awarded them restitution in terms of the Restitution of Land Rights Act.¹²⁸ In terms of section 39(2) of the Constitution which requires that all statutes be interpreted ‘through the

¹²² Botha *Statutory Interpretation* (5th edition) at 90-91.

¹²³ Woolman, Roux, Klaaren, Stein, Chaskalson and Bishop *Constitutional Law of South Africa* (2nd edition) at 32-71.

¹²⁴ 2004 (4) SA 490 (CC) at para 72.

¹²⁵ 2006 (5) BCLR 579 (CC).

¹²⁶ 1995 (8) BCLR 1018 (CC).

¹²⁷ 2007 (6) SA 199 (CC).

¹²⁸ 22 of 1994.

prism of the Bill of Rights’,¹²⁹ one sees Moseneke J engaging in a ‘moral evaluation’ relating to the dispossession of land rights in South Africa.

Because the interpretation clause is regarded as a ‘force that informs all legal institutions and decisions with the new power of constitutional values’,¹³⁰ it is maintained that this presumption, in particular, has a positive prognosis in the current constitutional era¹³¹ – as it is in accordance with the principles inherent in a transformative constitution.

4.5 The Legislature Does Not Intend that which is Harsh, Unjust or Unreasonable

It is submitted that the presumption that the legislature does not intend that which is harsh, unjust or unreasonable – in its embodiment of the intrinsic values of justice and fairness – has to be regarded as singularly the most crucial presumption that could have been invoked to uphold and protect civil rights and liberties, prior to South Africa’s introduction of a Bill of Rights. It is not surprising that in its encapsulation of the principles of natural law, this particular presumption enjoyed considerable esteem in Roman-Dutch law.¹³² The principle underpinning the presumption is reflected in the words of Johannes Voet about the nature of the law. He provides that it ‘ought to be just and reasonable ... (for) it preserves equality and binds citizens equally’.¹³³ Quite clearly, what is observed is that in the South African context, and in the absence of a Bill of Rights, this particular common-law presumption which epitomised justice, fairness and equality could conceivably have been considered as a surrogate for the Bill of Rights.

¹²⁹ See case of *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and Others* 2001 (1) SA 545 (CC) par 21. Langa DP explains that the ‘new’ methodology in interpretation requires that: ‘All law-making authority must be exercised in accordance with the Constitution.’

¹³⁰ *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588.

¹³¹ Du Plessis *The Re-Interpretation of Statutes* at 191.

¹³² Devenish *The Interpretation of Statutes* at 162.

¹³³ *Ibid.*

In terms of the operation of this presumption in statutory interpretation, the approach of the courts has been that where a statute was capable of more than one interpretation, or where the slightest degree of doubt arises when construing a provision of a statute, expression could be given to the presumption that the legislature must have intended that which was just, equitable and reasonable. Therefore, in the case of *Principal Immigration Officer v Bhula*,¹³⁴ the court applied this presumption by stating that:

‘Where, ... two meanings may be given to a section, and the one meaning leads to harshness and injustice, whilst the other does not, the court will hold that the legislature rather intended the milder than the harsher meaning.’

In a similar vein, when issues of vested rights were in dispute, the underlying protection of fundamental rights that were central to the operation of the presumption, ensured that such onerous provisions were strictly construed. Steyn submits that the interpretation of such (onerous) provisions ought to be interpreted strictly – so as to ensure that the outcome is the least unreasonable or inequitable.¹³⁵ This submission was met with approval in the case of *Transvaal Investments Co v Springs Municipality*,¹³⁶ where it was held, as per Solomon JA, that:

‘It is a well-established rule in the construction of statutes that where an Act is capable of two interpretations, that one should be preferred which does not take away existing rights, unless it is plain that such was the intention of the Legislature.’

Nevertheless, in spite of the fact that this particular presumption embodied the very essence of the fundamental principles of justice and fairness, unfortunately under the pre-democratic system of parliamentary sovereignty, parliament basically had free reign to enact absolutely any law it wanted to – irrespective of how unjust, unfair, unethical, immoral or unreasonable it was. However during the apartheid era the

¹³⁴ 1931 AD 323 at 336-337.

¹³⁵ Devenish *Interpretation of Statutes* at 170.

¹³⁶ 1922 AD 337 at 347.

courts could have been more assertive in protecting rights. Clearly, this was not always the case.

4.5.1 The Application of the Presumption

Prior to the new democratic order, regardless of the presumption that the legislature does not intend that which is harsh, unjust or unreasonable, statutes which were innately unjust or unreasonable were nevertheless still given effect to by the courts. The main reason for this could be attributed to the fact that when construing the relevant legislation, courts were inclined to give effect to the ‘plain meaning’ of the words or the ‘intention of the legislature’. From the case of *Principal Immigration Officer v Bhula*,¹³⁷ the position of the court was as follows:

‘where a statute is clear the court must give effect to the intention of the legislature, however harsh its operation may be to individuals affected thereby’.

It is, however, the following submission made by the previous Appellate Division when deliberating, that ‘this court has no power to adjudicate on the reasonableness or unreasonableness of an Act of Parliament’, since the ‘function of the court is to declare the law as given by the Legislature, and not to make it’,¹³⁸ that raises pertinent questions about the obligations of courts in the realm of judicial law-making.

As a result of applying a literal methodology, as reflected above, courts during the apartheid era were instrumental in upholding and giving effect to ‘notorious racial and draconian security legislation’.¹³⁹ The correct approach of the courts when construing provisions that allowed for inroads into the liberty of the individual – who is neither charged nor convicted of an offence – should have been that such provisions be restrictively interpreted. Thus, the court’s approach to the

¹³⁷ 1931 AD 323 at 336.

¹³⁸ See *S v Takaendesa* 1972 (4) SA 72 (RAD) at 77, where the court as per Beadle CJ maintained that: ‘...(there) is no justification for a court of law assuming the mantle of the legislature and itself amending the statute.’

¹³⁹ Devenish *Interpretation of Statutes* at 162.

interpretation of the ‘idle person’ provision in respect of the Native (Urban Areas) Consolidation Act¹⁴⁰ in the cases of *In Re Vakaza*¹⁴¹ and *S v Sibiya*¹⁴² – has been criticized because it should have been subjected to a restrictive interpretation.

The findings of the court in the case of *S v Werner*,¹⁴³ where the court rebutted the operation of the presumption by necessary implication when construing the provisions of the Group Areas Act,¹⁴⁴ was also flawed. In this case, Indian and Coloured families who were unable to find suitable accommodation in residential areas designated for Indian and Coloured families, settled in a so-called White area. King J, in trying to prevaricate about the role and function of the courts, made the submission that:

‘an 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.’¹⁴⁵

The above is an apt example of the ‘ridiculous dicta’ that Du Plessis speaks of. The mode of reasoning adopted by the court in the application of the presumption is nonsensical and ridiculous, as it makes the interpretation of equity entirely dependant on the wording of the enactment.¹⁴⁶ Theoretically it would seem that while the principles of fairness and justice that were pivotal to the operation of the presumption – and which could quite easily have operated as a surrogate for a Bill of Rights – did not materialise, with some notable exceptions.¹⁴⁷ Under a system of parliamentary sovereignty, whereby parliament could enact any law and if the aim and the ‘intention of the legislature’ was clear, as reflected in case-law discussed above, the

¹⁴⁰ 25 of 1945.

¹⁴¹ 1971 (2) SA 10 (E) 11.

¹⁴² 1971 (1) SA 199 (E) 201.

¹⁴³ 1981 (1) SA 187 AD.

¹⁴⁴ 77 of 1957.

¹⁴⁵ See *S v Adams* 1979 (4) SA at 793 (T) at 798 G.

¹⁴⁶ Du Plessis *The Interpretation of Statutes* at 84-85.

¹⁴⁷ See for example *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 and *R v Detody* 1926 AD 198.

courts had no choice but to apply the law – no matter how harsh, unjust or unreasonable it was.

4.5.2 The Relevance of the Presumption in the Current Constitutional Dispensation

The principles underpinning the presumption that harsh, unjust or unreasonable results are not intended – are fully in keeping with the spirit and scope of the fundamental rights enshrined in the Bill of Rights. In a post-apartheid constitutional order, the importance of a right to equality cannot be over-emphasised. Section 39 the Constitution speaks of the type of society that the people wish to create and emphasises that it has to be based on equality, dignity and freedom¹⁴⁸ – which are reflective of a transformative constitutional order. It is therefore quite clear that section 9,¹⁴⁹ the equality provision, is not only the cornerstone of democracy but that it is given recognition as the first right, in terms of the Bill of Rights. Because South African society was previously based primarily on inequality and discrimination that were perpetuated by apartheid laws. Built into the equality provision is a mandate that measures have to be taken to ensure the protection of the rights, as well as the advancement of people who have been discriminated against as a result of past racially and discriminatory laws and practices.¹⁵⁰ To attempt to redress and ameliorate the situation to which most people of South Africa were subjected to for decades, is indeed no small feat. For this reason, the implementation of affirmative action policies and the promulgation of legislation such as the Promotion of Equality and the Prevention of Unfair Discrimination Act,¹⁵¹ which have as their genesis the equality provision of the Constitution, must be seen as steps in the right direction.

¹⁴⁸ De Waal *et al* *The Bill of Rights Handbook* (6th edition) at 146.

¹⁴⁹ Section 9 (1) of the Constitution provides that: ‘Everyone is equal before the law and has the right to equal protection and benefit of the law.’

¹⁵⁰ Section 9 (2) of the Constitution provides that: ‘Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.’

¹⁵¹ Act 4 of 2000.

From an examination of the operation of the equality provision, as expounded above, it is obvious that before the new constitutional dispensation and introduction of the Bill of Rights, the jurisprudence premised on the presumption that statute law is not unjust, inequitable and unreasonable, did not apply to the extent to which one would have expected.¹⁵² The courts, in particular, were criticised because of their failure to apply the presumption where the rights of individuals were at stake. As can be garnered from an examination of relevant case-law, where courts could have seized the opportunity to mitigate the rigours of apartheid, this was easier in theory than in practice.

The position on the role and function of the judiciary in the current constitutional dispensation is substantially different to that which prevailed during the apartheid era. The replacement of the principle of parliamentary sovereignty by constitutional supremacy means that the overriding consideration of statutory interpretation is that the fundamental values must be considered within the framework of the Constitution. The courts are now obligated to reconcile the aim and purpose of legislation with the provisions in the Bill of Rights. From the case of *Matiso v Officer Commanding, PE Prison*,¹⁵³ Froneman J articulated his position on the subject as follows:

‘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.’

However, in view of the fact that the values that underlie this particular presumption are considered as being the pillars on which our Constitution is based, the reliance on the application of this particular presumption is no longer necessary, as it is incumbent on judicial officers to give effect to and promote the values that underlie an open and democratic society.

¹⁵² Du Plessis *The Re-Interpretation of Statutes* at 155.

¹⁵³ 1994 (4) SA 592 (SE) at 597-598.

4.6 Conclusion

In evaluating the role of presumptions in statutory interpretation, what is obvious is that the reliance on presumptions in statutory interpretation since 1994 has not depreciated. In fact, it is observed that not only has the Constitutional Court relied extensively on presumptions for the purposes of constitutional interpretation, but although many of the common-law presumptions have been subsumed into the provisions of the Bill of Rights, as highlighted in the discussion above, presumptions have continued to be invoked by the courts for purposes of statutory interpretation.¹⁵⁴ What has emerged has been an interesting inter-relationship between statute law, the common-law and the Constitution.

In the case of *Carmichele v Minister of Safety and Security*,¹⁵⁵ the Constitutional Court affirmed that there is a general obligation on courts to develop the common-law appropriately, in accordance with section 39 (2). The Court was emphatic that this obligation was not to be regarded as ‘purely discretionary’. The case of *Bhe v Magistrate of Khayelitsha and Others*¹⁵⁶ is also relevant. From the case, it is noted that customary law has not evolved to meet the changing needs of community life. Had customary law been permitted to develop in an ‘active and dynamic manner,’¹⁵⁷ the initial position in *Bhe*’s case would have been significantly different. Clearly it would not have excluded women from inheriting on the grounds of gender.¹⁵⁸ What is apparent is that the judgements of *Carmichele* and *Bhe* were not only innovative and creative, but indeed quite pro-active in dealing respectively with the development of the common and customary law. As the Constitution specifically mandates that the rules of common-law and customary law have to be developed in accordance with the principles enshrined in the Bill of Rights, it is therefore expected that the presumptions which form part of the common-law, will continue to

¹⁵⁴ Du Plessis *The Re-Interpretation of Statutes* at 152-153.

¹⁵⁵ 2001 (4) SA 938 (CC) at para 39.

¹⁵⁶ 2005 (1) SA 850 (CC).

¹⁵⁷ Woolman *The Selfless Constitution – Experimentalism and Flourishing as Foundation of South Africa’s Basic Law* at 448.

¹⁵⁸ *Ibid.*

‘augment, enrich and enhance the Constitution’¹⁵⁹ in facilitating and understanding of the operation and application of law in the current constitutional order.

The Constitution enjoins the judiciary to consider, respect, protect, promote and fulfil the foundational values on which the current system is based.¹⁶⁰ This is reflected in section 7(2) of the Constitution which provides that: ‘the State must respect, protect, promote and fulfil rights in the Bill of Rights.’ Section 7(2) clearly epitomises the ethos of a transformative Constitution.¹⁶¹ It conveys the idea that the State is not simply only required to refrain from interfering with the enjoyment of rights, but it must also ensure that it protects, enhances and realises the enjoyment of these rights.¹⁶²

Section 39 clearly mandates a value-based methodology. Implicit therein, is the responsibility of the judiciary to heed the call ‘to improve the quality of life of all citizens.’¹⁶³ Section 39 therefore in operating together with Section 7(2) of the Constitution which applies directly to the promotion of social and economic rights, has resulted in the emergence of a ‘new’ jurisprudence. Such jurisprudence requires a new, creative, innovative and pro-active approach to interpretation, as evidenced in the *Carmichele*, *Bhe* and *Rivonia School* cases. A pro-active approach to the process of interpretation, which is based on legal reasoning and is infused with ethical and moral considerations, to promote social advancement, is what is required in a transformative constitutional system. These are the core elements that comprise the deontic theory of interpretation, which is proposed for interpretation in the era of constitutional democracy in South Africa. In this regard the presumptions of interpretation involving principles of justice, fairness and equity still have an important role to play.

¹⁵⁹ Du Plessis *The Re-Interpretation of Statutes* at 151-152.

¹⁶⁰ Botha *Statutory Interpretation* (5th edition) at 199.

¹⁶¹ De Vos and Freedman *South African Constitutional Law in Context* at 671.

¹⁶² *Ibid.*

¹⁶³ Botha *Statutory Interpretation* (5th edition) at 204.

CHAPTER 5

THE RELEVANCE OF THE CANONS AND MAXIMS OF INTERPRETATION IN A SYSTEM OF CONSTITUTIONAL DEMOCRACY IN SOUTH AFRICA

5.1 Introduction

The focus of this chapter is on the canons and maxims of interpretation. The chapter therefore examines some of the more popular or commonly used common-law maxims and canons of construction.¹ The aim is to determine:

- a) whether these common-law rules which may be regarded as being outmoded and archaic – still apply; and
- b) their relevance and beneficial application in the current democratic constitutional order.

Rules of interpretation are commonly referred to as the ‘canons of construction.’² In fact, however, they are not rules or laws, in the ordinary sense of the word. No canon can ever conclusively resolve a dispute over the meaning of a statute, nor is a court required to apply a canon.³ The canons are merely generalisations about the use

¹ For purposes of the research, the focus will be on some of the more commonly used maxims and canons of interpretation. In examining the Rules of Restrictive Interpretation, the *Eiusdem Generis* Rule and the *Cessante Ratione Legis Cessat Et Ipsa Lex* will form the basis of the discussion. In terms of Extensive Interpretation, Interpretation by Implication (and the rules relating thereto), and Interpretation by Analogy will be dealt with more fully. Canon law is the body of laws and regulations made by ecclesiastical authority (Church leadership), for the government of a Christian organization or church and its members. It is the internal ecclesiastical law governing the Catholic church, the Eastern and Oriental Orthodox churches, and the Anglican Communion of churches. The way that such church law is legislated, interpreted and at times adjudicated varies widely among these three bodies of churches. In all three traditions, a canon was originally a rule, adopted by a church council. These canons formed the foundation of canon law. <http://wikipedia.org/wiki/canon-law> (Accessed on July 2012)

² Statsky *Legislative Analysis and Drafting* at 83.

³ Ibid.

of language and are therefore regarded as the ‘customs of writing.’⁴ What is obvious from an examination of the process of interpretation, however, is that any discussion on the application of the rules of interpretation – in particular the maxims and canons of interpretation – is incomplete without considering the role of the judges who have to apply these rules. There are a number of factors ‘constitutional and otherwise’ that support the law-making discretion of judges or courts during the interpretation of legislation.⁵ These factors will be examined more fully to help shed light on the subject and to provide a more nuanced understanding of the role of judges in the realm of judicial law-making in the current democratic constitutional dispensation. It is submitted that the role of the judge in a transformative constitution needs to be compatible with the goals of such a system, which in the South African context is to give effect to social transformation involving civil, political as well as socio-economic rights. In a transformative constitutional state, it is clear that the courts should focus on attempting to ameliorate the conditions of inequality and the eradication of poverty – by striving towards the attainment of social justice through transformation. The role of the judge it is submitted should therefore involve a moral function.

Before the current democratic constitutional order, Dugard observed that ‘Critics of the South African judiciary have been accused of failing to understand its role in the legal process.’⁶ While there is a perception that South African judges, unlike their American counterparts, ‘do not make law but only declare it’,⁷ which is in effect the operation of the *iudicis est ius dicere sed non dare maxim*, the same author stresses that critics ought to be reminded that while the Justices of the Supreme Court of the United States have a more political role to play, the function of the South African judge can be described as being purely judicial.⁸ This position has been changed

⁴ Ibid. In the case of a statute, certain canons of construction can help a court ascertain what the drafters of a statute – usually the legislature – meant by the language used in the law. When a dispute involves a contract, a court will apply other canons of interpretation, or construction, to help determine what the parties to the agreement intended at the time they made the contract. <http://www.thefreedictionary.com/construction> (Accessed on July 2012)

⁵ Botha *Statutory Interpretation* (5th edition) at 163-165.

⁶ Dugard *Human Rights and the South African Legal Order* at 366.

⁷ Ibid.

⁸ Ibid.

significantly with the advent of the new constitutional order. As ‘guardians of constitutional values’,⁹ section 39(2) of the Constitution mandates that it is now the responsibility of the judicial officer to reconcile the aim and purpose of the legislation with the provisions of the Constitution, and to uphold and give expression to the values that underlie an open and democratic society. This is not a matter of choice or election but one of obligation which is inherent in a deontic theory of interpretation.

The creative application of the rules of interpretation, by way of the canons and maxims of interpretation, are not to be seen as ‘a foreign principle falling outside the ambit’¹⁰ of their functions – but should be regarded as being very much part of what is required by a judicial officer in giving effect to his ‘discretionary powers’.¹¹ The crux of this important debate is dealt with in more detail below.

5.2 The Role of the Judge in the Realm of Judicial Law-Making

In examining the role of judges in the process of interpretation, what is fundamental to the discussion is the ‘ancient’ question of whether judges create or invent law¹² or interpret the law *only* mechanically,¹³ or are they involved in a more creative law-making function in the judicial process.

5.2.1 Concretisation

The interesting terminology used when describing the process of transition from interpretation to application is concretisation. Concretisation is the final stage in the interpretation process when the legislation is applied or becomes a reality.¹⁴ During concretisation, the abstract text of the legislation and the purpose of the legislation – which was determined earlier in the process – are correlated with the concrete facts

⁹ Botha *Statutory Interpretation* (5th edition) at 164.

¹⁰ Botha *Statutory Interpretation* (4th edition) at 97.

¹¹ Ibid.

¹² Dworkin *Laws Empire* at 225.

¹³ Ibid. (Emphasis added)

¹⁴ Botha *Statutory Interpretation* (5th edition) at 159.

of the case, in order to reach a meaningful conclusion.¹⁵ Some of the other terms used to describe the process – are correlation, harmonisation, realisation and actualisation.¹⁶ In examining the term concretisation and other synonyms, what is apparent is that the words tend to convey a move away from the abstract to the practical reality of the situation.¹⁷ What has to be emphasized, however, is that the process is only complete when the prescribed constitutional values and principles are also given expression to. Section 39(2) of the Constitution – which requires that courts must attempt to reconcile the aim and purpose of legislation within the provisions in the Bill of Rights¹⁸ – reinforces the role of judges as enforcers or guardians of constitutional values thereby giving them a moral function.¹⁹

However, the question of the law-making role of the courts during statutory interpretation is a matter of serious contention between on the one hand ‘textualists’ or the ‘pure literalists’, and on the other hand the contextualists or the ‘intentionalist literalists.’²⁰ According to the textualists who tend to favour the more orthodox viewpoint, the role of the courts is a more conservative one, in that the judicial officer is bound by the words used by the legislature. The pure literalists maintain

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Du Toit ‘The dimension of Futurity in the Law: Towards a Renewal of the Theory of Interpretation’ (1977) *Tydskrif vir Regswetenskap* at 11. Du Toit points out that the essence of statutory interpretation lies in the realization of the possible meanings of the original, legislation. Hence the use of the word ‘realisation’ or ‘actualisation’ to describe the process. The meaning of the text is tantamount to its application in a given concrete situation. Hence the use of the word ‘concretisation’ to describe the process.

¹⁸ Section 39 provides that :-
 ‘(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.
 (2) 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.’

¹⁹ Graham ‘SA Needs New Moral Code, Says Priest’ June 18-24, 2014 *The Southern Cross* at 1. The article acknowledges the need for a ‘moral code’ for the country’s law-making processes. Father Mkhathwa of the Moral Regeneration Movement commented on the Constitutional Court Chief Justice Mogoeng Mogoeng submission that ‘religion was to be factored into the law-making processes.’ It was further emphasized that such a moral code must be used to promote the best interests of the people, especially the disadvantaged.

²⁰ Du Plessis *Re-Interpretation of Statutes* at 231.

that the *ipsissima verba* of the legislation must be adhered to – no matter the consequences.²¹ The role of the court, therefore, is only to interpret legislation in a mechanical way. If there are any modifications, corrections or additions to be effected – such changes should be left to the legislature.²² A case in point is that of *Engels v Allied Chemical Manufacturers (Pty) Ltd*,²³ where the viewpoint was reflected as follows:

‘The basic reasoning behind this approach is that by remedying a defect which the Legislature could have remedied, the court is usurping the function of the Legislature and making law, not interpreting it.’

The contextualists or the ‘intentionalist literalists’, as they are also referred to, maintain a contrary view. Proponents of the intentionalist-literalist approach are of the opinion that the words of the legislation may be altered – provided that this process is clearly discernible from the intention of the legislature.²⁴ Basically, this view is in keeping with the school of thought that courts do, in fact, have a creative law-making function during the process of interpretation. The stance maintained in *Zimmat Insurance Co Ltd v Chawanda*,²⁵ illustrates this thinking:

‘...This is because judges have a certain amount of freedom or latitude in the process of interpretation and application of law. It is now acknowledged that judges do not merely discover the law, but they also make law. They take part in the process of creation. Law-making is an inherent and inevitable part of the judicial process.’

²¹ Ibid.

²² Botha *Statutory Interpretation* (5th edition) at 160. The idea that no changes are to be effected to the legislative text, except by the legislature, is consistent with the *maxim iudicis est dicere non dare* – which basically means that ‘it is the province of a judge to interpret the law, and not to make it.’ It is noted that *maxim* is in conflict with the purposive methodology and the ethos of the Constitution.

²³ 1993 (4) SA 45 (Nm) at 54 A-B.

²⁴ Du Plessis *Re-Interpretation of Statutes* at 231.

²⁵ 1991 (2) SA (ZSC) 825 at 832 H-I.

The literalists' viewpoint that the courts will usurp the power of the legislature when legislation is interpreted creatively, is based on a number of false assumptions, anomalies and contradictions.²⁶

The term often used to describe the process whereby changes are effected to the *ipsisima verba*, is the modification of language.²⁷ However, it has to be stressed that it is not essentially the language of the legislation that is modified at all – rather, the meaning of the legislation is ‘adapted’ during interpretation to give effect to the legislative purpose.²⁸ Du Plessis is quite emphatic that the orthodox viewpoint which forms the basis of the literalists or textualists’ school of thought, which prohibits any form of modification as described above, could indeed ironically result in an incorrect and unjustifiable form of judicial law-making.²⁹ Section 39(2) – which mandates the process of statutory interpretation – requires that the courts must reconcile the aims and the purpose of legislation with the provisions of the Constitution.³⁰ It is submitted that in a transformative Constitution, as alluded to, the function of the judge has to be a moral function. What is therefore required in the process of interpretation, is that judges need to embrace the challenge to give effect to social justice, by paying particular attention to the ethical and moral considerations in the process of legal reasoning and analysis of cases before them. The theory which underpins this rationale and which supports this approach, is the proposed deontic theory of interpretation.

²⁶ Botha *Statutory Interpretation* (4th edition) at 97.

²⁷ Botha *Statutory Interpretation* (5th edition) at 162.

²⁸ *Ibid.*

²⁹ Du Plessis *The Interpretation of Statutes* at 37.

³⁰ *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 (4) SA 592 (SE) at 597-598, the law-making function of the judiciary was expounded by the court as follows: ‘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... This does not mean that Judges should now suddenly enter an orgy of judicial law-making, but they should recognize 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.’

5.2.2 Factors which support **Modificative Interpretation**

There are a number of factors that support the law-making discretion of the courts during the interpretation of legislation. Some of these include:

- (i) The reading-down principle : where legislation is - on the face of it – unconstitutional, but is reasonably capable of another plausible interpretation compatible with the Constitution;
- (ii) Section 39 (2) of the Constitution: During interpretation the courts must try to reconcile the aim and purpose of the legislation with the provisions of the Constitution;
- (iii) Constitutional Supremacy: In terms of section 2 of the Constitution, the Constitution is the supreme law of the country;
- (iv) The common law presumptions: In particular, the presumption that the legislature does not intend futile, meaningless and nugatory legislation; and
- (v) The independence of the judiciary: In terms of Section 165(2) of the Constitution, this also facilitates judicial law-making.³¹

5.2.3 Factors that **Limit Judicial Law-Making During Statutory Interpretation**

- (i) The principle and practice of democracy: Reference here is to section 1 of the Constitution and the preamble. Although the courts are described as being guardians of constitutional values, they are not allowed to take over the constitutional role of the legislature. They make law only in a secondary sense.
- (ii) The principle of separation of powers: This tends to support the textualists' ideology that courts cannot make any alterations to the legislative text.
- (iii) The common-law presumption: that the legislature does not intend to change the existing law more than is necessary.

³¹ Botha *Statutory Interpretation* (5th edition) at 164-165

- (iv) The rule of law and the principle of legality.
- (v) Judges and judicial officers are accountable and responsible for their judgments and actions on three levels:
 - First – personal responsibility;
 - Second – formal responsibility; and
 - Third – substantive accountability with reference to the constitutional values of accountability, responsiveness and openness expressed in section 1 (d) of the Constitution.
- (vi) Penal Provisions: the courts cannot create new crimes.³²

In attempting to address the question of whether judges make law in the process of judicial law-making, one's attention is directed to the fact that a 'full understanding of the judicial process on the part of the judge must be considered.'³³ The essence of this is captured by Judge Jerome Frank:

'To do their intricate job well our judges need all the clear consciousness of their purpose which they can summon to their aid. And the pretence, the self delusion, *that when they are creating*, they are borrowing, *when they are making something new*, they are merely applying the commands given them by some existing external authority, cannot but diminish their efficiency ... The honest, well trained judge with the completest possible knowledge of the character of his powers and his own prejudices and weaknesses is the best guarantee of justice.'³⁴

It is interesting that the learned judge refers to 'the creating' of and the 'making of something new' in the process of interpretation.³⁵ Dugard affirms that once there is a clear 'recognition of such creative powers of the judiciary, in the interpretation of statutes', the law-making task for judges is made easier *if* they are guided by accepted legal values – rather than by subconscious preferences.³⁶ He develops this

³² Ibid.

³³ Dugard *Human Rights and the South African Legal Order* at 381.

³⁴ Ibid at 381-382. (Emphasis Added)

³⁵ Ibid.

³⁶ Ibid at 382. Statsky is in agreement with Dugard that courts do in fact have the power to create law, and ascribes much of this to the general language of the statute. See Statsky *Legislative Analysis and Drafting* at 11, which reflects the authors thinking on this aspect of

argument further in asserting that such legal values or principles should be employed to guide judicial policy and to assist the election that judicial officers are usually faced with. These legal values or principles should form part of the South African legal heritage, and must encapsulate the basic political and legal ideal of the modern democratic society, in order to promote the well-being and free the potential of the individual. These are today encapsulated in the Constitution.

In reflecting on the key elements, as articulated above, what is clear is that Dugard is undoubtedly referring to a value-based method of interpretation. As a value-laden document, the Constitution is underpinned by a number of express and implied norms and values. The fundamental principles are not only the ideals to which the South African society has committed itself, but they also form the objectives which should now regulate all aspects of South African society.³⁷ The spirit of the Bill of Rights referred to in section 39(2) of the Constitution, is a reflection of these fundamental principles. The spirit, purport and objects of the Bill of Rights must be promoted during the process of interpretation.³⁸ As guardians of the Constitution, judges must give expression to the values – to uphold and protect the Constitution.³⁹ This means that courts or judges will have to make value judgments during the interpretation and application of legislation.⁴⁰ As a result of section 2 which declares the supremacy of the Constitution, and section 39(2) which articulates the manner in which laws are to be interpreted in the democratic era in South Africa, a ‘new’ jurisprudence has emerged. The value-based methodology mandated by section 39(2), has resulted in a paradigmatic shift away from positivism to a jurisprudence that is akin to natural law. The formalistic literal approach to interpretation has been replaced by one which can be described as a purposive, and value-based

interpretation: ‘...the courts role in applying statutes is very limited because of the doctrine of separation of powers. In practice, however, the court often has a major creative role in the application of Statutes. This is due to the nature a) of the language and b) of the legislative process.’

³⁷ Botha *Statutory Interpretation* (4th edition) at 65.

³⁸ Ibid.

³⁹ The sentiment that judges are guardians of constitutional values is reflected in *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 (4) SA 592 (SE), discussed above.

⁴⁰ Such value-judgments are consistent with a value-based methodology that underpins the operation of a teleological theory of interpretation. See **Chapter 2** for a comprehensive examination of the traditional theories of interpretation.

methodology of interpretation. The methodology of interpretation that must be applied must be adapted to be brought in line with the values of the Constitution. As reflected in an examination of case-law, the ‘new’ jurisprudence requires a ‘new’ theory for interpretation. The proposed deontic theory – which embodies the elements of morality as its central feature and requires an amalgamation of the different methodologies of interpretation as its *modus operandi* – is most suited to a transformative constitution striving to further the agenda of social transformation.

As already discussed, concretisation⁴¹ is the final stage in the interpretation process, during which the facts of the case and the relevant legislation are harmonised within the framework of the purpose of the legislation in a holistic manner. The possibilities which arise during the process of concretisation may also be influenced by the Constitution.⁴² Sometimes this may require a certain ‘tampering with the *ipsissima verba* of the statute’.⁴³ Such modificative interpretation occurs when the initial meaning of the text does not correspond fully to the purpose of the legislation as influenced by the Bill of Rights, and its values. It also occurs where the text has stipulated either more or less than its purpose, or when the *prima facie* or the initial meaning of the text is in conflict with the Constitution and its inherent values.⁴⁴ Because the legislative text ‘bounds state authority’,⁴⁵ Du Plessis cautions that the ‘interpreter-judge is no legislator’⁴⁶ and that such adaptive interpretation is to make sense of the legislature’s law as it stands and not to substitute the judge’s law for it.⁴⁷ Judges should therefore make the law only in a secondary sense and not in a primary sense as does the legislature.

If the purpose indicates that modification is necessary (and possible), in principle there are two possibilities that may arise. Either the initial meaning of the text is reduced (restrictive interpretation), or the initial meaning is extended (extensive

⁴¹ See discussion at **4.2.1 Concretisation** in the **Chapter 4**.

⁴² Botha *Statutory Interpretation* (5th edition) at 166.

⁴³ Du Plessis *Re-Interpretation of Statutes* at 229.

⁴⁴ Botha *Statutory Interpretation* (5th edition) at 166.

⁴⁵ Du Plessis *Re-Interpretation of Statutes* at 229.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

interpretation). The canons and maxims that define the restrictive and extensive rules of interpretation will be explored more fully in this chapter.⁴⁸ In examining the canons and maxims of interpretation, the purpose of this chapter is to provide clarity on the following important considerations. The first is directed at assessing the significance and relevance of the rules and maxims of interpretation in the current constitutional order in South Africa. If the enquiry reveals that the rules are found to be applicable and relevant, the next part of the analysis will be directed at ascertaining how these rules ought to be applied and given expression to promote the values in the Bill of Rights. This would also require an analysis of the relevant theories of interpretation.⁴⁹ It is submitted that the canons and maxims found in the common-law are therefore still relevant but must be used to give expression to the values encapsulated in the Bill of Rights which are not only liberal but also socio-economic in nature.

5.3 Techniques of Restrictive Interpretation

5.3.1 Definition

Restrictive interpretation is applied when the words of a particular provision embrace more than its purpose. Courts employ the technique of restrictive interpretation to limit or restrict the meaning of the words. The meaning of the text is then modified to reflect the true purpose.⁵⁰

Restrictive interpretation is justified in order to bring the words in line with the *clear* object of the Act.⁵¹ It is submitted that where such object is absent, or perhaps not

⁴⁸ For purposes of the research, only the more commonly used rules have been selected to illustrate their relevance for the operation of the proposed deontic theory of interpretation in the current constitutional order.

⁴⁹ The relevant theories of interpretation are examined in detail in **Chapter 2**, but are referred to throughout the thesis to highlight the need for a new theory in the new dispensation. Such a theory is the proposed deontic theory of interpretation.

⁵⁰ De Ville *Constitutional and Statutory Interpretation* at 121. De Ville provides that courts traditionally apply three forms of restrictive interpretation: *noscitur a sociis, eiusdem generis* and *cessante ratione legis, cessat et ipsa lex*. Restrictive interpretation is however, not only limited to instances where the above-mentioned rules apply. Any interpretation which restricts the broader ordinary meaning of the text in light of the purpose of the legislation, is by definition restrictive interpretation.

⁵¹ Devenish *Interpretation of Statutes* at 65.

clearly ascertainable, the technique of restrictive interpretation should be used to harmonise the meaning of a statutory provision with the common-law prior to the dispensation and in contemporary South Africa to bring it in line with the Constitution. The point emphasized here is that restrictive interpretation should be used not only to bring words in line with the legislature's intention,⁵² but also in line with the values in the Constitution. For the purposes of the discussion, the following two manifestations of restrictive interpretation are discussed, to demonstrate their inherent flexibility:

Eiusdem Generis Rule; and

Cessante Ratione Legis, Cessat Et Ipsa Lex.

5.3.2 *Eiusdem Generis* Rule

This is a well known maxim which literally means 'of the same kind'.⁵³ The maxim is based on the *noscitur a sociis* principle, that words are known by those with which they are associated. This means that the meaning of the words is qualified by their relationship to other words, or, said another way, the maxim is used to restrict the meaning of general words by reference to specific words in their vicinity.⁵⁴

In the general application of the maxim, the procedure revolves around the establishing of the following:

- a) Do the words form a genus or class?
- b) Is the genus followed by a general expression?

⁵² Ibid.

⁵³ Botha *Statutory Interpretation* (5th edition) at 170.

⁵⁴ Ibid. See for example, the application of the *eiusdem generis* rule in *Poovalingam v Rajbansi* 1992 (1) SA 283 (A) at 294, where the words 'or otherwise' had to be interpreted *eiusdem generis* to include similar procedures by which parliamentary business is transacted. The letter did not relate to any business transacted in the House on that date. The letter also did not fall within the ambit of any procedure recognized by Parliament. The section therefore did not provide the respondent with the legal immunity for the consequences of publishing the letter. See also *S v Du Plessis* 1981 (3) SA 382 (A) at 403-404, where it was held that the words 'or any other means' in terms of section 118 of the Defence Act 44 of 1957 had to be interpreted *eiusdem generis*.

- c) Does the statute express any intention as far as the general expression is concerned?

If so, then the general expression must be interpreted *eiusdem generis* within the scope of the matters which form the genus or class and can only be applied if there is a definite genus or category.⁵⁵

*Sacks v City Council of Johannesburg*⁵⁶ has been described as being an ‘exemplary illustration of how the maxim should be applied’.⁵⁷ A traffic by-law provided that ‘no person shall sit or be on any street, nor shall any person stand, congregate or walk or otherwise act in any such manner as to obstruct the free traffic ...’

The accused, a prominent trade unionist, had addressed a crowd of people which had gathered to hear him speak during an industrial dispute. He addressed the crowd from a car on a public street, and, as a result, caused an obstruction of the flow of traffic. What is evident from an analysis of the facts and findings *in casu*, is that the process starts off with a consideration of the actual words – whether addressing the crowd from a loudspeaker and the consequential traffic congestion it caused could be construed as being in contravention of the traffic by-law in question. Apart from a consideration of the actual words of the provision, a contextual examination of the law – in light of the other conduct mentioned in the by-law and other by-laws relating to the subject – proved to be most useful.⁵⁸ The court was able to establish from the object or the purpose of the Act, that the law was intended to make punishable *only* conduct which caused an obstruction by the direct physical act of the person. The phrase ‘or other act’ had to be read ‘*eiusdem generis*’ to give effect to the object or the purpose of the statute.⁵⁹ Therefore, in the final analysis, the court found that the traffic by-law did not apply to the individual who addressed a crowd of people that had gathered to hear him. This was a consequential obstruction.

⁵⁵ Botha *Statutory Interpretation* (5th edition) at 170-172.

⁵⁶ 1931 TPD 443.

⁵⁷ Devenish *Interpretation of Statutes* at 72.

⁵⁸ *Ibid* at 72-73.

⁵⁹ *Ibid* at 73.

In reflecting on the outcome of the case, Devenish makes the point that the *Sacks*' case might reflect that which has been referred to as being the 'inarticulate premise' of judicial sympathy to liberal values.⁶⁰ With regard to some of the more controversial decisions, it would appear that judges have exercised their choice without providing a satisfactory explanation – which suggests that the 'inarticulate premise may have played some part in the preference shown for certain precedents and principles, at the expense of others.⁶¹ It is therefore acknowledged that if the judicial process is regarded as an exercise in choice, and not as a purely mechanical operation, it will 'open the way' or allow for the judiciary to resolve competing claims and to exercise its choice in accordance with articulated judicial policy decisions, based on legal values.⁶²

The 'legal values' that Dugard refers to epitomise a value-coherent or a teleological mode of interpretation.⁶³ In terms of section 39(2) of the Constitution, the fundamental values in the Bill of Rights are the foundation of a normative, value-laden jurisprudence, during which all conduct has to be evaluated.⁶⁴ A proponent of the teleological approach – Denning explains that the *modus operandi* of the teleological method of interpretation requires that whenever one is presented with a choice, one must choose the meaning that most accords with reason and justice.⁶⁵ This is precisely the manner in which the judge in *Sacks* applied his mind to the matter at hand, in order to arrive at his conclusion. Devenish is therefore justified in his submission that, had an executive-minded judge presided over the case, in all likelihood a completely different outcome and finding might have been reached.⁶⁶ In terms of the *eiusdem generis* rule, however, there should be caution with regard to its

⁶⁰ Ibid.

⁶¹ Dugard *Human Rights and the South African Legal Order* at 381.

⁶² Ibid.

⁶³ See Du Plessis *Re-Interpretation of Statutes* at 247-249, for an examination of the teleological theory of interpretation.

⁶⁴ Botha *Statutory Interpretation* (5th edition) at 108.

⁶⁵ Devenish *Interpretation of Statutes* at 46.

⁶⁶ Ibid at 73.

application.⁶⁷ The submission that the rule is to be applied with considerable circumspection,⁶⁸ is therefore well received and relevant for the new dispensation.

*S v Buthelezi*⁶⁹ is an apt example of the application that the *eiusdem generis* rule is not to be applied mechanically. In the case, the statute made reference to ‘any place of entertainment, café, eating house, race course, or premises or place to which the public are granted to have access’. The court held that the words ‘... premises or place to which the public are granted to have access’, should be interpreted *eiusdem generis* and therefore they did not include a court-room and a police station as places of entertainment.⁷⁰ Quite interestingly, however, the court in *S v Sayed*⁷¹ maintained a contrary view point in the application of the rule. A statute prohibited the obstruction of free passage along a public street ‘by means of any wagon, cart, or other thing whatsoever’. The court declined to interpret the words *eiusdem generis* and therefore found that the provision also included ‘full boxes of vegetables’ which had caused an obstruction – even though a genus or class was clearly discernible from the wording of the statute.⁷²

What is important, is that with regard to both above-mentioned cases is that, the actual wording of the particular statute or provision was the first consideration in order to determine whether there was in fact an accepted genus or class. While the application of the rule appears to have yielded a different outcome in each of the cases,⁷³ the determining factor that the court took into consideration was the purpose of the legislation – as the rule may not be applied contrary to the legislature’s clear intention.⁷⁴ What is therefore obvious about the role of a judge, is that it is not merely one of election, but also requires a moral evaluation of the text and the

⁶⁷ De Ville *Constitutional and Statutory Interpretation* at 125.

⁶⁸ Devenish *Interpretation of Statutes* at 70-71.

⁶⁹ 1979 (3) SA 1349 (N).

⁷⁰ See Devenish *Interpretation of Statutes* at 71, for the authors comments about *Buthelezi*’s case.

⁷¹ 1962 (2) SA 128 (C) at 129.

⁷² See Devenish *Interpretation of Statutes* at 73, for the authors comments about *Sayed*’s case.

⁷³ Reference here is made to *S v Buthelezi* 1979 (3) SA 1349 (N) and *S v Sayed* 1962 (2) SA 128 (c).

⁷⁴ Du Plessis *Re-Interpretation of Statutes* at 235.

context, and therefore extends to both ‘linguistic’ and ‘non-linguistic considerations.’⁷⁵ The amalgamation of the different methodologies is clearly evidenced in the courts’ approach to the question of interpretation. While the starting point of interpretation is initially a consideration of the words used, this has to extend to a consideration of the context and also to search for the purpose of the legislation. While the above cases were heard prior to the Constitution, subsequent to the Constitution it is necessary, in terms of section 39(2), to also conduct a ‘teleological evaluation.’ What is therefore evident is that the court’s approach in the application of the canons and maxims of interpretation is reflective of an eclectic methodology, which forms the *modus operandi* for the operation of the proposed deontic theory of interpretation.

5.3.3 *Cessante Ratione Legis Cessat Et Ipsa Lex*

The maxim literally means that ‘if the reason for the law ceases (or falls away) then the law itself also falls away.’⁷⁶ However, an Act of Parliament or enacted legislation cannot fall away by reason of custom or circumstances; it is necessary for the legislature to actually repeal the legislation concerned. Therefore, there is merit in Botha’s argument that the *cessante ratione* rule is not applied in South Africa in its original form.⁷⁷

The question that arises – is when does one employ the rule? The rule is used as a device of restrictive interpretation, whereby the court gives effect to the purpose of the legislation, which justifies the suspension of the operation of the statute.⁷⁸ This becomes necessary where it is revealed – from an examination of the circumstances of the case – that it would be futile or unnecessary to apply the legislation.⁷⁹ One statute in particular – which has resulted in courts invoking the application of the

⁷⁵ Devenish *Interpretation of Statutes* at 49.

⁷⁶ De Ville *Constitutional and Statutory Interpretation* at 122.

⁷⁷ Botha *Statutory Interpretation* (5th edition) at 168.

⁷⁸ Ibid at 169. See the operation of the *cessante ratione legis* in *Suliman v Hansa* 1971 (4) SA 69 (D); *Ex Parte Vermaak* 1977 (2) SA 129 (N) 133; and *Singh v Govender Construction* 1986 (3) SA 613 (N) 618.

⁷⁹ Ibid.

cessante razione rule quite frequently – has been the defunct Stock Theft Act.⁸⁰ Before its amendment, section 10(1) provided for the levying of a compensatory fine. In some cases, the court was faced with the problem of whether the compensatory fine still had to be paid – even though the stolen stock had been returned to the owner. The cases of *R v Mbamali and Xaba*⁸¹ and *R v Nteto*,⁸² are considered here to compare the different approaches to statutory interpretation applied by the presiding judges, and to examine the outcome as a result thereof. While the court in *R v Mbamali and Xaba* enforced the letter of the law and levied the compensatory fine, in *R v Nteto* the court held that as the complainant in the matter had already been compensated, the purpose of the legislation had been achieved, and a compensatory fine was not necessary.⁸³ What is clear, is that while the court in *R v Mbamali and Xaba* adopted the literal methodology in the interpretation of the provision – hence the finding that the compensatory fine was still required to be paid – the approach and methodology of the court in *R v Nteto* was unmistakably more purposive and value-coherent in nature.⁸⁴ This is clearly reflected in Gane J’s reasoning, where he applies his mind to the question of interpretation of the legislation, as follows:⁸⁵

‘I think the object of Section 10 of Act 26 of 1923 is to secure compensation to complainants; and once however that object has been secured, the necessity of the compensatory fine falls away.’

Devenish’s remarks, that the approach of the court in attempting to ascertain the legislature’s presumed intention ‘pursuant to the uncertainty of the legislature’s intention’, is in-keeping with a value-based evaluation that is pivotal to teleological interpretation.⁸⁶ In applying the same maxim in *De Kock v Resident Magistrate of*

⁸⁰ 26 of 1923.

⁸¹ 1938 NPD 2.

⁸² 1940 EDL 305.

⁸³ See discussion in Botha *Statutory Interpretation* (5th edition) at 169, for a commentary on the application of the *cessante razione legis* rule in *Ntetos* case.

⁸⁴ See Devenish *Interpretation of Statutes* at 68, for a critique of the application of the *cessante razione legis* rule in *Mbamali and Xaba* and *Nteto*.

⁸⁵ See De Ville - *Constitutional and Statutory Interpretation* at 123 for the authors comment about the operation of the Stock Theft Art 26 of 1923 in *Nteto*’s case.

⁸⁶ See Devenish *Interpretation of Statutes* at 68-69.

Caledon,⁸⁷ where the provision to be considered provided that ‘no person in any district where not less than two attorneys practice, shall be committed and enrolled as an agent’, one finds De Villers CJ vacillating between a literal and a purposive methodology – with the judge eventually electing to apply a literal approach.⁸⁸ This is decidedly not the way in which the provision should have been applied.

In making reference to the dilemma faced by judges in the process of interpretation, where they are often faced with conflicting approaches or competing values of construction, the point is made that because there is no hierarchy of rules of statutory construction and presumptions, the judge has the discretion to select that which he feels is best suited to the interpretation of the statute before him.⁸⁹ This reinforces the point made by the renowned judge Felix Frankfurter, that the process of construction is ‘not an exercise in logic or dialectic,’ but rather an ‘exercise in choice ...’.⁹⁰ As seen with the operation of the other maxims of interpretation, what is evident from an examination of the relevant cases, is that the process of interpretation is clearly an eclectic one – commencing with an analysis of the ordinary grammatical meaning of the words, and thereafter requiring a teleological evaluation of all of the facts under examination. It is therefore clear that this maxim is compatible with the ethos of the democratic constitutional dispensation.

5.4 Techniques of Extensive Interpretation and the Maxims Related to Such Interpretation

5.4.1 Definition

Extensive interpretation is the opposite of restrictive interpretation. This occurs in instances where the purpose is broader than the initial meaning of the legislation. The meaning of the text is then extended within the framework of the purpose of the

⁸⁷ (1896) 13 SC 386.

⁸⁸ See Devenish *Interpretation of Statutes* at 69, for the author’s criticism of the approach adopted by the judge in *De Kocks* case.

⁸⁹ Dugard *Human Rights and the South African Legal Order* at 370.

⁹⁰ *Ibid* at 371.

legislation – to give effect to that purpose. This applies where the legislation has specified less, but in fact intended more.⁹¹

Extensive interpretation, however, does not only refer to instances where particular words are assigned wider connotations – as described above. It also involves *inter alia* reading further words into a statute by way of implication.⁹² Generally, when courts employ this method of interpretation, they do so with a degree of circumspection.⁹³ The important consideration in the process of interpretation is the reason for the promulgation of the Act. Once this is ascertained, the courts will look to provide a meaning that furthers – rather than one that frustrates the purpose of the legislation.⁹⁴

As with the techniques of restrictive interpretation, the more commonly accepted and used maxims that are applied quite frequently in South African courts have been selected, and will form the basis of the analysis. The following mechanisms of extensive interpretation – interpretation by implication and interpretation by analogy – will be explored more fully.

5.4.2 Interpretation by Implication

Interpretation by implication involves extending the textual meaning on the grounds of a reasonable and essential implication which is evident from legislation. Express provisions are thus extended by implied provisions.⁹⁵ It is emphasized that the ‘test’ that courts use generally when applying the rules of interpretation by implication, are

⁹¹ Botha *Statutory Interpretation* (5th edition) at 172.

⁹² An illustration of words being read into a statute by way of implication, is evident in *Rennie NO v Gordan and Another NNO* 1988 (1) SA 1 (A) at 22. This approach has also been adopted in the interpretation of the Constitution in *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC).

⁹³ Devenish *Interpretation of Statutes* at 76.

⁹⁴ This methodology where courts must attempt to further the purpose of legislation, is purposive. The Constitutional Court has adopted the view that, in general, a generous or broad interpretation should be given to the Bill of Rights. See *S v Zuma and Others* 1995 (4) BCLR 401 (SA) para 14; and *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Other* 1998 (12) BCLR 1517 (CC) para 21.

⁹⁵ Botha *Statutory Interpretation* (5th edition) at 173.

not only instances of usefulness or convenience – but also necessity.⁹⁶ Such implication may arise from inference abstracted from an examination of all the provisions of the statute.⁹⁷ There are various grounds that could result in the provisions of the legislation being extended by implication. What is noted, is that most of these grounds tend to overlap and are not always easy to prove.⁹⁸ – as is illustrated:

(i) Interpretation *ex contrariis*

The implication here arises from opposites. If the legislation provides for a particular case, then the implication is that it makes a contrary provision for the opposite case.⁹⁹ The maxim generally overlaps with the *expressio unius est exclusio alterius* rule.¹⁰⁰

(ii) *Inclusio Unius Est Exclusio Alterius* Rule

The rule basically provides that the expression of one thing results in the exclusion of the other.¹⁰¹ Devenish describes it as the ‘rule of logical thought’.¹⁰² In *Keeley v Minister of Defence*,¹⁰³ the court refused to apply the rule, since the court found that in doing so would defeat the purpose of the legislation. In terms of the Defence

⁹⁶ See for example *Bloemfontein Town Council v Richter* 1938 AD 195, where the court found that a municipality has a statutory right to contain a river for the purposes of water supply. It also therefore by implication has a right to remove washed-up silt from the dam.

⁹⁷ See for example *Mpehle v Government of the Republic of South Africa and Another* 1996 (7) BCLR 921 (CK) at 928-930. The court *in casu* examined section 149 (4) (d) and section 153 (4) of the 1993 Constitution, to decide whether the power to terminate the membership of a member of the province, included the power to suspend such a member.

⁹⁸ Botha *Statutory Interpretation* (5th edition) at 173.

⁹⁹ See application of the *Ex Contrariis* Rule in *S v Mjoli and Another* 1981 (3) SA 1233 (A) at 1247.

¹⁰⁰ Mureinik ‘Expressio Unius: Exclusio Alterius?’ (1987) *South African Law Journal* at 264.

¹⁰¹ Devenish *Interpretation of Statutes* at 85.

¹⁰² *Ibid* at 86. In *Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics* 12911 AD 13 at 28, it was said that the maxim: ‘may sometimes afford useful guidance for construing a doubtful enactment, but it is not a rigid rule of construction to be applied without reference to the context in which the expression... occurs.’ Notwithstanding the fact that the quotation refers directly to *Chotabhai’s* case, it highlights an important aspect of the maxims, which is their flexibility in nature, making them still relevant and applicable in the current constitutional order to further the aims of social transformation.

¹⁰³ 1980 (4) SA 695 (T).

Act,¹⁰⁴ section 3 stipulated that ‘every citizen’ was liable to undergo compulsory military training. The issue in contention, was whether the application of the above rule would result in a non-citizen not being compelled to undergo military training. In examining the other provisions of the Act, the court declined to invoke the rule in the circumstances of the case.¹⁰⁵

The application of the rule requires a weighing up of all the relevant linguistic, contextual and common-law considerations in order to determine whether judicial law-making was justified in the circumstances.¹⁰⁶ The methodology once again supports that which has been proposed in this chapter as well as others – that the process of interpretation involves an analysis of an amalgamation of the various methodologies of interpretation when construing legislation. It is submitted that the inherent flexibility of the maxims and the amalgamation of the methodologies that forms the basis of their *modus operandi*, favours the operation of the proposed deontic theory in the constitutional era in South Africa.¹⁰⁷

(iii) Interpretation by Implication *ex consequentibus*

With regard to the application of the rule in the case below, it is necessary to decide whether a prohibition or authorisation, not contained in the express words of the provision, is implied.¹⁰⁸

The case of *Bloemfontein Town Council v Richter*¹⁰⁹ is relevant to the discussion. In the matter, the court had to decide whether a law which authorised the City Council to dam a river and to maintain a

¹⁰⁴ 44 of 1957.

¹⁰⁵ See discussion in Botha *Statutory Interpretation* (4th edition) at 106, for the operation of the *inclusiouniusest exclusion alterius* rule in *Keeley’s* case.

¹⁰⁶ Devenish *Interpretation of Statutes* at 86.

¹⁰⁷ The amalgamation of the methodologies compares favourably with the eclectic methodology that has been proposed for the operation of the proposed deontic theory of interpretation. See **Chapter 1, 1.6.4 Eclecticism**, for a closer analysis of the terms eclectic and eclecticism.

¹⁰⁸ Devenish *Interpretation of Statutes* at 86.

¹⁰⁹ 1938 AD 195.

dam, also included the right to remove silt – which infringed upon the rights of a landowner. Once again, in its analysis of the matter, what is evident is that the court did not only focus on the linguistic aspects of the legislation, but also extended its analysis to the balancing of the rights of the Council and those of the landowner. In so doing, it was necessary to give effect to all of the fundamental jurisprudential issues which also justified judicial law-making – more specifically, interpretation by implication – in giving effect to the *ex consequentibus* rule.¹¹⁰

In applying the rule, Stratford J arrived at the following outcome:

‘I have no hesitation in coming to the conclusion on the evidence that without the right to remove the silt, the right and power of the municipality cannot be properly enjoyed or exercised. If this is the position in fact the law is clear, that the right to clean (ie. take away silt) is one conferred by necessary implication.’¹¹¹

(iv) Interpretation *ex accessoria eius de quo verba loquuntur*

Basically the rule provides that if the principal thing is forbidden or permitted, then the accessory thing is also forbidden or permitted.¹¹² In order to apply the rule effectively, it is essential to distinguish between accessory powers. It would appear that even though accessory powers are much wider than necessary powers – in reality, such a distinction is, in fact, an artificial one.¹¹³ This is supported by the fact that courts tend to use the terms ‘reasonably incidental’¹¹⁴ and ‘reasonably ancillary’¹¹⁵ interchangeably. In *Moleah v*

¹¹⁰ Ibid at 226-227.

¹¹¹ Ibid at 227.

¹¹² Botha *Statutory Interpretation* (5th edition) at 173.

¹¹³ Devenish *Interpretation of Statutes* at 87.

¹¹⁴ *Brakpan Town Council v Burstein* 1932 TPD 335 at 402.

¹¹⁵ *Johannesburg Consolidated Investment Co Ltd v Marshalls Township Syndicate Ltd* 1917 AD 662 at 666.

*University of Transkei and Others*¹¹⁶ Van Zyl J drew attention to the fact that ancillary and incidental powers have either to be reasonably incidental or reasonably ancillary to the conferred power. He maintained further that although ancillary and incidental powers are broader concepts than necessary or essential powers, the use of the adjective ‘reasonably’ implies necessity.¹¹⁷

Due to the fact that the approach that has been adopted, for purposes of the research, with regard to the rules and the presumptions of interpretation, has been to focus on only selected rules and presumptions of interpretation, in examining the canons and the maxims of interpretation, it is emphasized that only the selected maxims form the crux of the debate. For the reasons submitted, the *natura ipsius rei*¹¹⁸ and the *ex correlativis*¹¹⁹ are only noted here as maxims that may also be employed to extend the purpose of the text.

5.4.3 Interpretation by Analogy

This method of interpretation involves extending the legislative provisions from one case to an analogous one – where the language of the legislation concerned does not expressly provide for such a case. If legislation applies to certain instances and its purpose can apply equally to other instances, the provisions of the legislation in question must be extended to such other instances on the basis of equality of *ratio*.¹²⁰ Maxwell refers to this technique as ‘equitable construction’, and submits that the rule was not very popular in England.¹²¹ It is noted that due to the obvious influence of

¹¹⁶ 1988 (2) SA 522 (TK).

¹¹⁷ Ibid at 538.

¹¹⁸ The maxim is concerned with inherent relationships. So, for example, the power to issue a regulation implies the power to withdraw it.

¹¹⁹ The maxim deals with mutual and reciprocal relationships.

¹²⁰ Botha *Statutory Interpretation* (5th edition) at 174,

¹²¹ Maxwell *On Interpretation of Statutes* 1969 at 236. The author defines ‘equitable construction’ as extending to general cases the application of an enactment, which literally, was limited to a special case, on the ground, in the words of Coke, that ‘it was the wisdom of ancient parliaments to comprehend much matter in few words.’ He further advances a definition of the ‘equity’ according to Powden as that which enlarges or diminishes the latter according to its discretion...Experience shows us that no lawmakers can foresee all things

English law on South African law, the South African courts and judiciary, as a result, have also shown an aversion to analogical interpretation.¹²²

Steyn has asserted that interpretation by analogy should also be considered as interpretation by implication.¹²³ He has submitted further that – even though our courts have shown a resistance to employ this particular technique of interpretation – its use may be justified. This is on the basis that no matter how ‘painstakingly and exhaustively statutes are drafted, it is virtually impossible for a legislature to foresee every concatenation of circumstances that may arise – hence the drafting of legislation in such a manner that would allow for the ‘combinations of factual situations’¹²⁴ not provided for expressly in the provision. Steyn’s research on the subject has revealed that interpretation by analogy was not applied in Roman-Dutch law where it would make inroads into the rule of law – for example, as indicated below:

- (i) In the case of *legis correctivae* and *leges exorbitantes* – i.e. statutory provisions which change the common law or make inroads into the principles of common law;
- (ii) With regard to laws which impose penalties or remove or limit rights – i.e. *casibus odiosis*;
- (iii) In the case of *leges singulares or personales* – i.e. laws presumably intended for specified circumstances or particular persons; and
- (iv) In provisions where restrictive words or expressions such as ‘only’ or ‘to this extent only’ are used. In such cases, an extended meaning would be in conflict with the apparent intention of the legislation.¹²⁵

It has been observed that because interpretation by analogy is a consequence of the purposive theory of interpretation found in Roman-Dutch law, it involved a

which may happen, and therefore it is fit that if there be any defect in the law, it should be reformed by equity...’

¹²² Botha *Statutory Interpretation* (5th edition) at 174.

¹²³ Ibid.

¹²⁴ Devenish *Interpretation of Statutes* at 78.

¹²⁵ Ibid.

‘jurisprudential synthesis of natural law’ to be justified and hence applied.¹²⁶ However, due to the influence of English law and the dominance of parliamentary sovereignty prior to the new democratic dispensation, our courts were reluctant to apply a purposive methodology, and generally declined to fill in gaps or omissions in statutes.¹²⁷ Nevertheless, there have been a few exceptions where our courts have decided otherwise. A case in point is *S v Mpofo*,¹²⁸ where the court found that where there is clear evidence that an article or section thereof has been omitted as a direct result of a printer’s error, the court is obliged to insert or provide the missing words. This position is also reflected in *Ex Parte Wilson*,¹²⁹ where the court held that:

‘this is a case not provided for and accordingly an order of Court is necessary and it seems to the Court that a procedure must be adopted which will correspond as nearly as possible to that laid down in the Act and regulations already referred to and that the officials should act in accordance with the spirit of the provision quoted, and attempt, as nearly as possible, to follow them out’.¹³⁰

It is noted that while prior to the new constitutional era our courts vacillated over the role of judges – particularly with regard to the filling in of gaps of provisions in legislation – this position has been changed fundamentally since the inception of the Constitution and, in particular, by section 39(2).¹³¹ As guardians or enforcers of the Constitution, judges are mandated to give effect to the ‘spirit, purport and object of the Bill of Rights’. This reinforces the creative element that is fundamental to judicial law-making and the moral obligation on the part of judges to give expression to the values of the Constitution so as to facilitate and promote transformation. Dugard endorses the creative role of judges in filling in gaps of a statute where

¹²⁶ Ibid 77-78.

¹²⁷ Ibid at 80.

¹²⁸ 1979 (2) SA 255 (R).

¹²⁹ 1930 OPD 16.

¹³⁰ Ibid at 18.

¹³¹ Section 39(2) provides:-

‘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.’

jurisprudentially justified. It is maintained that in terms of the process of interpretation, these rules are not used to *guide* a judge to a particular interpretation, but to *justify* an interpretation already arrived at by judicial intuition.¹³² Labuschagne describes the creative law-making function that occurs during statutory interpretation, as secondary or a ‘sub-ordinate law-making function’ that inevitably forms part of the process.¹³³ He explains further that legislation, as a document, is ‘incomplete’, and it is *only* when the court applies the legislation that it becomes ‘real’ and a ‘complete’ functional statute.¹³⁴ For this reason, it is submitted that the role of the judge is accentuated by the fact that they are expected to play a role in ensuring that ‘the final link in the legislative chain’,¹³⁵ is in keeping with the aims and vision of a transformative constitution.

5.5 Conclusion

As has already been discussed, the role of the judiciary – to promote the values of the Constitution – is clearly mandated in terms of section 39.¹³⁶ However, what is apparent, is that the discretion of the judiciary to modify or adapt the initial meaning of the text, is limited.¹³⁷ If the purpose of the legislation is not sufficiently clear, or if it does not support a modification or adaptation of the initial meaning of the text, the legislature has to rectify the errors or supply the omissions in the legislation.¹³⁸

There may, however, be cases that arise whereby the court would not be able to supply an omission in the particular legislation.¹³⁹ In such instances, the common-

¹³² Dugard *Human Rights and the South African Legal Order* at 369-370. (Emphasis Added)

¹³³ Botha *Statutory Interpretation* (5th edition) at 161.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ Section 39 (1) of the Constitution provides that:-
‘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.....’ (Emphasis Added)

¹³⁷ Botha *Statutory Interpretation* (5th edition) at 174.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

law may be referred to in order to complete the concretisation process.¹⁴⁰ Such judicial law-making is ‘legitimate’ – provided it takes place within clearly defined parameters that reflect the principles and ethos of the common-law and the Constitution.¹⁴¹ Due to the fact that, section 39(2) of the Constitution, provides that the common-law has to also be in-keeping with constitutional values, requires that the common-law is brought in line with the values and principles of the Constitution in the process of interpretation.¹⁴²

As discussed in this chapter and as is shown throughout this dissertation – what is evident from examination of the various rules, maxims, techniques and aids to interpretation, is that in the process of interpretation is eclectic. While the process initially starts with the literal theory and an examination of the ordinary grammatical meaning of the words (literal theory), in order to ascertain the *ipsissima verba*, the enquiry tends to further lend itself to conducting a contextual examination of the background (contextual theory). A search for the purpose for the promulgation of the legislation is also highly relevant to the evaluation (purposive theory). The process is, however, not complete until the legislation is tested against the values and principles of the Constitution (teleological mode of interpretation). The combined operation of the methodologies of interpretation, as indicated above, is eclectic.

The creative application of the discretion of judges is now mandated in terms of section 39(2) of the Constitution – which provides that the ‘spirit, purport and objects of the Bill of Rights must be promoted during the process of interpretation’, while section 39(1) refers to an open and democratic society based on democratic values, of which freedom, equality and human dignity are singled out as being the cornerstones or pillars.¹⁴³ The moral and ethical elements that comprise the basis of the

¹⁴⁰ See discussion of what entails concretisation at **5.2.1 Concretisation**.

¹⁴¹ Devenish *Interpretation of Statutes* at 94.

¹⁴² Section 39(2) of the Constitution provides that:-
‘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.’ (Emphasis added)

¹⁴³ Section 39(1) of the Constitution provides that:-
‘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*’ (Emphasis added)

enquiry in terms of section 39, informs the proposed deontic theory that has been identified as being the preferred theory of interpretation in the current constitutional era. Section 39(2) mandates that the common-law and customary law have to be developed to reflect constitutional values. From *Carmichele v Minister of Safety and Security*,¹⁴⁴ the stance of the Constitutional Court is reflected as being not purely discretionary, but that there is in fact an obligation on courts to develop the common law appropriately. As a result of this constitutional mandate, it is clear that section 39 (2) and section 7, invites pro-activism.

What is evident from case-law,¹⁴⁵ is that the methodology for the interpretation and application of the canons and maxims of interpretation resembles the eclectic methodology that is suggested as the *modus operandi* for the operation of the proposed deontic theory. To meet the needs of a transformative society however, a pro-active interpretation and application of the law is essential. Such a pro-active, eclectic methodology is what characterises the operation of the proposed deontic theory of interpretation in the current constitutional era in South Africa.

¹⁴⁴ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

¹⁴⁵ See for example, *Keeley v Minister of Defence* 1980 (4) SA 695 (T); *S v Mjoli and Another* 1981 (3) SA 1233 (A) and *Mpehle v Government of the Republic of South Africa and Another* 1996 (7) BCLR 921 (CK), amongst others.

CHAPTER 6

THE INFLUENCE OF INTERNATIONAL LAW AND FOREIGN LAW ON SOUTH AFRICAN LAW

6.1 Introduction

Due to the interpretive directive in terms of section 39(2) of the Constitution – that ‘when interpreting legislation ... every court, tribunal and forum, *must consider international law and may consider foreign law*’,¹ the influence of international and foreign law is the crux of the discussion in Chapter 6. This immediately raises a host of questions about the nature and existence of international law. The first of these is whether international law qualifies as a system of law.

According to John Austin’s theory that law is the command of a political superior (to a political inferior) – backed by a threat of sanction – international law does not qualify as law. Hart, who rejected Austin’s command theory of law, was willing to accept international law as a species of ‘law’.² However, of all of the submissions that have been made to assess whether international law qualifies as a system of law, Pollock’s identification of specific elements has been considered as being the most satisfactory response to the question. Pollock asserts a legal system of law, is where there is a political community and recognition by its members of settled laws binding upon them. In terms of the criteria articulated by Pollock, international law therefore qualifies as a system of law, for three reasons:

- i. Because there is a political community – over 191 modern states – there is the existence of a political community.

¹ Section 39 (1) of the Constitution provides:-
‘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.’

² Dugard *International Law – A South African Perspective* (4th edition) at 7-8.

- ii. There is a set of established rules and principles that comprise the international legal order.
- iii. The members of the international community recognize these rules and principles as binding upon them.³

While history has revealed incidents of violation of international law, generally it is observed that states do comply with international law. To put it categorically, ‘international law is not binding because it is enforced, but it is enforced because it is already binding’.⁴ While the origins of international law can be traced as far back as the ancient histories of the Egyptians, Jews, Greeks and Romans, it was not until the Roman and medieval times that the scholarly jurists had a role to play in the development of international law. Due to the fact that in the seventeenth and eighteenth centuries the Netherlands was a leader of economic and intellectual life in Europe, it is not surprising that the Dutch contribution to the development of international law was most significant. Grotius, the acclaimed ‘father of international law’, and Van Bynkershoek a distinguished judge who wrote extensively on maritime and commercial law, were the most instrumental in shaping the new international order.⁵ What is noteworthy about the contribution of each of these writers, is that it also reflected the genesis of the natural law versus the positivism debate. While Grotius’s work *De Jure Belli ac Pacis Libri Tres* – which reflected the idea that ‘the law of nature is a dictate of reason’ – contributed to modern natural law, Van Bynkershoek’s emphasis on the importance of consent in the form of custom or treaty as the basis of international law, revealed him to be one of the early positivists.⁶ While the natural law versus the positivism debate underpins the field of international law – its undeniable influence on other aspects of law cannot be ignored. It is emphasized that this debate is also significant in the field of statutory interpretation – particularly with regard to the theory or the methodology that should

³ Ibid.

⁴ Ibid at 8-9.

⁵ Ibid at 9-10. *De Jure Praeda* was not published during Grotius’s lifetime. It discovered in 1864 and published in 1868. *De Domino Maris* (1702), *De Foro Legatorum* (1721) and *Quaestionum Juris Publici* (1737) were amongst the works that were undertaken by Van Bynkershoek.

⁶ Ibid at 10.

inform the process of statutory interpretation – and it is therefore a theme that reverberates throughout this chapter and others.

It is clearly evident that an examination of the statutory process in the preceding chapters has revealed that the interpretation and application of section 39 has transformed the process of interpretation – from a ‘mechanical re-iteration of what was supposedly “intended” by parliament’, to that which is now permitted by the Constitution.⁷ As a result, a transformed methodology – which prescribes the manner in which laws are to be interpreted – has seen the emergence of a new jurisprudence. This jurisprudence is clearly no longer one of positivism, but is akin to natural law. It therefore raises the question as to the extent of the influence of international and foreign law in shaping the ‘evolving’ jurisprudence in a post-democratic constitutional era in South Africa. For this reason,⁸ this chapter is intended to:

- a) explore the mandate contained in section 39(2);
- b) formulate an understanding of the distinction between international law and foreign law; and
- c) determine how the influence of international law and foreign law has transformed (and continues to transform) the methodology and theory of interpretation in the current constitutional order in South Africa.

6.2 Comparative Law

6.2.1 Is Comparative Law a Method, a Discipline or a Science?⁹

Constantinesco considers that the prime purpose of the science of comparative law is to classify world legal systems into a few large families. Watson’s definition is similar to that of Constantinesco, to some extent. He submits that comparative law is

⁷ Botha *Statutory Interpretation* (5th Edition) at 103. In *Union Government v Mack* 1917 AD 731, it was held that the intention of the legislature should be deduced from the words used in the legislation; in other words the plain meaning of the text in an intentional disguise.

⁸ See discussion in **Chapter 3, 3.7 The Interpretation and Application of section 39.**

⁹ See Venter *Constitutional Comparison – Japan, Germany, Canada and South Africa As Constitutional States* at 15, where the author poses the question about what is comparative law.

to be regarded as an academic discipline in its own right. He qualifies his statement on the basis that it is a study of the relationship – above all the historical relationship – between legal systems or between rules of more than one system. Kokkini-Iatridow, from her examination of the subject, disagrees with Constantinesco. She is of the opinion that even though comparative law is capable of developing into an independent scientific discipline, it is *not* to be regarded as a science.¹⁰

However, of all of the views on the subject, the submission by Peter de Cruz – that comparative law is neither a branch of law, nor a body of rules, but is a method of study – is the most sound. His well-considered, well-structured definition of comparative law is articulated as follows:

‘Modern comparative law draws on a range of disciplines, but is eclectic in its selection. It recognizes the important relationship between law, history and culture and operates on the basis that every legal system is a special mixture of the spirit of its people, and is the product of several intertwining and interacting historical events which have produced a distinctive national character and ambience’.¹¹

It is submitted that the above definition is without doubt a more a comprehensive one than the others presented above. It has, at its core, some important elements in its formulation – that the others seem to ignore. Elements encapsulated in Peter de Cruz’s definition (and lacking in the others) are:

- (i) a recognition of history and culture;
- (ii) an appreciation of a special mixture of the spirit of its people;
- (iii) the acknowledgement that, as a final product, every legal system is unique; and
- (iv) the assertion that the discipline itself is eclectic.

What is apparent, is that the view that a reader interested in justificatory practices in the interpretation of statutes in any particular system can come to understand that

¹⁰ Ibid at 16. (Emphasis added).

¹¹ Ibid at 17.

system better by attempting to understand what it is not- is indeed quite perceptive.¹² There is no one-size-fits-all, or no standard recipe for valid comparative research. However, giving due consideration to the factors as identified above, when effecting a comparison it will surely yield well-conceived and executed research. Nevertheless, the view that being overtly concerned with the nature and methodology of the pursuit of legal comparison may prove to be an obstacle in the ascertaining of useful results¹³ – is beneficial.

6.2.2 Understanding the Purpose for Comparative Law

The process of legal comparison depends, to a large extent, on the purpose for which it is undertaken. The purpose of legal comparison can therefore vary widely – depending on the particular purpose of the research. According to Zweigert and Kötz, generally, the more specific purpose that legal comparisons would be conducted, are for the following reasons:

- (i) As an aid to the legislative process.
- (ii) As an instrument of interpretation of law.
- (iii) As a vehicle for teaching law.
- (iv) As a means of promoting legal unification.
- (v) The development of a common private-law system (particularly in Europe).¹⁴

Kazuyuki Takahashi suggests that there are two purposes for effecting a comparative study:

- To look for possible solutions to constitutional problems – to which other countries could have found a solution; and

¹² MacCormick and Summers *Interpreting Statutes-A Comparative Study* at 461.

¹³ Ibid.

¹⁴ Ibid at 19. According to Zweigert and Kötz, the more profound the purpose of comparison becomes, the more paradigmatic will be the *tertiumcomparatonis* and its distinction from compatibility; the more the emphasis is on the production of new and verified scientific knowledge, the more important does the sensible compatibility most likely be co-determined by the nature of chosen comparative standard or framework.

- A more detached and objective manner of observing foreign constitutional laws with a sense of general curiosity.¹⁵

Engaging in a comparative analysis is beneficial for the following reasons:

- (i) Knowing about constitutional issues and theories discussed in foreign countries, is always stimulating and fascinating;
- (ii) It helps widen ones perspective about other possibilities of constitutional thinking;
- (iii) It provides new ways or frames of looking at constitutional law; and
- (iv) It enables one to become aware of constitutional issues that could have been missed, and also of potential issues sure to arise in the near future in ones own country.
- (v) It provides an understanding not only of the constitutional laws of foreign countries, but also of ones own – through raising awareness of similarity and difference in respective laws.¹⁶

The benefit of adopting the latter objective approach – as outlined above – is significant for a number of reasons. As a relatively ‘new’ democratic constitutional state, South Africa is in a position that enables its judiciary to turn to, consider, and to reflect on, constitutional issues in foreign jurisdictions – and to find possible solutions when confronted with similar problems. Generally, an effective comparison with foreign jurisdictions does not only reveal similarities, the differences in respect of the operation of law, the application of theories and approaches to statutory interpretation are also noted. It is therefore intended to adopt a similar approach to a comparative analysis of international and foreign law – to that articulated by Takahashi above. In the South African context the role and emphasis of international law is particularly relevant. Whereas international law was

¹⁵ Jackson and Tushnet *Defining the Field of Comparative Constitutional Law* at 47.

¹⁶ Ibid. See also MacCormick and Summers *Interpreting Statutes-A Comparative Study* at 24, where it is submitted that; ‘one of the great virtues of a comparative approach in legal and jurisprudential studies, is the heightened awareness of its own system, both in reminding one of its traditional and well understood strengths and weaknesses, and yet also, all the more, in enabling one to notice and appreciate hitherto unnoticed features.’ This statement is particularly relevant for purposes of the research as comparatively the South African Constitution is a relatively new constitution compared to most other jurisdictions.

previously regarded as a threat to the state, it is now viewed as one of the pillars of democracy.¹⁷

6.3 A Consideration of the Features of Selected Constitutional States and their Influence on South Africa Law

The jurisdictions which have been selected include:

- (i) Canada;
- (ii) United States of America;
- (iii) Germany; and
- (iv) United Kingdom

The reason for the selection of the above mentioned jurisdictions relate mainly to the fact that they have been instrumental in influencing the development of South Africa law over the past few decades particularly in constitutional law and human rights.

6.3.1 Canada

Modern Canadian constitutionalism is significant for a number of reasons. Firstly, as a former British-colonial dispensation, founded upon the supremacy of the British Parliament, that prevailed in Canada over a hundred years, it was transformed in 1980 into a system directed by a supreme Constitution and Charter of Rights. Secondly, and that which makes it relevant to the research, is that constitutional jurisprudence of the Canadian Supreme Court has become an ‘influential reference point’ in the development of constitutionalism¹⁸. This is especially the case in countries like South Africa with a history of parliamentary sovereignty modelled on the Westminster System.¹⁹

¹⁷ Dugard ‘International Law and the South African Constitution’ (1997) *European Journal of International Law* at 77.

¹⁸ Venter *Constitutional Comparison-Japan, Germany, Canada and South Africa as Constitutional States* at 27.

¹⁹ De Vos and Freedman *South African Constitutional Law in Context* at 42. See the authors’ discussion of the Westminster system which is described as follows: ‘The Westminster model has its origin in Britain. Of particular importance is the fact that the Westminster

The Supreme Court of Canada is not established in terms of constitutionalism, but is a feature of an ordinary federal state. Section 52(1) of the Canadian Act²⁰ introduced an important element to Canadian constitutional law. Previously due to the British-colonial supremacy of a parliament doctrine, the courts constitutional testing function related mostly to matters of federal-provincial legislative authority. The introduction of the Canadian Charter of Rights and Freedoms in 1980, projected the fundamental rights dimension of the constitution to the fore, and in so doing making the Constitution an ‘absolute standard.’²¹

Another significant contribution that the Supreme Court has made to the process of interpretation of rights entrenched in the Charter, is that it has set out the two basic sets of tests or standards for the validity of law interfering with one’s constitutional rights, namely reasonableness and proportionality.²² Further, the approach of the Canadian Supreme Court in *R v Big M Drug Mart Ltd*²³ has often been referred to in a number of judgements in South African Courts. In the cases of *S v Zuma*²⁴ and *The Department of Land Affairs v Goedgelegen Tropical Fruits*²⁵ the Constitutional Court, followed the position of the Canadian Supreme Court by making reference to the following *dictum* of the case of *R v Big M Drug Mart Ltd*:

‘In my view... the purpose of the right or freedom in question is to be sought, by reference to the character and larger objects of the Charter [of

constitutional model is premised on the British Constitution and is actively a series of conventions, ordinary laws in the form of statutes, common-law and case law, that broadly regulate state power as well as the regulations between the State and its citizens. Where the Westminster model has been adopted, particularly in former British colonies such as pre-democratic South Africa, Botswana and Zimbabwe, the practice has been to reduce the Constitution to writing. An important feature of the Westminster system is that of parliamentary sovereignty or parliamentary supremacy which basically means that there is no Bill of Rights which denies Parliament the power to destroy or curtail liberties. Parliament is said to have the power to make any law on any subject.’

²⁰ Canadian Act of 1980.

²¹ Venter *Constitutional Comparison-Japan, Germany, Canada and South Africa as Constitutional States* at 94-94.

²² *Ibid* at 96.

²³ 1985 18 DLR (4th) 321.

²⁴ 1995 (2) SA 642 (CC).

²⁵ 2007 (6) SA 199 (CC).

Rights and Freedoms] itself, to the language chosen to articulate the specific right or freedom to the historical origins of the concepts 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 implementation should be ...a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection.²⁶

Many courts both South African and Canadian, have often referred to *R v Big M Drug Mart Ltd* to re-inforce support for the application of the purposive methodology, as is evidenced here. The obvious influence of Canadian constitutionalism in shaping the emerging jurisprudence in South African law in this respect apparently in South African case law is noted.²⁷

6.3.2 United States of America

The following influence of the United States constitutional model may be regarded as being significant to the development of the South African Constitution. An important feature of the United States constitutional model is that of constitutional supremacy. Like the South African Constitution, which declares its supremacy, the United States Constitution, is also premised on the idea that the Constitution is the highest law and that all law and conduct are required to comply with it.²⁸

The inclusion of Bill of Rights which serves to protect individuals' freedoms and liberties is an important contribution. Constitutionally protected rights in the Bill of Rights were also responsible for a so-called 'rights culture' in the South African context. The manner in which this operates is two-fold, not only are

²⁶ *R v Big M Drug Mart Ltd* 1985 18 DLR (4th) 321 at 95-96.

²⁷ *R v Big M Drug Mart Ltd* 1985 18 DLR (4th) 321 has been cited in *S v Zuma* 1995 (2) SA 642 (CC) and *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC).

²⁸ De Vos *et al South African Constitutional Law in Context* at 46.

fundamental rights protected, but it also serves as a limit on the power of government not to infringe on freedoms and liberties of individuals.²⁹

Another important feature that has been borrowed from the United States system, is that of judicial review.³⁰ The techniques that facilitate such a process in South African law, include the reading-in, reading-down, severance.³¹

6.3.3 Germany

Similar to the model of the United States of America, the German model operates on that of constitutional supremacy. This brings into focus the concept of *Rechtsstaat*, which basically affirms that the Constitution is the highest law and all law and conduct must be subject to the Constitution.³² In terms of the South African Constitution, the notion of constitutional supremacy has far-reaching implications. From a historical perspective, it is obvious that the German constitutional model, was drafted in reaction to Nazi atrocities, so as to ensure that the inhumane conditions to which people were subjected, are never repeated. Likewise the South African constitutional model was drafted in response to notorious and abhorrent apartheid legislation.³³ To that extent the similarities are noted.

Another ‘important layer’ to the German Constitution, is that in an attempt to secure democratic rule, the German Constitution which is the Basic Law of 1949, has established a value-based democratic order.³⁴ Such a value-based order, resonates with the current South African constitutional dispensation. This is particularly the case in respect of section 39(2) which mandates a value-orientated approach to the process of interpretation.

²⁹ Ibid.

³⁰ Ibid at 45.

³¹ See **Chapter 3, 3.4** for a discussion of **Reading-in, Reading-down, Severance and Reading in Conformity with the Constitution.**

³² De Vos *et al South African Constitutional Law in Context* at 49-50. See also Muller’s article ‘Basic Questions of Constitutional Concretisation’ (1999) 3 *Stellenbosch Law Review* at 269-283 for a discussion of foreign terms adopted into South African law.

³³ Ibid at 49.

³⁴ Ibid at 49-50.

Due to the fact that section 39(2) authorises a departure from literalism, what has emerged as a result thereof has seen a distinct shift from literalism to purposivism. The emerging jurisprudence thereof is no longer one of positivism, but may be regarded as being akin to natural law. This is significant in the current constitutional era in South Africa, since an emerging jurisprudence requires a new theory and methodology for the process of interpretation of legislation. To redress the social inequalities of a racially divided and segregated society, it is suggested that this ‘new’ theory must incorporate ethical and moral considerations and must be applied pro-actively. As a result of the invaluable contribution by way of assimilation of a value-based order, that is the dominant feature of the German constitutional model into the South African system, has created the impetus for the formulation of a new theory of interpretation in South Africa. The theory as suggested, is the proposed deontic theory of interpretation.

6.3.4 United Kingdom

The Westminster constitutional model has had its origin in Britain. The influence of the Westminster constitutional model on South African law has had far-reaching consequences. In Britain, Parliament comprises the House of Commons and the House of Lords. Parliament is of central importance as it exercises sovereign or supreme law making powers.³⁵ This is a distinct feature of the Westminster model, that is been referred to as parliamentary sovereignty. According to this doctrine, parliament has complete law-making powers. Therefore in terms of the model, courts do not have the power to decide on the constitutionality of legislation.³⁶ According to Dicey, the concept of parliamentary sovereignty may be defined as follows:

‘Neither more nor less than this, namely that Parliament has under the English Constitution the right to make or unmake any law whatsoever, and

³⁵ De Vos *et al South African Constitutional Law in Context* at 42.

³⁶ *Ibid* at 43.

further that no person or body is recognised by the Law of England as having a right to override or set the Legislation of Parliament.’³⁷

What is evident is that the doctrine was imposed on South African law during the British-colonial rule. In accordance with the doctrine of parliamentary sovereignty, during the apartheid era, the South Africa courts in general applied mainly a literal or textual approach when interpreting the law. As a result of giving effect to the so called will of parliament or command of the sovereign, many of the laws which were applied, were applied without any consideration of ethical or moral elements, or how harsh or unjust the laws were. This position changed significantly with the introduction of the Interim Constitution and the supremacy status of the Constitution. The new South African democratic Constitution has been instrumental in enabling the judiciary to give effect to the values that reflect an open and democratic society.

In contrast to the United Kingdom, in South Africa a paradigmatic shift from parliamentary sovereignty to constitutional supremacy, has clearly transformed the approach to statutory interpretation from a literal or textual methodology to a more value-based methodology. The idea of the independence of the judiciary re-enforces the idea that judges in a transformative constitutional democracy ensure that they consider the ethical and moral considerations in interpreting legislation to give effect to social and economic aims to achieve social justice.

6.4 The Position Adopted by South African Courts to International Law before 1994

As alluded to, before 1994, South Africa’s constitutional system was modelled significantly on that of Britain, premised on parliamentary sovereignty. The effect was that South African courts frequently referred to English Law rather than Roman-Dutch law particularly in the field of public law. Because the tendency in English

³⁷ Dicey *Introduction to the Study of Law and the Constitution* at 70.

Law was to treat customary international law as municipal law,³⁸ a similar position was adopted by South African courts.

6.4.1 Customary International Law

For decades, South African courts assumed that the rules and principles of customary international law might be applied by municipal courts as if they were in some way part of South African law. Consequently, it was not required that international law had to be proven to be a foreign legal system.³⁹

In 1971, in *South Atlantic Islands Development Corporation v Buchan*,⁴⁰ the court refused to admit an affidavit from an expert on international law on the grounds that international law was not foreign law and therefore could not be proved by affidavit. South African courts therefore showed cogent support for the Monist Approach (which is the doctrine of incorporation) in respect of customary international law.⁴¹ In most instances, the position maintained by South African courts was that they applied customary international law without questioning its place in the legal order.⁴² In a number of cases – commencing with *South Atlantic Islands Development Corporation v Buchan*⁴³ in 1971 – the courts expressly asserted that international law ‘forms part of our law’ and that it was the duty of a municipal court ‘to ascertain and administer the appropriate rule of international law’.

³⁸ Dugard *International Law – A South African Perspective* (4th edition) at 45.

³⁹ *Ibid* at 51.

⁴⁰ 1971 (1) SA 234 (C) at 238 B-F.

⁴¹ Dugard *International Law – A South African Perspective* (4th edition) at 42-43. The Monist School whose advocates were Kelsen, Verdoss and Scelle, maintain that international law and municipal must be regarded as manifestations of a single conception of law. As a result, the Monists argue that municipal courts are obliged to apply rules of international law directly without the need for any act of adoption by the courts, or transformation by the legislature. Dualists, whose protagonists include Triepel and Anzilotti, see international law as completely different systems of law. Therefore they contend that international law may be applied by domestic courts only if ‘adopted’ by such courts or transformed into local law by legislation.

⁴² *Ibid* at 46.

⁴³ 1972 (1) SA 234 (C) at 283 C-D

6.4.2 Treaties and Municipal Courts

Because the position in South Africa mirrored that of the United Kingdom, the power to enter into treaties was entrusted completely to the executive.⁴⁴ Before 1994, therefore, the South African approach to the incorporation of treaties was clearly a Dualist Approach; treaties were negotiated, signed and ratified by the executive.⁴⁵ The legislature played no part in the treaty-making process. Only those treaties incorporated by an Act of Parliament became part of South African law. This explains why treaties usually did not become part of municipal law without some act of legislative incorporation.⁴⁶ With the new dispensation section 231 (4) of the Interim Constitution provided that ‘the rules of customary international law *binding on the Republic* shall, unless *inconsistent* with this Constitution or an Act of Parliament, form part of the law of the Republic’. The omission of the word ‘binding’ from the 1996 Constitution has led commentators to argue that all rules of customary international law including those to which South Africa may have ‘persistently objected’ are now very much part of municipal law.⁴⁷

The need for legislation to transform a treaty into South African law was clearly illustrated by Stein CJ in *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd*,⁴⁸ where it was maintained that it was:

‘trite law ... that in this country the conclusion of a treaty, convention or agreement by the South African government with any other government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are not embodied in our law except by legislative process...’⁴⁹

⁴⁴ Dugard *International Law – A South African Perspective* (4th edition) at 48.

⁴⁵ *Ibid* at 53.

⁴⁶ *Ibid* at 48.

⁴⁷ Keightely ‘Public International Law and the Final Constitution’ (1996) *South African Journal on Human Rights* at 408.

⁴⁸ 1965 (3) SA (A) at 161 C-D.

⁴⁹ The *dictum* was confirmed by the Appellate Division in *S v Tuhadeleni and Others* 1969 (1) SA 153 (A) at 173-175.

Prior to 1994 the courts vacillated in their approach to the place of international law in the South African legal order, this changed significantly with the new constitutional dispensation, and, in particular, section 39 – the interpretation provision of the Constitution.

6.5 The Position Adopted by South African Courts to International Law and Foreign Law in the New Constitutional Order

6.5.1 An Examination of International Law

From an examination of the relevant provisions of the Constitution, that is, in terms of section 233, which provides that:

‘when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law;’

and section 39, which declares that:

- ‘(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*,’ [Emphasis added]

It is clear that the courts are under an obligation to ensure that South African law is interpreted to comply with international law – particularly with regard to human rights. While a court must consider treaties to which South Africa is a party in interpreting the Bill of Rights, no such rule exists in respect of treaties to which South Africa is not a party, where the Bill of Rights is not an issue.⁵⁰ A treaty to which South Africa is not a party is *res inter alios acta* and may not be considered *qua* treaty, although it may be considered as evidence of a customary rule.

⁵⁰ Dugard *International Law – A South African Perspective* (4th edition) at 63.

Different considerations apply in respect of a treaty to which South Africa is a party, but has not been incorporated into municipal law. Firstly, a municipal court may have recourse to an unincorporated treaty in order to interpret an ambiguous statute. Secondly, an unincorporated treaty may be taken into account in a challenge to the validity of delegated legislation on the grounds of unreasonableness.⁵¹ Although there is no clear judicial support for this proposition, the question has twice been raised and left open by the erstwhile Appellate Division. In the cases of *Winter v Minister of Defence and Others*⁵² and *S v Tuhadeleni*,⁵³ the Appellate Division left open the question of whether proclamations might be tested against the terms of the mandate for South West Africa – a treaty which was not incorporated into municipal law. Dugard correctly maintains that this is a sound proposition, since the concept of reasonableness is inextricably linked with presumptions of legislative intent, and there is a presumption that the legislature in enacting a law did not intend to violate South Africa's international obligations.⁵⁴

With the advent of the new constitutional order in 1994, both the Constitutional Court and other courts have shown an inclination to be guided by international law. In *Glennister v The President of the Republic of South Africa*,⁵⁵ the majority court maintained a firm stance on the status of the international law and its influence on South African law. The position of the court is reflected in the *dictum* as follows:

'It is possible to determine the contents of the obligations section 7(2) imposes on the State without taking international law into account. But section 39(1)(b) makes it constitutionally obligatory that we should. This is not to use the interpretive injunction of that provision ... to manufacture or create constitutional obligations. It is to respect the careful way in which the Constitution itself creates concordance and unity between the Republic's

⁵¹ Ibid at 63-64.

⁵² 1940 AD 194 at 198.

⁵³ 1969 (1) SA 153 (A) at 176-177.

⁵⁴ See Dugard's comments on the findings of the cases of *Winter v Minister of Defence and Others* 1940 AD 194 at 198; and *S v Tuhadeleni* 1969 (1) SA 153 (A) at 176-177 in *International Law – A South African Perspective* (4th edition) at 64.

⁵⁵ 2011 (3) SA 347 (CC).

external obligations under international law, and their domestic legal impact.’

While the decisions of the European Commission and the Court of Human Rights have usually been referred to, South African courts have also been influenced by the ‘views’ of the United Nations Human Rights Committee and the reports of the United Nations with regard to human rights.⁵⁶ This is manifestly reflected in one of the earliest decisions, *S v Makwanyane and Another*,⁵⁷ which involved the constitutionality of the death penalty. In this judgment, Chaskalson P, laid down clearly articulated guidelines for reliance on international and foreign law in constitutional interpretation by stating that:

‘Customary international law and the ratification and accession to international agreements are (sic!) dealt with in S231 of the Constitution, which sets the requirements for such law to be binding within South Africa. In the context of Section 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

⁵⁶ Ibid. See also discussion in De Vaal and Currie *The Bill of Rights Handbook* (6th edition) at 570 on the status of international instruments relating to socio-economic rights. The International Covenant on Economic, Social and Cultural Rights of 1996 (ICESCR) is the most important international instrument relating to socio-economic rights. Other instruments protecting rights that have been ratified by South Africa are the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979), the Convention of the Rights of the Child (1995) and the African Charter of Human and People’s Rights (1981).

⁵⁷ 1995 (6) BCLR 665 (CC), 1995 (3) SA 391.

assistance from public international law and foreign case-law, but we are in no way bound to follow it.’⁵⁸

The above *dictum* is significant for a number of reasons. First, in construing the 1996 Constitution, it is required that a South African court must consider international law and may consider foreign authorities. Such authorities are to be considered because they are of value in their own right.⁵⁹ Chaskalson P in fact laid down a binding precedent effectively granting constitutional authorisation to consider international law and foreign law when interpreting constitutional provisions *not* found in the Bill of Rights. What is evident, however, is that he does not explicitly say whether – in the interpretation of such provisions – a court is enjoined to consider public international law. Considering the language in which the above *dictum* is phrased, it is probably not specific enough to read it as imposing such an injunction. However section 39 requires that international law must be considered. It is thus highly advisable (but advisable nonetheless), to consider international law in constitutional interpretation – except in terms of the ‘black letter’ provisions in section 231 and 232 or the presumption embodied in section 233 that international law must not just be considered, but indeed observed as binding with regard to municipal law. Second is the observation that binding as well as non-binding international law provides a framework within which the Bill of Rights can be evaluated and understood. Third, the court in *Makwanyane* was emphatic that in the interpretation of the 1996 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. It is noted that such an approach to interpretation should therefore operate in accordance with its own theoretical framework, as is the proffered deontic theory of interpretation. It is emphasized that even though assistance may be derived from international law and foreign law, a court – according to the judge – is in no way bound to follow either of them. Nevertheless, in spite of this, a criticism of the manner in which Chaskalson P suggests that one ought to interpret international and foreign law, is that it is flawed because he overlooked a critical difference between

⁵⁸ Ibid at para 35 and para 39.

⁵⁹ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-172 - 32-173.

international law and foreign law for purposes of constitutional interpretation, which is that *international law must* be considered and that *foreign law may* be considered.⁶⁰

The case of *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*⁶¹ is also relevant in this regard. The applicants in the case sought to set aside section 20(7) of the Promotion of National Unity and Reconciliation Act⁶² – providing for amnesty from criminal and civil proceedings – on the grounds that it was inconsistent with section 22 of the Interim Constitution, which provides that every person shall have the right to have justiciable disputes settled by a court of law, or, where appropriate, another independent or impartial forum. The applicants in the case maintained that the state was obliged by international law – particularly the Geneva Conventions of 1949 – to prosecute those responsible for gross human rights violations and that the provisions of section 20(7) which authorised amnesty for such offences, constituted a breach of international law.⁶³

In terms of the international convention it was provided:

‘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.’⁶⁴

Mahomed DP postulated his finding on the place of international law, as follows:

‘The issue which falls to be determined in this court is whether Section 20(7) of the Act is inconsistent with the Constitution. If it is, the enquiry as to whether or not international law prescribes a different duty is irrelevant to

⁶⁰ Ibid. See Du Plessis’ criticisms about the approach of the court in *Makwanyane*, with regard to the interpretation of international law and foreign law.

⁶¹ 1996 (4) SA 671 (CC).

⁶² 34 of 1995.

⁶³ See Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32- 178, for a commentary on the findings of the court with regard to the *AZAPO* case.

⁶⁴ 1996 (4) SA 671 (CC) at 687 para 25.

that determination. International law and the contents of international law treaties to which South Africa might or might not be a party at any particular time are, in my view, relevant only to the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms of international law.⁶⁵

The Constitutional Court thought that the issue which falls to be determined was whether section 20(7) was inconsistent with the Constitution and the enquiry as to whether or not international law prescribes a different duty is irrelevant to that determination.⁶⁶ In according the meaning of section 39, the court thought it was directed only to have regard to public international law. The approach therefore was that, international law would have to be binding in terms of the black-letter constitutional law qualified to be '(public) international law', as envisaged in terms of section 39(1).⁶⁷ What is evident from the position adopted by Mahomed DP in the *AZAPO* case, is that he did not treat 'binding' as well as 'non-binding' international law as a framework within which the Bill of Rights 'can be evaluated and understood'.⁶⁸ The judgment was therefore not well received amongst legal scholars and academics on the basis that it failed to adequately address the question of whether conventional and customary international law obliges a successor regime to punish the officials and agents of the prior regime for international crimes. The court's reading and application of section 39(1)(b) has been criticised as being superfluous, for the reason that if a court, tribunal or forum is bound to follow 'binding' international law, there is no need for any further impetus to drive it further by additional provisions.⁶⁹

⁶⁵ Ibid at 688 para 26.

⁶⁶ See Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-172-32-179 for Du Plessis' comments on the courts reasoning and analysis in the *AZAPO* case.

⁶⁷ Reference is made to the Interim Constitution. At the time that the matter was being litigated, section 34(1) of the Interim Constitution was the Interpretation Clause- the equivalent of section 39(1) of the Final Constitution.

⁶⁸ See Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-178 - 32-179 for Du Plessis' criticisms of the stance maintained by Mohamed DP in the *AZAPO* case.

⁶⁹ See Dugard's comments in *International Law- A South African Perspective* (4th edition) at 65.

The extent to which the decisions of the above judgments have influenced subsequent cases is evident in *Government of RSA and Others v Grootboom and Others*.⁷⁰ The case dealt with the interpretation and meaning of section 26 of the Constitution.⁷¹ The right to housing in the form of basic shelter was at the heart of the dispute. 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, the court had to also consider the place of international law.⁷² What is noteworthy about Yacoob J's reference to Chaskalson P's *dictum* in *Makwanyane*, is that he added a significant qualification:

'The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle on the rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.'⁷³

In *Grootboom*, the court thus maintained the distinction between international law binding on South Africa and other sources of international law that must be considered in the interpretation of the Bill of Rights.⁷⁴ The *Grootboom* court focussed its inquiry on Articles 11.2 and 2.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and highlighted the differences between the interpretive significance of the provisions of the Covenant and section 26 of the South African Constitution. The court was also of the opinion that the general comments (issued) by the United Nations Committee on Economic, Social and Cultural Rights of the ICESCR, was significant in that it constituted a guide to

⁷⁰ 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).

⁷¹ Section 26 of the Constitution provides that -
'(1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
(3) 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.'

⁷² Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-179.

⁷³ 2000 (11) BCLR 1169 (CC), 2001 (1) SA 46 (CC) at para 26.

⁷⁴ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-180, for Du Plessis' comments on the findings of the *Grootboom* case.

the interpretation of section 26. By allowing itself to be guided by the Committee in this way, the *Grootboom* Court not only restored the *Makwanyane* standard on recourse to non-binding international law, but also developed the standard further to acknowledge the importance of reliance on an applicable text in the interpretation of international law.⁷⁵

The findings of *S v Makwanyane* are significant because they invalidate the death penalty on the basis of its conflict with *inter alia* the right to life, and because it was regarded as being cruel, inhuman and degrading punishment.⁷⁶ Although the Constitution does not provide a comprehensive definition of the right to life, the Constitutional Court judges presiding over the matter agreed that the right to life incorporates the right not to be deliberately put to death by the state. O'Regan J, in her judgment, explained that the right to life meant more than simply the guarantee of a physical existence. It was also inextricably 'entwined' with the right to human dignity.⁷⁷ She articulates her reasoning as follows:

'...The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society. The right to life, thus understood incorporates the right to dignity. So the rights to human dignity and life are *entwined*. The right to life is more than existence. It is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.'

In *S v Makwanyane*, the court treated the right to life, the right to equality, and the right to dignity as collectively giving meaning to the prohibition of cruel, inhuman and degrading treatment or punishment – as provided for in terms of section 11(2) of the Interim Constitution. The court therefore made 'extensive and decisive use of the contextual interpretation'.⁷⁸ In this regard, the Constitutional Court, referring to *S v Zuma*,⁷⁹ adopted the stance maintained by Kentridge AJ, that:

⁷⁵ Ibid.

⁷⁶ De Waal *et al The Bill of Rights Handbook* (6th edition) at 260.

⁷⁷ Ibid at 267-268.

⁷⁸ Ibid at 144.

‘whilst paying due regard to the language that has been used, [an interpretation of the Bill of Rights should be “generous” and “purposive” and “give expression to the underlying values of the Constitution”].’⁸⁰

Basically, what was emphasized, was that if there was a clear meaning of a provision, it cannot be ignored in favour of a ‘generous’ and purposive’ meaning of the provision. But at the same time, the *dictum* stresses that while the literal meaning must be given ‘due regard’ to, it is not necessarily determinant of meaning. In other words, a literal meaning will be an acceptable interpretation of a provision, only if it is consistent with a ‘generous’ and ‘purposive’ interpretation that ‘gives expression to the underlying values of the Constitution.’⁸¹ This is clearly a value-based or a value-coherent method of interpretation, which is the essence of the teleological method of interpretation. Likewise, in the above-mentioned *AZAPO* case, the Constitutional Court relied on international law, when construing section 20(7) of the Promotion of National Unity and Reconciliation Act⁸² in according a meaning to the provision, in order to promote harmony between international law and municipal law. The stance *in casu* maintained by the court is unmistakably purposive.

What is significant with regard to the above-mentioned cases, is that in construing the relevant provisions, the court initially focused on the ordinary, literal or plain meaning of the words. The provisions were also examined contextually. However, before arriving at its finding with respect to the relevant sections in all the above-mentioned cases, there must be purposive or teleological enquiry to establish the meaning of the provision – by giving due consideration to the underlying values of the Constitution.⁸³ Because the mode of interpretation of international treaties and instruments is teleological, it is logical that in construing the relevant provisions, the same standard and mode of interpretation should apply in interpreting the provisions

⁷⁹ 1995 (4) BCLR 401 SA; 1995 (2) SA 642 (CC).

⁸⁰ 1995 (6) BCLR 655 (CC); 1995 (3) SA 391 (CC) at para 9.

⁸¹ De Waal *et al The Bill of Rights Handbook* (6th edition) at 136.

⁸² Act 34 of 1995.

⁸³ See De Waal *et al The Bill of Rights Handbook* (6th edition) at 136, for a discussion of the courts approach to the preferred method of interpretation.

of the Constitution. As a result of this, the *Grootboom* court had to consider but was not be necessarily bound by the comments of the United Nations Committee on Economic, Social and Cultural Rights of ICESCR – with regard to what comprised the notion of ‘a minimum core’ of socio-economic rights.⁸⁴

It is noted that the approach of the judge in giving consideration to the elements that comprised ‘a minimum core’ of socio-economic rights, can, without doubt, be regarded as furthering the agenda of social transformation. The Court’s search for factors that go beyond ascertaining the purpose for the provision or placing the right in its context, and this is in keeping with the proposed deontic theory of interpretation which requires that in the process of interpretation, regard must be given to moral and ethical considerations. It is therefore apparent that without being aware of it, the court in *Grootboom* had applied concepts in judicial reasoning that are consistent with deontic logic.

From an examination of the interpretation and application of international law, what is also evident is that the methodology of interpretation requires the adoption of an amalgamation of the different methods of interpretation. This is consistent with the eclectic method of interpretation referred in earlier chapters. This methodology also forms the basis of the *modus operandi* of the proposed deontic theory.⁸⁵ From an examination of *Makwanyane*, *AZAPO* and *Grootboom*, what has emerged in the above-mentioned judgments constitutes a new jurisprudence which is reflective of the Constitutional Court’s position and approach to international law into South African law.

6.5.2 An Examination of Foreign Law

The South African constitutional jurisprudence not only reflects the influence of a wide range of international human rights law instruments, but there is also evidence of the influence of foreign constitutions. Some of the more influential include the German Basic Law, the Canadian Charter, the United States Constitution, and the

⁸⁴ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-179- 32-180 for Du Plessis’ comments on the findings of the *Grootboom* case.

⁸⁵ See **Chapter 1, 1.6 Definitions of Terms and Concepts** for a discussion of the *modus operandi* of the proposed deontic theory.

Indian Constitution – which were all instrumental in developing and shaping the South African Constitution and its Bill of Rights.⁸⁶

In *K v Minister of Safety and Security*,⁸⁷ O'Regan J's position on foreign law was clear. She maintained that:

'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...

Consideration of the responses of other legal systems may enlighten us in analysing our own law, and to 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 Rights.'⁸⁸

Further reference to foreign law is evident in the following *dictum* by Kriegler J, in *S v Mamabolo (E Tv, Business Day and Freedom of Expression Institute intervening)*⁸⁹ – in his submission that:

'... 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.'⁹⁰

The view maintained in the above *dicta* about the significance and relevance of foreign law, is acceptable in light of the fact that as a fairly 'new' democracy, the

⁸⁶ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-183. See earlier discussion in this chapter for an examination of the selected jurisdictions in **6.3 A Consideration of the Features of Selected Constitutional States and their Influence of South African Law**. Further see Davis 'Democracy-its Influence upon the Process of Constitutional Interpretation' *South African Journal on Human Rights* 103-121 where the author in his article carefully analyses the jurisprudential developments of the law in other jurisdictions for example Canada, India, United States and Bophuthatswana and their influence on the emerging constitutional democracy in South Africa.

⁸⁷ 2005 (9) BCLR 835 (CC), 2005 (6) SA 419 (CC).

⁸⁸ *Ibid* at paras 34-35.

⁸⁹ 2001 (5) BCLR 449 (CC), 2001 (3) SA 409 (CC).

⁹⁰ *Ibid* at para 133.

older jurisdictions and constitutions are able to provide precedents and jurisprudential analysis that are beneficial for interpretation of South African law and our Constitution. However, while effecting comparisons with other jurisdictions can indeed prove beneficial, ‘the wholesale importation of foreign doctrines and precedents’⁹¹ is to be avoided. In *Du Plessis and Others v De Klerk and Another*,⁹² Kriegler J was guarded in his approach to the influence of foreign jurisdictions. It was maintained that:

‘...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, construed on unique design and intended for unique purposes.’⁹³

In emphasising the uniqueness of the South African constitutional system, he followed the position adopted by the Constitutional Court in *S v Makwanyane*, 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 Constitution’.⁹⁴

Therefore, it would seem that even though reference to foreign law is expressly provided for in terms of section 39(1), it was not the intention of the drafters of the Constitution that foreign doctrines and precedents be applied in an unqualified manner. The danger of over-reliance on foreign jurisdictions, reference to inappropriate foreign sources, and shallow comparativism⁹⁵ – as highlighted above – must be avoided at all costs, if an effective comparative analysis is to be conducted.

⁹¹ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-186.

⁹² 1996 (3) SA at 850.

⁹³ *Ibid* at para 127.

⁹⁴ 1995 (3) SA 391 at para 39.

⁹⁵ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-183-32-187.

6.6 Conclusion

The discussion in this chapter involves essentially an examination of section 39 of the Constitution. In order to formulate an understanding of the distinction between the references to international law and foreign law, it is necessary to explore the constitutional imperative contained in section 39 – that ‘every court, tribunal and forum a) *must consider international law* and b) *may consider foreign law*’. This has presented some interesting and thought-provoking ideas about both international law and foreign law.

A jurisprudential analysis of case-law has revealed that in the application of *international law*, international norms and standards must be considered – but are not binding in the interpretation of our law. Not only does international law provide a framework against which the norms, standards and principles are to be measured, but it also provides clarity on the methodology that should underlie the process of interpretation. International law influences the way we interpret laws in South Africa. As a result of the influences of international law on South African law, laws ought to be interpreted purposively.⁹⁶ This is largely because international instruments are interpreted purposively or teleologically. As a result of this influence, it is observed that with regard to the method of interpretation, there has been a definite paradigmatic shift from the literal to the purposive or teleological mode of interpretation.

Foreign law is also not binding, but may be considered in the process of interpretation. What this therefore ensures, is that it creates room and allows for a ‘creative imagination’ in raising new questions and new possibilities with regard to both new and old problems.⁹⁷ This view is also espoused by Liebenberg who is unwavering in her support that a reflection on the consideration of the interpretation of the socio-economic rights in other international and comparative jurisdictions should generate ‘new’ options and possibilities in considering the emerging

⁹⁶ This is clearly evident in case law. See for example *S v Zuma* 1995 (4) BCLR 401 SA; 1995 (2) SA 642 (CC); and *S v Makwanyane and Another* 1995 (6) BCLR 655 (CC); 1995 (3) SA 391 (CC)

⁹⁷ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-183-32-188.

jurisprudence in South Africa.⁹⁸ A comparison of the position in foreign jurisdictions is therefore useful, in that it allows for a certain degree of flexibility to consider the approach to statutory interpretation in other jurisdictions, and to decide on a preferred method of interpretation in South African law.

Van der Walt's view on constitutional comparativism is innovative and relevant in the South African context. He contends that:

‘ 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.’⁹⁹

Van der Walt's submission is important for a number of reasons. Firstly, it highlights the fact that a comparative analysis is extremely useful. It is helpful in that it enables the interpreter to consider other possibilities in terms of the array of different methods, techniques and approaches that are available.

Secondly, in terms of the submission, the point is made that a comparative analysis should provide a set of options that should liberate us, by enabling the interpreter to decide what needs to be done and what is most appropriate – rather than restricting

⁹⁸ See Liebenberg ‘Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate’ in Woolman and Bishop (eds) *Constitutional Conversations* at 324, where the author is also supportive of the idea that international and comparative sources are not to be referred to slavishly, but rather because they broaden the range of options available to courts in developing the interpreting of socio-economic rights, that they are also to ensure that the court is aware of applicable law standards. Nevertheless, the South African courts remain under a duty to consider which interpretations best advance the values and transformative commitments of the Constitution in the current political, economic and social context of South Africa. The crux of Liebenberg's argument supports the idea that in a transformative Constitution that judges are under a moral obligation to heed the commitment for social reform and social justice. It is submitted that such ethical and moral considerations are central to the operation of the proposed deontic theory of interpretation.

⁹⁹ *Ibid* at 32-189.

interpretation only to that which is familiar. Section 39 prescribes the manner in which the process of interpretation should apply. It is clear that not only must the values that underlie an open and democratic society be given expression to, but section 39 specifically mandates that international and foreign law are to be considered – as they are regarded as being intrinsically part of the process of interpretation. This value-based methodology, which underpins the statutory process, has resulted in a distinct shift from positivism to that which is akin to natural law – with the Constitution as the supreme law, in a sense a surrogate for natural law or a higher law. While the tendency after 1994 has been to adopt a purposive theory – as it accords with international norms and standards and is in keeping with the values of the Constitution – this particular theory is in itself *not* to be regarded as the uncontested ‘Open Sesame!’¹⁰⁰ for purposes of interpretation. The evolving jurisprudence with its influences from South African and international law, requires a ‘new’ theory and a ‘new’ methodology for the process of interpretation. It is suggested that the proposed deontic theory with an eclectic methodology requires that in the process of interpretation one should be inclusive and comprehensive, as explained.

The third point made by Van der Walt is interesting, in that he specifically makes reference to a range of ‘fallacious doctrines, *theories* and arguments’,¹⁰¹ which he asserts are to be avoided. It is submitted that by simply focusing on that which other jurisdictions have applied, would not only be fallacious, but also counter-productive. What a comparative analysis has revealed is that in the process of interpretation in South Africa, one ought not slavishly apply a theory, doctrine or approach that has worked elsewhere. South Africa’s unique history and background, and factors that influence decision-making in South Africa, require an indigenous approach to interpretation. It is therefore submitted that a deontic theory of interpretation, which is based on deontic reasoning and requires pro-active consideration of ethical and moral elements as its central feature, provides the most viable option to address the challenge of social transformation in the current constitutional era.

¹⁰⁰ Du Plessis *Re-Interpretation of Statutes* at 116. (Emphasis added)

¹⁰¹ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-183 - 32-188. (Emphasis Added)

CHAPTER 7

CONCLUSION

7.1 Introduction

It is submitted that the aims and objectives of the research required for this thesis, as articulated in Chapter 1, have been addressed.¹ Each of the chapters examined a particular aspect of statutory interpretation and a discussion with regard to each has been conducted. The approach adopted at the outset was that the multifarious rules and principles that inform the field of statutory interpretation had to be scrutinized. The purpose was to provide a response to the *research problem* posed, which was *to determine whether the Constitution and in particular section 39 have transformed the process of interpretation, and, if so, how has this influenced the law in South Africa.*² The response to the research problem is in the hypothesis. It is submitted that the findings of the research are in support of the hypothesis: *the Constitution has indeed transformed the process of interpretation in South Africa.*

Not only has the Constitution transformed the process of interpretation in South Africa, but what has occurred as a result thereof is that our courts are obliged to give effect to the operation of section 39 – resulting in a transformative Constitution with a new emerging jurisprudence. It is no longer one of legal positivism, but one akin to natural law, with the Constitution being the supreme law and all that such a Constitution entails. The thesis postulates a ‘new’ theory and the ‘new’ methodology – designated as the deontic theory, which requires an eclectic methodology. The formulation and

¹ See the Aims and Objectives of the research as discussed at **1.3 Aims and Objectives** in **Chapter 1**.

² See the Research Problem and Hypothesis as set out at **1.2 Research Problem and Hypothesis** in **Chapter 1**.

presentation of this theory of interpretation for the new constitutional order, is supported by the findings of the research undertaken, a summary of which is detailed hereunder.

7.2 A Summary of the Observations and Findings of the Study

An examination of the cases that form the basis of the research are important from the perspective of their impact on the developing law and jurisprudence and the changes effected in the current constitutional era in South Africa.

The most important feature, from an analysis of the subject, has been the transition from the formalistic and mechanical approach of legal interpretation to a more purposive, generous or teleological method – and that which is often referred to as a value-orientated method of interpretation.³ The supremacy of the Constitution and the operation of section 39(2), in particular, must be regarded as being instrumental in ensuring that the orthodox methodology of interpretation is eclipsed by the new constitutional order.⁴ It is therefore obvious from the plethora of case-law decided subsequent to the Constitution, that the value-laden approach to interpretation that has been applied by courts, has resulted in a manifestly more equitable and just outcome of the legal process.⁵ This compares starkly with the discredited system of apartheid with its inherently racist laws that prevailed prior to the new constitutional dispensation.

What is also clear is that the courts have been granted a power to ‘create’ law, in a secondary sense. As a result of a number of corrective techniques which have been illustrated by the operation of reading-down, reading-in and the severance process,

³ The more commonly accepted theories of Statutory Interpretation have been discussed throughout the thesis. **Chapter 2** essentially focuses on a critical examination of the theories of interpretation.

⁴ **Chapter 3** deals predominantly with an examination of various aspects of the Constitution. The importance of the supremacy clause and the significance of section 39, as well as other relevant provisions are considered in detail.

⁵ See for example *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC); *African Christian Democratic Party v The Electoral Commission* 2006 (5) BCLR (CC); *Baloro v University of Bophuthatswana* 1995 (8) BCLR 1018 (CC); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism* 2004 (4) BCLR 735 (CC) and *SV Mhlungu* 1995 (3) SA 867 (CC).

during constitutional review,⁶ a competent court may endeavour, if reasonably possible, to modify or adapt legislation to render it constitutional and alive, or may as a last resort declare it invalid and strike it down, if it is found wanting.⁷

It is submitted that the combined effect of this power and the ability of the courts in the process of judicial review has effected a paradigmatic shift in emphasis from a literal to a value-laden approach to interpretation – resulting in an emerging constitutional jurisprudence in South Africa. Since the 1996 Constitution is often referred to as being ‘post liberal and transformative in nature’,⁸ it is not surprising that the term ‘transformative constitutionalism’⁹ is used to describe this emerging jurisprudence. In attempting to address the inequalities in a post-apartheid South African society, transformative constitutionalism emphasizes the realization of, *inter alia*, socio-economic justice and all it entails.¹⁰ Pieterse, a strong protagonist of social transformation, identified the attainment of social justice as being a distinct trait of a transformative South African Constitution.¹¹ In examining the concepts of ‘social justice’ and ‘transformation’ alluded to, Liebenberg opines that the concepts of social justice and transformation should inform the way we interpret legislation.¹² Du Plessis

⁶ See **Chapter 3** for a complete discussion and analysis of the processes and mechanisms that apply in constitutional review or the testing of legislation against the Constitution.

⁷ Botha *Statutory Interpretation* (5th edition) at 195-197.

⁸ Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) *South African Journal on Human Rights* at 146.

⁹ Ibid. See Klare’s discussion on the influence of a transformative constitution on constitutional and statutory transformation.

¹⁰ Brand *Courts, Socio-Economic Rights and Transformative Politics*, (2009) LLD Thesis, University of Stellenbosch.

¹¹ Pieterse ‘What Do We Mean When We Talk About, Transformative Constitutionalism?’ (2005) 20 *South African Public Law* at 155. See also Langa ‘Transformative Constitutionalism’ (2006) 3 *Stellenbosch Law Review* at 351.

¹² Liebenberg ‘Needs, Rights and Transformation: Adjudicating Social Rights’ (2005) 1 *Stellenbosch Law Review* at 17.

perceptively explains that the transformative nature of the Constitution has far-reaching implications for interpretation.¹³

In the research undertaken, there are many judgments that have illustrated the significance of social justice realised in terms of the Constitution.¹⁴ The seminal cases of the *Government of the Republic of South Africa and Others v Grootboom and Others*¹⁵ and the *Minister of Health and Others v Treatment Action Campaign and Others*¹⁶, are described as being two of the ‘most conspicuously inspired by transformative constitutionalism’.¹⁷ In the application of the socio-economic rights, namely section 26 and section 27 of the Bill of Rights respectively, the Constitutional Court emphasized that the responsibility of a competent court was to enforce these rights to provide respectively access to the right to housing, (in terms of section 26),¹⁸ and the right to health care, food, water and social security (in terms of section 27).¹⁹ As a result, the ‘far-reaching implications’ that Du Plessis refers to above, resulted in the granting of

¹³ Woolman, Roux, Klaaren, Stein, Chaskalson and Bishop *Constitutional Law of South Africa* (2nd edition) at 32-81.

¹⁴ See also the cases of *S v Makwanyane and Another* 1995 (6) BCLR 655 (CC); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism and Others* 2004 (7) BCLR 687 (CC); *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC).

¹⁵ 2001 (1) SA 46 (CC).

¹⁶ 2002 (5) SA 721 (CC).

¹⁷ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-82.

¹⁸ Section 26 of the Constitution - the Right to Housing, provides that:

- ‘(1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of this right.
- (3) 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.’

¹⁹ Section 27 of the Constitution - the Right to Health Care, food, water and Social security, provides that:

- ‘(1) Everyone has the right to have access to –
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.’

declaratory and mandatory orders in *Grootboom* and the upholding of the state's obligation to supply and administer Nevirapine to pregnant HIV women in *Treatment Action Campaign*.²⁰ The approach of the court in *Khosa*²¹ which stressed the political community's responsibility to provide non-citizens who find themselves on the margin of that community with the material benefits, and *Fourie*²² which recognised that gays and lesbians have an entitlement to public recognition of their intimate relationships as discussed in Chapter 3, is clearly indicative of a more expansive approach adopted by the courts in deciding on matters relating to fundamental socio-economic rights. What is apparent from case-law dealing with socio-economic rights, is that the central question that the court focuses on is whether the means chosen is reasonably capable of facilitating the realisation of the socio-economic rights in question. The court has thus indicated that it will assess the reasonableness of the state's conduct in light of the social, economic and historical context and consideration will have to be given to the capacity of the institutions responsible for implementing the programme.²³ While the court in *Soobramoney*²⁴ raised the standard of the rationality test for socio-economic rights claims, the court in *Grootboom* and *Treatment Action Campaign* adopted a slightly different approach in that it proceeded to advance a set of criteria for assessing the reasonableness of the state's acts or omissions. The assessment of the reasonableness of government programme²⁵ is influenced by two factors, firstly, the concept of progressive realisation, and secondly, the availability of resources (which is linked to the first).

²⁰ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-82.

²¹ *Khosa v Minister of Social Development* 2004 (5) BCLR 569 (CC).

²² *Minister of Home Affairs and Another v Fourie and Others* 2006 (3) BCLR 355 (CC).

²³ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 43.

²⁴ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

²⁵ Michelman 'Against Regulatory Taking: of the Two-Stage Inquiry-A Reply to Theunis Roux' in Woolman and Bishop (eds) *Constitutional Conversations* at 306-307.

Nevertheless in spite of these interventions, Liebenberg is quite bold in her assertion that the law and legal processes alone are not sufficient to ‘bridge the chasm between the realities of poverty and inequality that pervade our society.’²⁶ What is needed is that when courts decide in respect of cases dealing with socio-economic rights, is that they should embrace the challenge that the jurisprudence to be applied must ‘facilitate the transformation of unjust social and economic relations entrenched by current laws.’²⁷ This highlights the responsibility of judges in the interpretative process – to ensure that social justice through transformation is achieved. A recent finding by Davis and Klare on transformative constitutionalism has revealed that despite the fact that the 1996 Constitution mandates courts to uphold and protect human rights, some judges in the lower courts and Supreme Court of Appeal are ‘reluctant to deviate from traditional legal reasoning and fail to be more sensitive to the context, and the potential and real consequences’²⁸ of their decisions. It is unfortunate that even though ‘the Constitution invites imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals’,²⁹ certain judges are content to continue to operate in the comfort of old methodologies. Klare argues forcefully that in a transformative constitutional democracy, such as in South Africa, the role and responsibility of judges must be re-visited. He submits that:

‘Judicial mindset and methodology are part of law, and therefore they must be examined and revised so as to promote equality, a culture of democracy and transparent governance.’³⁰

²⁶ Liebeneberg ‘Socio-economic Rights: Revisiting the Reasonableness Review/ Minimum Core Debate’ in Woolman and Bishop (eds) *Constitutional Conversations* at 329.

²⁷ Ibid.

²⁸ Davis and Klare ‘Transformative Constitutionalism and the Common and Customary Law’ (2010) 26 *South African Journal on Human Rights* at 403.

²⁹ Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) *South African Journal on Human Rights* at 156.

³⁰ Ibid.

The sentiment encapsulated in the quotation above is integral to this thesis. This is significant because it speaks directly to the theories of interpretation that are applied in South African courts, and impacts on the methodology that informs their operation. What is revealed from the analysis of the more commonly accepted theories of interpretation,³¹ is that while they are not completely devoid of merit, the paradigm in which they operate is inadequate to achieve the goals of social justice and to attain transformation in the contemporary constitutional and political system in South Africa. This view is supported by Klare, who maintains that it could not have been the intention that the new Constitution was to be interpreted using legalistic and obsolete methods of interpretation, based on primitive literalism.³²

It is therefore submitted that a theory which acknowledges the responsibility of the courts and the role of judicial officers to achieve the transformative goals of the Constitution, is the most appropriate in the current constitutional order. Bearing this in mind, a deontic theory is postulated. In *Fose v Minister of Safety and Security*,³³ the Constitutional Court accentuated the importance of the responsibility of judges in the South African context. It was stated that:

‘Particularly in a country where so few have the means to enforce their rights through the courts, it is essential on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it will be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to “*forge new tools*” and shape innovative remedies, if needs be, to achieve this goal.’

The proposed deontic theory of interpretation which requires that judges are expected in the process of interpretation, to apply ethical and moral reasoning, together with

³¹ The more commonly accepted theories of interpretation are examined fully in **Chapter 2**. These include the Literal Theory, the Contextual Approach, the Purposive Theory, the Teleological Theory, the Intention Theory, the Objective Theory and the Judicial Theory.

³² Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) *South African Journal on Human Rights* at 156.

³³ 1997 (7) BCLR 851 (CC) para 69.

induction and deduction, all of which are to be applied pro-actively as a ‘new tool’, is referred to by the court, in the *dictum* above – in order to achieve social justice.³⁴

7.3 The Formulation of a New Theory Involving Deontic Reasoning

In a transformative South African constitutional democracy, with the Constitution as the supreme law, the paradigmatic shift or transition from literalism to purposivism has not only resulted in an emerging new jurisprudence, but has significantly changed the way laws are to be interpreted. This idea supports the position that this ‘new’ jurisprudence requires a ‘new’ theory and a new methodology to interpretation. In his presentation of a general theory of law, Wahlgren submits that while the task of developing a new theory might be regarded as being an ‘ambitious, long-term project’, in the same vein he acknowledges that it need not necessarily ‘only be the result of extensive philosophical investigations’.³⁵ The quest for a ‘new’ theory in a transformative constitutional democracy in South Africa, might also have initially been regarded as an ambitious project. However, the sound and carefully reasoned judgements of the courts³⁶ illustrating the ethical and moral elements underpinning the courts’ reasoning and therefore emphasizing the approach adopted by judges in assimilating this factor when deliberating and adjudicating – has contributed to formulating a new theory of interpretation. The proposed deontic theory of interpretation which has its origin in classical philosophy³⁷ with a holistic component and a *modus operandi* which requires

³⁴ See **Chapter 1** for the definition accorded to the deontic theory and the description of the eclectic methodology that would apply in the operation of the model.

³⁵ Wahlgren ‘A General Theory of Artificial Intelligence and the Law’ Legal Knowledge Based Systems; JURIX 1994 at 87.

³⁶ See for example *Höerskool Ermelo and Another v Head of Department of Education Mpumalanga and Others* 2009 (3) ALL 386 (SCA); *Modder East Squatters v ModderklipBoerdery*; *President of the Republic of South Africa v ModderklipBoerdery* 2004 (8) BCLR 821 (SCA) and *Agri South Africa v Minister of Minerals and Energy* (CCT 51/12) 2013 ZAZZ 9.

³⁷ From the discipline of philosophy, ‘holism’ is described as the theory that whole entities, as fundamental components of reality, have an existence other than as the mere sum of the parts. <http://www.thesaurus.com/broese/holism> (Accessed on March 2015). The term holism is generally applied to views that treat the meanings of all of the words in a language as

an eclectic methodology and pro-active approach to the application of law is, it is submitted the most appropriate in the transformative constitutional era in South Africa.

While the court's approach in the interpretation and the application of legislation in the *Rivonia School* case,³⁸ is reflective of the pro-active manner which underpins the methodology for the operation of the proposed deontic theory,³⁹ it is evident that there are other recently decided cases that have adopted a pro-active stance without acknowledging it by name.⁴⁰ It is therefore submitted that a transformative Constitution requires a theory which embraces transformation. The proposed deontic theory of interpretation with a pro-active mode of application, as opposed to a minimalistic approach,⁴¹ it is submitted, is a theory of interpretation which is most favourable in the current constitutional order.

In order for a *proposed* theory to qualify as a *new* theory of legal reasoning, the theory must exhibit certain distinct criteria. In terms of its overall structure, therefore, a theory must comprise certain basic components. The theory must:

- Have its own distinct model

It is submitted that the proposed deontic theory as presented, which operates according to its own theoretical framework and *modus operandi*, has revealed a distinctiveness with regard to its application. The proposed deontic theory is one that involves inductive

interdependent. The interdependence associated with 'holism' is usually taken to follow from the meaning of each word or sentence being tied to its use. The determinants of the meanings of our terms are interconnected in a way that leads a change in the meaning of any single term to produce a change in the meanings of each of the rest.- Stanford Encyclopedia of Philosophy <http://plato.stanford.edu/entries/meaning-holism> (Accessed on March 2015)

³⁸ *MEC for Education v Governing Body of the Rivonia Primary School* 2013 (12) BCLR 1365 (CC).

³⁹ See definition of a deontic theory in **Chapter 1, 1.6.2 Deontic Theory**.

⁴⁰ See for example *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism and Others* 2004 (7) BCLR 687 (CC); *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC); and *Minister of Home Affairs and Another v Fourie and Others* 2006 (3) BCLR 355 (CC).

⁴¹ See Woolman *The Selfless Constitution - Experimentalism and Flourishing as Foundations of South Africa's Basic Law* at 580-581 for the author's discussion on the concept of minimalism.

and deductive legal reasoning, encapsulates ethics and morality and is applied in a proactive manner.⁴²

- Be a general theory

What is required here is that a theory must reflect the components that could be accepted by scholars of various traditions. The theory as postulated is a general theory of application. The main reason for this submission is that an examination of case law has revealed that the theory is capable of being applied to different areas in law, for example private law, public law, commercial law and international law, which is evident from the array of legal judgments examined.

- Be transparent

What is expected here, is that the components are to be described in a non-technical way and all legal and technical terms are explained as they appear. The application of the theory will operate on the basis of an eclectic methodology. An understanding of how this would unfold has been illustrated in the jurisprudential analysis of the traditional theories of interpretation applied in South African courts

- Reflect explicitness

This is necessary in order to ensure that all the relevant aspects of the jurisprudential paradigm be included – to make it possible to identify. It has been necessary to explore the various rules of interpretation as well as to examine a host of canons and maxims, to determine the applicability and relevance of the proposed deontic theory of interpretation. An examination of the above has revealed that the proposed deontic theory of interpretation may very well be used and applied with regard to the commonly accepted canons and maxims of interpretation.⁴³

- Comprise its own *modus operandi*

⁴² See discussion in **Chapter 1, 1.4 Background/Overview** for the articulation of the elements of the deontic theory.

⁴³ See **Chapter 5**, for an examination of the canons and maxims of interpretation.

As defined the proposed deontic theory of interpretation would operate in accordance with its own set of rules and methodology. The methodology or *modus operandi* that informs the proposed deontic theory, has been clearly defined. The *modus operandi* is an eclectic methodology. What is proposed for the operation of the theory is an amalgamation of the *modus operandi* of the various theories of interpretation, which has to be applied pro-actively. Such pro-activism is identified as being pivotal to its operation. The operation of the eclectic method with a pro-active approach as outlined, is unique to the proposed deontic theory.⁴⁴

- Be flexible

What is evident is that the inherent flexibility of the proposed deontic theory, in that it is a theory that may be applied to legislation, the common-law and customary law, makes it extremely favourable for interpretation in a transformative constitutional system.

The basis of Wahlgren's work is significant because it supports the rationale for the research undertaken. This is that future advancements are dependent on one's ability to develop more adequate theories reflecting their own unique characteristics and requirements.⁴⁵ The research undertaken clearly illustrates that the proposed deontic theory of interpretation, as expounded, conforms with all of the criteria, as articulated. What has emerged as an important feature in the application of the proposed deontic theory of interpretation is that it supports the idea that in interpreting a statute, that the statute is to be read holistically. Holism is the idea that something can be more than the sum of its parts. It contends that one must understand reality as a whole. In applying holism to language would result in semantic holism. The idea behind semantic holism is that every word has a meaning only in relation to other words, sentences, or language (as a whole), in which it is used.⁴⁶ In his analysis of the concept of 'holism' which in effect

⁴⁴ See discussion in the eclectic methodology in **Chapter 1, 1.6.3 Methodology**.

⁴⁵ Wahlgren 'A General Theory of Artificial Intelligence and the Law' Legal Knowledge Based Systems: JURIX 1994 at 88.

⁴⁶ Semantic holism, is defined as, the idea that words have no meaning apart from the context, or sentences in which they are used. This can, perhaps, be better understood by looking at the

was an appraisal of Smuts' work *Holism and Evolution*, Mowatt maintains that Smuts coined the term 'holism' to describe the 'more' that he referred to. Holism is thus best described as a force inherent in any object or organism. Mowatt argues further that when holism and the process of evolution are combined they comprise the main forces of existence namely:

- (i) Evolution – which is the force of development and growth and
- (ii) Holism – which is the form of regulation and formation.

However Mowatt emphasises that Smuts did not specifically define holism but rather developed throughout his thesis the concept of holism incrementally.⁴⁷ Likewise, in the process of interpretation the court is guided by the basic principle that each of the elements or 'layers' that comprise its separate parts - should be read as a 'harmonious whole' within their broader context in a manner that furthers the statutory purpose.⁴⁸ It is therefore submitted that the proposed deontic theory of interpretation which incorporates the elements of inductive and deductive legal reasoning, an evaluation of ethical and moral considerations and is applied pro-actively in accordance with an eclectic methodology, embraces the idea of holism. The proposed deontic theory of interpretation is intended to operate holistically in resolving matters of dispute in the interpretation of statutes.

7.4 Prognosis and Conclusion

What can be garnered from the findings of the research and from the rich repository of case-law and jurisprudence that the study has explored, is that the emerging jurisprudence requires a new legal theory for statutory interpretation in the era of constitutional transformation in South Africa. This may, perhaps, not come as a surprise

meaning of holism, and contrasting it atomism. Holism can be contrasted with atomism, which is the idea that everything can be broken down into smaller parts. Applied to biology one would argue that one can obtain an accurate picture of a duck by breaking down the duck into fundamental 'duck parts.'

<http://www.yorku.ca/hjackman/papers/holism-and-inst.pdf> (Accessed on October 2013)

⁴⁷ Mowatt 'Holism and the Law' (1991) 108 *South African Law Journal* at 344.

⁴⁸ Kim *Statutory Interpretation: General Principles and Recent Trends* at 1.

for scholars and lawyers. From his analysis of the conventional theories of statutory interpretation since the advent of the Constitution, Du Plessis is unwavering in his assertions that the conventional theories of interpretation are insufficient in a constitutional democracy. His view is both relevant and receptive to the idea of an ‘emerging discourse on legal interpretation’.⁴⁹ In fact, Du Plessis goes so far as to suggest the augmented Savignian Quartet, in its adapted form, as a model for both constitutional and statutory implementation.⁵⁰ Another legal scholar who has been openly critical of the assessment of the adjudicative performance of the Constitutional Court due to the inadequacy of available theories – has been Roux. In one of his seminal works, he identifies the need for an appropriate legal theory of interpretation in the new constitutional order. He submits that:

‘The problems with the currently available theories of judicial review...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 an acceptable legal theory.’⁵¹

While the inadequacy of the conventional theories of interpretation and the need for an acceptable legal theory is a subject that has been broached by legal academics and jurists – none have endeavoured to suggest an appropriate or acceptable alternative. It is for this reason that the research undertaken is relevant, as it provides a feasible, practical and sound option by way of a deontic theory of interpretation coupled with a pro-active methodology. The proposed deontic theory of interpretation as explicated, is a model that is based on ethical and moral considerations and requires an eclectic – pro-active methodology to further the aims of social transformation. For the reasons suggested and

⁴⁹ Woolman *et al Constitutional Law of South Africa* (2nd edition) at 32-40.

⁵⁰ *Ibid* at 160.

⁵¹ Roux T 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal on Constitutional Law* at 112.

supported by a myriad of case-law, as illustrated throughout this thesis, the proposed deontic theory is presented as a theoretical framework for interpretation in the transformative constitutional era – in South Africa. As indicated above the deontic theory also involves the concept of holism: the sum being more than the parts. This is also a method of legal reasoning and provides a basis for a pro-active application of the meaning of a text, as mandated by section 7 and section 39 (2) of the Constitution. Deontic reasoning involves balancing conflicting values, harmonisation and prioritisation of values, besides the application of the principles of holism. Values must include, besides human dignity, equality and freedom the transformative socio-economic values necessary for economic equality in South Africa.

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