Memory and Meaning

Lourens du Plessis and the haunting of justice

Edited by Jacques de Ville

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Preface

In October 2013 a *Call for Papers* was circulated amongst (former) colleagues and students of Lourens du Plessis, inviting the submission of essays and tributes by the end of October 2014:

> Lourens Marthinus du Plessis is due to celebrate his 65th birthday on 31 May 2014. In celebrating this event with him, we, as colleagues, friends, and former students, are necessarily and admiringly drawn to what can, invoking Lourens's own terminology, be called the voluminous 'text' of his academic engagements, and which itself calls for interpretation. This text, which spans four tumultuous decades, bears witness to the diverse roles he has played as anti-apartheid academic activist, constitutional drafter and theorist, as well as mentor to a new generation of jurists. The devotion with which Lourens played these roles, as well as the more general and overarching one of incisive reader-writer, points to someone being haunted by justice, already evident in his doctoral thesis, dating from 1979. In respect of interpretation, and specifically the question of how meaning comes about, a question to which Lourens has remained irresistibly drawn, this haunting meant that his quest has never simply been for meaning, but for just meaning. More recently, with Lourens donning the mantle of constitutional theorist, the latter quest has become increasingly tied to the role of memory in interpretation, which in turn raises important questions about the structure and functioning of texts, including his own.

Lourens retired from his position as Research Professor at North-West University (Potchefstroom Campus) at the end of 2014. The collection was and is meant to honour and thank him for his friendship and mentorship as well as for his contribution to the South African legal system over the past four decades. The collection aims not only at honouring Lourens in the traditional Festschrift style, but also to engage with his thinking, critically or otherwise, and to reflect on how his thinking can be applied to different areas of the law.

This publication would not have been possible without the support of a number of people:

Syntyche de Waal, a former student of Lourens and representative of *LexisNexis*, the publisher of many of Lourens's texts including *Re-Interpretation of Statutes* (2002), generously agreed to support the publication of this collection.

Hugh Corder and Elmien du Plessis contributed the photos included in this collection.

Kitty Malherbe, Riekie Wandrag, Nico Steytler and Wessel le Roux gave encouragement and valuable advice.

The reviewers are thanked for their time and efforts in reviewing the essays submitted, providing detailed comments on each submission and selecting the essays to be included in this collection.

The contributors are thanked for their enthusiasm for and devotion to this project.

Jacques de Ville

24 May 2015

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Introducing Lourens

Jacques de Ville

1 Overview

Lourens du Plessis needs no introduction it may be said, least of all by a former student of his. Yet, convention requires that a few words be said here of Lourens, about who he is and what he has written on the law, as well as about what the other contributors to this collection will say in this regard.[1] The roots of the word 'introduce' (Latin: *intrōdūcere*) point to a leading (lead, pull, draw, Latin: *dūcere*; Indo-European root: *deuk*-) within, inside, innermost (Latin: *intrō*; Indo-European root: *en*).[2] Viewed through the lens of metaphysics, the writer of the introduction would thus be required to lead the reader into some intimate interior or essence of the person being introduced and of his texts. This (impossible)[3] task can fortunately in large part be left to Lourens himself here in view of his expertise in the writing of introductions.[4] We can start with his response to a question about his parents and the schools he attended:

> My Pa was Hermanus Johannes Wilhelmus du Plessis (Hermanus) gebore in Angola, getoë in Namibië en oorlede in Potch. Hy was 'n landdros. My Ma, oorwegend 'n tuistebestuurder, was Anna Francina Johanna (née Maree) gebore en getoë in Kuruman distrik en in Namibië getroud—waar ek dan ook verwek is. Ek is in Kuruman gebore en het in die Unie/RSA grootgeword en soos dit 'n destydse tyd landdrosseun betaam het, in vier skole skoolgegaan: Middelburg (Mpumalanga) Afrikaanse Laerskool (1955–1957), Staatskool Dannhauser, (KwaZulu) Natal (1957–1961), Sterkstroom (later John Vorster) Hoërskool (1961–1964) en Hoërskool Wolmaransstad (1965–1966). By laasgenoemde is ek tot hoofseun gesalf – en as Wina se aanstaande eggenoot touwys gemaak (e-mail of 2 April 2015).

This response already reveals a great deal about Lourens: his sense of humour, his feminism, and perhaps also a certain rootlessness, homelessness or placelessness, to which we shall return. An event during his school years, which Lourens once recounted to me, and which he noted had a lasting effect on him, was when a teacher in standard eight gave him a book to read. I could however no longer remember which book it was when starting to write this introduction. In the same e-mail Lourens reminded me: 'Die boek wat die onderwyser my in die hand gestop het (met die opdrag "Lees en kom sê my wat jy dink"), was Adam Small se *Kanna hy kô hystoe*. Die hele episode (en die boek self) het 'n groot indruk op my gemaak en my aan die wonder gesit. Daar was natuurlik nog ander soortgelyke insidente ook.' We will return to this text in what follows. On his relation with Wina (Wilhelmina Steyn), also mentioned in the e-mail, Lourens in a later e-mail (on 4 May 2015) commented that they had known each other since the beginning of standard nine and that they started a relationship ('was gekys') in the month of May of their matric year (1966). They married five years later, in 1971, and his daughters Carien, Elmien and Anné were

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1 These are marked with an asterisk (*) in the footnotes that follow.

2 Farlex *The Free Dictionary*.

3 The reasons for this 'impossibility' will appear from what follows.

4 See eg Du Plessis *Inleiding tot die Reg/An Introduction to Law*, of which there were 3 edns (in 1992, 1995 & 1999).

born in 1974, 1975 and 1979 respectively. Lourens became a grandfather for the first time in 2004, and on the last count boasted three grandsons and two granddaughters.

From his *curriculum vitae*, we further learn that in 1968 Lourens started his studies at the Potchefstroom University for Christian Higher Education, as it was known then. He received the degree BJur et Com (with a distinction in Private Law) in 1970 and the LLB degree (*cum laude*) in 1972. This was followed by a BPhil degree, also awarded to him *cum laude* in 1974. In 1973 he was appointed lecturer in the Faculty of law, Potchefstroom on the basis of his stellar academic performance, as recounted in his contribution to this collection by Johan van der Vyver, Dean of the Law Faculty at the time. Lourens wrote his doctorate under the supervision of Van der Vyver, and was awarded the LLD degree in 1979 for his 876-page thesis on *The Juridical Relevance of Christian Justice*. Lourens was promoted to Senior Lecturer in 1976, and he became Professor and Head of the Department of Jurisprudence in 1981. He was to remain in this position until 1987, when he departed from Potchefstroom to take up the position of Professor in the Department of Public Law at Stellenbosch University. In 2011, Lourens returned to Potchefstroom, now called the University of the North-West, as Research Professor, until his retirement at the end of 2014.

In a career spanning four tumultuous decades, Lourens has played the role of lawyer, philosopher, theologian, anti-apartheid academic activist, constitutional drafter and theorist, as well as mentor to a new generation of jurists. The South African legal system will undoubtedly remain marked by his influence for many years to come. This collection of essays seeks to honour him for his remarkable achievements, but also to thank him for the role he has played in our lives. Thanking Lourens in this way is however faced with a particular difficulty. As Michael Naas[5] points out, the problem with a collection of essays of this nature, is that it cannot simply be a gift in return for what the person whose work is being celebrated has meant to us, that is, thanking him by giving him back what we think we owe him. Such a return gift would disqualify the collection as gift. For this collection to really qualify as gift, we have to go beyond the return, and give something more. But is this possible? Or is it exactly the impossible that is being called for here?

This introduction will proceed by first giving a brief overview of Lourens's time spent in Potchefstroom and in Stellenbosch. Mention will be made of some personal memories of Lourens, of the other contributions to this collection, and of his own texts. Thereafter will follow an enquiry into three concepts which are arguably central to Lourens's life and *oeuvre*: democracy, justice and the concept of the constitution itself. These concepts are likewise explored via personal memories of Lourens, the analyses and memories of Lourens of the other contributors to this collection, as well as through Lourens's own texts. As subtitle to this 'Introduction', I thought of posing the question whether Lourens is, like Socrates, a corrupter of the youth and the founder of a new 'religion'. I decided against a subtitle, but these questions remain central to the issues explored in this 'Introduction', and arguably to all the tributes and essays included in this collection. Socrates, and specifically Plato's 'Apology', plays an important role in Lourens's early texts. The contention, in brief, is that this is not incidental. Socrates appears on the threshold of metaphysics, which through the hand of Plato has provided the basic structure for all our concepts, including that of democracy, justice and of a constitution. Whereas many scholars do not distinguish between the thinking of Plato and Socrates, Lourens, already in his PhD, resisted this somewhat

5 *Taking on the Tradition* 33–34.

simplistic equation. This opens the way to a reading of Socrates which discloses a certain beyond to metaphysics and which at the same time 'explodes' these central concepts of constitutional theory.

2 Lourens in Potchefstroom

While based at the University of Potchefstroom (1973–1987), justice and human rights were the dominant themes in Lourens's publications.[6] He was furthermore actively involved in the politics of the day, for example as a leading player in the drafting and distribution of the Koinonia Declaration (a Christian-based critique of government actions and policies) of 16 November 1977, the year of Steve Biko's death in police custody, and on the eve of the (white) general election; by meeting in 1987 the banned-at-the-time ANC in Dakar together with other Afrikaner intellectuals; as well as by way of a great number of diverse popular scholarly publications, especially in religious journals and in newspapers.[7] In these activities Lourens showed himself to be 'God's troublesome and ironical gadfly in the polis'.[8] In his early academic career, Lourens wrote on what appears at first sight to be a somewhat esoteric topic: legal/professional ethics.[9] This interest however went hand in hand with the fact that he practised as an advocate while based in Potchefstroom (as 'naweekadvokaat', as he modestly referred to it), showing that this philosopher-jurist had his feet firmly on the ground.[10] *Die Professionele Gedrag van die Juris* did not have any subsequent editions, but some sections of it were later incorporated into Lourens's bilingual *Introduction to Law/Inleiding tot die Reg*. The writing of these texts, which were meant to introduce undergraduate students to the law and to the practice of law, incidentally squares completely with Lourens's description of the duty Socrates believed he had in relation to the youth: 'Socrates proceeds in principle from the viewpoint that an expert in the correct technique can educate people (*in casu* the youth) in respect of virtue – train them as it were'.[11] The virtue at stake here is of course ultimately justice, which the books in question clearly had the aim of promoting.

2.1 *Legal practice and political resistance*

The unique nature of Lourens's early attempts at training students in the techniques of justice is for example evident from the discussion in *Die Professionele Gedrag van die Juris*

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6 See Annexure A.

7 See Annexure B.

8 See Du Plessis 'Socrates and his juridical environment' 423; Du Plessis *Westerse Regsdenke tot en met die Middeleeue* 69; and par 5 below. Other descriptions by Lourens of Socrates also appear to fit: 'a remarkable gentleman and a rather extraordinary tutor' ('Socrates and his juridical environment' 423), as well as 'Socrates's habit of questioning the validity of the conventional and passable mores of the city and (the majority of) its people' (*ibid* 424).

9 *Die Professionele Gedrag van die Juris*; see also Christa Rautenbach 'Ode aan 'n "Beste Professor"'*.

10 One of the cases in which he was involved was an income tax matter. André van der Walt (also a contributor to this collection) challenged the Commissioner of Revenue's refusal to allow a rebate for expenses relating to his home office. Lourens was successful in representing Van der Walt in an appeal by the Commissioner from the Income Tax Special Court to the then Transvaal Provincial Division; see *Kommissaris van Binnelandse Inkomste v Van der Walt* 1986 (4) SA 303 (T); see also Du Plessis 'Belastingaftrekking: 'n belangrike beslissing vir akademici' 471.

11 Du Plessis *Westerse Regsdenke* 68.

of the removal of legal practitioners from the roll for involvement in political crimes.[12] Lourens refers *inter alia* to the *Mandela* case[13] where the court refused to remove Mandela's name from the roll of attorneys for advocating civil disobedience of certain laws in order to bring about changes in relation to discriminatory legislation. With further reference to the *Cassim* case,[14] Lourens gives a restrictive interpretation to the courts' power of removal, noting that the commission of a political crime would only lead to removal from the roll if this is accompanied by a clear manifestation of 'disrespect for the course of the law' ('minagting van die weg van die reg'). Lourens thereafter summarises and evaluates the legal position as follows:

> Indien regspraktisyns wil toesien dat die weg van die reg verander word, moet hulle (skynbaar) òf hulle gewone regte as landsburgers uitoefen (en in die gevalle van Nie-blanke regsgeleerdes in Suid-Afrika is dit nogal problematies) òf hulle ywer via hulle professionele verenigings probeer kanaliseer. Indien hulle hulle gewelddadig of op 'n nie-institusionele wyse verset, kom hulle professionele status onmiddellik in gedrang. Met hierdie uitgangspunt is nie fout te vind nie, mits daar 'n simpatieke en billike ruimte vir uitsonderings gelaat word.[15]

Yet what would authorise such exceptions? The legal system itself, by leaving space for equity? This is no doubt a possible reading, in view of Du Plessis's veneration of Aristotle's conception of justice.[16] Yet it could also be said that many of those who disobey the law for 'political' reasons, like Nelson Mandela, did and still do so in the name of a higher law, out of respect and admiration for a law beyond the legal system.[17] The authority for allowing exceptions to the general rule which Lourens identifies would thus stem from this 'law of law'. What Lourens says in the above quotation and the reading thereof proposed here, is incidentally fully in line with his discussion elsewhere of Socrates's respect for the law.[18] This respect, he points out, is not a legal positivist respect for a cold/unbending order of norms as such, but for an order which can accommodate man as a unique being.[19] As example of this respect for law which accommodates human nature, Lourens refers to the voice of the *daimon* as recounted in Plato's 'Apology', which, although it usually steered Socrates away from danger, did not prevent him from attending his trial.[20] A higher law, a law beyond the legal order, stemming from the *daimon*, appears to be at stake here. Socrates thus showed respect not only for the law of the city, but more importantly, and as we will see further below, for the law of law.

2.2 *Statutory interpretation*

While based at Potchefstroom in the 1980s, Lourens started establishing himself as an authority in the field of statutory interpretation.[21] This field was ideally suited for Lourens

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12 *Die Professionele Gedrag van die Juris* 58–61.
13 *Incorporated Law Society Transvaal v Mandela* 1954 (3) SA 102 (T).
14 *Ex Parte Cassim* 1970 (4) SA 476 (T).
15 *Die Professionele Gedrag van die Juris* 60.
16 See eg Du Plessis *Westerse Regsdenke* 102–114; Du Plessis 'Conceptualising "law" and "justice" (1): "Law", "justice" and "legal justice" (theoretical reflections)' 281–282. See also Pienaar 'Land reform and restitution in South Africa: An embodiment of justice?' par 4.2.1.
17 See Derrida 'The laws of reflection: Nelson Mandela, in admiration' 74.
18 Du Plessis *Westerse Regsdenke* 71–72.
19 Du Plessis *Westerse Regsdenke* 72.
20 See the discussion in par 5 below of the 'Apology'.
21 See Van der Vyver 'Literalism, *travaux preparatoires* and purposive construction as interpretation incentives in international law'* for the reasons for this; as well as Du Plessis 'Die

continued on the next page

to apply his philosophical as well as practical insights. At the same time it served as a vehicle for his academic activism. It was after all by way of the rules and presumptions of statutory interpretation that apartheid legislation was enforced by the courts, and Lourens's solid grounding in legal philosophy made it possible for him to pose a fundamental challenge to what he referred to as the 'literalist-cum-intentionalist approach' of the courts. My first 'introduction' to Lourens was incidentally in 1989 in Potchefstroom in the final year LLB course 'Legal Hermeneutics', through his 1986 book, *The Interpretation of Statutes*, although Lourens had by that time already left for Stellenbosch. In this groundbreaking text he set out in detail a critique of the dominant approach of the courts and proposed an interpretive approach in terms of which the presumptions of interpretation would play a far greater role. The presumptions — a kind of common law Bill of Rights — had to serve as not only the ABCs, but also the XYZs of interpretation.[22] One of these presumptions, which Lourens discussed at length, was incidentally the presumption that enactments are not aimed at achieving unjust and inequitable results.[23]

3 Lourens in Stellenbosch

Lourens's move to Stellenbosch University in 1988, which was to last until 2011, and on a part-time basis, to the University of the Western Cape (1989–1995, from 1991–1993 as Extraordinary Professor), coincided with a period of major political transition in South Africa. Hugh Corder tells us something more about this period in his contribution to this collection, and specifically of Lourens's role in the drafting of the Bill of Rights. I incidentally met Lourens in person for the first time in Stellenbosch in October 1989 to discuss the possibility of him acting as supervisor of my thesis. Having worked under his supervision from 1990–1992, I can, like the other contributors to this collection, testify to his acute sense of justice as well as his capacity for friendship and hospitality. I for example recollect an outing with Lourens, Wina and a visiting professor from Germany (through Khayelitsha and up to Cape Point), his care for his terminally ill brother, a trip to help me buy my first computer, being welcomed on numerous occasions to his house in De Vos Street, discussions about politics, his founding of the *Stellenbosch Law Review*, and his co-authoring of a number of academic articles and a chapter in a book with me after the completion of my doctorate. Since then, I could always count on him for providing (undeserved) glowing testimonials and references as well as the odd citation.

Shortly after I started teaching at the University of the Western Cape (a position for which I no doubt have to thank *inter alia* my supervisor) I was invited by Lourens (as Director-founder) to join the Research Unit for Legal and Constitutional Interpretation (RULCI, 1997–2004), which hosted regular discussions around issues of interpretation and a number of *colloquia*. The *colloquia* gave opportunities to undergraduate and postgraduate students to present papers, brought together South African scholars with an interest in legal philosophy, and made possible intellectual exchanges with some exceptional international scholars (Frank Michelman, Karl Klare, Michel Rosenfeld, Drucilla Cornell, Costas Douzinas, and Peter Fitzpatrick, to mention a few). RULCI, with Lourens at its helm, was an exemplary place for friendship in the sense explored in more detail in paragraph 4.1

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verdienstes en tekortkominge van 'n alsydige regsakademikus. 'n Kritiese waardering van Johan van der Vyver se bydrae tot die regswetenskap in Suid-Afrika' 146.

22 Du Plessis *The Interpretation of Statutes* 52.

23 *Ibid* 83–97.

below. Lourens's *Re-Interpretation of Statutes*,[24] a second edition of *The Interpretation of Statutes*, but at the same time a complete re-write thereof, shows the influence of many of the critical voices at these seminars and *colloquia*, but perhaps most of all that of the late Paul Cilliers and of Friedrich Müller (also a contributor to this collection). In this text Lourens rethinks statutory interpretation in view of the new constitutional dispensation in South Africa and in view of his own 'linguistic turn'. Some of the most remarkable statements are to be found in the 'Prolegomenon', which one is again tempted to link to Socrates's *daimon*:[25] '"The law" itself', Lourens for example notes, 'is a complex system, and "invoking it" is a complex undertaking in a complex world of which the subject, the interpreter, cannot be in control'.[26] And immediately after citing Cilliers's *Complexity and Postmodernism*, Lourens comments that –

> [f]or purposes of legal interpretation it is essential to bear in mind that language cannot accurately image (let alone capture) all complexity "out there", its own thorough complexity notwithstanding. Linguistic renditions of complexity, for instance textualisations of the law, thus inevitably reduce, enervate and even undermine complexity itself.[27]

The quotation marks accompanying the words 'out there',[28] suggests that Lourens is not referring here to what some would say is the inability of language to capture reality,[29] but rather to some other 'unrepresentable thing' that language struggles to give expression to. This reading is supported by Lourens's statement in his highly acclaimed chapter on 'Interpretation' in *Constitutional Law of South Africa* (with reference to Derrida) that '[l]inguistic signifiers do not signify and give meaning to things, events, concepts, phenomena et cetera (in other words, signifieds) "out there"'.[30] An attempt to explore the 'nature' of this 'thing' will be undertaken below with reference to the concepts of friendship, democracy, justice and the constitution.

4 Democracy

4.1 *Friendship and the open community*

Lourens's political activism as recounted above had as their primary aim the establishment of a democratic constitutional state in South Africa. Democracy, as we know, has been modelled on the dominant conception of (ideal) friendship inherited from the Western philosophical tradition: as something that happens occasionally, but typically, between men of the same kind and which is characterised by calculation (one should not have too many friends) as well as by reciprocity.[31] Apartheid can be said to have brought to its logical conclusion the model of 'democracy' based on this traditional conception of friendship: a racial oligarchy consisting of an alliance between church and state, coupled with the exclusion of all others, or in Derrida's words, though not with specific mention of South

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24 This text appeared almost simultaneously with Lourens's extensive contributions to *The Law of South Africa* (LAWSA) and to the *Bill of Rights Compendium*.
25 See par 5 below.
26 Du Plessis *Re-Interpretation of Statutes* ix.
27 *Ibid* x.
28 A few lines down the words *reality out there* similarly appear in quotation marks.
29 See De Ville *Jacques Derrida: Law as Absolute Hospitality* 3–5 for criticism of such an approach.
30 Du Plessis 'Interpretation' 32–86; see also Felder 'Legal text and meaning – A linguistic perspective on a complex relationship'* par 7.
31 Derrida *Politics of Friendship* 20, 23.

Africa, 'a political dictatorship of fraternocracy'.[32] Lourens challenged both this conception of friendship and its associated conception of democracy. His conception of friendship/democracy was not only a more inclusive one, although it was that too.[33] Lourens can be said to have followed Zarathustra's advice: 'My brothers, I do not exhort you to love of your neighbour: I exhort you to love of the most distant'.[34]

From Cicero, giving expression to the traditional notion of friendship, we learn that the friend is the same rather than the other: 'For he, indeed, who looks into the face of a friend beholds, as it were, a copy of himself'.[35] The exemplary friendships celebrated through the ages are without exception between brothers.[36] Lourens no doubt had friendships in line with this model. As can however be seen from his dedication in the *Re-Interpretation of Statutes* to Wina as his 'lifelong companion, spouse and best friend', his conception of friendship also poses a fundamental challenge to this tradition. The tribute of Hugh Corder tells us of Lourens's other friendships that also went beyond the traditional model: for example the friendships in the technical committee to the Multi-Party Negotiating Process between those of diverse backgrounds and specifically of an unlikely friendship between an Englishman and an Afrikaner. He furthermore recounts, and here we touch on the relation between friendship and democracy, Lourens's contribution to the drafting of the 'seepage clause' in the Bill of Rights (instructing the judiciary on the interpretation of statutes and the development of the common law in line with the Bill of Rights), as well as the inclusion in the Bill of Rights of sexual orientation as well as sex and gender as prohibited grounds of discrimination. In their tributes to this collection, Amanda Gouws and Christa Rautenbach likewise testify to Lourens's refusal to stay within the confined circles of (male) Afrikanerdom, as can for example be seen in the trip to Dakar, irrespective of the personal consequences for him. They recount his gift of time, his accessibility to students, and his friendship in general, especially around a bottle of good wine. At stake here appears to be a 'conception' of friendship, if it can still be called thus, exceeding measurement and moderation, what Derrida would call 'lovence' (*aimance*).[37] Many of the contributions

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32 Derrida *Rogues: Two Essays on Reason* 50.

33 The notion of the Constitution as memorial, as we will see in par 6.1 below, is specifically concerned with the vindication of 'traditionally marginalised (and stigmatised) sections of the population such as religious and cultural minorities and, of particular note in South Africa, gays and lesbians'; see Du Plessis 'Constitutional dialogue and the dialogic constitution (or: Constitutionalism as culture of dialogue)' 685.

34 Nietzsche *Thus spoke Zaruthustra* 88. The Du Plessis family's dogs deserve mention (and analysis) in this context. For reasons of space a quotation from Lourens's playful e-mail response to a question from me in this regard will have to suffice: 'Wat my/ons honde betref: die eerste een was die weergalose Stompie, binne ons ervaringswêreld toenmaals 'n "groot soort Foksterriër met regop oortjies". Sy haat vir katte, in besonder die kat van die Engelse posmeester op Dannhauser, was die oorsaak van sy pynlike strigniendood. Ek weet dat Stompie se opvolger Boesman was, maar van meer honde uit my kinderjare kan ek nie onthou nie. Die eerste hond wat Wina en ek gehad het, was Rufus, die Kolliehond, wat opgevolg is deur 'n Engelse Bulhond, Magnus, ons troue Minister van Verdediging en beskermer teen die Totale Aanslag. Sedert Magnus het ons twee Boerboele gehad vir wie ons sterk boerename gegee het: Hendrik en Basjan. Ons het ook twee stamboek Foksies gehad (Tripper en Nina), so klein soos die rasstandaarde vereis en met oortjies wat nóg hang nóg regop staan, soos wat die standaard eweneens vereis.'

35 Cicero *On Friendship* par 7; Derrida *Politics of Friendship* 4.

36 Derrida *Politics of Friendship* 103.

37 *Ibid* 7.

to the present collection testify to Lourens's capacity for friendship beyond the confines of the same as well as beyond calculation.

Some of Lourens's publications, most particularly 'Legal Academics and the Open Community of Constitutional Interpreters',[38] the focus of *inter ali*a Janet Epp Buckingham's contribution to this collection, explicitly seeks to transcend the idea of brotherhood or 'high priesthood' as Buckingham calls it, in the interpretation of the Constitution. With reference to Peter Häberle, Lourens remarks that the open community of constitutional interpreters 'transcends the "closed" fraternity of legal oracles masquerading as sole (effectual) expositors of the Constitution'.[39] Such 'community' is furthermore not restricted to state structures and to those with legal training, but includes the broader public, ie all those who are protected and empowered by the Constitution, citizens and non-citizens alike.[40] As Häberle expresses it in Lourens's translation: 'There is no fixed number of constitutional interpreters'.[41]

The notion of an open community of interpreters furthermore has important implications for a conception of meaning. Lourens points out in this regard that it has the consequence that there is not simply one meaning to be found in the text, but that its meaning comes into being through a debate between all participants.[42] The text of a constitution is indeed 'complete', insofar as its authors have 'spoken', yet, as Lourens points out between brackets, what it had said 'may not always be exactly what it wanted to say'.[43] The completed text furthermore remains no more than a starting point as 'it invites, with equal authority, improvisation thereby recognising its own inconclusiveness'.[44] Lourens in this respect, again taking his cue from Häberle, uses the metaphor of the 'performance of a musical composition'.[45] Anél Boshoff, in her contribution to this collection, alerts us to the fact that such analogies nonetheless assume a 'harmonious interplay of diverse voices'.[46] The requirement for membership of this community is thus that one has to play 'in key'.[47] What about the off-key player, she asks? Respect for difference, as Boshoff points out, typically means respect for 'reasonable differences'.[48] In view of Lourens's statement referred to above about the author's intention and the text, the off-key player can perhaps be said to be someone who exploits the disjuncture between what the text says and what its authors may have wanted to say (perhaps unconsciously); or perhaps it could be said to refer to Socrates' *daimon* who points us beyond the circular economy of metaphysics.[49] Lourens's thinking on democracy, friendship, hospitality, justice and the concept of the

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38 This article was first presented as Lourens's Presidential Address at the Congress of the Society of University Teachers of Law held at the University of the Western Cape from 22 to 25 January 1996. Lourens served as President of the Society from 1994–1996.

39 Du Plessis 'Legal Academics and the Open Community of Constitutional Interpreters' 215.

40 Epp Buckingham 'Constitutional Interpreters: High Priests or Priesthood of Interpreters'* par 4; also Du Plessis 'Interpretation' 32–22 and 32–27 to 32–28.

41 Du Plessis 'Legal Academics and the Open Community of Constitutional Interpreters' 214–215.

42 *Ibid* 220; see also Felder 'Legal text and meaning – A linguistic perspective on a complex relationship'*.

43 Du Plessis 'Legal Academics and the Open Community of Constitutional Interpreters' 222–223.

44 *Ibid* 223; see also Boshoff 'In conversation with the harmonious wordsmith'* par 1.

45 Du Plessis Legal Academics and the Open Community of Constitutional Interpreters' 221.

46 Boshoff 'In conversation with the harmonious wordsmith'* par 2.

47 *Ibid*.

48 *Ibid*.

49 See par 5 below.

Constitution, as explored in this essay, arguably makes of him an off-key player too, ie a player who opens up the meaning of the constitution to a certain madness of non-meaning.[50] The off-key player, as Boshoff suggests, inevitably forms part of any debate between the members of an open community of interpreters, however broadly conceived, on the meaning of the constitution. The concept of friendship, as reconceived by Lourens, requires of us to affirm her haunting presence.

4.2 *Hospitality*

In her tribute to Lourens, Amanda Gouws introduces the value of tolerance and its limits in the wake of the Charlie Hebdo attack. Although on the surface the essay appears to be about the limits of tolerance, the discussion of Lourens in this context announces a break with this still-very Christian notion.[51] Even though it is not thematised and the word is not mentioned, Gouws's tribute implicitly contrasts the Western/Christian value of tolerance with a hospitality that exceeds reciprocation; in other words a hospitality that entails welcoming the absolutely other and which thereby also disrupts sovereignty.[52] One finds an allusion to hospitality in this 'form' *inter alia* in Lourens's texts on religion, a theme which Francois Venter, in his contribution to this collection, points to and further develops. Venter takes issue with the liberal idea of state neutrality *vis-à-vis* religion and points to its origin in 'religiously driven views regarding tolerance of religious diversity as a product of protestant Reformation'.[53] Like Lourens, he expresses himself in favour of an approach which moves beyond mere tolerance of religious views. In 'Freedom *of* or Freedom *from* Religion', a text which Venter refers to, Lourens notes that the '1996 Constitution has, in many respects, been designed to inculcate tolerance among South Africans'.[54] At stake is not however '[p]assive tolerance', that is, the bearing or putting up with others, but 'affirmative tolerance', meaning that people 'understand, accept and appreciate one an-other'.[55] He refers in this respect to the value of national reconciliation set out in the Constitution, the protection of the right to freedom of religion and of the right to religious equality, as well as the right to freedom of expression.[56] Lourens ends the article by noting that the realisation of religious rights and freedoms cannot be left solely to the courts and that the 'inculcation of a culture of tolerance or, rather, an appreciation of diversity and mutual respect is, and will remain, vital'.[57] In 2008, Lourens appears to take a step further by signalling a move in the judgments of the Constitutional Court towards 'a jurisprudence

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50 See also Felder 'Legal text and meaning – A linguistic perspective on a complex relationship'*.

51 In a co-authored article, 'The relationship between political tolerance and religion: The case of South Africa' 663 Gouws and Du Plessis define political tolerance, with reference to Sullivan *Political Tolerance and American Democracy*, as follows: 'Political tolerance is conceptualised as the "willingness to put up with those things one rejects or opposes. It could also be viewed as the willingness to grant basic rights to disliked groups. This conceptualization presupposes aversion. One cannot tolerate something one likes.' The limits of tolerance clearly come to the fore here.

52 The notion of memorial constitutionalism, which will be explored in more detail in par 6 below, seems to be ultimately about hospitality, rather than mere tolerance; see eg Du Plessis 'Interpretation' 32–77 where the *Fourie* and *Pillay* cases are analysed.

53 Venter 'Die ongeregtigheid van neutraliteit: sekulêre beregting van religieuse kwessies'* par 3.

54 Du Plessis 'Freedom *of* or freedom *from* religion' 442.

55 *Ibid*.

56 *Ibid* 463.

57 *Ibid* 466.

of difference', noting that '[t]his jurisprudence affirms and, indeed, celebrates Otherness *beyond the confines of mere tolerance* or even magnanimous recognition and acceptance of the Other'.[58] Lourens interestingly ties this approach to memorial constitutionalism.[59]

Elmien du Plessis, in her contribution to this collection, likewise alludes to the issue of hospitality, specifically insofar as it relates to selfhood or ipseity. She does so by posing the question what a home is with reference to Mda's *Ways of Dying* as well as the position of 'unlawful occupiers' in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE, 1998) and the Constitution. The 'homes' of the two main characters in Mda's novel are characterised by insecurity, vulnerability or 'fragility' as Du Plessis refers to them:[60] 'Noria ends up living in an informal settlement, in a shack that has been burned down before, and that can be destroyed at any time. Toloki's tenure is even more insecure. He sleeps in a waiting room [allusions to Kafka?], his few possessions stored in a shopping trolley'.[61] Du Plessis and Mda thereby allude to a general structure of 'insecure tenure' or not-being-at-home in the world, and which precedes the longing for a home.[62] Elmien du Plessis's analysis of the home could thus be said to resonate with Small's *Kanna hy kô hystoe*,[63] and furthermore with the mention by Amanda Gouws in her tribute to Lourens of the 'door of no return', a painting in the Du Plessis home.[64] This painting could perhaps be understood as not only a reference to the terrors of the trans-Atlantic slave trade, but as posing a challenge to the notion of ipseity, ie of the self as sovereign, of the self as simply returning to itself in its self-identity. The painting understood thus would point to a certain 'passage' which places in question such self-identity. It would point to a certain relation between life and death, to the self departing from itself with the risk of no return to the self, which precedes any attempt at self-appropriation.[65] A certain relation between life and death would be at stake here; not of death as some inevitability that awaits us; not of death as opposed to life, but of death lodged inside of life.

Lourens seems to allude to the 'passage' referred to in the above paragraph in his reflections in 1988, a year after returning from Dakar, at the University of the Western Cape on the 'democracy to come' in South Africa, more specifically on the prospects of capital punishment.[66] The latter is of course closely aligned to sovereignty,[67] and at the time this

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58 'Affirmation and celebration of the 'religious Other' in South Africa's constitutional jurisprudence on religious and related rights: Memorial constitutionalism in action?' 378 (my *italics*); also Du Toit 'The South African Constitution as memory and promise: An exploration of its implications for sexual violence'* par 4.1.

59 See par 6.1 below.

60 Du Plessis 'Ways of living in a transformative democracy'* par 3.

61 *Ibid preface*.

62 See also Derrida *Acts of Religion* 403–404. See further Botha '(In)dignity remembered'* pars 4–7 on the vulnerability of the human body.

63 Coetser 'Voorstellings van verset in drie Adam Small-dramas' 58 points to the title character of *Kanna hy kô hys toe* (Kanna, an adopted, 'welfare child', growing up in the Coloured community during apartheid, and who leaves for England, only returning briefly for the funeral of his adopted mother) as characterised by *inter alia*, displacement, placelessness and nostalgia. See further Vermeulen *Kanna hy kô hystoe* 33 who points out that Kanna indeed never comes home again, his 'home' is now elsewhere. He has become a total stranger to his people.

64 See Photos*.

65 See further De Ville *Jacques Derrida* 28–37.

66 Du Plessis 'Capital punishment: A legal philosophical appraisal'.

67 Derrida *The Death Penalty* 2–3, 5.

power of sovereign execution still had Lourens under its spell, arguing from a Christian-ethical perspective for its qualified retention. In his 'Introduction' to this paper/article, Lourens quotes with approval from Tripp's *International Thesaurus of Quotations* to express something of people's fear of death. Lourens comments, as an introduction to the quotation that '[a]t least part of people's respect for life, emanates from their fear of death'.[68] The lines quoted, originally from Robert Browning's poem *The Ring and the Book*, however also appear to say something more, if read without any nostalgia:

> You never know what life means till you die
> Even throughout life, 't is death that makes life live,
> Gives it whatever the significance.[69]

Lourens's academic activism during apartheid can clearly be understood as aimed at ending the 'political dictatorship of fraternocracy' and, read with his texts on religion post-1994, as advocating the wider 'sharing of *kratos* in the *dēmos*'.[70] Yet the texts explored above suggest that something more may be at stake here. Democracy understood in view of the notion of 'insecure tenure' and the 'door of no return' would involve the risk of a departure with no return to the self, ie to the sovereignty of the people; the dissolution thus of itself in absolute hospitality, in a welcoming of the wholly other with no expectation of a return.[71] *Kratos* itself would thereby be undermined, thus exploding the inherited concept of democracy, rendering it meaningless; implying that 'properly' understood, the *demos* does not simply *rule*, but also opens itself to its own destruction.[72] The return to what Browning in *The Ring and the Book* calls 'significance' (ie the hermeneutic impulse, by which Lourens was clearly driven) would follow only as a response in the form of a 'binding', to this call from what will be referred to in paragraph 5 below as 'the non-sovereign god', which needs first of all to be affirmed. This democracy which Lourens alludes to in his writings, will remain to come, not in an ideal future present, but as an urgent injunction in the disjuncture of the present.[73]

5 Justice

The *Call for papers* for this collection quoted as epigraph Lourens's statement that the 'human obligation to do justice cannot be assigned to any law-text, not even the Constitution'. Lourens repeated this statement in a number of his texts.[74] The question arises where the pre-constitutional obligation he speaks of here is to be located. In other words, and in view of Lourens's statements elsewhere, is this obligation to be understood as coming from the sovereign God? Lourens namely often expressed the view that God is the

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68 Du Plessis 'Capital punishment: A legal philosophical appraisal' 182.

69 See also Mda's *Ways of Dying* 98, referred to by Elmien du Plessis in her contribution to this collection: 'Death lives with us everyday. Indeed our ways of dying are our ways of living. Or should I say our ways of living are our ways of dying?' 'It works both ways'.

70 See Derrida *Rogues* 17.

71 See in this respect Du Plessis 'Calvin, "Calvinism" and present-day South Africa' 47 on 'the boundlessness of the love that Christians are obliged to show to their fellow-humans'.

72 Derrida *Rogues* 63.

73 Derrida *Rogues* 108.

74 See eg Du Plessis 'The South African Constitution as memory and promise' 388; 'The South African Constitution as Monument and Memorial, and the Commemoration of the Dead' 194; 'Interpretation' 32–76.

(only) sovereign.[75] Friedrich Müller appears to raise the same question in his tribute included in this collection. 'From which sources', he asks, does Lourens 'draw the strength for his search for *meaning* (*Bedeutung*), his quest for *sense* (*Sinn*), for his determined and courageous *resistance* against the apartheid regime, and from where does he, on the whole, draw his *passion for justice* among (us) human beings'. Lourens may have sought to venture an answer to these questions already in 'Socrates and his juridical environment' referred to above. Lourens here analyses Plato's 'Apology', that is, Socrates' self-defence at his trial on charges of *inter alia* impiety and misleading the youth. He is specifically interested in what ultimately drives Socrates:

> Socrates, God's gift to (and gadfly in) the polis, must keep the citizens morally awake. He practices philosophy because God – the *daimonion* or voice 'deep down inside' – exhorts him to do so. Socrates must obey the voice of God, which (in essence) is the same as the voice of human nature. In so doing, he may even be compelled to disobey an order of court; but come what may, God should be obeyed rather than the people.[76]

In reading this essay, one at times gets the idea that Socrates is a pseudonym for Lourens, and that he (Lourens) is in a sense relying on the 'Apology' to justify his own resistance to the apartheid regime. Yet it is as if some 'voice of God' told him at the time that he could not associate himself completely with the 'heathen' Socrates for whom the voice of the *daimon* was simply the voice of human nature.[77] To seek an answer today to the question raised by Müller, it is necessary to re-read Lourens's 'Socrates and his juridical environment' as well as the 'Apology', more specifically Socrates' invocation of the *daimon*.[78] In doing so, it is to be noted, first, and Lourens also refers to this elsewhere,[79] that Socrates mentions that the *daimon*, who would usually tell him what not to do,[80] on the morning of the trial had nothing to say to him as he left his home, as he entered the court, or at any point during his defence. Secondly, the *daimon* is not simply a deity, but also a lesser god, a

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75 See eg Du Plessis 'Vryheid in gesagsverskeidenheid: Enkele opmerkings oor die betekenis van die Christelik-reformatoriese teorie van soewereiniteit in eie kring vir die begrensing van die staatstaak as regstaak' 104–5; Du Plessis 'A Christian Assessment of Aspects of the Bill of Rights in South Africa's Final Constitution' 59; Du Plessis 'Koinonia – in memoriam' 22.

76 Du Plessis 'Socrates and his juridical environment' 425.

77 For Socrates, on Lourens's reading, man is by nature (*phūsis*) a noble being who does not intentionally wrong his fellow human beings (*ibid* 430 and 431); Du Plessis *Westerse Regsdenke* 74). Lourens argues that Socrates's view of human nature is illogical in light of the fact that Socrates himself is being unfairly prosecuted by people who intend to cause him harm. His prosecution thus testifies instead to the depravity of human nature as well as of legal institutions. This reading of the 'Apology' appears to be somewhat problematic, although this is not our main concern here. The 'Apology' 25d–26a does not on my reading support the view, as Du Plessis 'Socrates and his juridical environment' 430 has it that '[a]ll human wrongs are…unintentional'. Socrates does not seem to be saying here that there are no wicked people, but instead that good and wicked people act in very different ways (the wicked harm those closest to them whereas good people assist those closest to them) and that he (Socrates) is now being accused of not knowing this. It would in other words not make sense for Socrates, so his argument in his trial, to (deliberately) make his associates wicked through his teaching as then they would harm him (being closest to them). He may be doing so unintentionally, but he cannot be criminally charged in such an event.

78 See also Du Toit 'The South African Constitution as memory and promise: An exploration of its implications for sexual violence'* par 3.

79 Du Plessis *Westerse Regsdenke* 72, 75.

80 Plato 'Apology' 31d.

spirit (the soul of the dead), destiny (often of death), and of an evil supernatural being, ie the devil.[81] We should therefore not too readily equate the *daimon* with an inner voice of conscience, which would, if understood in a certain way,[82] deny Nietzsche's notion of the 'irresolvable disharmony of Dasein' (*unauflösbare Disharmonie des Daseins*) which Lourens invokes elsewhere.[83] A certain transcendence, ie a voice beyond the human being appears to be heard here,[84] and not necessarily by everyone, as would seemingly[85] be the case with the voice of god/conscience.[86] Thirdly, it is telling that when Socrates is facing the worst (what Lourens elsewhere calls 'the ultimate horror')[87] ie death, the voice of the *daimon* falls silent, and thus allows him to speak as he does, thereby ensuring that he receives the death penalty.[88] A 'god', if it can still be called thus, without sovereignty[89] and which calls for self-destruction, appears to be at stake here, ie some form of the Freudian death drive.[90] The charge against Socrates, and perhaps against Du Plessis as well, can consequently be understood as that of having –

> committed the injustice (*adikein*) of corrupting the youth and of (or for) having ceased to honor (*nomizein*) the gods (*theous*) of the city or the gods honoured by the city – and especially of having substituted for them not simply new gods…, but new demons (*hetera de daimonia kaina*).[91]

It is of course not only Socrates who was condemned on such grounds. Jesus, whose trial incidentally provides the point of departure for Du Plessis's LLD thesis,[92] was likewise condemned for 'hearing voices', the voice of God.[93] Socrates and Jesus (amongst others) were killed, as Derrida points out, 'perhaps because people are afraid to hear directly, immediately, the voice of God…They are killed perhaps because they are felt to be bearers of death insofar as they say they bear the voice of God'.[94] In his role of 'gadfly' of the polis, Lourens likewise often incurred the wrath of the powers that be. It will suffice to mention a few of these instances here. In relation to the Koinonia Declaration, in which as

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81 See Derrida *The Death Penalty* 5, 24; *Online Etymology Dictionary* (demon).

82 Different readings of such an inner voice are no doubt possible, see eg Derrida 'The Laws of Reflection: Nelson Mandela, in admiration'.

83 Du Plessis 'Die grondwet as gedenkteken en die werkdadigheid van onopvallende, grondwetlike kragte' 550.

84 Derrida *The Death Penalty* 24.

85 'Seemingly', because as we will see below, hearing the voice without mediation, in itself holds a danger (Derrida *ibid* 19).

86 Should one act properly (in accordance with human nature) the voice (of god/conscience) will not speak to you; should you act wrongly (not in accordance with human nature), then the voice will speak to you; Du Plessis *Westerse Regsdenke* 74. Lourens (*ibid* 40) further argues that in Greek mythology the gods are at most super-humans, which would further explain his equation of the voice of the *daimon* with (the voice of) human nature.

87 Du Plessis 'Capital punishment' 182.

88 Derrida *The Death Penalty* 25. See likewise Du Plessis *Westerse Regsdenke* 70 where he mentions the forms of punishment which Socrates asks not to receive (imprisonment, banishment, a fine): 'Die enigste oorblywende alternatief word dus eintlik deur Sokrates self gesuggereer: doodstraf'.

89 See Derrida *Rogues* 114.

90 Derrida *The Death Penalty* 25. The figure of Jesus can itself be read as undermining the sovereignty of God; see eg Derrida *Rogues* 157, Derrida *Politics of Friendship* 109.

91 Derrida *The Death Penalty* 5.

92 *Die Juridiese Relevansie van Christelike Geregtigheid* 17–22.

93 Derrida *The Death Penalty* 24.

94 *Ibid*.

reported above, Du Plessis had a leading hand, David Hanson notes that it 'burst like a bombshell…Within hours of publication, the University of Potchefstroom received calls from the most senior government ministers and disciplinary measures were demanded.[95] Then there were the Dakar deliberations with the ANC (in 1987), which made some call for charges of high treason to be brought against the participants.[96] In the drafting of the interim Constitution's Bill of Rights, Lourens's proposal for a clause which, as noted above, instructed the judiciary on how to interpret the Bill of Rights as well as the common law and statutes (ie in view of the Bill of Rights), upset a significant section of this 'brotherhood'.[97] Lourens appears to have been hearing directly the same voice – the voice of the *daimon* – as Socrates, Jesus and others. Whereas Socrates and Jesus did receive what they unconsciously desired,[98] Lourens's trial is still ongoing.

The 'drive' or 'source' of Lourens's 'quest' and 'passion' as explored in the preceding paragraph, can and indeed *must* be translated into the 'desire' for the law of law or what can be referred to as an unconditional justice beyond law.[99] Further support for this reading can be found *inter alia* in Lourens's 'Prolegomenon' to the *Re-Interpretation of Statutes* where Derrida's understanding of justice as beyond law is specifically referred to as well as in the conclusion to the 'Prolegomenon' where Lourens notes that '[w]e can approximate justice as an ever-escaping ultimate only in law's institutional terms'.[100] Justice understood thus, as Derrida points out, entails the 'demand of gift without exchange, without calculation, without recognition or gratitude, without economic circularity, without calculation and without rules, without reason and without theoretical rationality, in the sense of regulating mastery'.[101]

6 The concept of the constitution

6.1 *Monument and memorial*

The question of constitutional theory as to the essence of a constitution has been asked with a certain intensity in the South African context after the adoption of the interim (1993) and final (1996) Constitutions. This question has also been at the centre of many of Lourens's reflections on the South African Constitution: 'What is a Constitution?' he asks in his chapter on 'Interpretation' in *Constitutional Law of South Africa*,[102] and he seeks to answer this question in this chapter and in a number of other publications, with reference to the monumental and memorial natures of a constitution. The possibility of viewing constitution-making in South Africa as a politics of memory was raised for the first time by

95 David Hanson 'Koinonia – brotherly admonition' 10.
96 See Gouws 'When jurisprudence meets political science'*.
97 See Corder 'An unlikely friendship, yet typically South African'* par 2; and Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 119–120.
98 Derrida *The Death Penalty* 15.
99 See De Ville *Jacques Derrida* 37–38; see also the concluding observations of Van der Vyver 'Literalism, *travaux preparatoires* and purposive construction as interpretation incentives in international law'* par 6.
100 Du Plessis *Re-Interpretation of Statutes* xvi and xviii.
101 Derrida 'Force of law: The "mystical foundations of authority"' 254; compare in this regard the comments of Venter 'Die ongeregtigheid van neutraliteit: sekulêre beregting van religieuse kwessies'* par 2 on justice and reciprocation, which also come to the fore in Lourens's LLD.
102 Du Plessis 'Interpretation' 32–16.

Johan Snyman,[103] and Lourens was the first constitutional scholar to further develop this idea. It has since then been taken up by a number of (mostly) legal scholars, also in the present collection of essays. Snyman's essay focuses on 'strategies of memory' which societies invent 'in order to cope with the effects of profound social traumas'.[104] According to Snyman, the construction of war memorials is one such strategy, and constitution-making another.[105] Snyman ties war memorials not only to trauma, but also to guilt, mourning and a pledge or promise: 'Apart from atoning for the guilt of the survivor and from being a form of institutionalised remembrance of lost ones, one can say that war memorials vow in an ineffable language: on behalf of the dead and on behalf of the visitor it says, "Never again!"'[106] Snyman links this 'never again' with the command 'Thou shalt not kill' and furthermore invokes Lyotard in support of a broad interpretation of this command: 'It [ie killing] does not only mean to take a life. There are more ways than one "to take a life", and of that one must be reminded.'[107] Snyman then argues that constitutions are similarly marked by memory, trauma and guilt:

> The reason for the idiosyncrasy of each constitution, although it is invoking 'universal' or 'fundamental' or 'basic' principles that allegedly obtain everywhere and always, is its particular history which is sedimented in each constitution as a memory, ie an index of what this particular constitution implicitly and/or explicitly proscribes because of negative experiences of the past. Each constitution wants to avoid a particular identifiable and definable dystopia.[108]

In the further discussion, Snyman distinguishes between three types of war memorial: (1) the monument in the strict sense, usually associated with triumph, victory and/or celebration; (2) the memorial, which is focused on the mourning of victims, and from which issues the 'never-again' obligation; and (3) the counter-monument, which in certain instances, 'destroys itself as a spatio-temporal edifice'.[109] In her contribution to this collection, Louise du Toit elaborates insightfully on this distinction, especially insofar as she highlights the dangers coupled with both kinds of memorialisation. Du Toit is concerned specifically with the darker side of the monument: the monument entails the celebration of the violent sacrifices of typically men for the collective 'we', with the individual being invited to associate him- or herself as individual and as part of a living collective with these heroic deeds.[110] The monument furthermore promises the future existence and flourishing of the collective through the making of further sacrifices.[111]

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103 Snyman 'Interpretation and the politics of memory'. Many of his ideas were developed in an earlier article on war memorials; see Snyman 'Suffering and the politics of memory'.

104 Snyman 'Interpretation and the politics of memory' 312. In 'Suffering and the politics of memory' 106, Snyman asks why it is that 'societies seem to perpetuate the very same traumas they hold others to have perpetrated against them'. The question is asked specifically with reference to the apartheid policy which followed upon the suffering of the Anglo-Boer or South African war (1899–1902).

105 Snyman 'Interpretation and the politics of memory' 312.

106 *Ibid*.

107 *Ibid* 313.

108 *Ibid* 314.

109 *Ibid* 318. For an assessment of the counter-monument, which ties in closely with the analysis undertaken in this chapter, see Le Roux 'War memorials, the architecture of the Constitutional Court building and counter-monumental constitutionalism'.

110 Du Toit 'The South African Constitution as memory and promise: An exploration of its implications for sexual violence'* par 2.

111 *Ibid*.

Insofar as suffering is concerned, the monument deals with it through appropriation for purposes of collective aspiration.[112] On Du Toit's reading, Snyman expresses a clear preference for the memorial over the monument.[113] The memorial does not appropriate suffering; it rather focuses 'indignant attention' on such suffering with the argument that it is ultimately unjustifiable; and pledges or promises that this should never happen again, anywhere to anyone.[114] Snyman nevertheless also warns against the danger that the memorial can be monumentalised or as Du Toit poignantly puts it, 'the best aspects of the memorial can be sabotaged by monumental impulses'.[115] It can in the first place result in a form of victimhood, a reminder of humiliation and consequently in the turn against the 'other', as arguably happened with the Women's memorial in Bloemfontein.[116] Secondly, and tied to the first danger, is that of exclusivity: instead of the memorial serving to remind us that this suffering should never happen again to anyone, anywhere, it becomes focused simply on the past suffering and need for survival of a specific nation, ethnic or religious group.[117]

As noted above, Lourens takes on board specifically the distinction drawn by Snyman between monument and memorial and argues that the South African Constitution can and should be viewed in both of these ways. Tying in with the traditional role of monuments in 'the development of national unity and a strong collective identity',[118] Lourens notes that the South African Constitution can be viewed as a monumental achievement after centuries of racial oppression. He points in this respect to a number of judgments of the Constitutional Court which draw on this monumental moment in the constitution, such as the *Makwanyane* case, which abolished the death penalty. The Constitution should however in accordance with its function as memorial also, or perhaps preferably,[119] be viewed more modestly insofar as it is not '*an overarching, all-encompassing, super law*', and as 'it reminds the nation of their pledge (and provides them with appropriate legal means) to achieve social justice'.[120] Here the pledge of the memorial to avoid the future suffering of anyone everywhere comes to the fore and Lourens refers in this respect to judgments of the Constitutional Court which came to the rescue of, or gave voice to the marginalised members of society.

Both as monument and as memorial, the Constitution ultimately serves a political function, although the latter mode (as memorial) appears to be more acceptable from a 'left' (transformative) perspective. Du Toit is for example of the view that the memorial function is capable of translation into a politics/jurisprudence of difference or a politics of memory.[121] Botha notes in this respect that memorial constitutionalism, 'with its focus on

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112 *Ibid*.
113 *Ibid*.
114 *Ibid*.
115 *Ibid*.
116 *Ibid*. See also Botha '(In)dignity remembered'* par 5.
117 Du Toit 'The South African Constitution as memory and promise'* par2.
118 See Harris 'German Memory of the Holocaust: The Emergence of Counter-Memorials' 37; also see Du Toit 'The South African Constitution as memory and promise'* par 2.
119 See Botha '(In)dignity remembered'* who points out that Lourens, like Johan Snyman, prefers viewing the Constitution as memorial, and this with good reason; and see Du Toit 'The South African Constitution as memory and promise'* as discussed above.
120 Du Plessis 'The South African Constitution as memory and promise' 388.
121 Du Toit 'The South African Constitution as memory and promise'* par 3.

loss and preference for careful, context-sensitive modes of analysis make it more likely to respond to social struggles which place received meanings in question and which evoke alternative ways of ordering our normative world'.[122] Van der Walt, in his contribution to this collection, shows how the memorial function of the constitution can be relied on to engage in a critical, reflective and transformative manner with the legal tradition. All of this is no doubt commendable. Yet could the implications for the concept of the constitution not perhaps be more far-reaching when viewed in terms of memory?[123] The question that arises, phrased somewhat differently, is what hides behind this strange opposition between the monumental and the memorial, with one term (the monumental) always threatening to overwhelm the other (the memorial). According to Du Toit, whose reference to 'monumental impulses' we should be reminded of here, this is a constant threat posed by the 'self-undermining or repressive aspects of the monumental strategy'.[124]

Du Toit, later in her essay, notes again that the Constitution calls on us 'to take responsibility for preventing similar forms of oppression from occurring to anyone ever again, even in new and unexpected guises'.[125] The radical nature of this call, ultimately a call to end all 'making suffer', all cruelty (as well as the pleasure that accompanies it),[126] should not be underestimated. Cruelty, as Derrida points out in 'Psychoanalysis searches the states of its soul' with reference to Freud, is indissociably linked to the drive for sovereign mastery,[127] or what Lourens refers to as 'the constitution as monument'. There is no escape from this drive: the drive for sovereign power cannot be eradicated.[128] Yet the latter drive always already involves a reaction to a primary masochism, a drive of cruelty against the self, a making-oneself-suffer for pleasure.[129] One must therefore still ask, and this is arguably also the question raised by Lourens as well as by Du Toit, Botha, Van der Walt, Babie and others who have taken up this distinction in different ways and in different areas of the law, how one escapes from being cruel.[130] Although cruelty has no opposite, there are, as Derrida puts it, 'differences in cruelty, differences in modality, quality, intensity, activity, or reactivity within a *same* cruelty'.[131]

6.2 *Trauma*

What are the implications of what was said above for the concept of the Constitution? It is interesting to note, and here we return to the issue raised in paragraph 1 above, that Lourens, in his exploration of this concept, does not find a single essence, as is usually the

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122 Botha '(In)dignity remembered'* par 4.

123 Note in this respect the interesting title of a paper presented by Lourens in 2006 (Annexure C): 'Memorialising a constitution: The power of unspectacular constitutional forces'.

124 Du Toit 'The South African Constitution as memory and promise'* par 2. The 'self-undermining' or risk of self-refutation which Du Toit refers to here, is to be understood as a reference to the tendency, which will be explored further below, of 'all strategies of remembrance to sabotage their own intentions, *viz* to the active forgetting which lies at the heart of every attempt at remembrance' (*ibid*).

125 *Ibid* par 3.

126 See Derrida *The Death Penalty* 163–164, 168.

127 Derrida 'Psychoanalysis searches the states of its soul: The impossible beyond of a sovereign cruelty' 268.

128 *Ibid* 271.

129 *Ibid* 240; see further, in general, Derrida 'To speculate – on "Freud"'.

130 Derrida *The Death Penalty* 168.

131 Derrida 'Psychoanalysis searches the states of its soul' 271.

result of such enquiries. In fact, in a 2005 essay on the Constitution as monument and memorial he explicitly rejects the notion of essence.[132] He does so by relying on Cilliers' theory of complexity, which as Lourens notes, shows a certain preparedness to live with aporias, paradoxes and hyperdoxes.[133] Lourens finds further support for his rejection of essentialism in Nietzsche's previously mentioned notion of the 'unauflösbare Disharmonie des Daseins'.[134] At stake in the concept of the Constitution, if it can still be called a concept, is thus a Constitution divided in itself. Yet, as was suggested above in the exploration of cruelty, this division is not to be found between its monumental and memorial elements. We saw earlier that the issue of complexity according to Lourens involves the struggle to give expression in language to some 'thing' that is un-representable.[135] In relation to the concept of the Constitution, as we learn from Johan Snyman and from Lourens, this 'thing' relates to trauma.

Van Marle[136] gives us a clue as to what is ultimately at stake here in her reflections on the Constitution as archive, more specifically as archiving trauma. Relying on Derrida's *Archive Fever* she points out that the archive is not simply about preserving memory as it is traditionally conceived of, but also, invoking the Freudian death drive, about forgetting.[137] We should however tread carefully here as two kinds of forgetting are at stake in the archive.[138] Forgotten or repressed memories, as Derrida points out, still form part of an economy; these memories are kept safe somewhere and can return.[139] The forgetting at stake in the (diabolic) death drive[140] is however more 'radical':

> But this economy [of repression] – and this is an economy according to which nothing is annihilated, or destroyed forever – this economy is, let's say, threatened or in conflict with the aneconomic death drive, that is, a drive which motivates, so to speak, the radical destruction of the archive. There is a destruction which does not leave anything in place, which is even more radical than repression. It's the repetition of a possibility of a, let's say, burning into ashes the very trace of the past.[141]

Here we find ourselves close to the Socrates of the 'Apology' again, and thus to the *daimon* of Lourens/Socrates.[142] It is furthermore exactly because of this 'archiviolithic force' or 'desire' in the psychic apparatus for the total destruction of the trace that there is a desire

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132 Du Plessis 'Die grondwet as gedenkteken en die werkdadigheid van onopvallende, grondwetlike kragte' 550. Du Plessis describes essentialism as 'die triomfantlike denkhouding wat probeer voorgee dat 'n komplekse werklikheid in terme van een of enkele wetmatige (en onvermydelik reduksionistiese) kernformule(s) beskryf en begryp kan word. Essensialisme kan ewegoed as keiharde, positivistiese natuurwetenskap of verdogmatiseerde en ideologies-instrumentele sosiale- en/of geesteswetenskap (óók regswetenskap) manifesteer – en albei is ewe misplaas in hulle magswaan.'

133 *Ibid*.

134 *Ibid*.

135 See par 3 above.

136 'Constitution as archive'.

137 Van Marle 'Constitution as archive' 217–218; see also the statement referred to above of Du Toit 'The South African Constitution as memory and promise'* par 2, in relation to 'the active forgetting which lies at the heart of every attempt at remembrance'.

138 Derrida 'Archive fever in South Africa' 42.

139 *Ibid*.

140 See Derrida *Archive Fever* 9.

141 Derrida 'Archive Fever in South Africa' 42.

142 See par 5 above.

for archiving.[143] Van Marle thus reminds us that viewing the Constitution as memory cannot remain restricted to what can be consciously remembered, but that a certain forgetting which is not limited to repression is inevitably also at stake here. This 'forgetting' is in turn closely tied to trauma, yet not trauma related to some past (present) event which can (only) later be accorded a meaning.[144] This trauma is not foreseeable, it cannot be experienced, and it is not appropriable.[145] This trauma furthermore forms part of the human topical structure;[146] it inevitably returns, seeking an unbound pleasure in demonic fashion[147] and is therefore also testified to in monuments, memorials, and constitutions. At stake here, as appears from Derrida's 'Force of law: The "mystical foundations of authority"', is the (forgotten) memory of self-destruction which threatens especially in the case of a revolution, and which belatedly (*nachträglich*) comes back to haunt in every act of constitutional self-preservation.[148]

6.3 *Force*

Marinus Wiechers, in his contribution to this collection, refers to the various factors that play a role in ensuring that a constitution remains 'a living document'.[149] The title of his contribution is pertinent: 'What makes the South African Constitution alive?' he asks. In 'Legal academics and the open community of constitutional interpreters', Lourens had somewhat similarly likened the interpretation of a constitution to the performance of a musical composition, which a 'musician is not only required to understand…but must bring …to life'.[150] Wiechers furthermore notes that the 'life of a constitution' is constantly under threat and that it risks becoming 'terminally sick' through the 'violation of human rights, abuse of state powers, administrative arrogance and estrangement from civil society'.[151] The 'almost inevitable consequences' would be 'revolution and revolt'.[152] Lourens expressed similar sentiments in a two-part article on what was then the 14th constitutional amendment debate,[153] which Hans-Peter Schneider refers to in his contribution to this collection. According to Lourens '[a] constitutional democracy may be robust today and spring into oblivion tomorrow because the crucial conditions for its continued existence have been left uncared for or have been compromised through sheer inanity or, worse,

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143 See Derrida *Archive Fever* 11; Derrida 'Archive Fever in South Africa' 44.

144 In his exploration of the monument/memorial distinction in the sphere of property, Babie 'Property as monument and memorial'* par 3 invokes Walter Benjamin's figure of the flâneur, quoting a passage from Benjamin *The Arcades Project*, which resonates with what is at stake here. Mentioned in the passage is a 'vanished time' towards which the flâneur is led, precipitous streets leading downward, not to the mothers (*den Müttern*), but to a bewitching past which is not his (the flâneur's) own, not private; this time remains the time of a childhood, but perhaps, Benjamin seems to suggest, not necessarily of the life he has lived; as well as a gaslight throwing a suggestive/ambiguous/equivocal (*zweideutiges*) light on this double ground.

145 See Derrida'Autoimmunity: Real and symbolic suicides' 96–98.

146 Derrida *Points…Interviews* 6.

147 Derrida 'To speculate – on "Freud"' 352.

148 Derrida 'Force of law: The "mystical foundations of authority"' 271–273.

149 Wiechers 'What makes the South African Constitution alive?'* par 1.

150 Du Plessis 'Legal academics and the open community of constitutional interpreters' 221.

151 Wiechers 'What makes the South African Constitution alive?'* par 11.

152 *Ibid*.

153 Du Plessis 'How Fragile is Constitutional Democracy in South Africa?'.

through measured malevolence'.[154] Schneider's text, as well as that of Lourens, testifies to the heated emotions and fears awoken by the discussion around what was to become the 17th constitutional amendment in South Africa, with some seeing it as a harbinger of the end of constitutional democracy.[155] In his role as 'gadfly of the polis', Lourens further uses the opportunity to castigate the official opposition in Parliament, certain judges and academics as well as the legal profession about their 'unduly alarmist' comments concerning these amendments.[156] He shows how the envisioned (at the time) amendments could and should be read to conform to the structures and provisions of the constitution read holistically, as well as to the 'constitutional value system' and thus to not constitute a significant threat to the independence of the judiciary and the principle of separation of powers. At the same time he argues against the need for certain of the proposed amendments, though, in his own assessment, in a more 'level-headed' manner than many of its opponents.[157] Insofar as the intention behind the proposed amendment is concerned, Lourens does not express a final opinion, but mentions the possibility that it could possibly have 'emerged from a *nefarious* yearning to clip judicial wings'.[158] In his analysis, Schneider refers specifically to a passage where Lourens elaborates on the aims of his own interpretation and its role in the battle between forces which oppose and have the potential of weakening or destroying each other:

> What is written in(-to) the constitutional text cannot of course guarantee that antidemocratic (political) forces will inevitably fail to manoeuvre the construction and implementation of constitutional provisions, but if our appropriately constructed constitutional text is construed to optimise "the good" in it [as Lourens attempts to show through his article], it can and will go a long way to counter and eventually enervate "mischievous" forces.[159]

The interplay between the forces seeking to keep a constitution 'alive' and those seeking its demise,[160] which Lourens expresses so vividly in the passage above with reference to constitutional interpretation, is as we saw above, ultimately made possible by the trauma of a forgotten 'event' that is not experienced in space and time. A constitution secretly testifies to this traumatic event which always threatens to return, *inter alia* in certain (proposed) constitutional amendments. The 'hullabaloo' surrounding these proposed amendments or the 'hell [that] broke loose' in this regard, as Lourens refers to these events,[161] should be understood in view of what is/was ultimately at stake here: the judiciary as not only the 'vigilant guardians of constitutional democracy',[162] but also as guardians of the law of law,[163] that is, of deferring entry to the law of law.[164] In the discussion

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154 *Ibid* (part 1) 194.
155 *Ibid*.
156 *Ibid* (part 2) 12.
157 *Ibid* (part 1) 193; (part 2) 12.
158 *Ibid* (own emphasis).
159 *Ibid* (part 1) 195.
160 Schneider 'How to Tame the Judges: Der Streit über die Justizreformen in Südafrika und in Deutschland aus vergleichender Perspektive'* par 8 argues that the attempts at the reform of the judiciary show that the judiciary in both countries have a high degree of self-healing power. Attempts to bring about reform, which would lead to a breach in the system (of an independent judiciary), stand no chance.
161 Du Plessis 'How Fragile is Constitutional Democracy in South Africa?' (part 2) 10, 12.
162 *Ibid* 12.
163 See pars 2 and 5 above.
164 See De Ville *Jacques Derrida* 89–90 on Kafka's 'Before the Law' and Derrida's reading thereof.

above we referred to this 'law of law' or 'unpresentable event' as friendship or lovence, hospitality and justice. Here we find ourselves beyond the contemplation of the constitution in metaphorical (or literal) terms.[165] The language of the Constitution, glossing the words of Deleuze and Guattari, which Van Marle quotes, when understood thus, 'ceases to be representative in order to stretch toward its extremes or its limits'.[166] An impasse is indeed at stake here,[167] but perhaps not simply between constituent and constituted power. The implication of re-thinking the 'nature' of the Constitution with reference to the unconditional 'concepts' of friendship, hospitality and justice, as we saw above, is that complete self-identity is not possible: constituent power does not simply return to itself, does not close in on itself. It loses itself in seeking a return. This perhaps makes of a constitution, in the words of Van Marle (again with reference to Deleuze and Guattari) a 'minor literature', ie a text written without authorial sovereignty.[168] Constitutional theory has the function of repeating this trauma, ie to not forget it completely, yet without being completely annihilated by it.[169]

7 Lourens before the law

With Lourens having been thus 'introduced' (as without essence, ie as exemplary of the irresolvable disharmony of Dasein), we now turn to the other contributions to this collection. Much has already been said of these contributions in this introduction, yet a few more words are required here. The four tributes appear in more or less chronological order, starting with Christa Rautenbach, who was taught by Lourens at Potchefstroom University in his early career. The writing style in the tributes is personal, and Lourens is referred to by name, as is the case in the present introduction. The 14 essays evaluate (the implications of) Lourens's texts from different perspectives and within different, sometimes overlapping, fields of law. The invitation to contribute to this collection was furthermore interpreted in different ways by the different contributors with some essays engaging directly and critically with Lourens, specifically with his work on memory and meaning; other essays deal with an issue which ties in with Lourens's work or which develops further an aspect of his work; and yet other essays involve an 'application' of Lourens's thinking to a specific field of law. In some essays more than one of these approaches can be detected. Classifying these essays under different subheadings would have been difficult and they therefore appear here in alphabetical order. The writing style adopted in the essays is more formal (than in the tributes) and Lourens is referred to here by his surname.

In all of the contributions to this collection, Lourens is in a certain sense being judged, summoned to appear before the law, like Socrates, Jesus… and Adam Small's Kanna.[170] We saw earlier that Socrates and Jesus were perhaps ultimately condemned for hearing the direct voice of god/God, for having sought to found a new religion, a religion of the non-sovereign god that calls for self-destruction, as well as for misleading the youth. Kanna does not, like Jesus and Socrates, appear before a legal system; he is in other words not

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165 See Van Marle 'An aesthetic mode of coping' – "authorship", "narration", "monument" and "memorial" in post-apartheid jurisprudence'* par 4.

166 *Ibid*.

167 *Ibid* par 2.

168 *Ibid* par 4.

169 See Derrida *Points…Interviews* 382 on philosophy and trauma.

170 Small *Kanna hy kô hystoe*.

judged and condemned by the apartheid legal system, like Diekie, for example, who receives the death penalty for having avenged the repeated rape and death of his sister, Kietie. Kanna's trial takes the form of a dream.[171] He seems to stand accused not only for the death of those close to him, but also for having failed his family and community, that is, by not saving them, like Moses, from the consequences of the social and political rape perpetrated by the apartheid (legal) system.[172] This voice of accusation or prejudgment,[173] which Lourens also heard very clearly, perhaps from as early as standard eight (or earlier), ultimately calls, as we saw, for a justice beyond law, for absolute hospitality and for 'lovence'. Kanna, Lourens and we too, ultimately stand accused before another law, the law of law, which Lourens was a (non-sovereign) master at introducing his students to, but also the South African public and the legal community, both nationally and internationally.

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171 Vermeulen *Kanna hy kô hystoe* 34.

172 *Ibid* 27, 34. See par 6.1 above on Snyman and the 'taking of a life' as well as the discussion of cruelty in the same par.

173 See Derrida 'Préjugés: Devant la loi'.

_____ 'Préjugés: Devant la loi' in Derrida J *et al La Faculté de Juger*, 87–139 (partly translated as 'Before the law' in Derrida J *Acts of Literature* ed. D Attridge, 181–220).

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Essays

*Property as monument and memorial**

Paul Babie

1 Introduction

As a concept, property proves difficult to characterise – descriptively, it eludes a single, univocal definition, while normatively, there is little, if any, consensus as to what it ought to do and to achieve. Of course, theorists propose many ways of analysing it, from a range of doctrinal perspectives – philosophy, political theory, economics, psychology, sociology, anthropology, theology, law, and even scientifically – both in terms of its substantive content and as to how it can be justified. Typically, in the case of the former, this has settled on some form of the 'bundle of rights' picture of the content of property (incorporating the liberal trinity of the rights to use, dispose and exclude), although more recently a social relations dimension has been added to this; in the case of the latter, justifications include first possession, desert, efficiency, liberty, autonomy, freedom, and so on. Yet, in all of this theorising, what one rarely finds is a means or a method of considering and recording the impact of property on a society when it is deployed within a legal system as a means of allocating scarce resources. And this is no minor point, for every legal system the world over implements the concept of property, however it is understood, in order to allow the allocation of resources and the protection of that allocation once it has been made. This essay presents, in an introductory and exploratory way, an attempt to fill this gap in the literature, using interpretative lenses provided by a public law scholar, Lourens du Plessis, and his monumental and memorial approaches to constitutional law and interpretation.

To show how, consider first the lenses provided by Du Plessis, whose ground-breaking work on constitutional memorialism captures law's potential to act as the repository of a nation's memory,[1] 'a constitution both narrates and authors a nation's history'[2] in two ways, both of which have memory in common. First, through 'monumental constitutionalism', which celebrates the past, in a jubilant or exultant way, while the second way, 'memorial constitutionalism', commemorates the past, which is to say it remembers it. And contradictions notwithstanding – and there is no use trying to reconcile or harmonise

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1 The term 'memorial constitutionalism' was first coined by Snyman, 'Interpretation and the Politics of Memory', but it has been developed and popularised in the work of Du Plessis, 'The South African Constitution as memory and promise'; 'Die grondwet as gedenkteken en die werkdadigheid van onopvallende, grondwetlike kragte'; 'Affirmation and celebration of the "religious Other" in South Africa's constitutional jurisprudence on religious and related rights: Memorial constitutionalism in action?'; 'The South African Constitution as memory and promise' 63; 'AZAPO: monument, memorial…or mistake?' 51; 'The South African Constitution as monument and memorial, and the commemoration of the dead' 189.

2 Du Plessis 'The South African Constitution as memory and promise' 385.

them, for there are many in law – Du Plessis argues that both of these meanings of narration and authoring a nation's history can coexist. The contradictions are, simply, something that a state, a society, and especially law, should learn to live with and of which they and it should make sense.[3] As Du Plessis persuasively suggests in applying this to the South African Constitution:

> Living with contradictions in our postmodern world is not a fate. It is rather an opportunity to appreciate the contrasts that constitute the full picture of the reality we experience, in other words, an aesthetic mode of coping with the dilemma of contradiction. Monuments and memorials are aesthetic creations. There is no reason why a constitution cannot be the same.[4]

For Du Plessis, the South African Constitution is both monument and memorial.[5] That is not to suggest that this duality in the case of a constitution, such as South Africa's, as both monument and memorial, is unproblematic; but what that means is that in order to fulfil the promises of a constitution, difficult work will need to be done[6] 'to pave a way through a complex constitutional reality permeated with the contradictions of divergent modes of constitutional memory, and then still to reach out to the promise(s) the Constitution holds.'[7] In summarising this difficult work, Du Plessis writes that –

> [a] constitution as memory and promise memorialises the past, but is also a monument triumphantly shedding the shackles of what went before, and setting the nation free to take responsibility for the future. Memorial constitutionalism... is transitional constitutionalism, and in particular… the transitional constitutionalism of memory, in a South Africa (still) coming to terms with its notorious past, but eventually also a constitutionalism of promise along the way of (still) coming to grips with the future.[8]

Still, as Du Plessis concludes his seminal article on constitutional memorialism:

> There is no predetermined recipe for rescuing the Constitution as monument from the Constitution as memorial and *vice versa*. *Watchfulness* seems to be the watchword. An alertness to the perennial antithesis of constitutional monumentalism and memorialism neither obviates nor resolves this contradiction in a higher synthesis of dialectical opposites. It reminds us, however, not only that the antithetical dimensions of the Constitution as memory can coexist, but also that they must be honoured. A nation that only celebrates tends to become oblivious of how meticulous it should guard against the mischiefs of the past. A nation that only commemorates tends to underplay its memorable achievements; thereby denying itself the inspiration it needs to come to terms with an undecided future.[9]

Contradictions there may be, but these do not mean that the two aspects of a constitution, as monument and as memorial, cannot nonetheless coexist in the same text. Thus, memorial constitutionalism kindles 'the hope that duly *and simultaneously* acknowledged, the coexistence of the Constitution's monumental and memorial modes of being – which, at a glance, may seem to be at odds – will be mutually inclusive, constructive and invigorating'.[10] In this way, South Africa's public law takes its place as an organic presence in the legal and political structure of a people. South Africa's interim and final Constitutions

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3 *Ibid* 385–386.
4 *Ibid* 385, 386.
5 *Ibid* 386–393.
6 *Ibid* 390.
7 *Ibid* 385, 391.
8 Du Plessis 'Interpretation' 32–1.
9 Du Plessis 'The South African Constitution as memory and promise' 393.
10 Du Plessis 'Affirmation and celebration of the "religious Other" in South Africa's constitutional jurisprudence on religious and related rights' 402.

'are monumental "linguistic data", and it is possible to "tour their provisions", awestruck by how they evince a diverse and divergent South African nation's most extraordinary, peaceful transition to a non-racial democracy after more than three centuries of oppressive racial and racist aristocracy.'[11]

In this essay, I argue that Du Plessis's understanding of monument and memorial can be very helpful in better understanding the role of private law concepts in preserving the 'memory' of a society, both as monument and as memorial. Of course all private law concepts demonstrate the monument and memory of a society. Contract and tort structure inter-personal conduct, for instance. Property, though, goes further – true, it structures interpersonal conduct, but perhaps more significantly, while property not only stands as both monument to and memorial for our collective past, not just as a nation, but as a species, it also differs from other private law concepts through its power to shape the world in which we live, both physically and socially. Specifically, property both embodies the memory of the state and manifests that memory in the shape of the world we inhabit, both physically and socially. We see this in the political, economic, social and cultural forms adopted by a state, and through the legal structures which enshrine and mould property itself. In short, from the property law of a state we can 'reconstruct' a society's past, understand its present, and predict its future.

The fit in adopting and adapting lenses developed to explore public law concepts for use in the private law realm will always, of course, be imperfect, leading some to claim that I have 'stretched' Du Plessis's categories too far. Yet, given the paucity of attempts to consider the impact of property on a society, the endeavour itself seems important. Any loss of precision is more than amply compensated for in the ways in which we see that property can play and has played a much larger role in our world than we might otherwise credit.

Moreover, adopting and adapting the monumental and memorial concepts is not entirely unknown to the private law realm generally, or property law specifically. Indeed, others have made similar claims about property,[12] although all for specific purposes – that property carries its own memories of the past,[13] that property can be used to recover past memories,[14] or that property may serve as a cultural memory of a people.[15] Unlike those claims, though, which use the memory motif to explain property, in this essay I make a broader point, which may seem simple, but which is often overlooked: property law, alone among private law concepts, *is* the memory of a state and the spaces it and its people inhabit. My claim is simply this: that property carries within it the memory of the spaces we inhabit, ranging from the most intimate to the most expansive. This story is written into the very spaces and places we inhabit, both physically[16] and socially.[17] We can re-construct, re-tell the story of our history, as individuals, as peoples, and as political demarcations of them, through property. And while the fit may be imperfect, Du Plessis

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11 Du Plessis 'Interpretation' 32–73 to 32–74.
12 See generally, Banner *American Property: A History of How, Why, and What We Own*.
13 Peñalver 'Property's memories'.
14 Silverman 'Repossessing the past? Property, memory and Austrian Jewish narrative histories'.
15 Godden 'Grounding law as cultural memory: A "proper" account of property and native title in Australian law and land'.
16 See Babie 'The spatial: A forgotten dimension of property'; Babie 'How property law shapes our landscapes'. See also Blomley *Unsettling the City: Urban Land and the Politics of Property*.
17 Babie 'The spatial'.

helps us to do that, thus filling a gap in the literature, at least in a preliminary way. Consider just some aspects of that story.

The most intimate telling of property's monument and memory begins with our own bodies, where property law marks out the boundaries of the human person through its recognition or non-recognition of property in the human body.[18] This intimate bodily space includes aspects of the mind, through that unique creature/construct of law known as 'intellectual property' – copyright and patents, which can benefit those who hold it, but disadvantage others.[19]

From the intimacy of our bodies, property's memory extends out to our living arrangements, both as compact units, usually families, to our neighbourhoods, cities, states and nations.[20] In this way, it tells the tale of the interrelationships within and amongst nations,[21] carving up, indeed, creating territory,[22] leading to inequality in the distribution of goods and income,[23] and between nations and the natural world we inhabit.[24] Climate change is becoming the ultimate memory of these human and natural interrelationships submerged in property.[25] Our ever increasing demand for and use of fossil fuels in our intimate, local and regional communities, and the property rights necessary to make use of those resources, sits behind anthropogenic climate change, which in turns produces increasingly extreme weather events for the global community.[26]

The space below our feet, the sub-surface, that which runs by us in liquid form – rivers and watercourses, and that above our heads, airspace within the earth's atmosphere, has long been the subject of property and its constraints,[27] and so carries the memory of our interactions with those parts of our surroundings. Soon, though, not only will property carry the memory of those spaces closer to home, but it will also carry space itself – the upper reaches of the Earth's atmosphere into deep outer space – as part of its memory. With the increased private exploration and exploitation of space,[28] concerns are increasing about who can control that uncharted and unregulated territory, and how they can do it. And so, a law of space emerges.[29]

Property law, in short, is the story of humanity written into law, and it is constantly changing.[30] In this essay, I open a conversation about the monumental and memorial functions of private law, and specifically, property. Property today carries the memory of

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18 See eg *Moore v Regents of the University of California* 793 P.2d 479, 489 (Cal. 1990).
19 See 'The new drugs war', *The Economist*, 4 January 2014.
20 Babie 'The spatial'.
21 See the outstanding outline of this history in Neff *Justice Among Nations: A History of International Law*.
22 Elden *The Birth of Territory*.
23 See Piketty *Capital in the Twenty-First Century*.
24 Babie 'The spatial'; Babie 'Idea, sovereignty, eco-colonialism, and the future: Four reflections on climate change and private property'.
25 See Purdy *A Tolerable Anarchy: Rebels, Reactionaries, and the Making of American Freedom* 187, 215–228.
26 Walsh 'El Nino is on the way: When the Pacific Ocean warms, the weather will get … weird'.
27 See Wisdom *The Law of Rivers and Watercourses*; Banner *Who Owns the Sky?: The Struggle to Control Airspace from the Wright Brothers on*.
28 See Rayman 'The private space race is on'.
29 See White 'Real property rights in outer space' 370.
30 Banner *Who Owns the Sky?* 291.

the changes we have wrought through the goals we pursue, demonstrating much of what has been successful in the modern world in which we live – the tragedies of the commons[31] and of the anti-commons[32] are examples of why property can be celebrated in a jubilant and exultant way – showing how we can achieve those values we most prize: justice, freedom, and autonomy.

Yet, not all is perfect in what we find in the past – the many tragedies, pure and simple, wrought by property, as we will see in this essay, exhort us to say never again. Slavery offers the most appalling and deeply personal example of this memorial dimension of property. I do not intend this essay to be a definitive statement of the way in which this happens, but more an exploratory and speculative assessment of the ways in which property law tells us about the world in which we live. And, above all, as Du Plessis tells us, the monumental and memorial dimensions of law shows us that to which we can aspire in the future, and where we still have work to do.[33] The essay is intended, then, in two parts, to explore, and so stimulate dialogue, discussion and debate about the ways in which private law concepts serve a monumental and memorial function in contemporary society.

Section 2 examines closely three examples of the monumental and memorial roles played by property. First, I consider the role played by property in shaping the way in which we understand, monumentalise and memorialise *the person*, through the control of our own bodies – in the form of genetic material – and those of others – in the subjugation of others through racial segregation in the United States. Second, I outline how Australia's law demonstrates its overcoming the dispossession of *a group* of people, in this case Aboriginal Australians, through the recognition of native title by judges and legislators.

Section 3, the conclusion, argues that while it can be seen that property reveals its use to achieve the loftier ideals of justice, freedom and autonomy at work in a society, there nonetheless remain many instances where property law continues to enshrine iniquitous memories of ongoing injustice. As such, property law must become not only a memorial of the tragic past, but also a monument to its overcoming, to the possible, pointing the way to overcoming injustices which remain, allowing growth rather than ossification into a rigid memory of unyielding injustice. And to do this, we need to become what I call a 'flâneur of property'.

2 Property as monument and memorial

2.1 *The person*

Our understanding of the person, of who we are, at the most intimate physical level, is structured by property law. Much might be and has been said about the problems with our scientific and social understandings of corporeality and memory, the nature of 'being', but these are questions and concerns which go beyond the scope of this essay and must be left to another day. In this section, then, I explore the way in which the law of property structures our idea of the genetic material of which we are made in a physical, as opposed to a metaphysical sense. In this we can see how property has structured who we are at the genetic level and how it ascribes a social understanding of who we are as individuals. We see this in the way law has treated and treats DNA and race. These examples clearly

31 Hardin 'The tragedy of the commons'.
32 Heller 'The tragedy of the anticommons: Property in the transition from Marx to markets'.
33 See Soja *Seeking Spatial Justice*.

contain elements that take them well beyond the traditional categories of private law; yet, at the same time, they are very much connected to private law. Contract, tort, property; each plays its role in either tolerating or constraining the way in which we understand ourselves, from our genetic makeup to our physical person, and the way in which the law structures and constructs that understanding. And, in the case of property, in looking at these constructions of law, we see both its monumental and its memorial roles.

2.1.1 DNA

Human development, and the expression of humanity through the arts and sciences, forces us to confront the inevitable issue of control. Who possesses the natural produce of the earth, and, similarly, the produce of human endeavour? Who owns them? Who may dispose of these things that result from human endeavour? And how? And how may any of this be achieved by a society? These questions and so many more confront us when we seek to divide up a world of finite natural and human-made resources. These questions are, imperfectly, the province of what a society typically deals with through some form of rules relating to possession, ownership, control and disposition. From the time of Plato, political theory grappled with these questions, positing the notion of self-ownership; this has run through Hegel and up to our own time in the pluralist account of property posited by Stephen Munzer.[34]

As technologies relating to the use and manipulation of human genetic materials themselves advance – and this has been rapid over the last 50 years – these questions of control find increasing application to the very stuff of which we are made. These are the ultimate 'natural resources', and the law structures the space of physical being through its recognition or rejection of self-ownership through property. While the space we physically inhabit in our bodies is part of natural existence, the law also controls that space through what we are permitted to do with our body. Property plays a large role in that structuring. Thus, in 1908, the High Court of Australia could decide that a preserved human two-headed baby could be the subject of property rights because care and skill had gone into its lawful preservation.[35] More recently, and thanks to advances in reproductive technology, it has become necessary to consider whether it is necessary to recognise property rights in human sperm.[36]

In either recognising or rejecting property in the human body and its parts, the development of the law of property as concerns the body stands not only as monument to the past, in terms of providing answers to the control question, but also as memorial to the very fact that we concern ourselves with questions of 'self-ownership' and the disposition of parts of ourselves for reasons that involve, in some cases, a matter of survival. The growing underground markets in body parts, such as kidneys,[37] demonstrates the extremes to which some people may go when forced with providing enough for themselves and their families.

Yet, the law's struggles with the notion of self-ownership may only be the tip of iceberg, for recent scientific studies into and advances concerning the mapping of the human

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34 See Munzer *A Theory of Property*; and Taylor 'Self-ownership and the limits of libertarianism'.
35 *Doodeward v Spence* (1908) 6 CLR 406, 414 (Griffith CJ).
36 See eg *Re Edwards* (2011) 81 NSWLR 198.
37 See *Tales from the Organ Trade*.

genome now enable us, or, more accurately, enable scientists in heavily-funded corporate research labs, to isolate DNA samples. We are being forced to confront the control question yet again; simply, the law must grapple with the nature and content of property rights appropriate to the blueprint of life itself. Do the providers of genetic samples retain ownership of the genes once they are removed? So far, the law seems to be facing the limits of its ability to deal with such questions: both Australian and US law seems to be indicating that the providers of genetic material – you and me – may not control that material once it is removed or extracted from the body.

Two recent US cases denied donors any proprietary rights in the tissue and genetic matter of donors once it had been removed from their bodies.[38] And while this issue has not yet arisen in the Australian courts, the Australian Law Reform Commission has expressed reservations about the use of property law as a protection for a person's interest in their own genetic material.[39] Yet, while the donor may hold no proprietary interest in the genetic material taken from their body, Australian and US law recognises a possessory property right in preserved samples from human sources, such as those used in research laboratories:[40] 'the person whose body provided the sample has no property rights, although we seem to have no problem giving others property rights in those cells.'[41]

The trend towards the recognition of property in those who hold genetic material for research purposes while denying similar protection for the donors of that material is particularly prevalent in relation to intellectual property rights over particular DNA sequences. The identification of the segment of DNA responsible for a particular genetic illness involves extensive expensive research;[42] once discovered, institutions typically attempt to acquire a patent (or property) in relation to the isolated segment, thereby ensuring the exclusive right either to exploit or dispose of that right over the segment. Obviously, no shortage of controversy exists when a patent is sought in respect of otherwise natural materials which have been removed from their natural cellular environment.[43]

In the most publicised example of this trend, Myriad Genetics sought and obtained various patents, in both the United States and Australia, in respect of its discovery of the location and sequence of the DNA responsible for the production of BRCA1 and BRCA2, mutations of which cause breast and ovarian cancer.[44] When other institutions began to offer breast cancer pre-screening tests using the gene, Myriad sent cease-and-desist letters and filed suits alleging patent infringement,[45] effectively attempting to create a monopoly over genetic testing of the gene to ascertain pre-disposition for these cancers: 'Myriad's patents would, if valid, give it the exclusive right to isolate an individual's BRCA1 and

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38 *Moore v. Regents of the University of California* 793 P.2d 479, 489 (Cal. 1990).
39 Australian Law Reform Commission *Essentially Yours: The Protection of Human Genetic Information in Australia* 534 [20.34].
40 Feldman 'Whose body is it anyway? Human cells and the strange effects of property and intellectual property law' 1378–1379.
41 Feldman 'Whose body is it anyway?' 1379.
42 *Ibid* 1387.
43 *D'Arcy v Myriad Genetics Inc* (2014) 224 FCR 479, 481 [1].
44 *Association for Molecular Pathology v Myriad Genetics Inc*, 569 US (2013).
45 *Ibid* (slip opinion at 7).

BRCA2 genes (or any strand of 15 or more nucleotides within the genes) by breaking the covalent bonds that connect the DNA to the rest of the individual's genome.'[46]

Unsurprisingly, groups and individuals in the US and Australia concerned about the extent of this monopoly challenged the patents claimed by Myriad. The US challenge ultimately reached the United States Supreme Court, which found that the gene sequences were products of nature and so not patentable, emphasising that Myriad had not altered the genetic sequence in any way. While Myriad had certainly expended a great deal of resources, both financial and human, in finding the genes, that effort was not sufficient to constitute an act invention:[47] 'to be sure, [Myriad] found an important and useful gene, but separating that gene from its surrounding genetic material is not an act of invention.'[48] Most notably, the Court held that 'Myriad's claims are not saved by the fact that isolating DNA from the human genome severs the chemical bonds that bind gene molecules together.'[49]

Ironically, the very fact of the chemical changes to the gene sequences during isolation formed the foundation upon which the Australian Federal Court accepted Myriad's patent claim over the whole gene sequence. Yet, unlike the US position, because Australian law recognises no exception to patentability based on 'products of nature',[50] the key question before the Federal Court was whether the subject of the patent involved 'an artificially created state of affairs' leading to 'an economically useful result.'[51] Thus, because the DNA samples underwent chemical changes when they were removed from the cell and surrounding DNA, the product created was held to be artificial and therefore open to patentability.[52]

While the US Supreme Court and the Federal Court of Australia went in very different directions in the Myriad Genetics cases on the same question regarding the patentability of DNA – largely based on the differing US and Australian statutory provisions relating to patents – we nonetheless find in the story of self-ownership and property in the human body, including our very genetic content, the twin pillars of monumentalism and memorialism.

On the one hand, property stands as monument to a useful means of ensuring efficient protection of and control over parts of the human body, even over the very basis of life itself. Over the course of human history, we have struggled to find answers to the control questions as they relate to our own bodies and, for good or for ill, the law has offered its solutions to those problems, sometimes recognising that property serves the control objective well, and sometimes that it does not. And DNA represents another step forward in the law's efforts to grapple with these enduring dilemmas. It is, of course, monument to scientific advance, and to the as yet undiscovered potential for humanity that lies hidden in its genetic blueprint found in DNA. We might look to Article 1 of the UNESCO Universal Declaration on the Human Genome and Human Rights as an apt summary of the monumental status of the application of property to such 'natural' resources: 'The Human

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46 *Ibid* (slip opinion at 6).
47 *Ibid* (slip opinion at 14).
48 *Ibid* (slip opinion at 12).
49 *Ibid*.
50 *D'Arcy v Myriad Genetics Inc* (2014) 224 FCR 479, 516 [207].
51 *Ibid*.
52 *Ibid* 517, [212].

Genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity. In a symbolic sense, it is the heritage of humanity.'[53]

Yet, on the other hand, the story of the patentability of DNA clearly represents a memorial. At the simplest, human, level, it is a memorial to the people who have been and will be denied access to affordable treatment because of the monopolies created through the recognition of gene patents. In the United States, while the patent over the whole gene sequence itself was denied, the US Supreme Court affirmed the cDNA and other aspects of the patent. In short, quite wide genetic patents are still possible in both Australia and the United States. Thus, as Feldman writes:

> Specifically, in our enthusiasm for the truly ground-breaking and spectacular work of the scientific community, we have, at times, granted rights that are far too expansive. In the process, we have lost sight of the interests of the individual and the interests of scientific progress on the whole. Rushing to reward and incentivize, we have created opportunities for patent holders to arrogate to themselves large swaths of territory, well beyond what should be permissible, and they have taken advantage of our invitation.[54]

The world seems so entranced by the monumental effect of gene patent decisions that we may be neglecting the memorial.

And perhaps the enduring memorial of the story of property in DNA is simply this: today, as you read this, over 20 per cent of your genetic code is owned by someone else through patents; about two-thirds of these patents belong to private companies, and one-third belong to universities. The company that owns the most patents is called *Incyte*, a drug company based in California which owns the patents on 2,000 human genes.[55] Nameless, faceless corporations own bodies without us even knowing that that is the case, let alone having agreed to this ownership of those parts of every cell in our body. This surely represents the most notorious memorial to the use of private property as a means of apportioning the most intimate of all 'natural resources' of our world – our very genetic blueprint. And what of the chilling notion of genetic design of embryos which this blueprint may make possible?[56]

This potential dystopian future, represents but one, albeit the most intimate, means of controlling the human body. There are other, more direct, and much more visible and much more spurious ways of doing this. And this begins with the structuring of the physical space which we inhabit in our bodies. From this intimate form of control, property allows us to control the space around us, socially and physically, through the decisions that property allows us to make about people and resources.

2.1.2 Race

Why does it matter who controls a resource? Almost a century ago, Morris Cohen gave us the answer to that question in the seminal 'Property as Sovereignty', where he argued that property is really a government grant of sovereignty over resources to individuals. In short, it makes each person who is said to hold property a 'little sovereign', just as a

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53 Universal Declaration on the Human Genome and Human Rights (11 November 1997), Art 1.

54 Feldman 'Whose body is it anyway?' 1380.

55 See Adams 'US government claims 100% ownership over all your DNA and reproductive rights; genetic slavery is already here'.

56 See Shilo *Life's Blueprint: The Science and Art of Embryo Creation*.

monarch once was and as states are today.[57] More recently, scholars have referred to this by other names: 'decision-making authority',[58] 'agenda setting',[59] or simply, 'choice'.[60] Whatever one calls it, property allows a person to control, almost absolutely – subject, of course, to whatever minimal impairment the law may place upon that control – whatever the resource said to be the subject of that property. DNA is the most intimate form of that control exercised over the person of another, but it is by no means the most abhorrent; that place is reserved for that peculiar form of property that allows one person to own another: slavery.

The ownership of people, slavery – a form of ownership certainly not new in the history of humanity, but one that still thrives even today – carries some of the strongest memories in our contemporary legal world. A system of property surrounding the ownership of people as slaves emerged in Roman law[61] and formed a part, albeit one seldom spoken of today, of early American law.[62] A children's story, *Who Owns the Sun?* perhaps captures this best, recounting the dawning awareness of a young African American boy in the nineteenth century United States coming to know that not only his parents, but he, too, was owned by a white slave owner.[63] Indeed, recent scholarship demonstrates how the very basis of American capitalism itself may lie in these racist origins of slavery and the system of property that grew up around it.[64] And the capitalist inheritance of slavery can be seen everywhere one looks in the modern United States. While it may seem a minor example of this legacy, the practice of segregated lunch counters in Southern United States diners demonstrates the monumental and memorial aspects of US racial segregation found in private property.

The story of Southern US lunch counters recounts the right to restrict entry to one's real property (a diner) and the right to refuse to sell one's personal property (food and beverage). The case law and legislation surrounding this major strand of American history is well-known. Yet that familiarity, rather than detracting from the utility of using that law as an example of the ways in which property allows us to structure social and physical space, allows us to see that process much more clearly than an obscure example might. We are familiar with American slavery and the struggles to overcome its legacy; that allows us to move rapidly beyond explaining the background and context and to move directly to the salient point: the role property played in that story. In an experimental essay such as this, such familiarity serves us well.

Prior to the enactment of the Civil Rights Act 1964,[65] it was legal in some States for the owners of restaurants and diners to refuse access to African Americans, or to restrict the entry of such citizens to a specified area within the restaurant.[66] And it was legal in those States also to refuse service on the basis of race. Those rights were taken to be a part of the

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57 Cohen 'Property and sovereignty'.
58 Baker 'Property and its relation to constitutionally protected liberty'.
59 Katz 'Exclusion and exclusivity in property law'.
60 Babie 'Climate change: government, private property and individual action'.
61 Nicholas *An Introduction to Roman Law* 60–97.
62 Watson *Slave Law in the Americas*.
63 Chbosky *Who Owns the Sun?*
64 Baptist *The Half Has Never Been Told: Slavery and the Making of American Capitalism*.
65 Civil Rights Act of 1964 (PubL 88–352, 78 Stat 241, enacted July 2, 1964).
66 See Singer *Entitlement: The Paradoxes of Property* 72–74.

absolute right of private property owners to control the use and alienation of real and personal property.

By 1960, six years after *Brown v Board of Education of Topeka* had de-segregated schools, a decision hailed as the death-knell of US segregation,[67] public authorities in the South continued either to stall de-segregation in public schools or actively to resist it. And, more problematic, *Brown* applied only to *de jure* segregation by civil authorities. *De facto* segregation - the consequence of the exercise of the liberal triad of private property rights held by owners, and used to refuse entry to or the transfer of property - remained a legal practice even after *Brown*. In some cases it was even required by State laws, while in others businesses were legally run that way simply through custom and tradition: a common phrase that demonstrates this was the blunt and abhorrent 'We don't serve Negroes here'.[68] Business owners had the customary right to operate this way and there were 'Whites Only' or 'Coloured Only' facilities to be found across the segregated South.

Changes to this notion of property came about slowly in the US, and followed the slow changes in the relations between White and African Americans. Because the inhabitation and use of spaces in twentieth-century America characterised racism and race relations, property use and property law formed the epicentre of the civil rights movement. And property was not only part of the problem, but part of the resistance and part of the ultimate legal solution. As Martin Luther King Jr said about the segregation of buses following the resistance of Rosa Parks, the purpose of the system was to oppress and exploit, rather than merely to separate.[69] Property law, encompassing the right to exclude and restrict, was the means of achieving this racial oppression.

And even after the United States Supreme Court had ruled in *Brown* that the pernicious *Plessy v Ferguson*[70] doctrine of 'separate but equal' of 1896 was no longer good law, and that separate is not equal, many Southern White Americans attempted to maintain segregation, preserving spaces where they would only encounter other Whites. Little Rock, Arkansas, became a touchstone of this resistance; in the wake of a US Federal Court order that the White-only Central High School in Little Rock admit African Americans, Governor Orval Faubus twice arranged a contingent of the National Guard to turn away the nine students on their way to school.[71] And when the National Guard were called off, thousands of White citizens turned up at the school to take over, forcing President Eisenhower to arrange a military escort armed with bayonets simply to allow the nine to enter the school and to attend their classes throughout the day. Later, Little Rock closed the public schools rather than integrate. While property law itself is conceptually neutral as concerns race, we know from the law of persons in Roman law and the law of slavery in the United States, that it takes little for that veneer of neutrality to vanish. Thus, for many Southern Whites, *de facto* segregation represented a social rather than a strictly legal issue, a use of the liberal triad of private property in an attempt to keep the African American population 'in their place'.

Segregated Southern lunch counters became the primary battleground for other peaceful protests of the civil rights movement. In Greensboro, North Carolina, four African

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67 347 US 483 (1954).
68 Sitkoff *The Struggle for Black Equality 1954–1980* 69.
69 *Ibid* 51.
70 *Plessy v Ferguson*, 163 US 537 (1896).
71 Sitkoff *The Struggle for Black Equality 1954–1980* 30.

American university students, angered by the situation and, inspired by Ghandi and Martin Luther King, planned an act of civil disobedience: they would defy the private property rights of business owners and sit at a Whites-only lunch counter until they were served. On the first day, four protesters sat at the counter – in two days, the protest had become so popular that the students filled sixty-three of the sixty-six available seats. And the Greensboro sit-ins inspired many similar non-violent protests in the private sector. Parks, pools and movie theatres, as well as lunch counters, were 'trespassed' upon by African Americans. No longer content to wait for Whites to give them rights of access to public venues, those who participated in the protests were going to take them. The sit-ins accelerated desegregation of private property in the South through the sheer economic pressure the protests put on businesses.

Thus, while the civil rights movement precipitated *Brown*,[72] the Civil Rights Act 1964 represents its crowning legal achievement, and it was this landmark legislation that hastened the end of legal segregation generally, and lunch counter segregation specifically. In the pursuit of equality, the Civil Rights Act 1964 introduced restrictions on the property rights upon which the racial segregation of lunch counters relied. Joseph William Singer argues that the public accommodation provisions of the Civil Rights Act 1964,[73] rather than a mere limitation on property rights, represented a form of transfer of a property right to the public, 'grant[ing] members of the public a limited right of access to businesses open to the public'.[74] This, of course, overcame the traditional understanding of property as encompassing, as part of the 'liberal triad' of rights, the right to exclude (along with use and alienability).[75]

Perhaps 42 USC §2000(a) of the Civil Rights Act 1964 stands most prominently as both memorial and monument to the struggles of the civil rights movement and their lasting impression upon the fabric of American property law:

> All persons shall be entitled to full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation…without discrimination or segregation on the ground of race, color, religion or national origin.

This law stands as a monument as to what property can achieve – as a concept, it carries boundless potential, not only to enslave, as it has in the past, but also to liberate through equality and integration. And in choosing the former, those who struggled and won the hard-fought battles of the civil rights movement, and those who drafted and enacted into law the Civil Rights Act, erected this monument to inspire greater inclusion in public life through the simple concept of property. It will forever showcase the great triumph of the non-violent protests and marches that led to its enactment.

Still, Du Plessis's theory highlights the truth that '[a] nation that only celebrates tends to become oblivious of how meticulously it should guard against the mischiefs of the past.'[76] We must not, in other words, overlook the memorial function of those very same struggles now forever embedded in the bedrock of property, reminding us that this simple concept, so capable of liberation, can allow the right to control access to premises and the freedom to choose to whom one may sell goods to become a tool of marginalisation and oppression.

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72 See Tushnet, *Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961–1991*.
73 42 USC § 2000(a).
74 Singer *Entitlement: The Paradoxes of Property* 40.
75 Radin *Reinterpreting Property* 121–124.
76 Du Plessis 'The South African Constitution as memory and promise' 393.

The monumental function of the Civil Rights Act 1964 showcases the change in law that restricts the exercise of the proprietary right of exclusion for the very purpose of liberating those oppressed by that exercise. Yet, it serves at one and the same time the memorial function by preserving the memory of paratroopers and bayonets in the effort simply to allow nine students entry to school in the face of angry howling crowds. And it draws the mind back to the great lengths to which African American students had to go to enjoy the simple pleasure of a cup of coffee alongside any other citizen.

What might the monumental and memorial functions of property as it emerged from the civil rights movement and the enactment of the *Civil Right Act 1964* have for our own times? Without in any way wanting to suggest that the two share the same historical origins or harrowing aspects of discrimination and oppression, might property now enter new territory, and mount a new liberating challenge in the service of gay and lesbian Americans? One could be forgiven for thinking that a 2014 Bill of the Kansas State Legislature seeking to allow business owners a right to refuse the provision of accommodation, and to refuse the sale of goods because it offended their religious sensibilities in relation to marriage,[77] seems very familiar. Does not the apparent intent of the law to allow refusal to sell goods or rent space that may be used in relation to a gay or lesbian partnership seem like a story we already know? Indeed. Columnist Kristen Powers dubbed the Bill a 'homosexual Jim Crow law'.[78]

The Kansas Bill is certainly much more limited in scope than the systematic racial segregation that preceded the Civil Rights Act 1964 (US), and focussed narrowly on the issue of religious freedom. Yet, the monument of the earlier transformation of private property remains clear for all others facing oppression and discrimination for any reason in any time: involvement in society depends on the repudiation of a systemic inability to acquire property, and the ability to move freely into and out of not only public, but also, and sometimes much more importantly, private spaces constitutive of the world in which we live.[79]

Clearly, then, through looking at property as monument and memorial we can see ways in which property became a tool for achieving abhorrent ends. But there are systems in which such racist objectives form the very heart of property law itself: the treatment of the prior occupation of Indigenous Australians in Australian land law represents such a case.

2.2 *The group*

As is now well-known, upon the European settlement of Australia in 1788, the continent was regarded as *terra nullius*, and as such, the absolute title to all land in Australia was ostensibly acquired by the Crown.[80] This remained the Australian legal position for more than 200 years. The result of this notion rendered the system of land tenures in operation in Australia inconsistent with the recognition of any indigenous or native title rights to Australian land. The High Court of Australia, in the landmark decision in *Mabo v Queensland [No 2]*,[81] ultimately recognised the existence of native title in Australia, a type of beneficial title to land which depends on the traditional occupation of, or connection with,

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77 Kan HB 2453 s 1(a).
78 Powers 'Jim Crow laws for gays and lesbians?'.
79 See Babie 'The spatial'.
80 See *A-G (NSW) v Brown* (1847) 2 SCR (NSW) (App) 30; *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.
81 (1992) 175 CLR 1.

the land by indigenous people.[82] Yet in order to understand the monumental and memorial aspects of this story within Australian land law we need to know what came before this both monumental and memorial decision, itself a rare example of a court creating in one decision both a lasting monument and memorial within land law.

A shift in the non-Indigenous understanding of Indigenous societies, their culture and their legal structures began to emerge in the mid-twentieth century; it is this shift in social attitudes that led most directly to the recognition of native title in Australia.[83] The shift was dramatic: the first European settlers – today sometimes seen as invaders – of the Australian continent adopted an attitude of superiority and dismissal towards the Indigenous population present on the continent for at least 40,000 years. The words of Captain James Cook, the British explorer who claimed Australia for England, perhaps best capture these early racist attitudes, when he said of the Indigenous people he encountered that they had 'no fix'd habitation but move from place to place like Wild Beasts in search of food…'[84]

In this early post-settlement/invasion period, any contact between Europeans and Indigenous peoples occurred mainly with the aim of Christianising, Europeanising and 'civilising' the Indigenous population. Generally speaking, these early Europeans made no attempt either to learn or to understand anything about Indigenous law and culture. Instead they sought systematically to destroy it; wide-ranging policies of removal or distancing of Indigenous children from their parents and families and communities, in an effort to merge and assimilate them into European society comprise one of the most insidious, racist, and morally reprehensible of these attempts to destroy.[85] Many Christian missionaries went to great lengths in their efforts to convert Indigenous people, almost entirely without attempting to accommodate traditional language or lifestyle.[86] In short, 'implicit in the past assimilation policies was the view that there was nothing of value in Indigenous culture.'[87]

Most importantly for present purposes, the Euro-centric perspective adopted by the early European settlers/invaders took no account whatsoever of Indigenous systems of law as being sufficiently significant as to register at all in the scheme of land ownership. Thus, upon settlement, Captain Cook observed nothing which he considered 'cultivated' territory, and so claimed Australia on the basis that it was uninhabited land.[88] Consequently it was legally settled, not ceded or conquered, under the international norms of settlement of the time recognised by British law. The legal consequence, as noted earlier, was to treat the whole of the land mass of the Australian continent as vested in the Crown, unencumbered by any rights of the existing inhabitants.

It was, as we know, entirely apparent even at the time that European settlers were claiming it not to be the case, that this account of an uninhabited territory, or *terra nullius*, was entirely untrue, both historically and legally.[89] Yet international law sanctioned this

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82 See also the Native Title Act 1993 (Cth) and *Wik Peoples v Queensland* (1996) 187 CLR 1.

83 'Indigenous societies' refers to all of the various cultural and language groups who were the inhabitants of the Australian continent and surrounding Islands before 1788, and their descendants.

84 Castles *An Australian Legal History* 22.

85 Human Rights and Equal Opportunity Commission *Bringing them Home Report*, pt 2–2.

86 Thompson *Religion in Australia: A History* 5.

87 *Ibid*.

88 Castles *An Australian Legal History* 22.

89 See Reynolds *Dispossession: Black Australia and White Invaders*.

fictional application of the *terra nullius* doctrine as a means of acquisition of inhabited territory. Thus, if territory was inhabited, but not utilised according to European standards (ie farmed in settled communities), the land would be treated as uninhabited. In fact, the Indigenous peoples did have law and custom, including law in relation to the occupation and use of land. Yet, because they did not fit into conceptions of property and ownership under the Anglo-Australian common law, the Australian law denied the effect of these laws as giving rise to property rights that might be enforceable in Australian law.[90] Indigenous land systems were unique because they were often owned communally by tribes, were characterised by responsibilities to the land as well as rights, and were not exploited for resources in the manner that Europeans might have exercised.[91] But as late as 1971, Blackburn J in *Milirrpum v Nabalco* denied that these systems could be proprietary in nature under the common law.[92]

Throughout the latter-half of the twentieth century, as Australian attitudes to the culture and society of Indigenous Australians changed, so too did attitudes towards Indigenous law. The general perception of Indigenous Australians moved from that of a primitive, lawless society to one which recognised the reality of a people with law, customs and culture. Serious study was made of Aboriginal land management systems,[93] and European/White Australians ultimately found, as Indigenous Australians have known all along, that pre-colonisation land laws were 'certainly as legitimate as the system of property that was derived from the English law, and was adapted to and developed in the conditions found in Australia.'[94] And this ultimately meant that it must be acknowledged that –

> [t]he common law of this country would perpetuate injustice if it were to continue… to persist in characterising the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land.[95]

And so in 1982 Eddie Mabo, an Indigenous member of the Meriam people of the Torres Strait Islands, sought declarations from the State of Queensland that he and the Meriam were entitled to three islands on the basis of continuous occupation.[96] Ten years of litigation culminated in the High Court's landmark decision in *Mabo*, in which the Court declared that the characterisation of Australia as uninhabited land had been false and acknowledged the unique doctrine of Native Title in land colonised by settlement where there was nonetheless a prior occupation by Indigenous peoples.[97] In a truly uninhabited territory, the Crown would have gained full beneficial ownership when it gained sovereignty.[98] That would not be the case, though, if the land was occupied by the Indigenous inhabitants.[99]

The High Court thus held that upon European settlement, and the acquisition of sovereignty, the radical title so derived did not have the effect of displacing the exclusive possession over land by Indigenous peoples, who continued to hold Native Title recognisable at

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90 See eg *Milirrpum v Nabalco* (1971) 17 FLR 141, 272.
91 Bradbrook et al *Australian Real Property Law* 360–1.
92 (1971) 17 FLR 141, 270–3.
93 See eg Gammage *The Biggest Estate on Earth: How Aborigines Made Australia*.
94 Babie 'Sovereignty as governance: An organising theme for Australian property law' 1097.
95 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 58 (Brennan J).
96 *Ibid* 176 (Toohey J).
97 Blackshield and Williams *Australian Constitutional Law and Theory* 156.
98 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 48 (Brennan J).
99 *Ibid*.

common law. The Court further held that this title would subsist until the Crown exercised its radical title inconsistently with the Native Title, or the Indigenous title holders ceased to have any connection to the land and had ceased to observe their own laws and customs.[100]

The recognition of native title stands as a monument to the flexibility of Australian land law to redress the injustices of the past visited upon the Indigenous inhabitants of Australia. Both the *Mabo* decision and the Native Title Act 1993 (Cth) were possible because of the malleability and adaptability of the common law of property to accommodate those developments within the pre-existing legal system. As Brennan J wrote in *Mabo*:

> In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.[101]

While the Court was not free to fracture the skeleton of principle, it could use the doctrine of precedent to achieve the recognition and protection of Native Title through that very pre-existing common law. Justice Brennan went on:

> It is not possible, *a priori*, to distinguish between cases that express a skeletal principle and those which do not, but no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system. If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied.[102]

The monument of *Mabo* takes the form of a window, through which the Indigenous past is made visible again through the common law of property. Under the previous doctrine of the Crown's absolute beneficial ownership of land, the rich Indigenous past existed behind a closed and shuttered window; *Mabo* cast open this window both to reveal the pre-colonisation regime and to acknowledge it as the basis of land rights under a new regime.[103] We might summarise *Mabo*-as-monument this way: 'In essence *Mabo* is a statement that the principles of the Australian legal system cannot withstand the immorality of the proposition that Australia is a settled territory because there was no legal system in force prior to the claim by the British Crown.'[104]

But one cannot deny the memorial of Mabo, which lies in the British Crown's acquisition of sovereignty over the continent, and what that allowed through the pre-*Mabo* racist land law. Native title and its relationship to the Crown's radical title is a memorial to the power relationship that existed and still exists between the British-derived legal system and the Indigenous inhabitants of Australia. While Australian property law incorporates Native Title in an attempt to balance the recent colonial history with the ancient Indigenous past, the balance is skewed heavily against the Indigenous population. Indigenous land rights might be recognised as stemming from a pre-existing tradition, but they must approach the new European invaders/colonisers to seek recognition, protection and enforcement.

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100 *Ibid* 59, 69.
101 *Ibid* 29.
102 *Ibid* 30.
103 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 453–4 (Gleeson, Gummow and Hayne JJ).
104 Bradbrook *et al Australian Real Property Law* 368 [6.305].

And, of course, sitting behind all of that is the stark reality that what *Mabo* gave with one hand in the recognition of Native Title, it took with the other in denying that there was any doubt about the acquisition of sovereignty and so radical title in 1788, or that any lawful government action vesting property interests in others would extinguish Native Title. Native Title extinguished between 1788 and 1993 was taken without compensation, fair notice or due process; in this way '[d]ispossession is attributable not to a failure of native title to survive the acquisition of sovereignty, but to its subsequent extinction by a paramount power.'[105]

The legally sanctioned extinguishment of Native Title pre-Native Title Act 1993 (Cth) memorialises the dispossession of Indigenous Australians across Australia because, simply, Native Title notwithstanding, they still lived and continue to live under an imposed 'paramount power'. And it continues to stand as memorial to the ongoing difficulties which Australia's Indigenous peoples continue to face today: the disproportionate and rising number of Indigenous people being jailed and self-harming, while rates of disability and chronic disease remain high.[106] While *Mabo* did much, today it stands merely as monument to what can be, and still needs to be achieved in the face of the paramount power to which Australian land law now stands as memorial.

3 Concluding reflections: The flâneur, 'thick-mapping', and the monumental-memorial of property

Equipping ourselves to see property as memorial to injustices of the past and monument to overcoming those moments, an overcoming which points the way to eradicating the invidious injustices which continue to creep into every society, we must assume a certain stance towards the world in which we live. The figure of the 19th Century French flâneur, as modified in the work of Walter Benjamin and modern practitioners of the 'digital humanities', perhaps best captures that stance.

The flâneur, 'the stroller, the passionate wanderer emblematic of nineteenth-century French literary culture – has always been essentially timeless; he removes himself from the world while he stands astride its heart.'[107] Benjamin gave the academy his own understanding of the flâneur, which 'the academic establishment has used…as a vehicle for the examination of the conditions of modernity – urban life, alienation, class tensions, and the like.'[108] In short, to assume the stance of the flâneur is to practice the art of allowing the past to become present to us as we explore our own moment, our own context. Benjamin wrote this:

> The street conducts the flâneur into a vanished time. For him, every street is precipitous. It leads downward – if not to the mythical Mothers, then into a past that can be all the more spellbinding because it is not his own, not private. Nevertheless, it always remains the time of a childhood. But why that of the life he has lived? In the asphalt over which he passes, his steps awaken a surprising resonance. The gaslight that streams down on the paving stones throws an equivocal light on this double ground.[109]

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105 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 58 (Brennan J).

106 See Australian Productivity Commission *Overcoming Indigenous Disadvantage: Key Indicators 2014*.

107 Stephen 'In praise of the flâneur'.

108 *Ibid*.

109 Benjamin *The Arcades Project* 416 [M1,2].

For Benjamin, the flâneur is 'a time-traveler. As the flâneur walked along the streets, he was conducted downward in time.'[110]

The modern digital humanities adapt Benjamin's flâneur's explorations of 'double ground' to our own time in the notion of 'thick mapping':[111]

> What a striking idea: that the physical topography of the street could lead you back to a time that had vanished, to a time that was not even your own. How could this be? Is it really the street, or might it be a kind of sensibility or openness to apprehending, listening to, and, ultimately, caring about and caring for the past? In other words, maybe the past is always there – quiet, muted, faded, hidden – and it is the task of the flâneur to enable it to speak, to make it come alive and come to light, and, thereby, resonate with the present. In this sense, the past must be conjured, awakened, and cared for.[112]

Thick mapping is 'a verb and bespeaks an on-going process of picturing, narrating, symbolizing, erasing, and re-inscribing a set of relations.'[113] And we, as the flâneur of property, have the task of engaging in this activity as we look at the world around us, but looking closely not only for what the surface, the simple map, shows us, but for what lies below the surface, the 'arguments and stories [that] make claims and harbour ideals, hopes, desires, biases, prejudices, and violences.'[114] Only in this way can we see, and understand, both the monument and the memorial of property.

Assuming our stance as the 'flâneur of property', then, what must we look for on our 'strolls' over the asphalt of our own 'double time'? In short, we are looking for injustice – the examples explored in this chapter are but a select few of the many injustices which have become both monument and memorial. And, increasingly, it is not merely social injustice, and there is much of that for which property is both responsible and capable of overcoming, but also, and perhaps more importantly, to what Edward Soja has called 'spatial injustice', those instances and events of systemic injustice that may be of racial, gender, ethnic, or economic origin or any combination of them, that are caused by the economic, social, and political production of space, both physical and social, and that evolve over time.[115]

Obviously, if we are looking for the unjust geographies in which we live and for their causes, then we must also be looking for the ways in which we can act to change both the processes and so the geographies. Looking for spatial injustice means looking for the memorialism of property; but looking for the monument means we look also for how we can change what is. And that means looking for the ways in which one might achieve spatial justice; this is not only a substitute for social, economic, or environmental justice, but also an amplification and extension of those concepts into new areas of understanding and political practice: 'everything that is social (justice included) is simultaneously and inherently spatial, just as everything spatial, at least with regard to the human world, is simultaneously and inherently socialized.'[116] And property is both the source of the injustices, social and spatial, and it is the source of potential for change. It is memorial and monument, both socially and spatially.

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110 Presner, Shepard and Kawano *HyperCities: Thick Mapping in the Digital Humanities* 23.
111 *Ibid*.
112 *Ibid* 23.
113 *Ibid* 15.
114 *Ibid*.
115 Soja *Seeking Spatial Justice* 2–3.
116 *Ibid* 5–6.

Of course, the property flâneur's wanderings point not only to what property has wrought, but also to what it might become. But we can hardly predict what that outcome might be. All that we can know is that property carries within it a constant dual monumental-memorial which does not stop here, or at any fixed point in the ever unfolding story of our history. As with law itself, as Du Plessis so eloquently demonstrates, for property, it is the memory, always the memory, that must *be* remembered. At every stage of human development, with new law comes new memory, and with new memory comes new law, and so on…

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In conversation with the harmonious wordsmith

Anél Boshoff

Understanding a sentence in language is much more akin to understanding a theme in music than one thinks

Wittgenstein[1]

1 Du Plessis and Pythagoras on harmony

The legend goes that Pythagoras discovered the hidden formula of harmonic intervals whilst out for a stroll through the streets of Athens. Iamblichus, a fourth-century Pythagorean scholar, describes the event in remarkable detail:

> As having some bearing upon the wisdom employed by Pythagoras in instructing his disciples, it is well to relate how he invented the harmonic science and harmonic ratios:
>
> Intently considering the reasoning with himself, whether it would be possible to devise instrumental assistance to the hearing, which should be firm and unerring, such as sight obtains through the compass and the rule, or through a dioptric instrument; or such as the touch obtains through the balance, or the contrivance of measures, thus considering, as he walked near a braz-ier's shop, he heard, from a divine casualty, the hammers beating out a piece of iron on the anvil and producing sounds that accorded with each other, one combination only excepted.[2]

Pythagoras noticed that some hammers, when struck simultaneously, generate a pleasant sound. The opposite is also true: some combinations produce jarring and disagreeable noises. Upon investigation it became clear that the weight of the hammers, or rather the weight ratio between two hammers, determines the harmony or disharmony of the sound. A hammer half, two-thirds, or three-quarters the weight of another particular hammer generates, when struck simultaneously, a harmonious sound. Conversely, hammers producing disharmony when struck together had a weight that bore no simple relationship to the other weights.

The consequences of this discovery were profound. Harmonious sounds, and thus almost everything which we now classify under the term 'music', are part of and can be explained by the mathematical world. From Beethoven's sublime sonatas, to heavy-metal rock music, it is possible to establish, with mathematical certainty, whether a harmonic interval is concord or discord.[3] This explains why it is possible for very large and complicated symphonic pieces, which consist of a wide variety of simultaneous sounds of different pitch, to be played in perfect harmony – unless, of course, one musician plays 'out of key'. I will give more attention to this aberrant player below.

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1 Wittgenstein *The Idea of a Social Science and its Relation to Philosophy* 227.

2 Iamblichus *The Life of Pythagoras* 49.

3 In Western tonal music, perfect concords have intervals of a 4th, 5th and 8th; imperfect concords 3rd and 6th. All other intervals – ie all 2nds and 7ths, are discords (or dissonant intervals, as they are also called).

A few millennia later, in 1996 to be precise, South Africa found itself in the midst of the anticipation and excitement of the new and 'final' South African Constitution taking shape. Lourens du Plessis, one of the figures intensely involved in the shaping of the new legal order, pleaded for what he called an 'open community of interpreters'.[4] Drawing on the work of Häberle and on Gadamer's notion of *Vorverständnis*, he provided an alternative to what he called the tradition of 'exploded *Subsumtionsideologie'*.[5] Du Plessis used the apt metaphor of an orchestra's performance of a musical composition to illustrate the possibility and value of the harmonisation of pluralistic improvisation, that is, constitutional interpretation. He envisaged a plurality of voices, different in strength and pitch, but adhering to the same key – the key of rationality, freedom and tolerance. The constitutional text requires, simultaneously, a recognition of its inevitable inconclusiveness, and thus the necessity for meaning(s) to remain open-ended, *as well as* an acknowledgment that the constitutional text is a normative model, and as such demands a certain level ofobservance. He writes:

> The completed [constitutional] text posits, with authority, a starting point for interpretation, and eventually application, but it invites, with equal authority, improvisation thereby recognizing its own inconclusiveness.[6]

His argument is that this difficult and almost impossible task can only be fulfilled by a radically open community of interpreters: a community which is diverse yet concordant. I will follow Du Plessis's line of thought through a long (and slow) movement, focussed mainly on the 'hermeneutic turn' and its main exponents. Following that I will (briefly) question and somewhat unravel the present status (and the future?) of these strands/riffs of interpretive harmony.[7]

Du Plessis's disagreement is first and foremost with legal interpreters, mostly of German origin, who use the method of so-called 'subsumption' in order to reach a 'correct' interpretation of legal texts.[8] Subsumption, understood in its most basic form, means to incorporate something specific under a more general category. As such it is widely used in legal argumentation. Hegel explains, in a slightly more complex manner, that, 'even the association of ideas is to be treated as a subsumption of the individual under the universal, which forms their connecting link'.[9] Subsumptionist procedures are regarded as especially problematic when the written text is general and open-ended, as is the case with broad constitutional provisions. In addition to the obvious dilemma of linguistics, namely the fact that words have no inherent or stable meaning, Du Plessis identifies two further flaws in using a method of subsumptive legal interpretation: first, its inability to harmonise conflicting entitlements, in other words, its inability to harmonise the normative with the political,

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4 Du Plessis 'Legal academics and the open community of constitutional interpreters' 214–229.

5 *Ibid* 216, referring to Häberle.

6 *Ibid* 223.

7 It does need to be emphasised that critical scholars, in general, are in agreement with Robert Cover that '(l)egal interpretation takes place in a field of pain and death' and that neither the law nor the violence it occasions can be properly understood apart from one another. See Cover 'Violence and the Word' 203. This chapter does not deny the crucial connection between law and violence by employing a more aesthetic metaphor. My understanding is also that Du Plessis had no intention of disagreeing with Cover on this point.

8 Du Plessis 'Legal academics and the open community of constitutional interpreters' 216 refers, amongst others, to legal positivists, such as Müller, Schmalz and Larenz.

9 Hegel *Philosophy of Mind* 74.

and, second, its disregard for any subjective elements forming part of the interpretive process. It does not acknowledge the historicity of interpreters, who participate in the interpretation process, not as blank slates, but with a certain level of pre-understanding of which they themselves may often be unaware. From such a contextual point of view, there is no such concept as complete interpretive objectivity. Interpretation is not a value-free or scientifically objective activity. The 'objective' judge or interpreter simply does not acknowledge or recognise his or her own pre-understanding.

My focus will be on this second objection of Du Plessis, that is, the failure to acknowledge or understand the fact that subjective pre-understanding inevitably conditions an interpreter's decision. Far from condemning pre-understanding, or pre-judgement, as negative bias, Du Plessis agrees with Gadamer that *Vorverständnis* is vital to our ability to experience and understand the world. What one already knows provides the horizon against which new experiences become possible. The fact that no-one can position themselves outside of tradition, in other words that no-one can adopt an a-historical vantage point, does not imply that the interpreter is passively conducting his or her own historical values. The interpreter is an active mediator between his or her own tradition and the tradition(s) of the text. The horizon of the text thus comes into contact with the horizon of the interpreter and so-called *Horizonverschmelzung* takes place. Holub explains Gadamer's much-used but elusive use of the word 'horizon' as follows:[10]

> [I]t designates a standpoint that limits the possibility of vision and is thus an essential part of the concept of situation. Horizon describes and defines our situatedness in the world. It should not be conceived in terms of a fixed or closed standpoint; it is 'something into which we move and which moves with us'. It may also be defined with reference to the prejudices that we bring with us at any given time, since these represent a horizon beyond which we cannot see.

Interpreters do not abandon their own history and traditions in favour of the tradition of the other or of the text. Rather, in dialectical fashion they expand their own horizons to incorporate the other.[11] Du Plessis's musical metaphor goes some way in capturing this harmonious process. A musical composition can be interpreted and re-interpreted, many times over, every time reflecting the influences of different musical traditions. The 'horizon' of the original composition never gets erased, but it is repeatedly transformed by contemporary insights and sensitivities.

These new insights can originate from a variety of sources: from Du Plessis's wide and diverse community of interpreters; from the (constitutional) text itself and from experience, which simply comes through time. Prompted by such new insights, interpreters should be open to re-evaluate their own pre-understanding. Gadamer uses the metaphor of the so-called 'hermeneutic circle' to describe the dialectical movement between the whole and the parts of the text. The text, as a whole, can only be understood in the light of its constitutive parts and each individual part can only be interpreted within the context of the whole. This process implies, crucially, a significant amount of goodwill from the interpreter(s): the interpreter should be prepared to approach the text in the belief that it *will* form a coherent whole and that the constitutive parts of the text *will*, in fact, contribute towards the meaning of the whole. This implies an idealised form of holism, which needs to be agreed on, or rather 'believed in' at the outset of the interpretive process, when there is still no evidence that the process will be a success. This 'blind faith' or *Vorgriff der*

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10 Holub *Jürgen Habermas: Critic in the Public Sphere* 58.

11 Hoy 'Interpreting the law: Hermeneutical and poststructural perspectives' 165.

Vollkommenheit, in Gadamer's terminology,[12] however, often proves erroneous. As mentioned above – there is always an off-key player.

2 Habermas conducts and Rorty joins the string quartet

Even if interpreters have open hearts and minds, and even if they have the best of intentions, interpretive conflict remains unavoidable. And so it should. Such conflict, where parties passionately take up absolute and incommensurate positions, with no possibility of compromise or conciliation, sometimes makes perfect sense. Blatant irrationality, unfounded bias and maybe what Badiou would term 'evil', sometimes *requires* discordance and a refusal to compromise. I will maintain that the problem originates, at least partly, in our inevitable reliance on language – and after that, on its offspring – ideology. Encouraged by the re-reading of Du Plessis I will explain this view by following the argumentative strands of hermeneutic theory.

In an attempt to preserve Gadamer's and Du Plessis's vision of interpretation as being a harmonious interplay of diverse voices, I will look at two possible strategies to either 'manage' or 'contain' interpretive conflict. The first is Jürgen Habermas's idea to keep much stricter control over the process of interpretation. The open community of interpreters will still be 'open', but only to those who are worthy of its membership, in other words, only those who play 'in key'. The second is Richard Rorty's strategy to contain interpretive conflict by keeping the group of interpreters small and localised – not a full orchestra, but closer to a harmonious string quartet. Friends preferred.

Whereas Gadamer saw language as a reliable system for human interaction – for the most part untouched by power and manipulation, Habermas very early on recognised the flaw in such 'linguistic idealism'. He said: [L]anguage is *also* a medium of domination and social power; it serves to legitimate relations of organised force.' [13] Referring to Albrecht Wellmer,[14] Habermas writes in a later essay:

> The Enlightenment knew what hermeneutics forgets – that the dialogue which, according to Gadamer, we 'are' is also a context of power and precisely for this reason not a dialogue.... The universal claim of the hermeneutic approach [can only] be sustained if one assumes that the context of the tradition as the locus of possible truth and factual agreement is, at the same time, the locus of factual untruth and continuing force.[15]

Despite this, there are still considerable overlaps and areas of agreement between the two German philosophers, and in fact also with the views of Du Plessis. In fact, the initial impression from Habermas's *Zur Logik der Sozialwissenschaften*, was that he supported Gadamer's version of hermeneutics. He seemed to agree that Gadamer's *Wahrheit und Methode* offered a viable alternative to positivism, on the one hand, and so-called neo-Wittgensteinian language theory, on the other. Gadamer spoke out against attempts by positivism to postulate a neutral or 'scientific' language for social sciences, which would 'elevate' it to the same level of objectivity as that of the natural sciences. Gadamer's hermeneutics emphasised the inescapable and necessary situatedness of *all* understanding. There is no knowledge field, not even abstract mathematics, which functions in a free floating manner, and which is wholly independent from a specific tradition. Interpretation

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12 See Warnke *Justice and Interpretation* 128–134.
13 Habermas *Toward a Rational Society* 360.
14 See Wellmer *Kritische Gesellschaftstheorie und Positivismus* 48–49.
15 Habermas *Communication and the Evolution of Society* 204–205.

cannot sidestep the situated tradition which creates the perimeters of acceptable methods, verification techniques and interpretive paradigms. The law, and specifically legal interpretation, does not even come close.

Habermas also used Gadamer's emphasis on the convergence of, and mediation between, traditions (or 'languages') to counter the views of neo-Wittgenstein scholars, such as MacIntyre and Taylor, on so-called 'closed language games'.[16] Following Wittgenstein they claim that a specific semantic field, due to its unique normative structure of presuppositions, is impenetrable and incomprehensible to outsiders.[17] The only way into the system is through a process of fundamental re-socialisation and a willingness to master completely the 'language' of the other system. Habermas, however, agrees with Gadamer that 'understanding' implies that multiple languages or traditions can, and indeed *must*, be regarded *in relation* to each other, for 'understanding' to become possible. Habermas writes:

> The language analyst in the role of the comparing interpreter must always already presuppose a concept of a language game in general and a concrete pre-understanding in which different languages converge.[18]

Gadamer's concept of 'interpretation as translation' is also favoured by Habermas. Translation does not imply that the translator or interpreter needs to be re-socialised as a linguistic or cultural 'insider', but translation also does not mean that the foreign language or culture simply gets reduced to the known language. The translator needs to be acutely aware of his or her limitations and also of the limitations of the first language to capture the full meaning and subtleties of the foreign language. Interpretation (as translation) implies that the interpreter uses the horizon of his or her own language as a frame of reference and then expands this horizon to understand what was said in the foreign language. The success of the process hinges on the interpreter's capacity for critical self-reflection. In post-apartheid South Africa this idea seems to be very sensible.

There is, however, a deep and important schism between Gadamer and Habermas, which relates to the nature and function of language and the role of ideology. According to Habermas, Gadamer ignores the possibility of an agreed interpretation being the product of systematically distorted 'consensus'. History and culture are always already influenced by external pressures of censorship, public opinion and ideological bias. In Habermas's words:

> [E]very consensus, in which the understanding of meaning terminates, stands fundamentally under suspicion of being pseudo-communication induced… [since] the prejudgemental structure of meaning does not guarantee identification of an achieved consensus with a true one.[19]

Gadamer's focus on finding the 'truth', as it appears through the circular movement of the hermeneutic dialogue, ignores the possibility of first, the ideological functions of entrenched perspectives, and second, historical patterns of disadvantage and unequal distribution of resources. The problem gets amplified by the fact that patterns of inequality, such as the patriarchal patterns of the suppression of women, or the patterns of racial discrimination, get internalised and participants in the hermeneutic dialogue regard the historically entrenched disadvantage as 'natural', rather than as a product of culture.

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16 See Winch *The Idea of a Social Science and its Relations to Philosophy*.
17 Taylor 'Interpretation and the sciences of man' 3–51.
18 Habermas *Toward a Rational Society* 244.
19 Habermas 'Der Universalitätsanspruch der Hermeneutik' 314.

Habermas identifies the weak point in Gadamer's theory as the lack of a critical perspective. However, a critical perspective is impossible without an external vantage point. Habermas therefore proposes '(an) objective framework constituted jointly by language, labour and domination',[20] which will have the effect of negating the universality of hermeneutics. The linguistic tradition, *on its own*, is insufficient in providing a critical frame of reference for interpretation and it is therefore impossible for participants in the hermeneutic dialogue to fully understand or to fully control the meanings of their statements or the statements of others.

Gadamer's response to this critique is that Habermas unduly restricts the meaning of hermeneutic understanding to the much narrower category of explicit truth.[21] He argues that hermeneutic understanding also encompasses non-articulated (even subconscious) values, pre-understandings and expectations. The hermeneutic dialogue, therefore, does promote the disclosure of ideological bias. Habermas's so-called 'non-hermeneutic' factors, such as power and labour, are already implicit in universal linguistic understanding. Insisting on the universality of linguistics, he writes: '[T]here is no societal reality, with all its concrete forces, that does not bring itself to representation in a consciousness that is linguistically articulated.'[22] Hermeneutics, on this view, is not only capable of critical reflection, it is uniquely suitable to it, precisely because the hermeneutic dialogue is aimed at disclosing hidden complexities in meaning and at discovering multiple dimensions of the text.

The problem with Gadamer's explanation, and by implication also with Du Plessis's 'open community of interpreters', is that Gadamer does not make a distinction between pre-judgements and ideological distortions. Historical and social context is not the same as ideology and, conversely, not all unarticulated views and conceptions can be regarded as ideology. Ideological claims make assumptions in a way which makes it impossible to distinguish between valid and invalid statements. Ideological distortion is by definition covert and very hard to detect – irrespective of the 'hermeneutic angle' used and irrespective of the number and diverse nature of the group of interpreters. Ideology warps the relationship between social reality and the expression of social values and this distortion happens systematically and over a very wide spectrum. A 'bigger picture' is created, that, although it is inherently false, still conforms to Gadamer's 'anticipation of completeness'. This, I think, makes it very difficult for hermeneutics to make a claim as to the possibility of pure or untainted understanding.

This brings up the problem of what could possibly be used as the external standard against which hermeneutic consensus should be measured. Habermas proposes an idealised model of communication, the so-called 'ideal speech situation'. Eagleton provides the following lucid summary of Habermas's idealised construct:

> [The ideal speech situation] would be one entirely free of domination, in which all participants would have symmetrically equal chances to select and deploy speech acts. Persuasion would depend on the force of the better arguments alone, not on rhetoric, authority, coercive sanctions and so on. This model is no more than a heuristic device or necessary fiction, but it is in some sense implicit even so in our ordinary, unregenerate language dealings…. Our most despotic speech acts betray, despite themselves, the frail outlines of a communicative *rationality*: in making an utterance a speaker implicitly claims that what she says is intelligible, true, sincere and

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20 Habermas *Toward a Rational Society* 361.

21 See Gadamer *Philosophical Hermeneutics* 18–43 for his answer to Habermas's critique.

22 Gadamer *Philosophical Hermeneutics* 35.

> appropriate to the discursive situation… There is, in other words, a kind of 'deep' rationality built into the very structure of our language, regardless of what we actually say, and it is this which provides Habermas with the basis for a critique of our actual verbal practices. In a curious sense, the very *act* of enunciation can become a normative judgement on what is enunciated.[23]

Gadamer replies by condemning the ideal of rational consensus, a consensus without prejudice or distortions, as 'shockingly unreal'.[24] He compares it to medieval theories about the 'angel' representing intelligence, and who has the advantage of seeing the real character of God.[25] In his view the rationality of a tradition cannot be measured against the *abstract* ideal of absolute knowledge or unforced consensus. Rather, it should be judged from the perspective of a concrete and practical context, as being the degree of knowledge and openness that is possible at a specific time and under specific circumstances. Traditions evolve naturally and in the process they do overcome prejudices and expose ideological distortions. This, however, does not happen in the linear way that Habermas suggests. At each point our perceptions are tied to a specific historical horizon and hence there is no direct progression in the direction of absolute transparency.

To counter this criticism, Habermas goes on to postulate a complicated and controversial 'program of universal pragmatism'.[26] He claims that the idea of unforced or 'ideal' communication is in fact not as artificial as Gadamer makes it out to be. Rather, it is an implied possibility in communication practices used in everyday life. Competent speakers defend their statements and actions by way of providing rational reasons and arguments. By calling on 'reasons', they presume that their arguments *can* be substantiated by rational discourse, in other words, that their arguments will be accepted because they are objectively the 'best arguments'. General communication practices indicate in the direction of 'ideal speech conditions', where speakers are concerned with finding the truth and the conversation is free from implicit or explicit force.

From the perspective of Du Plessis's 'open community of interpreters' – arguably also an idealised construct – there is a problem with the cultural specificity of Habermas's theory. Indeed, Habermas admits that his version of the rational structure of communication reflects the influence of Western traditions.[27] One aspect of this influence is the presumption that all speakers are capable of distinguishing between different types of statements. Also, that they can discriminate between suitable and unsuitable arguments to support different types of arguments. Habermas acknowledges that these distinctions are not universal. He even refers to so-called 'undifferentiated' mythical world views, where different categories of statements (such as religious, juridical or scientific) are not distinguished. This admission begs the question whether Habermas's idealised communication model is nothing but a version of current Western tradition and therefore deeply context and time specific, in other words, a good example of the limits of the Western 'horizon' of understanding.

Habermas further makes the very contentious statement that human capacity for communication evolves. The differentiated worldview of modern (Western) societies represents,

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23 Eagleton *Ideology: An Introduction* 130.
24 Gadamer 'Replik' 314.
25 Gadamer 'Replik' 304.
26 For a critical overview, see McCarthy 'Rationality and relativism: Habermas's "over-coming" of hermeneutics' 57–78. Also see Benhabib *Critique, Norm and Utopia* chaps 7–8.
27 Habermas *The Theory of Communicative Action* vol.1: *Reason and Rationalization of Society* 48–53.

not one of many alternative and equally valid worldviews, but rather a progression in human development.[28] This idea of a 'higher degree' of cognitive development puts Gadamer's goodwill towards the text and towards other interpreters in question. There is no initial assumption that the other 'may be right' and hence no real purpose in entering into dialogue at all. Habermas claims that this is all a matter of getting the balance right: the interpreter should keep in mind that the text or the other interpreters *may* be right, but he also needs to consider that he is part of a specific 'developed' tradition, and therefore he is also likely to be right. He criticises Gadamer's 'anticipation of completeness':

> Gadamer gives the interpretive model of *Verstehen* a peculiarly *one-sided twist*. If in the performative attitude of virtual participants in conversation we start with the idea that an author's utterance has the presumption of rationality, we not only admit the possibility that the interpretandum may be exemplary *for us*, that we may learn something from it; we also take into account the possibility that the author could learn something *from us*.[29]

As can be expected, Habermas's argument, and the research he relied on, was met with serious opposition. He relied, amongst other things, on Piaget's research on the cognitive development of children and Kohlberg's version of moral development.[30] Both these writers are often criticised for their Eurocentric and male bias. For instance, Gilligan has pointed out that women are generally placed lower on Kohlberg's scale of moral development than men.[31] Does this suggest that men can, as a rule, not learn anything from women? Likewise, is it unlikely for adults to be able to learn anything from children?[32] Admittedly Habermas never made any such claims, but it is nevertheless clear that he regards a specific view of the world (his) as the most highly developed and then he 'reads back' the various stages of the so-called 'development process'.

On logical grounds there are two objections to Habermas's 'programme of universal pragmatism'. First there is the question of how it can be possible to make *our* (Western) differentiations generally applicable to all communication, when it is clear that there are cultures or societies, which are functioning well without them. Does it imply that the *entire* 'other' culture, and all the communications taking place within that culture, is thus distorted? The second question is how we can prove that Western communicative ability is functioning on a higher plane of development than in other cultures, if all the research to support such a finding already accepts that it should be proven. Warnke asks the following pertinent question:

> How do we escape the vicious circle in which we accept as the principle of research – differentiated as opposed to undifferentiated world-views – precisely that which is at issue: namely, the greater cognitive adequacy of the latter?[33]

Taking the entire debate into account, I nevertheless think that Habermas's critique of Gadamer is important – despite the obvious problems with his theory, especially within the context of heterogeneous societies and the potential undermining of the 'open society of interpreters'. If we take juridical interpretation as an example, it becomes clear that

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28 Habermas *ibid* 48 warns that this statement is at present only a 'research project' and that its truth has not been established.

29 Habermas *The Theory of Communicative Action* 134.

30 Habermas *Communication and the Evolution of Society* 205.

31 See in general Gilligan *In a Different Voice*.

32 See McCarthy 'Rationality and relativism: Habermas's "over-coming" of hermeneutics' 69–72.

33 Warnke *Hermeneutics, Tradition and Reason* 134.

Gadamer's 'goodwill' towards the text and towards his fellow interpreters, coupled with his optimistic 'anticipation of completeness', cannot be completely realistic. To assume, at the outset, that all participants in the extended community of interpreters will be solely focussed on finding the truth and that the outcome will be a rational (harmonious) synthesis of views, may lead to disappointment. Habermas must be credited for making a serious, albeit flawed, attempt to combine critical reflection with hermeneutic understanding. Habermas, like Gadamer, is clearly in favour of interpretive harmony. Unlike Gadamer, however, he would not tolerate off-key players and he would conduct the orchestra with an iron baton.

Turning to Richard Rorty and other exponents of so-called pragmatic hermeneutics, one finds a related process: they accept the basic value of Gadamer's insights into hermeneutics, but are circumspect about the manifest theoretical and practical problems associated with it. However, the concerns raised by the 'new pragmatists' are very different from those raised by Habermas's critical school.

Rorty, like Habermas, agrees with Gadamer that it is impossible for interpreters to somehow escape their own historicity. Interpreters, he says, cannot simply 'step outside (their) skins'.[34] All understanding is provisional and all understanding is linked to the interpreter's specific cultural and historical background. Unlike Habermas though, Rorty does not believe that 'truth' can be tested against some kind of universal knowledge or enduring moral values.

Rorty denies that his dismissal of epistemology would lead to a form of radical relativism. The absence of neutral or external criteria against which to judge the validity of conflicting claims does not mean that one is incapable of choosing between them. What it does mean is that the reasons for the decision why one claim is preferred, cannot be provided at the outset and with reference to objective truth or to universal moral principles. Reasons for the decision will emerge during the conversation and as a result of a process whereby the concrete advantages and disadvantages of each claim will be considered. Rorty describes this process as 'pragmatic', rather than 'dogmatic'. Interpretive conflict can be resolved by way of dialogue, taking into account the specific aims of the participants which, under current conditions, 'make sense' for them.

Habermas questions, rightly, how one can ensure that the arguments and points of view of the participants are not tainted by damaging strands of ideology (of which the participants themselves may even be unaware). Rorty's suggested solution is a rather drastic narrowing of the interpretive community. Undistorted interpretation is possible, in his view, only where participants share common values and principles. Although he admits that for him it would be Eurocentric values which 'make sense', he is not elevating these values, like Habermas does, to universal or superior standards. In a different context, Rorty explains that *for him*, undistorted values are 'employing *our* criteria of relevance where we are the people who have read and pondered Plato, Newton, Kant, Marx, Darwin, Freud, Dewey, etc'.[35] His argument is that he does not have to prove that his (Eurocentric) system of values is superior or more developed than any other system, merely that this is the only system that makes sense to *him*. He writes: 'We Western liberal intellectuals should accept

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34 Rorty *Consequences of Pragmatism: Essays, 1972–1980* xix.
35 *Ibid* 173.

the fact that we have to start from where we are and that this means that there are lots of views which we simply cannot take seriously.'[36]

He explains that his ethnocentrism is underpinned by his belief that meaningful human existence can only be possible from a position of solidarity with the group one finds oneself in.[37] Humans tend to favour their own groups without external or objective evidence that their group's position is more correct or more justifiable than that of other groups. This does not imply that people are necessarily completely uncritical towards their own tradition and history. It does mean that the scope of critique is limited and that it will always remain within the parameters of 'acceptable alternatives'. He does admit that within some groups, for example very orthodox religious groups, the 'acceptable alternatives' may be very few. Stepping outside the religious/cultural/historical boundaries, for instance by launching an attack on firmly entrenched concepts, is both futile and impossible. Rorty explains:

> To be ethnocentric, is to divide the human race into the people to whom one must justify one's beliefs and the others. The first group – one's *ethnos* – comprises those who share enough of one's beliefs to make fruitful conversation possible. In this sense, everybody is ethnocentric when engaged in actual debate, no matter how much realist rhetoric about objectivity he produces in his study.[38]

Hence, debating competing interpretations of the meaning of texts or events is possible only between those who already form part of the same interpretive community and who share a common perception of 'the good'.[39] Bringing this back to language, one can say that each community has a unique 'vocabulary' and only those who share this vocabulary can enter into meaningful conversations with each other. Rorty's example is that of the traditional Indian caste system, which divides people, on a seemingly random basis, into strict hierarchical categories. His view is that it is impossible for Westerners, who are outsiders and who have no substantive relationship to the system, to offer critique or suggestions for improvements. Interpreters should never venture outside the boundaries of the 'normal discourse of the day'. In other words, one can only say what under the circumstances your community will 'allow' you to say:[40] 'There is nothing to be said about either truth or rationality apart from the familiar procedures of justification which a given society – *ours* – uses in one or another area of inquiry'.

Rorty is positive that so-called 'normal discourse' is possible within a (very confined) interpretive community. Because all the participants are 'insiders', it is highly likely that they will accept the outcome of the debate, even if it does not reflect their own personal views. In *Philosophy and the Mirror of Nature*,[41] he explains that 'normal conversations' take place 'within an agreed-upon set of conventions about what counts as a relevant contribution', whilst 'abnormal conversations' take place between '[those who are] ignorant of these conventions or who sets them aside'. On this point Guignon provides the following well-aimed point of critique:

> Critics of Rorty have pointed out that the pragmatist's ethnocentric solidarity in public life would tend to breed an uncritical conformism to the *status quo* which would block out meaningful

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36 Rorty 'Solidarity and objectivity' 3–19.
37 Rorty 'Habermas and Lyotard on Postmodernity' 166.
38 Rorty *Objectivity, Relativism, and Truth: Philosophical Papers* 30.
39 Norris *Uncritical Theory Postmodernism, Intellectuals and the Gulf War* 126 accurately refers to this as 'preach(ing) to the converted'.
40 Rorty 'Habermas and Lyotard on postmodernity' 6.
41 Rorty *Philosophy and the Mirror of Nature* 315–316. Also see Dallmayr *Critical Encounters* 3.

> reflection on the worthiness of our community's convictions. Unflinching commitment here begins to look like closeminded pigheadedness.[42]

Rorty's view can easily be discredited by linking it to ultra-conservative extremists, such as members of anti-Semitic and racist movements or radical religious groups. It is, however, not impossible to find some meeting points between pragmatic hermeneutics and certain current human rights concerns. Problems relating to the interpretation and application of human rights instruments, both on the national and international levels, struggle with the dichotomy between universal values (often synonymous with 'Western values') and cultural specificities.

There is, however, another objection which can be brought against Rorty's ethnocentric theories, namely that they are simply irrational. In order to enter into a 'normal conversation' with Rorty (and by implication with the rest of the eurocentric world), one has to be well-versed in the works of prominent (male) Western thinkers. The compilation of this list, even though Rorty admits that it may be incomplete, is in itself a very good example of an ideological activity. The content and relevance of the list are simply assumed as 'self-evident'. Even if certain blatant omissions from the list were not ideologically inspired, it nevertheless reflects the unequal distribution of power underlying Western thought patterns. There are no reasons to assume that if these thinkers participate in a conversation (by proxy, through their readers) it would guarantee an open and undistorted debate. Even if one assumes, for the sake of argument, that the list of randomly chosen male intellectuals indeed represents the core of Western thought, there is still the very realistic danger that their work can be interpreted in a one-sided or opportunistic manner. The question therefore remains: why should we simply accept, without any reasons provided, that Western values, as represented by the names on Rorty's list, are essential to meaningful discussions? Warnke formulates this question as follows:

> [I]f there is no reason for their importance other than the fact that they have traditionally been taken to be important why should we not move away from tradition and fill in the "etc." by adding Hitler and Stalin?[43]

Rorty admits that his answer inevitably contains a circular argument:

> The pragmatist cannot answer the question 'What is so special about Europe?' save by saying 'Do you have anything non-European to suggest which meets our European purposes better?'[44]

In my view Rorty's denial of the possibility of successful inter-cultural interpretation underestimates our moral and practical will to succeed. It also denies our commitment to shared moral responsibility. It implies that the diverse members of Du Plessis's orchestra, even if they try, can never play in harmony. In fact, they may not even be able to agree on what is 'harmonious'.

Norris, in a strongly-worded retort, condemns Rorty's neo-pragmatism as simply perpetuating ideological biases:

> [T]he upshot of a thoroughgoing neo-pragmatism – an ethics and a politics of Hegelian *Sittlichkeit* pushed to its logical extreme – is to cut away the grounds for any critical assessment of the prejudices, the blindspots or ideological motives that inhabit our own discourses of power/knowledge.

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42 Guignon 'Pragmatism or hermeneutics: Epistemology after foundationalism' 92.

43 Warnke *Gadamer: Hermeneutics, Tradition and Reason* 153–154.

44 Warnke *ibid* 154 is not satisfied with this answer, and replies: '[T]he problem here is that a different kind of pragmatist could ask a similar question, namely, "Do you have anything non-Orwellian or non-Fascist to suggest which meets our Orwellian or Fascist purposes better?"'

> And if the pragmatist in question just happens to speak, like Rorty, from the vantage point of a privileged hegemonic culture, with the power to impose its own values and beliefs on a well-nigh global scale, then there is reason to suspect that other interests are at work behind the liberal-pluralist rhetoric.[45]

My next question relates to the influence of ethnocentrism, not only on interpretation, but specifically on the interpretation of justiciable human rights claims. On the one side we have witnessed the growing recognition of universality: *everybody*, *qua* member of the human race, possesses equal dignity. In the second part of the 20th century, human rights protection has evolved from being not much more than vague aspirational claims to providing justification for enforceable and justiciable claims, protecting some of the most vulnerable members of society. Discriminatory distinctions based on sex, nationality, race or cultural backgrounds have, at least in theory, become obsolete. There is, however, a strong and legitimate suspicion that the conceptualisation and protection of universal human rights, as defined under international human rights law, are not as 'universal' as it may appear. I will make only brief comments on this, by returning to Gadamer's version of a 'true' hermeneutic dialogue.

Even if we are convinced that dialogue, in the hermeneutic sense of the word, is conducive to harmonious interpretation practices, 'dialogue' can take many forms. These forms are distinguishable from each other mainly with reference to the subjective attitudes of the participants – attitudes towards each other as well as attitudes towards the text.

Western liberalism, as a rule, expects wider political and legal frameworks to be capable of 'accommodating' a wide range of very diverse opinions. The protection of freedom of speech and, to some extent, freedom of association stems from this principle of pluralism. The problem is that interpretive conflict, in its more radical manifestations, is also regarded as harmful to the stability and even progress of society. The strategy is thus to 'sideline' any conflict by regarding diverse and incommensurate interpretations as different 'dimensions' of the social experience of pluralistic societies, that is, almost all societies. From the perspective of reaching substantive interpretive agreements, the 'liberal accommodation' of alternative perspectives renders such disparate interpretations meaningless. According to Gadamer, entering into a true hermeneutic dialogue should always carry the risk of the interpreter being 'turned' by the convincing arguments of his opponent. The interpreter should be open to the possibility that his pre-judgements were wrong and he should be prepared to reconsider and if necessary revise his own position. 'Accommodating' others' views does not hold this risk. It means that the interpreter can regard disparate opinions as 'interesting' and even study them as part of an anthropological or cultural study, but that is as far as it goes. One can even admit that 'other' interpretations are correct 'within their own context'. Everyone is allowed their own opinion, but these opinions are not taken seriously enough to subject them to critical scrutiny. Culturally diverse communities thus become moral islands, because *true* dialogue, the kind that can change minds, is regarded as too dangerous or sometimes simply as too much effort.

It seems, at first glance, as if the Western liberal attitude of 'live and let live' is far removed from Rorty's narrow ethnocentrism. Yet, the end result is remarkably similar. Both practices amount to almost limitless relativism, without any serious attempt to enter into a

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45 Norris *Uncritical Theory: Postmodernism, Intellectuals and the Gulf War* 149.

constructive, albeit dangerous or exhausting, hermeneutic dialogue. Douzinas *et al* describe the relationship between pragmatic hermeneutics and Western liberalism thus:

> Pragmatist hermeneutics does not see as its task to justify any truth claims or the authority of alien or past traditions or cultural concerns. It is just interested in keeping the conversation between the familiar and the strange moving, and believes in its educational and edifying character. It is a sophisticated defence of American liberalism as a pluralistic culture that needs no truths.[46]

Does this mean that Badiou is correct in his view that all attempts at cultural 'inclusion' are meaningless and even potentially harmful? In an interview in 2001 he made the assertion that the notion of 'respect for the Other' is indicative of a hegemonic attitude. He then made the following rather shocking remarks:

> I must particularly insist that the formula 'respect for the Other' has nothing to do with any serious definition of Good and Evil. What does 'respect for the Other' mean when one is at war against an enemy, when one is brutally left by a woman for someone else, when one must judge the works of a mediocre 'artist', when science is faced with obscurantist sects, etc.? Very often, it is the 'respect for Others' that is injurious, that is Evil. Especially when it is resistance against others, or even hatred of others, that drives a subjectively just action.[47]

It seems that 'respect for differences' would always amount to 'respect for *reasonable* differences' and would thus not repudiate modernist identity-thinking, but rather serve to delineate and fortify an already dominant identity. The conversational form that this takes is that the speaker or interpreter adopts an attitude of 'cultural modesty' and claims that all our views are relative and conditioned by historical patterns. Žižek points out that this modesty is somewhat suspect since it is always the dominant groups who can afford such 'luxury of tolerance'. He quotes Chesterton on this:[48]

> At any street corner we may meet a man who utters the frantic and blasphemous statement that he may be wrong. Every day one comes across someone who says that of course his view may not be the right one. Of course his view must be the right one, or it is not his view.[49]

Žižek regards this type of diffidence as a smokescreen and says that the 'apparently modest relativization of one's own position is the mode of appearance of its very opposite, of privileging one's own position of enunciation'.[50]

Critical theory has thus through a very slow movement, brought us to somewhat of an impasse and it seems that Du Plessis's 'open community of interpreters' has nowhere to turn: Gadamer is too indiscriminating; Habermas is too judgmental; Rorty is too insular and narrow-minded; 'tolerance' is regarded as hypocritical. What are the options for the disillusioned interpreter, the one who has lost faith in the possibility of interpretive harmony? Continuing Du Plessis's musical metaphor, but changing *genre*, I will consider two options. The first is the modernist asceticism of Adorno and Schoenberg's 'new music'. What would happen if notes could relate only to each other and only at that particular time, without the possibility of resolution by the key signature? Is it possible for the law to endure under the stark conditions of atonality? Second, and not unrelated, I will consider the potential of 'interpretation by improvisation', in other words, where (singular)

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46 Douzinas *Postmodern Jurisprudence: The Law of Text in the Texts of Law* 43.
47 Badiou 'On evil: An interview with Alain Badiou' 72.
48 Žižek *Welcome to the Desert of the Real* 78.
49 Chesterton *Orthodoxy* 37.
50 Žižek *Welcome to the Desert of the Real* 78.

performance outweighs stable and repeatable composition. For this I will turn to Derrida's notion of 'freeplay' – interpretation which, for Derrida, 'plays the game without security'.[51]

3 Alternatives: Adorno and/or Derrida?

As a member of the Frankfurt School of critical theory, Adorno, more than any other member of the group, interested himself in aesthetic theory and specifically in the critique of modern culture. His real passion, however, was music, and specifically so-called *New Music* as controversially practiced by Schoenberg. Adorno's interest was not primarily focused on artistic merit, but rather on the problematic relationship between music, as a distinct branch of aesthetics, and socio-political positions. His initial idea was that the connection between music and society is dependent on 'reconciliation between compositional freedom and technical necessity' and the idea that such reconciliation would lie at the heart of modern philosophy.[52] In *Philosophy of New Music* he states that the 'confrontation of the composer with the material is the confrontation with society'.[53] This, I will argue, also applies to some extent to the confrontation of the (constitutional) interpreter with the legislative material. Adorno maintained that it may be possible, albeit very difficult, to oppose the compelling influences of mass culture by preserving a crucial moment of critical and historical self-consciousness. Not doing justice to the range and complexity of his ideas on this topic, I will focus on a few aspects of Adorno's *Philosophy for New Music* and make some remarks concerning his views on language and interpretation from his unfinished book on Beethoven.[54]

In *Philosophy for New Music*, Adorno shows that *new music*, and especially the work of Schoenberg, has the capacity to insulate or protect itself from the harmful influences of the excesses of the modern culture industry. New music, which one can possibly equate with the terms 'dissonant music' or 'atonal music', thus has the potential of becoming a repository for the essence of *critical* historical experience. In order to understand this line of thinking it is important to see, first, what it is that Adorno is opposing and, second, how Adorno can attach such significance to the role of dissonance or atonality in music theory.

Adorno argues that the appeal of mass culture is situated mainly in a perception of the past as anecdotal and sentimental – an endless repetition of portrayals and representations of an already-existing world. Popular music portrays the sentiments of past journeys and past experiences. Photographs repeatedly transport one back to an emotionally-laden 'second frozen in time'. This presents, for him, a 'dull sign of an irretrievable past'. *New Music*, together with other forms of modernist visual art, such as that of Picasso and Kandinsky, reject this illusionist form of representation. It demands a focus on 'what is, the real and the truthful'. Hullot-Kentor explains that the movement of modernist art is therefore fundamentally against fiction and towards essence.[55]

The second question on the relevance and influence of dissonance or atonality requires a more technical explanation, which cannot be fully achieved in this context. The starting point is the divergent views on the nature of musical material. According to the Enlightenment concept of Persichetti, musical material can be seen as neutral raw material: 'Any

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51 Derrida 'Structure, sign, and play in the discourse of the human sciences' 369.
52 Bowie 'Adorno, Heidegger and the meaning of music' 5.
53 Adorno *Philosophy of New Music* 36.
54 See Adorno *Beethoven: The Philosophy of Music; Fragments and Texts*.
55 Hullot-Kentor *Things beyond Resemblance: Collected Essays on Theodor W. Adorno* 75.

tone can succeed any other tone, any tone can sound simultaneously with any other tone or tones', and so forth. In contrast Adorno insisted that musical material is always already part of the social world. The implication is 'the social consciousness that historically organized sound cannot be subtracted from any particular chord'.[56] Not only is music inescapably bound up with history, this link between history and music is covert and there is very often no direct reference to society or history and the music thus appears to be 'natural'. Hullot-Kentor explains that '[t]his aesthetic sublimation of the explicitly historical culture of sound is transformation of history into nature, a second nature'.[57] It is what Barthes would have referred to as 'mythification'. In order to prevent such unconscious (one can maybe say ideological) writing of history, it is necessary to compose music/history from the perspective of *the present*. The first composer, some may say 'anti-composer', to attempt this radical divergence from musical tradition was Arnold Schoenberg, who performed his first atonal work in 1908. The last movement of the piece (the Second String Quartet, Op. 10, with soprano) had no key signature and no diatonic harmonies. This was an astounding musical innovation, by which he not only broke away from Pythagorean theories of harmony, he also, relatedly and maybe more importantly, broke away from the traditional semblance of subjectivity as repetition. His work was not based on reduction to a tonal centre and therefore the composition of sequentiality (rather than repetition) became important. In a way the present (essence), replaced the past (representation). Adorno describes it as such:

> The truly revolutionary element in Schoenberg's work is the changed function of musical expression. Passions are no longer simulated, but rather genuine emotions of the unconscious – of shock, of trauma – are registered without disguise.[58]

In *Philosophy of New Music* Adorno defends Schoenberg's controversial work and comes out in theoretical support of his view of music as a dissonant order. Dissonance represents a freedom from the bindings of history and the possibility of a transformed subjectivity. Hullot-Kentor explains the far-reaching implications of such freedom, namely 'that what has transpired historically did not need to have happened and does not need to continue'.[59]

In *Beethoven: The Philosophy of Music: Fragments and Texts*, Adorno reflects more fully on the interaction between music and society and relatedly, on the relationship between music and language. He elaborates on his previous view that music is fundamentally ideological – perhaps even more so than language and visual art. He explains that this is due to the fact 'that it *begins*, that it *is* music at all – its language is magic in itself, and the transition into its isolated sphere has an a priori transfiguring aspect'. Music thus sets up 'a second reality *sui generis*'.[60] Following Barthes one can perhaps say that music is already so heavy with meaning, so saturated that it cannot be other than second-level mythical signification. Music is (also) the most 'consoling' of art forms and therefore it is 'more completely under [its own] spell of illusion'. According to Bowie this has the effect, in Adorno's scheme, of contributing 'to existing injustice by reconciling listeners to reality *as it already is*'.[61] However, and this is very important, Adorno also speaks of the 'immanent movement' of music. By this he means that 'music's lack of objectivity and unambiguous

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56 Adorno *Beethoven* 182.
57 Hullot-Kentor *Things beyond Resemblance* 182.
58 Adorno *Philosophy of New Music* 39.
59 Hullot-Kenntor *Things beyond Resemblance* 67.
60 Bowie 'Adorno, Heidegger and the meaning of music' 4.
61 *Ibid* (own emphasis).

reference' makes it '*freer* than any other art'. Musical material can be 'dissolved into the autonomy of form', can *escape* form, which is not the case for great literature or painting.

Textual/legal interpretation admittedly seems to require a much narrower perspective. My contention, however, is that the central question to be answered remains the same: how can one account for the relationship between 'material' that is pre-given in the social world and what the artist or interpreter can spontaneously achieve with this material? What is to be avoided is an attachment to self-confirming reality, or, in Heideggerian terms, an apophantic judgement (which Adorno equates with tonal music). The ideological and political functions of music, and I will argue also of language, *must* be confronted. This implies a rejection of a 'return to the past', a rejection of the comfort of repeating past conventions and failing to engage with contemporary society by new use of musical/ linguistic material.

I will conclude this cursory discussion of Adorno with a reference to the so-called two-sided 'linguistic' character of music. The semiotic roots of this distinction are clear. On the one hand there is the 'natural material' of music, which is incorporated into a 'more-or-less fixed system', akin to the system of language conventions. Such conventions are independent of individual users, but at the same time they are available to users as a means to express themselves. On the other hand there is music as expression, which Adorno describes as a survival of 'the inheritance of the pre-rational, magical, mimetic', and which relates to language as expression. The problem with this mimetic aspect of expression is that it becomes increasingly 'subjectively mediated and reflected', as an 'imitation of what happens on the inside of people'. Referring to Beethoven's tonal music, Adorno explains the ensuing 'crisis of expression', which followed the shift away from the connection between convention and expression:

> The process of the linguistification of music also entails its transformation into convention and expression. To the extent that the dialectic of the process of enlightenment essentially consists in the incompatibility of these two moments, the whole of Western music is confronted with its contradiction by this dual character. The more it, as language, takes into its power and intensifies expression, as the imitation of something gestural and pre-rational, the more it at the same time also, as its rational overcoming, works at the dissolution of expression.[62]

From the brief synopsis above two aspects of Adorno's theory can be identified as perhaps useful to the activity of textual interpretation, and maybe even useful to the particularities of legal interpretation: The first is an insistent focus on the transformational power of the present and its converse, namely the rejection of 'second-hand' subjectivity, or subjectivity rooted in repetition. The second aspect, relating more to Adorno's later work, points out the fine dialectical balance between convention and expression. Expression without convention has no social significance. Radical individuality means that the only convention is 'the refusal to accept anything dictated by convention'. Without its counterpart it is emptied out and becomes a repetition of its own 'conventional expression'.

Derrida's work, and especially 'Structure, Sign, and Play in the Discourse of the Human Sciences' is not completely unrelated to the above. He addresses the advent/event of what I will call structuralist *interpretation anxiety*. He explains that in Western philosophy and Western science, the word 'structure' has always been understood as conditional on the presence of a centre or a fixed point of origin.[63] The function of the centre is to orient,

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62 Adorno *Musikalische Schriften V* 61 as trans. in Bowie *Music, Philosophy and Modernity* 362.

63 Derrida 'Structure, sign, and play in the discourse of the human sciences' 352.

balance and organize the structure, akin to Du Plessis's key signature. This is done, first, by permitting and facilitating *freeplay* within the parameters of the structure, and second, by *limiting* the nature and extent of this *freeplay* within the structure. In itself, the centre is stable and unique. It is closed off from transformation and as 'the thing' which organises the structure, it cannot be regarded as part of the structure. Derrida explains that it 'governs the structure, while escaping structurality'.[64] In true Derridean fashion the centre is therefore simultaneously inside and outside the structure.

Seen like this the centre seems to provide stability, comfort and certainty to the process of interpreting. *Qua* centre it is not subject to *freeplay* and can thus provide the stability of that which is not 'part of the game' or that which cannot be 'implicated in the game'.[65] The referee is not a player and the conductor is not part of the orchestra. In main-stream music theory the *centre* can perhaps be seen as the key signature: the tonal key which is accompanied by notes in a hierarchical order and which relates to the key signature and to themselves throughout the duration of the composition. However, within the disciplinary structure of the centre, the *freeplay* of the hierarchical notes will eventually resolve back to the original, or new, key signature.

In 'Structure, sign, and play', however, Derrida points out that the so-called 'event' or 'rupture', which although it is announced by what is referred to as 'structuralism', has 'always already begun to proclaim itself and begun to *work*', and which makes it necessary to re-think the strategic position of the centre.[66] The centre can no longer be regarded as a fixed and present *locus*, but rather as a function 'where an infinite number of sign substitutions [come] into play'.[67] The *key* (the transcendental signifier) is no longer absolutely present and it is no longer outside the structure. The implication is that the interpreter can no longer rely on *freeplay* to be contained. Without a fixed centre, 'everything [becomes] discourse'.[68]

Legal theory is regarded as one of the so-called 'human sciences', and therefore it is directly affected by the perceived displacement of the centre. However, at the same time it is clear that the discipline originated from and functions within the element of discourse. But, as has already been seen above, all discourse is not necessarily of equal value: '[t]he quality and fecundity of a discourse are perhaps measured by the critical rigor with which this relationship to the history of metaphysics and to inherited concepts is thought'.[69] What Derrida is asking for is not that we abandon the use of language, which is after all our only tool, but that we do not regard it as separate from the Western metaphysics it derives from. We are working with language, which 'within itself [bears] the necessity for its own critique'.[70] This is something, I think, which Adorno would be able to agree with.

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64 Petrović 'Remembering and dismembering: Derrida's reading on Lévi-Strauss' 91 gives the example of God in the Biblical text: 'His presence at the centre of the story is paradoxically guaranteed by his existence outside the story, as its origin, independent of and prior to, self-identical and self-sufficient: he is who he is'.

65 Derrida 'Structure, sign, and play in the discourse of the human sciences' 352.

66 See *ibid* 351–354.

67 *Ibid* 353–354.

68 *Ibid*.

69 *Ibid* 356.

70 *Ibid* 358.

How does one go about this? How does one preserve and use something as a tool whilst at the same time criticising its truth-value? Derrida draws on Lévi-Strauss in this regard and he describes the method as follows:

> [It consists] in conserving in the field of empirical discovery all the old concepts, while at the same time exposing here and there their limits, treating them as tools which can still be of use. No longer is any truth-value attributed to them; there is a readiness to abandon them if necessary, should other instruments appear more useful. In the meantime, their relative efficacy is exploited, and they are employed to destroy the old machinery to which they belong and of which they themselves are pieces.[71]

Lévi-Strauss, in the first chapter of *The Savage Mind*, refers to this as *bricolage*.[72] *Bricolage* usually points to a method whereby something is constructed from that which happens to be available: musicians use pots and pans, artists use 'found objects' or do collage, actors improvise – using the words 'at hand'. Derrida, referring to the work of Genette,[73] attaches a far wider significance to the work of the *bricoleur*, to the extent that it is 'even possible to say that *bricolage* is critical language itself'.[74] The implication of this seems to be that a total break with the past is impossible. One cannot construct discourse 'out of nothing', or something out of 'whole cloth',[75] as Lévi-Strauss puts it. The opposite figure, namely that of the 'engineer', being someone who can construct something wholly original, is thus regarded by Lévi-Strauss as a myth. Furthermore – this myth of the engineer is (possibly) produced by the *bricoleur* himself.

In the 'Overture' to *The Raw and the Cooked* Lévi-Strauss explains that myth does not have a fixed source or an absolute centre. It is thus necessary, adds Derrida, 'to denounce the *episteme* which absolutely requires… that we go back to the source, to the centre, to the founding basis, to the principle, and so on'.[76] Lévi-Strauss chose a musical model for the composition of his book,[77] and the metaphor, although not always appreciated,[78] may nevertheless be apt:

> [T]he myth and the musical work thus appears as orchestra conductors whose listeners are the silent performers. If it be asked where the real focus of the work is to be found, it must be replied that its determination is impossible. Music and mythology bring man face to face with virtual objects whose shadow alone is actual… Myths have no authors.[79]

Freeplay, be it *freeplay* with history or *freeplay* with presence, can be perceived from the perspective of either a nostalgic loss or from the perspective of a joyous affirmation – as either Rousseauist or Nietzschean, as Derrida puts it.[80] The nostalgic view of *freeplay* longs for a return to origins, a return to 'an ethic of archaic and natural innocence' (Derrida).[81] For many South African legal scholars this longing is for the heady days of post-apartheid euphoria. It is a longing for openness and inclusiveness, for freedom and tolerance, for harmony. Such nostalgia is, for Derrida, to 'live like an exile the necessity of interpretation'.

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71 *Ibid* 359.
72 Lévi-Strauss *The Savage Mind* 274.
73 Genette 'Structuralisme et critique littéraire'.
74 Derrida 'Structure, sign, and play in the discourse of the human sciences' 360.
75 *Ibid*.
76 *Ibid* 362.
77 See also Lévi-Strauss 'Finale' of *The Naked Man*.
78 See Prieto *Listening in: Music, Mind, and the Modernist Narrative* 259.
79 Lévi-Strauss *The Raw and the Cooked* 5–6.
80 Derrida 'Structure, sign, and play in the discourse of the human sciences' 369.
81 *Ibid*.

The alternative, following Nietzsche, is an affirmative *freeplay*, which Derrida describes as being 'without truth, without origin' and, indeed, 'playing the game without security'.[82] These two sides are absolutely irreconcilable, but they are not alternatives. Derrida explains that there is no possibility of interpreters *choosing* between the two sides. We live them simultaneously.

4 Final

According to the basic 'sonata principle', it is very important that in the final movement the material first stated in a complimentary key be restated in the home key.[83] The community of interpreters, however, do not have the consolation of a home key. Being deprived of the stability of the 'centre', interpreters need to live with the fact that there is no-one 'outside the game'. There is no neutral vantage point and there is no conductor.

Lévi-Strauss, however, has pointed to the potential usefulness of *found objects* – and I will include in this category that which we can find in the text of the Constitution and in the work of the community of interpreters. Criticising old tools is not the same as discarding them. We can still use our 'old' concepts, some of which were and still are very helpful. Gadamer, Habermas, and even Rorty, provided us with new insights and new ways of reading. We do, however, have to use them with caution and with full awareness of their heritage – a heritage that may be in the midst of being destroyed.

Turning to Adorno one can possibly conclude that his relentless focus on the present and on 'essence' may be asking too much – we are human after all and maybe we cannot endure under such stark conditions. As for Derrida's *freeplay* – maybe he is asking too little? As a member of the community of interpreters I hope to be closely involved in debating these issues for a long time to come. We know that meaning (in language as in music) is not 'natural', it is a cultural artefact and hence we can make and remake it, according to our needs. Derrida, insightful as always, quoted Montaigne as follows: 'We need to interpret interpretations more than to interpret things.'[84]

The hermeneutic tradition has made important contributions to our understanding of language and interpretation. It has also, on occasion, led us astray. The same can be said about the work of Du Plessis. I am personally very grateful to him for both.

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82 *Ibid*.
83 *The Concise Oxford Dictionary of Music*.
84 Derrida 'Structure, sign, and play in the discourse of the human sciences' 351.

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(In)dignity remembered

*Henk Botha**

1 Introduction

In an article on the recognition of religious difference, Lourens du Plessis describes the judgment in *MEC for Education: KwaZulu-Natal v Pillay*[1] as one which not only affirms, but celebrates difference, and which 'resounds a "not again!", a "nie wieder!" as clarion call of a memorial (or *Mahnmal*) constitutionalism in South Africa'.[2] Du Plessis attaches particular significance to the fact that the case, which concerned a public school's refusal to grant an exemption from a school rule prohibiting the wearing of jewellery to a learner who wore a nose stud as an expression of her South Indian Tamil Hindu culture, did not centre around a practice that was mandatory in terms of the tenets of a religious group or customs of a cultural community. He praises the Court for its insistence that the Constitution protects voluntary as well as mandatory cultural and religious practices, and its recognition of the capacity of obligations that are assumed voluntarily to enhance the individual's dignity and autonomy.[3]

Du Plessis' discussion of the *Pillay* judgment touches on several themes that are central to his work. Most important, for purposes of this essay, is the link that he makes between memorial constitutionalism and the primacy of the constitutional value of human dignity. For him, the Constitution's injunction to remember the injustices of the past and resolve to prevent their recurrence is closely bound up with the role of dignity as an interpretive Leitmotiv in the Constitutional Court's jurisprudence.[4] At first blush, this idea seems neither novel nor particularly controversial. It is often claimed, in case law and academic literature, that the evil of apartheid consisted, first and foremost, in the denial of the basic human dignity of the majority of South Africa's people, and that constitutional interpreters constantly need to remind themselves of the history of the apartheid legal order's systematic violation of the equal dignity and worth inherent in every human being.[5]

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1 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC).

2 Du Plessis 'Affirmation and celebration of the "religious Other"' in South Africa's constitutional jurisprudence on religious and related rights: memorial constitutionalism in action?' 401.

3 *Pillay* par 64: 'A necessary element of freedom and of dignity of any individual is an "entitlement to respect for the unique set of ends that the individual pursues". One of those ends is the voluntary religious and cultural practices in which we participate. That we choose voluntarily rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity'.

4 'On the strength of [memorial] constitutionalism, human dignity as a value has… gained an upper hand in South Africa's constitutional project in general, and in the Constitutional Court's equality jurisprudence in particular.' Du Plessis 'Affirmation and celebration of the "religious Other"' 402–403.

5 See eg *S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) par 329 ('Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a

continued on the next page

It is, nevertheless, the contention of this essay that Du Plessis's work on memorial constitutionalism enables us to question some of the dominant assumptions that are made in the literature on human dignity. His work raises uncomfortable questions about the nature of the link between dignity, memory and constitutional interpretation, even if it does not address these questions directly or answer them conclusively. For instance, how is dignity – a concept that is notoriously difficult to define – to be understood if it is to be the touchstone of memorial constitutionalism? How is our understanding of (in)dignity transformed in the act of commemorating it? What happens to the universal nature of the injunction to respect and protect the dignity of every human being, if we are to honour it through the remembrance of particular historical instances of its denial? Conversely, are we not in danger of losing sight of the concrete particularity of individuals and the harms they suffer, when we look at them through the lens of the universal? Don't we risk conditioning dignity on preconceived understandings of autonomy and personhood? Doesn't his endorsement of the judgment in *Pillay* signal an uncritical equation of dignity with autonomy, and a neglect of the constitutive ties, constraints and networks of interdependence making us who we are?[6]

Drawing on Du Plessis's rich account of memorial constitutionalism and analyses of case law, and supplementing them with further theoretical reflections on dignity, constitutionalism and remembrance, the essay suggests some tentative links that could help us come to terms with the above questions.

2 Monuments and memorials

The relationship between constitutionalism and remembrance has been a major theme in Lourens du Plessis' work of the past decade and a half.[7] Drawing in part on an influential contribution by Johan Snyman,[8] Du Plessis distinguishes between two modes of constitutional remembrance, namely monumental and memorial constitutionalism. He explains that monuments involve 'an exultant or jubilant mode of remembering',[9] through which heroes or historic achievements are 'celebrated or lionised'.[10] Memorials, on the other

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denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution'); Ackermann *Human Dignity: Lodestar for Equality in South Africa* 9–10 ('The [apartheid] state did its best to deny to black South Africans that which is definitional to being human, namely the ability to understand or at least define oneself through one's own powers and to act freely as a moral agent pursuant to this understanding or self-definition. Black people were treated as means to an end and hardly ever as an end in themselves; an almost complete reversal of the categorically imperative concept of priceless inner worth and dignity').

6 See Barnard-Naudé, Cornell & Du Bois (eds.) *Dignity, Freedom and the Post-Apartheid Legal Order: The Critical Jurisprudence of Laurie Ackermann* for reflections on the relation between dignity and autonomy.

7 See eg Du Plessis 'The South African Constitution as memory and promise'; Du Plessis '*AZAPO*: monument, memorial... or mistake?'; Du Plessis 'The South African Constitution as monument and memorial, and the commemoration of the dead'; Du Plessis 'Affirmation and celebration of the "religious Other"'.

8 Snyman 'Interpretation and the politics of memory' 312.

9 Du Plessis 'The South African Constitution as memory and promise' 385–386.

10 *Ibid* 385.

hand, are more restrained: rather than celebrating – an often idealised or sanitised version of – historic events, they commemorate the past and serve as a warning against the repetition of past blunders and violations.

Both these modes of remembrance are at work in the text and interpretation of South Africa's Constitution. Monumental constitutionalism celebrates the fundamental break between an unjust past and a bright new future based on democracy and human rights. It draws attention to the divisions and injustices of the past in order to emphasise the Constitution's promise to overcome them. Its tone is bold and optimistic. In an adjudicative context, it often issues in forceful assertions of constitutional supremacy and strong exercises of judicial power. Memorial constitutionalism, by contrast, is more modest. It does not assume that the violations of the past have been, or are about to be overcome, but draws attention to such violations precisely because it fears that history may repeat itself. The discrimination and domination of the past may (still) be deeply entrenched in the fabric of society and its institutions. Past patterns of disadvantage may be perpetuated, and new forms of oppression legitimated in the name of the unity of the people that is boldly proclaimed in the constitutional text. Memorial constitutionalism is, accordingly, less optimistic about the capacity of social actors – struggle heroes, the founding mothers and fathers, judges or the people themselves – to change the course of history through bold interventions. It emphasises our responsibility to the victims of past abuses, and worries about the selectivity of our memory and our propensity to forget.[11] It is distrustful of sweeping narratives and bold assertions of judicial power, shows a clear preference for forms of analysis that include a careful consideration of the social and historical context, and cautions judges to exercise self-restraint.

In Du Plessis's view, the success of the constitutional enterprise hinges on our ability to keep monumental and memorial constitutionalism in balance.[12] But even though he resists subjecting the one to the other, his work in this area focuses mainly on the prevention of the first of these dangers, and on thinking through the implications of a memorial understanding of the Constitution. There are times when the Constitution as monument must be invoked, when constitutional supremacy must be forcefully asserted, or when it is appropriate to celebrate the achievements of the past. In Du Plessis's view, though, the majority of cases call for a more modest and cautious approach. Absolute right must give way to a careful negotiation of conflicts among countervailing rights, principles and interests. Bold assertions of constitutional supremacy must be qualified with reference to the network of institutions created by the Constitution, and the need for these institutions to cooperate in their endeavours to give effect to the Constitution. Broad generalisations over the ills of our colonial and apartheid past must make way for more nuanced understandings of the historical injustices to which the Constitution responds, which are alive to the complexity of past patterns of disadvantage.

There is an affinity between Du Plessis's view that, in the ordinary course of things, an understanding of the Constitution as a memorial is better able to guide judicial decision making than a vision of the Constitution as a monument, and his views on language,

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11 See Van Marle 'Lives of action, thinking and revolt – a feminist call for politics and becoming in post-apartheid South Africa'.

12 Du Plessis 'The South African Constitution as monument and memorial' 197 writes: 'The Constitution's promise of a democratic *Rechtsstaat* can only be kept if the Constitution as monument is not allowed to overpower the Constitution as memorial, but also when the Constitution as memorial does not enervate the Constitution as monument.'

interpretation and the community of constitutional interpreters. In a nutshell, the author rejects the idea that there is a single, authoritative method of interpretation that enables the interpreter to extract or receive the correct meaning from a legal text, and then to apply that meaning to any given factual situation in a detached or semi-detached manner. For him, interpretation involves working with different interpretive aids, methods and theories, which sometimes pull in different directions and resist systematisation within a single, unified and failsafe method. The resulting tensions cannot be resolved once and for all, but need to be negotiated – and renegotiated – within the context of particular cases.[13] Given the contested nature of interpretation and the dynamic interplay of general legal norms and specific factual scenarios, judges are well advised, in the majority of cases, to adopt a modest approach. This approach resists deciding more than is necessary, acknowledges that judges form part of a 'a pluralistic, "open community of constitutional interpreters"',[14] and respects the role of various organs of state and the diverse associations, communities, individuals and organisations comprising civil society in generating legal meaning through their interpretations of and reliance on the constitutional text. For Du Plessis, such an approach, with its careful attention to the specific social context and its sensitivity to notions of subsidiarity[15] and institutional comity, is closely allied to the idea of the memorial Constitution.

3 Memory and context

Du Plessis's juxtaposition of the judgment in *Crossley v National Commissioner of South African Police*[16] with the one in *Bührmann v Nkosi*[17] illustrates the link in his thought between dignity, memorial constitutionalism and contextual modes of reasoning. In *Bührmann*, it was held that the right of an occupier of farm land to bury her son on the farm in accordance with her culture and religious beliefs was outweighed by the owner's property rights. Du Plessis is critical of the monumental manner in which the Court proclaimed the absolute nature of ownership by treating the loss of an area of about 2 metres by 1 metre as a serious curtailment of the owner's property rights.[18] He points to the 'extremity' of the parallels that the Court drew in shoring up the property argument,[19] by claiming that requiring the landowner to permit the burial of the applicant's son was akin to demanding a right to erect a church or tabernacle on the property. These parallels were out of proportion to what the respondent was asking for, and invoked a 'parade of horribles'[20] which

13 See Du Plessis 'Interpretation' chap 32.
14 Du Plessis 'Legal academics and the open community of constitutional interpreters' 214 (citing Häberle *Verfassung als öffentlicher Prozess: Materialien zu einer Verfassungstheorie der offenen Gesellschaft* 155–181).
15 Du Plessis '"Subsidiarity": What's in the name for constitutional interpretation and adjudication?'
16 [2004] 3 All SA 436 (T).
17 2001 (1) SA 1145 (T). Du Plessis's discussion focuses for the most part on the judgment on appeal of the full bench of the then Transvaal Provincial Division (TPD). From there, the case proceeded to the Supreme Court of Appeal (SCA), which dismissed the appeal in *Nkosi v Bührmann* 2002 (1) SA 372 (SCA). As Du Plessis indicates, the reasoning of the SCA was similar to that of the full bench of the TPD.
18 Du Plessis 'The South African Constitution as monument and memorial' 197–200, 202–203.
19 *Ibid* 199–200.
20 Du Plessis 'Affirmation and celebration of the "religious Other"' 400.

made it far easier to circumscribe – and ultimately sacrifice – the religious rights of occupiers in terms of the Extension of Security of Tenure Act 62 of 1997.

In *Crossley*, on the other hand, an application brought by the accused in a murder trial for an urgent interdict to stay the victim's funeral, so as to enable forensic evidence to be gathered, was dismissed. Du Plessis praises the Court for its refusal to rank the conflicting rights of the parties (the applicants' right to a fair trial and the dignity of the deceased and his relatives) in the abstract, and for its appeal to practical wisdom and contextual modes of reasoning. The judge did not make light of the applicants' right to a fair trial, but found that the urgency of the matter was a result of their own procrastination. He also drew attention to their neglect to inform the family of the deceased of the application, and afforded one of the family members the opportunity to address the court. The family member spoke out powerfully against the 'trivialisation of [the] family's identity' by the applicants' claim that they 'were not traceable and therefore not contactable'.[21] The judgment appealed both to the dignity of the deceased and his relatives and to the value of *ubuntu*. In Du Plessis's view, the judgment is as notable for the careful manner in which the court contextualised – and concretised – the conflicting rights, as for its 'attempt to reclaim human dignity for the deceased Nelson Chisale and his (extended) family'.[22]

Du Plessis's juxtaposition of *Bührmann*'s monumentalism and *Crossley*'s memorialism suggests that, in his view, cautious, context-sensitive modes of adjudication are more likely to honour the dignity of the deceased than the application of categorical rules or reliance on a rigid hierarchy of rights. Johan Snyman's reflections on the distinction between monuments and memorials may help us to understand this link. According to Snyman, a monument commemorates some decisive moment which marks a new beginning, such as the birth of a nation or its liberation from an external threat or the shackles of oppression. Its subject is 'a collective "we", symbolising an uninterrupted continuity between the represented heroes, the founders, and a possible public who ought to identify with what is represented'.[23] Translated into a constitutional context, monumentalism could be said to focus on the establishment of a more encompassing constitutional order, which establishes a common South African citizenship and promises basic human rights and social justice for all. It could be expected to rely on stock narratives about the injustices of the past, and how the Constitution enables their overcoming.

A memorial, on the other hand, is about victims, not heroes. It does not focus on the overcoming of past suffering and loss through heroic deeds or victories which establish or reaffirm the unity of a collective 'we', but undercuts that unity by making visitors feel that they 'owe the victims something'.[24] By drawing attention to the particularity of victims' suffering, it resists the monumental drive to instrumentalise loss as simply a necessary prelude to the achievement of unity and freedom. But while referring to particular historical instances of suffering, a memorial at the same time points beyond them, as it inscribes the suffering of any given group into the moral universality of the Kantian categorical imperative. It thus articulates particular struggles for justice with more universal ones, and resists the closure of the ranks of those historically wronged. As Wessel le Roux notes:

> It is the limits of the imagination, the limits of our ability to turn these records of suffering into a totalising and redeeming national story… that signals the categorical nature of our political

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21 Du Plessis 'The South African Constitution as monument and memorial' 204.
22 *Ibid* 203.
23 Snyman 'Interpretation and the politics of memory' 318.
24 *Ibid*.

> obligation to every single past and future victim... [M]emorial engagement with the past is therefore not a search for the truth of the past, or the true meaning of the past. It is a search for the minimum norms of political responsibility – a search which must start with the inescapable fact of that responsibility. The voice of the victims can be heard only obliquely, in or as the disruption of the well-maintained symmetries of public space and public dialogue. Our relationship with and responsibility to the victims of past injustices remain asymmetrical, non-reciprocal, and thus will never be completely assimilated into the shared dialogue of a collective 'we'.[25]

Since our historical understanding inevitably rests on broad generalisations over the harms of apartheid, colonialism and – on some accounts – patriarchy, our ability to do justice to the victims of past abuses is necessarily limited, and our attempts to correct inequalities through historicist modes of constitutional interpretation are invariably partial. Memorial constitutionalism is acutely aware of these limitations and realises that the truth about the past will forever elude us. At the same time, however, it is not ready to abandon its responsibility to the victims of injustice, whether past, present or future, or to forgo careful contextual analyses of multiple and overlapping forms of disadvantage in the name of the identity and historical continuity of the nation. Bent on resisting the normative closure that comes from a narrow identification of the injustices of the past with a particular group of victims or subset of laws or practices, it insists that context-sensitive forms of constitutional interpretation are a better way of squaring up to this responsibility than categorical modes of analysis that rest on stereotypical views about the nature of the injustices of the past and the transition to a democratic society.

4 Dignity and memory

There is another reason why the responsibility to honour the dignity of victims of human rights abuses is better served by careful, contextual modes of constitutional reasoning. This has to do with the fact that our ways of seeing, making sense of and intervening in our social world is necessarily bounded. In an article on the epistemology of rape, Lorraine Code invokes Cornelius Castoriadis's idea of an 'instituted social imaginary' to refer to the received 'normative social meanings, expectations, prohibitions, and permissions' that enable us to perceive our world as coherent and that constrain our ability to imagine alternative social worlds.[26] This concept encompasses, *inter alia*, understandings of what constitutes knowledge; conceptions of autonomy, agency and personhood; expectations about appropriate behaviour and social roles; and norms relating to the distribution of power. She notes how, in the context of rape (law), an oppressive social imaginary has served to entrench patriarchy and naturalise male violence against women. Even in 'post-conflict' societies which self-consciously seek to come to terms with their unjust past, this social imaginary continues to block efforts to do justice to the victims of sexual violations. She refers, in this context, to the work of Louise du Toit,[27] who has shown how South Africa's Truth and Reconciliation Commission has failed to come to terms with rape as a political act through which women are subjugated to male power.[28]

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25 Le Roux 'War memorials, the architecture of the Constitutional Court building and counter-monumental constitutionalism' 70–71.

26 Code 'A new epistemology of rape?' 330.

27 See Du Toit *A Philosophical Investigation of Rape: The Making and Unmaking of the Feminine Self*.

28 Code 'A new epistemology of rape?' 336–338.

What we remember, how we remember and what passes as the injustices of the past is thus shaped by a social imaginary that is always already given, and not freely chosen. An essay by Judith Butler illustrates how certain harms are naturalised through public discourse, and consigned to a space beyond mourning.[29] Writing against the background of the vulnerability and grief experienced in the United States in the wake of the 9/11 attacks, Butler observes the workings of a 'hierarchy of grief'[30] which establishes the conditions under which a life can be considered 'grievable'. She refers to instances in which newspapers in the United States refused to publish obituaries and memorials for Palestinian families who had been killed by Israeli troops and observes that, just as discourse serves to affirm the reality and humanity of some, it also places others beyond the realm of the real and the human. The deaths of the Palestinians – like the deaths of the war casualties inflicted by the United States – simply vanished, as if nothing happened, as if there were no lives worth valuing, as if they fell outside the circle of those qualifying for recognition. Because they had been relegated in advance to 'a state of suspension between life and death',[31] their deaths were unable to leave a mark on public discourse. Butler is interested, accordingly, in the obituary as 'an act of nation-building' and as 'the instrument by which grievability is publicly distributed'.[32] She is also concerned about our tendency to 'establish the familiar as the criterion by which a human life is grievable'.[33]

It seems likely that South Africa is still under the spell of the hierarchy of grief established and maintained for centuries under colonialism and apartheid (a hierarchy, that is, that has been modified, but not fundamentally transformed, by its encounter with neoliberalism). Perhaps this is the reason why monumental constitutionalism is unlikely to come to terms with the indignities that are routinely visited upon those whose lives are considered to be less grievable. Monumental constitutionalism, with its emphasis on the fundamental break between the atrocities of the past and the bright future heralded by the new constitutional order, is less attuned to the continuities between the old and the new, and therefore less likely to see how established hierarchies and forms of exclusion are perpetuated under supposedly neutral laws. Its celebration of the achievements of the past, which culminated in the proclamation of the equal dignity of all South Africans, can easily blind it to the maintenance and recreation of a hierarchy of grief through the official silence surrounding the deaths of foreign nationals during xenophobic attacks, or of protesters at the hands of the police. Its lionisation of past struggles and strong assertions of constitutional supremacy can, paradoxically, hide the complex interplay of cultural misrecognition, economic deprivation and political silencing that serve to relegate the lives – and deaths – of those whose stories we find too unfamiliar to fathom, to the margins.[34]

By contrast, memorial constitutionalism is more sober in its assessment of the constitutional transition, more conscious of the mistakes and trade-offs that were made in the process, and more aware of the impossibility of ever fully rectifying the injustices and horrors of the past.[35] It draws attention to the vulnerability of humans, whose bodies break

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29 Butler 'Violence, mourning, politics' 19.
30 *Ibid* 32.
31 *Ibid* 36.
32 *Ibid* 34.
33 *Ibid* 38.
34 See Botha 'Equality, plurality and structural power'.
35 For egs of such an assessment of the constitution-making process, see Botha 'Instituting public freedom or extinguishing constituent power? Reflections on South Africa's Constitution-making

continued on the next page

down under physical force and whose worlds threaten to disintegrate when their loved ones are taken away from them. It grounds our commonality in (the memory of) our shared vulnerability as embodied and relational beings, rather than in nationalistic narratives about the heroic deeds through which our unity as a nation was forged. Its consciousness of our common vulnerability and propensity for the careful analysis of legal rules with reference to the social and historical context in which they operate, make this approach more likely to be sensitive to the ways in which ostensibly neutral laws lend legitimacy to discourses that consign some to lives that are less valued and considered less grievable. As Du Plessis's analysis shows, the judgment in *Crossley* illustrates the capacity of memorial constitutionalism to interrogate the idea that the lives of some individuals are less real, less visible and less human, and to give a voice to the indignation and suffering of the bereaved.

Of course, that is not to say that memorial constitutionalism could break open existing hierarchies of grief at will, as if it stood outside of the instituted social imaginary and were able, dispassionately, to identify the contradictions and shortcomings inherent in our normative and discursive structures and replace them with more humane alternatives. However, its focus on loss and preference for careful, context-sensitive modes of analysis make it more likely to respond to social struggles which place received meanings in question and which evoke alternative ways of ordering our normative world.[36]

5 Autonomous selves and vulnerable others

The point made above about memorial constitutionalism's awareness of our common vulnerability is in need of further elaboration. At one level, the statement about the vulnerability that arises from our nature as embodied and relational beings seems trite. However, at another level it isn't – as Butler notes, social and political discourse contains a fair amount of denial of our vulnerability and dependence. She cites responses to 9/11 as an example. Butler points out that Americans not only had to come to terms with the loss of lives, but also with the loss of a sense of the impermeability of their national borders. She argues that the 'loss' of the grandiose notion of 'the world itself as a sovereign entitlement of the United States'[37] presented the latter with new possibilities – of transforming democratic political culture and forging new kinds of international ties. But instead of rethinking its commitments, the United States reasserted its sovereignty and sought to 'reconstitute its imagined wholeness, but only at the price of denying its own vulnerability, its dependence, its exposure, where it exploits those very features in others, thereby making those features "other to" itself'.[38]

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experiment'; Van der Walt 'Vertical sovereignty, horizontal constitutionalism, subterranean capitalism: a case of competing retroactivities'.

36 See Code 'A new epistemology of rape?' 335–336, who points out, again with reference to Castoriadis, that the 'instituted character' of a social imaginary does not preclude its transformation. Although she is more circumspect than some other theorists about the impact of judgments of the International Criminal Tribunal for the Former Yugoslavia, which declared that war-time rape constituted a crime against humanity, she recognises that these judgments could help pave the way for a transformation of legal and social understandings of rape, which would have fundamental implications for women's equality and citizenship.

37 Butler 'Violence, mourning, politics' 40.

38 *Ibid* 41.

This kind of failure to come to terms with our common vulnerability and to construct a more universalistic and humane ethic from the ruins of traumatic events is all too common. Closer to home, Johan Snyman has shown how the meaning of the Women's Memorial's memorialisation of the trauma suffered by women and children during the Anglo-Boer War was transformed under the weight of Afrikaner nationalism. Drawing on Emily Hobhouse's views and the letters of Boer women written from concentration camps, Snyman argues for a reading of the Women's Memorial as a warning against the horrors of war that transcends the particularity of local history or any specific group of victims. He refers to Hobhouse's speech at the inauguration of the memorial, in which she articulated the sacrifices of Boer women with women's worldwide struggle for recognition. She drew attention to the 'thousands of the dark race' who 'perished also in Concentration Camps' and asked, 'Was it not an instance of that community of interest, which binding all in one, roots out racial animosity?'[39] These passages, along with others in which she admonished the audience not to withhold from others 'the very liberties and rights which you have valued and won for yourselves',[40] were omitted from later commemorative issues of her speech, as they were at odds with the ethno-nationalist project which turned the victims of the war into heroines, transformed their suffering and despair into bravery and love of the fatherland, and 'monopolise[d] the meaning of the suffering of the war for whites only'.[41]

These examples show how the monumentalisation of past trauma tends to result in a denial of vulnerability and dependence, as it demarcates a collective self from others, celebrates the former's proven ability to overcome adversity, and projects vulnerability onto the latter. Something similar is at work at the individual level, where the helplessness of individuals and their dependence on norms and ties that precede their own individuation are often displaced onto others who are considered to be lacking in agency, autonomy and self-determination. Against this background, Butler asks whether there is not something important that is hidden from view in our discourse on individual autonomy. As important as the ideals of autonomy, bodily integrity and self-determination are to feminist and other struggles for equality and recognition, is something not lost when we fail to pay attention to the dependence and vulnerability that flow from our social embodiment? At what price do we treat dependence and vulnerability as an individual failure or a lack of the requisite autonomy, rather than as something inherent in who we are as socially embodied beings? Does that enable us to evade collective responsibility for the need of others, whose vulnerability is explained away as an inherent flaw or the result of personal choice? Conversely, isn't it precisely the splitting of the world into autonomous selves and non-autonomous others that is used to justify intervening on the others' behalf, irrespective of their own views on the matter? And isn't such intervention designed to overcome otherness, by imposing our own conceptions of individual autonomy – and gender equality – on the rest of humanity?[42]

Feminists have critiqued the way in which the Western symbolic order identifies masculinity with autonomy and femininity with vulnerability. In the words of Debra Bergoffen:

> women are required to carry the vulnerability of the human condition as a burden so that men can imagine that they can escape the vulnerabilities of being human. It creates a fantasmatic social

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39 Quoted in Snyman 'Interpretation and the politics of memory' 329.

40 *Ibid*.

41 Snyman 'Interpretation and the politics of memory' 335.

42 See Butler 'Violence, mourning, politics' 41–42 for a critique of the way in which the liberation of women was used by the Bush administration to justify military intervention in Afghanistan.

order where the myth of masculine invulnerability is aligned with heroic military ideals to position men as the protectors of the body politic.[43]

A series of dichotomies are at work here: between autonomy and dependence, between those who protect and those in need of protection, between pure reason and the materiality of nature, and between man's disembodied rationality and woman's gendered embodiment. Bergoffen shows how war time rape exploits these gendered dualities. It serves not only to stigmatise the raped woman, but also to humiliate the men in her community who are unable to protect her. The violation of women's dignity and bodily integrity serves simultaneously to subjugate and shame the body politic, emasculate the men by turning them into powerless spectators, and expose their vulnerability. She argues that the judgment of the International Criminal Tribunal for the Former Yugoslavia, which declared war time rape a crime against humanity, destabilises these gender codes by tying women's dignity to their sexual self-determination. The judgment does not shy away from addressing women's sexual vulnerability; however, it situates their vulnerability at the structural, not the individual level, by focusing on the absence of the conditions under which consent is possible, rather than displacing the onus onto the victim who must show that she resisted. Here, women's vulnerability is treated as a mark of their dignity, rather than as a lack of agency.[44]

6 Rethinking dignity

The post-apartheid constitutions officially brought to an end a system which carved up the social world into autonomous selves and non-autonomous others, and entrusted the former with the rights of citizenship, while relegating the latter to administrative control. However, many of the hierarchies of old live on in the distribution of wealth and power and the structures of social recognition. Law plays an important role in the legitimation of these inequalities and divisions. It has, for instance, been pointed out that legal rules and concepts that appear to be neutral, are sometimes based on problematic conceptions of individual autonomy and consent, which abstract away from material differences and unequal power relations.[45] The judgment in *Jordan*,[46] in which it was held that a statute criminalising the conduct of the prostitute but not that of the client was gender neutral and that the stigma suffered by prostitutes was the result of their own choice, is a case in point. The Court in *Jordan* has been criticised for its failure to situate its inquiry within the context of material and structural disadvantage. The assumption that prostitutes knowingly chose a profession that carries social stigma is problematic in view of the vulnerability and material need that induce many women to do sex work. But the majority judgment not only ignores the vulnerability and dependence that influence sex workers' choices. It also denies their autonomy by assimilating their claims to middle-class social norms and expectations, and by declining to treat them as citizens who can enrich public dialogue by challenging conventional understandings of choice, consent and 'normal' sexual relations.[47]

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43 Bergoffen 'Exploiting the dignity of the vulnerable body: rape as a weapon of war' 318.

44 *Ibid* 321–323. See also Bergoffen 'February 22, 2001: toward a politics of the vulnerable body'.

45 See eg Bhana and Pieterse 'Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited'; Albertyn 'Substantive equality and transformation in South Africa'.

46 *Jordan v S* 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC).

47 For different critiques of the *Jordan* judgment, see Fritz 'Crossing Jordan: constitutional space for (un)civil sex?'; Botha 'Equality, plurality and structural power' 18–19; Woolman *The Selfless*

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One would have thought that the Constitutional Court's insistence on the equal and inalienable dignity of every human being would have precluded a judgment in which sexual self-determination is conditioned on conformity to mainstream sexual mores. Could it be that there is something about the Court's basic understanding of dignity that facilitates the shift from the fundamental dignity and worth of every human person to the idea that dignity is premised on dignified behaviour?[48] At first blush, not. The Kantian orientation that informs the Court's jurisprudence insists that dignity is absolute and unconditional.[49] And yet, it could be asked whether this understanding of dignity is able to resist the dichotomy, alluded to earlier, between rational autonomy and embodied vulnerability. The following quote from Günther Dürig, whose Kant-inspired object formula has been influential in Germany and South Africa, suggests that a Kantian understanding of dignity may in fact be consonant with this dichotomy. Dürig writes:

> All humans are human by virtue of their intellectual capacity… which serves to separate them from the impersonality of nature and enables them to exercise their own judgment, to have self-awareness, to exercise self-determination and to shape themselves and nature.[50]

The centrality of the distinction that is made here between the human capacity for judgment, self-awareness and self-determination, and the impersonality of nature, makes one wonder whether this conception of dignity is not rooted in the dichotomy between rational autonomy and the animality and vulnerability of the human body. We have seen that this dichotomy has a strong affinity with the monumental myth of the hero, and lends itself to being used to emphasise the autonomy of some and the vulnerability and dependence of others. Against this, some writers have argued for an articulation of autonomy with vulnerability. Bergoffen emphasises the interrelatedness of our existence as 'conscious beings, subjects who bring meaning and value to the world, and bodied beings, material objects in the world'.[51] The meaning we create is 'always articulated through [our] embodiment',[52] and our bodily integrity is closely linked to our dignity as beings who bring value to the world. But the ambiguity of our existence as conscious and bodied beings is not only the source of our dignity and integrity. It is also at the root of our vulnerability. Our dignity is violated when others reduce our bodies to mere objects (as in slavery), or when they manipulate the human need for bodily intimacy or vulnerability to pain to turn our meaning-making powers against us, to make us an accomplice to a world which is based on the annihilation of what we believe in (as in war time rape or torture).

Vulnerability is an inescapable fact of our existence as conscious and embodied beings. At the same time, however, the extent of our vulnerability is directly impacted upon by laws which mark some as more autonomous than others, and dignify some forms of dependency and need while treating others as unworthy of protection. Life is precarious, but that does not absolve laws and social structures from responsibility for the ways in which

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Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law 428–430.

48 See Rosen *Dignity: Its History and Meaning* 6, 31–38, 68–77 on the identification of dignity with dignified behaviour.

49 See Ackermann *Human Dignity* 54–62; Woolman 'Dignity' 36–6 to 36–19 on the Kantian underpinnings of the Constitutional Court's approach to human dignity.

50 Dürig 'Der Grundrechtssatz von der Menschenwürde' 125, as translated by Ackermann *Human Dignity* 138.

51 Bergoffen 'Exploiting the dignity of the vulnerable body' 312.

52 *Ibid*.

the burden of that precariousness is distributed. We need to interrogate laws and social practices that displace vulnerability onto women, immigrants or the poor. We must ask whether and to what extent they are rooted in an overblown ideal of autonomy, which ignores the degree to which we are dependent on and exposed to each other. We must abandon the idea that dignity is somehow conditional on autonomy or virtue, and ask instead how we can create 'climates of recognition, mutual responsibility, and trust' which will enable us to 'live [our] vulnerabilities well'.[53]

7 Concluding remarks

Lourens du Plessis's reflections on memorial constitutionalism raise important questions about our understanding of human dignity. Memorial constitutionalism, with its emphasis on the responsibility to do justice to the victims of past abuses, not only disrupts the supposed unity and symmetry of the collective 'we', but also calls into question the idea of the fully autonomous and self-present individual, who is able to realise her own identity in accordance with a set of ends that she has freely chosen.[54] The memorial Constitution is more likely than the monumental Constitution to come to terms with vulnerability and dependence, not only because it invites us to remember the suffering of victims of past injustices, but also because it reminds us of our own vulnerability. As Butler states, grief not only denotes mourning over the loss of the other, but also involves our own sense of dispossession and disorientation in the face of the severance of ties that are constitutive of who we are. Grief demonstrates 'the thrall in which our relations with others hold us… in ways that challenge the very notion of ourselves as autonomous and in control'.[55] It attests to the capacity of others to leave an imprint on our lives, to interrupt the sense that we may have of scripting our own life story, to undo and dispossess us. It recalls the profound vulnerability, dependence and helplessness that marked our entry into the world, and that preceded any sense we had of ourselves as individual human beings. Years later, it still confirms our status as 'socially constituted bodies, attached to others, at risk of losing these attachments, exposed to others, at risk of violence by virtue of that exposure'.[56]

On my reading, then, Du Plessis's work invites us to rethink the relationship between autonomy and vulnerability. Our obligation to the victims of past abuses requires us to abandon the myth of absolute individual autonomy, and to devise laws and social structures that enable individuals to come to terms with their vulnerabilities, and to develop their capacity for public and private freedom.

At the beginning of the essay, I referred to Du Plessis's reading of the *Pillay* judgment, and asked whether it does not amount to an endorsement of a near-absolute conception of individual autonomy. The optimism of his reading of *Pillay* stands in contrast to his more sombre reflections on some of the other cases that he describes as 'memorial',[57] and the

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53 Code 'A new epistemology of rape?' 328.

54 See Woolman *The Selfless Constitution* for an important attempt to expound a theory of constitutionalism which breaks with metaphysical conceptions of selfhood and individual freedom.

55 Butler 'Violence, mourning, politics' 23.

56 *Ibid* 20.

57 Most notably the judgment in *Azanian Peoples Organisation (AZAPO) v The President of the Republic of South Africa* 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC), in which the Court held that the granting of amnesty against criminal and civil liability in respect of acts committed with a political objective, did not amount to an unconstitutional infringement of the victims' right of access to court. Du Plessis, while critical of the judgment, writes that it assumes

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judgment, with its emphasis on the link between dignity and autonomy and on the importance of religious and cultural practices that are freely chosen,[58] may appear difficult to square with a memorial understanding of selfhood. Why, then, does Du Plessis read *Pillay* as a memorial judgment? A possible clue lies in the Court's construction of the disadvantage suffered by the learner. The Court rejected the contention that the prohibition in the school code of the wearing of certain forms of jewellery was neutral as it affected all religions equally. It held that the code, by favouring 'mainstream and historically privileged forms of adornment… at the expense of minority and historically excluded forms',[59] compromised the sincere religious beliefs of some learners (mostly from minority religions) but not those of others. It thus resisted a narrow, stereotypical view of the discriminatory practices of the past, and was sensitive to the capacity of ostensibly neutral rules to privilege mainstream worldviews over others. Drawing on a distinction made by Martha Minow,[60] it could be said that the Court rejected the idea that difference inheres in individuals, who must carry the burden of their divergence from the norm. Instead, it adopted a relational understanding of difference, which recognises that the social significance of difference is produced by the relationship between individuals and social institutions, and that institutions have been designed with only some people in mind.

A second clue to Du Plessis's reading of *Pillay* lies in the evolving, relational and dialogic nature of the understanding of dignity and freedom articulated in it. The judgment does not presuppose the full autonomy of individuals, but recognises that they become who they are through their membership within a community (or communities) and their relations with others.[61] Learners establish their identity through participation in social practices that are culturally mediated and embedded in history, and through interaction with their parents, teachers, fellow learners, religious figures, state institutions and the like. The networks of relationships and belonging that constitute their social world and the means through which they understand them are not of their own making – they are always already there, preceding the formation of the individual. At the same time, the judgment resists the idea that individual identities simply reflect dominant beliefs or modes of being. It stresses that cultures are 'living and contested formations',[62] not unified entities, that cultural practices may have different meanings for different members and subsets of the same community, and that the Constitution protects 'all those for whom culture gives meaning, not only… those who happen to speak with the most powerful voice in the present cultural conversation'.[63] It thus understands religious and cultural freedom in terms of the dynamic interplay between the 'givenness' of shared norms, beliefs, practices and ways of making sense of our world, on the one hand, and the contestation and difference that is at the heart of religious and cultural tradition, on the other. The Court's emphasis on the importance of voluntary cultural and religious practices should therefore not be seen as an

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'the unenviable role of a *Mahnmal*-like memorial', as it reminds us that the 'shadiness' of the past is inscribed in the 'political wheeling and dealing' that was so central to the Constitution-making process. Du Plessis '*AZAPO*: monument, memorial… or mistake?' 62.

58 Par 64. At pars 149–157 of her separate judgment, O'Regan J criticised the majority's subjective and individualised approach to cultural rights.

59 Par 44.

60 Minow *Making all the Difference: Inclusion, Exclusion, and American Law* chaps 1–3.

61 See par 53, where the Court invokes the indigenous value of *ubuntu* to underscore the link between the individual and community.

62 Par 54.

63 *Ibid*.

assertion of the sovereignty of the individual in choosing her own world. It is, rather, an affirmation of the ineradicability of difference – understood not as that which neatly demarcates cultural and religious traditions from one another, but as that which resists the closure of any particular identity, and creates spaces for dialogue, contestation and individual choice.

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*Ways of living in a transformative democracy**

Elmien du Plessis

As usual, they cannot say what the meaning is. It is enough only to know that there is a meaning, and that it is a profound one.

Zakes Mda[1]

Preface

Mda's *Ways of Dying* is set in an unnamed harbour city. The period is between Christmas and New Year after the fall of apartheid in 1990, but before the first democratic elections. The story takes us through the events of two protagonists, Toloki and Noria, both of whom independently of one another left their (unnamed) rural homes to find new lives in the city. Noria ends up living in an informal settlement, in a shack that has been burned down before, and that can be destroyed at any time. Toloki's tenure is even more insecure: he sleeps in a waiting room, his few possessions stored in a shopping trolley.[2] That Toloki sleeps in a waiting room cannot be a coincidence: through the whole book the reader is left anticipating that something will happen; the reader is left in a waiting room, unsure where to go.[3] The reader is left in constant insecurity, but also in constant hope. The transitional period, the waiting of the characters, is symbolic of what is happening around them politically.[4]

The hardship of apartheid penetrates this nameless city to the core. On a more public level we learn that the male protagonist, Toloki, joined homeless people's struggles when they 'defiantly built their shacks there against the wishes of the government', a

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* I would like to thank various people with whom I had conversations about this issue in the past year: Linda Stewart and Lourens du Plessis, who did not know that he was helping me.
When Wilhelm Verwoerd, the grandchild of Hendrik Verwoerd, met someone at the fall of apartheid, he apologised for his grandfather. The person asked him 'but was he a good grandfather?', to which Wilhelm replied 'yes'. Years later when I decided to study law, I promised myself that I will always separate the 'private' father from the 'public' Lourens du Plessis, if the need arose. I was privileged (and as a child should be, I was sometimes embarrassed) to be in Lourens's class for interpretation. But I am even more privileged to be his child and to have grown up in his home. This chapter, the theme of which is 'home', is therefore dedicated to my father. I have aspired to write it in such a way as to honour and speak to the work of Prof Lourens du Plessis.

1 Mda *Ways of Dying* 200.

2 *Ibid* 14.

3 See Visser 'How to live in post-apartheid South Africa: Reading Zakes Mda's Ways of Dying'. She notes that in apartheid literature the future brings anxiety, while in post-apartheid literature it seems as if the future, however uncertain it may be, brings hope.

4 Ndebele *Rediscovery of the Ordinary: Essays on South African Literature and Culture* states that South African fiction will be politically most effective if it details the life of the ordinary.

government which 'was bent on sending [black people] back to the places it had demarcated as their homelands';[5] people who immediately rebuild the shacks after they have been demolished. In this nameless place Toloki and Noria become the storytellers of a displaced and defiant people.[6] But it is clear that even though the story is ostensibly about Toloki and Noria, it is in effect a communal story:

> [I]n our orature the storyteller begins the story, 'They say it once happened… ', We are the 'they'. No individual owns any story. The community is the owner of the story, and it can tell it the way it deems fit.[7]

On a personal level the reader is struck by the pervasiveness of apartheid in private spaces. In a tender moment when both characters go to bed naked, it is immediately noted that '[s]mart settlement people never sleep naked, since they don't know when the next invasion will be'.[8] Being naked in their beds can also be regarded as an act of defiance. The book ends on New Year's Eve. 'No one sleeps on New Year's Eve, at least not until the bells toll midnight, and a new year is born with its new problems.' It seems as if all the past, all the sins, all the suffering, will end abruptly on New Year's Day. This day is marked by dressing up in new clothes, or by an almost festive carnival atmosphere.[9] But can one believe this? Do we not know from experience that New Year's marks a day on a calendar, and cannot be equated with sudden amnesia? How can a story that is filled with the interconnectedness of the past and the present, deny the existence of the past, simply because of the coming around of New Year's Day? And in the bigger narrative, can it be said that 27 April 1994 meant, or should have meant, a sudden amnesia from apartheid, especially in the context of property and housing?

1 Introduction

'A constitution', Du Plessis[10] tells us, 'both narrates and authors a nation's history. The potency with which it can mold a politics of memory thus equals the authority with which it can shape the politics of the day.' But it remains one of many narrators, and merely stands side by side with other narrations (such as *Ways of Dying*) in determining where a nation is heading. Du Plessis goes further to point out that 'the manner in which we deal with the Constitution as memory predetermines the fulfillment of the Constitution as pledge'. He poses the Constitution as either a monument (that remembers in a celebratory way) or a memorial (that remembers in a commemorative way).[11] For the Constitution to fulfill its promise, it needs to be both a monument and a memorial.[12] He draws inspiration for this from his long-time friend, Johan Snyman,[13] who showed that while both monu-

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5 Mda *Ways of Dying* 111.
6 Mda, like Njabulo Ndebele, can be regarded as a writer of 'fiction for development'. Ndebele encouraged post-apartheid South African writers to engage in a new style of writing which offered ways in which individuals could redeem and transform themselves. See Mervis 'Fiction for Development: Zakes Mda's *Ways of Dying*'. The characters are great examples of Ndebele's statement that not every assault on injustices in our society must be spectacularly political; Ndebele *Rediscovery of the Ordinary: Essays on South African Literature and Culture* 51.
7 Mda *Ways of Dying* 12.
8 *Ibid* 181.
9 *Ibid* 194.
10 Du Plessis 'The South African Constitution as memory and promise' 385.
11 *Ibid* 385.
12 *Ibid* 390.
13 Snyman 'Interpretation and the politics of memory'.

ments and memorials deal with memory, monuments celebrate while memorials commemorate.

I will start this chapter with a brief introduction, looking at the nature and process of constitutional interpretation as explained by Lourens du Plessis. I will thereafter look at section 26(3) of the Constitution, and the Prevention of Illegal Eviction and Unlawful Occupation of Land Act,[14] which was promulgated to give concrete effect to this section. My concerns and question lie in the meaning of 'home' after 20 years of democracy in South Africa. I want to investigate if, in the context of section 26(3) of the Constitution and the interpretation of 'home', the South African Constitution is a monument that celebrates achievements, or a memorial of the ordinary experiences of South Africans. After a discussion on how PIE operates in this context, I will look within the framework of Du Plessis's work at how the courts dealt with the concept 'home'. As an academic I cannot 'provide ready-made "tools" for constitutional interpretation, fit to help implement a "one and only correct" method of reading the Constitution.'[15] My aim is thus not to give a definite definition or meaning to 'home', but rather to provide interpretative guidance on how to approach the concept in erecting a 'memorial of the ordinary'.[16]

2 Ways of interpreting

An enacted law text carries meaning, and it is the interpreter's task to find the meaning in the text in terms of certain rules or methods.[17] We are taught these rules and procedures during the course of our legal studies, in my case through Interpretation of Statutes, the subject Lourens du Plessis taught me. But we also learned that reading alone does not give meaning to a text. In order to find meaning, one needs to *deal* with the provision.[18] Interpretation is a process. Even when we say 'we do not know the meaning!' or 'the meaning is clear!' we have already started or finished the interpretative process.[19] We eventually get to the place where we can understand that by interpreting, by going through the process, we are constantly restructuring the legal tradition. How? By choosing interpretation A above interpretation B, we choose to protect certain interests and exclude others.[20] When we do that, we shape the legal tradition. Du Plessis explains in this regard that –

> [m]eaning results from a complex to-and-fro movement, an action and reaction, of non-constant, non-lasting and non-metaphysical signifiers which all contain traces of one another. The one gives meaning to the other, but only incompletely and provisionally. Meaning is never, at any given time, a fixed and stable presence. The interplay of signifiers constitutes it over and over again, and diverts and shifts it as often. The possibilities for meaning are boundless. Language is the hyper-complex, boundlessly open system that makes such a proliferation of meaning inevitable. Meaning is relativized; but language as generator of meaning (and only in this capacity) is not. But note: meaning is open and not arbitrary. Language as a generator of meaning is hyper-complex, but it is still a system. A text is not an entity built up with language as a component – even though

14 19 of 1998 (hereafter referred to as PIE).
15 Du Plessis 'Legal academics and the open community of constitutional interpreters' 224.
16 Van Marle 'The spectacle of post-apartheid constitutionalism' 413.
17 Stewart 'Legislative intentions and purposes (Historical interpretation)' 4.
18 Du Plessis *Re-interpretation of Statutes* xiv. See Stewart 'Legislative intentions and purposes (Historical interpretation)' for a discussion.
19 Stewart 'Legislative intentions and purposes (Historical interpretation)' 18.
20 *Ibid* 19. I will not further analyse this point as this is done adequately and with better skill by people like Stewart and De Ville *Constitutional and Statutory Interpretation* in the South African context.

> language may be its life and soul. Because meaning is only possible in the to-and-fro play of signifiers, signifiers are interactively interwoven, and dependent on one another for meaning. Their traces are to be found in one another mutually and reciprocally.[21]

In an earlier article[22] Du Plessis explains the 'matrix of interpretative legitimacy (or credibility)'. In the process of interpreting legislation we go through a justification process, a complex process of reasoning, and this is perpetuated by a matrix of interpretative legitimacy. The matrix refers to both the origin of something, and the thing that gives form to something. This matrix in the context of constitutional interpretation is thus both the source and the holder of the modes of interpretative reasoning that are accepted as legitimate at any given time. The Constitution enriched this matrix, and made it possible that different modes of interpretation that were unacceptable before the advent of constitutional democracy are now acceptable. In this process judges play a particular role in substantiating and (mostly) enriching the matrix through their construction and interpretation of the Constitution.[23] But there are different sources that feed into this matrix: legal doctrine, politics and experience. These are not sources that are inherent in the text itself, but they can enrich or restrain interpretation by placing the interpreter in a specific context, or by explaining the interpreters' theoretical positions, that often determine their interpretive preferences.[24]

The traditional, pre-constitutional matrix of interpretative legitimacy contained formalistic phrases such as 'The intention of the legislature is x' or '[i]t is obvious from the clear language provision that it means x' or '[i]t is clear from the ordinary signification of the words used that the provision can only mean x'.[25] These phrases and presumptions are not without their problems, of course. The constitutional matrix of interpretative legitimacy introduced new types of phrases, such as '[a]n analysis of the purpose of the guarantee that the provision contains and of the interests that it seeks to protect shows its meaning to be x', or '[g]iving expression to the underlying values of the Constitution and reading the provision generously and purposively, it means x'.[26] Together with the values laid down in section 1 (namely human dignity, the achievement of equality and the advancement of human rights and freedoms), this feeds the matrix.

3 Eviction law

While reading *Ways of Dying* I started questioning the meaning of 'home' in the context of section 26 of the Constitution and what it means to have a 'home' became unclear.[27] It

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21 Du Plessis 'Lawspeak as text… and textspeak as law: reflections on how jurists work with texts – and texts with them' 799.

22 Du Plessis 'The evolution of constitutionalism and the emergence of a constitutional jurisprudence in South Africa: An evaluation of the South African Constitutional Court's approach to constitutional interpretation' 299.

23 *Ibid* 300.

24 Du Plessis 'Interpretation' 32–85 to 32–86.

25 Du Plessis 'The evolution of constitutionalism and the emergence of a constitutional jurisprudence in South Africa' 302. For a good eg of a court trying to ascertain the meaning of 'house' in this way, see *Berger v Bloemfontein Town Council* 1935 OPD 115.

26 *Ibid* 313.

27 Ndebele states in 'Arriving home? South Africa beyond tradition and reconciliation' that asking questions about the ordinary will help us to give people personal human attributes, and explains why people act the way they do in specific situations, instead of attaching stereotypical labels to their behavior, such as 'crime' and 'racism'. He states that stereotypical labels 'do not

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raised questions like: Would one have to use PIE to evict Toloki from his waiting room? Is that a home? What is the meaning of home? The fragility of Toloki and Noria's tenure is clear, yet the universal aspects of 'home' are present: a home for sleeping, a home for cooking, while at times one is painfully aware of how it is not 'home' – such as the time when Toloki must bath outside, in full view of passers-by. But does the absence of a bath mean that a structure is not a home? And is it a home if one cannot sleep naked in the structure? As a lawyer, asking these questions led me to jurisprudence to find out what feeds into the interpretative matrix when we look for the meaning of the term 'home'. I found that there is a particular space in jurisprudence where the same experiences that Toloki had are contested. This is the jurisprudence on section 26(3) of the Constitution.

Section 26 of the Constitution states that 'no one may be evicted from their home, or have it demolished, without an order of the court made after considering all the relevant circumstances'. The constitution does not define 'home', nor does PIE. It might seem peculiar that eviction and demolition orders are given from or for 'homes' on a daily basis, without there being a statutory definition of a 'home'. It will be useful to remember here what was said earlier: even if one proclaims 'but it is so clear!' or finds that 'a definition is impossible!' the process of interpretation has already started. Yet recent case law has shown just how difficult arriving at such a definition can be.[28]

Indubitably PIE was promulgated in terms of section 26(3) of the Constitution. While not as direct as section 25(9) of the Constitution, which states that Parliament *must* enact legislation, PIE makes it clear in the preamble that is was enacted to give effect to section 26(3) of the Constitution. Du Plessis refers to this type of legislation as 'subsidiary constitutional legislation'.[29] This characterisation suggests that there might be a situation where different legal norms are applicable to a particular situation (such as section 26(3) of the Constitution and PIE), and that through the subsidiarity principle certain legal norms will have preference for application to the situation.[30] Subsidiary constitutional legislation is enacted to 'amplify and give more concrete effect'[31] to the broad meaning of the provisions of the Constitution. The relationship between such legislation and the Constitution is special, and it influences both the interpretation of the legislation and the interpretation of the Constitution.

In practice, if a litigant wants to take action because of an infringement of a Constitutional right (such as section 26(3)), the litigant must rely on the statute that gives more

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substantially enhance our knowledge of the situation and do not give us a yield of insights for a fresher and even more radical approach to possible solutions that are more likely to render sustainable solutions'. Instead, asking questions will lead us to understanding individuals' actions and the specificity of an individual's experience.

28 See Liebenberg 'What the law has to say about evictions', who states that '[t]he Constitutional Court, the highest court in South Africa, has not finally decided the question of what constitutes a home in these circumstances. However, it is obviously of great importance to those whose structures are being demolished on the basis of the perception of the Anti-Land Invasion Unit staff that no-one lives in them.'

29 Du Plessis '"Subsidiarity": What's in the name for constitutional interpretation and adjudication?' 207. Van der Walt applied these principles extensively to the property clause in *Property and Constitution*.

30 *Ibid* 207.

31 Du Plessis 'Interpretation' par 2C10.

concrete effect to it (PIE). It cannot rely directly on the Constitutional right.[32] This is because the legislature has a duty to respect, protect, promote and fulfill the rights in the Bill of Rights, and because the *trias politica* principle allows the legislature to do so through legislation, and in a way it deems fit. This also implies that these statutes must be interpreted purposively, to fulfill the right that they are meant to give concrete effect to.[33] This does not mean that the legislation is restricted to the protection offered by the Constitution, but indeed in some instances may 'extend protection beyond what is conferred by'[34] the provision in the Constitution. In the *Pillay* case, this was explicitly spelled out:

> The legislature, when enacting national legislation to give effect to the right to equality, may extend protection beyond what is conferred by section 9 [of the Constitution]. As long as the Act does not decrease the protection afforded by section 9 or infringe another right, a difference between the Act and section 9 does not violate the Constitution.[35]

In the context of this paper, the implication is that where a right protected in section 26(3) of the Constitution is infringed, PIE will always be the starting point of the inquiry. But the word 'home' occurs only in the preamble of PIE, which echoes the wording of section 26(3) of the Constitution. PIE is therefore also silent on the meaning of 'home'. The question of what a 'home' is, nevertheless often crops up in eviction jurisprudence in terms of section 4 of PIE.[36] In terms of section 4(1) of PIE, 'the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier'. Section 4(1) thus enables a landowner to evict an unlawful occupier, but only if the process in the section is followed. In section 1 'evict' is defined as 'to deprive a person of occupation of a *building or structure*, or the land on which such building or structure is erected, against his or her will,'[37] and 'building or structure' is defined as 'any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter'. The emphasis is therefore more on the type of physical structure than on the function of a 'home'.

Early case law on PIE made it clear that PIE applies to buildings or structures that are 'homes' of unlawful occupiers only, and not to buildings or structures that are not homes.[38]

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32 *Ibid* par 2C10. *MEC for Education: KwaZulu-Natal v Pillay* 2008 (2) BCLR 99 (CC) par 40; *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amicus Curiae)* 2006 (1) BCLR 1 (CC) par 96; *South African National Defence Union v Minister of Defence* 2007 (8) BCLR 863 (CC) par 51; *NAPTOSA v Minister of Education, Western Cape* 2001 (4) BCLR 388 (C) 396I–J. Van der Walt *Property and Constitution* later looked at the subsidiarity principle and the interplay between the Constitution, legislation and the common law. His point of departure is the same as that of the courts and of Du Plessis, but he adds the following: if a constitutional right was infringed, the 'subsidiary constitutional legislation' must be used, and not the common law. The common law may be applied only when the legislation does not adequately cover the problem. When the common law is so applied, this must be done in line with the Constitution.

33 *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (10) BCLR 1027 (CC) par 53.

34 *MEC for Education: KwaZulu-Natal v Pillay* 2008 (2) BCLR 99 (CC) par 40.

35 *Ibid*.

36 See par 4 below.

37 Own emphasis.

38 *Ndlovu v Ngcobo; Bekker & another v Jika* 2003 (1) SA 113 (SCA) par 3; *Cape Killarney Property Investments (Pty) Ltd v Mahamba & others* 2001 (4) SA 1222 (SCA) 1229E. See the recent case of *MC Denneboom Service Station CC v Phayane Case* no CCT 71/14 of 3 Oct 2014 (CC), where the court confirmed that when property is used for dual purposes (commercial and residen-

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This poses a difficulty for some courts, which are often confronted by the defence of the landowner that the property in question is not the unlawful occupant's 'home'.[39] PIE provides procedural and substantive protection to occupiers at eviction. Procedurally, a landowner (or a person in charge of the land) may evict an unlawful occupier only by following the procedures set out in PIE. Such an eviction would be granted only if the court finds that it is 'just and equitable' to do so. PIE thus provides protection for occupiers of residential dwellings only. An application in terms of PIE will therefore fail when one of three things happens. Firstly, if one or more of the technical requirements in section 4 are not met (such as the occupier's occupation not being 'unlawful').[40] Secondly, the evictee can raise a valid defence. In this sense some of the technical requirements can become a defence, such as the applicant's not being the owner or the person in charge, or that the evictee is not unlawful. Lastly, the court may refuse an eviction order because it is not 'just and equitable' to do so.[41] To break free from the procedural and substantive requirements of PIE, which owners often regard as onerous, they have now started devising reasons why the occupants are not protected by PIE. Many of these reasons revolve around the meaning of 'home'. Courts are increasingly faced with the question of what constitute a 'home'. What follows is a case-by-case discussion of the interpretation of 'home' in the South African courts.

4 Judicial interpretation of 'home'

In the classic housing case, *Government of the Republic of South Africa v Grootboom,*[42] the court had to assess if the state had infringed the respondents' rights to adequate housing by not providing temporary shelter after an eviction. While most of the case dealt with the state's duty to provide adequate housing, the court acknowledged 'that housing entails more than bricks and mortar'.[43] In *City of Cape Town v Rudolph*[44] the court specifically considered what would be considered a 'home'. Rudolph and others were allegedly in

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tial), one can evict the non-residential occupants by means of the common law, but that PIE must be complied with when evicting any person that might use the premises as a dwelling or shelter. The court in *Breede Vallei Munisipaliteit v Die Inwoners van Erf 18184, Dikkopstraat 3, Avian Park, Worcester and 18 Others* [2012] ZAWCHC 390 relied on the preamble and the purpose of PIE to conclude that the above restriction is acceptable as the 'unlawful occupier' requirement leads us away from subjective terms such as 'land-grabbers'. This also indicates that the question of the nature of a 'home' is a contextual question that must be broadly interpreted. Of course this also raises questions relating to the second qualification in the *Pillay* case, namely that the broader protection afforded by the subsidiary constitutional legislation infringes on another right – namely s 25 and the right to property. This was also argued in the *Rudolph* case. There might be instances where a court may find that the dwelling will not be a 'home' (as the Constitution requires), but that the people are still 'unlawful occupiers'. This kind of protection is clearly broader than the protection afforded by the Constitution itself, and infringes on a landowner's right to property. In such a case the court will probably have to weigh up the rights of the landowner against those of the unlawful occupier as part of the process of determining if the eviction is 'just and equitable' as required by s 4.

39 See the discussion below, specifically the *Rudolph, Breede Vallei, Fischer* and *Afzal* cases.

40 *Mokwena v Boschplaats Boerdery (Pty) Limited* (39828/2008) [2009] ZAGPPHC 125.

41 Pienaar *Land Reform* 727.

42 2001 (1) SA 46 (CC).

43 Par 35. In the context of access to adequate housing, 'house' is not defined.

44 [2003] 3 All SA 517 (C).

unlawful occupation of a park that was next to a residential suburb. Rudolph was the first to erect an informal structure in the park.[45] The City of Cape Town tried to remove the structures, but failed. The City of Cape Town instituted the *mandament van spolie*, a possessionary remedy, to regain possession of the land.[46] The City tried to circumvent the Act by distinguishing between 'land-grabbers' and 'unlawful occupiers' of the land.[47] Relying on previous PIE cases, the City argued as follows:[48]

> It is submitted that the *intention of the legislature* with PIE was clearly to afford procedural protection in the case of eviction proceedings against unlawful occupiers who had, at the time of the transitional negotiations and thereafter, been living in informal settlements and who had established themselves in such a way that their structures could be said to have become their homes – ie implying some degree of *established settlement as opposed to a deliberate grab of land* in terms of which a physical presence thereon was achieved.

The court rejected this argument, and found that –

> [t]here can be *no doubt* that the shelters erected by the respondents are their homes. Indeed, their only homes. They reside with their families in these shelters and have nowhere else to live. A 'home' is defined as a 'dwelling place; house, abode; the fixed residence of a family or household; one's own house; the dwelling in which one habitually lives.' (See: The Shorter Oxford English Dictionary, 3rd ed. 1973). Respondents can, on the evidence, justifiably claim that they have established their homes in the park and that they had already done so when the application was instituted.[49]

Falling back on the plain language and purpose of PIE, the court found that the people are 'unlawful occupiers' and therefore protected by PIE, whether or not they are called 'squatters' or 'land grabbers'.[50] The phrases 'plain language' and 'no doubt' coupled with the citing of the dictionary meaning of 'home', as well as the action of looking at the intention of the legislature rather than the purpose of the Constitution seem to drag us back to pre-constitutional methods of interpretation, or in Du Plessis's words, the pre-constitutional matrix of interpretative legitimacy. While the court tried to place the question in a social and historical context, it struggled to place it in a specific constitutional context.

A year later the Constitutional Court started to develop a richer interpretative matrix in the classic eviction case, *Port Elizabeth Municipality v Various Occupiers.*[51] Here the state applied for the eviction of 68 people who had illegally occupied the municipality's undeveloped land. Most occupiers had been evicted previously, and had lived on this piece of land for anything between two and eight years. In *Port Elizabeth Municipality* Sachs J referred to a 'calibrated constitutional matrix'[52] that is needed in order to apply and understand PIE. When seen through the lens of 'justice and equity'[53] and the 'values of human dignity, equality and freedom',[54] we come to a place where we can 'acknowledge that a home is more than just a shelter from the elements'. Sachs J continues to describe it as a place of intimacy and of family security. It is often the only place where people can

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45 *City of Cape Town v Rudolph* [2003] 3 All SA 517 (C) 520–521.
46 *Ibid* 521–522.
47 *Ibid* 525.
48 *Ibid* 527 (own emphasis).
49 *Ibid* 532 (own emphasis).
50 *Ibid* 531.
51 [2004] ZACC 7.
52 *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7 par 14.
53 *Ibid* par 14.
54 *Ibid* par 15.

retreat to for peace and rest. From an interpretative perspective, and with specific reference to Du Plessis's matrix of interpretative legitimacy, it is notable that Sachs J starts building on an interpretative matrix that contained elements of the Constitution. He later states that 'PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of law'.[55] By incorporating grace, compassion, human dignity, equality, justice and equity into the interpretation of PIE, he enriches and builds on the interpretative matrix for section 26(3), and an interpretation of 'home'. The Constitutional Court thus gave direction on how it thinks the term 'home' should be interpreted.

While the previous cases dealt with people evicted from their only homes, *Barnett v Minister of Land Affairs*[56] dealt with an application for the eviction of people from holiday cottages built in a coastal conservation area (and on communal land). In an attempt to prevent the eviction of the occupiers and the demolition of the cottages in terms of the common law, the occupiers stated that the eviction must take place in terms of PIE. The court found that PIE is applicable only to 'homes', and therefore proceeded to establish whether or not these beach cottages constituted a 'home' for the purposes of PIE. While the court admitted that 'the concept "home" is not easy to define',[57] it agreed that 'the concept of home require[d] an element of regular occupation coupled with some degree of permanence'. The court came to this conclusion on the basis of the Oxford English Dictionary's definition of a 'home' as 'the dwelling in which one habitually lives; the fixed residence of a family or household; and the seat of domestic life and interest'.[58] Based on this, the court found that the beach cottages did not constitute a 'home', and that the appellants were thus excluded from the protection of PIE. This added a new requirement for the identification of a 'home', namely some form of permanence. Note that here the court relied on a literal interpretation of 'home', and did not build on the new interpretative matrix initiated by Sachs J. In fact, by *defining* 'home' the court probably damaged the matrix. If the court had instead employed the matrix built in *PE Municipality* and *Grootboom* above, it could have justified its decision within the specific context of section 26 of the Constitution (the right to access to *adequate* housing) and equality and justice. Equality and justice will not be offended if people who obtained the right to erect holiday homes on an ecologically sensitive coastline in a dubious manner (a bottle of brandy and a few hundred Rand a year) were evicted from their second homes.

In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*[59] Sachs J gave a different interpretation than in the *Barnett* case by linking the understanding of 'home' to citizenship. He turned the focus to what adequate or dignified housing would entail. A humble home, when dignified, will show that the people otherwise marginalised will be accepted as members of an organised civil society, thus enhancing people's self-esteem. It will remove the threat of eviction. It will ground them somewhere.[60] It seems that Sachs J suggests that the interpretation of a dignified home would at least include a degree of permanence or security, which would enable a person to participate in civil society. This brings back the imagery created by Mda, of Noria's fear of being naked in her home

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55 *Ibid* par 37.
56 2007 (11) BCLR 1214 (SCA).
57 *Ibid* par 38.
58 *Ibid* par 38.
59 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2009 (9) BCLR 847 (CC).
60 *Ibid* par 388.

because of attacks always being imminent, and it reminds us of the invasiveness of apartheid into this private sphere – the 'home' – which connects to the bigger political picture of denying black people civic rights, and excluding black people from participating in public life. It also links to Michelman's idea that constitutional property rights should be protected in order to enable an individual to participate in a democracy.[61] If the right not to be evicted is interpreted similarly, the argument can be made that if political participation rights are protected, then people cannot be evicted if their ability to participate in politics will thus be diminished. In the *Joe Slovo* case, Sachs J argued that a dignified home would enable exactly this.

In an act of political defiance, the occupiers in *Breede Vallei Munisipaliteit v Die Inwoners van Erf 18184, Dikkopstraat 3, Avian Park, Worcester and 18 Others*[62] unlawfully occupied empty houses that formed part of a housing project but had not yet been allocated.[63] Many of the people that moved into the empty houses did so from unsatisfactory (crowded) accommodation. Trying to institute the *mandament van spolie* to restore possession, the municipality argued that it had peaceful and undisturbed possession of the empty houses, and that the occupiers unlawfully disturbed such peace. A magistrate found that the *mandament* was available to the municipality, because the respondents had not established that the dwellings they occupied were their 'homes', thereby not falling under the ambit of PIE's protection. The appeal to the High Court dealt with the question of whether or not PIE was applicable, as the occupiers claimed that they had effectively been evicted from their 'homes'.[64] The court initially made it clear that the *Barnett* case could not be an authority in cases like this. The *Barnett* case was restricted to holiday cottages ('an additional home') built by wealthy people without permits. In that case, the question of regular occupation or a degree of permanence as well as the question of the existence of another, second 'home' had been important. In the *Breede Vallei* case, the pre-existing accommodation that some of the people moved from was unsatisfactory and could not constitute a second 'home'. That fact, coupled with the fact that the people believed that they had a claim to the houses and occupied the houses to make them their homes, distinguished their case from the *Barnett* case.[65] As if pre-empting the *Fischer* scenario,[66] the court stated that–

> [i]t would be a remarkable proposition if it were contended […] that squatters who overnight make their home on unoccupied land by erecting a make-shift shelter and who have no other fixed abode could not claim the protection of PIE if the authorities were to immediately demolish such dwellings without a court order.[67]

In *Breede Vallei* the court built on the interpretative matrix by invoking memory. The court investigated the historical background of forced removals in Cape Town in the 1970s and 1980s, and placed PIE and section 26(3) of the Constitution in that context. In this sense, 'where a person's housing circumstances are dire, much less may be required for such a

61 Michelman 'Property as a Constitutional Right'.
62 [2012] ZAWCHC 390.
63 While the bulk of the houses in the scheme had been allocated to people who qualified for a housing subsidy, the houses that were illegally occupied had not been allocated because the municipality was awaiting provincial approval for this to be finalised.
64 *Ibid* pars 1–11.
65 *Ibid* par 19.
66 Discussed below in more detail.
67 *Ibid* par 20.

person to establish a "home" by way of regular occupation and a degree of permanence'.[68] It seems as if the court suggests that the word 'home', even if it is not the only home (as in *Barnett*), will be interpreted differently where the current circumstances of the unlawful occupant are distressing and the alternative accommodation unsatisfactory. Our memory is in this instance evoked to remember the situation of insecure tenure we try to avoid. The court also shows its unwillingness to return people to their previous, unsatisfactory accommodation. In this sense the interpretative matrix is developed to make sure that section 26 not only serves as a monument that leads us to the situation where peoples' right to adequate housing are respected, but also serves as a memorial, by ensuring that ordinary people are not left without shelter again because of a too narrow interpretation of the law, in this case the meaning of 'home'.

The question of an alternative home and the use of the *mandament* to get people out of a house surfaced again in *Afzal v Kalim*.[69] In this case the parties got divorced in terms of Muslim law (which divorce was the subject of a different dispute).[70] Before the divorce Kalim left the family home (that they co-owned) and moved to a different city, living in a house that her family bought her and her children. Afzal in the meantime married another wife in terms of Muslim law. Three years after leaving the house, Kalim moved back. Afzal applied to have his possession restored and for the removal of her from the premises by instituting the *mandament van spolie*.[71] The respondent answered by saying that the applicant should use PIE to evict her.[72] Relying on the preamble of PIE, the court concluded that PIE is applicable only to the eviction of unlawful occupiers of 'homes'.[73] After considering the *Barnett* judgment the court found that the house was not the respondent's home because she returned to it sporadically while living in another city with her children. The court stated clearly that –

> she had not occupied [the house in dispute] regularly and with any *degree of permanence*. […] It is not, from her perspective, her and her family's *fixed residence*, much less the *seat of her domestic life*. In these circumstances, the house is not her home, even if she is a co-owner of it. [own emphasis]

This echoes the dictionary definition used in *Barnett*. The case shows the problem with the pre-constitutional interpretative matrix that relied heavily on a literal interpretation. On *Barnett's* interpretation the house is not a home. What would a richer interpretative matrix with a Constitutional element produce? Will the court ask different questions? Would it perhaps ask what Kalim subjectively thought the house to be? How would a decision that is informed by the values of human dignity, justice and equity influence the court's interpretation of 'home'? One would not know, because those were not the cues that the court took. They were not part of the matrix of interpretive legitimacy that the court followed.

In *Fischer and Another v Persons whose identities are to the applicants unknown and who have attempted or are threatening to unlawfully occupy Erf 150 (Remaining extent) Philippi*

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68 *Ibid* pars 20, 31. The court agreed with the *Rudolph* judgment that 'unlawful occupiers' could be evicted only by following the procedures in PIE, whether the people are referred to as 'squatters' or 'land grabbers'.

69 [2013] ZAECPEHC 33.

70 *Ibid* par 1.

71 *Ibid* pars 1–6.

72 *Ibid* par 3.

73 *Ibid* par 24.

In re: Ramahlele and Others v Fisher and Another,[74] the owner of the land, Mrs. Fischer, applied for an urgent interdict (main application) to prevent people from entering and staying on the property. About 40 homeless people had earlier built structures on the land, which had then been demolished by the Anti-Land Invasion Unit and the South African Police. When Mrs. Fischer applied for the interdict to prevent people from entering and staying on the property, the people left homeless launched a counter-application interdicting the applicant from demolishing the structures and declaring the dismantling and destruction unlawful and unconstitutional (spoliation order). The City, in their affidavit, admitted that certain occupiers[75] enjoyed the protection of PIE, and had to be evicted using PIE.[76] The City, however, claimed that it had acted lawfully with regard to the structures that were being put up, as these structures 'were not yet homes', and therefore fell outside the ambit of PIE.[77] The court granted the counter-application based on the fact that the structures were 'occupied', but *obiter* considered the meaning of 'home'. Referring to Sachs J in *Port Elizabeth* and distinguishing this case from Brand J's definition in *Barnett*, the court did not find the duration of occupation to be decisive, but rather the *lack of alternative places to stay*.[78] Relying on Lorna Fox's interdisciplinary research,[79] the court considered that the deeply significant role that a house plays in human dealings makes the formulation of a legal concept difficult. For this reason the court found that an interpretation of 'home' in the constitutional context should be wide rather than restrictive. Referring to *Rudolph* and *Breede Vallei Munisipaliteit* the court found that the meaning of home cannot be restricted with reference to the length of occupation, but rather the *intention* behind the occupation. If the structure is completed with the intention of taking up residency,[80] the concept of a home is invoked and PIE is applicable.

Drawing on various psychological studies relating to the notion of a 'home', as contained in Fox's work, the court thus enriched the interpretative matrix. It is not just the length of occupation or the question of whether or not it is the seat of domestic life that has to be taken into account. The intention of the occupiers has also become important. Fox[81] identifies a person's *home* as an essentially subjective phenomenon, thus giving home a value that can be used to measure if something is, indeed, a home.[82] While a home is both a place and a setting for the law to happen in (think of divorces, domestic violence, custody) as well as the subject of much social science research, it remains largely undefined in law.[83] Fox examines the idea that *home* = house + *x*, where the 'house' refers to the physical structure that is easily translated into legal language, and the *x* represents the social, psychological and cultural

74 2014 (7) BCLR 838 (WCC).
75 In the applicant's affidavit a distinction was made between persons who had been on the property for a fair length of time, those who attempted or were in the process of erecting structures and those who threaten to unlawfully occupy the land.
76 *Ibid* par 27. On appeal in *Fischer v Ramahlele* [2014] ZASCA 88 the Supreme Court of Appeal reprimanded the High Court for raising points *mero motu* and deciding the case on such points without hearing oral evidence on the factual dispute between the parties relating to the counter-application. The matter was referred back to the court *a quo* for the hearing of such oral evidence.
77 *Ibid* pars 23, 67.
78 *Ibid* par 89.
79 Par 90. See also discussion below.
80 Par 78.3.
81 Fox 'The meaning of home: a chimerical concept or a legal challenge?' 580.
82 *Ibid* 581.
83 *Ibid* 586.

values that one finds in and around such a physical structure.[84] This *x* is, of course, subjective, and not necessarily the same for all occupiers. Through empirical research into occupiers' ideas of what a home is, four main value-types were identified, namely: home as a physical structure (material shelter); home as territory (security, permanence and privacy); home as a center for self-identity; and home as a social and cultural unit (the place for relationships with family and friends).[85] Being a fluid concept, 'home' may contain all or some of these meanings in the mind of a particular occupier.[86] Thus, while the physical structure (the house) is easier to incorporate in law, it is also the physical structure that provides a space for the other phenomena to exist. It is important to remember that the house, the physical aspect, is not the only or the most important aspect of the concept 'home'.[87]

When seen in this light, it is possible that the shelter in the *Dladla* case constitutes a 'home', even if it is temporary, even if it is just a transition, or a 'waiting room'. In *Dladla and Others v City of Johannesburg Metropolitan Municipality*[88] people who had already been evicted previously were being housed in a temporary shelter pursuant to a court order by the Constitutional Court. While the occupants were meant to stay in this temporary shelter for only six months, they had already been living there for three years.[89] The court had to deal with the question of whether or not this temporary shelter in the hostel constituted a 'home' that was entitled to constitutional protection.[90] While the City eventually accepted that it was the 'home' of the occupiers, and that they therefore enjoyed the protection of PIE, the discussion in the court is still interesting for the purposes of this chapter.

The City's central argument supporting the contention that the shelter did *not* constitute a home was that it provided accommodation for only a limited time period, *even if the individual had nowhere else to go*. The idea was that the occupants had to transition to permanent 'homes'.[91] The other problem was that the shelter had many rules. These rules, the applicants contended, infringed on their rights to dignity, freedom of movement and privacy, rights that the applicants associated with a 'home'. These included rules about keeping rooms clean, cooking in the common area, vacating the premises during most parts of the day, and men and women being in separate dormitories. The court accepted that the rights to privacy, freedom of movement and dignity were important for a person to feel human and to feel that his or her human worth was being recognised. It was important for an individual to have these rights in order to be able to live a life of dignity.[92] Rules that threaten the core of a person's privacy, that arrange a person's intimate personal space, his or her family life, his or her 'home', are therefore not enforceable. The way the court dealt with the shelter as a (temporary) home, and what the functions must be of such a shelter, gives a glimpse of the other constitutional rights that become important when we look for the meaning of 'home'.

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84 *Ibid* 590.
85 *Ibid* 590.
86 *Ibid* 591.
87 *Ibid* 592.
88 (39502/12) [2014] ZAGPJHC 211.
89 *Ibid* pars 1, 6.
90 *Ibid* par 15.
91 *Ibid* par 21.
92 *Ibid* par 41.

Dladla dealt with a separate issue, but the court's articulation of the importance of a physical structure that must make a family life possible, the importance of a feeling of 'home', was well demonstrated. Njabulo Ndeble, who wrote about his own 'homecoming' in 1991, beautifully describes this subjective sense of belonging. He writes:

> Returning home, I did not find my home. But then again, I have returned home. Yet, it is true that I am still looking for a home to stay. (Where in this vast country will I finally live?) These contradictions force home the question: what is a home? Surely it is not merely a house. Is it a place associated with long memories? Somewhere to dig up roots?[93]

He concludes that a 'home' is a space that makes intimacy possible, an intimacy that helps us make sense of ourselves, of our place in society. This resonates with Sach J's idea that home is a 'zone of personal intimacy and family security', and with the court in *Dladla* protecting what is dear to us in a 'home' through the rights of dignity and privacy.[94] This was not always possible during apartheid, but the constitutional interpretive matrix will require from us to incorporate these elements into the definition of 'home', whenever we are called on to interpret it. Toloki started off in a waiting room, anticipating it to be a place between the past and the future. His moving in with Noria, the warning not to be naked in a shack, takes away some of the intimacy and privacy a house is supposed to have in order for it to be a home. In this context, Ndebele's wish rings loud:

> I dream that my children can build homes of the kind that eluded me; homes that can never be demolished by the state in order to make memories impossible; homes that can sustain public life because they infuse into it the values of honor, integrity, compassion, intelligence, and creativity. Public intimacies do need private intimacies. This is the discovery of personal and social meaning through the pains and the joys of belonging, participating, trusting, and just feeling at home.

5 Conclusion

When faced with the realities of competing rights (property rights vs the right not to be evicted), or when a court needs to decide if one person can remain in her home while another person must go, how should courts go about it?

This question does not have a definite answer. 'The possibility for meaning [is] boundless.'[95] The courts seem to suggest that in different contexts the term 'home' can mean different things. The courts will therefore have to go through the interpretative process freshly in the context of every separate case until we have a larger body of case law that will harmonize our instincts as to what a 'home' is for the purposes of section 26(3) of the Constitution.

The *Barnett* case dealt with wealthy people owning holiday cottages. By invoking a literal interpretation the court concentrated on the degree of permanence of occupation. Looking at the richer matrix of interpretative legitimacy could also have solved the issue. The occupiers' ability to participate in a democracy was not dependent on their occupation of the cottages. Their family life, their intimacy, their privacy would not have been offended to such an extent that we would wish to exclaim 'No! Don't evict them from their "homes"'. The *Azil* case poses a greater difficulty. We are not sure *why* the ex-wife moved back to the house, or what her subjective perception of the house is. The whole story is not told in the case, so that her intent is not revealed. Does she and the children (still) have an alternative home to retreat to, to find intimacy and privacy?

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93 Ndebele 'A home for intimacy' 29.

94 *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7 par 17.

95 Du Plessis 'Lawspeak as text… and textspeak as law' 799.

Njabulo Ndebele states that interpreters of society (like writers and artists) have a great responsibility to the rest of society: they have to define accurately, and then promote the broad social interest. Writers are regarded as formal interpreters of society, and writers often lead us to understanding, or help us to give meaning to concepts that might not otherwise be revealed. This can aid the legal interpreter greatly when faced with ideas such as that of a 'home'. Writers like Mda and Ndebele remind us about the complexity of societies, and that by focusing on the ordinary we can grow our consciousness of our realities.[96] This increases our understanding of the signifiers at stake; they enrich our understanding of certain concepts. The journey we walk with Toloki makes it possible for us to imagine different meanings of the term 'home'.

After Noria's shack burned down, Toloki helped her to rebuild her home, much as South Africa is trying to build a post-apartheid nation.[97] The shack was multi-colored and bright, decorated with magazine cuttings from a *Home and Garden* magazine.[98] Neighbours seeing the shack admired it. Representing the rebuilding of a nation,[99] the shack was spectacular. The people –

> marvel at the workmanship, and at how the plastic and canvas of different colours have been woven together to form patterns that seem to say something to the viewer. No one can really say what their message is, except to observe that it is a very profound one.[100]

This passage reminds me of the Constitution as a monument (the marvelous shack, the house, the home). With a right not to be arbitrarily evicted from a home, we have achieved something monumental. Perhaps, like the neighbours, we sometimes stand in awe of this monument, a glimmering shack, without exactly knowing what the message is.

But it is also a memorial. The fact that Noria and Toloki live in the shack, decorated with pictures of a house they can never afford, shows how dispossessed people are sometimes restricted to a space where they can only imagine their rights being fulfilled.[101] The anticipation of the fulfillment of the promise lives alongside the memories of past violations and the continued effects the violations have on the lives of ordinary people.[102] The house on the wall is beyond the reach of our two characters, and we, the readers, are left in the waiting room, waiting to see if their space constitutes a 'home'.

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The South African Constitution as memory and promise

An exploration of its implications for sexual violence

Louise du Toit

'The need to lend a voice to suffering is a condition of all truth'
Theodor Adorno[1]

'*However utopian a community thinks itself, it still must begin by building a prison and a graveyard*'
Judith N Shklar[2]

1 Introduction

As we move further away from apartheid in time, the politics of memory seems not to fade, but instead to intensify, and the past is now more contested than ever.[3] Moreover, as a young generation of 'born-free' South Africans of all races fight for a rightful place in the new democracy and the economy, one can only expect these struggles over meaning to escalate. With the launch of the Institute for Justice and Reconciliation in 2000 Lourens du Plessis[4] claimed that '[t]he potency with which [the South African Constitution] can mould a politics of memory … equals the authority with which it can shape the politics of the day'. His understanding that 'the manner in which we deal with the Constitution as memory predetermines the fulfilment of the Constitution as pledge',[5] echoes Paul Ricoeur,[6] for whom hope is intertwined with reminiscence. Du Plessis recognises that the promise embodied by the South African Constitution is dynamically dependent on the exact ways in which the text and its interpretations remember (ie evoke, shape, package and preserve) the past of this country. Du Plessis's rootedness in the hermeneutical tradition makes him particularly sensitive to continuities over time.[7] He is ever alert to the force of traditions and to the pre-understanding (*Vorverständnis*) that feeds into and 'navigates' all

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1 *Negative Dialectics* 365.
2 *Redeeming American Political Thought* 72, said with reference to Nathaniel Hawthorn's *The Scarlet Letter*.
3 See Davis 'SA Reconciliation Barometer 2014: The struggle against Apartheid amnesia' *The Daily Maverick* 4 December 2014 for a discussion of the Institute for Justice and Reconciliation's 2014 Reconciliation Barometer which shows that among all race groups there is a drop in the percentage of people who believe apartheid to have been a crime against humanity.
4 'The South African Constitution as memory and promise' 385.
5 *Ibid*.
6 *Hermeneutics and the Human Sciences* 100.
7 Du Plessis 'The jurisprudence of interpretation and the exigencies of a new constitutional order in South Africa' 11.

interpretive activities. Not only do our understandings of the South African past shape how we interpret the Constitution post-apartheid; it is also the case that our changing expectations of what the future should yield or what the present demands, feed into and shape our changing interpretation of the meaning of past events. Quoting from Milan Kundera, Johan Snyman[8] emphasises that the fight over the meaning of the past lies at the heart of any politics of memory: 'The struggle of man against power is the struggle of memory against forgetting... The only reason people want to be masters of the future is to change the past'.[9]

In the same paper Snyman proposes that his suggestive distinction between two different strategies employed in the politics of memory – monumental and memorial respectively – could be fruitfully applied as a critical lens to evaluate the politics of memory inherent in every instance of constitutional interpretation.[10] In the first part of my chapter I trace Snyman's distinction between the ways in which the monument and the memorial tend to remember the past and pledge a future. I supplement the tension which he sets up between these strategies with insights from Elaine Scarry, focusing on different interpretations of violence and suffering. In the second section I turn to Du Plessis's application of that distinction to constitutional interpretation. In particular, I am interested in how he sees the balancing of the monumental and memorial moments as lying at the heart of a critical jurisprudence of difference. Du Plessis's position on the need for interplay between monument and memorial is further illuminated by the work of Judith Shklar. The third part of the chapter is devoted to the challenge to constitutional interpretation presented by the major problem of ongoing and escalating sexual violence in South Africa. The role of sexual violence in armed conflict (for example, in Rwanda and the former Yugoslavia) as well as the meanings of high levels of sexual violence post-conflict have received unprecedented focus in feminist scholarship since the 1990s. The United Nations Security Council Resolution 1325 of 2000 responds to these insights by attempting to address 'men's historically privileged positioning in the nation state' as well as the masculinisation and militarisation of the nation during political transition through gender-based violence.[11] But the relation of the South African Constitution to international and human rights frameworks is precisely one of the issues at stake in different strategies of remembrance. I am interested to explore whether, and if so how, the resources for constitutional interpretation that Du Plessis identifies in the monumental and memorial politics of memory and in the type of jurisprudence of difference which he favours, can be harnessed to reinvigorate the firm promise to put an end to sexual violence which the South African Constitution contains on the face of it.

2 Monument and memorial as different remembrance strategies

In this section of the article I first draw attention to the tendency of all strategies of remembrance to sabotage their own intentions, *viz* to the active forgetting which lies at the heart of every attempt at remembrance. I then analyse Snyman's distinction between monument and memorial, linking it with Scarry's understanding of the body in pain. I show

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8 'Interpretation and the politics of memory' 312.
9 *The Book of Laughter and Forgetting* 1, 22.
10 Snyman 'Interpretation and the politics of memory' 315.
11 Hoewer 'Reframing nationalisms and addressing gender-based violence in societies in transition' 2.

why Snyman privileges the memorial strategy of remembrance, and conclude by looking closely at the dangers that Snyman nevertheless detects even in memorial remembrance.

Implicit in Du Plessis's understanding of the constitutional 'moulding' of a politics of memory, is the hermeneutical understanding that the Constitution cannot actually capture or represent the unique past event. Any text can at most hope to trace particular aspects of the South African past by selecting elements and arranging them narratologically.[12] These elements have always necessarily been lifted out of the complexities of context, meaning that they are always already interpretations more or less in the service of meaning-making political projects in the present. Every politics of memory simultaneously urges us to remember some things, while prompting us, paradoxically, to actively *forget* others. Any interpretative grasp or narrative construct can only achieve identity if it can successfully repress those elements of contradiction and contestation that threaten to derail the constructed unity meant to mould the past into something that would serve the present or future. Devices of remembering thus tend to work against themselves in that forgetting, exclusion and repression lie at the heart of their projects of remembering. Memory is thereby clearly understood as the site of ongoing struggle. Yet, Du Plessis does not take this insight into the necessary limitations of the 'struggle of memory against forgetting' to imply that the politics of memory should therefore be relegated to an irresolvable relativism. Instead, there are indeed better and worse ways to remember (and forget).

Du Plessis's normative evaluation of different strategies of memory is oriented mainly by the basic distinction Snyman develops between the monument and memorial as two different strategies of remembrance. Following Arthur Danto,[13] Snyman sees the monument as that which urges us to remember what is easy to remember, to celebrate the memorable. Usually the memorable would be a high point in the history of the 'we', or of the implied collective readership of the monument. The monument marks an authoritative commencement or beginning, a (re-)birth of the collective. In spite of its association with birth, it is explicitly masculine and heroic in that it typically celebrates heroes and their often violently sacrificial or self-sacrificial acts which serve to honour the 'we'. Monuments celebrate victories and triumphs, even if they may allude to death, loss and suffering in the process. This interpretative strategy renders the suffering and death of the monument a sacrificial, life-giving, and therefore ultimately justifiable death.[14]

Considering the death of the hero, the onlooker is made to feel grateful for the sacrifice and has a renewed sense of being alive, both as individual and as part of a living collective. A monument aspires to be a salient part of the group's everyday life and thus occupies a central and highly visible position. It extends an invitation to the intended viewers to identify with the heroes and to see a facile continuation between themselves and the events remembered, and thus really *to honour themselves as they honour their heroes*. The monument is affirming of the continued collective existence and aims to inspire national or ethnic pride and confidence. What does the monumental Janus promise for the future? The

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12 See Ricoeur *Hermeneutics and the Human Sciences* 274–296.

13 *The State of the Art* 1987.

14 See Cavarero *In Spite of Plato: A Feminist Rewriting of Ancient Philosophy* for a discussion of how death is the measure of the worth of the masculine hero in the western literary tradition. Because of the gender bias of the term 'hero' the suffering of women does not easily lend itself to monumentalisation. See for instance the article by Theidon 'Gender in transition: Common sense, women, and war' 464, and Snyman's quote – where women's suffering is seen as doubly heroic precisely because women do not easily gain honour through their suffering.

promise of monumental remembrance is the ongoing existence and flourishing of the 'we' whose (re-)birth is authored and authorised by the monument. Monumental versions of the past serve to narrate the collective into an identifiable and legitimate group with a particular place in history. It moreover inscribes the individual story within an optimistic national story and calls for a 'tacit oath of allegiance', says Snyman.[15] To abandon the group or to question its monumental history would amount to a betrayal of the sacrifice of the heroes. A central aspect of the monument entails that it remembers losses in a sacrificial way, thereby actively repressing perspectives that would undermine or challenge that version.

It is useful to recall in this regard Elaine Scarry's phenomenological descriptions of the body in pain, in torture and in war. She notes a constitutive resistance of pain to language and share-ability. This is not to say that pain can never be articulated, but rather that, 'the moment [pain] is lifted out of the ironclad privacy of the body into speech, it immediately falls back in. Nothing sustains its image in the world; nothing alerts us to the place it has vacated'.[16] This trait of pain yields a rich field of possibilities for its abuse in the form of transference of its stirring power. Similar to torture, theatres of war and violent conflict are for her –

> based on a simple and startling blend of the real and the fictional. In [torture and war], the incontestable reality of the body – the body in pain, the body maimed, the body dead and hard to dispose of – *is separated from its source and conferred on* an ideology or issue or instance of political authority impatient of, or deserted by, benign sources of substantiation.[17]

The appropriation of suffering and of the meanings of bodies in pain is thus not something that only happens monumentally after the event; Scarry shows that in war and in torture it is part of the event even as it unfolds. As she explains, there is no reason why an international dispute cannot be settled by a chess game, for instance, other than that 'the legitimacy of the outcome' of a war, unlike the outcome of a chess game, 'outlives the end of the contest because so many of its participants are frozen in a permanent act of participation'.[18] Thus, while the rules of war are as arbitrary as the rules of chess, 'the winning issue or ideology' in a war, or the outcome of the conflict 'achieves for a time the force and status of material "fact" by the sheer material weight of the multitudes of damaged and opened human bodies'.[19] Survivors abide by the outcome of the war, precisely so that the sacrifice of and by loved ones would not have been in vain. The meaningful narration of that suffering in terms of a national sacrificial story simultaneously justifies and appropriates the power of the suffering. This is the main insight of Scarry's book: that bodies in evident pain, suffering or dead bodies, carrying the marks of violence, 'make up and make real' truth regimes. This is similar to where the ritual sacrifice makes up and makes real the invisible deity in whose name it is performed. In the terminology of this chapter, monumental suffering is therefore *justified* in the name of some or other truth regime which appropriates the power of that suffering. The sheer materiality of injured and dead bodies, the instinctive empathetic fear and awe that they inspire, says Scarry, get lifted or 'separated from their source' and conferred onto something abstract and elusive such as national honour.

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15 'Interpretation and the politics of memory' 318.
16 Scarry The Body in Pain: The Making and Unmaking of the World 60.
17 *Ibid* 62 (own emphasis).
18 *Ibid*.
19 *Ibid*.

For Snyman, where the monument is celebratory, the memorial by contrast reminds us to mourn what properly calls for mourning.[20] The memorial struggle is against the human inclination to forget that which is difficult to remember, painful to be reminded of. In Scarry's terms, the mourning memorial will arguably attempt to facilitate the expression of suffering without separating it from its source, without appropriating and transferring its stirring force onto something else. The memorial ideally returns their suffering to the victims, and refuses a sacrificial justification thereof. This is why the memorial (*Mahnmal*) disturbs, questions, warns and even castigates its implied audience.[21] In Danto's words, the monument urges us always to remember, whereas the memorial reminds us never to forget.[22] The best way to explain the memorial strategy might be to say that it ritualises the reality of endings and it therefore centres victims, losses, defeats, and the irretrievability of the dead. It ideally critically interrogates and destabilises the grand narratives in whose name the suffering and losses have been inflicted and justified and can thus be seen as an anti-monument. Snyman sees the memorial as less salient – like a cemetery, the memorial tends to be a 'special precinct, extruded from [everyday] life, a segregated enclave where we honour the dead'.[23]

Where monuments celebrate beginnings, memorials mourn endings. Whereas the monument encourages us to repeat the heroic acts of the past in future, emphasising the new life that emerges from suffering and death, the memorial's message or pledge is a loud and clear: 'never again!' In place of the oath of allegiance elicited by the monument, the memorial's warning calls for an act of resistance or refusal. The *promise* of the memorial is therefore also that certain past events should be prevented from happening ever again. This is urged through keeping alive in people's minds the memory of the loss, of the victims, *for their own sake.* The promise of the monument entails that in future, as in the commemorated past, heroes will fight for the group's survival, violent sacrifices will be made. They thus call for sacrifice. In contrast, the memorial asks of the viewer: will you be one who will fight to ensure that such a 'sacrifice' need never happen again? As anti-monument, the memorial thus disrupts the logic of sacrifice. The monument inspires us with a vision of wholeness and health, in spite of, or even thanks to, suffering or loss. In contrast, the memorial calls us to vigilance through a vision of unjustifiable suffering and loss. As Snyman says, in the monument we are encouraged to identify with heroes; in the memorial we are challenged to identify with victims. Psychologically, the latter is much harder. Instead of reconfirming the self-worth of the viewer as the monument does, the memorial 'makes the public feel they owe the victims something'.[24]

Snyman's preference for the memorial over the monumental mode of remembrance is clear from his sympathy for Emily Hobhouse's attempt to create a memorial for the women and children who were the main victims of the Anglo Boer War. He critically links the retention of monumental elements in the design of the Women's Memorial in Bloemfontein (eg the transformation of the *victims* of the war into self-sacrificing *heroines*) with the emergence of Afrikaner nationalism and apartheid.[25] It is noteworthy that, after prioritising the memorial over the monumental moment of remembrance, Snyman nevertheless

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20 Snyman 'Interpretation and the politics of memory' 318.
21 Du Plessis 'The South African Constitution as memory and promise' 386.
22 *The State of the Art* 115.
23 *Ibid* 112 quoted in 'Interpretation and the politics of memory' 317.
24 Snyman 'Interpretation and the politics of memory' 318.
25 *Ibid* 336.

warns of several dangers associated with the memorial. At the start of this section it was argued that all strategies of remembrance are partial and run the risk of self-refutation. But this does not mean that all such strategies are equally self-undermining or equally unhelpful in shaping a better future. By working out the contrast between monument and memorial Snyman posits the ideal aspects of the memorial as preferable and as being constantly threatened by the self-undermining or repressive aspects of the monumental strategy. Recall that the memorial attempts to focus indignant attention on the actual suffering of actual victims, while the monument tends to gloss over suffering, or to appropriate suffering for a collective dream or aspiration. Memorial resistance to monumental impulses would thus entail two things in particular: (i) the focus on actual suffering understood as unnecessary and strictly unjustifiable (ie the refusal to appropriate suffering, to turn victimhood into heroism), and (ii) the focus on the universal promise or pledge that nothing like this should happen ever again, anywhere, to anyone.

For Snyman, the best aspects of the memorial can be sabotaged by monumental impulses, and this may happen even when a consciously memorial strategy is followed in the sense that the focus of the memory work is on the mourning of victims rather than the celebration of heroes. The first danger that Snyman explicitly notes is that the *Mahnmal* may 'turn into an ominous sign of humiliation';[26] ominous, because the victimhood as ritualised may be harnessed for violent ends. Related to this danger is the possibility that the memorial may function to 'other' the enemy[27] and that 'the other' may also *become* the enemy. Clearly revenge, xenophobia, racism and other violent phenomena may flow from such a strategy of remembrance. Snyman suggests that, short of the German counter-monuments that are self-consciously temporary and/or that self-destruct over time,[28] one way of averting the danger of a memorial turning into a rationale for revenge is to regularly attend the *Mahnmal* 'with the ritual of remembrance and mourning of all the unnamed victims' in order that the present generation may learn to 'empathise with the victims'[29] and wish to avoid similar actions in future. By being reminded to feel that we owe the victims of the actual past catastrophe something, that the specific dead exert an appeal on the living, the memorial resists a too easy identification between the victims and the 'we' or the viewing public. It thus resists the kind of vengeful self-righteousness, flowing from a facile identification with victims rather than heroes which can in its turn justify a further cycle of violence and suffering.

Yet precisely the particularity of the victims which should prevent too easy identification in victimhood, could feed into a second danger Snyman notes in the memorial strategy of remembrance. This is namely the memorial's possible exclusivity, and in this regard he refers to several instances of unjustifiably exclusive commemorations: the initial Auschwitz memorial (which excluded any mention of the Jewish and Roma victims), the Hiroshima Peace Park with its exclusive Japanese victimhood and the Women's Memorial in Bloemfontein, initially excluding thousands of black victims of the British concentration camps.[30] In each instance, the mourning is selective and exclusive, blatantly serving narrow national interests and ignoring the universal demand of proper memorialism. These memorials imply that it is only a particular, pre-existing and limited 'we' who ever have

26 *Ibid* 318.
27 *Ibid* 319.
28 *Ibid* 318.
29 *Ibid* 318.
30 *Ibid* 319–321.

had or have been victims, and also that this 'we' were never also perpetrators of similar offences.[31] Such narrow circumscription of the meaning of victimhood, such ontologisation of victimhood which freezes time and erases context, appropriates the victims for a 'we' that has closed ranks on the rest of humanity. Here, the victim has died 'as' an Afrikaner or a Pole, a worker or white person in the first place and only secondarily as a human being. Here, the memorial betrays its own deepest impulse, namely its aspirational universal 'never again'. By repeating the violent ascription of essential and ahistorical identity by the original perpetrator, such a self-refuting memorial undermines its own aspiration to transcend its context of origin.

The memorial proper is kept alive in the fruitful tension between the nauseating singularity of the original victims the loss to/of whom is irretrievable, and the universal promise of 'never again' rising from the contemplation of this specific, unjustifiable suffering. Memorial lives in the space between a genuine mourning of the victims and a resolute refusal to allow such an *affront to humanity* from being repeated. The memorial is destroyed for Snyman with a slippage or 'semantic shift' which 'reduces the palette of history'. This happens when the memorial is appropriated by impulses that draw the attention away from the actual victims and the universal 'never again' emerging from their mournful contemplation. The memorial is thwarted when a narrowly conceived collective (the 'we' as essential component of monumentalism) usurps the places both of the original victims and of humanity as such. The result is that 'we', Snyman says, now 'become the objects of our own reverence'.[32] When monument usurps memorial, the suffering of the historical victims is in Scarry's words lifted from their bodies and conferred onto the living 'we'. The historical victims are betrayed by being turned into 'recurring icons' and 'general assets' of the viewing public.[33] This logic of continuation between past and present ('we are the victims mourned here' and 'we are the heroes being sanctified here') is precisely that which is sought and proposed by the *monument*, but it spells the undoing, self-undermining or end of the *memorial*'s true purpose. The memorial invites us to identify with the victims but without erasing them and without appropriating their suffering. The successful memorial, but not the monument, envisions the possibility that its intended audience may have been perpetrators in the past and may become perpetrators in future. Part of the implicit promise of the memorial is thus that it elevates the suffering of a historically embedded group to an affront to humanity as such, without losing from sight, or probably precisely by keeping a clear focus on, their particular and in-exchangeable suffering.

3 Constitutional interpretation and the need to balance strategies of remembrance

Unlike Snyman who sees the monument as the anti-memorial, Du Plessis understands monument and memorial as existing in a delicate, dynamic and often imperfect balance. Here, I first discuss how Du Plessis conceptualises monument and memorial in the context of constitutional interpretation. Secondly, I further unpack Du Plessis's rich understanding of constitutional memorialism as linked with a jurisprudence of difference. In the third place I defend his retention and rehabilitation of the monumental moment as a necessary counterpoint to the memorial with reference to the work of political theorist Judith Shklar.

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31 *Ibid* 319.
32 *Ibid* 319.
33 *Ibid* 319.

Snyman sees our Constitution as deriving its legitimacy and fulfilling its memorial function *par excellence* when it responds in its vision/promise for the future to the 'negative experience of the past'. The 'particular, identifiable and definable dystopia'[34] which the Constitution pledges to avoid in future, properly propels and animates its interpretation. As memorial the Constitution best aligns itself closely with the victims of the past and keeps them at the centre of attention, moving forward. Du Plessis takes from Snyman the understanding that memorial and monument are in tension; and indeed, as 'constitutional modes of existence' he considers them to be 'largely contradictory' approaches that should however be neither harmonised nor resolved. Instead, he proposes, the two modes should be 'duly and simultaneously acknowledged and honoured',[35] as we learn to live with the contradiction that they represent,[36] without striving for 'a higher synthesis of dialectical opposites'.[37]

Transferring Snyman's seminal distinction to the sphere of constitutional interpretation is no simple task. For Du Plessis, in the South African case, the Constitutions of 1993 and 1996 are clearly salient *monumental* texts that *rightly celebrate* the achievement of a peaceful transition to a non-racial democracy.[38] The Constitution celebrates the birth of the new and stands in the sign of an abundant and triumphant 'enactment of the values of democracy and the constitutional state'.[39] Read as monument, the text is hopeful about the capacity of the Constitution to create a better world than the one left behind. In terms of the famous bridge metaphor:[40] monumental constitutionalism upholds faith in the capacity of the constitutional bridge to clearly demarcate and divide time and space between a better 'here and now' and a worse 'back then, over there'. It affirms the capacity of the Constitution to cut through and sever the threads of time of Bergson's *la durée* (duration of time)[41] and moreover to transport the nation safely from one side of the divide to the other – over what Mureinik lyrically describes as 'the open sewer of violent and contentious transition'.[42] Moses and the Israelites survive the perilous journey through the Red Sea, which takes them from a land of oppression and slavery (in the words of the postamble to the South African interim Constitution: 'the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice') into a free land ('a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans...'). One sees here many elements of Snyman's idea of the monument: celebration, an affirmation of the 'we', the authorising of a new birth and faith in the future of the celebrated nation. Violence and suffering are moreover placed firmly in the past where they are largely justified retrospectively as sacrificially facilitating the birth of the new and better.

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34 *Ibid* 314.
35 Du Plessis 'The South African Constitution as memory and promise' 385.
36 *Ibid* 386.
37 *Ibid* 393.
38 *Ibid* 386.
39 *Ibid* 387.
40 As used in the postamble to the (interim) Constitution of the Republic of South Africa Act 200 of 1993; Mureinik 'A bridge to where? Introducing the Interim Bill of Rights' 31.
41 See Muldoon *Tricks of Time: Bergson, Merleau-Ponty and Ricoeur in Search of Time, Self, and Meaning* 67ff.
42 'A bridge to where?' 31.

The youthful optimism of the monumental constitution for Du Plessis is furthermore expressed in a facile continuity between local and global human rights standards and discourse, comparable with the continuity that Snyman detects between the struggle heroes and the viewing public. The truly monumental judgments of the Constitutional Court for Du Plessis include *Makwanyane* which abolished the death penalty, and a series of ground-breaking gay and lesbian rights cases, where the Court triumphantly drew on international law to give 'short shrift to the remnants of long-cherished biases',[43] going against public opinion with great self-confidence. A further aspect of monumental constitutionalism is the Court's willingness, as in *Makwanyane*, to perform a function 'which politicians... were not up to'.[44] What Du Plessis means by this is that, in adopting a 'unanimous and unambiguous stance on capital punishment'[45] the Court played a clear political role, shaping the future political landscape of the country in line with constitutionalism and human rights values.[46] Although there are problems with the monumental moment in constitutionalism, Du Plessis nevertheless sees it as a necessary moment, since '[a] nation that only commemorates tends to underplay its memorable achievements; thereby denying itself the inspiration it needs to come to terms with an undecided future'.[47] In fact, for him, the promise of the Constitution can only be fulfilled if the memorial and the monumental aspects are in some sort of balance.

Following Danto and Snyman, Du Plessis sees the *Mahnmal* as commemorating negative moments in the past with the aim to warn and 'castigate'.[48] He refers in this regard to Pierre Schlag's[49] notion of a necessary tension between the preserving or stabilising impulse of constitutions (monumental) and their destabilising, critical impulse (memorial). Thus, Du Plessis focuses on the *limits* of the Constitution – limits both internal and external to it. This is very much in line with Du Plessis's rootedness in the hermeneutical tradition, which Georgia Warnke[50] describes as a philosophy of finitude. Similarly, for Judith Shklar, history 'shows us what men are by revealing to us what they once were' and 'teaches us our limitations and invites moderation'.[51] Instead of the optimism and energy characteristic of the monumental impulse, we find in the memorial moment, caution, modesty and self-restraint on the part of constitutional interpreters. In the memorial moment, there is a clear consciousness of what the Constitution *cannot do*.

There are several aspects to Du Plessis's notion of the memorial constitution understood as a restrained constitution.[52] Firstly, there is the insight that the Constitution does not embody or realise the quest for justice, but at most stands as a sign or promise of a justice that is always still to come. In this sense the memorial constitution 'reminds us [everyone]

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43 Du Plessis 'The South African Constitution as memory and promise' 387.
44 Du Plessis 'Azapo: Monument, memorial... or mistake?' 62.
45 *Ibid* 62.
46 Du Plessis 'The South African Constitution as memory and promise' 390.
47 *Ibid* 393.
48 *Ibid* 386.
49 'Rights in the Postmodern Condition' 263–305 in Du Plessis 'The South African Constitution as memory and promise' 386.
50 According to her, Gadamer's work forms the 'basis for [the] current focus [in philosophy] on limits'; she adds, 'his concern has been to overcome the positivistic hubris of assuming that we can develop an "objective" knowledge of... phenomena' in *Gadamer: Hermeneutics, Tradition and Reason* 1.
51 Forrester 'Hope and memory in the thought of Judith Shklar' 605.
52 Du Plessis 'The South African Constitution as memory and promise' 388.

of our pledge... to achieve social justice',[53] and that the promise lies unrealised in the future. The parallel with the memorial is clear: it calls for the public to take an active part in shaping the future, but that active part takes form first and foremost as a warning or a negative obligation.[54] Secondly, the universalising thrust or aspiration of the memorial means that new contexts to which the memory of unjustifiable past suffering may be applied are kept deliberately open. In that sense, the Constitution, like the memorial, urges vigilance: we are called upon to take responsibility for preventing similar forms of oppression from occurring to anyone ever again, even if in new and unexpected guises. Returning to the bridge metaphor, one could say that the memorial questions the effectiveness of the bridge and suggests that the 'other side' may not be as stable or safe as it had seemed from a distance, or that the journey 'across' is not over yet. The memorial thus introduces a deep scepticism about the monumental attempt to sever *la durée* – neither the 'here' of the present and the future, nor the 'over there' of the past can ever be stabilised and cordoned off from the other. The past can never be fully overcome and left behind, and the future can never be wholly new. Thirdly, the restrained or memorial constitution not only calls on everyone to work for greater social justice; it also explicitly constitutes 'a promise to the whole nation', says Du Plessis.[55] He refers here to memorial moments in some Constitutional Court judgments where there has been (or should have been) a clear call for all voices to be heard, but especially the voices of the marginalised or oppressed. This resonates with the centring of particular, irreplaceable victims typical of the memorial. In the cases analysed by Du Plessis these voices are represented for example, by the children of the Christian parents who called for corporal punishment in schools,[56] by the Rastafarian community on their religious use of marijuana,[57] and by people in favour of the death penalty[58] in reaction to high rates of violent crime; also by the family of Nelson Chisale.[59] The analogy in Snyman's work is Hobhouse's blatantly censured voice, echoing the voices – often of quiet desperation rather than triumphant sacrifice – speaking from the letters which emanated from the concentration camps.[60] For Du Plessis, this careful attention to marginalised voices represents one of the best ways to work towards fulfilment of the memorial constitutional promise of 'never again'. In the fourth place the memorial constitution self-consciously avoids self-absolutisation. This entails that it acknowledges itself as only one role-player amongst many. Du Plessis emphasises the subsidiarity principle as

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53 *Ibid* 388.

54 This idea is of course also forcefully articulated by Socrates in his *Apology* where he argues that his superior wisdom lies in the fact that he does not think that he can know what he does not know (21d) and similarly the voice or daemon that advises him since his early childhood 'always dissuades [him] from what [he is] proposing to do, and never urges [him] on' (31d).

55 'The South African Constitution as memory and promise' 390.

56 *Christian Education SA v Minister of Education* 2000 (10) BCLR 1051 (CC); 2000 (4) SA 757 (CC). See discussion in Du Plessis 'Affirmation and celebration of the "religious Other" in South Africa's constitutional jurisprudence on religious and related rights: Memorial constitutionalism in action?' 387–388.

57 *Prince v President, Cape Law Society* 2001 (2) BCLR 133 (CC). See discussion in Du Plessis 'Affirmation and celebration' 388–390.

58 *S v Makwanyane* 1995 (6) BCLR 665 (CC). See discussion in Du Plessis 'The South African Constitution as memory and promise' 390–391.

59 *Crossley & Others v National Commissioner of South African Police Service & Others* [2004] 3 All SA 436 (T). See discussion in Du Plessis 'Affirmation and celebration' 393–396.

60 Snyman 'Interpretation and the politics of memory' 333.

vital to the memorial, self-limiting moment in the restrained constitution.[61] The *Soobramoney* case[62] is for him the primary example of where the subsidiarity principle was evoked by the Constitutional Court to the effect that the latter refused to override local authorities' decisions about the distribution of scarce resources, seeing that they were not being unjust or unconstitutional.[63] Du Plessis describes *Soobramoney* as 'a *Mahnmal* to starry-eyed constitutional over-optimism'[64] – starkly accentuated by the fact that Mr Soobramoney died on the very same day that he was informed of the Court's decision not to grant him access to a dialysis machine on state expense. The Constitution is thus memorial in that it acknowledges its own limitations in pursuing the public good and avoiding new victims, instead of the boundless self-confidence characterising the monumental stance. The memorial constitution adopts a certain modesty towards the complexity of reality and chooses to err on the side of caution.

From Du Plessis's article on the constitutional affirmation of the religious Other, it becomes clear however that the difference between a memorial and a monumental approach to the Constitution is not wholly captured by the distinction between modesty and self-confidence. Here, Du Plessis uses terms like 'affirmation', 'celebration', 'positive action' and 'transformative rigour' to describe memorial interpretations. He links section 7(2) of the Constitution wherein all the rights in the Bill of Rights are said to be not only respected and protected, but also *promoted and fulfilled*, with his understanding of memorial constitutionalism. He thus sees an abundant application of human rights in affirmation of difference as memorial rather than monumental. In his analysis of different Constitutional Court cases, he criticises attitudes towards religious otherness in which the marginal Other is (i) 'othered', (ii) heeded ('wariness'), (iii) understood but restrained, and (iv) paid insufficient consideration. In none of these instances did the strategy of constitutional interpretation come close to fulfilling the memorial constitutional promise that otherness would be affirmed and celebrated (as Du Plessis reads section 7(2) as informed by a jurisprudence of difference). With these he contrasts two cases in particular: *Chisale* and *Pillay*, in which he sees respectively a symbolic resurrection and an affirmation and celebration of the religious Other.

Elements of the monumental in Du Plessis are found back here: a celebratory application of human rights frameworks, and one may add political interference. Why then are instances of radical affirmation of difference for him instances of memorial constitutionalism? The answer lies in South Africa's specific history. For Du Plessis, a jurisprudence of difference, closely related to the kind of politics of difference developed by Iris Marion Young, should feed into and sustain memorial constitutionalism. This is so, since the former provides the latter with a broader and more concrete social understanding of the power relations in society, guiding interpreters in simultaneously foregrounding victims and keeping open the universal aspiration, ie in remembering the particulars of the past, but not in too narrow a way. As such, a politics of difference bolsters the universal aspiration of the memorial in that it illuminates the vulnerable and marginalised groups of the new dispensation, the specific victims of the post-colonial present. It thereby links the particular and the present with the universal command to avoid suffering arising out of an unjust past.

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61 Du Plessis 'The South African Constitution as memory and promise' 388.
62 *Soobramoney v Minister of Health KwaZulu-Natal* 1997 (12) BCLR 1696 (CC).
63 Du Plessis 'The South African Constitution as memory and promise' 391.
64 *Ibid* 392.

Thus, for Du Plessis, the memorial aspect of constitutionalism has the potential to function as a critical lens placing the focus on existing power relations and in particular on those people rendered vulnerable or precarious[65] by such relations. The ideology-critical, power sensitive reading of the context provided by a jurisprudence of difference empowers constitutional interpreters to affirm and celebrate otherness and in the process to promote and fulfil people's fundamental rights. Du Plessis sees this much more affirmative stance towards the vulnerable other as enabled by the *dominance* of *Mahnmal* constitutionalism. In such a memorial climate '*human dignity* gains the upper hand in the constitutional project in general, and in South Africa's Constitutional Court's equality jurisprudence in particular'.[66] Placing a concern for human dignity (the flip side of human vulnerability) at the centre of attention resonates strongly with the victim-focused approach of the memorial. For Du Plessis, moreover, when assertions of the dignity of otherness, couched as equality claims, are dealt with under the sign of memorial constitutionalism, what is required by a jurisprudence of difference and dignity is that 'mainstream preferences and prejudices' and 'supposedly neutral norms' are 'increasingly interrogat[ed], with transformative rigour', informed by the 'the desire to proceed beyond all that used to contribute to and sustain marginalisation of the Other'.[67] This is a politics of memory that says in the first place: never again! In this politics the memory of the victims of apartheid, the dehumanisation of persons on the basis of their despised otherness, their otherness framed as despicable, looms large. The universalising aspiration of the memorial is moreover evident in the fact that the religious other is a different category from the racial other most blatantly denigrated under apartheid.

Importantly, at the same time as otherness is celebrated by memorial constitutionalism, there are however important indicators that the Constitutional Court nevertheless refrains from essentialising difference and otherness. This is clear in the Court's consideration that 'evidence showed that [the nose stud that Sunali Pillay wanted to wear with her school uniform] was not a mandatory tenet of either her religion or her culture'.[68] If anything, the Court said, the fact that Sunali *voluntarily* chose to wear a nose stud, as an expression of her belonging to her religious and cultural group, enhances, rather than detracts from, the significance of the practice to her autonomy, identity and dignity. The Court is thus careful not to essentialise difference, but instead to allow for and to anticipate difference even within a category of 'difference' both of which it couches with dignity, and with equal respect. The positive outcome of this case moreover had the effect of showing up more clearly the prejudices and biases of the dominant cultural-religious group inside the school – institutionalised prejudices that have been posing as the 'neutral' standard against which 'difference' is marked.

With this rich understanding of memorial constitutionalism intertwined with a jurisprudence of difference, one may well ask why the monumental moment should be preserved as a kind of restraint or counterpoint for the memorial. It is helpful in responding to this question to turn to the work of Judith Shklar. Engaging with the same concerns as Du Plessis, she instead talks about the dynamic interaction between hope and memory.[69] Like Du Plessis, for whom the dominance of the memorial means the affirmation of human

65 Butler *Precarious Life*.
66 Du Plessis 'Affirmation and celebration' 403.
67 *Ibid* 405.
68 *Ibid* 398.
69 Forester 'Hope and Memory in the thought of Judith Shklar' 592.

dignity and the prevention of suffering, Shklar has a perpetual concern about 'attentiveness to the past'[70] and she prioritises memory understood as memorial, as the remembrance of suffering and cruelty. Also like Du Plessis, however, she does not finally choose for painful memory to the exclusion of hope, but rather sees all sound political judgements as characterised by 'some sort of equilibrium between hope and memory', even if such equilibrium is often imperfect.[71] Where Du Plessis speaks of inspiration, Shklar talks about the energy generated by hope, saying 'we may well be able to get on without utopia, but not without the political energy required to think both critically and positively about the state we are in and how to improve it'.[72]

Shklar advocates a strong historical consciousness, but believes hope to be necessary for the pursuit of justice. A 'slither of hope', 'an ounce of optimism' is necessary in order to counter the problems associated with what she calls 'too much memory' where the remembrance of past cruelty and injustice leads to one of the following derailments: disaffection, prophecy (prophetic hope) and nostalgia. Like Snyman, Shklar worries about the many ways in which memorial strategies may become self-defeating. Too much memory can easily lead to a deep malaise in the face of the present. Melancholy hopelessness often leads to political paralysis. But it may also result in either prophetic or nostalgic strategies, both of which sacrifice the present and the future to either a presumed perfect future (prophetic thinking) or a presumed perfect past (nostalgic thinking). In other words, too much pessimism about the 'constancy of cruelty' leads to disengagement from political intervention in the everyday. Instead, hope should for Shklar be anchored in the everyday of the present, in the contemporary context and in what it offers in the line of concrete promises for a better (rather than a perfect) future. In terms of constitutional interpretation, we should be inspired to work hard with the little good that does lie within the Constitution's power,[73] instead of becoming disaffected because of the limitations of the law and the constancies of cruelty.

Hopelessness leads to inaction, but false – prophetic or nostalgic – hope as a version of 'too much memory' easily leads to new cycles of violence and cruelty. Too much memory tends to violate what exists in the name of what 'should be'. The prophet's hope is crucially not tempered through historical memory, which, if anything, is a lesson in the limitations of human projects. 'Without recourse to memory the optimist forgets that transformative politics lead to acts of cruelty'; zealous utopians are willing to sacrifice present reality, and even the future, in order to achieve an impossible ideal.[74] Instead, Shklar seeks sources of hope within 'the realities of the present... in her immediate, American, surroundings'.[75] She distrusts any basis of hope that lies outside the realm of human possibility. At the same time, she is also firmly opposed to all moralising anti-utopian thinkers who assume that any trace of utopian thinking must necessarily lead to totalitarianism. It all boils down to a mutual tempering of hope and memory, to a hopeful politics of finitude. For Shklar, the way in which to guard against disaffection and false hope is through an emphasis on current context.[76] Such an emphasis helps one to see the 'motivational complexities of human

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70 *Ibid* 592.
71 *Ibid* 593.
72 Shklar *Political Thought and Political Thinkers* 190.
73 Shklar *Ordinary Vices* 39.
74 Forrester 'Hope and memory in the thought of Judith Shklar' 603.
75 *Ibid* 597.
76 *Ibid* 608.

life' as well as 'the ordinary cruelties of human interaction'.[77] Attention to history should thus sensitise us to the complexities of concrete situations, but also to the banalities and ordinariness of evil (to borrow loosely from Arendt).[78] This will make us more vigilant about ongoing, often less than spectacular forms of violence in even the most liberal and democratic states. The only promise that something like the South African Constitution can hold for us, Shklar would argue, is incremental improvement won through strife. Shklar emphasises the messiness of the history of American constitutionalism, which includes its historical hypocrisies eg around slavery, but which also includes its 'thoroughly entrenched democratic optimism',[79] without which the decades of confrontation and incremental expansion and improved realisation of the promise would probably have lost their momentum.

To dwell on radical and spectacular instances of evil could well lead to tragic melancholy, but could also blind us to the pervasiveness of everyday cruelty and fear under 'normal' political circumstances. *Ordinary cruelty* ('the deliberate infliction of pain…upon a weaker person or group by stronger ones in order to achieve some end... of the latter') should for Shklar form the 'central subject of political theory'.[80] Struggling to improve the ordinary, instead of brooding over the extraordinary, is for Shklar the way to create realistic hope. She actively resists viewing victims as heroes and perpetrators as demons. For her, we are all potential victims and all potential offenders. The divide largely depends on chance. We know this through history. Therefore, concerns about ever new forms of ordinary cruelty should drive our political (and constitutional) action and thinking.

4 Sexual violence and the memory and promise of constitutional interpretation

In this final section I briefly draw together the main lines of the debate set out above in order to focus them on the issue of sexual violence in contemporary South Africa. I look at what the privileging of a memorial constitution implies for the sexual freedom of women. Then I look into the implications for the everyday cruelty of sexual violence against women and children of the monumental retention of a slither of hope as urged by Du Plessis and Shklar.

4.1 *The memorial moment*

The four thinkers of this paper concur in urging a sense of mourning and tragic limitation in constitutional interpretation, ie in emphasising the memorial moment of remembering. While any remembrance strategy must necessarily fall short of capturing 'the truth about the past', these theorists agree that the enduring lesson of the past is the constancy of unjustifiable cruelty. Particularly important in Snyman's thinking is the imperative to keep alive the tension within memorial thinking between the irreplaceability of the victims mourned and the universal command of 'never again'. This dynamic tension is important in resisting monumentalising impulses that would derail what is best about a memorial approach to the past.

A memorial emphasis within constitutional interpretation when brought to bear upon the problem of sexual violence and sexual oppression implies firstly that the constancy of

77 *Ibid* 609.
78 Arendt *Eichmann in Jerusalem: A Report on the Banality of Evil*.
79 Forrester 'Hope and memory in the thought of Judith Shklar' 612.
80 *Ibid* 614.

unjustifiable cruelty and the everydayness of oppression be acknowledged. Together, these two memorial insights work against the bridge metaphor which supposes that we can make a clean break with an oppressive past. Such a memorial stance urges us to acknowledge the specificity of victims in both past and present. Its universalising thrust is furthermore crucial in this regard: though the familiar faces of the oppressor and oppressed might have changed, the same logic could still be in place, repeating similar oppressive circumstances as in the apartheid past. In this regard, the work of Helen Moffett is instructive: she argues that the same patterns of intimate bodily cruelty that were once used by a white minority to keep a black majority in its socially subservient position are today used to keep women in a subservient position.[81] In contemporary South Africa where up to 65 000 rapes are reported to the police annually,[82] the universality of a memorial constitutional approach would demand that sexual oppression be taken just as seriously as the racial oppression of the past. The memorial moment in constitutional interpretation should highlight the ongoing physical, psychic and economic oppression of women in South Africa through extremely high levels of sexual violence which cannot but appear as an intolerable prolongation of apartheid-style practices. If we are serious about the 'never again!' imperative, the Constitutional Court should take up the matter of sexual violence as a matter of extreme urgency, harbouring the potential to destroy the heart of the democratic project. Nothing more or less is at stake than the full recognition of women's humanity. Drawing on Du Plessis's understanding of the progressive role a memorial (and difference sensitive) Court played in the *Pillay* case toward the religious Other by interrogating the supposed neutrality of the dominant culture, I would argue that a similar thorough acknowledgement and affirmation of the sexual Other (women) is needed. The Court should expose more the invisibility-through-pervasiveness of masculine privilege within, and the masculinisation of, the new nation. It should consistently expose the embedded, but also currently strongly reinforced patriarchal self-understandings of the whole range of South African cultures.

We should not underestimate the extent to which patriarchal self-understandings inform different levels of political contestation in contemporary South Africa. In the very project of nation-building, paradoxically, there lurks the danger of sacrificing women, of viewing the social control of women as a crucial dimension of building and maintaining social order. At the same time, however, sexual violence perpetrated against women may equally serve as manifestations of resistance to the nation-building project (associated with the Constitution, with human rights, and thus also sometimes with Western imperialism) and the assertion of more local, more ethnically or religiously informed identities. So, on the one hand, a monumental narrative about national liberation from apartheid apparently served as a way to keep women from speaking about sexual violence during the liberation struggle,[83] and also as a way to keep women from confronting the open sexism of political leadership. Under such a narrative, the large scale sexual violence against women is treated as purely sacrificial, in the service of the birth of the new (masculine)

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81 Moffett '"These women, they force us to rape them": Rape as Narrative of Social Control in Post-Apartheid South Africa'.

82 Rape Crisis 'Rape in South Africa'. Further, more than 40% of these victims are younger than 18 years; cf. Jewkes, Abrahams, and Mathews *Preventing Rape and Violence in South Africa: Call for Leadership in A New Agenda For Action* 1.

83 Du Toit *A Philosophical Investigation of Rape: The Making and Unmaking of the Feminine Self* 17ff.

nation. On the other hand, precisely the assertion of alternative identities in resistance to the imperatives of nation-building, may also feed sexual violence against women.

As we have seen in Du Plessis's very critical reading of *Azapo*,[84] the Constitutional Court is not above the use of sacrificial logic. In this case the Court placed the 'necessary sacrifices', the political compromises required by the master narrative of political reconciliation, above both the actual victims and the universal demand of the Constitution, bolstered by human rights and international legal frameworks. Karin van Marle issues a poignant warning in this regard. For her, following Mahmood Mamdani, political reconciliation (and its multiple needs) aims to destroy traces of past inequalities by normalising these inequalities in the present, thereby negating the possibility of social justice in future.[85] In this respect, the words that Njabulo Ndebele places in the mouth of his fictional Winnie Mandela as a kind of representative of South African womanhood are instructive. She says:

> I give you my heaven as possibly the single element of consistency in my political life: my distrust of reconciliation. In this I proclaim a new life in South Africa, against those who proclaim a truce between old lives (...) I will not be an instrument for validating the politics of reconciliation. *For me, reconciliation demands my annihilation.*[86]

Her words for me capture a woman's (feminist) expression of Shklar's proposed equilibrium between the memory of cruelty, the distrust of the bridge offered, and in spite of this, the slither of hope – the latter expressed in her 'proclamation' of 'a new life in South Africa'. This brings me to the necessity of a monumental moment in constitutional interpretation for confronting the problem of sexual violence.

4.2 *The monumental moment*

In contrast with the ways in which public discourse and pervasive sentiments often attempt to depoliticise sexual violence, the Constitution and some Constitutional Court cases contain on their face a potent promise to the women and children of South Africa, who live precarious lives due to the constant threat of sexual invasion. The promise extends to those men who are victims of sexual violence in a society where it is near impossible as a man to accuse another of rape.[87] As one example of where the full monumental force of the Constitution is unleashed in an all-out attempt to make good on the promise of the Constitution that women's sexual difference will be fully protected, embraced and celebrated, Azille Coetzee's study[88] shows how in the case of *Carmichele v Minister of Safety and Security and Another*[89] the Constitutional Court 'confirmed that there is a constitutional obligation on the state to protect the right of the safety and security of women' as a duty under international law. Commenting on section 12 of the Constitution, Albertyn *et al* add that the explicit and specific inclusion of the right to be free from violence, in particular the fact

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84 Du Plessis 'Azapo: Monument, memorial…or mistake?' 62.

85 Van Marle 'Lives of action, thinking and revolt – A feminist call for politics and becoming in post-apartheid South Africa' 611.

86 Ndebele *The Cry of Winnie Mandela* 112–113 (own emphasis).

87 The point here is not a legal one, since male rape is now treated on a par with female rape since the Sexual Offences Act of 2007. It is rather a symbolic impossibility to simultaneously occupy the position of man and rape victim.

88 Coetzee *Addressing the Problem of Sexual Violence in South Africa: A Philosophical Analysis of Equality and Sexual Difference in the Constitution and the new Sexual Offences Act* 1.

89 2001 (10) BCLR 995 (CC).

that it also finds horizontal application (which means that it can be applied in the context of private agents), is unusual in a national constitution.[90]

Yet, recall Du Plessis's warning that '[t]he potency with which [the South African Constitution] can mould a politics of memory.. equals the authority with which it can shape the politics of the day'. Perhaps the acid test of the Constitution lies in how it does this in response to sexual violence. In order for the Constitution to fulfil its promise in this regard, it will have to much more self-consciously balance the memories of the victims of apartheid and colonial cruelties with a willingness to act politically and to interfere with relations of sexual domination deeply embedded in the fabric of South African society. It should be unflinching in its commitment to equal human dignity. In this regard, the reluctance of the Constitutional Court to acknowledge that it does indeed and necessarily play a political role rather than a 'merely moral' one, as indicated by Du Plessis is troubling, particularly as far as sexual violence is concerned.[91] The current distribution of power in our society which makes pervasive sexual violence possible (and may even demand it) is at least partly the outcome of historical patterns but partly also sustained by our constitutional dispensation.

The Constitutional Court, if it is not to become completely paralysed by the magnitude of this problem, must address on a political level the things that are within its power to do, while avoiding the creation of new victims in the name of either nostalgic or utopian false hopes. However, so far I would say it has erred on the side of caution rather than on the side of affirming the victims and redistributing the power relations. The Court could arguably do much more, for instance by explicitly drawing on international frameworks and developments regarding sexual violence as expressed for instance by the famous Kunarac verdict of the ICTY in which three men convicted for war rape were sentenced for what was labelled as both war crimes and crimes against humanity.[92] The implications of this verdict, read in conjunction with for instance the UN Security Council Resolution 1325 of 2000, which takes cognisance of the way in which war and its aftermath are strongly gendered, often leading to increased gender-based violence in the aftermath, together with the re-consolidation of male power and the masculinisation of the new nation, offer powerful instruments for social change in South Africa. But as Du Plessis also points out, the Constitution does not 'belong' to the Court and neither does the latter carry the full responsibility for fulfilling its promise. For things to change for women and children, the hope offered by the Constitution should be harnessed for local political processes of protest and resistance to the banal and pervasive cruelties of sexual violence. Against the confluence of weighty patriarchal traditions strengthened by relatively new religious fundamentalisms, all of which could lead to 'too much memory' and paralysis, we should use the Constitution's promise to keep up the fight against sexual oppression. This is the monumental thrust or aspiration of the Constitution, and I would say that it is a particularly important and too often neglected dimension of the struggle.

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90 Albertyn *et al* 'Women's freedom and security of the person' 297.

91 Du Plessis 'Azapo: Monument, memorial... or mistake?' 53, 59–61.

92 *The Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber II, The Netherlands IT-96-23-T & IT-96-23/1-T (22 February 2001) <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf> (accessed 10 April 2015).

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Constitutional interpreters

High Priests or Priesthood?

Janet Epp Buckingham

1 Introduction

For those imbued with classical separation of powers theory, each of the three branches of government provides checks and balances on the others to ensure that one does not unduly infringe on political liberty.[1] This theory posits that the legislature enacts the laws, the executive administers the laws and the judiciary interprets the laws. Thus, the judiciary has the primary responsibility for interpreting the laws, including the supreme law, the Constitution, making them the high priests of constitutional interpretation. Yet Lourens Du Plessis argued in an essay in 1996,[2] and reiterated in his chapter on 'Interpretation' in *Constitutional Law of South Africa*,[3] that there should be an open community of constitutional interpreters, a priesthood of interpreters. He based his argument on the German constitutionalist, Peter Häberle.[4] At the very least, Du Plessis argued, the expertise of legal academics, of which he was one, should be considered relevant to the judiciary as they interpret the Constitution.

Du Plessis was making a strong argument for a change in legal and judicial culture in South Africa at the time of constitutional transformation. Under apartheid, judges were part of the minority white culture that imposed apartheid on an unwilling majority. The legislature enacted apartheid laws. The executive administered apartheid laws. The judiciary interpreted and applied apartheid laws even when they flew in the face of previous legal precedent. The judiciary were therefore implicated in upholding the unjust system.

In post-apartheid South Africa, it would be essential to create a new order, one that would have credibility with the people of South Africa, all the people of South Africa. And, in fact, the people were empowered to participate in constitution-building. There was unprecedented consultation during the development of the final Constitution of South Africa. It would disempower the people to limit constitutional interpretation to merely the judiciary, even though a Constitutional Court was created with great expertise on constitutional interpretation.

Of course there must be a final arbiter for constitutional interpretation, a role rightly reserved for the Constitutional Court. Yet many others in society have official roles that require them to interpret the constitution as well. They include those engaged in law making, including legislators and bureaucrats engaged with the development of bills. Others with official roles that require constitutional interpretation are lower court judges and administrative decision-makers.

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1 Montesquieu *De l'esprit des lois*.
2 Du Plessis 'Legal academics and the open community of constitutional interpreters'.
3 Du Plessis 'Interpretation'.
4 Häberle *Verfassung als Öffentlicher Prozeß. Materialen zu einer Verfassungstheorie der Offenen Gesellschaft*.

Beyond those with official roles are those in civil society who take a strong interest in interpreting aspects of the Constitution. This includes legal academics, as Du Plessis aptly points out. However, it also includes those engaged with legal organisations and those engaged with advocacy organisations for particular marginalised groups in society. It also includes those such as the religious communities which developed a Declaration of Religious Rights and Responsibilities in South Africa to apply constitutional principles in their particular context. While many in society have an interest in constitutional interpretation and should be empowered to participate, only those with formal roles, ie the legislature, the executive and the judiciary, have the authority to articulate constitutional principles that have legal applications to society.

As a doctoral student of Prof. Du Plessis, I now have the honour of revisiting Du Plessis's arguments about the roles of each of the above-noted groups of constitutional interpreters, using examples from South Africa and from Canada. Canada is at an interesting crossroads in 2015, with the role of the Supreme Court of Canada being highly contested with respect to recent decisions.[5] As the South African Bill of Rights was based on the Canadian model of constitutional human rights protection, it is useful to contrast the role of various constitutional interpreters in both countries. Canada and South Africa have very different histories, however. South Africa enacted the 1996 Constitution as a transformative constitution. It was intended that constitutional interpreters have a new framework for a new South Africa, one free from the oppression of apartheid. While Canada is not free from discriminatory treatment of minorities,[6] the Canadian Charter of Rights and Freedoms[7] was not enacted to be transformative from any particular oppression, although there is evidence that it was intended to be transformative.[8]

I will argue that the high priest model, one that depends solely on the highest courts for constitutional interpretation, is not ideal for constitutional democracies. A participatory model, the priesthood of interpreters, is to be preferred as it strengthens democracy. Both Canada and South Africa are democratic nations. Obtaining the right to vote for all racial groups was a large part of the 'struggle' for a new South Africa. In both countries, the ability to participate in the governing of the nation through the right to vote for members of the legislature is viewed as a fundamental right. While democracy is often denounced as the 'tyranny of the majority', both Canada and South Africa are multi-cultural and multi-ethnic nations and it is difficult to identify a 'majority'. Minorities participate in policy formation and human rights protection through their participation in the democratic system. This means that compromises are made in the legislative process that can be undermined by court judgments that do not take these into account in their decision making.

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5 The Supreme Court of Canada struck down federal laws relating to prostitution (*Canada (Attorney General) v Bedford* [2013] 3 SCR 1101) and to assisted suicide (*Carter v Canada* (*Attorney General*), 2015 SCC 5) on the basis that the laws violated Charter rights. Both decisions resulted in public debate over whether this type of decision should be within the purview of the courts.

6 The Canadian government has a long history of discriminatory treatment towards First Nations peoples, including the development of reservations and forcing children to attend residential schools. As well, religious minorities have faced discriminatory treatment including the banning of the Jehovah's Witnesses during the Second World War.

7 *Canadian Charter of Rights and Freedoms*, Schedule B to the Constitution Act, 1982, 1982, c 11 (UK). Hereinafter 'Charter'.

8 Kelly *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* 231.

I will conclude this chapter by identifying 'best practices' both in Canada and in South Africa for how extrajudicial constitutional interpreters can be empowered and educated in interpreting and applying constitutional principles.

2 Role of the judiciary – the (high) priests

Judges stand at the apex of constitutional interpretation. The justices of the South African Constitutional Court and of the Supreme Court of Canada have the final word on constitutional interpretation. The traditional view that courts are the *sole* interpreters of the law, however, puts these judges in the role of high priests of constitutional interpretation. The judiciary must therefore be cognizant of the limits of its role. If it usurps the legitimate role of other constitutional interpreters, most notably the legislature, it risks undermining the democratic system.

2.1 *Constitutional Court and Supreme Court judges*

Du Plessis opens his 1996 article 'Legal Academics and Constitutional Interpreters' with the provocative statement, 'To citizens conversant with the operation of a supreme constitution, the Constitutional Court might appear to be the Constitution's ultimate soothsayer.'[9] He goes on to argue that this is not so. Yet courts themselves seem to view their role as that of ultimate interpreter. As former US Supreme Court Justice surmised, 'We are not final because we are infallible, but we are infallible only because we are final.'[10] Du Plessis references Häberle who contends that judges should see outside influences such as political and social influences not as threats to judicial independence but as 'bolster[ing] the legitimacy of a court's interpretation of the constitution'.[11] Du Plessis notes that the Constitution is not limited to one and only one interpretation, which the Constitutional Court gives as 'the authorised version'.[12] Nor, however, is the court required to bend to popular opinion as to the meaning of a particular provision. So then, where does this leave judges? Du Plessis quotes Kentridge AJ in *S v Zuma*:

> While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single "objective" meaning. Nor is it easy to avoid the influence of one's personal and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.[13]

The Chief Justice of Canada, Beverley McLachlin, addressed specifically the myth that judges are 'oracles'. She asserts, 'The judge is not a high priest with a direct line to heaven, down which the right answers come tumbling'.[14] In that speech, she noted the challenges judges have in making decisions and in working together as joint decision-makers in appellant courts. She addressed the judicial process as separate from all other processes. However, McLachlin CJC was speaking to the issue of being a judge, not being a constitutional interpreter. Yet even in speaking on constitutional interpretation, she affirmed a transformative role for the courts: 'The transformation of Canada from a Parliamentary democracy in which Parliament had the last word to a constitutional democracy where

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9 Du Plessis 'Legal academics and the open community of constitutional interpreters' 214.
10 *Brown v Allen* 344 US 443 (1953).
11 Du Plessis 'Legal academics and the open community of constitutional interpreters' 218.
12 *Ibid*.
13 *S v Zuma* 1995 (4) BCLR 401 (SA), 412F–G (par 17), quoted at *ibid* 220.
14 McLachlin 'Judging in a democratic state'.

courts may be called upon to judge the ultimate constitutionality of laws was, from the beginning, unsettling to some.'[15] The court as the final arbiter and interpreter is borne out in other remarks of the Chief Justice: 'But the beliefs and actions manifested when this freedom is granted can collide with conventional legal norms. This clash of forces demands a resolution from the courts. The reality of litigation means that cases must be resolved.'[16] The Chief Justice does not seem to consider that these clashes can be resolved by any other mechanism than litigation in the courts. Yet there are many possible ways to resolve such disputes, litigation being only one. All the other ways involve constitutional interpreters and processes outside the courts.

Du Plessis uses two metaphors for the role of judges in constitutional interpretation. The first is that of the performance of a musical composition. The Constitution is the musical score but judges, along with an open community of constitutional interpreters, plays the score in a particular context, to wit, a legal case.[17] He also references Ronald Dworkin's discussion of progressive interpretation of the American Constitution, in particular the treatment of public flogging and that of women. Both have changed substantially in the 200 years since the Bill of Rights was enacted. Public flogging was widely accepted. Women were treated unequally. Now flogging is banned and women are treated equally. Thus, a constitutional text will not be interpreted the same now as in another era.

Du Plessis noted that the South African Constitution, 1996 was intended to have significant transformative social functions. He refers to these as memorial, transitional and transformative constitutionalism.[18] The memorial function both remembers the past, in this case notorious past, and is a promise for the future. The transitional function requires that the Constitution functions as a bridge from the authoritarian past to the 'culture of justification' of the new South Africa.[19] The transformational function sees the Constitution as a reforming document thereby granting the courts a role in reshaping the law as part of the transition to the new South Africa. The 1996 Constitution was intended to play an important role in the peaceful transition from the authoritarian apartheid past to the new South Africa. The courts in South Africa are therefore entrusted with participating in the project of peaceful, large-scale, social transformation.[20]

In Canada, the concept of progressive interpretation is captured in the 'living tree' doctrine, from the 1929 case of *Edwards v Canada*.[21] In that case, women were determined to be 'persons' for the purposes of being appointed to the Canadian Senate. Justice Sankey famously declared, 'The *British North America Act* planted in Canada a living tree capable of growth and expansion within its natural limits'.[22] The natural limits are those referenced by Kentridge AJ above. Lord Sankey made it clear that strict formalism was not an appropriate interpretive methodology for constitutional documents. McLachlin CJC has referred to the *Edwards* decision as one of four 'constitutional moments' that shaped Canada's

15 McLachlin 'Defining moments: The Canadian Constitution'.
16 McLachlin 'Freedom of Religion and the Rule of Law' 22.
17 Du Plessis 'Legal academics and the open community of constitutional interpreters' 221–222.
18 Du Plessis 'Affirmation and celebration of the "religious Other" in South Africa's constitutional jurisprudence on religious and related rights: Memorial constitutionalism in action?' 378.
19 *Ibid*.
20 *Ibid*.
21 *Edwards v Canada*, [1930] AC 124 (JCPC).
22 *Ibid* 136.

history.[23] The difference between Canada and South Africa is clear, however. The Constitution of Canada, even the Charter enacted in 1982, was not intended to be an instrument of transformative justice to revise laws of an oppressive regime.

Du Plessis, in a 1999 article on constitutional interpretation in South Africa, identified several techniques of interpretation used by jurists in South Africa both prior to and following the adoption of the new Constitutions (in 1993 and 1996).[24] Du Plessis noted that habitual formalism was a widely used technique for legislative interpretation prior to 1994. This approach requires jurists to determine the intention of the legislature. This approach, often referred to in American constitutional interpretation as 'founders' intent', has been abjured for constitutional interpretation in South Africa and in Canada. Yet Kentridge AJ notes that –

> even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination…I would say that a constitution "embodying fundamental principles should as far as its language permits be given a broad construction".[25]

Du Plessis notes that this 'oft cited dictum' does not license literalism 'although it does have a…literalist sting in its tail'.[26] He goes on to prefer a diversification of interpretive techniques: including grammatical interpretation, systematic interpretation, teleological interpretation, historical interpretation and comparative interpretation. What Du Plessis denounces with vigour, however, is the resort to vague expression of values that he terms 'rainbow jurisprudence', using Alfred Cockrell's label.[27] He also notes that the South African Constitutional Court is 'somewhat unreflecting' about which interpretive methodology it is employing in any given case and how these methodologies work together.[28]

Given Du Plessis's preference for courts to specify their interpretive techniques, he would likely not be impressed by the analysis[29] that the Supreme Court of Canada has employed so as to reduce all statutory interpretation to the 'cardinal rule' of Elmer Driedger:

> Today there is only one principle or approach: namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.[30]

Canadian law professor A. Wayne MacKay examined the number of times the Supreme Court of Canada used the term 'context' in their decisions. Before 1982, the term appeared in only 13 percent of all cases. This had increased to 77 percent by the year 2000.[31] Stéphane Beaulac and Pierre-André Côté criticise the Supreme Court's application of the

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23 McLachlin 'Defining moments'.

24 Du Plessis 'The evolution of constitutionalism and the emergence of a constitutional jurisprudence in South Africa: An evaluation of the South African Constitutional Court's approach to constitutional interpretation'.

25 *S v Zuma* par 18.

26 Du Plessis 'The evolution of constitutionalism' 304.

27 *Ibid* 304, referring to Cockrell, 'Rainbow Jurisprudence'.

28 Du Plessis 'The evolution of constitutionalism' 316.

29 MacKay 'Evolving fundamental principles and merging public law silos: The reshaping of Canada's constitutional landscape' 101.

30 Driedger *The Construction of Statutes* 87, quoted in MacKay, *Ibid* 101.

31 MacKay 'The Supreme Court of Canada and federalism: Does/Should anyone care anymore?' See, for eg, *Canada (Attorney General) v Stanford*, 201 FCA 234, pars 40–44 to see how widely this formulation is used.

above quotation: 'It provides what is in effect a gross over-simplification of a complex process, whether one considers the goals or the means of statutory interpretation.'[32] Rather, the full panoply of approaches to statutory interpretation should be applied to interpret and apply all legislation, including the Constitution. As Canadian law professor, Dwight Newman observes, 'Whatever you think of the outcome on the legal issue to be decided, courts have to explain why their decisions are legally correct – their giving of reasons is how we hold them accountable.'[33]

Du Plessis might further be alarmed at the heavy reliance on social science evidence 'to allow judges to decide cases in their proper contexts.'[34] In several recent cases, the Supreme Court of Canada has struck down laws relying on social science evidence introduced in court. This appears to be a move in the direction of judges engaging in policy formation. In his chapter on 'Interpretation' in *Constitutional Law of South Africa*, Du Plessis refers with approval to Froneman J's warning against the unrestricted exercise of powers by the judiciary:

> Similarly, Froneman J in *Matiso & Others v The Commanding Officer, Port Elizabeth Prison & Others*, warned that judges should not 'enter into an orgy of judicial law-making' and that '[j]udicial review…is…subject to important constraints', the recognition of which 'is the best guarantee or shield against criticism that…a system of judicial review is essentially undemocratic'.[35]

In a recent decision, the Supreme Court of Canada struck down criminal provisions relating to assisted suicide on the basis of social science evidence.[36] The court gave the legislature one year to draft new laws, a fairly short time period given the realities of passing legislation. If Parliament does not succeed in passing new legislation, a court-imposed resolution will take effect. Is it appropriate for courts to force a legislative agenda on the executive and legislative branches based on social science evidence presented to the court? Parliament has held numerous hearings on this issue over the last 20 years and decided on the basis of a broad range of evidence and expert testimony *not* to legalise assisted suicide.

2.2 *Role of lower court judges*

With very rare exceptions, legal cases commence in lower courts. Thousands of cases are heard by lower court judges; few are heard by the South African Constitutional Court and the Supreme Court of Canada. While certain cases of constitutional interpretation may be brought directly to the Constitutional Court,[37] which will hear and decide a precedent-setting case on constitutional interpretation, lower courts bear the responsibility of applying that precedent in subsequent cases on related issues. The High Court also has jurisdiction to interpret the Constitution and lower courts must apply those precedents.[38] In Canada, which does not have a constitutional court, lower courts are responsible to make initial decisions in all constitutional cases, with the exception of references to higher courts.[39] They must also interpret and apply relevant Supreme Court of Canada precedents and precedents from higher courts in their jurisdictions.

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32 Beaulac and Côté 'Driedger's "modern principle" at the Supreme Court of Canada: Interpretation, justification, legitimization' 165.
33 Dwight Newman 'Straight Talk' 3.
34 MacKay 'Evolving fundamental principles' 104.
35 Du Plessis 'Interpretation' 32–11.
36 *Carter v Canada* (*Attorney General*), 2015 SCC 5.
37 Constitution of the Republic of South Africa, 1996, Act 108 of 1996, s 167(6)(a).
38 *Ibid* s 169.
39 See s 3.1 for details of this process.

In South Africa the Constitutional Court is the highest court of the land and has the final jurisdiction to decide the constitutionality of Acts of Parliament, provincial legislation and actions of the President. The High Court and Supreme Court of Appeal also have jurisdiction in constitutional matters, including the power to strike down legislation to the extent that it violates the Constitution. Such an order would however need to be confirmed by the Constitutional Court before it takes effect. In Canada, provincial superior court and court of appeal judges have a similarly robust role in constitutional interpretation in that they make the initial determination of constitutional issues, including striking down legislation. Any judge can be seized of a constitutional issue and be required to decide it. Canadian judges therefore must be prepared to engage in primary constitutional interpretation. As all jurisdictions except Quebec use the common-law system, judges usually apply precedents from the vast body of constitutional interpretation on constitutional issues.

3 Role of the government – the clergy

Even under the traditional understanding of the roles of the judiciary, the legislature and the executive, there has always been a role, albeit a lesser one, for legislators and government officials in interpreting and applying the constitution as they make and implement laws. Prior to the adoption of the Charter in Canada, Parliament was seen as the protector of human rights. The adoption of a constitutional charter of rights gave the courts authority to override legislation if it violates human rights. If the judiciary are considered the (high) priests of constitutional interpretation, these other officials are at least in the role of clergy – applying the *dicta* of the courts. However, I argue that legislators and government officials, including administrative decision-makers, have significant and important roles in constitutional interpretation, beyond that of simply applying court rulings. They must act within the bounds of the constitution and apply it when proposing or implementing new legislation and regulations.

3.1 *Role of legislators*

As Du Plessis points out, legislators 'are invested with law-making authority (directly or ultimately derived from the supreme constitution)'.[40] As all laws must conform with the Constitution,[41] this gives legislators a significant role in constitutional interpretation. The South African Constitution, 1996 requires the enactment of subsidiary constitutional legislation, thereby requiring legislators to engage in a special type of constitutional interpretation. This legislation, including human rights legislation, must extend the provisions of the Constitution, putting flesh on the bones, as it were. As this legislation is passed by the legislature, rather than a constitutional conference or assembly, it is incumbent on the legislators to determine not only that the legislation is in conformity with the Constitution but that it extends the principles of the Constitution.

Legislators must also ensure that they follow constitutional procedure, written or unwritten, in passing legislation. The most obvious of these is that they are duly elected and follow parliamentary procedure. The legislation must also be within their legislative competence. The process to pass legislation must be followed. In South Africa, the Constitution requires various legislative bodies to engage in public consultation before

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40 Du Plessis 'The status and role of legislation in South Africa as a constitutional democracy: Some exploratory observations' 94.

41 S 2.

legislation is enacted.[42] If the President has reservations about the constitutionality of a federal bill,[43] or a Premier has similar reservations about a bill at the provincial level,[44] it may be sent back to the legislature for consideration as to its constitutionality or referred to the Constitutional Court.

In Canada, there are several procedures to ensure that legislation is constitutional. The first, which is for government legislation proposed by the governing party, is discussed in more detail below but requires that lawyers in the Department of Justice review legislation introduced by the executive to advise on its constitutionality. A second mechanism applies to Private Member's Bills. All Members of Parliament who are not part of Cabinet may introduce Private Member's Bills. A Standing Committee of the House of Commons reviews each of these bills to determine if they are constitutional.[45] A third mechanism to determine constitutionality is only used for high profile legislation that raises significant constitutional concerns. The Governor in Council may refer a bill to the Supreme Court of Canada,[46] or provincial Lieutenants Governor may refer provincial bills to the provincial Court of Appeal,[47] to rule in advance on their constitutionality. A recent example of this procedure is the *Senate Reference*.[48] The Governor in Council referred six specific questions related to proposed reform of the Senate, the upper chamber in Parliament, to the Supreme Court of Canada. The government planned to legislate these reforms if the Supreme Court of Canada ruled them constitutional. It did not. Instead, the court ruled that the proposed reforms constituted major changes to the federal government system which required provincial agreement according to a formula in the Constitution Act, 1982.[49]

This leads to a discussion of the relationship between the courts and the legislatures in terms of constitutional interpretation. In 1997, noted constitutional law professor Peter Hogg and Alison Bushnell argued that this relationship is a 'dialogue'.[50] The dialogue theory was developed in response to the criticism of the Charter of Rights for reducing the legislature to a subordinate position and elevating the role of the courts. Hogg and Bushnell reviewed a number of court rulings and found that legislatures generally responded by passing new legislation. The Charter also includes the possibility for legislatures to override a court finding of unconstitutionality using a 'notwithstanding' procedure in section 33 of the Charter. Legislation can be passed that violates a Charter right if it includes a clause making it explicit that it is 'notwithstanding' the particular Charter right. This must be renewed every five years. In practice, this provision is so rarely used as to be redundant.[51]

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42 Ss 59(10)(a), 72(1) & 118(1).
43 Constitution of the Republic of South Africa, s 79.
44 *Ibid* s 121.
45 House of Commons Subcommittee on Private Members' Business.
46 *Supreme Court Act, RSC* 1985, c S–26, s 53.
47 Each province has a Constitutional Questions Act which sets out the procedure.
48 *Reference re Senate Reform* [2014] SCR 704.
49 Constitution Act, 1982, 1982, c 11 (UK), s 38(1). The amending formula requires resolutions from both federal houses of Parliament as well as at least two thirds of the provincial legislatures representing at least 50 percent of the population. Proposed Constitutional amendments have failed twice.
50 Hogg and Bushnell 'The Charter dialogue between courts and legislatures (or perhaps the Charter of Rights isn't such a bad thing after all)'.
51 Immediately after the Charter of Rights came into force, the province of Quebec enacted a blanket notwithstanding clause covering all its legislation. This brought the use of this provision into disrepute. As well, any legislature applying the provision will be subject to

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There are several theories of the nature of the dialogue theory. The oldest is that of co-ordinate construction, developed by American constitutional architects Thomas Jefferson and James Madison. This theory posits that both courts and legislatures have the power to interpret the constitution for themselves. In its extreme form, it would mean that legislatures are not bound by decisions of courts. Yet as Canadian Christopher Manfredi argues, 'Unless the legislatures reassert their legitimately equal role to interpret the constitution, the paradox of liberal constitutionalism may become its decline.'[52] The reality is that it is easier for legislatures to allow courts to make hard decisions and for legislatures to then hide behind those decisions. Legislatures must assert their role as constitutional interpreters, while respecting court decisions.

A second theory posits that courts, as unelected bodies, should be held accountable by those who are democratically elected. Canadian political scientists Ted Morton and Rainer Knopff have argued that the Charter is 'deeply and fundamentally undemocratic'.[53] It is reasonable to argue that if courts strike down legislation from the democratically elected legislature, it undermines democracy. On the other hand, legislatures must be conscious of the Constitution when passing legislation. Courts, it could be argued, must be independent from, not accountable to, the legislature.

Finally, the dialogue theory may be based on the complementary roles of the courts and the legislatures. Canadian law professor Kent Roach prefers this approach as it does not prefer either the courts or the legislatures but recognises the distinct role of each.[54] The South African Constitutional Court has been cognizant of not overstepping its role and trenching on the legislative role. As the court stated in ITAC:

> Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.[55]

Rothstein J of the Supreme Court of Canada has expressed similar concerns, albeit in a dissenting judgment:

> In a constitutional democracy, the judicial branch of government is entrusted to rule on whether laws enacted by the legislature pass constitutional muster. But this Court's rulings are not subject to review. Its rulings are binding on the legislative branch, unless that branch invokes the rarely resorted-to s. 33 of the *Canadian Charter of Rights and Freedoms* to provide that its legislation will operate notwithstanding breaches of certain constitutional rights. This means that constitutional decisions of this Court have the power to freeze matters in time and restrict Parliament's ability to change course in the future, where facts and policy imperatives may suggest or require a different approach.
>
> It is fundamental, therefore, that the judicial and legislative branches of government have respect for the role and responsibility of the other. The legislative branch must respect the decisions of the courts and comply with them. Courts must equally respect the role of the democratically

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immediate criticism from opposition parties and the media that they are violating human rights.

52 Manfredi *Judicial Power and the Charter* 199.

53 Morton and Knopff *The Charter Revolution and the Court Party* 25.

54 Roach *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* 248–249.

55 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2010 (5) BCLR 457 (CC) par 95.

> elected legislature and its policy choices. The judicial branch must not exercise its great constitutional power to make rulings that are not firmly rooted in the text, context, and purpose of Canadian constitutional law.[56]

As legislators bear the constitutional responsibility for enacting legislation and directing policy initiatives, they must interpret and apply the constitution. They must ensure that they act only within their constitutional authority and ensure that their actions are within the letter and the spirit of the Constitution. They are elected to perform these roles. It undermines the integrity of the government system if legislators are seen to act unconstitutionally, even if it was unintended.

3.2 *Role of bureaucracy*

The bureaucracy has an important role in constitutional interpretation as all but senior bureaucrats are not subject to being replaced after an election.[57] Bureaucrats therefore have a long-term perspective, long past the next election. They therefore have a primary role as keepers of constitutional norms for the nation. This may sound rather grandiose, and bureaucrats may have trouble seeing themselves in that role. Yet as politicians-as-legislators come and go, the bureaucracy must ensure that policy is enacted and implemented in accordance with the Constitution. The overall vision of the Constitution is that of a free and democratic government that operates according to certain principles.

Bureaucrats are called upon to offer policy advice to legislators as well as to implement policy. Their advice must consider the Constitution in a number of perspectives. First, the policy must be within the jurisdiction of the branch of government. Second, it must be in accordance with human rights protection. Finally, it must be able to be implemented in a manner that respects constitutional principles. In Canada, every potential bill must be reviewed by the Constitutional and Administrative Law Section of the Department of Justice, which must advise on its constitutionality.[58]

The public administration in South Africa is required by the Constitution to 'be governed by the democratic values and principles enshrined in the Constitution'.[59] The Department of Justice and Constitutional Development specifically 'seeks to promote constitutional development through the development and implementation of legislation and programmes that seek to advance and sustain constitutionalism and the rule of law'.[60]

Bureaucrats also have the role of devising procedures to implement policy initiatives in a manner that ensures their constitutionality. The legislators or the executive may develop a policy initiative that raises constitutional issues. The bureaucracy may be tasked with finding ways to develop the initiative or implement the initiative to circumvent or address the issues. This can include negotiations with other levels of government. It can include consultation with stakeholders. It can even include funding a non-governmental organisation to perform the initiative; for example, providing funds to the Diabetes Association

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56 *Mounted Police Association of Ontario v Canada* 2015 SCC 1 pars 59–60.

57 In Canada, even senior bureaucrats are not subject to being replaced after an election. However, in South Africa, some senior bureaucrats are on contract for the period between elections.

58 See Department of Justice *Various Roles of Lawyers at the Department of Justice*. See also Kelly *Governing with the Charter* 234–235.

59 S 195(1).

60 Van Niekerk (ed.) *South Africa Yearbook 2012/13* 403.

to promote awareness of risk factors for developing diabetes. If the initiative requires legislation, bureaucrats draft the bill. All these involve interpreting and applying constitutional principles.

Some bureaucrats join the public service with particular expertise or with a particular policy initiative in mind. These bureaucrats must find ways of working within the governmental system to propose and implement their initiatives within the structures of government in a manner that respects the Constitution. The government sometimes will hire experts to do just that if there is coherence between a government initiative and that of a particular expert. A tax expert may be hired to develop new policy on a particular issue, for example, or a logistics expert to rationalise the government supply chain.

In the many roles that bureaucrats play in developing policy, advising on policy initiatives and in implementing policy, they frequently are called upon to be constitutional interpreters. They must not only ensure that they comply with the Constitution but that existing and emerging constitutional norms for the nation are preserved.

3.3 *Role of administrative decision-makers*

The modern regulatory state is characterised by administrative frameworks developed by the state to regulate various aspects of human activity. Some of these have specialised tribunals that enforce the regulations. In other situations, there is an administrative decision-maker. The legislature develops the overall framework. The executive makes more specific regulations. The decision-maker is usually someone with specialisation or expertise in the area. Administrative decisions can be reviewed by the courts through judicial review procedures.

Initially in Canada, which does not have a Constitutional Court, it was understood that administrative decision-makers did not have the power to interpret the Constitution, particularly the Charter. However, McLachlin J (now Chief Justice of Canada) stated the following in dissent in *Cooper v Canada*:

> The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.[61]

Since that decision, the Supreme Court of Canada has expanded the role of administrative tribunals and other decision-makers in applying the Charter. In a decision in 2012, *Doré v Barreau du Québec*, the Supreme Court of Canada made it clear that administrative decision-makers must apply not only the Charter's specific rights and freedoms, but also 'Charter values' in their decision making. Abella J stated: 'It goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including Charter values.'[62] While on the one hand, this is a reasonable requirement as administrative decisions can be challenged if they violate a Charter right, on the other hand, this opens the door to a Canadian form of 'rainbow jurisprudence' eschewed by Du Plessis as noted above. Administrative decision-makers are not always lawyers who have been trained in legal constitutional interpretation. They can include a

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61 Par 70.

62 *Doré v Barreau du Québec* [2012] 1 SCR 395 par 24.

wide variety of individuals that have been elevated to the level of constitutional interpreters without necessarily having the same tools at their disposal.

'Values' at best are difficult to delineate. Iain Benson has identified the challenges of 'values' language. He says, 'Few words are used as frequently and with less clear meaning than the word "values".'[63] Lorne Sossin and Mark Friedman explore the challenges administrative decision-makers face in determining Charter values, when and how to apply them.[64] While they are hopeful that this is a positive development, it is far from clear how administrative decision-makers will apply Charter values without, as Kentridge AJ puts it, engaging in divination.

In South Africa, the role of administrative decision-makers is more circumscribed. However, section 39(2) of the Constitution requires that tribunals 'promote the spirit, purport and objects of the Bill of Rights.' The Constitution also sets out a right to 'administrative action that is lawful, reasonable and procedurally fair.'[65] The grounds for judicial review are quite broad and set out in the Promotion of Administrative Justice Act, 2000 section 6. They include that the decision-maker committed an error of law, acted unfairly, acted in bad faith or acted in a manner that was illegal or unconstitutional. The court has a broad range of remedies set out in section 8, including in exceptional circumstances, 'substituting or varying the administrative action'.[66] One might forcefully argue that granting courts a high level of oversight of administrative decisions can be seen to be undemocratic in that it 'permits the judiciary to usurp the powers of the administration'.[67] Cora Hoexter recommends a regime similar to that adopted in Canada, where administrative decisions are given great deference.[68] However, one must ensure that administrative decision-makers are equipped to apply the 'spirit, purport and objects' of the Bill of Rights, rather than risking what Du Plessis refers to as 'divining' rather than interpreting and applying the Constitution.

4 Roles of other civilian actors – the choir

In the same way that Protestant Christianity liberated individual believers to read and interpret the Bible for themselves, civil society can be liberated to engage in constitutional interpretation. While certain individuals and organisations have special roles to play, all citizens can and should be encouraged to participate in the development of constitutional interpretation as they engage with public policy formation. Constitutions are said to reflect the will of the people so the people must engage in how it is applied.

4.1 *Role of civil society*

Du Plessis argues that civil society has an important role in constitutional interpretation. Arguing from Häberle's 'open community' of constitutional interpreters, Du Plessis notes that there is a 'publicness' about those who engage in constitutional interpretation. 'Labour, religious, business, cultural and sports organizations are all examples of such

63 Benson 'Do "values" mean anything at all? Implications for law, education and society' 5.
64 Sossin and Friedman *Charter Values and Administrative Justice*.
65 S 33.
66 S 8(c)(1)(a)(ii)(aa).
67 Hoexter 'The future of judicial review in South African administrative law' 490.
68 *Dunsmuir v New Brunswick*, [2008] SCR 190 is the leading Supreme Court of Canada decision on standards of administrative review.

actors.'[69] He stipulates that there be 'a free and rational society receptive to a pluralist interplay of forces and ideas shaping its destiny'.[70] As there have been numerous grass-roots mobilizations around the world in the last several years, from Cairo to Hong Kong, it appears clear that there is a groundswell of engagement by civil society in public affairs.

The South African Constitution, 1996 requires that the National Assembly,[71] the National Council of Provinces[72] and the provincial legislatures[73] facilitate public participation in the development of legislation. Du Plessis surmises, 'Duly putting any legislation in the process of adoption through its paces of public participation, greatly enhances its eventual status and stature as a source of law.'[74] A constitutional requirement for public participation, of course, puts an obligation on civil society to engage in a meaningful way. Civil society includes a wide variety of organisations that represent the interests of citizens, and even non-citizens, in a society. It includes families and religious organisations such as churches, mosques and temples. It includes individuals, particularly those such as teachers and professors who have broad experience with a sector of society. It also includes non-governmental organisations that exist for a wide variety of purposes, including advocacy for specific causes. It does not, however, include government or business. This section considers the role of civil society generally. The specific roles of legal academics and advocacy organisations are considered in specific sections below.

Participation in the political process is a recognised human right. The Universal Declaration of Human Rights, Art. 21(1) provides: 'Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.'[75] The International Covenant on Civil and Political Rights, Art. 25 states the following:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;[76]

The United Nations Human Rights Committee has elaborated in General Comment 25 on the right to political participation as follows:

> 8. Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association.[77]

In international law, then, citizens and civil society have the right and obligation to participate in public affairs.

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69 Du Plessis 'Interpretation' 32–27.
70 Du Plessis 'Legal academics and the open community of constitutional interpreters' 215.
71 S 59(10)(a).
72 S 72(1).
73 S 118(1).
74 Du Plessis 'The status and role of legislation in South Africa as a constitutional democracy: Some exploratory observations' 98.
75 UN General Assembly Universal Declaration of Human Rights.
76 UN General Assembly International Covenant on Civil and Political Rights.
77 UN Human Rights Committee General Comment 25 (57), General Comments under art 40, par 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1510th meeting, UN Doc CCPR/C/21/Rev.1/Add.7 (1996), Art 8.

In South Africa, civil society has a defined role in public participation in the formation of legislation as the Constitution mandates public participation. As Ngcobo J explains this as follows in *Doctors for Life International v Speaker of the National Assembly*:

> The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.[78]

One cannot expect that each person and individual will be informed of the consultation process. It is incumbent on organisations, in particular, to monitor government initiatives and consultation processes and engage accordingly. They also have a role in informing those they represent of the opportunity to engage. One can think of the responsibility of the South African Medical Association (SAMA) or the Canadian Medical Association (CMA) to monitor health-related legislation. They have a further responsibility to inform doctors of legislative and policy initiatives that might affect them or their practices. As the SAMA and the CMA participate in consultations, they will be mindful of their respective constitutions, particularly the protection of human rights.

While civil society in Canada does not have a constitutionally-defined role in participating in public policy and legislative formation, over time it has come to be seen as an important factor. Professional associations regularly meet with Cabinet Ministers to advise on policy within their expertise. The media regularly consult relevant non-governmental organisations for their positions on issues. As legislation is considered, Parliamentary committees consult civil society, both organisations and individuals, for their views on bills before the House of Commons or the Senate. Civil society also has an important role in participating in court challenges relating to the constitutionality of legislation or government action. McLachlin CJC has affirmed this role: 'I suggest that in Canada, especially since the introduction of the *Charter of Rights and Freedoms*, it is not only accepted, but also expected, that illegitimate laws and decisions will be challenged by an aware and active citizenry.'[79]

It is vital that those who participate in public consultations be mindful that they are engaging in constitutional interpretation. This means that they should both formulate their policies and engage in consultations with a view to upholding the rule of law, encouraging democratic participation, promoting human dignity and fostering human rights. As both South Africa and Canada are pluralistic nations, civil society must engage in a manner that recognises pluralism and diversity. This does not mean that participants in public participation may not take robust positions and defend them vigorously; far from it. The public square, where issues are debated, should be open to robust and emphatic debate. Civil society should, however, be respectful of the positions of others and recognise that there are many voices in public debate.

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78 Par 115.

79 McLachlin 'Le Droit dans le monde' 5.

The risk of not having participatory democracy is the loss of confidence in the process altogether. As Susan de Villiers surmises, 'Where people believe they have limited power to influence, they lose faith in the electoral system and in the checks and balances that regulate the use of power.'[80] This can result in less public participation, most significantly manifested in lower voter turnout. Civil society plays a crucial role in constitutional interpretation. The people vote, giving legitimacy to the legislature. As well, civil society participates in legislative development. Civil society also participates in challenging actions of the government that may be unconstitutional. A robust democratic society relies on a robust and active civil society.

4.2 *Role of advocacy organisations and special interest lobbies*

A wide variety of advocacy organisations engage with both government and the courts on issues that involve constitutional interpretation. These include organisations of lawyers, organisations dedicated to a specific issue, organisations representing certain sectors of the economy, and organisations representing specific interests. Many of these, although organisations of lawyers are most likely to, reference the Constitution in their advocacy. As a subset of civil society, these organisations have important roles in citizen engagement in the democratic process and can bring helpful perspectives on issues of constitutional interpretation.

Advocacy organisations have the explicit role of taking positions and arguing for them in the public square. They do not purport to be unbiased. An association for the advancement of the mining industry is not expected to be neutral but to take the position most advantageous to that industry. It will also interpret constitutional provisions in a manner that is most advantageous to their position. Advocacy organisations will frequently engage as intervenors in court actions as well as make submissions to government consultations. They therefore engage in a variety of arenas of constitutional interpretation.

Advocacy organisations must be expected to act in a professional manner. They will soon lose credibility and effectiveness if they take outlandish or unsupportable positions. Over time, organisations that have compelling positions, which they can support with rational argument and solid factual background, can become constitutional interpretation assets to legislators and courts.

4.3 *Role of legal academics*

Du Plessis argued for a robust role for legal academics in constitutional interpretation. 'Finally, academics' primary commitment to debating and developing ideas surpasses all their other entitlements and responsibilities both in civil society and in the public domain'.[81] He referenced the important role they had in promoting human rights, particularly in reference to the Bill of Rights.[82] Legal academics earned a place in constitutional interpretation by assisting with constitutional negotiations and in training lawyers and judges in human rights.[83]

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80 De Villiers *A People's Government, The People's Voice*.
81 Du Plessis 'Legal academics and the open community of constitutional interpreters' 215.
82 *Ibid* 225.
83 *Ibid* 226.

Du Plessis noted that legal academics both interpret the Constitution by expressing opinions on its meaning and reflect critically on the role of the courts.[84] He also maintained that they are disinterested in the outcome of particular cases and in the particular interpretation given to provisions of the Constitution.[85] Du Plessis suggested that legal academics have important roles to play in several areas.[86] One is in being appointed to the judiciary, thereby allowing them to contribute their substantial knowledge to constitutional interpretation directly. Another is in analysing and applying methods of legislative interpretation to constitutional interpretation. A third is to reflect critically on Constitutional Court decisions in case comments and learned articles. To these ends, Du Plessis urged that academic freedom be specifically protected in the Constitution. As universities in South Africa are publicly funded, there is a temptation on the part of legislators to 'clip the wings'[87] of universities if the views of professors are unpopular. 'A university without academic freedom is as much of a national asset as a hospital without medicine', argued Du Plessis.[88]

Perhaps it is still the case that legal academics in South Africa are disinterested in the outcome of cases. It is not a universal truth in Canada as some legal academics engage in advocacy on issues that come before the courts. One example of this trend is Alan Young, an associate professor at Osgoode Hall Law School, who was instrumental in bringing a successful legal challenge to Canada's prostitution laws.[89] While it may be unusual for law professors to be actively involved in legal cases, they do have strong opinions on public issues and teach their students from those perspectives.

One of the challenges that has arisen in Canada is the dominance of one voice from legal academia on constitutional interpretation. This is a name that has become familiar in South African courts as well: Peter Hogg. While Prof Hogg is an esteemed and superlative legal constitutional academic, it is always imprudent to depend primarily on only *one* authoritative academic voice. Many legal academics have written on both federal issues and the Charter, but it is Hogg who is consistently considered the authority by the courts and by bureaucrats. His writings are also consistently cited in the South African Constitutional Court. The inclusion of a wide variety of legal academics as constitutional interpreters will have the effect of broadening the pool of interpreters and adding vigour to constitutional interpretation.

5 Best practices – composing the chorale

In order for there to be broad participation of civil society, citizens must have opportunities for participation and be empowered and equipped to participate. There are many examples of best practices in empowering citizenry to partake in constitutional interpretation. In this section, I will address three such examples. The first is religious communities in South Africa, which came together to develop first a Declaration of Religious Rights and Responsibilities[90] and then a South African Charter of Religious Rights and

84 *Ibid* 224.
85 *Ibid* 224.
86 *Ibid* 226.
87 *Ibid* 228.
88 *Ibid* 228. Academic freedom is protected in s 16(1)(d).
89 *Canada (Attorney General) v Bedford*, [2013] 3 SCR 1101.
90 Referenced in Du Plessis 'Legal academics and the open community of constitutional interpreters' 229.

Freedoms.[91] The second is a public consultation, also relating to religion, in Quebec that came together to address 'accommodation' of religion and culture headed by Gérard Bouchard and Charles Taylor.[92] In their 2008 report, *Building for the Future: A Time for Reconciliation*, Bouchard and Taylor recommend that citizens be empowered to negotiate resolutions to perceived clashes of rights. The third instance of 'best practices' is a consultation by the Ontario Human Rights Commission (OHRC) in Canada on resolving competing rights. The OHRC engaged civil society and interest groups broadly in developing a document to assist citizens to resolve issues of competing human rights. None of these best practice documents are perfect but all involved open consultation and developed mechanisms to empower people to engage in constitutional interpretation.

5.1 *Charter of Religious Rights and Freedoms*

The Constitution of the Republic of South Africa, 1996 provides for the development of further Charters of Rights in section 234 as follows:

> In order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.

The first such Charter to be developed was by religious communities. Religious communities engaged in the first step of developing a Declaration of Religious Rights and Responsibilities[93] in 1992 under the auspices of the World Conference on Religions for Peace (WCRP – SA). This document was adopted by an Inter-Faith Conference after two years of negotiation. It was a consultation document for the development of the 1996 South African Constitution.

The Charter of Religious Rights and Freedoms was signed by delegates representing all major and many minor religions at a public ceremony in 2010. This followed several years of consultation and negotiation regarding content and language. Iain T. Benson, part of the Continuity Committee responsible for drafting the Charter, gives three arguments[94] for the benefits of such a document as opposed to allowing the law to develop through a common law approach by litigation before the courts. First, there is no control over which litigants will appear before the courts. Second, litigation does not foster 'communities of respect'; it rather perpetuates conflict. Third, litigation is costly. Issues that could be litigated often are not because the parties cannot afford to go to court.

In addition to Benson's rationales, the process itself of religious communities developing common ground is beneficial for developing and deepening communities of respect. It also results in a powerful statement if all religions can agree on how they wish to see religion treated in their democratic society. While the Charter has not yet been approved by Parliament in accordance with section 234 of the Constitution, it can be used in litigation as an expression of what religious communities see as vital aspects of religious freedom.

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91 See South African Charter of Religious Rights and Freedoms <http://academic.sun.ac.za/theology/religious-charter/>.

92 Bouchard and Taylor. *Building the Future: A Time for Reconciliation* 15.

93 See Declaration on Religious Rights and Responsibilities <http://www.wcrpsa.org.za/documents/rights_and_responsibilities.pdf>.

94 Benson 'Religious interfaith work in Canada and South Africa with particular focus on the drafting of a South African Charter of Religious Rights and Freedoms' 2.

5.2 *Bouchard-Taylor Commission*

A second example of best practices was the operations of and findings by the Bouchard-Taylor Commission. Appointed by the Quebec government, the Commission was a response to several well-publicised instances where religious minorities were perceived to be demanding special treatment.[95] The commission held a series of hearings across the province, which revealed animosity towards ethnic and religious minorities, largely from French Canadian Quebecois who feared the loss of their language and culture. The commission report in 2008 noted that many of the high-profile situations were exacerbated by the media and were ultimately resolved through negotiation.

The Bouchard-Taylor Commission strongly recommended that disputes be resolved through dialogue and negotiation, rather than confrontation. The commission stated, 'the duty of accommodation created by law does not require that a regulation or a statute be abrogated but only that its discriminatory effects be mitigated in respect of certain individuals by making provision for an exception to the rule or a specific adaptation of it'.[96] In addition, the commission recommended that the provincial government take steps towards building a common social identity that includes intercultural exchange but establishes common social values.[97] This would require crossing cultural and religious boundaries to develop common social values with 'the other'. Despite abundant critical commentary,[98] the Commission was a laudable attempt at public engagement with issues of the rights and responsibilities of observers of a minority religion in a society where their religion is not respected.

5.3 *Policy on competing human rights*

The third example of best practices in participatory rights development is that of the Ontario Human Rights Commission. The Commission undertook extensive consultation with stakeholders and legal experts before developing a *Policy on Competing Human Rights*.[99] These consultations took place over a period of two years and resulted in publication of two volumes of background papers.[100] Members of the commission participated along with educators, business owners, LGBT representatives and religious leaders.

Resolving issues involving competing rights is one of the most challenging issues in human rights protection. The resultant policy[101] includes an excellent framework for addressing competing rights without resort to an adversarial approach. It recommends that organisations develop policies to address competing rights in advance of a particular issue arising. Thus when an issue arises, the policy is neutral towards any particular issue. Those engaged in the process of resolution will have confidence in the process.

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95 These included a Sikh boy asking to wear a ceremonial dagger, the kirpan, to school; a Muslim group asking for alternative meals that did not include pork; and a Jewish school asking a sports facility to cover their windows so that male students would not be exposed to women working out on gym equipment.

96 *Ibid* 24.

97 *Ibid* 88–89.

98 Adelman and Anctil *Religion, Culture and the State: Reflections on the Bouchard-Taylor Report*.

99 Ontario Human Rights Commission *Policy on Competing Human Rights*.

100 Ontario Human Rights Commission *Balancing Competing Human Rights*. Azmi, Foster and Jacobs, *Balancing Competing Human Rights Claims in a Diverse Society: Institution, Policy, Principles*.

101 Ontario Human Rights Commission *Policy on Competing Human Rights*.

6 Conclusion

Both South Africa and Canada are diverse, multi-racial, pluralistic societies. Constitutional interpretation and public policy must reflect this diversity. There must be opportunities for broad engagement of the public to engage in the processes of constitutional interpretation and public policy formulation. It is not in the best interests of either country for the courts, particularly the Constitutional Court and the Supreme Court of Canada, to be the high priests of constitutional interpretation, in effect, dictating constitutional interpretation to the populace.

Each branch of government – the executive, the legislature and the courts – has an important role to play with respect to constitutional interpretation. If courts are the high priests, and interpret in a dictatorial fashion, they usurp the important roles of the executive and the legislature. These other two branches of government also have authority to interpret the constitution. The executive receives input from the bureaucracy on constitutional interpretation. The legislature has mechanisms for input from civil society. If the courts usurp their roles, it cuts off opportunities for the broader array of constitutional interpreters as well.

An engaged citizenry, and a vibrant civil society, can take an active role in constitutional interpretation outside the courts. This requires that they be educated and empowered to engage in dialogue with one another and with the legislature. The examples of best practices have two components. The first is that they involved inclusive processes, engaging a broad range of civil society. They also included policy-makers and legal experts. All those consulted or engaged in the process become constitutional interpreters. They also have ownership of the outcome. The second is that they resulted in recommendations for further processes to promote human rights protection. The Charter of Religious Rights and Freedoms continues to be circulated for further signatures amongst religious communities in South Africa. Quebec society and the current government continues to work towards finding paths towards religious and cultural harmony. Finally, the Ontario Human Rights Commission encourages entities to develop policies to address conflicting rights so that dialogue can replace confrontation, empowering individuals and organisations to apply human rights norms.

While Du Plessis used the metaphor of performance of a musical production, I have used the metaphor of a church service to depict the various roles that the courts, government and civil society have in constitutional interpretation. As priests (instead of high priests), the judiciary have the role of final, but I have argued not the only legitimate, arbiters of constitutional interpretation. Government, including the executive, the legislature and the bureaucracy have a role similar to clergy. They are cognizant of the *dicta* of the priests and develop local and national policies with an understanding and awareness of overarching constitutional interpretation. Civil society, including advocacy organisations and academics, comprises the choir, enhancing constitutional interpretation by their participation in public policy development. A performance, like a church service, is enhanced by a variety of players having distinct, mutually respected roles making a harmonious effect together. Diversity enhances society. Each player, performer or participant has an important role that enriches the experience for everyone.

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Legal text and meaning

A linguistic perspective on a complex relationship

Ekkehard Felder

1 Introductory thoughts

'A constitution speaks. So my experience as theoretician of constitutional interpretation has taught me. Constitution-speak is not a monologue, not a monolithic soliloquy, with the supreme constitution simply speaking for and on behalf of itself.' [1] Taking up this figurative image invoked by Lourens du Plessis, the question arises as to exactly who or what is speaking, from a communication-theory point of view. Is it the authors of the constitution, or is it the text of the constitution itself? Or do the authors of the constitution speak through the text of the constitution, along the lines of Foucault's view of discourse? Approaches to discourse which take an interest in legal theory generally orient themselves around Michel Foucault, according to whom discourses systematically construct the objects about which they speak.[2]

Let's take this position of Michel Foucault to be true and pursue the thought further. Against the backdrop of prevailing models of communication, we arrive at the assumption that it is most likely the recipient of the constitution who ascribes meaning to the original text of the constitution – who is thus convinced that he understands what is written in the text. This assumption is problematic from a semiotic point of view, because conventional wisdom holds that linguistic signs are arbitrary. As in general language, so in legal language: there is no natural connection between the symbol and its contents. A table could just as well have been called a 'chair'. And so, lawyers must not assume that the meaning is inscribed into the text itself, because in reality the construction of meaning only comes about through interactive language use and the way in which the text is applied. It is legal professionals who make the meaning. The arbitrary relationship between the form and content of linguistic signs is ameliorated by the semiotic property of conventionality. This is the only thing that makes communication possible in the first place. But how did this conventionalisation come about, or to put it more precisely: how did the participants in communication agree to follow certain rules, always using the respective expressions in a certain way, so that other participants in the communication can assume themselves to have understood the utterances? And which participants in the communication determine the rules for the use of signs within the context of the figurative image 'a constitution speaks'? Is it lawyers, politicians, or the common people? Can these groups communicate with each other at all, on the basis of their differing background knowledge and experiences with language use, or are we labouring under a mass delusion? Is the constitution using a legal language for special purposes (LSP), while citizens reply in a non-specialised general language?

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1 Du Plessis 'Constitutional dialogue and the dialogic Constitution (or: Constitutionalism as culture of dialogue)'.

2 Foucault *Archäologie des Wissens*.

Questions upon questions. In what follows, I will attempt an answer by presenting some thoughts on the complex relationship between normative text and meaning. I thus find myself confronted with the difficult task of 'answering' the question of how the meaning of texts in general – or legal texts in particular – could be modelled from a linguistic point of view. This undertaking seems all the more fraught with difficulty in light of the fact that neither linguists nor philosophers of language have yet been able to conclusively and satisfactorily resolve questions of meaning. Nor does legal theory have any convincing answers to the question of how legal professionals assign meaning to a legal text with respect to a certain case, or how they generate meaning out of said normative text.[3] This aim places us within the research field of forensic linguistics, comprising law as a realm of action from a linguistic perspective. To summarise: why is the question of meaning-generating in legal contexts so fundamental for constitutional democracy? The question of the role of language in law is central, because it is precisely in determining the meaning of legal texts that the actual justification for actions under the rule of law lies.

This paper will illustrate how the concept of semiosis (the process of substituting one sign for another, in an endless chain) can answer the question, heretofore unresolved in legal theory, of how meaning arises in the field of law. It will attempt to do so without giving rise to a new problem of legal uncertainty in terms of putting legal texts into practice. After explaining how this approach to meaning explication relates to Du Plessis's idea that 'a constitution speaks,' I will characterise the dialogue between constitution and citizens as a never-ending process of specifying and adapting the text of the constitution. It should thus become clear how the construction of legal meaning is negotiated discursively.

2 The point of departure

In his essay 'Constitutional dialogue and the dialogic Constitution', Du Plessis asserts the right of those who are subject to law to have that power be exercised over them with reference to written legal texts in general and the constitution in particular. According to Du Plessis –

> constitutionalism is one amongst many (possible) cultures of dialogue. Constitutionalism – of which the German equivalent is (more or less) *Rechtsstaatlichkeit* – is sometimes narrowly defined as the idea that government should derive its powers from a written constitution, and that such powers should also be limited to what is set out in the constitution.[4] However, a broader, value-laden notion of constitutionalism (*Konstitutionalismus*), as *the -ism of constitutional supremacy and justiciability at the heart of constitutional democracy*, is also feasible. It is in this latter capacity that constitutionalism instantiates a distinctive culture of dialogue neither drawing on nor constituting a monolithic master narrative of any sort, but manifesting in a plurality of dialogic events instead.[5]

Devoting our attention to the role of dialogue raises the question of which medium the dialogues are conducted in. That medium is of course language; and as a linguist, what interests me the most is the question – not uncontroversial in terms of legal theory – of the extent to which the ideas and intentions of the legislature are discursively further developed in the medium of language when the executive and judicial branches justify their actions and decisions with reference to this raw material, ie legal texts which are themselves formulated in language. We are dealing here with a very basic question, one also

3 Du Plessis 'Constitutional dialogue'.
4 Currie and De Waal *The Bill of Rights Handbook* 8.
5 Du Plessis 'Constitutional dialogue' 691.

raised by Du Plessis in his thoughts on the 'Interpretation of the Bill of Rights' in *Constitutional Law of South Africa*.[6] I would like to take up this question here and, with reference to the semiotician Charles S. Peirce, make a proposal which may help to render the problem of meaning in law more concrete.

In line with my own approach to 'Constitutional dialogue and the dialogic constitution', Du Plessis elaborates on the orientating function of constitutions when he clarifies the statement 'The constitutions speaks': 'I must stress: it is *ongoing dialogic interaction* that keeps the Constitution as a monument from overwhelming the Constitution as memorial and, *vice versa*, the Constitution as memorial from enervating the Constitution as a monument.'[7] With regard to the wording of a written constitution, it is abundantly clear that the 'language of the end product thus harbours – and has the potential to activate – contested and even contradictory ideas, sentiments and values'.[8]

The point I am interested in is the following: dominance and power are also exercised through semantics. Language is regarded as a means for asserting certain views on controversial topics in intellectual domains (eg medicine, economics, architecture, natural science, history, law, etc). Within debates among professionals, disputes arise with regard to appropriate terminologies and definitions in these fields. In other words, 'semantic battles' take place. Language directs the constitution of facts within the framework of knowledge; knowledge is developed through language. Successfully establishing a certain wording for a fact means directing the perspective of the constituted reality.[9]

3 Legal language and meaning

I would now like to describe a curious state of affairs, but first it will be necessary to introduce certain preliminary considerations: in and of itself, the practice of law in the 21st century (following a long historical evolution) functions effectively, is rationally organised, and as such enjoys a high degree of intersubjective recognition and esteem – as do its practitioners and their professional conduct. Of course, individual court decisions or actions of legal functionaries will nevertheless stir controversy and can become the subject of debate both among legal professionals and in the general public.

For a forensic linguistic approach like the one taken in the present contribution, the following point of view is essential: substantive law which regulates the rights and obligations of individuals amongst themselves and with respect to the community as a whole, and procedural law which is involved with putting material law into effect, are fixed in written form in various texts and are represented by the latter. They reflect intersubjectively comprehensible efforts to achieve objectivity. Objectivity is usually a paradigm known from scientific discourse. Repeated references to the criteria of exegetical jurisprudence established in legal discourses confirm their evidence, their relevance, and their quite high level of acceptance, even if their plausibility can be disputed in particular instances. In short, legal practice functions as an elaborated system and corresponds to rationalistic principles to a high degree. These are principles which likewise inform scientific contexts and which are required in order to legitimise democratic forms of government.

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6 Du Plessis 'Interpretation'.
7 Du Plessis 'Constitutional dialogue' 685.
8 *Ibid* 687.
9 Felder *Semantic Battles – the Power of the Declarative in Specialized Discourse.*

Professionals who operate within the legal system make use of a certain language. Suppose a politically, socially, and intellectually interested citizen approaches this system, and the specialists who work there, with a seemingly simple question which I will formulate as follows: *How do legal professionals actually extract meaning from legal texts? Can the procedures underlying this process be described and depicted in a comprehensible model?*

What the hypothetical citizen in this scenario may find amazing is that neither legal professionals in general, nor legal theoreticians in particular, have a clear and simple answer to this question. Rather, in Germany one often hears answers like the following (synthesised and reformulated in my own words):

> There are two types of approach: *Wortsinnermittlung* and *Wortlautgrenze* [German for 'word-meaning determination' and 'wording boundary,' respectively], but neither of these is entirely convincing. The question does not play a central role in the foreground of legal practice. Legal theoreticians, however, have been fighting about it for the longest time and will probably continue to do so for quite a while.

If one instead approaches linguists and philologists, questions regarding meaning explication are not usually met with any simple and easily comprehensible answers from this circle of experts either.

I would now like to address this unsatisfactory state of affairs (which I have obviously put a rather fine point on here) with a proposal that can be summed up in advance as follows: 'The meaning is to be found in legal linguistic practices themselves; that is where meaning is inscribed!' In what follows, I would like to substantiate and expand on this answer, cryptic though it may seem at first glance.

4 Research question and aims

This contribution seeks to present a stringent theoretical-linguistic model of meaning constitution in legal practice and will concentrate on the question of how the practice of meaning construal established by legal professionals can be explained in a semiotically plausible way. It will show that legal validity is produced through a process of placing real-life situations and court cases in relation to legal texts by ascribing meaning to the legal texts and, moreover, that the meaning ascribed to the legal text – via the concrete situation at hand – is to be found in the intertextual web of jurisprudential textual work. Any concretisation of a given legal-text meaning that is undertaken in the context of a specific situation will always stand in relation to the respective case preparation and comparable real-life situations. With the ascription of legal-text meanings thus perspectivised from the real-life situation to the court case at hand, it becomes clear that the notion of legal certainty is by no means endangered if we dispense with the myths of *Wortsinnermittlung* and *Wortlautgrenze*, which are untenable from a theoretical linguistic and semiotic perspective.

The dispute within legal theory over whether meaning in law is ever ascertained or specifically produced essentially applies to legal lexicography as well, since making sense of legal texts in specific life situations (a fitting way to sum up the core activities of legal professionals) depends on lexicographers to capture and document this sense-making process by making explicit the ways of employing different forms of word usage, abstracting away from any individual context. In the exposition that follows, I will assume that working with an interweaving of different text types[10] constitutes the central part of a

10 Cf Busse 'Textsorten des Bereichs Rechtswesen und Justiz' and, regarding specialised text types in institutional languages, Hoffmann 'Fachsprachen und Gemeinsprachen'.

lawyer's professional activities.[11] Building on this basic assumption, I will answer the question of which characteristics of legal LSP can be formulated by attempting to describe the professional activity of jurisprudential textual work, above all with an eye toward meaning explication in law.

5 Legal language, at the interface between specialised and general language

The 'classic' functional requirements placed on LSPs are traditionally considered to be exactness, explicitness, and economy.[12] Aside from these, the comprehensibility of LSP texts is being cited more and more often as an additional functional criterion of late.[13] On the one hand, the research on LSP texts examines them with respect to the language system, focusing on the morphological, lexical, and syntactic domains; on the other hand, the use of LSPs is investigated in terms of their cognitive function as conceptual instruments, as well as their communicative function in conveying specialist knowledge in disparate circumstances of use.[14] In dealing with specialist communication, the linguistic domain of pragmatics – ie the performance of language acts, or the communicative actions of a person making specialist utterances[15] is studied. Aspects of comprehension processes, how texts function in terms of their effect, circumstances of language use, and the specification of addressees have increasingly come to augment the traditional range of research. With respect to forms of communication of specialist knowledge, there are three different constellations of addressees to distinguish between: *intra*disciplinary communication between legal professionals, *inter*disciplinary communication between lawyers and experts from other fields, and *extra*disciplinary communication between legal experts and (relative) laypeople. To varying degrees, each of these forms of communication employs the specialised language of law, or legal LSP.

As a rule, the transmission aspect is placed at the centre of attention whenever difficulties in comprehension or communication arise. In this context, legal LSP is sometimes touted as the prime example of incomprehensibility. With reference to standard jurisprudential definitions concerning the question of whether the language used in the legal field and the justice system is to be characterised as more specialised or more general in nature, the two following poles present themselves: on the one hand, Kirchhof casts doubt on the categorisation of legal language as LSP, because it is closely related to general language (legal experts prefer the term *colloquial language*) and because central legal expressions are at the same time words belonging to general language. Moreover, he cites as an additional reason the fact that it addresses itself to everyday people, by virtue of its social-regulative function.[16]

Contrary to this, legal expert Ulfrid Neumann defines legal language in an empirical sense as that LSP in which 'the laws, regulations, exegetical jurisprudence and other legal texts are actually formulated'.[17] While Neumann characterises legal language as an LSP

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11 Busse *Recht als Text. Linguistische Untersuchungen zur Arbeit mit Sprache in einer gesellschaftlichen Institution*; Felder *Juristische Textarbeit im Spiegel der Öffentlichkeit*.

12 Cf also Felder 'Juristische Fachsprache'.

13 Biere 'Verständlichkeit beim Gebrauch von Fachsprachen'; Roelcke *Fachsprachen*.

14 Hoffmann *Kommunikationsmittel Fachsprache – eine Einführung* 15ff.

15 Fluck *Fachsprachen. Einführung und Bibliographie* 31ff.; Hoffmann *Kommunikationsmittel Fachsprache*; Hoffmann 'Fachsprachen und Gemeinsprachen'.

16 Kirchhof 'Deutsche Sprache' 754.

17 Neumann 'Juristische Fachsprache und Umgangssprache' 111.

that largely avails itself of the 'vocabulary of the colloquial language', Müller, Christensen and Sokolowski similarly describe the language of law as a 'natural language interspersed with LSP elements'.[18] There is little divergence between these last two attempts at a definition, and they correspond with the prevailing notion of legal institutional language use in the field of forensic linguistics.

The thoughts presented above concerning legal language insinuate a sharp division between specialised language on the one hand and general language on the other.[19] This distinction and the accompanying problems cannot be dealt with here in depth. My notion of legal language and general language in the context of linguistic research should be viewed against the backdrop of legal and everyday knowledge frameworks[20] – a point of view that must be considered in regard to the metaphor that 'a constitution speaks'. Because after all, the constitution speaks in a ductus emanating from a constitutional-law background and the *zoon politikon* answers from a non-legal everyday conceptual framework. The divergent background knowledge and differing expectations of the respective interlocutors within the 'constitution speaks' model pose a fundamental problem.

The question under consideration here, as to how meaning can be explicated in concrete contexts, is immanent to problems of both specialised language and general language and will be explored here for both forms of language use. By 'general language' as an antipole to LSP, I mean the syncretism of a very far-reaching system of expression (which is not specifically marked, neither regionally nor socially) and an everyday and transmissive-semantic content system (ie not exceedingly specialised semantically to a given field, so that it is not reserved for a small group of experts but is also accessible to relative lay-people).[21]

6 Legal meaning on the basis of legal texts and (real-life) situations

The problem of differences in meaning (especially between LSP and general language) presents itself in a specific way to any lexicographer interested in the reconstruction of legal meanings in past and present contexts of use – particularly in the case of historical lexicography informed by a sense of duty toward the 'societal and scholarly exigencies'.[22] In this context, the following observation by Reichmann is of critical importance:

> Among the unassailable theoretical presuppositions in all of linguistics are the following: first, the notion that the lexical unit is to be regarded as systematically polysemous and, second, that each of the senses ascribed to it is to be placed in a semantic relationship with at least one of the senses that are ascribed to other lexical units.[23]

Against this backdrop, an explanatory model is to be proposed in the following sections to elucidate a working practice with respect to its processes of meaning production and meaning explication. The point of departure is to be a notion of jurisprudential textual

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18 Müller, Christensen and Sokolowski *Rechtstext und Textarbeit* 9.

19 Regarding the problem of where to draw the boundary between LSP and general language, cf Felder *Juristische Textarbeit* 91ff.

20 Busse *Recht als Text*; Felder *Juristische Textarbeit* 89ff.

21 Felder *Juristische Textarbeit* 93.

22 Reichmann *Historische Lexikographie. Ideen, Verwirklichungen, Reflexionen an Beispielen des Deutschen, Niederländischen und Englischen*.

23 *Ibid* 379 (translated from the German).

work[24] that conceives of law as a text-processing and text-transforming institution.[25] Building on this basic assumption, my aim is to answer the question of how the legal professional can produce meaning from words in contexts, how the legal theoretician can theoretically model this process, and how it can be possible for the non-lawyer citizen to take part in the communication at all, within the framework of the assumptions of this model.

In his Structuring Legal Theory paradigm, legal theoretician Friedrich Müller calls jurisprudential work with texts 'legal work'; lawmakers and appliers of the law (ie legal professionals) are called 'legal workers' in his book *Juristische Methodik* [Legal Methodology].[26] With these designations, the role of the jurisprudentially acting subject in concretising legal prescriptions – that is, in ascribing meaning – is emphasised. The model to be presented here subscribes to this view of matters. On the basis of legal texts, the language acts performed by legal workers will be placed front-and-centre in order to demonstrate an approach through which meaning explication in legal contexts can be modelled (based on prototypical forms of word usage, abstracted away from any given context). My research question thus centres on a theory of meaning with regard to legal practice.[27]

7 Two conflicting approaches: meaning determination versus meaning stabilisation

It is of theoretical interest and practical utility to reflect on how codified legal texts are placed in relation to social situations and realities, which they are supposed to regulate in some way or other. Generally speaking, this is done (as detailed by Busse[28] and Felder[29]) by ascribing meaning to written laws from the point of view of a concrete case at hand. The ascription of meaning is discussed in the legal studies literature according to various paradigms – there are two conflicting explanatory approaches, which characterise meaning ascription in different ways: one approach (that of Larenz) is based on meaning *determination* and speaks of the possibility of determining the verbal meaning in a legal text;[30] Klatt even goes so far as to speak of the 'objectivity of linguistic meaning'.[31] The other explanatory approach, developed within the paradigm of action theory, is based on a *stabilisation* of meaning and falls within the purview of linguistic pragmatics, as expounded by Busse,[32] Müller/Christensen/Sokolowski[33] and Felder.[34]

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24 Felder *Juristische Textarbeit*.
25 Busse *Recht als Text*. See similarly, Du Plessis 'Lawspeak as text…and textspeak as law: Reflections on how lawyers work with texts – and texts with them'; and Du Plessis *Re-Interpretation of Statutes* 1–18.
26 Müller *Juristische Methodik*.
27 Cf on this topic Christensen and Pieroth Rechtstheorie in rechtspraktischer Absicht. Freundesgabe zum 70. Geburtstag von Friedrich Müller.
28 Busse *Recht als Text*.
29 Felder *Juristische Textarbeit*.
30 Larenz *Methodenlehre der Rechtswissenschaft*.
31 Klatt *Theorie der Wortlautgrenze. Semantische Normativität in der juristischen Argumentation* 285.
32 Busse *Juristische Semantik. Grundfragen der juristischen Interpretationstheorie in sprachwissenschaftlicher Sicht*.
33 Müller, Christensen and Sokolowski, *Rechtstext und Textarbeit*.
34 Felder *Juristische Textarbeit*.

The proponents of the meaning *determination* approach subscribe to the thesis of the 'objectivity of linguistic meaning,'[35] arriving at the conclusion 'that, contrary to many critics, linguistic meaning is capable of bearing the onus placed on it for the objectivity of legal decisions'.[36] A model such as that of meaning determination, based on the notion of a predetermined standard meaning that the authors of a constitution have established, cannot be reconciled with Du Plessis's 'a constitution speaks' approach, because modelling the rule of law as a dialogue between the constitution and citizens (as suggested by Du Plessis) insinuates that the participants in the discourse have not fixed their positions statically but negotiate them through ongoing proceedings.

Those researchers who argue for a *stabilisation* of meaning, approach the problem from a semiotic and language-pragmatics standpoint by identifying patterns of verbalisation and language acts. Such models are therefore fully compatible with the idea that 'a constitution speaks'. This approach describes protagonists in the legal field against the backdrop of concrete communicative situations; on the one hand, this highlights how language is used to gain access to the states of affairs that are to be constituted and the perspectivity[37] immanent to them (ie the semiotic plane, with its semantic battles over adequate constructions of reality). An analysis based on language acts or action theory, on the other hand, enters the fray earlier, at the point where language is exerting its influence on the legal processing of reality – ie in 'taking a normative stance on a situation' (as Thomas Seibert puts it).[38] It can be described as the 'construction of reality' in law. In this context, legal expert Bernd Jeand'Heur speaks of the 'preparatory function' that appertains to the use of legal LSP texts, which is what translates the 'case' into a legally relevant 'state of affairs' in the first place, that is, *prepares* it.[39] Current research subsumes these activities within the category of action aspects, with areas of investigation including the *determination of states of affairs*, *legal classification of states of affairs*, and *deciding*.[40] Legal professionals accordingly classify a certain number of characteristics of real-life situations as legally relevant with respect to the state of affairs that is to be constituted and thus designate them as significant for the situation or case.

In order to legitimise declarative and assertive language acts in the legal field, not only expert knowledge of the law but also knowledge of language acts in general is required. Knowledge of these matters thus becomes a central part of society's understanding of the law. We gain access to knowledge via the language of a speech community. And there lies the basis for the social nature of language: namely, that the people who belong to a certain cultural grouping have the same linguistic inventory at their disposal. Signs are thus to be

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35 Klatt *Theorie der Wortlautgrenze* 285.

36 *Ibid* 284.

37 Köller *Perspektivität und Sprache. Zur Struktur von Objektivierungsformen in Bildern, im Denken und in der Sprache*.

38 Seibert *Aktenanalysen. Zur Schriftform juristischer Deutungen* 16.

39 Jeand'Heur 'Die neuere Fachsprache der juristischen Wissenschaft seit der Mitte des 19. Jahrhunderts unter besonderer Berücksichtigung von Verfassungsrecht und Rechtsmethodik' 1292.

40 Felder *Juristische Textarbeit*; Li *„Recht ist Streit". Eine rechtslinguistische Analyse des Sprachverhaltens in der deutschen Rechtsprechung*; Vogel 'Das Recht im Text. Rechtssprachlicher Usus in korpuslinguistischer Perspektive'; Luth *Semantische Kämpfe im Recht. Eine rechtslinguistische Analyse zu Konflikten zwischen dem EGMR und nationalen Gerichten*.

thought of as collective units. It follows that the linguistic nature of knowledge constitution has as a consequence the social nature of language.[41] What this means for a socially informed view of language, and the scientific study of it, is that language and knowledge are central power factors and are constitutive for the development of the world; in them, societal conceptions of justice and forms of individual self-realisation within societies converge in a highly charged environment. In the system of written law, not only the macrostructures of power, but the status of its bearers, their prerogatives and liberties as well as the standards for, or authority of their (language) actions, are encoded. Texts in operation are thus the point of departure for any forensic-linguistic analysis. In other words, it is in the ability to act by means of legal language that the possibility of participating in a constitutional system lies. And this thought refers both to speaking legal language and to understanding it. Therefore, we need to be able to explain, in a theoretically plausible way, how comprehension in the legal field is supposed to work. Ultimately, a plausible explanation for how comprehension comes about in the legal field is a prerequisite for the rule of law and the loyalty of a citizen towards the law.

8 Unlimited semiosis in the legal field as an explanatory model for legal meaning explication[42]

At the centre of interest for the present work is the question of how legal professionals ascribe meaning to codified texts. Having described the problem of how legal meaning is constructed in paragraph 7 above, I will now suggest semiosis as a theoretical framework for solving that problem. Meaning ascription in legal practice takes place within the paradigm of semiosis, by ascribing signs to signs (and not by simply extracting the meaning out of legal texts). I will therefore join Hundsnurscher in taking a pragmatic approach to lexical semantics.[43] On this view, the meaning of a word is not given *a priori*, but is nailed down context-specifically with regard to the current *in situ* sense on the basis of previously encountered uses and the recognised regularities or rules of word usage (Wittgenstein's language game). We make sense of the world (as Hans Hörmann[44] puts it) by assigning a sign to a position along the spectrum of possibilities for using that sign – ie choosing a pragmatic perspective within pragma-semiotic textual work.[45]

In what follows, the paradigm of theoretically unlimited (and in legal practice, temporarily limited) semiosis will be adduced as an explanatory model of field-specific meaning stabilisation.[46] In the field of semiotics, 'semiosis' refers to the process by which something functions as a sign: 'Semiosis is the triadic "action of the sign," the process through which the sign exerts a cognitive effect on its interpreter or quasi-interpreter'.[47] Because it is

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41 On this point, see Felder and Müller *Wissen durch Sprache. Theorie, Praxis und Erkenntnisinteresse des Forschungsnetzwerks, Sprache und Wissen'*.

42 The thoughts presented here are drawn, in part, from Felder 'Unendliche Semiose im Recht als Garant der Rechtssicherheit'.

43 Hundsnurscher 'Pragmatische Wortsemantik. Zum pragmatischen Hintergrund einer gebrauchstheoretisch orientierten lexikalischen Semantik'.

44 Hörmann 'Der Vorgang des Verstehens' 25.

45 Cf Felder 'Sprache – das Tor zur Welt!? Perspektiven und Tendenzen in sprachlichen Äußerungen'; Felder 'Pragma-semiotische Textarbeit und der hermeneutische Nutzen von Korpusanalysen für die linguistische Mediendiskursanalyse'.

46 On this point, cf. also the comments in Felder 'Unendliche Semiose im Recht'.

47 Nöth *Handbuch der Semiotik* 62. Cf. also Peirce *Collected Papers* 5.472, 5.484.

never concluded, this process is thought of as infinite in theory, since every sign becomes the interpretant of another sign (resulting in the unlimited substitutability of signs for signs).[48]

Following Charles Sanders Peirce, what is meant by 'unlimited semiosis' in linguistics is the fact that the sign in a narrow sense, or rather the external form of the sign (which Peirce calls the 'representamen') can only be explained by interpretants in the sense of other linguistic signs – in short: in order to explain the meaning of one word, you need a second word, and in order to illustrate the meaning of the second, you need yet another. Nöth speaks of an 'unending process of semiosis'[49] – or infinite semiosis, because while the process of semiosis can be interrupted, it can never be concluded. For example, the process is interrupted by every court decision or administrative act, in the sense that the stabilisation of meaning entails substantial consequences for the parties involved in the proceedings (temporarily limited semiosis). From both a procedural and a theoretical standpoint, every legally valid stabilisation of meaning is carried forward by the institutions in charge through the intertextual written promulgation of conventionalised forms of word usage. For one thing, its validity is confined to the individual case under consideration (provided no legal challenges or appeals are mounted) and can be confirmed or modified by comparable cases and their respective stabilisations of meaning. Therefore, with regard to the process of semiosis, it must be specified that in legal practice, it can be temporarily limited in its effect, while in terms of legal and linguistic (and ultimately also lexicographical) theory, it is unlimited.

It follows that meaning is neither a static affair, nor can it be ontically hypostatised; meaning explication takes place through the semiotic interpretation of signs (ie by interpreting linguistic signs and strings of signs in texts with reference to their value within the web of the text).

To place what has been said thus far in relation to Du Plessis's 'a constitution speaks' and formulate it more pointedly for constitutional discourse: words *per se* have no meaning; rather, we as speakers have experiences with how certain words have been used in varying cotexts, contexts, and interactions. Consequently, we as speakers (whether experts or laypeople) make meaning with words – and we do so on the basis of our experiences with linguistic usage, as well as our prior knowledge through interaction-specific contextualisation. In the process, diverse forms of knowledge at varying degrees of specialisation have a role to play, and they manifest themselves cognitively in the knowledge frameworks of the acting subjects. Here, 'specialisation' is to be understood as a gradual phenomenon on a continuum between the poles of *rich in technical features* and *poor in technical features*.[50]

Peirce's approach to semiosis is not compatible with *Wortsinnermittlung* or *Wortlautgrenze* approaches. Peter Schiffauer[51] and Dietrich Busse[52] have investigated the concept of the *Wortlautgrenze* and demonstrated how tenuous its distinction between the

48 Cf also Eco's thoughts on this topic, in which he deals with abduction and the process of unlimited semiosis (Eco *The Limits of Interpretation*).

49 Nöth *Handbuch der Semiotik* 64.

50 On this point, see Kalverkämper 'Gemeinsprachen und Fachsprachen – Plädoyer für eine integrierende Sichtweise' and Becker and Hundt 'Die Fachsprache in der einzelsprachlichen Differenzierung'.

51 Schiffauer *Wortbedeutung und Rechtserkenntnis*.

52 Busse *Recht als Text*; Busse *Juristische Semantik*.

Bedeutungskern (core meaning) and *Bedeutungshof* (peripheral meaning) is. In the process, it became clear how illusory the notion of the judge as the 'mouthpiece of the law' is, in the sense of a 'subsumption automaton'.[53] Schiffauer reaches a radical verdict: 'When, in interpreting a law, the meaning of a word falls into doubt, the semantic argument can no longer be employed.'[54] Schiffauer's grappling with the problem of delineation culminates in the following thesis: 'The terms "interpretation in conformity with the constitution" and "analogy" have no specific content to justify them in the context of the stated grounds for court decisions.'[55] The position taken by Christensen seems most convincing from a linguistic point of view. In his opinion, the idea encapsulated in the term *Wortlautgrenze* is not an absolute but a relative quantity which, depending on the situation, 'requires the legal worker, at any given point, to give precedence to that argument which adheres more closely to the text of the law or, conversely, to grant to the element that diverges farther from the text of the law only a specifying function, and not an overriding effect'.[56]

9 Semiosis as a model for meaning explication: example scenario based on an indeterminate legal concept

The following question now arises with regard to jurisprudential meaning explication within the paradigm of unlimited semiosis: how can this sort of meaning stabilisation in the legal field be adequately modelled?

In characterising the stabilisation of legal meaning, the paradigm of unlimited semiosis presumes that we can only delimit the meaning of an expression by means of other linguistic signs. Since this process is infinite, Nöth – as mentioned above – speaks of an 'unending process of semiosis'[57] – or unlimited semiosis, because while the process of semiosis can be suspended, it can never be concluded. Accordingly, this process of semiosis is interrupted at an earlier stage in everyday communication than in specialist communication, where the process of specifying meanings further by employing additional signs as interpretants is part of the self-assurance process of both legal practitioners and the scientific community.

The meaning of legal texts in relation to a given case can be objectivised by degrees, even though, as a rule, not all of those who are subject to the law will agree as to the stabilised meaning of the legal text in relation to a concrete case. Nevertheless, stabilisations of meaning have intersubjective validity. The practice of discursive negotiation in concretising laws is like a never-ending language game; even the decisions handed down by supreme courts or federal constitutional courts can be placed in a new perspective years later – it is then a question of reformulations with regard to similar cases or types of case. This fact which demonstrates the relevance of unlimited semiosis as an explanatory model is reassuring since it makes it possible to take changing societal values into account – if only with a certain time lag and too late for certain affected parties – as long as a discursive debate takes place.

In the context of this imputed underdetermination the question arises for the paradigm of theoretically unlimited semiosis as to how the legal practice of meaning explication – conceived of as meaning stabilisation at a certain point in time – can be assisted by linguistic

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53 Busse *Juristische Semantik* 46ff.
54 Schiffauer *Wortbedeutung und Rechtserkenntnis* 103.
55 *Ibid* 254.
56 Christensen 'Das Problem des Richterrechts aus der Sicht der Strukturierenden' 91.
57 Nöth *Handbuch der Semiotik* 64.

methods and, of late, (semi-automated) corpus-linguistic techniques. This with an eye toward techniques that can help to lay bare ambiguous legal terms with respect to their conflict potential and the underlying attempts at fixing the meaning, while taking the enormous quantity of intertextually linked texts into consideration. The question for investigation thus becomes: how can the discursive formulations and negotiation processes in the legal field be captured and described?

To objectivise meaning postulates with respect to legal texts in relation to concrete cases, one needs analytical techniques that bring the central points of dispute to light economically, in terms of the effort required. In the legal context the question arises of how to efficiently investigate the differing ascriptions of meaning or jurisprudential points of dispute using large text corpora. I will conclude by illustrating, based on an example scenario, how such discursive conflicts can be identified with discourse analysis, employing semi-automated methods to reveal the jurisprudential usages of the German expression *Würde* (dignity, worth). For purposes of defining terms, the study in focus demonstrates the legally realised contextualisations as exemplified by German Federal Constitutional Court decisions (building on an analysis by Vogel).[58] I will show, in light of the vague meaning of the term 'human dignity', how its meaning can be ascertained through a concrete examination of the many ways in which the word *Menschenwürde* (human dignity) has been used.

With the help of computers, we can review the many different verbal contexts in which the expression *Menschenwürde* has occurred in a large corpus of legal language. Viewing the resulting data within the paradigm of semiosis allows us to catalogue the meanings that are ascribed to the expression *Menschenwürde* in concrete legal language use by lawyers and other legal professionals. By analysing the different verbal contexts within which *Menschenwürde* appears, I will thus provide a practical example of the abstract idea of semiosis.

Friedemann Vogel tests the investigatory potential of semi-automated analytical instruments for comprehending textual and legislative work in the legal field on the basis of 4,238 German Federal Constitutional Court decisions in which the multi-word term *Würde des Menschen* ('dignity of the human being,' Art. 1, Par. 1 of Germany's Basic Law) or the compound *Menschenwürde* appears, as an example of an indefinite legal term. With this method, he seeks to shed light on jurisprudential usages of the expression *Würde*, tracing the process of defining the term by demonstrating the contextualisations realised in the legal field. 'The focus is on language patterns recurring in large text corpora, as tracks in the sediment of exegetical jurisprudence.'[59] By focusing on the immediate environment (= the cotext) of the term *Würde des Menschen* or *Menschenwürde* (investigating the contextualisation by means of cotext analysis), specific details regarding the use of these words come to the fore – for example, predications (intensional and extensional ascriptions of characteristics) and attributions.

Our guiding interest crystallises mainly in the question 'in which recurrent linguistic formations (on the expressive side) do the expressions enshrined in Art. 1, Par. 1 of Germany's Basic Law *Würde* [*des Menschen*] or *Menschenwürde* occur in the corpus?' Based on the language patterns thus identified, the meaning specifications can be explicated by focusing on the concrete discourse context in large text *corpora*.

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58 Vogel 'Das Recht im Text'.
59 *Ibid* 315.

Vogel works out how *Würde* is specified through ascriptions within legal discourse with respect to (1) its bearers, (2) the preservation and maintenance of the law, as well as a regard for the person as a human being in the face of legal restrictions, and (3) violations of this law. Moreover, he outlines the attributes in relation to those protagonists who are entitled to legitimise *Würde* in the discourse and 'certain specifics of cases (or resolutions) that are represented at a frequency greater than chance'.[60] With this corpus-linguistic method the theoretical concept of semiosis is given a practical application in legal discourse where it can help to flesh out the notion that 'a constitution speaks'.

If such an analysis also takes into consideration the three fundamental types of linguistic act which are of central importance in any legal communication – namely, the language act of *identifying the state of affairs*, the act of *legally classifying the state of affairs* (ie assessing the case under preparation in light of the relevant legal texts) and third the act of *deciding*[61] – then the process of semiosis as a method for meaning explication can be described more precisely as follows: The potential of a corpus-linguistics-inspired approach to forensic linguistics within the paradigm of unlimited semiosis,[62] which takes into consideration the three types of language act[63] mentioned above (*identifying the state of affairs*, *legally classifying the state of affairs,* and *deciding*) lies:

- 'in a corpus-guided co(n)text disambiguation of jurisprudential legal expressions, which takes seriously the Wittgensteinian premise that "the meaning of a word" – and thus also of any segment of a legal text whatsoever – is "its [rule-bound] usage in the language" (Wittgenstein (1984))'[64] and analyses the performance of jurisprudential textual work in light of the three types of language act;
- 'in the transparent traceability of how legal states of affairs or norms are constituted by means of a semi-automated structuring of the data; and finally,
- in facilitating quantitative (macrosystematic) and qualitative (microsystematic) analysis and, thus, the relativisation of individual text passages with systematically recurring language patterns across a large quantity of text'.[65]

I hope that the above has sufficiently illustrated my purpose; the goal is to demonstrate a semantically consistent approach that is compatible with the basic assumptions of semiotics. Approaches based on determining meaning as described above (such as theories of *Wortsinnermittlung* or *Wortlautgrenze*), however, contradict semiotic principles. The model presented here aims to make the idea plausible that semantogenesis is negotiated through ongoing proceedings in the legal field and it can easily be reconciled with Du Plessis's assertion that 'a constitution speaks'. This model of meaning explication through processes of semiosis in the context of legal communication thus constitutes a refinement describing more stringently how legal LSP functions.

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60 *Ibid* 327.
61 Cf Felder *Juristische Textarbeit*, Li *„Recht ist Streit"*.
62 Cf the volume of basic research on corpus pragmatics by Felder, Müller and Vogel *Korpuspragmatik*.
63 Cf Felder *Juristische Textarbeit*); Li *„Recht ist Streit"*.
64 Vogel 'Das Recht im Text' 322, with reference to Wittgenstein L *Philosophische Untersuchungen* § 43.
65 *Ibid*.

10 Conclusion

The aim of this chapter has been to offer proof that the concept of semiosis (that every sign becomes the interpretant of another, with unlimited substitutability of signs for signs) which stems from the field of semiotics can close the gap in the theory of how meaning comes about in the legal field without opening a new gap of legal uncertainty in the way legal theory explains legal practice. This approach to meaning explication corresponds with Du Plessis's idea that 'a constitution speaks' and fine-tunes it as it were because the dialogue between constitution and citizens comprises a never-ending process with respect to specifying and adapting the text of the constitution which as a raw text is always in need of a specific fulfilment or fine-tuning depending on the circumstances at hand, and this has to be negotiated discursively.

And so, according to the view outlined here, the ascription of meaning to legal texts is a temporary stabilisation in the process of semiosis. The ascription of meaning can be calculated and anticipated within a certain knowledge framework.[66] To this extent, it thus becomes possible to dispense with the fiction of inferring the meaning of laws without calling legal certainty into question. The fiction goes as follows: in the ductus of the container metaphor, legal professionals only take out of the legal text what the lawmakers themselves put into it. Contrary to widespread fears of legal uncertainty (due to the judge no longer having the status of the 'mouthpiece of the law'), dispensing with this semiotically untenable assumption will do just the opposite: it will reinforce the idea of legal certainty (conceived of as the certainty vouchsafed by the legal system and jurisprudence).

The implications of the 'word-container metaphor' – ie the simplistic and misguided notion that the text producer (for example, the legislature) 'packs' meaning into an expression which is then 'unpacked' by the text recipients (eg those subject to the law, or more narrowly legal professionals) in a 1:1 ratio – suggest to the law's addressees a supposed neutrality of language, which can range all the way to the perception of objectivity, in the sense of a clearly realised will on the part of the legislative body. The metaphor alludes to a uniform automaticity in comprehension and effect of the legal text from the perspective of the lawmaker as text producer, abstracted away from any given recipient, and ignores aspects of linguistic perspectivity and societal power and interest relations. *In this way, things are attributed to the medium of language, with its blurred outlines, that it is not actually capable of.*

At the same time, the motivational force of a reference within the text of a law is expected to have a legitimising effect in terms of the rule of law (the linguistic usage argument) – an expectation to which the medium can only do limited justice under conditions of suboptimal determinacy. In the receptive processing of (legal) texts, it is therefore necessary to stress the potential for vagueness and the poor determination or underdetermination of language and the limited predictability of the repercussions legal texts will have for legal professionals.[67] As an extension of traditional hermeneutics, categories of linguistic pragmatics such as the *question of addressees, prior knowledge of text producers and recipients, polyfunctionality, interpretation of situations, meaning explication* and *intertextuality* offer considerably more clarity, against the backdrop of varying discourse experiences and forms, about a process which can only be apprehended with difficulty.[68]

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66 See eg Busse *Recht als Text* 36ff.

67 Cf Wolski *Schlechtbestimmtheit und Vagheit. Methodologische Untersuchungen zur Semantik* as well as Pinkal *Logik und Lexikon. Die Semantik des Unbestimmten*.

68 Felder *Juristische Textarbeit* 220ff.

Dispensing with the semiotically untenable assumption of *Wortsinnermittlung* in the framework of the container metaphor thus represents a reinforcement of the idea of legal certainty. It enables us to explain in theory what has long been the case in practice: namely that those who are subject to a legal prescription cannot predict with certainty how a real-life situation adjudicated in a court case will be placed in relation to a legal text and how the case will then be decided with reference to argumentation that adheres more closely to the text of the law versus that which diverges farther from the text of the law. This is because the process sketched above, of relating the case at hand to a legal text, leaves room for vagueness. The idea of some versions of legal positivism in contrast – which assumes there is one and only one interpretation – dangles before the eyes of those subject to the law a kind of objectivism that does not really exist in this form, which leads to disillusionment when, in practice (where the principle that 'law is contention'[69] obtains), the case is decided otherwise than hoped.

And this brings us back to the 'semantic battles' in law: reflections on the role of language in legal studies and in legal practice can look back on a long tradition. As a successor to the simplistic, instrumental conceptions of language that underlie legal positivism with its untenable and illusory assumptions of objectivistic meaning determination from legal texts, the view has been propounded here that law takes the form of a process. The medium of negotiation for this process is language – more precisely, legal language. This fact is particularly relevant where constitutional law is concerned. In particular, the discursive or 'dialogic' confrontations and jurisdictional disputes between courts as well as those between legal professionals and laypeople, are considered prime examples of discursively negotiated power plays and within the paradigm of 'semantic battles' they can be formulated as follows: what is meant by 'semantic battle' is the attempt on the part of different discourse participants to assert certain linguistic forms as an expression of specific, interest-driven patterns of action and thinking through the discursive process of negotiation within a knowledge domain such as law. The coining and asserting of specific technical terminologies and the fixation of that which appears to be given *a priori*, but is in reality a state of affairs that first had to be constituted linguistically, only then becomes negotiable. When viewed in this way, they represent the attempt to structure the world or a segment of the world, from a central perspective, as a systemic space from one specific point of view.

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69 Cf Li *„Recht ist Streit"*.

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Land reform and restitution in South Africa

An embodiment of justice?

Juanita Pienaar

1 Introduction

Commenting on the working draft of the Bill of Rights in 1996 Lourens du Plessis made the following statement regarding the property clause:[1]

> Measures aimed at the restitution of property therefore, do not constitute "exceptions to" the guarantee of property, but follow as its natural consequences.

Du Plessis elaborated further that redress followed naturally due to the dispossession of large numbers of people under apartheid and because of apartheid's history of disqualifying some people from acquiring property in certain places.[2] Accordingly, due to the particular history of dispossession, redress and restitution were natural consequences of a new political dispensation, embedded in the Constitution. But on what basis would it be a 'natural consequence' and how was this 'natural consequence' dealt with in practice? If it was a 'natural consequence' or indeed a 'logical consequence', can it be relayed to the premise that redress or restoration was the right thing to do? If that is indeed the case, further questions emerge, namely whether the programme of restitution that was eventually embarked on, is in fact an embodiment of justice and if so, which form(s) of justice? Is there a link between this 'natural consequence' and justice on the one hand, and the eventual programme that was devised and implemented and justice, on the other? How and at which points in time does justice enter into the picture where restitution of land and rights in land are concerned, having regard to the following statement also made by Du Plessis:[3]

> [s]ince law and justice appear to be inseparable, "justice" is most often associated with legal matters, but it is actually encompassing or encyclopaedic. Social justice, economic justice, moral justice, political justice and even poetic justice are all various forms or manifestations of justice, which can be thought apart from, for example, the activities of courts of law or the law-making and the administrative actions of government.

Du Plessis points out that inevitably, law and justice are concretised in people's perceptions and expectations of an optimally just society or in society itself.[4] In this regard he underlines that scholars' definitions and fundamentals remain limited and linked to the realisation that a final word on justice can hardly be spoken. Therefore, while being a 'fundamental', 'justice' as concept needs exploration and contextualisation within the restitution context specifically – where relevant also with reference to other authors' contentions and case law. It is in this context that it remains a 'working definition'.

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1 Du Plessis 'The Bill of Rights in the working draft of the new Constitution: An evaluation of aspects of a constitutional text sui generis' 6.

2 See for an exposition of the historical development of the South African racially-based land system Pienaar *Land Reform* 52–140.

3 Du Plessis 'Conceptualising "law" and "justice" (1)' 280. The ideas developed in the two articles dealing with law and justice were based on earlier work published by Du Plessis; see Du Plessis 'Justice as a legal concept' 24.

4 Du Plessis 'Conceptualising "law" and "justice" (1)' 279.

The aim of this contribution is to reflect on the South African restitution programme that forms part of the overall land reform programme, in light of Du Plessis's contention that measures that deal with restitution of property follow naturally. This reflection embodies two main parts. In the first instance, the general approach to restitution and its tools and mechanisms will be set out providing the necessary background and contextualisation, followed secondly, by a reflection on its justice dimension specifically. With regard to the latter, two further stages emerge: (a) reflecting on Du Plessis's point of departure that restorative measures follow as a natural consequence; after which (b) the particular forms of justice prevalent (or absent) in the South African restitution programme are explored. While the second part centres on du Plessis's concept of justice and its relevant forms, it is important to note that the publications dealing with justice pre-dated constitutional democracy and were therefore mainly exploratory, commenting on possible future constitutional and legal developments. To that end some discussion of other forms of justice, not identified by Du Plessis but still relevant within the context of restoration, is warranted. Accordingly, the various forms of justice that emerge at different points in time are considered, where relevant, also with reference to case law and other authors' contentions. Essentially the question is posed whether, considering the 'logical' need for a restitution programme, the programme that was eventually devised and implemented in South Africa, is indeed an embodiment of justice and if so, which form(s) of justice. This is necessary as the mere act of (officially) embarking on a restitution programme by formulating measures, in line with Du Plessis's contention, is not and cannot qualify as justice *per se.* Concluding remarks follow, having regard to Du Plessis's warning that the last word on justice can hardly be spoken. It is in this light that my reflection contributes, hopefully, to some contextualisation within the restitution paradigm, attempting to add to the working definition of justice within this particular context.

2 The South African land reform programme

While Du Plessis's statement in the introductory part of this contribution concerns the restitution dimension specifically, the overall programme of land reform – much like his concept of justice – is encompassing and somewhat encyclopaedic, especially within the South African context. Although this contribution is not aimed at unpacking the whole of the land reform programme and analysing it in detail, for purposes of contextualising the restitution programme, some discussion thereof is required.

Within the South African context two distinctive land reform phases may be identified: firstly, an exploratory programme which was embarked on by the De Klerk-government comprising a limited and incomplete programme;[5] followed by, secondly, an all-encompassing land reform programme embedded in the Constitution. This latter programme is described as all-encompassing because it embodies much more than restitution only and also incorporates endeavours to broaden access to land on the one hand and to address tenure inequity, on the other. Interestingly, restitution, being so urgent and sensitive, was already provided for in the interim Constitution under sections 121 to 123, initially not forming part of the Bill of Rights. These sections provided for relevant legislation to be drafted, the establishment of a Commission and a 'court of law' to deal with

5 See Pienaar *Land Reform* 153–160 for a detailed discussion of the first phase or exploratory land reform programme. The first phase programme was important with respect to restitution as it already provided for limited redress by way of the Advisory Commission on Land Allocation, later renamed the Commission on Land Allocation.

restitution.[6] While restitution had been provided for in principle before the final Constitution commenced, and pre-dates the other sub-programmes, an all-encompassing programme was eventually embodied in the final property clause. To that end section 25(5) and 25(6) (read with subsection (8)) provide for, respectively, the redistribution programme[7] and the tenure reform programme[8] while the main focus of this contribution – restitution – is found in section 25(7). Land reform therefore embodies three sub-programmes, linked to development[9] and coupled with enabling and implementing frameworks, policy documents[10] and an increasingly complex legislative framework.[11] While the aim of this contribution is not to dwell on the overall land reform programme and its outstanding characteristics, *per se*[12] some unique approaches to and characteristics of the restitution programme in particular will be elaborated on in light of their relevance to the justice-dimension below.

3 The South African restitution programme

3.1 *Approach to the restitution programme*

Various approaches to restitution were arguably possible.[13] However, within the South African context two factors in particular impacted on how the overall land reform programme would be approached, namely (a) the fact that South Africa underwent a peaceful transition; and (b) the fact that land reform embodied a negotiated settlement.[14] Inevitably that meant that existing rights and expectations were endorsed, while change,

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6 *Ibid* 171.

7 The redistribution programme aims to broaden access to urban and rural land to the landless and the vulnerable and has specific targets regarding the redistribution of agricultural land in particular; *ibid* 272–377.

8 The tenure reform programme is aimed at upgrading insecure tenure rights in order to make them more secure and to bring them in line with constitutional principles like equality and dignity; *ibid* 378–504.

9 Since 2009 emphasis was increasingly placed on development. In the *Green Paper on Land Reform* 'development' is listed as one of the four sub-programmes of the overarching land reform programme.

10 See for a detailed discussion of the policy framework supporting and guiding the South African land reform programme, Pienaar *Land Reform* 192–271.

11 Each sub-programme has its own set of legislative measures while further statutes guide the supporting systems of land and administration and even further legislative measures regulate issues linked to land reform, eg, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

12 See for an exposition of the outstanding characteristics of the overall land reform programme, Pienaar 'Reflections on the South African land reform programme: characteristics, dichotomies and tensions (part 1)' 425–446.

13 The main two options available were (a) allowing an all-encompassing programme in terms of which *all* racially-based land and property dispossessions would be redressed, including colonial dispossessions and (b) a more limited approach in terms of which a confined scope and format were endorsed. Concerning the first option, various approaches could have been embraced, including the theory of aboriginal title and enabling international documents and conventions to address dispossessions at a global scale. See Pienaar *Land Reform* 511–516. See also Reilly 'Land rights for disenfranchised and dispossessed peoples in Australia and South Africa: a legislative comparison' 33.

14 Roux 'Land restitution and reconciliation in South Africa' 145.

transformation and adjustment had to be catered for as well.[15] Accordingly, the peaceful transition and the negotiated settlement provided both *the basis* for and the *broad parameters* of land reform. This resulted in a very specific property clause, the draft on which Du Plessis commented initially and which was alluded to above. While he argued that restitution was not an exception to the protection of property and land rights, but essentially formed part-and-parcel of a property clause in principle, the end result embodied tension between the protection of existing property rights on the one hand and the constitutional imperative of reform and transformation of property rights, on the other. That tension was endorsed in the final property clause in that the first three subsections relate to the *protection of existing rights*,[16] whereas the last six subsections contain a clearly *transformative thrust*.[17] André van der Walt refers to this tension as a 'creative tension'[18] which has particular implications for land reform overall.

Having regard to the two critical factors that have geared and directed the overall land reform programme, Roux identifies the following factors that have impacted on the approach to restitution in particular:[19] (a) the international context within which the transition occurred; (b) the prominent role that lawyers played in the process;[20] and (c) the considered decision to separate the land restitution programme from the Truth and Reconciliation process.[21] Given that the whole world was scrutinising the South African transition, it was critical that international investors' and other role players' confidence in the transitional process had to be secured. To that end the confirmation of a land reform programme, confined in time and scope and embedded in the Constitution, made a lot of sense.

Having a constitutionally-embedded restitution programme, has major implications for government.[22] Not only does the government spearhead and facilitate the process, it is also involved in providing the necessary resources and mechanisms to ensure that the process is effectively implemented. In this regard government is represented by the Commission on the Restitution of Land Rights that processes claims documents, acts in a legal capacity and assists financially, where relevant. All claims are furthermore lodged against the state and all financial awards and settlements are dealt with by the state.[23]

In light of the impacting factors above an approach that was limited in time and scope was decided on, resulting in (a) the exclusion of colonial dispossession and (b) setting rigid

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15 Van der Walt *Constitutional Property Law* 12, 16.

16 S 25(1) provides for the deprivation of property rights in certain instances, s 25(2) provides for the expropriation of property rights when certain conditions have been met and s 25(3) sets out the factors guiding the determination of the amount, time and manner of payment of compensation for expropriation to ensure that it is just and equitable where expropriation is concerned; *ibid* 16–17.

17 S 25(4) provides that property is not limited to land and that land reform is in the public interest. S 25(5)–(7) provides for the various sub-programmes constituting redistribution, tenure reform and restitution, whereas s 25(8) underlines the reform of natural resources generally and s 25(9) confirms the duty to promulgate legislation as provided for in subs (6).

18 Van der Walt *Constitutional Property Law* 41.

19 Roux 'Land restitution and reconciliation in South Africa' 148.

20 *Ibid*; Pienaar *Land Reform* 511.

21 Roux 'Land restitution and reconciliation in South Africa' 148.

22 Pienaar *Land Reform* 516.

23 *Department of Land Affairs, Popela Community and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) pars 57–63.

time frames. That meant that only dispossessions that occurred after 19 June 1913 as a result of racially discriminatory laws or practices would be processed[24] and that land claims had to be lodged within the period May 1995 to 31 December 1998. While the re-opening of claims has recently been provided for and a new deadline for the submission of claims had been set at 30 June 2019,[25] the restitution programme essentially remains one of limited time and scope.

3.2 *Aims of the restitution programme*

Broadly speaking the objective of the restitution programme was primarily to provide redress, be it by way of restoring land or rights in land or where that was not viable, to provide for comparable redress.[26] This overarching goal was further supplemented by the ideal of furthering conciliation and nation-building,[27] but not identical to that of the Truth and Reconciliation process which was essentially a politically-inspired process.[28]

Over time the basic objective of redress and the supplementary objectives of reconciliation and nation-building were increasingly being trumped and tested by other considerations, including the promotion of good governance;[29] keeping costs down and protecting the rights of owners,[30] while at the same time promoting and controlling development.[31] A clear shift in focus had occurred with regard to the latter: since 2009 the consideration of development had been integral to the Department's approach to restitution.[32]

Having regard to the guiding factors set out above and the overarching and secondary goals, it becomes clear that the restitution programme never set out to achieve a total reconstruction of property-related issues and relations. It would not change tenure forms, though the particular nature of a right could be adjusted in the restitution process to make it more viable or practical.[33] Nor would the restitution programme redistribute or broaden access to land. Instead, the restitution programme aimed specifically to benefit a limited number of beneficiaries only, linked to strict requirements[34] within a set time frame.[35] The

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24 The date, 19 June 1913, is significant because it is the date on which the Native Land Act 27 of 1913, which was later renamed the Black Land Act, commenced.

25 The Restitution of Land Rights Amendment Act 15 of 2014 commenced on 1 July 2014 – GN 526 of 1 July 2014 in GG 37791.

26 *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC) par 53; s 1 of the Restitution of Land Rights Act 22 of 1994.

27 Gibson *Overcoming Historical Injustices: Land Reconciliation in South Africa* 20–23.

28 The Truth and Reconciliation Commission was set up following the Promotion of National Unity and Reconciliation Act 34 of 1995. See also Andrews 'Reparations for apartheid's victims: the path to reconciliation?' 1155–1180; Gross 'The Constitution, reconciliation and transitional justice: Lessons from South Africa and Israel' 47–104.

29 Hall 'Reconciling the past, present and the future' 21.

30 *Ibid* 37.

31 Von Leynsteele and Hebinck 'Through the prism. Local reworking of land restitution settlements in South Africa' 162–183.

32 Generally under the Comprehensive Rural Development Programme of 2009.

33 Eg, an informal tenancy right may be adjusted to become a formal (limited real) right – s 35(4) of the Restitution of Land Rights Act 22 of 1994.

34 S 2 of the Restitution of Land Rights Act 22 of 1994, comprising both formal and legal requirements.

35 Gibson *Overcoming Historical Injustices* 23; Gibson 'Land redistribution/restitution in South Africa: A model of multitude values, as the past meets the present' 135–169.

question emerges as to whether this embodies justice and if so, what kind of justice it exemplifies. Before the justice dimension is explored in more detail below, it first has to be established what 'restitution' means under the restitution programme. Once that is established, an exposition of the relevant tools, mechanisms and role players involved in achieving the stated goals, follows.

3.3 *What does restitution entail?*

Clarifying the content of 'restitution' and what it means for purposes of the South African restitution programme is integral for the later exploration of whether restitution is an embodiment of justice. Section 1 of the Restitution of Land Rights Act 22 of 1994 (hereafter the Restitution Act) provides for the restitution of a right in land. This entails the restoration of a right in land and/or equitable redress. 'Equitable redress' is defined broadly to include any equitable redress other than the restoration of a right in land itself, including a right in alternative state-owned land and the payment of compensation. A combination of both is also possible.[36] In addition to this, section 35(1)(d) of the Restitution Act empowers the Land Claims Court to order the state to include a claimant as beneficiary of a state support programme for housing or the allocation and development of rural land and may also determine the manner in which the rights are to be held. What is clear, however, is that a right to claim restitution does not entail an absolute, unlimited right to specific restoration.[37] Instead, the rather broad formulation of the Act and the purposive approach to interpretation provide wide discretionary powers to the Land Claims Court to determine which form of restitution would be best suited in each particular case. To that end different contexts may result in different settlements and ultimately in different forms of restitution, even if some disparities are exposed, as elaborated on in more detail below with reference to the recent Constitutional Court judgment of *Florence v Government of the Republic of South Africa.*[38]

3.4 *Tools, mechanisms and role players*

Inevitably, the approach to restitution and the aims and objectives that have to be achieved, must correspond. To that end the aims and goals inform the tools and mechanics that had to be developed and employed. Inevitably, the approach, the tools, mechanics and objectives all have to be aligned.[39]

Having regard to the limited time and scope-approach in which government plays an integral role, the consideration of aims and objectives resulted in the restitution programme being essentially *legislation-based*. The Restitution Act, already flowing from the interim Constitution, as explained, was further grounded in section 25(7) of the Constitution and constitutes the first tool. In light of the content of 'restitution', set out above, the crucial mechanism in the tool (the Restitution Act), has to be the mechanism that enables restitution, constituting the main objective of that tool. To this end certain requirements, two sets overall, become relevant. Threshold or formal requirements enable a claim to pass the first sifting, followed by legal requirements that will finally determine whether the claim is successful. In this context the pivotal section 2 of the Restitution Act containing

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36 *Richtersveld Community v Alexkor Ltd* 2003 (6) SA 104 (SCA) par 16.
37 *Concerned Land Claimants' Organisation v PELCRA* 2007 (2) SA 371 (CC).
38 2014 (6) SA 456 (CC).
39 Pienaar *Land Reform* 836.

both sets of requirements embodies this (combined) mechanism. In this process of sifting, evaluating, validating and finally settling and finalising claims in order to achieve the objective of restitution, various role players are integrally involved: the main role players being the Commission on the Restitution of Land Rights[40] (hereafter the Commission) and the Land Claims Court.[41] Again, an alignment of the mechanism provided for in the tool (the Act) and the duties and functions of the relevant role players is called for.

3.5 *The mechanism: enabling restitution, restoration or equitable redress*

In order to be successful with a land claim two sets of requirements have to be met.[42] The first set containing the threshold requirements acts as a first sifting so as to prevent frivolous applications. In this regard the claim must have been lodged within the prescribed time period: 1 May 1995 to 31 December 1998. As alluded to above, a second round of claims was recently announced, resulting in the amendment of the Restitution Act so that it now reflects the new deadline of 30 June 2019. As one can now distinguish between two different rounds of claims, the Amendment Act provides that a register be set up[43] in order to prioritise outstanding claims of the first round.[44] Also incorporated in the threshold requirement is the requirement that no just and equitable compensation had been paid previously. If that had indeed been the case, the claim may not be processed further.

Recent developments have indicated that threshold requirements may be rather complex, resulting in time-consuming, protracted litigation. Concerning the extension of deadlines, the emerging of two rounds of claims further complicate the process and demands meticulous checking of dates and processes, also requiring reflection in the register mentioned above. Whether just and equitable compensation had been paid before, may also be contentious and difficult to establish. The recent judgment in *Florence v Government of the Republic of South Africa,*[45] elaborated on in more detail below, is a case in point. Determining whether just and equitable compensation had already been paid to the claimants required the determination of change in value of money over time. In order to determine that, different mechanisms were employed and considered before finality was reached at Constitutional Court level. The complexity factor is compounded when the threshold requirement involving money and whether sufficient compensation had been paid is simultaneously embedded in the outcome of the process. Inevitably it means that two considerations are effectively fused into one: in order to determine whether the claim may be processed further (threshold) it has to be determined whether just and equitable compensation had already been paid, thereby also impacting on the end result (redress). In instances identical to or similar to the *Florence* case, the result is restitution in the form of *equitable redress*, begging the question whether finally, the end result is equitable. Accordingly, money value is considered at both the beginning and end of the process. Because this

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40 *Ibid* 566–576; s 4 of the Restitution of Land Rights Act 22 of 1994.

41 *Ibid* 576–590, 619–624, see Chapter III of the Restitution of Land Rights Act 22 of 1994. The Minister of Rural Development and Land Reform also plays an important role, especially in the finalisation of settlements by utilising s 42D agreements. However, because the Minister's involvement is not as constant compared to the Commission and the Court, it is not elaborated on here further.

42 S 2 of the Restitution of Land Rights Act 22 of 1994.

43 S 6(1)(1A)(a) makes provision for a National Land Restitution Register.

44 Inserting s 6(1)(g).

45 2014 (6) SA 456 (CC).

particular consideration in this context also feeds into the justice dimension, it is explored in more detail below. In any event, no claim will proceed if it had not been lodged within the set time periods and when just and equitable compensation had already been paid. Establishing these two facts can be simple and straightforward or difficult and complex, depending on the particulars of each claim lodged.

It is furthermore essential that the legal or substantive requirements are met before a land claim can be successful.[46] Section 2 provides that a claimant has to lodge a claim indicating that the applicant was dispossessed of a right in land after 19 June 1913 as a result of racially discriminatory laws or practices. It is imperative that all elements of this overarching requirement are met. Case law emanating from the broad spectrum of courts, spanning the Land Claims Court, the Supreme Court of Appeal and the Constitutional Court, has been instrumental in unpacking the various elements, approaches thereto and interpretation thereof. A claimant can be a natural person, a community or a part of a community.[47] It must be clear that the right in land – any right, not limited to ownership only,[48] was dispossessed. While the Restitution Act does not provide a definition of 'dispossessed' or 'dispossession', case law has shown that the loss can be immediate,[49] or over time,[50] as long as it is clear that the right either does not exist anymore or while it may still exist, the remaining format is such that it has lost its essence. Establishing that the relevant right was lost after 19 June 1913 locks the claim into the framework of the Restitution Act. In the course of 2013, announcements were made that dispossessions prior to 1913 would also be dealt with by way of amendments to the Restitution Act.[51] While the Memorandum to the Restitution of Land Rights Amendment Bill of 2013 contained statements to that effect, the final version of section 2 of the Amendment Act when it commenced on 1 July 2014 was unchanged. Accordingly, pre-1913-dispossessions are still not dealt with under the Restitution Act.

The loss of land or rights in land must have been as a result of racially discriminatory laws or practices. From the outset this particular requirement had been contentious, leading to important developments in case law. The point of departure set out in *Minister of Land Affairs v Slamdien*[52] was that the whole South African way of life and society in general was racially-based. Accordingly, all provisions, regulations and directives could, to some extent at least, be related to or linked to a racially discriminatory law or practice. That would in theory cause the floodgates to open. To curb the tide the Land Claims Court developed a test that would restrict dispossessions to only those linked to spatial racial discrimination, linked to the exercise of land rights.[53] The *Richtersveld* case scenario[54]

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46 See in general Pienaar *Land Reform* 543–564.

47 See especially *Department of Land Affairs, Popela Community and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) concerning community claims.

48 S 1 of the Restitution of Land Rights Act 22 of 1994. See also *Ndebele-Ndzundza Community v Farm Kafferskraal* 2003 (5) SA 375 (LCC).

49 *Dulabh v Department of Land Affairs* 1997 (4) SA 1108 (LCC).

50 *Department of Land Affairs, Popela Community and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC).

51 The Draft Amendment Bill was published in GN 503 of 23 May 2013 in GG 36477.

52 1999 (4) BCLR 413 (LCC).

53 See Pienaar *Land Reform* 554–557 for an analysis of the test.

54 *Richtersveld Community v Alexkor Ltd* 2001 (3) SA 1293 (LCC); *Richtersveld Community v Alexkor Ltd* 2003 (6) SA 104 (SCA) and *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC).

provided ample opportunity to explore this particular requirement, finally resulting in a finding in the Constitutional Court that the *Slamdien*-approach was too limited. Instead, more emphasis was placed on the *actual impact* of legislation – including legislation that was *prima facie* racially neutral.[55] *Department of Land Affairs, Popela Community and Others v Goedgelegen Tropical Fruits (Pty) Ltd*[56] has further shown unequivocally that such racially discriminatory practice and conduct may also be ascribed to private individuals, provided that their conduct was supported, aided and made possible by an overarching grid of racially discriminatory measures.[57] Dispossessions in this context are thus not limited to government or officials and agents working on its behalf.

Once both sets of requirements have been met, land claims can proceed to be finalised. In the process of sifting the initial applications, in considering the legal requirements and finally being involved in the settling and finalisation of claims, the role players below emerge at different stages and points in time.

3.6 *Role players*

3.6.1 Commission on the Restitution of Land Rights

The Commission is usually the first port of call. Applications are lodged and scrutinised for the first time at this point.[58] Obviously frivolous and vexatious claims are discarded whereas claims that meet the threshold requirements are accepted and processed further. The Commission is the one 'constant presence' in the process as a whole: it is integral in assisting claimants and preparing claims, is also involved in submitting reports to the Land Claims Court where claims are contested and is therefore also involved in the litigation and court processes throughout. Where claimants approach the Land Claims Court directly under section 38B of the Restitution Act, the Commission still remains relevant in that it can lodge documents on its own accord or is obliged to file reports and documents when ordered to do so. Following a successful claim, the Commission may furthermore be involved in implementing and monitoring court orders.[59]

The re-opening of the land claims process holds new challenges for the Commission. Not only will it be dealing with first round claims that are still outstanding, but the whole process will be starting anew, apparently involving thousands of new claims. While some claims will almost be finalised, thereby enabling the closing of files, a whole new wave of claims will demand renewed attention.

3.6.2 The Land Claims Court

In light of the fact that claimants have been able to approach the Land Claims Court directly since 2007,[60] the Court has different roles to play in varied contexts. While the court may be a court of first instance, a court of review and of appeal, not all of these dimensions emerge in restitution applications.[61] Within the context of restitution, the Land Claims

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55 Pienaar *Land Reform* 553–563.
56 2007 (6) SA 199 (CC).
57 Pars 57–63.
58 S 6 contains the list of general functions and duties.
59 S 6(2)(e) of the Restitution of Land Rights Act 22 of 1994.
60 The process initially always started with the Commission but changed when Chapter IIIA was inserted into the Restitution of Land Rights Act in 2007 providing for direct access.
61 The Land Claims Court is a review court when eviction applications granted by a lower court are automatically reviewed under s 19(3) of the Extension of Security of Tenure Act 62 of 1997

continued on the next page

Court is a specialised court. This status has particular implications, including that the Court is usually approached first. Only where justice requires a more speedy and urgent intervention, resulting in the Land Claims Court being sidestepped, would direct applications to the Constitutional Court be warranted.[62] The Land Claims Court also acts as a review court concerning decisions made by the Commission under section 36 of the Restitution Act.

The Land Claims Court is integral in considering claims and ultimately deciding on the best result, having regard to the facts and circumstances of each case. In this regard the Court has a crucial role to play, from the outset by determining whether the claim meets the requirements and is therefore valid, right through to considering the form of restitution – be it actual or specific restoration, alternative state land or equitable redress. In this endeavour the Court is assisted by section 33 that provides a list of factors that have to be considered in all its deliberations.[63] Apart from these factors that have to be considered specifically, case law has indicated that the Land Claims Court must be especially wary of 'double' or 'over compensation' in certain instances,[64] must be focused on whether actual restoration is indeed the optimal result,[65] and must be especially vigilant regarding applications for non-restoration under section 34 of the Restitution Act.[66]

4 The restitution programme and justice

In light of the exposition above dealing with the particular approach to land reform generally and restitution in particular, as well as the tools and mechanisms employed in the process, the focus shifts to the justice dimension of the restitution programme. In this regard two issues emerge, namely determining (a) whether the measures elaborated on above constitute 'natural consequences' following the collapse of the apartheid state – as argued by Du Plessis; and (b) considering what form(s) of justice is/are embodied in the restitution programme. While Du Plessis's concept of justice and its various forms constitute the core of the discussion with regard to both of these issues, the discussion is supplemented where relevant by reference to other authors' work and case law.

4.1 *Are measures dealing with restitution a 'natural consequence'?*

While the South African land reform programme flowed from a negotiated settlement in 1994, impacting greatly on the format of the reform programme, as explained, the process of transforming the country from a non-democratic apartheid South Africa to a constitutional democracy was only just beginning. It is in this context that transitional justice enters into the picture. Although the concept of transitional justice was not specifically dealt with by Du Plessis in his exploratory work on a constitutionally-based South Africa, its relevance for the justice dimension of restitution is clear. While being relevant, an in-depth discussion of the impact of transitional justice and whether it has been achieved (or not) [67] fall outside the scope of this particular contribution.

(ESTA). It also acts as a court of appeal where an appeal is lodged against the order handed down in the lower courts under ESTA.

62 *Concerned Land Claimants' Organisation v PELCRA* 2007 (2) SA 371 (CC) par 19.

63 See Pienaar *Land Reform* 583.

64 *Mphele v Haakdoornbult Boerdery CC* [2008] ZACC 5; 2008 (4) SA 488 (CC).

65 *The Baphiring Community and Others v Tshwaranini Projects CC and Others,* case number 806/12, [2013] ZASCA, 6 September 2013.

66 *KwaLindile Community v King Sabata Dalindyebo Municipality* 2013 (6) SA 193 (CC).

67 See for more detail Teitel 'Transitional justice genealogy' 1-17; Teitel *Transitional Justice*; Boraine 'Transitional Justice' 67.

During periods of change and political transformation one of the critical questions posed is how and to what extent past human rights violations have to be dealt with. To that end a backward-looking exercise brings the past violations to light and a forward-looking process enables all sides to participate in new processes.[68] In this context it is critical to forge the correct tool to achieve the desired result. While law is often the tool utilised, the end result – achieving justice – is more contentious, for various reasons. Firstly, the concept of justice often undergoes a 'paradigmatic shift'.[69] The concept that emerges is contextualised and partial: '[w]hat is deemed to be just is contingent and informed by prior injustice'.[70] Consequently, what is deemed just in present-day post-apartheid South Africa concerning property and land rights is directly informed by past injustices and dispossessions. This is clearly in line with Du Plessis's initial statement that the loss of property and land rights would have to be dealt with, not as exceptions to the property guarantee, but as its natural consequences. Secondly, the concept of justice is not 'one size-fits-all', as explained by Patrick Lenta when he cautions that '[j]ustice is contingent and particular, not universal'.[71] Being in a state of transition therefore may require a very particular form of justice, uniquely suited to South African needs and demands. Justice is, finally, also informed by whether the playing field was level, from the outset, as explained by David Dyzenhaus:[72] '[t]he impact of truth and justice policies on a new democracy depend on starting conditions or the initial balance of power'. In South Africa, the end of apartheid meant that political changes were intertwined with constitutional changes. Concerning property rights generally and the all-encompassing land reform programme specifically, the negotiated approach towards constitutional change impacted in particular on how land reform was approached. To that end the fact that South Africa underwent a peaceful transition that culminated in a negotiated settlement defined and undergirded the land reform programme. It resulted, finally, in a property clause that confirmed existing property and land rights, irrespective of how the rights were acquired, while simultaneously embracing a transformative thrust, thereby enabling the reform of all natural resources in the country, including water, land and minerals.

With regard to transitional justice and land restitution specifically, the alignment is quite striking. The point of departure is identical: legal responses are employed to address wrongdoings of repressive predecessor regimes.[73] This is essentially what Du Plessis calls for when he argues for measures that follow naturally to address the previous dispossessions. But transitional justice is not only aimed at redress, it is also integral in *changing society*, taking it away from what it had been while constantly considering the future. So too is land reform: it is integral in *making* that transition and therefore moving away from the past, but is simultaneously pre-occupied with the end result: a transformed 'proprietal society'. What was done during the apartheid years generally, but especially regarding land rights and property, is largely equated with injustice. Du Plessis underlines this when he states that persons, based on their racial background only, were *in principle* prohibited to acquire property in the first place in various parts of the country.[74] This divide between

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68 Gross 'The Constitution, reconciliation and transitional justice: Lessons learnt from South Africa and Israel' 47–104.
69 *Ibid* 50.
70 Teitel *Transitional Justice* 16.
71 Lenta 'Just gaming? The case for post-modernism in South African legal theory' 173–209.
72 'Judicial independence, transitional justice and the Rule of Law' 351.
73 Teitel 'Transitional justice genealogy' 1.
74 Du Plessis 'The Bill of Rights in the working draft of the new Constitution' 6.

justice and law is often highlighted, including by Patrick Lenta where he points out the enormous impact of legal positivism by essentially divorcing law and ethics, legality and morality and justice as process and justice as substance.[75] In this context it was 'acceptable' that certain individuals or communities would be able to access the full spectrum of property rights and enjoy their benefits, while others would be barred from doing that in principle. Changing that approach is what Du Plessis called for, as a natural consequence, by locating particular measures in the Constitution. In this light addressing and redressing past property injustices are part-and-parcel of constituting the transition, and therefore part-and parcel of constituting a democratic South Africa.

4.2 *Which form(s) of justice emerge(s) within the restitution programme?*

4.2.1 'Justice' according to Du Plessis

Having regard to the fact that embarking on a restitution programme was unavoidable and therefore a 'natural consequence' of the collapse of the apartheid state, just as Du Plessis envisaged, the question arises as to what forms of justice emerge once the programme is invoked and what form(s) of justice is/are absent. Does the form of justice matter or would any kind of justice suffice? How do these forms of justice correlate or differ from Du Plessis's approach to, and concept of justice? A brief overview of Du Plessis's analysis of the concept 'justice' in his two-part series of articles forms the backdrop to exploring these questions.

An abundance of justice forms exist. Du Plessis underlines that concepts of law and justice and the understanding thereof would elicit the 'proverbial Babel of tongues'.[76] While different tongues suggest at least some kind of definition, Du Plessis cautions at length in his first article against the idea that all phenomena fundamental to human existence, including 'justice' can be articulated fully.[77] While justice is a 'fundamental', its exploration and contextualisation is limited:[78]

> Definitions of 'law' and 'justice' will, therefore, by definition be working definitions, clarifying meaning at an interpersonal level but remaining conceptually inchoate.

In his first article Du Plessis also underlines that, while justice is not only a legal or forensic concept, it is indeed a legal concept. Since law and justice appear to be inseparable, justice is most often associated with legal matters. To that end it is often argued that law and justice are inter-dependent and that one cannot exist without the other.[79] Yet, justice remains encompassing and encyclopaedic and operates at a greater or a lesser level of abstraction.[80]

With reference to Aristotle, Du Plessis identifies three forms of justice:[81] (a) distributive justice, based on geometrical or proportional equality; (b) retributive justice, which is also based on geometrical equality, but is involved where a wrong is committed against an official of the *polis*; and (c) commutative justice, based on arithmetical or numeral equality. When distributive justice is involved and benefits of any kind are to be distributed among

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75 Lenta 'Just gaming? The case of post-modernism in South African legal theory' 176.
76 Du Plessis 'Conceptualising "law" and "justice" (1)' 278.
77 *Ibid* 278.
78 *Ibid* 279.
79 *Ibid* 281.
80 *Ibid* 279.
81 *Ibid* 281–282.

citizens, regard is to be had to the personal qualities (or merits) of prospective recipients relative to the purpose for which the distribution is made. Retributive justice involves the commitment of a wrong against an official of the *polis*, thereby requiring a different form of redress. Commutative justice 'is based on arithmetical or numerical equality, and is applicable to either relationships of exchange or wrongs committed between equals'.[82] Despite identifying these three forms of justice in particular, Du Plessis further warns that questions on justice elicit diverse responses because thinkers' views of justice are also interwoven with their worldviews.[83] Inevitably, justice is also tied to conviction.[84] But because convictions or belief-systems diverge, conceptions and precepts of justice also diverge. It is within this context that the social order within which justice operates becomes crucial. A social order therefore has to provide relatively 'neutral' conditions on which conviction-based diversity can be catered for, thereby requiring institutional justice.[85] Institutional justice interacts with the particular communal belief of the society and is interwoven with historical growth (or decline) and is therefore susceptible to change. Accordingly, social institutions with particular features usually emanate from or at least reflect a communal ethos.

Mindful of the classifications and approaches alluded to above, Du Plessis underscores that justice is not, as is often believed, essentially or even primarily a moral concept.[86] He explains that general justice is an expression of convictions as regards doing unto others and that there are various modes of expressing these convictions, including legal, moral, economic or religious modes. Legal justice will be evinced through legal institutions while economic justice takes place *via* economic institutions and so forth. Though justice as a legal concept refers primarily to matters of law, it cannot be isolated from other modes of human existence, including morality. Legal justice is actuated, concretised and exercised *via* legal institutions which, perceived comprehensively, include legal norms.[87]

His first article consequently concludes as follows:[88]

(a) Justice-as-conviction is not the same as institutional justice. The first-mentioned remains subjective whereas institutional justice alludes to the aptitude of social institutions as accommodating 'canals' through which human beings can realise their basic convictions about doing unto others.

(b) Norms of justice mediate between justice-as-conviction and institutional justice.

(c) Legal justice is justice expressed by the agency of the law as a distinctive mode of being and is therefore modal justice. Actuated, concretised and exercised *via* legal 'canals' or institutions, legal justice is also institutional justice of a particular kind.

While Du Plessis's first article deals with 'justice' and 'law' as concepts, his second article elaborates on just societies as that is the inevitable context within which justice functions and explores the Western notion of legal justice in particular.[89] In an optimally just society the attributes of legal justice are manifested to the greatest possible extent. He explains

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82 *Ibid* 282.
83 *Ibid* 282.
84 *Ibid* 287.
85 *Ibid* 288.
86 *Ibid* 290.
87 *Ibid* 291.
88 *Ibid* 291.
89 Du Plessis 'Conceptualising "law" and "justice" (2)' 357–374.

that the notion of an optimum is particularly apt in South Africa as it will remain a society-in-transition for some time. Historically the Western notion of the just society emanated to a large extent from a number of liberal suppositions, including the liberal ethos. Liberal justice is institutional justice *par excellence*, emphasising the need to check and balance the power of those who rule. Asserting the primacy of the individual with his or her inalienable, fundamental rights, it stresses the indispensability of mechanisms (such as a bill of rights) to protect the individual from possible excesses in government.[90]

Flowing from the particular ethos are various foundational norms. Du Plessis points out that the foundational norms of most present-day systems of law are enshrined in justiciable bills of rights. Having dealt with the ethos underlying the Western approach to justice, as well as stating the foundational norms, he lists various standards of legal justice in particular.[91] Among the list he includes the equitable application of legal norms and the degree of equality allowed for by the legal system. With regard to the latter he emphasises that the degree of equality entails that all people need not be treated exactly the same in all circumstances. Differential treatment in certain instances and for certain purposes is held to be permissible. Having regard to the approach, norms and standards alluded to above, within the South African context particular norms and standards would incorporate the handful of globally accepted liberal-democratic values, while also drawing some inspiration from a distinctly African rights ethos.[92] On the African continent in particular, corrective (or curative) action aimed at redressing the injustices of the colonial past is high on every government's priority list.[93]

Considering the above, the following may be highlighted: law and justice are interdependent. In order for justice to prevail, the law as mechanism is instrumental, including the equitable administration thereof. That is found in legal justice specifically, which is a very specific form of overarching institutional justice. In an optimally just society the attributes of legal justice are manifested to the greatest possible extent. Being a society-in-transition, the notion of an optimum is particularly apt in South Africa. In practice, operating under the overarching institutional level a variety of justice forms emerge: distributive, retributive and commutative or corrective.

4.2.2 The restitution programme and specific forms of justice

Having regard to the particular approach to restitution, the tools and mechanisms and the spectrum of forms of justice according to Du Plessis, as set out above, this section explores to what extent (various) forms of justice emerge in the restitution programme. This exploration is undertaken in light of the particular characteristics of the South African restitution programme and its unique approach, as highlighted in relevant case law.

Being a legislation-based programme that incorporates specific mechanisms ranging from qualifying formal and legal requirements to involving role players responsible for administration and adjudication, legal justice seems to emerge at an overarching level. Legal institutions balance, weigh and adjudicate issues in line with set principles and guidelines. In this regard procedural justice is also attained: claimants know what is required of them, how to access the process, what has to be proven, how the process is going to unfold and

90 *Ibid* 360.
91 *Ibid* 362.
92 *Ibid* 370.
93 *Ibid* 367.

what the possible outcomes are. In this context legal justice emerges as a distinctive form of institutional justice.

Would the particular forms of justice constituting distributive, retributive and commutative or corrective justice, also highlighted by Du Plessis, emerge here? The distribution of resources on a proportional basis is not the aim of the restitution programme. Instead, the programme is aimed at *redress* and *restoration*, but importantly, a very specific form of redress. In this regard retributive and commutative or corrective justice does not enter into the picture either. This very particular characteristic of the South African restitution programme concerning the absence of retribution or correction in an arithmetical fashion has to date been confirmed twice at the highest level possible. In *Department of Land Affairs, Popela Community and Others v Goedgelegen Tropical Fruits (Pty) Ltd*[94] Justice Moseneke pointed out that the approach to causation in determining whether a dispossession was a result of a racially discriminatory law or practice, was not identical to that of the common law approach in the private law of delict. The 'but for' (or *sine qua non*) test would not suffice in restitution claims and was for purposes of the Restitution Act therefore significantly broader.[95]

While the unique format of restitution claims and its characterising nature were only hinted at in the *Popela Community* decision, it was expanded on in more direct terms in a recent judgment handed down in the Constitutional Court in *Florence v Government of the Republic of South Africa*.[96] In order to illustrate the unique character and the concomitant justice dimension of the South African restitution programme better, it is necessary to convey the facts briefly: the Florence family lived in a house on Erf 44408 in present-day Rondebosch for the period: 1952–1970. In 1957 a purchase agreement was entered into after which instalment payments were paid up in full by 1970. When the property was classified as 'white', the sale agreement was cancelled and the Florence family was refunded R1 350. A land claim was lodged in 1995, initially claiming actual restoration which was later changed in favour of financial compensation.

The claim was successful in the Land Claims Court and was approached as follows: the compensation paid to the Florence family in 1970 was, as mentioned, R1 350. The value of the property, however, at that stage was just below R32 000. Accordingly, they were under-compensated by about R30 513 in 1970. Based on section 33(eC) of the Restitution Act that specifically refers to 'changes over time in the value of money' and applying the Consumer Price Index (CPI) the Land Claims Court reached the conclusion that the under-compensation, re-calculated in present-day terms amounted to R1 488 890.[97] On appeal the Supreme Court of Appeal confirmed the CPI as the mechanism to determine the changes in value of money over time which was finally followed by an appeal to the Constitutional Court.[98]

The question the Constitutional Court had to deal with in particular was how the money or compensation received at the point of dispossession was to be considered so as to

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94 2007 (6) SA 199 (CC) at pars 70–73.

95 See Pienaar *Land Reform* 554–563 for a detailed discussion of the approach to causation.

96 2014 (6) SA 456 (CC).

97 The Land Claims Court also awarded R10 000 as *solatium*, but found that the Court did not have the authority to order the state to install the memorial plaque.

98 The Supreme Court of Appeal found that the Restitution Act, by providing for 'any alternative relief' would include ordering the memorial plaque and therefore disagreed with the Land Claims Court on this point, resulting in a cross-appeal later in the Constitutional Court.

determine in principle whether just and equitable compensation had been paid. If just and equitable compensation had already been paid at the moment of loss, the claim would not be processed further. Essentially two possibilities emerged: (a) consider the compensation paid at the moment of dispossession, but re-calculated in modern-day money terms, or (b) consider the present-day value of the property, as if the claimant never lost the property. The approaches are vastly different: with respect to the first-mentioned approach it is accepted and acknowledged that dispossession, however unfair and cruel, had occurred and that it has to be dealt with in modern terms as fairly and equitably as possible. Any future increase in the value of property is thus not considered. However, with respect to the second approach, the act of dispossession, even though it had occurred, is overlooked for purposes of calculating just and equitable compensation. That is the case because the house, being a commodity, could have increased in value, had it not been lost.[99] In this context the possible increase in value of the property and its investment potential are considered specifically.

Although the *Florence* judgment consists of five separate judgments overall, the first two judgments, representing the two approaches highlighted above, are important for purposes of this discussion. The *Moseneke*-judgment, forming the main judgment,[100] endorsed the first-mentioned approach whereas the *Van der Westhuizen* judgment, forming the minority judgment, was in support of the second approach. While both judgments acknowledged that dispossession occurred, on a specific date, the second approach ignored the *act of dispossession* in order to calculate 'just and equitable' compensation. The *Moseneke* judgment, on the other hand, focused on the act of dispossession in particular, also in its approach to calculate 'just and equitable' compensation. It is within a particular historical context where dispossessions occurred which cannot be ignored, that redress must be determined, fairly, as best the courts are able to. To that end the judgment underlined that neither the Land Claims Court nor the Supreme Court of Appeal was misdirected when they exercised their discretion. They had furthermore done so judicially when they decided on the CPI as relevant mechanism to determine changes in money over time. This approach entailed the following:[101] what were the Florence family due in 1970? What did they get in actual fact? What is the under-compensation? What is that in today's terms? In considering the Restitution Act holistically, Judge Moseneke emphasised that compensation within the scheme of the Act was neither punitive nor retributive.[102] Instead:

> It is a constitutionalised scheme paid out of public funds in order to find equitable redress to a tragic past. Ultimately, what is just and equitable must be evaluated not only from the perspective of the claimant but also of the state as custodian of the national *fiscus* and the broad interests of society as well as all those who might be affected by the order made.[103]

Therefore, the overarching aim of the Act, its structure, as well as the underlying ethos and public interest embodied therein, resulted in a methodology that was not purely technical and which would not result in an exact, arithmetical exercise. This particular approach was endorsed for the following reasons: land claims are *sui generis* and cannot be equated with private law claims, land claims have reparatory and restitutionary elements; land claims

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99 Par 49ff.

100 Skweyiya ADCJ, Dambuza AJ, Jafta J, Madlanga J and Zondo J and Khampepe J concurred with the main appeal.

101 Par 105ff.

102 Par 125.

103 Par 125.

are neither punitive in the criminal sense nor compensatory in the civil sense; land claims advance public purposes and finally, land claims deploy public funds.[104]

Consequently, elements of retributive justice or commutative (or corrective) justice do not enter into the picture. The kind of justice that emerges here cannot be calculated in exact numerical or mathematical terms and cannot be equated to profit and loss identical to that of private law approaches. Neither is it distributive justice as the aim of the restitution programme is not and never has been that of distributing resources on a proportional scale: it deals with a limited number of claimants who meet the set requirements. While a spectrum of court orders is available, depending on the facts and circumstances of each case, it was never the aim of the programme to transform property law concepts or to adjust land ownership patterns *per se*. In this light social justice, not elaborated on by Du Plessis but still relevant, in its narrow sense of protecting socially vulnerable persons from exploitation and discrimination is likewise absent here.[105]

Du Plessis did not specifically mention restorative justice. Restorative justice, a form of justice often (but not always) linked to transitional justice, alluded to above,[106] is the kind of justice that was pursued in the truth and reconciliation processes.[107] This usually embodies a non-adversarial approach that tends to favour victim-oriented commissions over prosecution and criminalisation.[108] When victims[109] are given a voice and an opportunity to tell their stories it can finally, also result in restorative justice. In an African context, where much emphasis is placed on balance, harmonisation and reconciliation,[110] the need for this kind of justice is arguably greater. However, in practice, restitution hearings differ greatly from those conducted in the Truth and Reconciliation processes. The advantages usually linked to restorative justice,[111] including the promotion of a process of truth-finding and disclosure, coming to terms with the past and assisting the project of nation-building, do not all resonate in the restitution programme. Because persons who had benefited from the dispossessions and those who had suffered because of them were never given the opportunity to engage in a public forum other than a court of law and more importantly, to apologise where necessary, important elements integral to restorative justice were excluded.

The above discussion shows that infusing justice into the restitution programme is not a simple, straightforward process. Embarking on a process of restitution did follow naturally, just as Du Plessis envisaged. That was the case because it was essentially part of moving away from the apartheid state to a constitutional democracy, encapsulating transitional justice. Overarching institutional justice, highlighted by Du Plessis, prevailed in the form of checks and balances enshrined in the Bill of Rights, including the property clause that provides for land reform and restitution in particular. Legal justice, a particular form of

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104 Par 137. See also Pienaar *Land Reform* for an exposition of the unique characteristics of the South African restitution programme 521–525 and 836–838.

105 Mostert 'Land restitution, social justice and development in South Africa' 404.

106 See par 4.1 above.

107 Dyzenhaus 'Judicial independence, transitional justice and the rules of law' 366.

108 Graybill and Lanegran 'Truth, justice and reconciliation in Africa' 5.

109 The dispossessed insofar as restitution is concerned.

110 Bennett *Customary law in South Africa* 20–23; Claassens 'Contested power and apartheid tribal boundaries: the implications of 'living customary law' for indigenous accountability mechanisms' 174–209.

111 Dyzenhaus 'Judicial independence, transitional justice and the rules of law' 368.

institutional justice, constituting courts of law, norms and standards, furthermore emerged. Yet, elements of an African dimension that calls for restorative justice in particular are absent and distinctive forms of justice identified by Du Plessis constituting distributive, retributive justice or commutative justice are likewise absent. Mindful of Du Plessis's statement that justice is not primarily or essentially a moral concept, but a legal concept that cannot exist in isolation from other modes of human existence, including morality, Fay and James's contention is striking:[112]

> Land restitution forces the moral principles of restoration and justice to confront the difficult practices of determining ownership, defining legitimate claimants and establishing evidence in claims.

5 Conclusion

Du Plessis's words ring true: measures aimed at the restitution of property indeed followed quite naturally when the new political dispensation commenced. Land claims, forming part of the overarching restitution programme, are dealt with in the Restitution Act which is embedded in the property clause, in section 25(7) of the Constitution. While the parameters of the restitution programme are contained in section 25(7), its tenets and everything linked to the processes are found in the Act itself. The overarching aim of the Act, the structure thereof and the underlying ethos guide and inform the process of restitution as a whole. In this light the process is aimed at acknowledging the terrible losses that occurred and to deal with them as fairly and equitably as possible, having regard to the unique characteristics of the South African restitution programme.[113]

In reality this means that all claimants would not necessarily be placed on exactly the same footing when the claims have been resolved. This is in line with Du Plessis's concept of legal justice that includes the equitable application of legal norms and the degree of equality allowed for by the legal system: all people need not be treated exactly the same in all circumstances. Consequently, disparities are unavoidable: some claimants would be awarded the exact same property that they had lost, or other land or rights in land, while others would receive monetary compensation instead. The result will not (and cannot in reality) be an exact monetary equation of the loss suffered. To that end distributive justice and corrective or commutative justice do not feature.

Measures dealing with restitution were imperative, not only because they followed logically, but also because they were needed to heal society.[114] Clearly, there was no other option than to embark on a restitution programme. While the legislation-based restitution programme conducted in South Africa exposes gaps and short-comings, it does, however, embody a very *unique justice dimension*. Certainly, in this regard justice 'plays in a league of its own' as Du Plessis so aptly sets out in the Prolegomenon of his *Re-Interpretation of Statutes.*[115] The justice dimension of the restitution programme does not fit squarely into any of the forms and categories identified by legal philosophers and scholars, classic or present-day. This is not problematic. On the contrary: it is exactly in line with Du Plessis's contention that –

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112 Fay and James 'Giving land back or righting wrongs? Comparative issues in the study of land restitution' 41.

113 See also Pienaar *Land Reform* 521–525 and 533–536.

114 Gardner 'Justice, virtue and the law' 412.

115 Du Plessis *Re-Interpretation of Statutes* xvii.

> [t]here is always room for a transformation of conventional ideas on justice – and this is particularly true for us in South Africa, especially since the advent of constitutionalism. Our discourses on justice can be more concrete and more existential than ever before.[116]

The particular justice dimension employed in the land restitution programme has contributed greatly to a better understanding of the past, getting to grips with what certain sections of the population had to sacrifice and what they endured. In this process the meaning of land generally and to particular individuals and communities specifically has also come to the fore. By restoring land where it was possible, dignity has been restored and a sense of community, belonging and identity has been achieved. By not restoring land or rights in land but awarding monetary compensation instead, some benefits have still accrued, even if only at a symbolic level.[117]

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116 *Ibid* xvii.

117 Fay and James 'Giving land back or righting wrongs?' 17–59.

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How to tame the judges

Der Streit über die Justizreformen in Südafrika und in Deutschland aus vergleichender Perspektive

Hans-Peter Schneider

1 Einleitung

Am 29. November 2011 bekam das von mir geleitete "Deutsche Institut für Föderalismusforschung" in Hannover Besuch aus Südafrika. Angereist waren Mitglieder des „Portfolio Committee on Justice and Constitutional Development", die sich über das deutsche Justizwesen informieren wollten. Anlass war eine der tiefgreifendsten und umstrittensten Justizreformen in Südafrika, mit der die gesamte Gerichtsorganisation gestrafft, modernisiert, konsolidiert und rationalisiert werden sollte. Dem Parlamentsausschuss lagen Entwürfe des Ministeriums für Justiz und Verfassungsentwicklung zur 17. Änderung der südafrikanischen Verfassung von 1996 (Constitution Seventeenth Amendment Bill) sowie zur Reorganisation der Obergerichte (Superior Courts Bill) vor,[1] zu denen der Ausschuss Stellung nehmen und eine Beschlussempfehlung für das Plenum erarbeiten musste. Um sich ein Bild von den Gerichten und ihrer Verwaltung in anderen Ländern zu verschaffen, reisten die Abgeordneten auch nach Deutschland, wo sie mit Justizbeamten, Wissenschaftlern und vor allem mit Richterinnen und Richtern aller Ebenen zusammenkamen, um mit ihnen gemeinsam über ihre Probleme zu diskutieren und rechtsvergleichend nach für sie passenden Lösungen zu suchen.

Bei dem eintägigen „Round Table" im Institut stellte sich schnell heraus, dass es den Gästen um mehr ging, als um bloße Neugier auf andere Gerichtssysteme oder um einen rechtsvergleichenden Einblick in die deutsche Justizorganisation. Aus dem Kreis der südafrikanischen Teilnehmer wurde berichtet, dass Gegner der Reform in Südafrika die Gefahr einer Abschaffung der High Courts beschworen hätten. Von einer „Diktatur" des Chief Justice als Oberhaupt der gesamten Gerichtsbarkeit sei die Rede. Man halte sogar die Selbständigkeit des Verfassungsgerichts für bedroht, weil es im Hinblick auf die Schwierigkeiten, Verfassungsangelegenheiten (constitutional matters) von allgemeinen Rechtsfragen zu trennen oder zu unterscheiden, ratsam sei, den Constitutional Court in den Supreme Court of Appeal einzugliedern. Auf deutscher Seite waren vom Institut Professoren, hohe Richter sowie führende Justizbeamte und Rechtspolitiker eingeladen worden, die Kurzreferate über die Organisation der Gerichte, die Funktionsverteilung innerhalb der Justiz, die Unabhängigkeit der rechtsprechenden Gewalt sowie über die Wahl, Ernennung und Beförderung der Richter hielten. Am Nachmittag stand die Verfassungsgerichtsbarkeit auf dem Programm. Es wurde über die Rolle der Verfassungsgerichte in Bund und Ländern sowie über ihr Verhältnis zueinander gesprochen, das Bundesverfassungsgericht als „Spitzengericht" (apex court) problematisiert und die Stellung seines Präsidenten relativiert. An diese Impulsreferate schlossen sich jeweils lebhafte Diskussionen an, von denen beide Seiten profitierten und im Austausch der

1 Beide Entwürfe sind veröffentlicht in der *Government Gazette* 33216, 21. May 2010.

Argumente zu neuen Einsichten gelangten. Bei einer privaten Einladung während meines Kapstädter Aufenthalts im folgenden Jahr bestätigten einige Teilnehmer, dass sie für ihre Arbeit aus den Gesprächen großen Nutzen gezogen hätten.

2 Rückblick auf die Geschichte der südafrikanischen Justizreform

Bei der Tagung in Hannover stellte sich heraus, dass die 17. Verfassungsnovelle keineswegs der erste Versuch gewesen ist, das Justizwesen in Südafrika zu reformieren und zu modernisieren. Die entsprechenden Bemühungen reichen zurück bis 2003. Im August jenes Jahres wurden Vorläufer der beiden Gesetzentwürfe zur Änderung der Verfassung und zur Reorganisation der Obergerichte erstmals im Parlament eingebracht und an den Fachausschuss für das Gerichtswesen und die Verfassungsentwicklung zur weiteren Behandlung überwiesen. Der Ausschuss begann seine Beratungen mit ausgedehnten öffentlichen Anhörungen über die Entwürfe und erhielt eine Vielzahl von Vorschlägen oder Anregungen aus einer breiten Palette unterschiedlichster Gruppen und Interessen. Nach den Wahlen von 2004 wurde zwar die fragliche Verfassungsänderung fallen gelassen, das Gesetzgebungsverfahren im Übrigen aber fortgeführt. Ältere Fassungen beider Entwürfe waren Gegenstand intensiver und erschöpfender Diskussionen auf einem *Judicial Colloquium*, das von der früheren Justizministerin Brigit Mabandla im April 2005 veranstaltet wurde.

Dieser Konferenz folgte im Dezember 2005 der Entwurf eines 14. Gesetzes zur Änderung der Verfassung, der mit ausführlicher Begründung in einer vollständig überarbeiteten Version zusammen mit dem ebenfalls neu gefassten Entwurf des Gesetzes über die Obergerichte in der Gazette veröffentlicht wurde. Der zuständige Parlamentsausschuss für das Gerichtswesen veranstaltete zu Beginn des Jahres 2006 erneut zahlreiche öffentliche Anhörungen, in deren Verlauf klar wurde, dass noch weitaus mehr Übereinstimmung in zentralen Fragen der Gesetzgebung zwischen den maßgeblichen gesellschaftlichen „Rollenspielern" nötig war und hergestellt werden musste, bevor das parlamentarische Verfahren weitergeführt und abgeschlossen werden konnte. Im Endeffekt wurden die Verfassungsänderungen zunächst nicht weiter verfolgt und die Beratungen zur Reorganisation der Obergerichte bis zur Entwicklung neuer, breiter angelegter Richtlinien über die Transformation des Justizwesens angehalten.

Im Gefolge der Wahlen von 2009 war der Entwurf über die Obergerichte von 2003 zunächst nicht wieder aufgegriffen worden, um damit einer erneut überarbeiteten Version der nunmehr 17. Verfassungsänderung von 2011 den Weg zu bahnen und zeitgleich einen ebenfalls neuen Entwurf des Gesetzes über die Obergerichte einbringen zu können. Beide Entwürfe, die das Ergebnis weiterer intensiver Gespräche vor allem mit den Präsidenten der 13 High Courts reflektierten, die zusammengefasst und vereinigt werden sollten, wurden – wie bereits erwähnt – am 21. Mai 2010 in der Gazette No. 33216 veröffentlicht. Zu den wichtigsten Ergebnissen der langjährigen Beratungen und Diskussionen über die Justizreform in Südafrika gehörten die Beibehaltung eines selbständigen Verfassungsgerichts und der Verzicht auf die ursprünglich geplante Eingliederung weiterer Fachgerichte, wie zum Beispiel der Arbeits-, Wahl-, Kartellberufungs- und Landanspruchsgerichte, als besondere Abteilungen in die bestehenden High Courts.

3 Kritik an der Justizreform und deren Analyse durch du Plessis

(1) Während der Zeit von 2005 bis 2009 fand in der südafrikanischen Öffentlichkeit eine leidenschaftliche, erregte und teilweise äußerst hitzige Diskussion über die vorliegenden Gesetzentwürfe zur Justizreform statt, bei der verfassungsrechtliche Grundsatzfragen der

Gewaltenteilung, der Rechtsstaatlichkeit und der Eigenständigkeit der Justiz aufgeworfen wurden. Aus den Reihen der zahlreichen Kritiker sowohl in der Wissenschaft und als auch in der Rechtspraxis sei beispielhaft auf die *International Bar Association* hingewiesen, die in ihren Kommentaren zu den Entwürfen schon das Ende der verfassungsstaatlichen Demokratie in Südafrika gekommen sah. Die Entwürfe griffen unzulässig in die Unabhängigkeit der Justiz ein. Verfassungen seien besondere Dokumente, welche die ethischen Werte verbürgten und nicht nach den vermeintlichen Erfordernissen der Tagespolitik verändert werden dürften. Jedes politische Einwirken der Exekutive auf die Gerichtsbarkeit sei eine der größten Bedrohungen für eine freie Gesellschaft. Daher müsse die Justiz über eigene Kontrollmechanismen und Verwaltungsverfahren verfügen. Wenn Richter nicht intern zur Verantwortung gezogen werden könnten und nicht in der Lage seien, ihre eigenen budgetären Entscheidungen zu treffen, sei dies eine Einladung an die Politik, auf sie Druck auszuüben. Selbst wenn manchem die Vorschriften in den neuen Entwürfen eher technischer Natur zu sein schienen, stellten sie doch sowohl in individueller wie in kollektiver Hinsicht einen schweren Eingriff in das Gewaltenteilungsprinzip und die Unabhängigkeit des Justizwesens dar. Diese Grundsätze seien zentral für einen anhaltenden Erfolg der südafrikanischen Demokratie.[2]

(2) Lourens du Plessis knüpft an diese Fundamentalkritik an und verfasst dazu einen großen zweiteiligen Aufsatz mit dem signifikanten Titel: 'How Fragile is Constitutional Democracy in South Africa? Assessing (Aspects of) the Fourteenth Amendment Debate/Debacle'. Gleich zu Beginn des ersten Teils unter der Überschrift 'Constitutional Guarantees of the Separation of Powers and the Independence of the Judiciary in South Africa'[3] stellt du Plessis klar, dass es von einem „holistischen" oder „kontextualen" Blick auf die Verfassung aus sinnvoller ist, nach der Zerbrechlichkeit der verfassungsstaatlichen Demokratie, statt nach deren Robustheit zu fragen, und vor allem herauszufinden, welche rechtlichen Wirkungen die geplanten Verfassungsänderungen haben würden. In seiner folgenden Analyse ging er allerdings noch von drei Regelungen in der alten Fassung des Entwurfs zum 14. Amendments aus: 1. von der Unterscheidung zwischen richterlichen und administrativen Funktionen der Gerichte, wobei für die Überwachung ersterer der Präsident des Verfassungsgerichts (Chief Justice), letzterer der Justizminister verantwortlich sein sollte; 2. von einer Einfügung in den Verfassungstext, wonach alle Gerichte von der Befugnis ausgeschlossen werden sollten, Verfahren durchzuführen oder Anordnungen zu treffen, die das Inkrafttreten von Gesetzen suspendieren; 3. von einer Höherstufung des Verfassungsgerichts zum Obersten Gericht (apex court) in Südafrika, sofern Interessen der Justiz dies erfordern.

(3) Es ist hier nicht der Ort, den gesamten Inhalt des zweiteiligen Artikels zu referieren. Das ist auch gar nicht nötig, weil es du Plessis nicht in erster Linie um eine Gesamtbeurteilung der Vorhaben unter Abwägung des Für und Wider geht, sondern um die Strategie eines Verfassungsverständnisses ('constitutional reading-strategy'), mit der das „Gute" ('the good') im Verfassungstext bis zu einem solchen Ausmaß optimiert werden könne, dass es schon rein textlich sehr schwierig werde, Änderungen der südafrikanischen Verfassung vorzunehmen, die schon verankerte Grundlagen der verfassungsstaatlichen Demokratie jenseits schlichter Reparaturen in Mitleidenschaft ziehen könnten. Was im

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2 International Bar Association 'Comments on the impact of South Africa's Constitution Fourteenth Amendment Bill and the Superior Courts Bill'.

3 Du Plessis 'How Fragile is Constitutional Democracy in South Africa? Assessing (Aspects of) the Fourteenth Amendment Debate/Debacle – Part 1'.

Verfassungstext geschrieben worden sei, könne natürlich nicht davor bewahren, dass antidemokratische politische Kräfte unvermeidlich die Konstruktion und Implementation der Verfassung verfehlt in Stellung brächten. Aber der angemessen konstruierte Verfassungstext sei so aufzufassen, dass das „Gute" darin optimiert werde, wonach ein langer Weg zu gehen sei oder gegangen werden könne, um den „böswilligen" Kräften zu begegnen oder sie zu entnerven.[4]

(4) Du Plessis weist sodann im Einzelnen nach, dass die allgemeinen Verfassungsprinzipien der Gewaltenteilung ('trias politica'), der Unabhängigkeit der Justiz ('judicial independence') und das Gerichtsregime ('court governance') durch die Gesetzentwürfe zur Änderung der Verfassung und zu den Obergerichten bei richtiger Auslegung zwar berührt, aber nicht verletzt werden. Dabei müssten drei Formen der Gerichtsführung unterschieden werden, und zwar 1. definitives richterliches Eigenregime, 2. definitives exekutives Fremdregime und 3. definitives integriertes richterliches und exekutives Ko-Regime. Die unerschütterlichen Bekräftigungen der richterlichen Unabhängigkeit, wie sie durch sec. 165 in seiner jetzigen Form ihren Ausdruck gefunden hätten (unterstützt von anderen Verfassungsgarantien mit demselben Effekt) schlössen die Tür zu einem rein exekutiven Gerichtsregime und möglicherweise auch zu einem reinen richterlichen Eigenregime, da sec. 165 subsec. 4 die Einbeziehung von Staatsorganen verlange, welche die Aufgabe hätten, die Gerichte zu unterstützen und zu schützen, um ihre Unabhängigkeit, Unparteilichkeit, Würde, Zugänglichkeit und Wirksamkeit zu gewährleisten. Im Ergebnis spricht sich Du Plessis also für eine Form der Gewaltenteilung aus, die keine Isolierung der Gewalten sei, und für einen „Modus" der richterlichen Unabhängigkeit, deren Gewährleistung eine gemeinsame Aufgabe von Staat und Justiz ('decidedly integrated [judicial and executive] co-governance of the courts') darstelle.[5]

(5) Im zweiten Teil seiner Abhandlung[6] beschäftigt sich du Plessis zunächst mit der Änderung von sec. 172 subsec. 3, aufgrund deren, soweit die Verfassung keine andere Regelung trifft, allen Gerichten untersagt werden sollte, die Suspendierung des Inkrafttretens eines Parlaments- oder Provinzgesetzes zum Gegenstand einer Verhandlung oder Anordnung zu machen. Der Sache nach geht es hier im weiteren Sinn um einen Streit über das „richterliche Prüfungsrecht", wie er auch in Deutschland Jahrzehnte lang geführt wurde[7] und schließlich mit der in Artikel 100 Abs. 1 des Grundgesetzes verankerten Pflicht aller Gerichte zur Vorlage eines Verfahrens an das Bundesverfassungsgericht, bei dem es auf ein für verfassungswidrig erachtetes Gesetz ankommt (sog. konkrete Normenkontrolle), beendet worden ist. Unter Hinweis auf zahlreiche Entscheidungen des Verfassungsgerichts rät du Plessis, obwohl er das Suspendierungsverbot für richtig hält, von der geplanten Änderung der sec. 172 subsec. 3 ab und plädiert stattdessen in den seltenen Verfahren, bei denen ein solches Problem auftreten könnte, für eine behutsame richterliche Rechtsfortbildung im Einzelfall ('case law').[8] Sodann setzt sich du Plessis mit der Änderung der secs. 167 und 168 auseinander, wonach das Verfassungsgericht die Funktion eines höchsten Gerichts ('apex court') übernehmen solle. Seiner Ansicht nach

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4 *Ibid* 195.
5 *Ibid* 205.
6 Du Plessis 'How Fragile is Constitutional Democracy in South Africa? Assessing (Aspects of) the Fourteenth Amendment Debate/Debacle – Part 2'.
7 Hermann *Entstehung, Legitimation und Zukunft der konkreten Normenkontrolle im modernen Verfassungsstaat*.
8 Du Plessis 'How Fragile is Constitutional Democracy in South Africa? Part 2' 5.

habe diese Frage nach der Hierarchie von Gerichten keinen Einfluss auf die verfassungsstaatliche Demokratie in Südafrika, sondern sei eher von strategischer als von struktureller Bedeutung. Denn selbst wenn man die Zuständigkeit des Verfassungsgerichts auf die Entscheidung verfassungsrechtlicher Angelegenheiten beschränken wollte, befände dieses letztlich selbst darüber, was „constitutional matters" seien.[9]

(6) Abschließend gelangt du Plessis zu dem Ergebnis, dass das Spektakel ('hullabaloo'), welches von Teilen der juristischen Berufssparte und unter Oppositionspolitikern veranstaltet worden sei, auch nicht entfernt zum Beleg für deren Heftigkeit als Gefährdung der Grundlagen der verfassungsstaatlichen Demokratie in Südafrika gewertet werden könnten. Lese man die geplanten Änderungen der Verfassung in deren Kontext insgesamt, so hätten sie auf die funktionelle Teilung der richterlichen und exekutiven Gewalt nur minimalen Einfluss und seien auch nicht im Geringsten geeignet, die richterliche Unabhängigkeit in dem Maße zu beeinträchtigen, wie dies viele Rechtsexperten – einschließlich respektierter Richter im Ruhestand – in ihren Kommentaren gefürchtet oder lautstark verkündet hätten. Allerdings könnten die Ziele der beabsichtigten Reform durch sehr viel maßvollere Verfassungsergänzungen oder auch im Wege einfacher Gesetzgebung erreicht werden. Die Kritik aus Justizkreisen sei jedoch schon deshalb problematisch, weil diese damit zu Verbündeten der politischen Opposition würden. Gerade Richter ließen in dieser Debatte vielfach ihre Fähigkeiten zur (Verfassungs-)Interpretation vermissen, um die vorgeschlagenen Verfassungsänderungen und ihre möglichen Wirkungen auf die verfassungsstaatliche Demokratie richtig einzuordnen und zutreffend beurteilen zu können.

4 Ganzheitlicher (kontextbezogener) Ansatz von du Plessis

(1) Damit ist ein Thema angesprochen, über das sich zu äußern kaum jemand berufener und kompetenter ist als du Plessis, der in seinem Hauptwerk mit dem Titel *The Interpretation of Statutes*[10] und in dessen ursprünglich als zweite Auflage geplanter Nachfolgeversion *Re-Interpretation of Statutes*[11] die theoretischen und praktischen Fundamente für einen ganzheitlichen und kontextbezogenen Ansatz bei der Gesetzes- bzw. Verfassungsinterpretation gelegt hat. Zunächst verstand du Plessis die Interpretation von Rechtsnormen ähnlich wie bei einer Übersetzung als Übertragung von objektiven Daten in die subjektive Lebenswelt des Interpreten, wo sie – vermischt mit dessen gesammeltem Wissen und Erfahrungsschatz – überhaupt erst die Voraussetzungen für eine Auslegung der Norm schufen. Diese Theorie beruhte auf der Prämisse, dass ein solches Verständnis stets bestimmten Regeln unterworfen sei, die erst im Prozess der Erkenntnisgewinnung befolgt würden. Ein ähnliches Konzept hat in Deutschland *Josef Esser* mit seinem bahnbrechenden Werk *Vorverständnis und Methodenwahl in der Rechtsfindung*[12] vertreten.

(2) Der Nachfolgeband aus dem Jahre 2002 geht jedoch von einem völlig neuen Ansatz aus (deshalb der veränderte Titel), der sich in mehrfacher Hinsicht von der 1. Auflage unterscheidet: Erstens hatte du Plessis es jetzt mit einer Verfassung zu tun, die als oberstes Gesetz ('supreme law') der Republik für alle Staatsgewalten, also auch für die Gesetzgebung, verbindlich war und damit zugleich die Auslegung einfachen Rechts maßgeblich

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9 *Ibid* 9 sq.
10 Du Plessis *The Interpretation of Statutes*.
11 Du Plessis *Re-Interpretation of Statutes*.
12 Esser *Vorverständnis und Methodenwahl in der Rechtsfindung*.

beeinflusste. Zweitens hatte er seine theoretische Position modifiziert: Angeregt von einem Nachdenken darüber, wie mit den interpretatorischen Anforderungen eines neuen Rechts- und Verfassungssystems am Besten umzugehen sei, gelangte er zu der Erkenntnis, dass die Bedeutung einer Norm nicht *in* ihrem Text zu finden sei, sondern sich erst im Umgang *mit* dem Text herausstelle. Ihm kam es dabei in erster Linie nicht nur auf eine textgetreue Interpretation des Wortlauts von Normen an, sondern auf ein Verständnis des geschriebenen Rechts, in das auch die näheren Umstände seiner Entstehung, der Sinnzusammenhang mit anderen Normen sowie sein Sinn und Zweck, also der gesamte „Kontext" der Norm, einbezogen werden. Du Plessis selbst hat diesen Paradigmenwechsel einmal als seine „linguistische Wende" bezeichnet.

(3) Seither hat du Plessis diesen holistischen Ansatz seiner Auslegungstheorie im Sinne eines „Kontextualismus" fortlaufend verbessert und verfeinert.[13] Es ist daher nicht verwunderlich, dass er sich auch in dem hier behandelten Aufsatz über die südafrikanische Justizreform wiederfindet und als vorzugswürdige Interpretationsstrategie auf das Verständnis der vorgeschlagenen Verfassungsänderungen angewandt wird. Sie sei weder unüblich oder esoterisch, noch besonders abenteuerlich oder grundstürzend. Erstens sei sie auf ein ganzheitliches oder systematisches Verständnis gerichtet und entspreche der anerkannten und gefestigten Methode der Auslegung aus dem Wortsinn zur Re-Konstruktion von erlassenen Rechtstexten. Zweitens sei sie zweckbezogen ('purposive'), wobei das Modewort der „zielgerichteten Auslegung" allerdings nur mit Vorsicht gebraucht werde. In seinem Buch betrachte er sie (einschließlich teleologischer Interpretation) als eine moderne Manifestation der „mischief rule", einer Auslegungsregel, die von englischen Gerichten seit dem späten 16. Jahrhundert angewandt wird und der Feststellung dient, ob bei einem Missstand das dagegen erlassene Gesetz geeignet ist, ihn zu beseitigen. Diese Regel habe auch die in Südafrika über zweieinhalb Jahrhunderte vorherrschenden Methoden des Literalismus (buchstabengetreue Auslegung) und des Intentionalismus (absichtsgetreue Auslegung) vorweggenommen. Du Plessis fand es nach eigenem Bekunden ziemlich schwierig, sich einfach der Versuchung einer Interpretation nach dem Buchstaben oder nach der Absicht (klare und eindeutige Sprache) zu unterwerfen. Aber er sei gleichwohl davon überzeugt, dass der vom ihm bevorzugte holistische, kontextuale Ansatz letztlich auch der „Sprache der Verfassung" am Besten diene.[14]

(4) Aus deutscher Sicht ist hinzufügen, dass du Plessis's kontextbezogene Ganzheitsmethode inzwischen auch beim Bundesverfassungsgericht Anerkennung gefunden hat. In einem Urteil des Ersten Senats vom 1. Dezember 2009 über die Verpflichtung des Gesetzgebers zum Schutz von Sonn- und Feiertagen als Zeiten der Arbeitsruhe in Ausprägung der Religionsfreiheit (Artikel 4 Abs. 1 GG) heißt es: „Im Kontext des Grundgesetzes sind die Kirchenartikel[15] auch ein Mittel zur Entfaltung der Religionsfreiheit der korporierten Religionsgemeinschaften".[16] Wenig später wird in derselben

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13 Du Plessis 'The (re-)systematisation of the canons and aids to statutory interpretation'.

14 Du Plessis 'How fragile is constitutional democracy in South Africa? Part 1' 195 sq.

15 Gemeint sind die Artikel 136, 137, 138, 139 und 141 der Weimarer Reichsverfassung (WRV), die durch Artikel 140 GG in das Grundgesetz übernommen worden sind. Artikel 139 WRV regelt den Sonn- und Feiertagsschutz.

16 Bundesverfassungsgericht: Urteil des Ersten Senats vom 1. Dezember 2009 (1 BvR 2857, 2858/07) – 'Ladenöffnungszeiten' – in: Entscheidungen des Bundesverfassungsgerichts, Amtliche Sammlung (BVerfGE), Band (vol.) 25, p 39 sq. (80).

Entscheidung gesagt, besondere Ladenöffnungszeiten an jenen Ruhetagen aus Anlass von Firmenjubiläen oder Straßenfesten seien „verfassungsrechtlich weder für sich gesehen noch im schutzkonzeptionellen Kontext zu beanstanden".[17] In einem weiteren Urteil des Zweiten Senats vom 4. Mai 2011, in dem es um das Prinzip der „völkerrechtsfreundlichen Auslegung" von Begriffen des Grundgesetzes ging, wird festgestellt, „dass Ähnlichkeiten im Normtext nicht über Unterschiede, die sich aus dem Kontext der Rechtsordnungen ergeben, hinwegtäuschen dürfen: Die menschenrechtlichen Gehalte des jeweils in Rede stehenden völkerrechtlichen Vertrags müssen im Rahmen eines aktiven Vorgangs in den Kontext der aufnehmenden Verfassungsordnung ‚umgedacht' werden".[18] Zuvor hatte schon 1982 der Bayerische Verfassungsgerichtshof entschieden, dass „Verfassungsvorschriften … nicht isoliert, sondern aus dem Kontext der Verfassung heraus auszulegen" seien: „Vornehmstes Interpretationsprinzip ist die Einheit der Verfassung als eines logisch-teleologisches Sinngebildes".[19] Daher stellen die Annahme oder Behauptung des Vorliegens verfassungswidrigen Verfassungsrechts, wie sie von einem Teil der Kritiker gegen das 14. Amendment zur südafrikanischen Verfassung ins Feld geführt wurden, bereits einen Widerspruch in sich dar, den du Plessis in seiner Studie unter Hinweis auf die „lex posterior"-Regel oder auf den Vorrang der„lex specialis" gegenüber einer generellen Norm mit seiner Methode der kontextbezogenen und zielgerichteten Interpretation aufzulösen versucht hat.

5 Die südafrikanische Justizreform von 2013

(1) Inzwischen ist nach vielen Jahren vergeblicher Bemühungen die Justizreform in Südafrika abgeschlossen und der Entwurf des 14. Amendments von 2005 nach weiterer Überarbeitung als 17. Änderung der südafrikanischen Verfassung (Constitution Seventeenth Amendment Act, 2012) durch Proklamation des Präsidenten vom 1. Februar 2013 am 23. August 2013 in Kraft getreten.[20] Zu den wichtigsten Neuerungen gehört die Ergänzung des sec. 165 durch einen zusätzlichen subsec. 6, wonach der Präsident des Verfassungsgerichts („Chief Justice") das Oberhaupt der gesamten Gerichtsbarkeit ist und in dieser Funktion für die Schaffung und Überwachung von Normen und Standards zur Ausübung der Rechtsprechungsfunktionen aller Gerichte Verantwortung trägt.[21] In Deutschland wäre eine solche Regelung undenkbar. Weder der Präsident des Bundesverfassungsgerichts, der lediglich als Vorsitzender eines der beiden Senate amtiert und von einem Vizepräsidenten des jeweils anderen Senats vertreten wird, noch die Präsidenten anderer Bundesgerichte würden eine derartige Stellung einnehmen, geschweige denn beanspruchen können. Selbst der Präsident des kleinsten deutschen Amtsgerichts hat als Richter die gleichen Rechte und Pflichten wie der Verfassungsgerichtspräsident. Eine Personalhierarchie unter der Richterschaft würde zweifellos gegen die prinzipielle Gleichheit des Richteramts verstoßen. Noch viel weniger kommt es einem

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17 *Ibid* 100.

18 Häberle *Europäische Verfassungslehre* 255 sq.; Dreier *Grundgesetz* art. 1, s 2, n. 20.

19 Bayerischer Verfassungsgerichtshof: Entscheidung vom 25. Februar 1892 (Vf. 2-VII – 81) – "Feiertagsschutz") in: Entscheidungen des Bayerischen Verfassungsgerichtshofs (VerfGHE BY), Band (vol.) 35, p 10 sq. (23).

20 *GG* 36128, 1. February 2013; Proc. R35/GG 36774/20130822.

21 '(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts'.

Vorsitzenden Richter zu, die Entstehung und Einhaltung von Vorschriften über das Gerichtswesen zu kontrollieren. Für richterliches Fehlverhalten sind allein die Richterdienstgerichte zuständig.

(2) Ein zweiter Schwerpunkt der Justizreform betraf die Stellung des Verfassungsgerichts (sec. 167). Ein besonderes Verdienst des legislativen Kompromisses, an dessen Zustandekommen vermutlich auch du Plessis beteiligt war, besteht vor allem darin, dass es als selbständiges Gericht überhaupt erhalten geblieben und nicht als „Verfassungskammer" in den Supreme Court of Appeal eingegliedert worden ist, was ernsthaft diskutiert wurde. Darüber hinaus ist es in sec. 167 subsec. 3 zum höchsten Gericht der Republik („highest court of the Republic") bestimmt und damit als „apex court" ausgestaltet worden. Es soll künftig nicht nur über Verfassungsfragen entscheiden, sondern über alle Angelegenheiten, bei denen das Verfassungsgericht eine Berufung aus Rechtsgründen in Fällen allgemeiner öffentlicher Bedeutung zulässt, wobei man sich offenbar am Beispiel des Supreme Court der USA orientiert hat. Schließlich soll es abschließend über die Verfassungsmäßigkeit von Gesetzen und sogar darüber entscheiden können, ob eine Sache überhaupt in seine Zuständigkeit fällt. Feststellungen der Instanzgerichte zur Verfassungswidrigkeit von Gesetzen sollen erst wirksam werden, wenn sie vom Verfassungsgericht bestätigt worden sind (sec. 167 subsec. 5, 169 subsec. 1, 172 subsec. 2a). Im Ergebnis ist damit der Status des Verfassungsgerichts, der bisher ohnehin schon herausgehoben war, innerhalb der südafrikanischen Justiz noch erheblich gestärkt worden. Damit nähern sich seine Strukturen und Funktionen denen eines selbständigen Verfassungsorgans an, wie es in Deutschland für das Bundesverfassungsgericht angenommen wird.

(3) Das dritte Hauptziel der Reform richtete sich auf eine Reorganisation der Obergerichte („High Courts"). Zuvor gab es 13 voneinander getrennte High Courts in nur sieben Provinzen, nicht aber in Limpopo und Mpumalanga, von denen große Teile früher zu den sog. Homelands gehörten. Mit der Justizreform von 2013 wurde nunmehr ein einheitlicher High Court für ganz Südafrika geschaffen (sec. 169), der jedoch in neun Abteilungen („divisions") gegliedert und mithin in jeder Provinz präsent ist. Präsident *Jacob Zuma* begründete diese Konzentration der Obergerichte und deren Verteilung auf alle Provinzen unter anderem mit dem Argument, dass jetzt auch die Bürgerinnen und Bürger aus Limpopo und Mpumalanga einen High Court vor ihrer „Türschwelle" hätten und nicht mehr auf den High Court für Nord-Gauteng in Pretoria angewiesen seien. Tatsächlich war aber eine Neugliederung der südafrikanischen Obergerichte längst überfällig. Denn ihre bisherige Organisation beruhte noch auf dem Supreme Court Act von 1959 aus den Zeiten der Apartheid, wo die sog. selbständigen Homelands Transkei, Ciskei, Venda und Bobhuthatswana mit eigenen High Courts ausgestattet waren. Wenn *Zuma* in seiner Stellungnahme zur Ausfertigung des Superior Court Act freilich hinzufügte, es sei zwingend notwendig, dafür zu sorgen, dass das Recht auf Justiz „nicht ein Privileg der Reichen bleibt, sondern als fundamentales Menschenrecht von allen in unserem Volk genossen werden" könne, dann verkennt er freilich die Wirklichkeit. Denn in Südafrika sind (wie anderswo auch) die Anwalts- und Gerichtskosten so exorbitant hoch, dass sich in der Tat nur Begüterte einen Prozess zu leisten imstande sind.

6 Die „Große Justizreform" in Deutschland (2004–2011)

Etwa zur gleichen Zeit, in der die südafrikanische Bemühungen und Debatten um eine Reform des Gerichtswesens stattfanden, wurde auch in Deutschland unter dem anspruchsvollen Titel einer „Großen Justizreform" diskutiert. Es mag daher nicht zuletzt für du Plessis

interessant sein, einen Blick sowohl auf die Gemeinsamkeiten, als auch auf die Unterschiede zur Justizreform in Südafrika zu werfen.

(1) Die Reformbestrebungen begannen mit einem sog. Eckpunkte-Beschluss der Justizministerkonferenz des Bundes und der Länder vom 24. November 2004. Darin sprachen sich die Minister für die Entwicklung des Gesamtkonzepts einer „Großen Justizreform" aus, mit der die notwendige Leistungsstärke und Zukunftsfähigkeit der Justiz langfristig gesichert werden sollte. Bei der Entwicklung dieses Konzepts seien die Belange aller in und mit der Justiz Tätigen einzubeziehen. Die richterliche Unabhängigkeit müsse dabei uneingeschränkt gewahrt bleiben. Deshalb solle geprüft werden, ob sonstige Aufgaben, die bislang zwar von der Justiz erfüllt werden, jedoch nicht zwingend auf die Dritte Gewalt bezogen sind, anderen Stellen übertragen werden können. Hier dürfte auch an die Einbindung Dritter in die Aufgabenerfüllung zu denken sein. Weiter sollte die gebotene Reform als Chance verstanden werden, das Gerichtsverfassungs- und -verfahrensrecht bei Wahrung rechtsstaatlicher Standards grundlegend zu vereinfachen. Bestehende Differenzierungen beim Aufbau und Verfahren der Gerichte sollten nur dort fortgeführt werden, wo sie sachlich zwingend erforderlich sind.

(a) An der Spitze der Vorschläge stand die Forderung nach einer möglichst weitgehenden Vereinheitlichung der Gerichtsverfassungen und Prozessordnungen für alle Gerichtsbarkeiten. Die Regelungen für die Verwaltungs-, die Sozial-, die Finanz-, die Arbeits- und die ordentliche Gerichtsbarkeit hätten sich immer weiter voneinander entfernt. Unterschiedliche Instanzenzüge und Rechtsmittelmöglichkeiten sowie zahlreiche Verfahrensbesonderheiten führten zu einer nicht mehr nachvollziehbaren Inkonsistenz und trügen in erheblichem Maß zur Unübersichtlichkeit der Regelungen sowie zur Schwerfälligkeit und Intransparenz gerichtlicher Verfahren bei. Daher seien die unterschiedlichen Regelungen mit dem Ziel der Verfahrensvereinfachung und weitgehenden Vereinheitlichung zu harmonisieren.

(b) Außerdem beschlossen die Justizminister für den Instanzenzug eine funktionale Zweigliedrigkeit. Der Eingangsinstanz (Tatsacheninstanz) solle grundsätzlich jeweils nur ein Rechtsmittel folgen. Die Wahrung der Einheitlichkeit der Rechtsprechung sei durch ein Vorlageverfahren für Fälle der Divergenz und der grundsätzlichen Bedeutung einer Rechtssache sicherzustellen. Rechtsmittel seien zu vereinheitlichen und auf das verfassungsrechtlich Notwendige zu beschränken. Zur Begründung wurde darauf hingewiesen, dass gerichtliche Verfahren bis zur Rechtskraft häufig zu lange dauerten. Dazu trage wesentlich auch das derzeitige Rechtsmittelsystem bei, das eine Vielzahl unterschiedlich ausgestalteter Instanzenzüge und Rechtsmittelmöglichkeiten bereithalte. In einer Reihe von Verfahren im Zivilrecht und im Strafrecht würden zwei Tatsacheninstanzen zur Verfügung gestellt und selbst im Bereich der Bagatellkriminalität sogar verschiedene parallele Rechtsmittel/Rechtsbehelfe (Berufung, Revision) gewährt. Das gelte insbesondere für das Recht der Ordnungswidrigkeiten.

Die vielfältigen Reformen, mit denen punktuelle Änderungen innerhalb des Systems eingeführt wurden, hätten bislang weder in dem erhofften Ausmaß zu Effizienz- und Beschleunigungseffekten geführt, noch zur Transparenz gerichtlicher Verfahren beigetragen. Es bedürfe deshalb einer grundlegenden Bereinigung der Rechtsmittelstruktur. Ziel sei es, Rechtsmittel weitgehend zu vereinheitlichen und auf das verfassungsrechtlich Notwendige zu beschränken. Maßstab dafür seien eine hinreichende Rechtsschutzgewährung (Artikel 19 Abs. 4 Satz 1 GG) und Effizienz. Die Eingangsinstanz (Tatsacheninstanz) sei zu stärken; ihr solle grundsätzlich nur ein Rechtsmittel folgen. Im strafrechtlichen Bereich könnten Transparenz und Effizienzsteigerung vor allem durch die Einführung eines Wahlrechtsmittels gefördert werden. Damit würde der Instanzenzug bei

den vor dem Amtsgericht beginnenden Strafverfahren deutlich gestrafft, was nicht nur in der Revisionsinstanz, sondern vor allem in der Berufungsinstanz zu einer deutlichen Arbeitserleichterung führen könne. Bei freiheitsentziehenden Maßnahmen im Verfahren der freiwilligen Gerichtsbarkeit, die für Familien-, Nachlass-, Register-, Grundbuch- und Vormundschafts- bzw. Betreuungssachen zuständig ist,[22] seien Möglichkeiten zur erneuten Tatsachenfeststellung vorzusehen. Die Wahrung der Einheitlichkeit der Rechtsprechung könne durch ein Divergenzvorlageverfahren sichergestellt werden.

(c) Besonderes Aufsehen in der Öffentlichkeit erregte die Ankündigung der Justizminister, Möglichkeiten eines flexibleren Richtereinsatzes zu prüfen, weil man darin einen Angriff auf die richterliche Unabhängigkeit erblickte. Die Lage der Staatsfinanzen und die demografische Entwicklung führten perspektivisch eher zu einem Rückgang als zu einem Anstieg der Richterzahlen. Eine höhere Richterflexibilität sei erforderlich, um sowohl eine angemessene Ausstattung der Gerichtsbarkeiten mit Richtern als auch die Funktionsfähigkeit kleiner Gerichte sicherzustellen. Als Lösung kämen außer der Zusammenlegung von Gerichtsbarkeiten oder Präsidien als weitere Möglichkeiten in Betracht: Erweiterung der Versetzungsmöglichkeiten der Richter durch Änderung des § 32 Deutsches Richtergesetz (DRiG) oder durch landesgesetzliche Zuordnung von Richterstellen, Verlängerung der Abordnungsfrist des § 37 Abs. 3 DRiG, Bildung größerer Gerichtseinheiten innerhalb einer Gerichtsbarkeit, Übertragung weiterer Richterämter nach § 27 Abs. 2 DRiG und eine Kombination mehrerer dieser Maßnahmen. Es solle geprüft werden, ob und wie diese verschiedenen Möglichkeiten sowohl verfassungskonform als auch personalwirtschaftlich praktikabel ausgestaltet werden können. Danach könne politisch entschieden werden, welche dieser Varianten weiter verfolgt werden solle.

(d) Darüber hinaus empfahlen die Minister, Möglichkeiten einer Verlagerung von den Gerichten zugewiesenen Aufgaben mit dem Ziel zu prüfen, die Effizienz der Rechtspflege zu verbessern. Die hohe Belastung der Justiz einerseits und die schwierige Haushaltssituation der Länder andererseits zwängen zu einer umfassenden Aufgabenkritik. Wenn die Justiz mit den zur Verfügung stehenden personellen Ressourcen handlungsfähig bleiben wolle, müsse sie sich auf ihre Kernaufgaben beschränken, also auf diejenigen Tätigkeiten, deren Wahrnehmung durch unabhängige Gerichte für einen funktionierenden Rechtsstaat unerlässlich seien. Es sei daher zu untersuchen, ob und inwieweit der ordentlichen Gerichtsbarkeit, d.h. den Zivil- und Strafgerichten, zugewiesene Aufgaben ausgelagert und auf andere Stellen übertragen werden könnten. Als Stellen außerhalb der Gerichte seien etwa Notare, Gerichtsvollzieher oder sogar Industrie- und Handelskammern in Betracht zu ziehen.

(e) Ein weiterer Vorschlag der Minister zur Entlastung der Gerichte betraf den Ausbau und die Förderung von Verfahren zur außergerichtlichen Streitbeilegung (z.B. durch Schiedsgerichte oder Mediationsinstanzen). Die außergerichtliche Beilegung von Streitigkeiten sei nach wie vor ein vorrangiges rechtspolitisches Ziel. Wegen ihrer die Belastung der Gerichte minderndem und dem Rechtsfrieden dienenden Wirkungen seien alle Möglichkeiten zur Schaffung einvernehmlicher Konfliktlösungen auszuschöpfen. Ziel dieser Bemühungen müsse es sein, auf eine Änderung der Streitkultur hinzuwirken. Ein Ansatzpunkt hierfür in der Entwicklung und Förderung von Schlichtungs- und gerichtlichen sowie außergerichtlichen Mediationsangeboten bestehen. Das Kostenrechtsmodernisierungsgesetz, welches für die Beteiligten besondere Vergütungen vorsehe, gehe bereits in diese

22 Vergleichbar dem 'Master of the High Court' in Südafrika.

Richtung. Weitere Möglichkeiten seien zu prüfen. So könnte etwa ein Potential für vermehrte außergerichtliche Einigung auch in einer besseren vorgerichtlichen Aufbereitung des Prozessstoffes durch die Parteien liegen, die durch prozessuale Vorschriften zur Pflicht gemacht werden könnte.

Schließlich sei festzustellen, welche Bereiche in Zivilsachen sich anböten, in denen verstärkt auf eine außergerichtliche Streitbeilegung hinzuwirken sei, z.B die Bereiche der zivilrechtlichen Aufarbeitung von Verkehrsunfällen oder das Mietrecht. Nicht zuletzt sollte auch angestrebt werden, eine außergerichtliche Streitbeilegung durch die Tarifgestaltung der Rechtsschutzversicherungen zu unterstützen, indem z.B. die Deckungszusage für einen Prozess oder die Höhe der Erstattung auch berücksichtigten, ob eine angebotene außergerichtliche Streitbeilegung genutzt wurde. Selbst die Möglichkeit einer obligatorischen Selbstbeteiligung des Versicherungsnehmers erschien den Ministern näherer Prüfung wert.

(f) Besonderes Gewicht legten die Justizminister auf die Führungsverantwortung von Richtern und Staatsanwälten. Sie sprachen sich für aktive Führung und einen kommunikativen sowie kooperativen Führungsstil in der Justiz aus. Sie befürworteten eine stärkere Einbeziehung der Entscheider (Richter, Staatsanwälte, Amtsanwälte, Rechtspfleger) in die Personal- und Führungsverantwortung. Die Justiz brauche aktive Führung, um ihrem Verfassungsauftrag und den Anforderungen an eine qualitativ hoch stehende Rechtspflege angesichts drohender weiterer Einsparmaßnahmen im personellen und sächlichen Bereich auch künftig hinreichend gerecht werden zu können. Eine effektive Organisation der Arbeitsabläufe, die Motivation und Leistungsbereitschaft der Mitarbeiter und ein positives Bild der Justiz in der Öffentlichkeit hingen maßgeblich davon ab, ob und wie Führung tatsächlich praktiziert werde. Einen kooperativen Führungsstil ermöglichen u.a. Zielvereinbarungen und Qualitätsmanagement-Instrumente, wie z.B. Qualitätszirkel. Einer Verbesserung der Zusammenarbeit zwischen Führungskraft und Mitarbeiter diene das Mitarbeitergespräch. Es biete zudem die Gelegenheit zu Rückmeldungen über berufliches Verhalten und zur Erörterung beruflicher Perspektiven.

Führung in der Justiz erfordere neben der Fachkompetenz auch Sozial- und Führungskompetenz. Personalentwicklung setze ein systematisches und gezieltes Vorgehen bei der Besetzung von Stellen voraus. Anforderungsprofile für die zu besetzenden Ämter sowie aussagekräftige Beurteilungen, die gerade auch zu den Verwaltungs- und Führungskompetenzen des Mitarbeiters Stellung nehmen, dienten einer gezielten und transparenten Personalauswahl. Ein wichtiger Schritt in Richtung einer aktiven, kommunikativen und kooperativen Mitarbeiterführung sei die Einbeziehung von Richterinnen und Richtern sowie Staatsanwältinnen und Staatsanwälten in Aufgaben der Personalführung. Die Zuständigkeiten, die Gestaltung der Zusammenarbeit mit der Serviceeinheit zu regeln und einzelne Aufgaben der Personalführung gegenüber Servicemitarbeitern (z.B. Jahresgespräch, Beurteilungsbeitrag, Urlaubsbewilligung) wahrzunehmen, könnten übertragen werden.

Ob Führung bei den Gerichten aktiv wahrgenommen werde, hänge auch davon ab, in welchem Maße Führungskräfte Unterstützung erfahren. Sie sind in speziellen Veranstaltungen für Führungskräfte fortzubilden. Um ihren Aufgaben in der Gerichtsverwaltung nachkommen zu können, seien sie in ausreichendem Umfang vom richterlichen oder staatsanwaltschaftlichen Geschäft freizustellen. Führungsleitlinien und Führungsgrundsätze können zeigen, in welche Richtung Führung ausgeübt werden soll. Die Schaffung solcher Leitlinien erleichtert Führungskräften die Wahrnehmung ihrer Aufgaben und trägt dazu bei, die Ziele und Werte einer Organisation sowie deren Verständnis von Führung zu klären.

(g) In Deutschland existiert seit langem ein System regelmäßiger Richterfortbildung. Neben den Einrichtungen der Länder steht dafür in erster Linie die Deutsche Richterakademie in Trier zur Verfügung, die du Plessis während seiner dortigen Aufenthalte wohl auch aus eigener Anschauung kennt.[23] Bisher ist die Beteiligung an den dort angebotenen Kursen und Veranstaltungen freiwilliger Natur. Die Justizminister empfahlen zu prüfen, ob die Fortbildungspflicht im Richterbereich ausdrücklich gesetzlich geregelt werden sollte. Fortbildung sei für Richterinnen und Richter sowie Staatsanwältinnen und Staatsanwälte nicht nur eine schon jetzt bestehende Dienstpflicht, sondern eine (berufs-)lebenslange Aufgabe und Verpflichtung. Diese Pflicht folge aus dem Justizgewährungsanspruch und der Bindung der Rechtsprechung an Recht und Gesetz (Artikel 20 Abs. 3 GG). Die praktische Umsetzung stehe im Spannungsverhältnis zwischen fachlicher sowie persönlicher Weiterentwicklung einerseits und finanziellen Möglichkeiten der Justizhaushalte sowie dienstrechtlichen Rahmenbedingungen andererseits.

Angesichts einer gegenüber früheren Zeiten rascheren Veränderung der Gesetze, einer komplexer werdenden Rechtsprechung und Rechtsentwicklung erscheine es unerlässlich, die Pflicht zur Fortbildung stärker zu institutionalisieren und zu systematisieren. Das mache die Entwicklung neuer Fortbildungskonzepte notwendig, die folgende Kriterien berücksichtigen: Das Fortbildungsangebot müsse sich am Bedarf orientieren. Die Justiz brauche mehr Angebote zu verhaltensbezogenen Fortbildungsthemen. Möglichkeiten des E-Learning seien zu nutzen. Erwägenswert sei außerdem die Einführung von Pflichtfortbildungen für jeden Angehörigen der Richterschaft, gegebenenfalls im Wege einer entsprechenden Änderung des Deutschen Richtergesetzes.

(h) Schließlich setzten sich die Justizminister dafür ein, den Erfahrungsaustausch und die Zusammenarbeit von Gerichten und Staatsanwaltschaften auf dem Gebiet des Qualitätsmanagements durch die Einrichtung von Vergleichsringen und Qualitätszirkeln zu fördern. Sie empfahlen, gegebenenfalls im Zusammenwirken mit dem Ausschuss für Justizstatistik, gemeinsame Qualitätsstandards zu erarbeiten und länderübergreifende Methoden des Qualitätsmanagements vorzuschlagen.

Qualitätssicherung in der Justiz sei der Teil des Qualitätsmanagements, das gewährleisten solle, dass gesetzlich vorgegebene, selbst gesetzte sowie von den Rechtsuchenden gestellte Qualitätsanforderungen an die Justiz bei optimalem Ressourceneinsatz erfüllt werden. In den Ländern werde derzeit eine Vielzahl von Strategien zur Qualitätssicherung in der Justiz erprobt und eingesetzt. Mittel der Qualitätssicherung seien insbesondere die Kosten- und Leistungsrechnung, das Justizcontrolling, die Personalkostenbudgetierung, das Benchmark-Verfahren, die Balanced Scorecard, das EFQM-Modell, die verschiedenen Instrumente der Personal- und Organisationsentwicklung, die Personalbedarfsberechnung, die Geschäftsprozessoptimierung Anwalts-, Bürger- und Mitarbeiterbefragungen sowie Evaluationsinstrumente sowohl für die individuelle richterliche und staatsanwaltschaftliche Arbeit als auch für die Gerichte und Staatsanwaltschaften der Organisationen.

Der Stand der Entwicklung dazu sei in den Ländern nicht gleich. Auch die eingesetzten Methoden seien unterschiedlich. Die verwendeten Methoden und Ansätze stützten sich

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23 Inzwischen verfügt auch Südafrika mit dem 'South African Judicial Education Institute (SAJEI)' über eine ähnliche Fortbildungseinrichtung. Sie wurde 2009 aufgrund des South African Judicial Education Institute Act 2008 (Act. No. 14 of 2008) vom 12.09.2008, veröffentlicht in *Goverment Gazette* 31437, 16.09.2008, geschaffen.

zwar auf gleiche theoretische und wissenschaftliche Grundlagen; in ihrer Interpretation und Konzeption fielen sie jedoch sehr unterschiedlich aus. Diese Unterschiede setzten sich in der Umsetzung der Konzepte fort. Die Zusammenarbeit der Länder bedürfe insoweit der Verbesserung. Der bereits praktizierte gegenseitige Austausch von Informationen auf der Ebene der Landesjustizverwaltungen sei zu ergänzen durch Vernetzungen auf der Anwendungsebene. Mit einer solchen Ergänzung könne der bestehende Informationsaustausch um die Sichtweise und die Erfahrungen der unmittelbar betroffenen Stellen erweitert werden. Gleichzeitig werde damit ein unvermittelter und auf die Praxis fokussierter Informationsfluss ermöglicht.

Der Ausschuss für Justizstatistik habe hierzu in Teilbereichen bereits Überlegungen angestellt, deren Ergebnisse für die Gesamtaufgabe nutzbar gemacht werden könnten. Eine einzusetzende Arbeitsgruppe solle zunächst klären, welche Qualitätsstandards länderübergreifend gelten sollen bzw. welcher Mittel des Qualitätsmanagements man sich gemeinsam bedienen sollte (z.B. eines länderübergreifenden Benchmarking). Für die festgelegten gemeinsamen Qualitätsstandards seien anschließend die zur Untersuchung des Ist-Stands notwendigen Erhebungen und zum Schluss die Methoden zur Einleitung der Veränderungsprozesse festzulegen, um vom Ist- zum Sollstand zu gelangen. Darüber hinaus seien zur Bildung von Netzwerken auf der Umsetzungsebene folgende Voraussetzungen zu schaffen: 1. ein Informationsforum über Art, Gegenstand, Entwicklungsstand und Einsatzstelle laufender Projekte, möglichst im Internet, 2. die Förderung der direkten Kontaktaufnahme zwischen den Einsatzstellen, möglichst über einen Internet-Verteiler, und 3. die Bildung von Vergleichsringen oder Qualitätszirkeln von Einsatzstellen, die sich im Schwerpunkt einem speziellen Ansatz der Qualitätssicherung widmen könnten.

(2) Kaum von der Justizministerkonferenz beschlossen, ging man sofort energisch und zuversichtlich ans Werk, um die Reformvorschläge zu verwirklichen. Zunächst begann man mit dem Versuch, die Gerichte der Verwaltungs-, Sozial- und Finanzgerichtsbarkeit zusammenzuführen. Dazu bedurfte es einer Änderung des Grundgesetzes und einer entsprechenden „Öffnungsklausel" für die Länder, von bundesrechtlichen Regelungen abweichen zu können. Die Länder Baden-Württemberg und Sachsen brachten am 2. Juli 2004 einen „Gesetzentwurf zur Änderung von Artikel 92 und 108 Abs. 6 des Grundgesetzes" ein, der es den Ländern ermöglichen soll, ihre Gerichte der Verwaltungs-, Sozial- und Finanzgerichtsbarkeit zusammenzuführen.[24] Die genannten Länder hielten es für geboten, zu diesem Zweck die Verfassung zu ändern. Denn es erschien zumindest zweifelhaft, ob Artikel 95 Abs. 1 und Artikel 108 Abs. 6 GG nach geltendem Recht einer auf die Ebene der Länder beschränkten Zusammenlegung von Gerichten der Verwaltungs-, Sozial- und Finanzgerichtsbarkeit entgegenstehen.

Ziel des Gesetzentwurfs war es, diese verfassungsrechtlichen Zweifel auszuräumen und eine verfassungsrechtlich gesicherte Grundlage für die Umsetzung der Beschlüsse der Justizministerinnen und Justizminister zu schaffen. Der Text des Artikel 92 GG, der grundsätzliche Fragen der rechtsprechenden Gewalt in Deutschland regelt, sollte in zwei Absätze unterteilt und inhaltlich um die Feststellung ergänzt werden, dass Verwaltungs-, Finanz- und Sozialgerichtsbarkeit durch Fachgerichte der Länder einheitlich ausgeübt werden können. In Betracht kam hier sowohl die Ausübung aller drei Gerichtsbarkeiten, als auch eine Beschränkung auf die Zusammenführung von nur zwei der genannten

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24 Bundesratsdrucksache (Bill of the Federal Council) No. 543/04.

Gerichtsbarkeiten. Durch die Änderung von Artikel 92 GG wurde zugleich klargestellt, dass Artikel 95 Abs. 1 GG die Länder nicht dazu zwingt, am bisherigen fünfgliedrigen Gerichtsaufbau festzuhalten.

Außerdem wurde verdeutlicht, dass eine einheitliche Ausübung der ordentlichen Gerichtsbarkeit und der Arbeitsgerichtsbarkeit ebensowenig in Betracht kommt wie die Zusammenführung von Gerichten dieser Gerichtsbarkeiten mit Gerichten der Verwaltungs-, Finanz- und Sozialgerichtsbarkeit. Artikel 108 Abs. 6 GG sollte aufgehoben werden. Denn mit der Änderung von Artikel 92 GG wurde es den Ländern anheim gestellt, für das Gebiet der Finanzgerichtsbarkeit entweder Finanzgerichte einzurichten oder aber die Finanzgerichtsbarkeit durch einheitliche Fachgerichte auszuüben, denen zugleich die Ausübung der Verwaltungs- und Sozialgerichtsbarkeit obliegt. Mit dieser Regelung stünde eine „einheitliche" bundesgesetzliche Regelung der Finanzgerichtsbarkeit nicht in Einklang.

Der Gesetzentwurf zur Änderung des Grundgesetzes stand in engem sachlichem Zusammenhang mit einem weiteren, gesonderten Entwurf eines „Gesetzes zur Öffnung des Bundesrechts für die Zusammenführung von Gerichten der Verwaltungs-, Sozial- und Finanzgerichtsbarkeit in den Ländern (Zusammenführungsgesetz)" vom selben Tage.[25] Aus der Begründung ergibt sich eindeutig, dass die geplante Zusammenlegung der öffentlich-rechtlichen Gerichtszweige vor allem aus finanziellen Erwägungen angestrebt wurde. Die Justizhaushalte von Bund und Ländern sind geprägt durch einen im Vergleich zu sonstigen Bereichen der Verwaltung sehr hohen Personalkostenanteil. In Zeiten immer knapper werdender Haushaltsmittel liegt deshalb der vordringliche Ansatzpunkt für einen effizienteren Mitteleinsatz in den Justizressorts bei der Steuerung des Personaleinsatzes. Besonders schwierig gestaltet sich eine an den jeweiligen Bedürfnissen ausgerichtete Personalsteuerung in den öffentlich-rechtlichen Fachgerichtsbarkeiten.

Ziel sollte es daher sein, durch geeignete gesetzgeberische Maßnahmen zumindest auf der Ebene der Länder Rahmenbedingungen zu schaffen, die einen flexiblen, an aktuelle Bedarfssituationen angepassten Einsatz des richterlichen Personals im Bereich der öffentlich-rechtlichen Fachgerichtsbarkeiten ermöglichen. Bei der Zusammenführung der Gerichte der Verwaltungs-, Sozial- und Finanzgerichtsbarkeit handele es sich um den einzig Erfolg versprechenden Weg, die dringend erforderliche nachhaltige und systemgerechte Flexibilisierung des Einsatzes des richterlichen Personals zu bewirken. Der Entwurf greife die Beschlüsse der Justizminister vom 17. und 18. Juni 2004 auf. Er ziele mit seinem Artikel 1 auf die Einführung einer Gerichtsordnung der einheitlichen Fachgerichte – GOF –. Diese ermöglicht es den Ländern, ihre Gerichte der Verwaltungs-, Sozial- und gegebenenfalls auch der Finanzgerichtsbarkeit durch Gesetz zu einheitlichen Fachgerichten und je einem einheitlichen Oberfachgericht zusammenzuführen.

Weitere Bestandteile der Gerichtsordnung der einheitlichen Fachgerichte waren Regelungen über die Gerichtsverfassung der einheitlichen Fachgerichte und des einheitlichen Oberfachgerichts. Eine Zusammenführung von obersten Gerichtshöfen des Bundes war im Gesetzentwurf nicht vorgesehen, ebenso wenig eine Zusammenführung der bestehenden drei Prozessordnungen für die Gerichte der Verwaltungs-, Sozial- und Finanzgerichtsbarkeit. Auf Grund des engen sachlichen Zusammenhangs der beiden Gesetzentwürfe erschien es angezeigt, über beide Initiativen gemeinsam zu beraten und zu entscheiden.

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25 Bundesratsdrucksache (Bill of the Federal Council) No. 544/04.

Beide Gesetzentwürfe wurden zwar am 3. November 2004 im Bundestag eingebracht[26] und auf der 148. Sitzung am 16. Dezember 2004 auch in Erster Lesung beraten, fielen jedoch mit dem vorzeitigen Ende der 15. Wahlperiode am 18. Oktober 2005 dem parlamentarischen Diskontinuitätsprinzip zum Opfer und wurden seither weder vom Bundesrat noch vom Bundestag wieder aufgegriffen. Zwar unternahm die Justizministerkonferenz im Juni 2006 einen weiteren Anlauf, fand aber für einen neuen Gesetzesantrag im Bundesrat selbst unter den Ländern keine Unterstützung. Daher baten die Justizminister letztmals auf ihrer Herbstkonferenz im November 2011 nunmehr die Bundesjustizministerin, zeitnah einen Gesetzentwurf mit einer Länderöffnungsklausel vorzulegen – wiederum ohne die erhoffte Resonanz. Somit war bereits ein erster Eckstein der „Großen Justizreform" in Deutschland gescheitert – kein gutes Omen für die übrigen Reformvorschläge der Justizminister. Es hatte sich wieder einmal erwiesen, dass bestehende Institutionen über ein erhebliches Beharrungsvermögen verfügen, wenn es darum geht, sie aufzulösen oder zusammenzulegen. Das gilt namentlich für Gerichte, deren Selbstverständnis maßgeblich durch das Bewusstsein richterlicher Unabhängigkeit geprägt ist. Ihnen gegenüber hat es der Gesetzgeber überall auf der Welt besonders schwer, wenn er sich anschickt, bestehende Strukturen zu verändern.

(3) Ähnlich erging es dem zweiten Vorschlag der Justizminister, im Rechtsmittelwesen die sog. funktionale Zweistufigkeit einzuführen. Bisher bestand in Deutschland – von Ausnahmen abgesehen – ein dreistufiger Instanzenzug: zwei Tatsacheninstanzen (Eingangs- und Berufungsgericht) und eine Rechtsinstanz (Revisionsgericht). Künftig sollte es nach den Vorstellungen der Justizminister vor allem in Strafverfahren grundsätzlich nur noch eine Tatsacheninstanz geben. Dies sollte durch folgende Alternativmodelle erreicht werden: 1. durch Ausdehnung der Annahmeberufung (die Berufsinstanz entscheidet über die Annahme des Rechtsmittels), 2. durch Abschaffung der Sprungrevision (unmittelbar zur Rechtsinstanz) und Einführung eines generellen Revisionszulassungserfordernisses für die Revision gegen Berufungsurteile der Landgerichte, 3. durch Einführung eines Wahlrechtsmittels (entweder Berufung oder Revision) oder 4. durch völlige Streichung der Berufung.

(a) Gegen diese Pläne der Justizminister wandte sich vor allem die Anwaltschaft. In seiner Stellungnahme vom Januar 2006 lehnte der Deutsche Anwaltsverein die Pläne rundweg ab. Die bereits 1993 eingeführte Annahmeberufung bei geringen Geldstrafen habe sich nicht bewährt. Die Quote positiver Annahmeentscheidungen habe lediglich bei 1 bis 2 % gelegen. Damit sei der Zugang zur Berufungsinstanz praktisch versperrt gewesen. Wer jedoch nicht auf eine „zweite Chance" rechnen könne, müsse bereits im Verfahren vor dem Amts- oder Landrichter „ums Ganze kämpfen", so dass der Entlastungseffekt des eher summarischen Verfahrens vor dem Strafrichter entfalle. Hingegen sei die Sprungrevision unverzichtbar. Sie stelle ein einfaches und „schlankes" Instrument zur unmittelbaren Klärung einer Rechtsfrage durch das Obergericht dar und wirke zudem als Schranke gegen ein allzu summarisches Verfahren des Strafrichters. Gleiches gelte für die Einführung einer Zulassungsrevision. Die Einführung eines Wahlrechtsmittels führe praktisch zur Abschaffung der Revision, da sich ein Verteidiger in nahezu allen Fällen für das Rechtsmittel der Berufung entscheiden wird und wegen der damit verbundenen zweiten Tatsachenprüfung aus Gründen der Sicherheit wohl auch entscheiden müsse. Ein völliger Wegfall der Berufung würde dieselben nachteiligen Effekte sogar verstärkt auslösen wie

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26 Bundestagsdrucksachen (Bills of the Federal Diet) No. 15/4108 und No. 15/4109.

ein Verfahren der Berufungszulassung: die Strafrechtspflege würde zusammenbrechen. Die Justizministerkonferenz sei daher gut beraten, die Pläne einer „funktionellen Zweigliedrigkeit" im Strafverfahren ad acta zu legen. Keines der vorgestellten Modelle sei geeignet, die heutige Effizienz der Strafrechtspflege bei Aufrechterhaltung der Qualitätssicherung zu erhöhen.

(b) Auch die Richterschaft lehnte das Projekt ab. Der Deutsche Richterbund wies in seinem „Positionspapier zur Justizreform" darauf hin, dass die funktionale Zweigliedrigkeit in der Sache die Abschaffung der zweiten Tatsacheninstanz bedeute. Die erste Instanz müsste dann im Interesse des effektiven Rechtsschutzes den vorsorglich vorgetragenen Sachverhalt wesentlich detaillierter aufklären und ihre Entscheidungen umfangreicher begründen als bisher. Alle Erfahrungen zeigten, dass im Regelfall der Rechtsuchende zunächst eine schnelle, kostengünstige Lösung suche und nicht erwarte, dass sich erstinstanzliche Entscheidungen in aller Ausführlichkeit auch zu nicht unmittelbar entscheidungserheblichen Tatsachen und Rechtsfragen verhielten. Nur so könne die erste Instanz derzeit die große Anzahl der Verfahren erledigen.

Hierfür würde keine Bereitschaft – weder bei den Richtern noch bei den Parteien – bestehen, sofern Entscheidungskorrekturen in der zweiten Instanz nur noch eingeschränkt möglich seien. Wer „perfekte", immer höchsten revisionsrechtlichen Maßstäben gerecht werdende erstinstanzliche Entscheidungen wolle, müsse die Eingangsgerichte mit erheblichen zusätzlichen Mitteln personell und sachlich aufstocken. Eine funktionale Zweigliedrigkeit führe also nicht zu einer Entlastung des Justizsystems, sondern zu einer deutlichen Belastung. Angesichts der desolaten öffentlichen Haushaltslage sind jedoch die nötigen zusätzlichen Mittel nicht zu erwarten. Soweit die Ministerinnen und Minister neben der Abschaffung der zweiten Tatsacheninstanz erwägen, das Rechtsmittel der Berufung durch das Erfordernis der Zulassung zu beschränken, blieben konkrete Regelungsvorschläge (Welches Gericht hat über die Zulassung zu befinden? Was sind die Zulassungsvoraussetzungen?) abzuwarten.

(c) Angesichts dieses massiven Widerstandes in der Fachöffentlichkeit hielt letztlich auch die Bundesregierung den Versuch, den Instanzenzug zu vereinfachen und den Rechtsweg zu verkürzen, für gescheitert. Bereits am 8. Februar 2006 erklärte die Bundesministerin der Justiz Brigitte Zypries im Rechtsausschuss des Deutschen Bundestages, die sogenannte „funktionale Zweigliedrigkeit", wonach eine einzige Instanz die Tatsachen feststellen solle und eine weitere auf die Prüfung der Rechtsfragen beschränkt werde, sei nun endgültig „vom Tisch". Daraufhin traten auch die Justizminister der Länder den Rückzug an. Auf ihrer Konferenz in Erlangen am 1./2. Juni 2006 zogen sie nur noch Ersatzmaßnahmen mit kleinen Schritten in Betracht. Dazu gehörten in Zivilsachen die Erweiterung der erstinstanzlichen Zuständigkeit von Oberlandesgerichten, die Anhebung der Berufungssumme, im Bereich der Arbeitsgerichtsbarkeit die Angleichung des Rechtsmittelrechts an das der Zivilgerichte und schließlich die Einführung eines die Vereinheitlichung der Prozessordnungen fördernden allgemeinen Berufungszulassungserfordernisses.

(4) Auf dem Gebiet der Qualitätssicherung von Gerichten haben die Länder ebenfalls noch keine umfassende und flächendeckende Lösung gefunden, obwohl sie dringend erforderlich wäre. Veränderte Rahmenbedingungen, steigende Erwartungen der Bevölkerung und knappe Ressourcen stellen die Justiz vor ständig neue Herausforderungen. Für die Zukunft gerüstet ist deshalb nur eine lernfähige Justiz, die interne Verbesserungspotentiale nutzt und sich kontinuierlich weiterentwickelt. Ein effektives Qualitätsmanagement bei den Gerichten gehört daher in Deutschland heute zu den unverzichtbaren Voraussetzungen für eine funktionsfähige Rechtspflege und zugleich für die Rechtsuchenden zu einer Grundbedingung ihres Justizgewähranspruchs. Das Management steht für Methoden und

Instrumente zur Umsetzung von Veränderungen, die der Erreichung dieser Ziele dienen. Sie reichen von Qualitätszirkeln über die Befragung von Mitarbeitern und sogenannten Nutzern, beispielsweise Rechtsanwälten, Notaren und Bürgern, bis zum Vergleich der Gerichte untereinander nach bestimmten Maßstäben.

(a) Die bisher einzige länderübergreifende Initiative zur Qualitätssteigerung ging von den Oberlandesgerichten aus. Die Präsidentinnen und Präsidenten der Oberlandesgerichte Brandenburg, Braunschweig, Bremen, Celle, Düsseldorf, Dresden, Hamburg, Hamm, Jena, Koblenz, Köln, Naumburg, Oldenburg, Schleswig, Zweibrücken und des Kammergerichts Berlin haben sich im Jahr 2008 entschieden, ihre Gerichte in einem länderübergreifenden Qualitätsmanagementverfahren einem systematischen Vergleich zu unterziehen. In diesem Verfahren werden die Verfahrensdauer in Zivil-, Familien- und Strafsachen verglichen, Unterschiede in der Arbeitsweise der Gerichte offen gelegt und auf zahlreichen Fachtagungen ein kontinuierlicher Diskussions- und Veränderungsprozess über etablierte Organisationsstrukturen und Verfahrensweisen angestoßen. Wesentliche Bestandteile des Projekts sind – wie im landesinternen Vergleichsprojekt – Mitarbeiterbefragungen sowie die Befragungen von Rechtsanwälten. Die Fragebögen setzten sich aus verschiedenen Themenbereichen zu den Eckpunkten des Qualitätsmanagement zusammen wie beispielsweise Zufriedenheit mit Verwaltung und Rechtsprechung, Qualität der Arbeit, Einhaltung von Terminen, Service und Freundlichkeit des Personals sowie Organisation und Erreichbarkeit. Das Oberlandesgericht Dresden hat bei den Befragungen im Jahr 2009 erfreulich gut abgeschnitten und bei vier von neun der Qualitätskriterien Bestwerte erzielt. Insgesamt 88 Prozent der Rechtsanwälte äußerten ihre Zufriedenheit.

(b) Darüber hinaus werden seit dem Jahr 2003 innerhalb der Geschäftsbereiche zahlreicher Oberlandesgerichte im Rahmen des Qualitätsmanagements zunehmend Aktivitäten und Maßnahmen zur Qualitätssicherung und Qualitätssteigerung in Gang gesetzt. Qualität betrifft dabei nicht nur die juristische Güte der Entscheidungen, sondern ebenso den bestmöglichen Umgang mit Rechtsuchenden, Anwälten und Notaren, die effektive Gestaltung der Verfahren, die Verbesserung der Organisationsstrukturen sowie die Motivation der Mitarbeiter. Auf diese Weise werden die entsprechenden Empfehlungen der Justizministerkonferenz von 2004 wenigstens punktuell und regional umgesetzt.

(5) Dagegen haben sich die Forderungen der Justizminister nach mehr Führungsbereitschaft, Führungsfähigkeit und Führungsverantwortung nicht durchzusetzen vermocht. Denn sie hätten in der Konsequenz zu einer weiteren Hierarchisierung der Richter und zu einer Konzentration von Entscheidungsbefugnissen an der Spitze von Gerichten geführt. Darüber hinaus war unter den Richtern die Sorge verbreitet, dass ihre sachliche und personelle Unabhängigkeit durch Richtlinien, Verhaltensregeln oder sonstige Vorgaben beeinträchtigt werden könnte. Denn mit dem Ruf nach mehr Führung in den Gerichten traf man wie in Südafrika einen besonders empfindlichen Nerv der Richter und Staatsanwälte.

Stattdessen sind in den letzten Jahren verstärkt sogar eher umgekehrt Stimmen laut geworden, die für mehr Selbstverwaltung in der Justiz plädierten. So hat beispielsweise der Deutsche Richterbund in seinem „Positionspapier zur Justizreform" eine „umfassende Selbstverwaltung" des Gerichtswesens verlangt. Der gegenwärtige Aufbau der Judikative sei geprägt von einem Systembruch, weil an ihrer Spitze der Justizminister als Repräsentant der Exekutive stehe. Der Exekutive gelinge es immer weniger, den erforderlichen Mittelbedarf der Justiz zu decken. Das vom Grundgesetz gezeichnete Bild des Richters wie des Staatsanwalts sei so lange nicht verwirklicht, als die Exekutive die für die Justiz bewilligten Mittel verteile und das Kabinett Personalentscheidungen treffe oder maßgeblich beeinflusse. Die Richtervereinigung forderte daher eine umfassende

Selbstverwaltung der Justiz in personeller, finanzieller und organisatorischer Hinsicht. Nur diese sichere dauerhaft die Unabhängigkeit der Richterinnen und Richter und werde der besonderen Stellung der Staatsanwaltschaft gerecht.

(6) In einem wichtigen Punkt waren die Reformbemühungen jedoch erfolgreich – und zwar nicht zuletzt dank einer Richtlinie der Europäischen Union, die dabei umgesetzt wurde. Der Forderung nach Formen und Verfahren außergerichtlicher Streitbeilegung zur Entlastung der Gerichte wurde durch eine bundesgesetzliche Regelung der Mediation entsprochen. Am 26. Juli 2012 trat des „Mediationsgesetz (MediationsG)" vom 21. Juli 2012 in Kraft.[27] Wesentliches Ziel des Gesetzes ist es, die Mediation und andere Verfahren der außergerichtlichen Konfliktbeilegung zu fördern. Bislang waren die verschiedenen Formen der Mediation weitgehend ungeregelt, nämlich die unabhängig von einem Gerichtsverfahren durchgeführte Mediation (außergerichtliche Mediation), die während eines Gerichtsverfahrens außerhalb des Gerichts durchgeführte Mediation (gerichtsnahe Mediation) und die während eines Gerichtsverfahrens von einem nicht entscheidungsbefugten Richter durchgeführte Mediation (gerichtsinterne Mediation). Für die gerichtsinterne Mediation wurde nunmehr eine ausdrückliche rechtliche Grundlage geschaffen.[28]

Das Gesetz stärkt die Mediation, indem es die Vertraulichkeit des Mediationsverfahrens durch eine Verschwiegenheitspflicht von Mediatoren schützt und die Vollstreckbarkeit von in einer Mediation geschlossenen Vereinbarungen erleichtert. Zudem wurden bestimmte Mindestanforderungen an Mediatoren gesetzlich geregelt. Des Weiteren wurden wissenschaftlich begleitete Modellprojekte an den Gerichten ermöglicht, um festzustellen, ob und in welchem Umfang es bei der Durchführung einer mit staatlicher Unterstützung geförderten außergerichtlichen Mediation in Familiensachen Einspareffekte im Bereich der Prozesskostenhilfe gibt. Schließlich wurde die Möglichkeit einer Verweisung aus dem gerichtlichen Verfahren in die Mediation oder in ein anderes Verfahren der außergerichtlichen Konfliktbeilegung erweitert und die gerichtsinterne Mediation in der Zivilprozessordnung, dem Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit, dem Arbeitsgerichtsgesetz, der Verwaltungsgerichtsordnung, dem Sozialgerichtsgesetz sowie dem Patentgesetz und dem Markengesetz ausdrücklich auf eine rechtliche Grundlage gestellt. Nach ersten praktischen Erfahrungen mit diesem Gesetz wird das neue Mediationsreglement bereits als großer Erfolg gewertet.

7 Vergleich der Justizreformen in Deutschland und Südafrika

(1) Vergleicht man die beiden Reformen des Gerichtswesens in Deutschland und in Südafrika, so stößt man auf zahlreiche Unterschiede, aber auch auf überraschende

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27 Verkündet als Artikel 1 des „Gesetzes zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung" vom 21.7.2012 (Bundesgesetzblatt [Federal Gazette] I S. 1577).

28 In Südafrika haben gerichtliche und außergerichtliche Mediationsverfahren (letztere können vom Gericht sogar angeordnet werden) vor allem in Familiensachen eine sehr viel längere und im Justizsystem tiefer verankerte Tradition, die bis in die frühen achtziger Jahre zurückreicht. Es gibt eine 'South African Association of Mediators (SAAM)' sowie ein 'Mediation Training Institute (mit)'. Die Regeln für die unteren Instanzen (magistrates' courts) sind erst kürzlich geändert und reformiert worden (cf. Magistrates' Courts [Civil] Rules [2013], s 72 sq.; Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa [2014]).

Gemeinsamkeiten. Besonders augenfällig sind die Verfahren und Methoden der Beteiligung der Öffentlichkeit. In Südafrika sind die verschiedenen Vorschläge des Justizministeriums über lange Jahre hinweg breit und ausgiebig debattiert worden. An diesen Diskussionen war ein Großteil der fachnahen Zivilgesellschaft beteiligt. Wie du Plessis's Beispiel zeigt, ist auch die Wissenschaft einbezogen worden. Dagegen wurde in Deutschland nur die Fachöffentlichkeit im engeren Sinne, genauer die juristischen Berufsverbände auf Bundesebene, über einen relativ kurzen Zeitraum hinweg um ihre Stellungnahmen gebeten. Der Transparenz des gesamten Reformprozesses in Südafrika stand in Deutschland ein auf Experten und Interessengruppen beschränktes Spektrum von Meinungsführern gegenüber.

Ein weiterer Unterschied besteht darin, dass in Südafrika die Justizreform zu einer stärkeren Zentralisierung von Gerichtsfunktionen und zu einer personellen Hierarchisierung geführt hat. Der Chief Justice des Verfassungsgerichts wird sogar von Verfassungs wegen als Oberhaupt des gesamten Gerichtswesens betrachtet. Das Verfassungsgericht selbst wird zum höchsten Gericht (apex court) erklärt. Dagegen blieb die Stellung des Bundesverfassungsgerichts in Deutschland unangetastet. Sein Präsident nimmt zwar nach dem Bundespräsidenten, dem Bundestagspräsidenten, dem Bundesratspräsidenten und dem Bundeskanzler die fünfte Position in der protokollarischen Rangfolge ein; er würde aber niemals eine Art „Vorgesetztenrolle" spielen können oder wollen. Sogar die Bemühungen um eine Stärkung der Führungsverantwortung an der Spitze der Gerichte verliefen im Sande. Auch käme niemand auf die Idee, das Bundesverfassungsgericht als höchstes Gericht anzusehen. Es ist eines von fünf Bundesgerichten, die sich auf gleicher Augenhöhe befinden, und hat, wenn über Urteilsverfassungsbeschwerden zu entscheiden war, immer betont, dass es keine „Superrevisionsinstanz" sei wodurch es sich vom US-amerikanischen Supreme Court strukturell unterscheidet.

Schließlich wäre auch die Bildung eines einheitlichen „High Court" mit Filialen in allen Provinzen bzw. Ländern nicht möglich. Eine solche institutionelle Konzentration von Obergerichten in einem einzigen Spruchkörper würde in Deutschland schon an dessen föderaler Gliederung scheitern. Nach dem Grundgesetz ist die Ausübung der rechtsprechenden Gewalt in erster Linie Sache der Länder. Sie sind auch für die Einrichtung von Oberlandesgerichten (OLG, vergleichbar den High Courts) und die Abgrenzung ihrer Bezirke zuständig. Gegenwärtig existieren insgesamt 24 OLG (in jedem Land mindestens eines, in Baden-Württemberg und Rheinland-Pfalz zwei und in Bayern, Niedersachsen und Nordrhein-Westfalen drei), die allesamt stolz auf ihre Judikatur sind und ein hohes Maß an „corporate identity" entwickelt haben. Der kürzlich in Rheinland-Pfalz unternommene Versuch, das zweite OLG in Zweibrücken zu schließen, scheiterte am Widerstand von Richtern, Anwälten und Kommunalpolitikern.

(2) Zu den geradezu verblüffenden Gemeinsamkeiten beider Reformen gehört der im Ergebnis gescheiterte Versuch Fachgerichte zusammenzufassen und/oder in bestehende Gerichte einzugliedern. In Südafrika ging es um die Auflösung von Fachgerichten der Arbeits-, Wahl-, Kartellberufungs- und Landanspruchsgerichten und ihre Eingliederung in die High Courts. In Deutschland war es nicht möglich, die drei öffentlich-rechtlichen Gerichtsbarkeiten in Gestalt der Verwaltungs-, Sozial- und Finanzgerichte zu einem einheitlichen Spruchkörper zusammenzufügen. Aus diesen Beispielen lässt sich der Schluss ziehen, dass eine Fachgerichtsbarkeit, wenn sie erst einmal errichtet ist, spezifische Umstände hervorbringt, die sie unentbehrlich und unangreifbar werden lassen. Dazu gehört zuallererst die Sonderrolle, die sie im Justizwesen spielt und die ihr den Ruf der Exklusivität einträgt. Ihr Personal verfügt über Spezialkenntnisse auf einem bestimmten Rechtsgebiet und damit auch über Herrschaftswissen. In ihrem Umfeld

entsteht ein Kreis von Experten, sog. Fachanwälte oder Gutachter, die eine Art forensische Fachbruderschaft bilden. Hinzu kommen zivilgesellschaftliche Gruppen und Organisationen, die ein großes Interesse an ihrer Mission und an ihrem eigenen Überleben haben. Man kennt sich, ist aufeinander eingestellt und erfreut sich der Vorzüge einer Art „Insel-Daseins" – eine kleine, feine Welt inmitten der oft als monströs wahrgenommenen rechtsprechenden Gewalt. Derartige Verflechtungen erzeugen zu viele Akteure mit Veto-Positionen und sind deshalb kaum mehr aufzulösen. Wenn man es dennoch versucht, ist der Misserfolg gleichsam schon vorprogrammiert.

Eine weitere Gemeinsamkeit beider Justizreformen besteht darin, dass trotz entsprechender Versuch am Rechtsmittelsystem nichts geändert worden ist. Sowohl in Südafrika als auch in Deutschland hat man sich letztlich gescheut, den Instanzenzug auf Kosten der Arbeitsbelastung von Richtern der Eingangsgerichte und des Verlusts von Kontrollmöglichkeiten für Rechtsuchende zu verkürzen. In beiden Ländern ist der dreistufige Rechtsweg für Zivil- und Strafsachen mit zwei Tatsacheninstanzen unverändert erhalten geblieben: Eingangsgerichte sind die Amts- oder Landgerichte (Deutschland) oder die 'Magistrates' Courts' (Südafrika). Gegen ihre Entscheidungen ist Berufung (appeal) zum Land- bzw. Oberlandesgericht (Deutschland) oder zum 'High Court' (Südafrika) zulässig. Deren Entscheidungen können wiederum im Wege der Revision (final appeal) zum Oberlandesgericht bzw. Bundesgerichtshof (Deutschland) oder zum 'Supreme Court of Appeal' (Südafrika) angefochten werden. Der Weg durch diese Instanzen ist zwar oft recht mühsam und beschwerlich, dient aber dem wichtigsten Ziel aller Rechtspflege in Südafrika ebenso wie in Deutschland: der Herstellung von Rechtsklarheit und Rechtsfrieden.

8 Schlussbemerkung

Der Vergleich zweier Justizreformen in Südafrika und in Deutschland, die fast zur selben Zeit ins Werk gesetzt worden sind, beweist eindrucksvoll, über welch hohes Maß an Selbstheilungskräften das Justizwesen beider Länder verfügt. Vorschläge, die zu einem Systembruch führen würden, haben keine Chance. Deshalb erscheint es auch unangebracht, gegen jede Neuerung sofort das Geschütz des Verfassungsrechts in Stellung zu bringen und das Argumentationsarsenal mit Warnungen wie „Gefahr für die Unabhängigkeit der Justiz" oder „Abbau des Rechtsschutzes" aufzufüllen. Beides trifft weder in Südafrika noch in Deutschland auf die Bemühungen um eine Modernisierung des Gerichtswesens zu. Deshalb gibt es für die äußerst moderate, behutsame und verhalten positive Einschätzung der südafrikanischen Justizreform durch du Plessis gute und überzeugende Gründe. Sie spiegelten sich auch in den Gesprächen mit unseren Gästen aus dem „Portfolio Committee for Justice and Constitutional Development" wider, die über ein in der heimischen Öffentlichkeit extrem kontrovers behandeltes Thema sowohl mit uns als auch untereinander überraschend sachbezogen, unaufgeregt und professionell diskutierten. Unterschiede in der politischen Bewertung oder Zielsetzung der Reformbestrebungen nach der jeweiligen Partei- oder Fraktionszugehörigkeit waren kaum erkennbar.

Die Impulsreferate unserer Experten und die anschließenden Nachfragen aus dem Kreis der Teilnehmer erreichten ein hohes wissenschaftliches Niveau und ließen, als manche Ähnlichkeiten und Parallelitäten zwischen südafrikanischen und hiesigen Problemen mit der Justizorganisation sichtbar wurden, klar erkennen, wie gut die Gäste bereits mit der deutschen Gerichtsverfassung vertraut waren und welch großer Anstrengungen es noch bedurfte, die allgemein für notwendig gehaltenen Reformschritte in Südafrika durch- und umzusetzen. Daran haben viele mitgewirkt, nicht zuletzt auch Interpretationstheoretiker wie du Plessis, die mit ihrem spezifischen Ansatz einer ganzheitlichen Verfassungsauslegung überhaupt erst den Boden für politische Kompromisse bereitet haben.

Insgesamt hat Südafrika mit seiner Justizreform von 2013 entgegen dem ersten Anschein einen erheblichen Schritt in Richtung auf eine Modernisierung und Rationalisierung seines Gerichtswesens getan, dessen Hauptbedeutung aus meiner Sicht in der Erhaltung und Stärkung eines eigenständigen, unabhängigen Verfassungsgerichts besteht.

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Literalism, travaux préparatoires *and purposive construction as interpretation incentives in international law*

Johan van der Vyver

1 Introduction

In the early 1970s, when I was Dean of the faculty of law, I approached the Rector of the Potchefstroom University for Christian Higher Education, Prof Hennie Bingle, with the request to offer an appointment in the faculty of law to a brilliant student in his final year of study. I informed Prof Bingle of the background and excellence of the student, upon which he asked: Do you have a vacancy for an appointment? I said: No, but for a person such as Lourens du Plessis one creates a vacancy. Prof Bingle responded instantly: Offer him an appointment; and as everyone who was on the faculty or staff knew, Prof Bingle's word was law!

And so Du Plessis came to be appointed as a lecturer in the faculty of law assigned to the department of legal philosophy of which I was the head. Our department included the teaching of interpretation of statutes. This branch of the law was of no interest to me personally, and so I dumped it on my junior colleague – not knowing at the time that Du Plessis would in the long run transcend the recital to his students of a set of empirical legal rules of interpretation in order to penetrate basic principles that ought to prevail when attributing a meaning to the words selected by a legislature to express its intent. He came to reject a literalist interpretation of statutory texts, which 'in its crude and unqualified form' would have it 'that 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' and assumes 'that statutory language as it stands, on the condition that it is clear and unambiguous, is a reliable expression of legislative intent'.[1] Instead he preferred a teleological approach that would above all ensure that 'the most beneficial interpretation' will prevail '*regardless of considerations of legislative intent and language*',[2] one that 'endeavours to realize the "scheme of values" that informs the legal order'.[3] Mindful of the fact that the legal idea entails the principle of justice to be the primary guideline of the law, and that purpose of legislation could be repressive and discriminatory, Du Plessis distinguished teleological from purposive interpretation, describing teleological interpretation as 'an enriched version of purposive interpretation' that 'moves from the effectual acknowledgement of the purpose of a particular provision to the realization and fulfillment of values and purposes key to the legal and constitutional order as a whole'.[4] In this tribute to my former student and colleague, and a life-long friend, I propose to highlight the prevalence of the typical Du Plessis approach in contemporary international law.

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1 Du Plessis *Re-Interpretation of Statutes* 93.
2 *Ibid* 162.
3 *Ibid* 247.
4 Du Plessis 'Interpretation' par 32.56.

2 Literalism versus purposive interpretation in international law

Recently, a Trial Chamber of the International Criminal Court (ICC) was called upon to interpret Article 63(1) of the Statute of the International Criminal Court (ICC Statute) which provides: 'The accused shall be present during the trial'.[5] The Trial Chamber decided that this provision does not preclude permission of the Court for an accused not to be continuously present during trial.[6]

The interpretation of the ICC Statute provision was prompted by the indictment of Mr Uhuru Muigai Kenyatta and Mr William Samoei Ruto to stand trial in the ICC for crimes against humanity that were committed during the 2007–2008 post-election violence in Kenya.[7] Following the elections of 4 March 2013, Mr Kenyatta became the President of Kenya and Mr Ruto the Deputy President. It might be noted for the record that prior to the elections, an application was brought in the High Court of Kenya at Nairobi to contest the eligibility of the two gentlemen for public office in view of the fact that they had been indicted to stand trial on serious charges in the ICC.[8] The Court declined to make such a ruling, because '[d]espite the seriousness of the charges… [Mr Kenyatta and Mr Ruto] are presumed innocent until the contrary is proved'.[9]

Subsequent to the elections, Mr Kenyatta and Mr Ruto complied with summonses to appear before the ICC. However, their defense teams filed separate motions for them not to be present in court at all times during trial so that they could remain in a position to perform their functions, as far as possible, as President and Deputy President (respectively) of Kenya.[10] The Prosecutor opposed the applications, based in part on the above provision of Article 63(1) of the ICC Statute and on the rule of statutory interpretation that words must be given their generally accepted and plain meaning.

The Trial Chamber of the ICC followed the same line of reasoning as Du Plessis that literalism is never the final answer to the rules of statutory interpretation.[11] It noted that the

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5 Statute of the International Criminal Court, art 63(1), UN Doc A/CONF 183/9 (17 July 1998), (hereafter 'ICC Statute').

6 *Prosecutor v Uhuru Muigai Kenyatta* (*Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial*) Case No ICC–01/09–02/11–830 (18 Oct 2013); and see also *Prosecutor v William Samoei Ruto & Joshua Arap Sang* (*Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial*) Case No ICC–01/09–01/11–777 (18 June 2013).

7 Charges against Mr Kenyatta were confirmed by the Pre-Trial Chamber II on 23 January 2012. *Prosecutor v Francis Kirimi Muthuara, Uhuru Muigai Kenyatta & Mohammed Hussein Ali* (*Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*) Case No ICC–01/09–02/11–382-Red (23 Jan 2012). Charges against Mr Ruto were confirmed by the Pre-Trial Chamber II on 23 January 2012. *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang* (*Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*) Case No ICC–01/09–01/11–373 (23 Jan 2012).

8 *International Centre for Policy and Conflict & 5 Others v The Hon Attorney-General & 4 Others*, Petition 552 of 2012 (15 Feb 2013), available at http://kenyalaw.org/CaseSearch/view_preview1.php?link=119030658917561929345 59.

9 *Ibid* par 168(d).

10 *Prosecutor v Francis Kirimi Muthuara & Uhuru Muigai Kenyatta* (*Defence Request for Mr Kenyatta to be Present during Trial via Video Link*) Case No ICC–01/09–02/11–667 (28 Feb 2013); *Prosecutor v William Samoei Ruto & Joshua Arap Sang* (*Joint Defence Submissions on Legal Basis for the Accused's Presence at Trial via Video Link*) Case No ICC–01/09–02/11–629 (28 Feb 2013).

11 Du Plessis *Re-Interpretation of Statutes* 93–94.

rule of statutory interpretation which requires words to be given their generally accepted and plain meaning only denotes 'a starting point, a *prima facie* guide',[12] and that the Trial Chamber must in the final analysis: 'be free to construe the existing text in the best way it sees that achieves the ends of fairness, reasonableness, good faith and justice in the case'.[13]

In discarding the incontestable sanctity of literalism as a norm of statutory interpretation, the Trial Chamber in the Kenyatta case referred to a passage in the celebrated work of Lord McNair on *The Law of Treaties*,[14] where he questioned the unqualified application of the proposition that words in a statute must always be given their 'general and ordinary meaning': '[I]f it means that tribunals must stop short of applying the term in its primary and literal sense and permit no inquiry as to anything further, it is submitted that the doctrine is wrong'.[15] In laboring the point, Lord McNair referred to a case where a man with wife and children made a will '*of conspicuous brevity*' proclaiming succinctly: 'All for mother'. His widow successfully claimed the estate based on evidence that the deceased always referred to his wife as 'mother'.[16]

I was reminded in this regard of a judgment of the South African Appellate Division of the Supreme Court (as it was then called) in the 1920s that decided that black African women were not 'persons' within the meaning of a certain statutory provision.[17] At first glance this might sound like profound gender discrimination. However, analysis will show that the decision of the Court was founded on an interpretation of the statute concerned *in favorum libertatis*. Under statutory provisions of yesteryear, black African men (not women) over the age of 14 years were required to carry on their person a reference book (commonly referred to as a 'pass') that contained authorization for them to be in the streets of an urban area between 9 pm and 4 am. It was in due course presumably decided to make the night pass laws also applicable to black African women, and 'every person' was consequently substituted for 'every male person above the age of 14 years' in the concerned legislation. Based on this amended law, a black African woman was convicted in the Magistrates' Court of Pretoria for having been found in the streets of the city after 9 pm without a pass. She noted an appeal, maintaining that the change of wording was not intended to extend the night pass law to African women. The matter eventually came before the Appellate Division of the Supreme Court, which conceded by a 3 to 2 majority the appellant's submission. Chief Justice Innes decided: 'I am satisfied that if the Legislature had intended to impose this supplementary restriction upon women who had previously been subject to no pass restrictions at all, special and explicit language would have been used for the purpose'.[18]

It might be noted for the record that Mr Ruto and his co-accused, former broadcaster Joshua Arap Sang, surrendered to the court for trial, which was scheduled to commence on 10 September 2013. In the meantime, the defense team of Mr Ruto submitted a formal

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12 *Prosecutor v Uhuru Muigai Kenyatta* (*Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial*) par 68 Case No ICC–01/09–02/11–830 (18 Oct 2013) (citing McNair *The Law of Treaties* 366).

13 *Prosecutor v Uhuru Muigai Kenyatta* (*Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial*) par 77 Case No ICC–01/09–02/11–830 (18 Oct 2013).

14 *Ibid* par 69.

15 McNair *The Law of Treaties* 367.

16 *Ibid*.

17 *R v Detody* 1926 AD 198.

18 *Ibid* 211; and see also *ibid* 221 (per Solomon J).

application for the accused to be excused from continuous presence at trial in order to enable him to perform his functions as Deputy President of Kenya, and on 18 June 2013 Trial Chamber V(A), by majority vote, decided that Mr Ruto will be conditionally excused from continuous presence at trial.[19] Leave to appeal was granted to the prosecution on 18 July 2013,[20] and on 20 August 2013, the Appeals Chamber granted suspensive effect to the latter decision in the event of the Appeals Chamber not being able to resolve the appeal before Mr Ruto went on trial on 10 September 2013;[21] that is to say, permission granted to Mr Ruto not to be continuously present at trial was suspended pending the outcome of an appeal by the prosecution against the decision of 18 June 2013. The trial of Mr Ruto and Arab Sang indeed commenced on 10 September 2013. Following the terrorist attack of 21 September 2013 in the Westgate shopping mall in Nairobi, Kenya, the Trial Chamber adjourned the proceedings so that Mr Ruto could attend to his duties as Deputy Head of State in his home country.[22] Since the decision authorizing Mr Ruto not to be continuously present at trial was suspended pending the outcome of the prosecutor's appeal against that ruling, the case did not go on during his absence. The trial resumed on 2 October 2013 following Mr Ruto's return to The Hague.

The trial of President Kenyatta was scheduled to commence on 7 November 2013. On 23 September 2013 his defense team filed a request for the accused to be conditionally excused from continuous presence at trial.[23] On 18 October 2013, Trial Chamber V(B) granted the request in part only. The Trial Chamber ordered that Mr Kenyatta must be physically present in the courtroom during certain critical stages of the proceedings, for example when opening and closing statements are made, when judgment is delivered and, if applicable, during the sentencing hearing, and when so directed by the Trial Chamber.[24]

The Assembly of States Parties, the governing body of the ICC, did subsequently decide to add to the Rules of Procedure and Evidence a provision that authorizes an accused subject to a summons to appear to submit a written request to the Trial Chamber 'to be allowed to be present through the use of video technology during parts of his or her trial',[25] and one authorizing an accused subject to a summons to appear to 'submit a written request to the Trial Chamber to be excused and to be represented by counsel only during part or parts of his or her trial'.[26] Perhaps most significant is the new Rule 134*quater*, which provides as follows:

> An accused subject to a summons to appear who is mandated to fulfill extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused and

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19 *Prosecutor v William Samoei Ruto & Joshua Arap Sang* (*Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial*) Case No ICC–01/09–01/11–777 (18 June 2013).

20 *Prosecutor v William Samoei Ruto & Joshua Arap Sang* (*Decision on Prosecution's Request for Excusal from Continuous Presence at Trial*) Case No ICC–01/09–01/11–817 (18 July 2013).

21 *Prosecutor v William Samoei Ruto & Joshua Arap Sang* (*Decision on Request for Suspensive Effect*) Case No ICC–01/09–01/11–862 (20 Aug 2013).

22 See Case No ICC–01/09–01/11–T–35–ENG and ICC–01/09–01/11–T–37–Red–ENG.

23 *Prosecutor v Uhuru Muigai Kanyatta* (*Defence Request for Conditional Excusal from Continuous Presence at Trial*) Case No ICC–01/09–02/11–809 (23 Sept 2013).

24 *Prosecutor v Uhuru Muigai Kanyatta* (*Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial*) Case No ICC–01/09–02/11–830 (18 Oct 2013).

25 Rules of Procedure and Evidence Rule 134*bis*, inserted by Resolution ICC–ASP/12/Res 7 (27 Nov 2013).

26 Rules of Procedure and Evidence Rule 134*ter*, inserted by Resolution ICC–ASP/12/Res 7 (27 Nov 2013).

to be represented by counsel only; the request must specify that the accused explicitly waives the right to be present at the trial.[27]

The decision of the Assembly of States Parties to amend the Rules of Procedure and Evidence so as to afford to the court a discretion to excuse an accused that must fulfill extraordinary public duties at the highest national level from being present at trial may seem to conform with a literalist interpretation of Article 63(1) of the ICC Statute; but that is indeed not the case. The ICC Statute emphatically provides that the Rules of Procedure and Evidence and amendments thereto 'shall be consistent with this Statute',[28] and that '[i]n the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail'.[29] The amendments to the Rules of Procedure and Evidence were therefore based on the assumption that Article 63(1) must not be taken by its word. If literalism were to prevail, the above amendments of the Rules of Procedure and Evidence would have been null and void!

In the end the trial against Mr. Kenyatta could not proceed, presumably because of the intimidation of witnesses who declined to testify against him, and on 3 December 2014 the Trial Chamber declined further adjournment of his trial in consequence of which the Prosecutor had no option but to withdraw the charges against him.[30]

3 Rules of construction applying to the interpretation of international treaties

The interpretation of treaties is regulated by Section 3 (Articles 31, 32 and 33) of the Vienna Convention on the Law of Treaties.[31] It proceeds on the assumption that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty',[32] but qualifies the literalist point of departure in important respects. The terms of the treaty must be interpreted 'in their context and in the light of its object and purpose'.[33] The context of the treaty is furthermore not confined to the text thereof, which for interpretation purposes includes the preamble and annexes attached to the treaty, but must also be established in view of 'any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty',[34] as well as 'any instrument which was made by one or more of the parties in connection with the conclusion of the treaty and acceptance by the other parties as an instrument related to the treaty'.[35] Besides the 'context' thus defined, the interpreter must also take into account 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions';[36] 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation';[37] and 'any relevant rules of international law applicable in the relations between the

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27 Rules of Procedure and Evidence Rule 134qua*ter*, inserted by Resolution ICC–ASP/12/Res 7 (27 Nov 2013).
28 ICC Statute art 51(4).
29 *Ibid* art 51(5).
30 See Statement of the prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr Uhuru Muigai Kenyatta, ICC Press Release of 5–12–2014.
31 Vienna Convention on the Law of Treaties arts 31–33, UN Doc A/CONF 39/27 (23 May 1969).
32 *Ibid* art 31(1).
33 *Ibid*.
34 *Ibid* art 31(2)(a).
35 *Ibid* art 31(2)(b).
36 *Ibid* art 31(3)(a).
37 *Ibid* art 31(3)(b).

parties'.[38] A special meaning may furthermore be given to a term in the treaty 'if it is established that the parties so intended'.[39]

One need not read between the lines to see that the Convention affords primary importance to the intention of the parties and that its drafters were sensitive to the fact that their intention is not necessarily and exclusively reflected in the text of the instrument to be interpreted. A systematic-teleological construction of certain treaties is thus preferable to a literalist interpretation. The International Court of Justice (ICJ) has decided accordingly that the rule requiring words used in a legal instrument to be given their 'natural and ordinary' meaning is not an absolute norm: 'Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it'.[40] In the Kenyatta case, the Trial Chamber of the ICC stated categorically that 'any interpretation of the treaty that could defeat its object and purpose must be rejected as a correct interpretation of the treaty'.[41]

The Vienna Convention on the Law of Treaties also listed as a 'Supplementary Means of Interpretation', 'the preparatory work of the treaty and the circumstances of its conclusion'.[42] However, reference to the *travaux préparatoires* is only permissible 'to confirm the meaning resulting from the application' of the primary rules of interpretation stipulated in Article 31 and which are based on the requirements of (a) interpretation 'in good faith'; (b) upholding 'the ordinary meaning to be given to the terms of the treaty in their context'; and (c) affording prominence to the 'object and purpose' of the treaty. It can be considered more in particular if application of the primary rules of interpretation stipulated in Article 31 would leave the meaning attributed to the words of the treaty 'ambiguous or obscure',[43] or would 'lead to a result which is manifestly absurd or unreasonable'.[44]

In the Kenyatta case, the Trial Chamber of the ICC emphasized accordingly that '[i]nternational law neither requires nor recommends consultation of the *travaux préparatoires* in treaty interpretation';[45] it 'has not seen fit to *require* consultation of the *travaux préparatoires* for any reason in the task of treaty interpretation'.[46] It has furthermore been pointed out that 'resort to *travaux préparatoires* may be inappropriate in the interpretation of treaties, like the Rome Statute, which sets up an international organization'.[47] Michael Akehurst explained why:

> Treaties setting up international organizations are intended to last longer than most other types of treaty, and recourse to *travaux préparatoires* would not always be appropriate in such

38 *Ibid* art 31(3)(c).
39 *Ibid* art 31(4).
40 *South West Africa Cases* (*Ethiopia v South Africa, Liberia v South Africa*) *Preliminary Objections* 1962 ICJ 319, 336.
41 *Prosecutor v Uhuru Muigai Kanyatta* (*Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial*) par 90 Case No ICC–01/09–02/11–830 (18 Oct 2013).
42 Vienna Convention on the Law of Treaties art 32.
43 *Ibid* art 32(a).
44 *Ibid* art 32(b).
45 *Prosecutor v Uhuru Muigai Kanyatta* (*Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial*) par 76 Case No ICC–01/09–02/11–830 (18 Oct 2013).
46 *Ibid* par 77.
47 *Ibid* par 78.

> circumstances, because it would mean looking at the (possibly distant) past, instead of looking at the present and future...[48]

In the Kenyatta case, the Trial Chamber noted in support of this assessment that 'the Rome Statute is a living legal document' and that the court 'must be free to construe the existing text in the best way it sees that achieves the ends of fairness, reasonableness, good faith and justice in the case' and 'must be free to undertake that responsibility, unshackled from the need to make composite sense of the inchoate unused materials and other shavings (in the manner of possibly unresolved disputes, partial texts, competing texts, revised texts, disparate views, and so on, in the drafting committee) collected from the work floor of those who had done their job in drafting the text as good they could in their own time and had since left the scene'.[49] It also emphasized that 'the intentions of the States Parties at the time of conclusion of a treaty may have evolved over time'.[50] To this I would add that many provisions in the ICC Statute were negotiated in informal discussions, under constraints of confidentiality, and behind closed doors, and there are consequently no official records of such negotiations to be found on file. This includes for example, deliberations between the Caucus for Gender Justice and the Holy See that culminated in the definition of 'gender' in the ICC Statute and the distinction made between 'forced' and 'enforced' pregnancy. Those of us who participated in the Rome Conference know that the provisions in question were carefully designed, at the insistence of the Holy See, to exclude the protection of gays and lesbians and so as not to penalize the prohibition of abortions (respectively).[51]

Du Plessis pointed out along similar lines that 'genetic interpretation [ie focusing "on the history on the wording of the text"] can be of limited value only',[52] and must be applied '(if at all)… with circumspection'.[53] I would caution, though, against altogether discarding the *travaux préparatoires*. A single example will suffice to prove my point.

4 Article 16 of the ICC Statute

The United States of America participated in the proceedings that culminated in the adoption of the ICC Statute for the primary purpose of ensuring that American nationals will not be subject to the jurisdiction of a permanent international criminal court, basing its position on what came to be known as American exceptionalism. As explained on many occasions by Ambassador at Large for War Crimes Issues and leader of the American delegation at the Rome Conference, David Scheffer, the United States, being the only remaining superpower in the world, has become the major/only peace-keeping force of our times;[54] and

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48 Malanczuk *Akehurst's Modern Introduction to International Law* 366.

49 *Prosecutor v Uhuru Muigai Kanyatta* (*Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial*) par 77 Case No ICC–01/09–02/11–830 (18 Oct 2013).

50 *Ibid* par 78.

51 See Van der Vyver 'Contribution of the Holy See in the refinement of the Rome Statute of the International Criminal Court' 45–72.

52 Du Plessis *Re-Interpretation of Statutes* 267.

53 *Ibid* 268.

54 See also Wedgwood 'Improve the International Criminal Court' 66; Wedgwood 'The International Criminal Court: an American view' 101–02; Wedgwood 'The United States and the International Criminal Court: Achieving a wider consensus through the "Ithaca Package"' 537–38; Zwanenburg 'The statute of the International Criminal Court: Peacekeeping under fire?' 126–27; Zwanenburg 'The statute of the International Criminal Court and the United States: Peace without justice?' 6; Arsanjani 'Reflections on the jurisdiction and trigger mechanism of the International Criminal Court' 59–60; David 'Grotius repudiated: The American objections to

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American troops engaged in peace-keeping efforts abroad do not want to run the risk of prosecutions in an international criminal tribunal for acts committed in the interest of peace and security on earth. In an address at the University of Oklahoma College of Law delivered on 24 February 1998, David Scheffer thus explained that –

> no other country shoulders the burden of international security as does the United States. In the post-Cold War world, the US military is called upon to defend our national security from a wide range of threats; to carry out mandates from the Security Council; to fulfill our commitments to NATO; to help defend our allies and friends; to achieve humanitarian objectives, including the protection of human rights; to combat international terrorism; to rescue Americans and others in danger; and to prevent the proliferation or use of weapons of mass destruction. Many other governments participate in our military alliances and a larger number of governments participate in the UN and other multinational peacekeeping operations, such as SFOR in Bosnia. It is in our collective interests that the personnel of our militaries and civilian commands be able to fulfill their many legitimate responsibilities without unjustified exposure to criminal legal proceedings. The permanent court must not be manipulated for political purposes to handcuff governments taking risks to promote international peace and security and to save human lives. Otherwise, the permanent court would undermine the efforts to confront genocide, crimes against humanity, and war crimes.[55]

It was upon this basis only that the United States – in the words of Ambassador Scheffer – 'remains strongly committed to the achievement of international justice'.[56] Justice Richard Goldstone, judge in the Constitutional Court of South Africa (now retired) and former Prosecutor in the International Criminal Tribunals for the Former Yugoslavia and International Tribunal for Rwanda, in a press interview at the Rome Conference gave short shrift to this reasoning: 'I really have difficulty understanding that policy', he said: 'What the US is saying is, "In order to be peacekeepers… we have to commit war crimes". That's what the policy boils down to.'[57]

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the International Criminal Court and the commitment to international law' 357; Williams 'Preconditions to the exercise of jurisdiction' 336; Weschler 'Exceptional cases in Rome: The United States and the struggle for an ICC' 91–92; Melanczuk 'The International Criminal Court and landmines: What are the consequences of leaving the US behind?' 80–81; Bergsmo 'Occasional remarks on certain state concerns about the jurisdictional reach of the International Criminal Court, and their possible implications for the relationship between the court and the Security Council' 102–103; Washburn 'The International Criminal Court arrives – the US position: Status and prospects' 881–882; Kaul 'Preconditions to the exercise of jurisdiction' 601; McGoldrick 'Political and legal responses to the ICC' 402; Smith 'Moral hazards and humanitarian law: The International Criminal Court and the limits of legalism' 187–188.

55 Scheffer 'Address at Univ of Oklahoma College of Law'; and see also Scheffer 'US policy on international criminal tribunals' 1399; Scheffer 'The United States and the International Criminal Court' 18–19; and see also Lee 'Creating an International Criminal Court – of procedures and promises' 148.

56 Scheffer 'The United States and the International Criminal Court' 22.

57 'Goldstone: US stance contradictory'; and see also Broomhall *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* 182 (noting that the United States opposes the rule of law and the principle of accountability); Zwanenburg 'The Statute of the International Criminal Court: Peacekeeping under fire?' 142; Zwanenburg 'The statute of the International Criminal Court and the United States: Peace without justice?' 7; Melanczuk 'The International Criminal Court and landmines: what are the consequences of leaving the US behind?' 82.

But be that as it might, the United States in the early stages of the deliberation sought to achieve American exceptionalism by proposing that all prosecutions in the ICC be approved by the Security Council of the United Nations – so that the United States would be in a position to veto the prosecution of American nationals. In laboring the point, Abassador Scheffer explained that investigations by and prosecutions in the ICC deriving from situations that constitute a threat to the peace, a breach of the peace, or an act of aggression could create tensions between the ICC and the Security Council if the Security Council, pursuant to its powers under Chapter VII of the UN Charter, is seized with the same situation being investigated by the ICC. Although a vast majority of states rejected the salience of American exceptionalism – basing their stance on the basic principle of criminal justice proclaiming equality before the law and equal protection of the laws – they did concede the potential conflict of interests between the ICC and the Security Council if both institutions were seized with one and the same situation. The matter was finally addressed in Article 16 of the ICC Statute – which in its present form derived from a proposal of the United Kingdom on procedural issues submitted to the Preparatory Committee in its final session before the Rome Conference.[58] Article 16 provides as follows:

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations has requested the Court to that effect; that request may be renewed by the Council under the same conditions.[59]

Regrettably, the wording of Article 16 does not specify that a request of the Security Council to delay an investigation or prosecution for a (renewable) period of 12 months was to be confined to instances where a conflict of interests between the Council and the ICC could emerge in virtue of the fact that both institutions are seized with the same situation – as indeed dictated by its *travaux préparatoires*. This sloppy drafting has been exploited by the Security Council and distorted by the African Union. Let us consider more closely the distortion of Article 16 by the African Union.

5 Prosecution of African heads of state

The indictment of African heads of state to stand trial in the ICC did not find favour with the African Union. When President Omar Hassan Ahmed Al Bashir of Sudan was indicted in 2009 to stand trial in the ICC on serious charges based on crimes against humanity (murder, extermination, rape, torture, and forcible transfer) and war crimes (intentionally directing attacks against the civilian population or individual civilians, and pillage) committed in Darfur,[60] and subsequent charges based on the crime of genocide,[61] the African Union at a meeting held in July 2009 endorsed a decision of the African States Parties to the Rome Statute of the International Criminal Court which proclaimed that 'the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir

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58 Proposal submitted by the United Kingdom UN Doc A/AC249/1998/WG3/DP1 (25 March 1998); and see Bergsmo 'The jurisdictional régime of the International Criminal Court (Part II, Articles 11–19)' 358 note 39.

59 ICC Statute art 16.

60 *Prosecutor v Omar Al Bashir* (*Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir*) Case No ICC–02/05–01/09–3 (4 March 2009).

61 *Prosecutor v Omar Hassan Ahmad Al Bashir* (*Second Warrant of Arrest for Omar Hassan Ahmed Al Bashir*) Case No ICC–02/05–01/09–59 (21 July 2009).

of The Sudan'.[62] The situation in Darfur was referred to the ICC by the Security Council of the United Nations, with one abstention.[63]

On 2 July 2011 the African Union decided in similar vein that the indictment of President Moammar Gaddafi to stand trial in the ICC 'seriously complicates' the AU's efforts to broker a settlement in the Libyan civil war and decided that its 'member states shall not cooperate in the execution of the arrest warrant'.[64] The situation in Libya was referred to the ICC by the Security Council of the United Nation (by unanimous vote) on 26 February 2011,[65] and on 27 June 2011 a Pre-Trial Chamber of the ICC issued a warrant for his arrest to stand trial as an indirect co-perpetrator (the person who gave the orders for crimes to be committed) on charges of murder and persecution as crimes against humanity.[66] Gaddafi was shot and killed on 20 October 2011 by members of the Libyan rebel forces in circumstances that are indicative of his extra-judicial execution.

Since Al Bashir and Gaddafi were sitting heads of state and as such allegedly enjoyed sovereign immunity from prosecution for any criminal offences, States Parties of the ICC – according to the African Union – cannot be required to surrender them for trial in the ICC without the consent of Sudan or Libya (both non-party States).[67] The African Union based its position on Article 98(1) of the ICC Statute, which provides:

> The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for a waiver of the immunity.[68]

However, Article 98(1) does seem to be in conflict with Article 27(2) of the ICC Statute, which provides:

> Immunities and special procedural rules which may attach to official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.[69]

Article 27(2) discards immunities and special procedural rules that may attach to the official capacity of a person indicted to stand trial in the ICC. Article 27(2) is in conformity with the rules of international law that base the principle of sovereign immunity on the sovereignty of states and which accordingly only apply to prosecutions in municipal courts

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62 *Decision of the meeting of African states parties to the Rome Statute of the International Criminal Court (ICC)* par 10 UN Doc Assembly/AU/13(XIII) (3 July 2009).

63 SC Res 1593 (2005) of 31 March 2005 UN Doc S/RES/1593 (2005).

64 *Decision on the implementation of the assembly decision on the International Criminal Court* par 6 Doc EX CL/670 (XIX) (2 July 2011).

65 SC Res 1970 (2011) of 26 Feb 2011 par 4–8.

66 *Situation in the Libyan Arab Jamahiriya* (*Warrant of Arrest for Saif Al-Islam Gaddafi*) Case No ICC–01/11–01/11–3 (27 June 2011).

67 See *Decision on the progress report of the Commission on the Implementation of the Assembly Decision on the International Criminal Court (ICC)* para 6 Assembly/AU/Dec.395 (XVIII) Doc EX CL/710 (XX) (29–30 Jan 2012) (reaffirming that 'Article 98(1) was included in the Rome Statute establishing the ICC out of recognition that the Statute is not capable of removing an immunity which international law grants to the officials of States that are not parties to the Rome Statute').

68 ICC Statute art 98(1).

69 *Ibid* art 27(2).

of law and not to prosecutions in international criminal tribunals.[70] There is thus a discrepancy between the provisions of Article 27(2) and Article 98(1), which – as we have seen – is based on the assumption that a person indicted to stand trial in the ICC may enjoy state or diplomatic immunity under the rules of international law. According to Dino Rinoldi, Article 98(1) 'clashes with the spirit of the Statute and… with Article 27(2)'.[71] The discrepancy is attributable to the fact that Articles 27 and 98 were drafted by different working groups and, probably due to time pressures, were not synchronized by the drafting committee in Rome. The fact that Article 27(2) renders Article 98(1) redundant raises other questions of statutory interpretation, including a presumption against the redundancy of words and phrases in a statutory instrument.[72] But this is a debate for another place and another time.

Important in the present context are efforts of the African Union to invoke Article 16 for the purpose of suspending the prosecution in the ICC of President Al Bashir of Sudan and other African heads of state through Security Council interventions and to amend that provision so as to make it more amenable for future use by Africa. As noted above, Article 16 was inserted in the ICC Statute solely as a mechanism to avoid a conflict of interests between the Security Council and the ICC in situations where the Security Council is engaged in efforts under its Chapter VII powers to counteract a threat to the peace, a breach of the peace or an act of aggression and the ICC is conducting an investigation or prosecution arising from the very same situation with which the Security Council is seized. Applying Article 16 in the context of Al Bashir and other heads of state was therefore not justified by its original rationale. The situation in Darfur was furthermore referred to the ICC by the Security Council, and it would be highly inappropriate for the Security Council to defer investigations or prosecutions by the ICC in instances where the Security Council itself requested such investigations and possible prosecutions.

To add injury to insult, the African Union proposed an amendment of Article 16 for consideration by the Review Conference of the ICC that was held in Kampala, Uganda on 31 May to 11 June 2010. The proposal of the African Union to amend Article 16 was submitted by the Republic of South Africa, on behalf of the African Union States Parties to the ICC Statute.[73] The proposal was drafted at the African Union's Ministerial Meeting on the Rome

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70 *Democratic Republic of Congo v Belgium* 2002 ICJ 3 par 61 (14 Feb 2002) (noting that an official may be subject to criminal prosecutions in certain international criminal courts, such as the ICC); *Prosecutor v Taylor* 128 ILR 239 par 51 (31 May 2004) (noting that the principle of sovereign immunity 'derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community').

71 Rinoldi and Parisi 'International co-operation and judicial assistance between the International Criminal Court and states parties' 389; and see also Saland 'International criminal law principles' 202 note 5 (observing that there seems to be a contradiction between the two articles, 'at least if "the third State" mentioned in Article 98 is interpreted to include not only a non-party State but also a party to the Rome Statute'); Gaeta 'Official capacity and immunities' 986 (referring to 'a problem of coordination of Article 98(1) and 27(2)').

72 See Du Plessis *Re-Interpretation of Statutes* 190.

73 'African Union States Parties to the Rome Statute' in *Assembly of States Parties to the Rome Statute of the International Criminal Court, Eighth Session, The Hague, 18–26 November 2009* Annex II *Report of the Working Group on the Review Conference* Appendix VI (at 70). The proposal was submitted to the Secretary General of the United Nations in a verbal note dated 18 November 2009. See *Report* [to the Executive Council of the African Union] *of the Commission on the Outcome of the 8th Session of the Assembly of States Parties to the Rome*

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Statute of the International Court held in Addis Ababa, Ethiopia on 6 November 2009,[74] and was endorsed by the African Union at its summit meeting in Addis Ababa of 31 January to 2 February 2010.[75] The proposal, which was clearly informed by negative responses of the African Union to the indictment in March 2009 of President Al Bashir,[76] was introduced by Sudan and other non-party States. It requested two additions to Article 16:

- A State with jurisdiction over a situation before the Court must be granted the competence to request the Security Council to defer investigations or prosecutions under its Article 16 powers; and
- If within a period of six months after it received such a request, the Security Council should fail to take a decision to suspend proceedings in the ICC, the state concerned may then request the General Assembly 'to assume the Security Council's responsibility' to suspend the proceedings as provided for in Article 16 'consistent with Resolution 377(V) of the UN General Assembly'.[77]

And just for the record, Resolution 377(V) is the Uniting for Peace Resolution of 1950, which afforded to the General Assembly the power to assume the responsibilities of the Security Council under Chapter VII of the UN Charter in cases where the Security Council has been immobilized by the veto power of its Permanent Members, and more in particular for the General Assembly to 'consider the matter immediately with a view to making appropriate recommendations to its Members for collective measures, including in the case of a breach of the peace or an act of aggression the use of armed force when necessary, to maintain or restore international peace and security.'[78]

It was decided, though, to confine the agenda of the Review Conference to a limited number of matters and to refer other proposals to a working group to be appointed by the Assembly of States Parties at its next meeting scheduled for December 2010. The proposal of the African Union was therefore not considered in Kampala. At the Review Conference, Malawi, speaking in its capacity as chair of the African Union, nevertheless stated that the indictment of heads of state could jeopardize effective co-operation of the African Union

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Statute of the ICC held at The Hague, Netherlands from 16 to 26 November 2009 Doc EX/CL/568(XVI) Annex 2.

74 *Report of the 2nd Ministerial Meeting on the Rome Statute of the International Criminal Court* Doc Min/ICC/Legal/Rpt(II) par 13 R.3 and Annex A (6 Nov 2009). The matter was referred to the meeting pursuant to a decision taken at the Thirteenth Ordinary Session of the Assembly of the African Union held in Sirte, Lybia on 3 July 2009. *Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC)* Doc Assembly/AU/13 (XIII) (3 July 2009).

75 *Decision on Report of the Second Meeting of States Parties to the Rome Statute of the International Criminal Court* (*ICC*) Doc Assembly/AU/Dec.270(XIV) par 2 (2 Feb 2010).

76 *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court* (*ICC*), par 10, Doc Assembly/AU/13(XIII) (3 July 2009) (deciding that 'the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan').

77 'African Union States Parties to the Rome Statute' in *Assembly of States Parties to the Rome Statute of the International Criminal Court, Eighth Session, The Hague, 18–26 November 2009* Annex II *Report of the Working Group on the Review Conference* Appendix VI (at 70).

78 Uniting for Peace Resolution GA Res 377 (V) (A) of 3 Nov 1950 5 UN GAOR Supp (No 20) at 10 UN Doc A/1775 (1950).

with the ICC and jeopardized its peace efforts in Darfur. It should be noted, though, that peace talks initiated by the African Union with respect to Darfur only commenced after the indictment of President Al Bashir of Sudan.[79] The working group on amendments was established by the Assembly of States Parties at its eighth session in November 2011,[80] and the proposal to amend Article 16 is currently still under consideration.[81]

The African Union proposal for the amendment of Article 16 is flawed in almost every respect. It must again be emphasized that Article 16 was included in the ICC Statute for the sole purpose of addressing possible conflicts of interest between the Security Council and the ICC in instances where both institutions are seized with the same situation. It was clearly not intended to interrupt the prosecution of African heads of state. Besides weight to be attached to the *travaux préparatoires*, a purposive as well as a teleological interpretation of Article 16 within the meaning attributed to those directives of statutory interpretation by Du Plessis, strongly counteracts the adoption of the proposed amendment of Article 16.

Taking Article 16 by its word and ignoring or distorting the genesis of its creation was resorted to by the African Union for all the wrong reasons. Whereas the ICC was created for the purpose of securing 'that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured',[82] the African Union manipulated Article 16 for the exact opposite reason, namely to shield the Sudanese President from prosecution on charges that include acts of genocide, the 'the crime of crimes'.[83] The ICC was founded on what Du Plessis identified as 'the so-called *mischief rule*' that applies where 'the purpose of enacted law is to suppress mischief', in which event a theory of construction depicted by him as 'purposivism' prevails which demands that '[w]here "clear language" and purpose are at odds the latter must prevail'.[84]

6 Concluding observations

Problems attending construction of the ICC Statute were not confined to Article 16 discrepancies. For example, the *mens rea* requirement for a conviction is confined to 'intent and knowledge' on the part of the perpetrator, 'unless otherwise provided'.[85] Drafters of the Elements of Crimes saw fit to 'provide otherwise' by subjecting knowledge of a person charged with enlisting or conscripting children under the age of 15 years into armed forces, or using persons under the age of 15 years to participate actively in hostilities, to

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79 See Méndez 'The importance of justice and security' par 16.

80 *Official records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, eighth session, The Hague, 18–26 November 2011* (ICC–ASP/8/20) vol I, part II, ICC–ASP8/Res.6.

81 *Report of the Working Group on Amendments* par V, ICC–ASP13/31 (7 Dec 2014).

82 ICC Statute Preamble par 4.

83 *Prosecutor v Jean Kambanda* Case No ICTR–97–23–S par 16 (4 Sept 1998); and see also *Prosecutor v George Anderson Nderubumwe Rutaganda* Case No ICTR–96–3–T par 50 (6 Dec 1999); *Eliézer Niyitegeka v The Prosecutor* Case No ICTR–96–14–A par 53 (9 July 2004); Schabas *Genocide in International Law* 9 (proclaiming that in a hierarchy founded on the seriousness of crimes, genocide belongs to 'the apex of the pyramid'); Schabas 'Genocide' 109; Fronza 'Genocide in the Rome Statute' vol 1 105, 116 and 117; Sadat *The International Criminal Court and the Transformation of International Law: Justice for the new Millennium* 141.

84 Du Plessis *Re-Interpretation of Statutes* 96.

85 ICC Statute art 30.

mere negligence on the part of the perpetrator as to the age of the child soldier (the perpetrator knew 'or should have known' that the child soldier was under the age of 15 years).[86] This raises the question whether drafters of the Elements of Crimes were competent 'to provide otherwise'. Those who believe that they could, base their reasoning on Article 21(1)(a) of the ICC Statute that lists the Rules of Procedure and Evidence and the Elements of Crimes, alongside the ICC Statute, as primary sources of law to be applied by the court. Those who maintain that they could not, refer to Article 9(1) of the ICC Statute which confines the Elements of Crimes to merely assisting the court in its interpretation of the definitions of crimes, and Article 9(3) which requires that '[t]he Elements of Crimes and amendments thereto shall be consistent with the Statute'. If the provisions of the ICC Statute proscribing child soldiering only render a perpetrator liable if he knew the child was under the age of 15 (the definitions attending child soldiering do not 'provide otherwise'), then the Elements of Crimes must abide by it. The Pre-Trial Chamber confirming the charges in the Lubanga Case (uncritically) accepted the negligence criterion contained in the Elements of Crimes.[87] The Trial Chamber, by contrast, applied the *mens rea* requirements of Article 30 (intent and knowledge) without reference to the deviation from those requirements in the Elements of Crimes and while tactfully not referring to the position taken by the Pre-Trial Chamber that had confirmed the charges.[88] The Trial Chamber could avoid references to the 'should have known' criterion since it was convinced that Lubanga actually knew the children enlisted, conscripted, and used to participate actively in hostilities were under the age of 15 years.

The Pre-Trial Chamber confirming the charges in the Lubanga case also blew it – from the perspective of both literalism and the demands of *travaux préparatoires* – when it decided that the distinction made in the ICC Statute between 'the national armed forces' and 'armed forces or groups' for purposes of the conscription and enlistment of child soldiers in the context of an international armed conflict and an armed conflict not of an international character (respectively)[89] is of no consequence. It decided that enlistment, conscription or active participation in armed conflict of children under the age of 15 years 'is similar in scope in international and non-international armed conflicts' and that the provisions in the ICC Statute dealing with child soldiers in the context of international armed conflicts and armed conflicts not of an international character, respectively, 'criminalize the same conduct'.[90] The problem emerged from uncertainties as to whether the

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86 Finalized draft text of the Elements of Crimes, Article 8(2)(b)(xxvi) *War crime of using, conscripting or enlisting children* par 3, UN Doc PCNICC/2000/INF/3/Add 2 (6 July 2000); and see Bothe 'War crimes' 416; La Haye 'The elaboration of the Elements of Crimes' 321.

87 *Prosecutor v Thomas Lubanga Dyilo* (*Decision on the confirmation of charges*) Case No ICC–01/04–01/06–803 tEN par 357–59 (29 Jan 2007); and see also *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui* (*Decision on the confirmation of charges*) Case No. ICC–01/04–01/07–717 pars 251–52 (30 Sept 2008).

88 *Prosecutor v Thomas Lubanga Dyilo* (*Judgment pursuant to article 74 of the Statute)* Case No ICC–01/04–01/06–2842 par 1273–59 (14 March 2012).

89 See ICC Statute art 8(2)(b)(xxvi) (prohibiting in the case of international armed conflicts 'Conscripting or enlisting children under the age of fifteen years into the national armed forces') and ICC Statute art 8(2)(e)(vii) (prohibiting in the case of armed conflicts not of an international character, 'Conscripting or enlisting children under the age of fifteen years into armed forces or groups').

90 *Prosecutor v Thomas Lubanga Dyilo* (*Decision on the confirmation of charges*) Case No ICC–01/04–01/06–803 tEN par 204 (29 Jan 2007).

armed conflict in the Democratic Republic of the Congo (DRC) was an armed conflict not of an international character or had been converted into an international armed conflict through the involvement of armed forces of neigbouring States. The Pre-Trial Chamber confirming the charges decided that it was an international armed conflict, and in order to overcome the problem that Lubanga did not conscript or enlist child soldiers into 'national armed forces' – those of a State – decided on 'the basis of basic humanitarian considerations and common sense'[91] that 'the international armed forces' are not limited to armed forces of a State or government.[92] The fact is, though, that 'national' was deliberately inserted into the definition of conscription or enlistment of child soldiers in international armed conflict in response to concerns of several Arab States who feared that prohibiting the conscription or enlistment of persons under the age of 15 years into 'armed forces' might implicate young Palestinians wishing to join the *intifadah* revolt against Israeli occupying forces.[93] Equating 'national armed forces' with 'armed forces or groups' also violates the rule of statutory interpretation proclaiming that a change of wording in a statutory instrument must be presumed to denote a change of meaning.[94] It is finally not in accord with the express provision in the ICC Statute that provides in no uncertain terms:

> The definition of a crime shall be strictly construed and shall not be extended by analogy. In cases of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.[95]

The Trial Chamber in its judgment of 14 March 2012 again avoided the clearly erroneous interpretation by the Pre-Trial Chamber of 'national armed forces' by holding that the armed conflict in the DRC was after all not one of an international character.[96] Lubanga could therefore be convicted of the recruitment and enlistment of child soldiers into the *Force Patriotique pour la Libération du Congo*, which is indeed an 'armed force or group' but not a 'national armed force' of any State or government.

The bottom line is, though, that the ICC regime is based on supreme principles of criminal justice. The procedures to be applied by the ICC represent a commendable combination of the (Anglo-American) adversarial and the (civil-law) inquisitorial systems of criminal procedure, described by one analyst as reflecting 'a truly international convergence',[97] and by another as 'the "melting-pot" of the most adequate and fortunate tendencies of criminal procedure stemming from all families of legal systems'.[98] Theo van Boven noted that 'in many ways the [ICC] Statute is not the product of one predominant legal system and culture but the result of a healthy cross-fertilization of several legal systems and cultures'.[99]

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91 *Ibid* par 284.
92 *Ibid* par 285.
93 Von Hebel and Robinson 'Crimes within the jurisdiction of the court' 118; Schabas *An Introduction to the International Criminal Court* 50.
94 Du Plessis *Re-Interpretation of Statutes* 194–195.
95 ICC Statute art 22(2).
96 *Prosecutor v Thomas Lubanga Dyilo* (*Judgment pursuant to article 74 of the Statute)* Case No ICC–01/04–01/06–2842 par 563, 565 (14 March 2012).
97 Amann 'Harmonic convergence? Constitutional criminal procedure in an international context' 845.
98 Donat-Cattin 'Protection of victims and witnesses and their participation in the proceedings' 872.
99 Van Boven 'The position of the victim in the Statute of the International Criminal Court' 88; and see also Fernández de Gurmendi 'Elaboration of the rules of procedure and evidence' 255; Delmas-Marty 'The ICC and the interaction of international and national legal systems' 1924; Friman 'Procedural law of the criminal court – an introduction' 202–203.

The Board of Editors of an anthology on the International Criminal Court stated that 'the ICC Statute indeed represents an admirable attempt to achieve the right mixture – the "golden mean" – between the inquisitorial and accusatorial systems'.[100]

Based on these directives, the ICC upholds the principle of the equal protection of the laws almost to a fault: it vests the burden of proof above reasonable doubt squarely on the shoulders of the prosecution and proclaims that in no circumstances shall there be a reversal of the burden of proof; a person prosecuted in a national court or in the ICC cannot again be brought to trial in the ICC for a crime based on the same conduct; in the ICC ignorance of the illegality of one's conduct is an excuse, including ignorance of fact *and* ignorance of the law; upon conviction a person cannot be sentenced to death, and in the case of life imprisonment the detention of the convicted person will be reviewed after 25 years and if release is not granted, thereafter periodically every second year; prison facilities where a convicted person is to be detained must comply with internationally approved standards; and much more.

The spirit of unconditional justice, in accordance with the perceptions of statutory interpretation championed by Du Plessis, must surely be the sole guide for the purposive interpretation of the ICC Statute, procedures and decisions. It is perhaps important to note in conclusion that the intense commitment of Du Plessis to the principles of justice (implementing 'a society's "sense of fair play"'), equity ('the need for a personalization and particularization of institutional, normative and procedural justice') and reasonableness ('the need for rational, considered and justifiable decision-making'),[101] is deeply rooted in his personal spiritual conviction. The title of his thesis for the Doctor of Laws degree, which I had the great honour of supervising, says it all: *The Juridical Relevance of Christian Justice* (*An Inquiry into the Juridical Meaning of Justice as a Concept and Idea in Christian Thought with special focus on the Christian-Reformational Tradition*).

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100 Board of Editors 'The Rome Statute: A tentative assessment' 1908.

101 Du Plessis *Re-Interpretation of Statutes* 154.

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Legal research and legal education 20 years after the advent of democracy

André van der Walt

1 Introduction

Three seemingly unrelated contributions in volume 25(1) of the *Stellenbosch Law Review* caught my eye while working on this contribution, not only because they all rather strikingly pose questions in their titles – we live in times when asking questions often seems to be the wisest or even the only proper form of legal analysis – but also because they highlight problems with legal education and legal research, areas in which Lourens du Plessis has made important contributions.[1] Upon closer scrutiny, these articles are also related insofar as they deal with the transformation of legal research and legal education in South Africa in a context for which Du Plessis's work provides a useful, critical, analytical framework.

In one of these articles, Jonathan Campbell asks an enduring question: what is the purpose of legal education?[2] Campbell pleads for reflective development of the law curriculum that would promote a 'well-rounded, formative, and academically challenging legal education'[3] but that would maintain both functions of the first law degree (academic education and qualification for practice). In the course of his analysis, he emphasises that the training of good lawyers must be understood in the context of the current constitutional dispensation, with its social justice values of equality, human rights and freedoms.[4] Although he does not further analyse the implications of this normative statement,[5] I understand Campbell to imply that the law curriculum and legal education in general should be informed and inspired by the transformative ideals and obligations that characterise the South African Constitution. Geo Quinot makes the point more emphatically: 'If the academic sector of the South African legal community is serious about our transition from authoritarian rule to constitutional democracy, it is imperative that legal academics, without exception, start to engage with educational theory as part of the core of their craft.'[6] In an

1 From Du Plessis's academic publications, see eg *Regsteorie in praktyk, regspraktyk in teorie en regsopleiding*; 'Teaching legal ethics in South Africa and abroad'; 'Menseregte in die skadu's en skanse van die ivoortoring ('n akademiese waardering van enkele fasette van menseregte-beskerming in Suid-Afrika se finale grondwet)'; 'Die verdienstes en tekortkominge van 'n alsydige regsakademikus. 'n Kritiese waardering van Johan van der Vyver se bydrae tot die regswetenskap in Suid-Afrika'.

2 Campbell 'The role of law faculties and law academics: Academic education or qualification for practice?' 15–33.

3 *Ibid* 29.

4 *Ibid* 27.

5 Quinot 'Transformative legal education' 411–412 notes that academic writing on theory of legal education is a rare phenomenon in South Africa and that paying more attention to the theory of education is crucially necessary for a serious attempt to transform legal education.

6 *Ibid* 412.

article published some two years earlier, Quinot refers to 'transformative legal education' to indicate what he thinks that law teachers can and must do in order to achieve the aims of transformative constitutionalism. In a nutshell, the notion of transformative legal education involves a call for a fundamental shift, amongst other things, from formalistic legal reasoning to substantive reasoning under a transformative constitution and for a paradigm shift from a linear to a non-linear, relational or complex perception of knowledge.[7]

The other two articles relate to legal research and its effect on the development of the law in the context of the Constitution. In the published version of his 2013 Morti Malherbe Memorial Lecture at the Stellenbosch Law Faculty, Judge Dennis Davis asks a question that troubles both academics and judges: 'Where is the map to guide common-law development?'[8] His argument takes it for granted that legal development must fulfil the constitutional promise 'to establish ground rules supportive of the broad transformative enterprise'[9] and proceeds from there to translate Karl Klare's analysis of transformative constitutionalism in the context of an inherently conservative legal culture[10] into a more direct and urgent quest for a map to guide the development of the common law. This development, Davis argues, must give effect to the constitutional obligation to transform the law; remain faithful to the common-law paradigm; and avoid the temptation of simple deference to the existing principles of common law.[11] Klare's original article indicated serious concern about the prospect of transformation; Davis seems more optimistic but laments the ongoing lack of a clear 'animating theory which would cause a trigger for the development of the common law', instead of more or less *ad hoc* decisions inspired by simple deference to either statute or existing interpretations of the common law.[12]

In the third article, Zsa-Zsa Temmers Boggenpoel considers approaches to situations where the courts apparently have to choose between constitutional, statutory and common law solutions to a conflict. Although she does not purport to devise anything as ambitious as a road map, her search for a 'methodological approach' that would simplify and structure this choice could be seen as a partial response to Davis's question.[13] Adopting the same point of departure as Davis, namely that the continued relevance and application of the common law must be considered in view of constitutional obligations, she casts the problem in the form of a question about method: is there a methodological approach that assists litigants and courts in deciding which remedy to rely on when more than one remedy deriving from different sources (constitutional, statutory, common law) could apply to a particular conflict and where both common-law and constitutional rights are at stake?[14] Interestingly in view of Davis's quest for a map, Temmers Boggenpoel seems to suggest (at least for the area on which her analysis is focused, namely eviction law) that

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7 *Ibid* 412.
8 Davis 'Where is the map to guide common-law development?' 3–14.
9 *Ibid* 5.
10 Klare 'Legal culture and transformative constitutionalism' 146–188. See further in the same vein Davis and Klare 'Transformative constitutionalism and the common and customary law' 403–509. Michelman 'Expropriation, eviction, and the gravity of the common law' 245–263 covers some of the same ground in a slightly different way.
11 Davis 'Where is the map to guide common-law development?' 5.
12 *Ibid* 6, 14.
13 Temmers Boggenpoel 'Does method really matter? Reconsidering the role of common-law remedies in the eviction paradigm' 72–98.
14 *Ibid* 72.

sensitivity for the particular context in which a dispute is adjudicated (including the transformative, constitutional context and the historical and social context) and deep reflection about starting points (such as the transformation-aimed point of departure she shares with Klare and Davis) are more important (or at least more realistic) than well-worked out, detailed, methodological road maps.[15]

The common ground shared by the concerns voiced in these articles is clear. Campbell asks whether, and to what extent, legal education now, 20 years after the advent of democracy, responds to the demands of the new democratic constitutional dispensation and its social justice values like human dignity and equality. Davis and Temmers Boggenpoel ask roughly the same question in the context of legal research, namely whether, and to what extent, the law now, 20 years after the advent of democracy, reflects compliance with the constitutional obligation to promote development of the law in a direction that will promote democracy and social justice. It is noteworthy that all three articles are titled in the form of questions – this seemingly coincidental stylistic choice suggests that we are hesitant, tentative, cautious, when posing and reflecting upon these issues. One (possibly coincidental) difference between the three articles is that Campbell does not place as much emphasis on the restrictive influence of what Klare described as legal culture, while both Davis and Temmers Boggenpoel explicitly echo Klare's concern that unless a pro-active reformist strategy is devised and followed, the inherently conservative intellectual and professional sensibilities of legal culture will slow down – or even inhibit – the development of the common law and legal transformation in general.

2 Law as monument and memorial

Du Plessis has always been deeply involved in legal education and in the transformation of the law, even before 1994 but especially during the drafting of the new Constitution and since the advent of the democratic constitutional order.[16] He has had significant influence in both legal education and legal research in his publications and in his teaching and mentoring of undergraduate and graduate students, many of whom are now law academics. In this contribution I consider the questions concerning legal research and legal education that emerge from the articles I refer to above with reference to Du Plessis's notion of the differences between the law as monument and as memorial,[17] specifically in view of the grasp that these two visions of the law have on our intellectual and professional sensibilities. In a nutshell, I am reading Du Plessis's analysis to the effect that a purely monumental vision of legal tradition (in the form of either the common law or of legal education) will inhibit transformation, whereas a more complex memorial vision (which might include

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15 *Ibid* 96–98.

16 From the long list of his publications concerning the drafting and outcomes of the constitution-writing process, see eg 'The genesis of a bill of rights in a divided society. Observations on the ideological dialectic reflected in the chapter on fundamental rights in South Africa's transitional constitution'; 'Legal academics and the open community of constitutional interpreters'; 'Menseregte in die skadu's en skanse van die ivoortoring ('n Akademiese waardering van enkele fasette van menseregtebeskerming in Suid-Afrika se finale grondwet)'; 'Just legal institutions in an optimally just South Africa under the 1996 Constitution'; 'Re-reading enacted law-texts. The epoch of constitutionalism and the agenda for statutory and constitutional interpretation in South Africa'; 'Constitutional dialogue and the dialogic Constitution (or: constitutionalism as culture of dialogue)'.

17 Du Plessis 'The South African Constitution as memory and promise' 385–394.

some monumental moments) might contribute towards the realisation of constitutional transformation ideals.

According to Du Plessis, the transformative promise that a constitution holds can emerge only from contradictory modes of dealing with that constitution as memory.[18] Two such modes of dealing with a constitution as memory are to see the constitution as monument or as memorial.[19] These readings of a constitution are contradictory but not mutually exclusive; they can be held at the same time. The difference is that a monument typically celebrates achievements, whereas a memorial also remembers failures.[20] In the rest of his article Du Plessis applies this distinction to the new South African Constitution, pointing out that it can be seen both as a monument that celebrates achievements such as democracy and constitutionalism and as a memorial that remembers and warns against past failures and abuses such as over-centralisation of power.[21] Interestingly, in his discussion of the memorial function of the Constitution he notes a problem in case law that points towards the issue highlighted by Davis and Temmers Boggenpoel in the articles I mentioned earlier, namely a tendency in certain Supreme Court of Appeal decisions to solve constitutional issues in an 'enlightened, rights-friendly' manner without relying on or even referring to the Constitution.[22] This tendency, Du Plessis argues, can be seen as an example of the restraint that characterises the memorial function of the Constitution (remembering the abuse of over-centralised power in the past and avoiding repetitions of it in the future by distributing power more widely), but it could also be a sign that the memorial function of the Constitution has become too faint (assuming that the legal tradition can provide just solutions, even without the Constitution, and thereby pretending that it (ie the legal tradition) was and still is value neutral). In that perspective, he reads the decisive 'single-system-of-law' passage in the Constitutional Court decision in *Pharmaceutical Manufacturers*[23] as a reminder of the monumental authority of the Constitution (reminding us that change is inspired by and takes place under the guidance of the Constitution and not on the basis of the assumed inherent morality of the legal tradition).

The Du Plessis article I cite here deals with the monumental and memorial reading of the Constitution, but in my view his metaphor also holds for the questions I set out earlier to the extent that we tend to experience legal tradition, including the body of principles and institutions we know as the common law and the professional apparatus of conceptual frameworks with which we analyse that body of law, purely as a monument that inspires

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18 Like Du Plessis I am assuming here, without arguing the point, that a transformative constitution functions in a space where notions of what was wrong in the past and what is aspired to in the future inevitably involve dealing with memory.

19 Du Plessis 'The South African Constitution as memory and promise' 385, citing Snyman 'Interpretation and the politics of memory' 312–337.

20 *Ibid* 386. Du Plessis explains the difference with reference to the German distinction between a *Denkmal* and a *Mahnmal*; the latter indicates that a memorial also implies something of a warning against the failures or mistakes that it memorialises.

21 *Ibid* 387, 388.

22 *Ibid* 392–393.

23 *Ibid* 393. The relevant passage appears in *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC) par 44: 'There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control'; for an interpretation of it compare Van der Walt *Property and Constitution* 19–112.

us to honour and revere past achievements, rather than as a memorial that also reminds us of where we went wrong in the past. For that purpose I read the case law Du Plessis deals with in the last part of his article slightly differently; in my view the Supreme Court of Appeal decisions he refers to do not indicate a healthy subsidiarity approach that treats the Constitution as memorial rather than just as monument. Instead, I see them as decisions that treat the legal tradition embodied in the common law purely as a monument, an achievement to be celebrated, rather than also as a memorial of the failures embodied and brought about in the name of the common law tradition. Seen in that way, Klare's criticism of the inhibiting effect of legal culture on the project of constitutionally inspired and demanded transformation becomes relevant to Du Plessis's analysis of the monumental and the memorial function of legal tradition. In a nutshell: insofar as we see and treat legal tradition (both in the form of the common law and legal education) purely as a set of achievements to be celebrated, it will entrench a conservative legal culture that will tend to inhibit constitutionally inspired and required transformation.

For this purpose I propose to translate the questions that Campbell, Davis and Temmers Boggenpoel raise in the articles I referred to earlier into two different questions. Firstly, is it fair to say (as is often claimed) that nothing has changed in the law and in legal education over the 20 years since full democracy; or that less has changed than we had hoped for; or that less has changed than is necessary for the new democracy to succeed? Secondly, if it is fair to say that nothing has changed, or that not enough has changed, what are (some of) the main causes for that failure? Could it be said that a purely monumental, celebratory view of legal tradition is one of the causes? And if it is, what would it take to achieve the changes that are required or desired? Is a more complex memorial, failure-sensitive and cautionary approach to legal tradition possible, what would such a memorial approach look like, and how could that help solve the problem?[24]

An example of what I have in mind was voiced recently, in a characteristically incisive fashion, by Constitutional Court judge Johan Froneman in a review of a collection of essays in honour of JC de Wet.[25] As good as the book is, Froneman concludes, it nevertheless lacks 'something' insofar as it fails to subject the honoree's work and legacy to the kind of critical analysis that might have 'swept the cobwebs away' for a proper appreciation of his legacy in the context of the transformative constitutional order. In Du Plessis's terms, Froneman is suggesting that the book is largely a monument to, rather than a memorial of, De Wet's legacy in South African law. As a monument, such a book largely celebrates the achievements of a legacy; as a memorial, it might have remembered both the achievements and the shortcomings, possibly with critical reflection on the warnings that one might derive from the memory of those failures. One of the difficult and troublesome critical questions that could have been asked in a book of this nature, Froneman continues, concerns the consequences of De Wet's methodology in South African law for the role of law in the apartheid system:[26] 'Did it contribute to students, lawyers, judges and academics critically questioning the moral content of the law that emerged, or not?'[27] And, if acceptance of the

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24 Michelman 'Expropriation, eviction, and the gravity of the common law' 245–263 suggests that the common law can indeed play such a restrictive role and analyses different readings of the common law that would avoid the problem.

25 Froneman 'Book review of "Du Plessis and Lubbe (eds.) *A man of principle. The life and legacy of JC de Wet / '*n *Man van beginsel. Die lewe en nalatenskap van JC de Wet*"' 474–480.

26 *Ibid* 474–480.

27 Froneman *ibid* 477 indicates that Lubbe, in his contribution to the volume, raises the question whether De Wet was the last Pandectist.

De Wet methodology did not contribute to that kind of critical approach, could it have been different? In some sense, that is the same question that I want to raise in this contribution, albeit not specifically with reference to JC de Wet or his legacy. If anything, I would suggest that Froneman's question identifies the crux of what memorial legal analysis should be about: do the legal research we indulge in and the legal training we offer contribute to students, lawyers, judges and academics critically questioning the moral content of the law that emerges?

My hypothesis is twofold. Firstly, I argue that the formal outlines and the character of both legal education and legal research have changed surprisingly little over the 20 years since 1994, especially if legal education (degree programmes, syllabi, course contents, tuition style, but also admission policy) and legal research (what counts as a legal problem, a good argument and a valid result) are assessed against the backdrop of what Karl Klare describes as 'legal culture' in the sense of our frame of mind or our intellectual and professional sensibilities.[28] Secondly, I argue that the shortcomings that we might identify in the social and legal changes since 1994 could be related to our failure, as law academics, to develop and propose critical, reflective, memorial alternatives, which in turn pivots on our failure to ask critical questions and think outside of the constraining framework of our legal culture. In Du Plessis's terminology, we failed to bring about the required development of the law and transformation of legal education because we are too in awe of the monumental achievements of our legal tradition, and we have failed to develop a sufficiently vigorous memorial, cautionary perspective of legal culture and tradition.

3 The development of the law and legal research

Both Davis and Temmers Boggenpoel focus on legal research. Davis is looking for a road map that might indicate the way towards development of the common law. His main complaint is that the Constitutional Court has to date failed to develop a coherent approach to the horizontal application of the Bill of Rights. Even where there are theoretical tools to start developing part of the road map in judicial deference or subsidiarity cases, the Court has failed to use and explicate those tools.[29] Application of the notion of judicial subsidiarity in the South African constitutional context was first considered by Du Plessis, in a wide sense, to indicate that the memorial aspect of the Constitution might sometimes require state organs to defer to the decisions of other state organs.[30] In this respect, Du Plessis uses the notion of judicial subsidiarity as a marker for judicial deference in view of the

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28 Klare 'Legal culture and transformative constitutionalism' 146–188.

29 Davis 'Where is the map to guide common-law development?' 13 refers to the decision in *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC). On the same aspect of the decision see also Michelman 'Expropriation, eviction, and the gravity of the common law' 245–263; Maass 'Rent control: a comparative analysis' 41–100.

30 Du Plessis 'The South African Constitution as memory and promise' 388; but see also Du Plessis '"Subsidiarity": what's in the name for constitutional interpretation and adjudication?' 207–231. Du Plessis's work in this regard was developed further, with reference to the Constitutional Court's jurisprudence, by Van der Walt 'Normative pluralism and anarchy: reflections on the 2007 term' 77–128; Van der Walt *Property and Constitution* 19–112. It should be noted here that both Du Plessis and Van der Walt do not use the notion of subsidiarity to refer to what is also known as judicial avoidance or minimalism; in their usage the term refers to a very specific (and flexible, Constitution-focused) set of principles according to which judges determine the applicable source of law for the adjudication of a specific dispute. Van der Walt *ibid* explains the outlines.

monumental function of democracy and constitutionalism and the memory of over-centralised power. Practically, it means that the courts may have to defer to the work of the democratic legislature in those instances where the democratic legislature has fulfilled its constitutional obligation to make laws that give effect to a right protected in the Bill of Rights, instead of bypassing such legislation and creating its own protection directly based on the constitutional text.[31] There are indications in Constitutional Court decisions that the courts should be careful not to underestimate or dismiss the constitutionally compliant and responsive work of the democratic legislature in cases where the legislature has applied its mind and indicated where, when and how constitutional rights should be given effect to in view of constitutional demands. Practically, in cases of that kind the courts should look for solutions to constitutional rights disputes in the relevant legislation and not outside of it (effectively, either in the Constitution itself or in the common law).

As Davis rightly indicates, this notion of judicial deference does not have much traction outside of cases where the legislature has made laws to give effect to specific constitutional rights or obligations.[32] In fact, if the constitutional validity or efficacy of the legislation is challenged the subsidiarity principle does not apply at all.[33] In a very careful and nuanced analysis, Michelman[34] indicates that although reverence for tradition is a force to be reckoned with, it is possible that the judicial subsidiarity principle can do some work in suitable instances to give structure to the constitutional, transformation-oriented development of the law. Furthermore, with the necessary qualifications and hesitance, guidelines that extend the subsidiarity principle could provide some assistance in instances where the subsidiarity principles do not apply obviously or clearly.[35]

In instances where the notion of judicial subsidiarity has less traction, where development of the common law is clearly the only route, Davis argues that the Court has also failed to use whatever indications of a road map there are in the Constitution itself.[36] Davis suggests that the Constitution envisages three separate forms of development of the common law in view of the Bill of Rights. He explains the main landmarks on the map as follows:

> [T]he Constitution envisages three separate possible forms of development in terms of the Bill of Rights, namely in terms of section 8, section 39(2) and in the general development of public policy. Section 8(2) read with section 8(3) demands an initial determination of the applicability of a provision of the Bill of Rights to a private relationship. Section 8(3) then takes over the inquiry and involves three separate stages: the determination of the existence of any legislation or a common-law rule giving effect to the constitutional right; in the event of an absence of a relevant rule, then the crafting of a common-law rule to give effect to the applicable constitutional right and then further, the development of a new rule of the common law in order to limit the applicable right, so created, if necessary.

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31 Van der Walt 'Normative pluralism and anarchy: reflections on the 2007 term' 102, citing *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) par 52.

32 Davis 'Where is the map to guide common-law development?' 13 refers to the decision in *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC).

33 In terms of the proviso to the first subsidiarity principle; see Van der Walt 'Normative pluralism and anarchy: reflections on the 2007 term' 101 and authority referred to there.

34 Michelman 'Expropriation, eviction, and the gravity of the common law' 245–263.

35 Compare the suggestions of Van der Walt 'Normative pluralism and anarchy: reflections on the 2007 term' 77–128; Van der Walt *Property and Constitution* 19–112.

36 Davis 'Where is the map to guide common-law development?' 13–14.

> In circumstances where there is an applicable common-law rule but which confronts no direct provisions of the Bill of Rights, common-law development to render a rule congruent with the normative framework of the Constitution takes place through section 39(2). Finally, there are cases where the common-law rule cannot be considered to be constitutionally incongruent. However, the application of the common-law rule may give rise to an interpretation for example of a contractual provision which interpretation is contrary to public policy. The development of public policy must reflect the constitutional normative framework or what is customarily referred to as the *boni mores*. There too, the Constitution as a repository of the *boni mores* has application.[37]

Temmers Boggenpoel is cautious in her discussion of cases where the litigants and courts seem to be uncertain whether an eviction case can or should be decided in terms of the common law, anti-eviction legislation or the anti-eviction principle in section 26(3) of the 1996 Constitution. Despite a clear 'matrix of provisions' in the Constitution that are supposed to ensure that the appropriate source of law is applied, Temmers Boggenpoel points out, identifying the appropriate source of law remains a thorny issue.[38] The question is especially problematic in cases where the state effects an eviction without any reference to and without complying with the constitutional provision or the applicable legislation.[39] Evictions that are conducted without any reference to PIE leave the evictees little choice but to attack their lawfulness on the basis of the common law *mandament van spolie* since PIE does not provide a remedy for such cases. In effect, she argues, the subsidiarity principles are in some instances eliminated from the picture not for fear that they might inhibit transformation, but simply because of a shortcoming in the applicable legislation. Elimination of the subsidiarity principles in these cases does not simplify the problem but exacerbates it considerably because it practically forces complainants to fall back on their common law remedies.

As Temmers Boggenpoel shows, if an eviction case reaches the court on the basis of the common law remedy instead of constitutionally inspired legislation or constitutional rights provisions, the effect is that the focus is shifted away from the breach of a constitutional right (the unlawful eviction) and from the question whether the constitutional right can be protected or upheld (restoration of the occupation) to the requirements and possible limitations of the common law remedy (which was not designed for the post-apartheid anti-eviction situation).[40] In a very real sense, this would undermine the constitutional aims and obstruct transformation. In this instance, Temmers Boggenpoel concludes, the failure of the dedicated legislation (PIE) to give effect to the constitutional obligation in section 26(3) results in a situation where evictees could have one of two remedies available to them: the common law *mandament van spolie* or a constitutional remedy that has a similar effect.[41] By resorting to a constitutional remedy, as the Supreme Court of Appeal did in *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others*,[42] the court could avoid the negative effects of relying on the common law remedy, but on the other hand designing a constitutional law remedy that strongly resembles a common law remedy in all but one or two minor aspects could create uncertainty and confusion.

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37 *Ibid* 14.
38 Temmers Boggenpoel 'Does method really matter?' 85.
39 A number of anti-eviction statutes might apply, but in many instances the applicable legislation is the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).
40 Temmers Boggenpoel 'Does method really matter?' 88.
41 *Ibid* 85.
42 2007 (6) SA 511 (SCA).

The examples that Temmers Boggenpoel analyses illustrate the applicability of Du Plessis's distinction between a monumental and a memorial approach to the common law and to the Constitution rather well. The lack of clarity about the applicable source of law in eviction cases effectively results in a choice between the common law remedy and a constitutional remedy, as Temmers Boggenpoel shows. The one significant decision where the court opted for the constitutional remedy could be seen as an example of a purely monumental approach to the common law, whereas a memorial approach might have favoured development of the common law instead. In *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others*[43] the Supreme Court of Appeal elected to create a new, constitutional remedy to come to the aid of former occupiers who had been evicted illegally, instead of applying or developing the *mandament van spolie*, on the basis of a decision that the common law remedy does not provide for relief in instances where the evictees' former structures had been destroyed. However, even if this reading of the common law is correct it could be argued, on the basis of a particular High Court decision from the apartheid era,[44] that the common law could in fact have been developed to make provision for a specific kind of replacement order in circumscribed conditions. Instead, the Supreme Court of Appeal opted to follow another High Court decision[45] in which it was decided that such development was not possible. In view of the role that evictions played during the apartheid era the contrast between these two decisions is highly significant – even if one accepts that both were simply the result of opposing technical interpretations of the common law, the one nevertheless upheld the effects of apartheid evictions, while the other opposed them and tried, bravely under the circumstances, to rectify them. In Du Plessis's terms, one could say that following the dissident *Fredericks* decision now, during the constitutional era, would have served a usefully progressive, memorial purpose, reminding ourselves of the failures of the law during apartheid and of the possibilities of judicial bravery and activism in the face of oppression. On the other hand, following the conservative *Rikhotso* decision to the extent that the common law is not regarded as capable of development and then, commendably, fashioning a constitutional remedy to ensure that the evictees nevertheless get a remedy amounts to treating both the common law (the *Rikhotso* view of the *mandament van spolie* and its inflexibility) and the Constitution (as the ultimate source of solutions) in an unreflective, purely monumental manner.

My point is not simply that the Supreme Court of Appeal missed an opportunity in *Tswelopele*. Instead, my point is that we, as law academics, have failed over the past 20 years to develop the theoretical foundations, in the form of a suitably reflective, memorial perspective on the common-law tradition, that would have assisted the courts in developing something like the road map that Davis is looking for. Clearly, as appears from the literature I refer to above, some work has been done, but it is not nearly enough.

I mention some remaining questions that require further critical analysis briefly here, without elaboration. (a) What exactly is the relationship between sections 8, 39 and others (such as 173) of the Constitution in directing the development of the common law? Does a

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43 2007 (6) SA 511 (SCA). For a critical discussion of the decision see van der Walt 'Developing the law on unlawful squatting and spoliation' 24–36. Compare Temmers Boggenpoel 'Does method really matter?' 85–86.

44 *Fredericks and Another v Stellenbosch Divisional Council* 1977 (3) SA 113 (C).

45 *Rikhotso v Northcliff Ceramics (Pty) Ltd and Others* 1997 (1) SA 526 (W).

'road map' or 'methodology' that starts out with section 8(2) (as Davis suggests)[46] restrict the process too much to a common-law focus, considering that section 39(2) also refers to interpretation of legislation and that the common law extends beyond the classic horizontal relationship of private law?[47] (b) Apart from the narrow category of cases that are directly affected by the subsidiarity principles, can these (or other, similar) principles be adapted or applied in other situations, for instance where legislation clearly applies but does not explicitly give effect to a constitutional right?[48] (c) How are situations of the kind described by Temmers Boggenpoel, where there seems to be a more or less open choice between constitutional, statutory and common law remedies, to be approached to ensure the development of a single system of law in the shadow of the Constitution? (d) How far can development of the common law depart, in an effort to give effect to and fulfil constitutional requirements and obligations, from what Davis and others have described as the innate paradigm of the common law?[49] This question is especially interesting in view of the extent to which the courts have been willing to depart from the statutory text, and from the traditional canons and principles of statutory interpretation, in the name of purposive interpretation (an approach to interpretation which Du Plessis supported, subject to certain *caveats*).[50] If legislation has to be interpreted purposively, to an extent that might involve significant departures from what appears to be the clear language of the text, to ensure compliance with the purpose of both the legislation itself and the Constitution from which it derives its force, the same should in principle be possible (arguably to an even greater extent) when it comes to the development of the common law. (e) What should be the ideal balance between common law and legislation when it comes to the development of post-apartheid, constitutionally driven law? Is it possible that some of the theories, 'road maps' or 'methodologies' that have emerged to date focus too heavily on the common law and the courts, and not enough on the writing and amendment of legislation? In practical terms, should we as law academics spend more time in devising suitable statutory interventions that would avoid the inhibiting force of tradition and speed up the transformation process?[51]

4 The development of the law and legal education

I have noted in the introduction that although Campbell[52] concerns himself primarily with the need for reflective development of the law curriculum that would maintain both the academic and the practical functions of the first law degree, he does imply that the law curriculum and legal education in general should be informed and inspired by the transformative ideals and obligations that characterise the South African Constitution. His article therefore raises a similar problem to the one discussed in the previous section: does the law curriculum, and legal training in general, assist us to comply with and fulfil the constitutional transformation requirements and obligations? In the language of Froneman

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46 See the quote accompanying fn 40 above.
47 Significant parts of administrative law and criminal law, to mention just two egs, are based on the common law but do not involve horizontal application, which is the focus of s 8.
48 An eg might be the Deeds Registries Act 47 of 1937.
49 Davis 'Where is the map to guide common-law development?' 5.
50 See eg Du Plessis 'Interpretation' 32–52 to 32–56 and case law referred to there.
51 In this respect Temmers Boggenpoel 'Does method really matter?' 94 argues that a suitable amendment of PIE is crucially important.
52 Campbell 'The role of law faculties and law academics' 15–33.

one could state the question differently: does legal training as it stands contribute to students, lawyers, judges and academics critically questioning the moral content of the law that emerges?[53] Froneman suggests that at least in part, the answer to this question must be that legal training traditionally does not contribute to the development of the critical mindset that is required. In the terminology of Du Plessis, one might say that we tend to treat legal training purely as a monument, a set of past achievements to be celebrated, to the extent that it blinds us for the failures and shortcomings of legal training in the past.

The next question is obvious: can it be different? Is it possible to devise a more complex, critical, memorial perspective on legal training that will allow us to remember both its achievements and its failures, and so to develop a different approach that might avoid or overcome some of its current shortcomings? More specifically, again in the terminology of Froneman: can we see the legacy of legal training in a reflective, memorial manner that will help us identify – and possibly rectify – its shortcomings insofar as it currently does not help (or challenge) students (who later become lawyers, judges and academics) critically to question the moral content of the law that emerges? As I indicated in the introduction, Quinot confirms that legal training indeed could, and should, be different. In his view, transformative legal education requires a fundamental shift from formalistic legal reasoning to substantive reasoning under a transformative constitution and a paradigm shift from a linear to a non-linear, relational or complex perception of knowledge.[54] As he indicates, this calls for the development of a legal culture that embraces the normative framework of the Constitution, both in its perception of what the law is and in its methodology.[55] For legal education, that requires a shift in the curriculum (what students are taught) and in the legal method that students are taught.[56]

It can well be argued that legal training as it stands has failed to achieve this objective in many respects. Obviously the circumstances vary from law faculty to law faculty and even from module to module, but by and large it would be difficult to maintain that legal training has changed since 1994 to such an extent that it now helps students (and whatever kind of lawyers they later become) critically to question the moral content of the law that emerges from legal tradition, or to engage in a substantive and critical manner with the normative framework of the Constitution and its implications for both obvious (human rights) and non-obvious, seemingly technical (servitudes) parts of the common law. Among law academics and students, awareness of and the ability to engage substantively and normatively with constitutional law and related areas (administrative law, human rights law) have increased by leaps and bounds, as a quick scan of the law journals and of faculty staff webpages show, but in other areas of the law, curricula and legal training have not changed enough to achieve the outcomes that Froneman, Davis, Quinot and others look for as signs of real transformation. In what remains of this section I will note a few examples of areas where we arguably hold on to a purely monumental veneration of the past achievements of legal training and thus entrench a tradition and a legal culture that precludes critical assessment of the shortcomings and failures of legal training. In reality, the legal training status quo does not promote transformative legal education, nor does it challenge or enable students and lawyers to engage with the new constitutional order in

53 Froneman, 'Book review' 477; see par 2 above.
54 Quinot 'Transformative legal education' 412.
55 *Ibid* 414.
56 *Ibid* 415.

any meaningful way. In fact, in the words of Duncan Kennedy one could argue that it merely reproduces hierarchy.[57]

One could start with admission policies. Although many South African law faculties have since 1994 (some before that) adopted a non-discriminatory admission policy and have become much more diverse as far as race, social, cultural and religious backgrounds are concerned, there are still signs (in some faculties more than in others) of holding onto a purely monumental celebration of perceived past achievements that might well stand in the way of transformation. One admittedly controversial example is language policy. The argument, often heard in the media and relied on in university policy making bodies, that there are strong cultural, constitutional and demographic justifications for the continued existence of one or more Afrikaans-language universities in South Africa (meaning that the main lecture in each module is only or primarily taught in Afrikaans) is at least largely founded upon a reverential, monumental perception of past achievements. However, it disregards the fact that universities and other publicly-funded institutions of higher education are extremely costly, privileged, and scarce public resources that have per definition to serve the country as a whole. Arguing that a particular cultural or language group has a right to maintain the status quo as it was established at certain privileged universities during the apartheid era relies on what Du Plessis describes as a monumental perception of the past achievements – and privileges – of the formerly unjustly privileged Afrikaans-language community, and it ignores the cautionary lessons to be learnt from critical reflection on the failures of that social and political legacy in terms of exclusion and denial of equal rights and opportunities. Any argument that the Constitution guarantees this, that or the other benefit established or acquired under the apartheid government, commits the logical error of substituting a purely monumental perception of what the Constitution supposedly does for the transformative function that it in facts serves – the Constitution is primarily transformative, not protective of the status quo. These arguments also disregard the shortcomings of university teaching and learning in a social or language enclave that resembles pre-1994 more than it does the current reality. And, as Quinot indicates, they ignore the fact that university teaching and learning involves much more than a weekly main lecture and that learning problems created by language diversity can be overcome in a number of ways.

However, the failures of legal training extend beyond admission policy. Most university lecturers are confronted by the reality of the apartheid legacy in a secondary school system that still bears the fruits of political disadvantage. Many students who gain access to university now simply do not have the skills base that would allow them, without further assistance and support, to take on and succeed with tertiary education on any level, let alone the challenging work that social and legal transformation requires of future jurists. Of course, some students may not belong in a university because they may not have the talents and interests that are required for academic learning, but the problem is not restricted to poor advice regarding further education and vocational choices. Many bright and promising students who do belong there enter the university with inadequate skills. Excluding them from tertiary education – or from tertiary education at the top universities that are as good as they are because of sustained privilege during the apartheid era – will continue instead of reverse, the legacy and the injustices of apartheid. Complaining about poor secondary schooling does not help much either; that is a problem that needs to be

57 Kennedy 'Legal education and the reproduction of hierarchy' 591–615.

rectified, but for now the universities have to cope with the situation and do their part to overcome the remaining inequalities of apartheid education. The point I make is that former white universities may well be in the best position to devise and implement whatever academic support is required to rectify and supplement the shortcomings of poor secondary school training, and therefore it is doubly unjustified for them to exclude students on the basis of an admission policy that has its roots in apartheid privilege.

There is a further dimension to admission policy that arguably also undermines efforts to transform the law and legal teaching: postgraduate training. It appears from Campbell's article and the sources that he cites that the main point of discussion about legal training concerns the balance between a basic, 'academic' training that is supposed to shape and develop certain intellectual skills on the one hand, and practice-oriented training that develops skills that are required for legal practice. Perhaps surprisingly, most law faculties have never been overly concerned about legal training that is specifically aimed at the training of future law academics.[58] Usually this takes place on the postgraduate level, but traditionally a postgraduate student in law is either a young, recently qualified practitioner who enrols for a coursework LLM to gain an edge in practice, or an experienced practitioner or a young academic who takes on part-time doctoral studies over a relatively long period of five or more years. Usually, the latter kind of doctoral work is completed in relative isolation, with the doctoral candidate working more or less on his or her own apart from seeing the promoter a few times a year. Dedicated, full-time doctoral programmes that involve intensive training in higher academic skills are the exception rather than the norm; programmes that involve this kind of training in groups are rare. Involving groups of doctoral candidates in research on one cooperative project is even rarer. However, if the transformation of South African law is to be realised in a relatively short time this is exactly what is required: training relatively large groups of young lawyers in groups that receive intensive training and intensive supervision, completing their degrees in a relatively short time, and working together in a cohort that focuses on a single, cooperative project that relates directly to the transformation of the law in view of the normative framework of the Constitution. Together, such a group of senior students can develop a single critical, transformative vision that they can carry through to their individual thesis projects and, eventually, into their independent research projects and their teaching, if they end up as academics. This is the model that has delivered results in the natural sciences over decades; it is one that deserves attention and support in South African law schools. Currently many law schools are loath to implement postgraduate training programmes of this nature because of subsidy pressures, inadequate staff numbers, and other economic concerns, but that should not blind us to the possible advantages of a transformation-focused and intensive approach to postgraduate training. Arguably, a similar type of intensive training for judges and for policy makers involved in the conceptualisation and drafting of legislation might also be a possibility that could speed up the transformation of the law.

The problem goes deeper than admission policy or prospective students' skills, though. Judge Johan Froneman identified the real problem in his book review referred to earlier: the real question is one that predates transformation, namely that legal training does not succeed in assisting (or challenging, or, for my money, requiring) law students to reflect

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58 The kind of integrated, contextualised curriculum and learning that Quinot 'Transformative legal education' 416–418 argues for (see also Kennedy 'Legal education and the reproduction of hierarchy' 614) would come much closer to real academic education that might produce future academics.

critically upon the social justice of the law that results from legal tradition. Quinot echoes a similar sentiment in his argument in favour of transformative legal education and the shifts in focus, approach, methodology and emphasis that it requires. Critical reflection of this kind is certainly not taught in secondary schools, but it is not taught as widely and as incisively as it should be in the law faculties either, especially when it comes to the common law tradition. To the extent that the courts struggle to deal with development of the common law in a way that would satisfy and promote constitutional requirements and obligations, the reason is very likely that neither the litigating lawyers nor the judges are properly equipped to ask the right questions about changing legal tradition. Practising lawyers and judges who struggle with transformation of the law do not have the reflective, critical vocabulary, the logic and the conceptual and methodological tools they need because we failed to teach them those tools at law schools, preferring to continue teaching the common law method instead.

Comments on the lack of tools that would enable students, lawyers, judges and academics to engage reflectively and critically with legal tradition and to ask critical questions about the morality of the law that emerges from tradition are sometimes met with the observation that this is not a constitutional, transformation issue but a general one. Critical reflection on legal tradition and questions about the morality of the law are part of the South African common law tradition, the argument goes; this is what we have always done. It remains to do it better or more effectively. In my view this is a disingenuous argument that underplays both the seriousness of the wrongs of the past and the seriousness of the constitutional obligation to change. If asking critical questions about the morality of the law is part of the legal tradition and of what we have always done, one wonders how apartheid could have happened in the face of so much critical morality. The point is, of course, that asking critical questions in a reflective mode is not part of legal tradition to the extent that legal tradition has failed to prevent us from making the mistakes that we made in the past. Furthermore, seeing and recognising those mistakes, in their full range and extent, is the first step on the long and difficult road of making a serious attempt to rectify the results as far and as best we can.

To conclude in the terminology of Du Plessis, we find it difficult to exercise a memorial assessment of the common law tradition, that would allow us to see its failures and shortcomings in a critical perspective that might stimulate creative proposals for change and development, because we are taught (and we teach) law in an environment where that tradition is generally held in awe. We still tend to see our legal tradition as a hierarchical structure and teach our students to find their proper place and role in the hierarchy. Our perception of legal tradition is still largely monumental, informed by celebration of its achievements and its heroes, to such an extent that we find it difficult, even painful,[59] to gain the critical distance that would allow for a more complex, memorial, critical, transformative perspective. That monumental perception of legal tradition and the discomfort we experience when change and reform are on the table are reflected in large parts of the curriculum and in our teaching of the law, and so we continue and entrench the legacy that makes it difficult to achieve our transformative goals.

At the same time it would serve no purpose to hold on to a purely monumental perception of change either. Transformation of the legal tradition and of legal education is not about changing the common law and legal education for the sake of change and at all costs.

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59 See the comments in Froneman 'Book review' 475.

It is about critically reflecting on legal tradition, including the tradition of legal education, so as to recognise both the achievements and the mistakes, and to conceptualise a way in which we can build on the achievements while avoiding the mistakes and rectifying their legacy. In its proper historical, social and political context, transformation of the legal tradition is less about the legal principles and rules and institutions and more about how we see them, perceive them, and think about them, and above all what we do with them.

In that perspective, one has to say that Du Plessis has always challenged and continues to challenge us, in his research and in his teaching and postgraduate supervision, to critically reflect upon the morality of the law as it emerges.

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'An aesthetic mode of coping'

'Authorship', 'narration', 'monument' and 'memorial' in post-apartheid jurisprudence

Karin van Marle

1 Introduction

Lourens du Plessis in a tribute to the work of German scholar Friedrich Müller writes:

> A constitution both narrates and authors a nation's history, with neither of these roles dominant. The constitution is furthermore *but one among many* narrators of a nation's history and at most a co-author of its destiny. The narrative and auctorial constitution as memory, is a *monument* and a *memorial* at the same time.[1]

My primary aim in this chapter is to reflect on Du Plessis's use of the notions of narration and authorship and memorial and monument in relation to the South African Constitution and ultimately its role in the becoming of a post-apartheid or post 1994 jurisprudence. I am interested in how Du Plessis, by introducing the notion of narration, authorship, memorial and monument highlighted the contradictory and paradoxical nature of constitutionalism,[2] its performativity[3] and the value of aesthetics in interpretation, in particular with reference to memory.[4]

Memory has played a central role in the reconfiguring of South African society in the aftermath of apartheid. Reconciliation and reparation are closely related to the notion of memory, remembering the past, as ways of engaging a future. The notion of memory is inscribed in the constitutional text itself. The epilogue of the interim Constitution of 1994 under the heading 'National unity and reconciliation' starts as follows:

> The constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice.

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1 Du Plessis 'The South African Constitution as monument and memorial, and the commemoration of the dead' 189.

2 *Ibid*; Du Plessis 'The South African Constitution as memory and promise'. See also Botha 'Instituting freedom or extinguishing constituent power? Reflections on South Africa's constitution-making experiment' 66; Van der Walt 'Vertical sovereignty, horizontal constitutionalism, subterranean capitalism: A case of competing retroactivities' 102; Davis 'Transformation: The constitutional promise and reality' 85 and Arato 'What I have learned' 130 on the theme of constitution-making. See also Christodoulidis 'Against substitution: The constitutional thinking of dissensus' 189; Klare 'Legal culture and transformative constitutionalism' 146; Van der Walt 'Dancing with codes – protecting, developing and deconstructing property rights in a constitutional state' 258.

3 Derrida *Acts of Literature* 216; Arendt *On Revolution*.

4 Du Plessis 'The South African Constitution as monument and memorial, and the commemoration of the dead' 189; Le Roux 'The aesthetic turn in the post-apartheid constitutional rights discourse' 101; Le Roux and Van Marle (eds.) *Post-Apartheid Fragments: Law, Politics and Critique*.

The preamble of the 1996 final Constitution similarly states the past and the aim to redress:

> We, the people of South Africa, recognise the injustices of our past, honour those who suffered for justice and freedom in our land; respect those who have worked to build and develop our country and believe that South Africa belongs to all who live in it, united in our diversity.[5]

Many scholars have engaged with the theme of memory and how it relates to transformation. A well-known and often cited example is that of Karl Klare in suggesting a project of 'transformative constitutionalism.'[6] Klare describes the South African Constitution as post-liberal, and names as one of the reasons for viewing it as post-liberal the 'historical self-consciousness' of the Constitution meaning that memory as embedded in the Constitution, should 'guide' each and every interpretation and application of the Constitution.[7] His argument is of course coming from his own theoretical and political framework, which means that indeterminacy will trouble any attempt to treat memory as one-dimensional. In this vein the historical self-consciousness is one of the reasons why one can only have multiple interpretations of the Constitution. Du Plessis in describing the Constitution in terms of monument and memorial was influenced by South African philosopher, Johan Snyman, who, drawing on examples from post-war Germany has made a distinction between two ways of remembering, one monumental the other memorial.[8] The former celebrates victory in grand fashion; the latter memorialises the losses and victims of war/struggle. The excerpts from both the 1994 and 1996 Constitutions above illustrate that the South African constitutional endeavour is, as Du Plessis remarked 'hardly modest', claiming among other things the achievement of a 'peaceful transition', a 'non-racial democracy.'[9] Du Plessis describes the entrenchment of the values of dignity, equality and freedom as 'monumental flair'.[10] The writings by Snyman and Du Plessis provided the opportunity for other legal scholars to take these initial reflections further, to argue for example for memorial constitutionalism or as phrased by some 'counter-monumental constitutionalism'.[11] At the heart of these reflections is memory, how we remember our past, engage with our past and live with our past.

The main aim of the chapter can be divided in three moments.

Firstly, I want to think about narration and authorship with reference to the well-known debate between Carl Schmitt and Hans Kelsen on constituted and constituent political power.[12] My main interest is not the debate as such and I do not aim to add anything new to the debate. My contention is that Du Plessis, by evoking the notions of narration, authorship, memorial and monument within the context of South African constitutional discourse

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5 Constitution of the Republic of South Africa, 1996.
6 Klare 'Legal culture and transformative constitutionalism' 146.
7 *Ibid*.
8 Snyman 'Interpretation and the politics of memory' 312; Du Plessis 'The South African Constitution as memory and promise' 385.
9 Du Plessis 'The South African Constitution as memory and promise' 385.
10 *Ibid*.
11 Van Marle 'Lives of action, thinking and revolt – A feminist call for politics and becoming in post-apartheid South Africa' 605–628; Le Roux 'Bridges, clearings and labyrinths: The architectural framing of post-apartheid constitutionalism' 84.
12 Schmitt *The Crisis of Parliamentary Democracy*; Kelsen *The Pure Theory of Law*.

managed to capture what lies at the heart of this debate and underscored maybe unconsciously the significance of the debate to a South African readership.

Secondly I attempt to use the frame of constitutional narration and constitutional authorship to reflect on the discourse around land reform, restitution and tenure. My interest is not in land reform, restitution or tenure *per se* but in the role of memory, history and the past and how they are framed in the discussions related to land reform and restitution. In what terms are the claims and counter-claims being made, how do they respond to memory, do they invoke the past, in memorial or monumental ways? What role is given to the Constitution – is the Constitution and reforms emanating from it perceived as authoring (constituted); or narrating (constituent) a new era? I rely on reflections on land reform, in particular observations by Cheryl Walker concerning the extent to which a master narrative based on dispossessions of rural land and restoration by a liberation government dominates the discourse with consequences also for how we perceive of nationhood and citizenship.[13] How could these understandings emanating from land restitution connect with the debate between on the one hand the Constitution as monument, as representative of constituted power, as author, or on the other hand the Constitution as memorial, as representative of constituent power, the Constitution as narration?

Thirdly I turn to Du Plessis's support of the use of aesthetic examples, for example his explicit statement that we could think of the Constitution as an 'aesthetic creation'.[14] I invoke ideas of a minor literature, refusal to write a book and a communal narration as the kind of aesthetics and accordingly constitutionalism that Du Plessis suggests. Relying on a term developed in the context of spatial studies, namely *genius loci* or spirit of the place,[15] I argue that Du Plessis invites a certain reading and interpretation of constitutionalism that could leave a significant trace in the becoming of a post-apartheid, post 1994, South African jurisprudence.

2 'A constitution both narrates and authors a nation's history'[16]

Du Plessis refers to the constitution as being both author and narrator of a nation and connects this idea immediately with the distinction between monument and memorial. I want to take a risk and tentatively think about this distinction in light of the well discussed distinction between the Constitution as constituted/constituent emanating from the famous Kelsen-Schmitt debate.

Schmitt's view briefly and maybe crudely summarised is that modern constitutional states should be understood as systems of political activity rather than a series of legal restrictions imposed on political activity.[17] For Schmitt constitutional power must be understood as constituent and not as constituted. In his words: '[T]he concrete existence of the politically unified people is prior to every norm.'[18] By emphasising the concrete

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13 Walker *Landmarked: Land Claims and Land Restitution in South Africa*; Walker et al (eds.) *Land, Memory, Reconstruction and Justice: Perspectives on Land Claims in South Africa*.

14 Du Plessis 'The South African Constitution as monument and memorial, and the commemoration of the dead' 190.

15 Tally *Spatiality* 81.

16 Du Plessis 'The South African Constitution as monument and memorial, and the commemoration of the dead' 189.

17 Lindahl 'Constituted power and reflexive identity: Towards an ontology of collective selfhood' 9.

18 *Ibid*; Schmitt *Verfassungslehre* 121.

existence of the people Schmitt explicitly rejects Hans Kelsen's pure theory of law. For Kelsen the people have no prior political existence, the unity of the people is but the unity of a legal order.[19] Schmitt criticises Kelsen for collapsing constituent power into constituted power, all power and politics into law. For Kelsen the legal order is a self-grounding, self-serving and self-sustaining system of rules.[20]

In my understanding, Du Plessis's invocation of constitutional authorship and narration could be linked to the difference between constituted and constituent power – for Kelsen the Constitution is the author (and creator) of a nation's history, for Schmitt the Constitution, legal power can but only narrate. Hans Lindahl responds to both theorists by way of an ontological enquiry – by addressing questions of collective identity, specifically reflexive identity (identity as selfhood in contradiction to identity as sameness) and the ambiguity that governs the mode of being of collective selfhood, he assesses Schmitt's claim of democracy being prior to rule of law.[21] By way of a complex engagement with Searle, Ricoeur and Heidegger, Lindahl concludes that the Schmitt-Kelsen debate leaves us with an *impasse*. For Lindahl the modern *Rechtsstaat* is an example of how modern democracy deals with the aporia of collective identity.[22] Simply put, Lindahl is saying that Schmitt and Kelsen are both correct and wrong. Collective self-constitution is an act that constitutes the collective self by claiming that it is acting on its behalf whilst knowing that it can't really act on its behalf – as Lindahl puts it, a community is only democratic if it recognises that the claim of acting on behalf of the collective comes too soon, that this is only a provisional act.[23] Coming back to Du Plessis, to my mind this is also his concern – to understand the Constitution as both authoring and narrating the nation's history; and to understand the Constitution being simultaneously a monument and a memorial.

Du Plessis explains this distinction with reference to the German distinction between Denkmal and Mahnmahl: A Denkmal celebrates (and may even commemorate) and a Mahnmal warns (and may even castigate). The Mahnmal constitution is in his view the restrained and unpresumptuous Constitution, the one that echoes the cry of 'not again' of post-Holocaust Germany. He describes this notion of the restrained constitution as memorial as follows: 'a written law-text that does not profess to constitute the moral high ground of justice all by itself: instead it reminds us of our pledge… to achieve social justice. The human obligation to do justice cannot be assigned to any law-text, not even the supreme Constitution.'[24] Du Plessis continues to link this idea of the restrained constitution with the idea of subsidiarity. Subsidiarity can be described as the obligation placed on any subordinate body or community to refrain from taking into account matters that a 'smaller' subordinate body or community can deal with. This may have two effects: firstly, it could result in a better balance of power among organs of state, and secondly, it could expand ownership of the Constitution to not only organs of state but to a wider community.[25]

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19 Lindahl 'Constituted power and reflexive identity' 10.
20 *Ibid* 11–14.
21 *Ibid* 14–17.
22 *Ibid* 17–19.
23 *Ibid* 23.
24 Du Plessis 'The South African Constitution as monument and memorial, and the commemoration of the dead' 194.
25 *Ibid* 194.

Du Plessis relies on the notion of an open community of constitutional interpreters.[26] He coins the phrase adjudicative subsidiarity to describe this approach of mode/issue centric/norm centric subsidiarity. For him this is the key to an unspectacular, day to day development of existing law that stands against constitutional absolutism or imperialism. He emphasises the paradox of co-existence between the monumental and memorial. To tentatively reflect on the Schmitt-Kelsen debate as discussed by Lindahl one may say that both these positions stand in the guise of the monument – both constituent and constituted power may neglect the memorial politics and norm making practices of the everyday. However both play a role in how we understand political power. Du Plessis's use of narration and authorship within the South African context invites ways to think about the relationship between the people, the Constitution and continuous constitution-making and political struggle in a way that recognises the limits of the constitutional project as such and underscores the politics of everyday life.

I turn now to a few general comments on the discourse on land restitution. My interest is to read the discourse through the distinctions drawn between authorship and narration. What story is being told, or maybe rather authored through the discourse on land dispossession and return? To what extent is one unified story being told with the aim of forging a new national identity that denies past and present complexities?

3 'Monumental exaggeration'[27] / 'Reclaiming humanity' through 'contextualisation'[28]

The Restitution of Land Rights Act 22 of 1994 was the first example of transformative legislation of the ANC government.[29] The aim behind the legislation was to enable those who were dispossessed of their land after the 1913 Land Act to lodge claims for restitution.[30] In terms of the legislation a Land Claims Commission and Land Claims Court were established.[31] The public was given until 31 December 1998 to lodge claims.

Cheryl Walker, commenting on the land reform discourse has referred to a 'master narrative' that tells a one-dimensional story of black South Africans being dispossessed of their land under apartheid to be restored after a successful liberation struggle by government.[32] She has urged for everyone involved to realise the limits of land reform, the discontinuities and that the process of land reform is open-ended and inconclusive. According to Walker a mainstream discourse, master narrative, has chosen to present a 'selective simplified past' to explain history as if it occurs in a direct and linear way, starting from a fixed place.[33] She has commented also on the mismatch between the expectations that were created – in terms of the monumental and restorative – and the potential of land reform.[34] By highlighting the limits of the master narrative of rural dispossession and restoration Walker is not denying the truth of it, but she argues that it is insufficient as basis for understanding the challenges that confront transformation in South Africa at present.[35] An

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26 *Ibid* 194.
27 *Ibid* 200.
28 *Ibid* 203.
29 Restitution of Land Rights Act 22 of 1994.
30 1913 Land Act.
31 S 22.
32 Walker *Landmarked*. See also Walker *et al* (eds.) *Land, Memory, Reconstruction and Justice*.
33 Walker *Landmarked* 229.
34 *Ibid* 231.
35 *Ibid* 233.

interesting point that she raises is the extent to which urban issues have been neglected. Even though far more urban claims were made, scholarly analyses and public political commentary have focused much more on rural claims and rural land issues.[36] The issue of urban land is from the start much more fractured than the rural and more attuned to the everyday, the ordinary, reflective nostalgia and the restrained Constitution.

Linking Walker's take on the land reform discourse with Du Plessis's description of the Constitution as monument or memorial it seems as if the former has many elements of what Du Plessis calls monumentalism, in particular as far as rural land reform is concerned.

I turn now to two cases that involved land rights and burial rites that illustrate the difference between monumental and memorial judicial reasoning. As Du Plessis notes, these cases deal with the 'commemoration and (thereby memorialisation) of the dead'.[37] The Bührmann-Nkosi case tells the story of Grace Nkosi who with her husband and children lived on the Bührmann family farm. Both of them were farm labourers. They moved to a neighbouring farm where Grace's husband died, whereafter Grace with the permission of Gideon Bührmann, who had taken over from his father moved back to the Bührmann farm. In 1997, in terms of the Extension of Security of Tenure Act (ESTA) Grace became 'an occupier' of the land with the right to reside on and use it. This right also include living in accordance with one's culture, freedom of religion, belief, opinion and expression. ESTA allows a person to visit and maintain family graves on someone else's land subject to certain conditions. When Grace's son Petrus died in 1998, Gideon refused her wish to bury him on the Bührmann farm. He approached the high court in Pretoria to obtain an order preventing the funeral. A single court judge refused but on appeal to a full bench the order was granted. Grace appealed to the appeal court in Bloemfontein who dismissed her appeal. Her contention was based on the fact that other members of her family were buried on the farm and that the necessary rituals were performed according to her tradition and religious beliefs that declared the land as 'home for the ancestors'.[38] Du Plessis comments on the monumental way in which the court refused. The issues were immediately framed in terms of conflicting rights, the right to religious and cultural belief against the right to land. The High Court in the decision of Satchwell concedes to a right to religion but warns against taking it too far, which may result in 'each occupier who professed a religion or set of beliefs [being] entitled to require of the landowner that he permit the erection of a church or tabernacle or other place of worship on his land'.[39] Du Plessis rightly contrasts this to the more sobering words of Ngoepe J, who noted in a dissenting judgement that what is at issue here is the size of a grave of probably 1 by 2 m and that in terms of the law as it stands the respondent is in any case allowed to visit the existing graves. In his words: 'I am not persuaded that the loss of a 1m by 2m area constituted such a drastic curtailment of the appellant's right of ownership as to justify denying the respondent the right.'[40] In light of this case parliament included a provision in ESTA including the right to bury a

36 Walker *et al Land, Memory, Reconstruction and Justice* 3; Bohlin 'A price on the past: Cash as compensation in South Africa Land Restitution' 672.

37 Du Plessis 'The South African Constitution as monument and memorial, and the commemoration of the dead' 191.

38 Du Plessis 'The South African Constitution as monument and memorial, and the commemoration of the dead' 198.

39 *Ibid* 199.

40 *Ibid* 200.

deceased occupier on the land where she lived. An interesting and significant observation by Du Plessis is the monumental way in which the legislation (ESTA) concerned was drafted. He notes that monuments beget counter-monuments: 'Grace Nkosi's monumental occupational rights to Gideon Bührmann's family farm (possibly including burial rights), inevitably brought Bührmann's constitutionally guaranteed right to his/the family's property into play.[41] He notes how, informed by a certain ideology the court was convinced that the right to property should trump 'lesser' religious rights and totally missed their colleague Ngoepe's 'sobering', down-to-earth observation referred to above.

The second case involved white farmer Mark Scott-Crossley, who with the assistance of some of his workers assaulted an ex-employee who returned to the farm to fetch his belongings and after the assault threw him in an encampment to be eaten alive by white lions. The farmer wanted to prevent the burial of the deceased, this time framed in terms of the right to a fair trial (the remains could be important evidence in the criminal trial). Judge Patel, although his dismissal of the application was based on the fact that the applicant failed to establish urgency, made significant substantive observations in his judgment in an attempt to reclaim humanity and dignity for the deceased and his family.[42] The court heeded a plea of one of the deceased's family members, who invoked the right to human dignity coupled with *ubuntu*. The court took the right to a fair trial seriously, but through a process of 'contextualisation' in contrast to the 'exaggeration' in Nkosi-Bührmann didn't treat it in a monumental way, trumping all other rights.

Fay and James note how restitution can be seen as a combination of 'modernity's romantic aspect, nostalgia for the lost rootedness of landed identity', with more technical and bureaucratic features of the state.[43] The discourse on land reform has significant implications for how the past is remembered, but also for the understanding of rights, citizenship, state formation and nation building in the present and future.[44] In describing land reform as not only a spatial process but also a temporal one they identify six phases: The first phase is dispossession which could come about because of conquest, treaty, expropriation, eviction, sale, or contested and misunderstood transactions.[45] The second phase is the *interim* period after dispossession with significant variations – 'Is the lost land the home of one's childhood or youth, imbued with nostalgia for a happier, better time? Or did it belong to some distant ancestors, with a connection that may have been forgotten – unimagined – prior to the land claim?'[46] The third phase is the phase in which the restitution policy is created and the conditions of possibility of restitution should be carefully studied. The fourth phase is when the particular claim is being made, during which specific categories of those who might be eligible might be a starting point as set out in restitution policies, but the process itself goes beyond these categories. Fay and James explain that 'actual land claims typically entail another round of boundary-drawing; concrete groups of people constitute themselves or are constituted as claimants through the brokerage of NGOs, activists, and benevolent – if paternalistic – state agencies.'[47] They describe restitution as

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41 *Ibid* 203.
42 *Ibid*.
43 Fay and James 'Giving land back or righting wrongs? Comparative issues in the study of land restitution' 41.
44 *Ibid* 43–44.
45 *Ibid* 44
46 *Ibid*.
47 *Ibid* 46.

requiring 'the establishment of new forms of community', 'authentic identity is both required and acquired, whether based on geography, genealogy, language, ethnicity, culture, way of life, or race'.[48] The authors, with reference to Du Toit, note that in South Africa it was expected that land claims would be 'profoundly litigious and adversarial', but that the biggest problem turned out to be practical problems after the claim for restitution had been successful.[49] The fifth phase, the post-transfer phase, entails resettlement, a phase that often also entails many pitfalls.[50] Concerning the final phase, the 'time beyond restitution' they point to the realisation that 'restitution may never occur.'[51] The authors note that to recognise these 'defining moments in restitution – dispossession, policy formation, community formation, claim-staking transfer, post-transfer, and post-restitution – allows for comparison across space and time' and for 'case studies from widely differing contexts' to be examined in light of the process.[52] The tension between on the one hand a master narrative on land dispossession linked to the monumental promise of land restitution and reform and on the other hand a recognition of multiple and ordinary narratives and attempts to cope with daily life resonates with how Du Plessis reflected on the Constitution through the notion of monument, memorial, authorship and narration. Du Plessis underscores not only constitutional constraint, the ambiguity and complexity of meaning but also that processes of transformation, reparation and reconciliation should be modest and aware of limits and possible failures.

4 'Monuments and memorials are aesthetic creations'[53]

Since 1994 a number of what could be seen as 'metaphors' have come to play a role in post-apartheid discourses on memory and on the constitution.[54] It might be worthwhile to take note of Deleuze and Guattari's following of Kafka's rejection of the use of metaphor in literature.[55] They developed the notion of a minor literature as a way of reading or engaging with the work of Kafka. For them a minor literature has three features: 1) deterritorialization of language, 2) the connection between the individual and the political and 3) the collective nature and value of the work.[56] These three features highlight the essence of a minor literature in which '"minor" no longer characterises certain literatures, but describes the revolutionary conditions of any literature within what we call the great (or established).' [57] Minor literature for them is not a literature written in a minor language but rather exactly a literature written in a major language, for example Kafka as a Jew writing in Prague in German. Central to their work on a minor literature is the idea of 'line of flight'. Meaning is of value only insofar as it relates to such a line of flight and is constantly deferred. There is thus no use or value to metaphor in this understanding. They invoke Kafka, who said: 'Metaphors are one of the things that make me despair of

48 *Ibid*.
49 *Ibid* 47.
50 *Ibid* 48.
51 *Ibid*.
52 *Ibid*.
53 Du Plessis 'The South African Constitution as monument and memorial, and the commemoration of the dead' 190.
54 Botha 'Metaphoric reasoning and transformative constitutionalism' 612.
55 Deleuze and Guattari 'What is a minor literature?' 13.
56 *Ibid* 14.
57 *Ibid* 18.

literature.'[58] 'Metamorphosis' is exactly opposite to metaphor. Any sense of literal or figurative language ceases to exist, what we have is rather a multiplication of possible meaning. 'Language ceases to be representative in order to stretch toward its extremes or its limits.'[59] It is interesting in light of this view to note Du Plessis's naming of monument and memorial as aesthetic creations, not metaphors. I follow this as cue to think of monument and memorial and authorship and narration in terms of the aesthetic, in terms of notions of challenging and problematizing assumptions of simplified understanding and clear meaning. It would be interesting to consider some of the other images invoked in post-apartheid discourse along the possible distinction between aesthetic creations and metaphors and I consider the image of the book below. Before I do that I want to raise another notion that for me discloses a way in which Du Plessis's work on South African constitutionalism could be read.

For the past few decades spatiality has become prominent in amongst others cultural and literary studies. The 'spatial turn' has refocused attention away from mainly discourses of time and history to space and spatiality.[60] This spatial turn brought with it also a new 'aesthetic sensibility'. Spatiality and in particular a focus on the production of space underscore the significance of 'the consciousness of one's place' meaning 'one's sense of situatedness in space, as well as spatial divisions, partitions, and borders.'[61] A thorough reading of constitutionalism, including how Du Plessis's use of aesthetic creations and the production of space could influence readings of the Constitution is beyond the main focus of this chapter. However, I want to raise one idea that came to the fore in literary geography, namely that of the spirit of the place. The spirit of the place is a notion that can be traced back to DH Lawrence that he translated from the original Latin concept of 'genius loci, a guardian spirit that watches over a particular locale.'[62] For Lawrence 'this "spirit" informs, if not directs and controls the ideas of the people who live in a place.'[63] He relied on the notion to explain something about the character of the people of a certain place that for him played a central role in understanding writing in specific times in specific places. Virginia Woolf, Umberto Eco and others have understood the spirit of place to be of great importance in influencing readers in their experience of literary texts.[64] For me the aesthetic creations relied on by Du Plessis invoke also spatiality and the social relations produced by space. Both monument and memorial are spatial metaphors signifying particular spaces and notions of spatiality. Also authorship and narration invoke a sense of spatiality – authorship could recall a place or space of foundation, of beginning, a constituted space where narration brings forth the idea of community, sociality, a plural gathering of bodies, views and voices. Above I have suggested tentatively how Du Plessis contributed to and enriched discourses on political power and land reform. I argue here that by invoking aesthetic images he introduced also the notion of the spirit of place to South African constitutional discourse.

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58 *Ibid* 22.
59 *Ibid* 23.
60 Tally *Spatiality* 11–43.
61 *Ibid* 14.
62 *Ibid* 83.
63 *Ibid* 83.
64 *Ibid* 84.

Mark Antaki focuses on two other images relied on in the Epilogue of the 1993 Constitution, namely that of the bridge and the book.[65] Antaki notes that although the bridge has been central in a number of reflections,[66] the book has been neglected. Given my reference to Kafka's rejection of metaphor and the role it plays in Deleuze and Guattari's notion of a minor literature it is important to note that Antaki employs the term 'metaphor' in his discussion of the bridge and the book. As my discussion will show, Antaki's engagement with the 'book' in particular in the context of Krog's refusal to write a book is not in opposition to the gist of the rejection of metaphor that we find in Kafka and that is supported by Deleuze and Guattari. Antaki's affirmation of Van der Walt's problematisation of the bridge as a metaphor designating a simplified linearity from a bad past to a better future confirms a reading aligned with the search for lines of flight/meaning to escape closed and final definition. For Antaki, Van der Walt's critique of the dominant interpretation of the bridge is similar to Krog's ethical problem with writing a novel.[67] He invokes David Scott's support of tragedy rather than romance as the genre through which to narrate the change from colonial to postcolonial.[68] He describes Krog's position set out in her 2009 *Begging to be Black* as follows: 'Krog's refusal is at once the refusal of a novel that allows one to play out the fantasy of "getting" into someones else's (or even one's own) head or heart, and the refusal of a novel that involves the movement of a protagonist towards a place where he or she arrives at a prefigured unity and maturity.'[69] Antaki explores Van der Walt's response to the dominant writings on the bridge and his invocation of 'codes', particularly two forms of dancing to problematize the notion of a linear movement from past to future, or bad to good. Central to Van der Walt's take is the continuities at play. Antaki quotes the following passage: '[L]and reform is essentially toyi-toyi jurisprudence, which tends to feed off the energy of confrontation within the very apartheid law and system that it is meant to reform, just like the toyi-toyi marches fed off the energy of the apartheid system which it confronted, demanding change, waiting for change.'[70] It is significant for my emphasis on Du Plessis's insistence on 'aesthetic modes' that Van der Walt also views his own framing of dancing codes as 'aesthetic', which Antaki interprets as 'to be about how one "senses" or "experiences"'.[71] At stake here is the refusal to claim 'a wilful imagination … a form of imagination as invention.'[72] Van der Walt's hope lies at the end with the possibility for things to be 'different' but not necessarily better.

Turning to Krog, Antaki interprets her refusal to write a novel as a refusal of 'the fantasy that one can, somehow, know others', a refusal 'of imagination as a form of mastery in the service of both reason … and will'.[73] He elaborates on Patchen Markell's critique of 'recognition' that similarly puts the knowing and mastery into dispute.[74] Antaki reads Krog also

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65 Antaki 'From the bridge to the book: An examination of South Africa's transformative constitutionalism's neglected metaphor' 49.

66 For one of the first writings see Mureinik 'A bridge to where? Introducing the interim bill of rights' 31 and for a more critical assessment see Van der Walt 'Dancing with codes – protecting, developing and deconstructing property rights in a constitutional state' 258.

67 Antaki 'From the bridge to the book' 51.

68 Scott *Conscripts of modernity: The tragedy of colonial enlightenment*.

69 Antaki 'From the bridge to the book' 52.

70 *Ibid* 58; Van der Walt 'Dancing with codes' 292.

71 Antaki From the bridge to the book' 58; Van der Walt 'Dancing with codes' 292.

72 Antaki 'From the bridge to the book' 60.

73 *Ibid* 64.

74 Markel *Bound by Recognition* 2003; Arendt *Between Past and Future*.

to reject what he calls 'the literary analogue to the legal form of human rights and human-rights-based constitutionalism.'[75] She is refusing 'the authorial sovereignty that sets up a politics and an ethics of identification' that assumes that others and ourselves can be known.[76] 'The "novel" Krog rejects… is a genre that thematises, performs, both self-reformation and the knowing of the psyches of others…'[77] For Antaki this kind of novel might be the novel meant in the Epilogue of the 1993 Constitution – he interprets the Epilogue (and also the AZAPO judgment's reliance on the Epilogue) as reflecting 'a moment of self-recognition, of attainment of maturity… of a form that allows the protagonist to retrospectively interpret his life story as a formation.'[78]

However, there are literary genres, different kind of novels, that differ from employing the imagination as willing, as mastery, as establishing a kind of sovereign authority – such is the notion of a minor literature as written by Kafka, and supported by Deleuze and Guattari. Antaki refers to novels by Coetzee[79] and also Van Niekerk's *Agaat* as examples. At stake here is, if the Constitution is seen as a 'book', what kind of book it is, and linked to this is performing the role of narrator or author. Du Plessis has shown how both roles of author and narrator are present in the South African constitutional discourse. By placing emphasis on the Constitution as only one aspect of a broader and complex engagement with history, politics and transformation he has underscored the significance of narration. His insistence on a community of interpreters who should be involved in giving meaning to the ideals of the Constitution also stands in the guise of narration rather than authorship.

I want to conclude this section by referring briefly to one book that for me stands exactly in the guise of narration rather than authorship. Njabulo Ndebele in *The Cry of Winnie Mandela* crafted a story through the voices of four ordinary women. Antjie Krog in a reflection on the book notes her 'complete surprise' when, instead of finding Winnie in the first pages of the book she was introduced to Penelope.[80] A second surprise was when it became clear to her that neither Winnie nor Penelope will be the main protagonist in the story, but rather four women telling their 'own stories' in a non-linear way, without proper beginning or ending.[81] Krog notes also an interesting relation between 'real' and 'imagin–ary' – the four women who are initially presented as '"real" and "realistic" moved into the "unreal" company of Winnie and Penelope'.[82] She describes this shift also as a 'transformation from the physical to the metaphysical sphere.'[83] Another significant aspect of the story is what Krog calls the 'communal location' that she interprets to mean that Winnie's story on her own makes no sense.[84] For Krog, Ndebele is saying that to focus on Winnie as an individual is not the point at all, but rather that 'the story about Winnie is the story about every one of us and is at heart an ethical story.'[85] Krog quotes the words of an

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75 Antaki 'From the bridge to the book' 66.
76 *Ibid* 67.
77 *Ibid* 68.
78 *Ibid* 67.
79 See Pippin 'The paradoxes of power in the early novels of JM Coetzee' 19; and eg Coetzee *Waiting for the Barbarians* and *Disgrace*.
80 Krog 'What the hell is Penelope doing in Winnie's story?' 55–56.
81 *Ibid* 56.
82 *Ibid*.
83 *Ibid* 56–57.
84 *Ibid* 57.
85 *Ibid*.

imaginary Winnie saying to the four other women: '*You*, all of you, have to reconcile not with me, but with the meaning of me. For my meaning is the endless search for the right thing to do.'[86] Krog argues that Ndebele, by choosing not to make Winnie a main character in the conventional way, but rather a community of women, makes two points: Firstly, that Winnie is who she is because of all of us: 'she is us, she is like us, she is who she is through us, we made her and she us';[87] and secondly, that the way of telling a story by focussing on a conventional hero, like Odysseus, is not the form that he feels is appropriate to tell the ethical story of his community.[88] Finally Krog comments on how Ndebele uses Penelope in his story: She as a Western character is not dictating an African story but rather through Winnie an alternative route and African framework is created for Penelope.[89] For Krog Ndebele created a shift from Penelope's 'faithfulness' to 'reconciliation': 'My journey follows the path of the unfolding spirit of the world as its consciousness increases; as the world learns to become more and more aware of me not as Odysseus's moral ornament on the mantelpiece, but as an essential ingredient in the definition of human freedom.'[90]

My argument in this chapter has been that Du Plessis in making the theme of memory prominent in the context of South African constitutional discourse by introducing aesthetic metaphors and arguing that the Constitution itself is an aesthetic creation has not only contributed to constitutional discourse but has imbued it with a certain spirit of place. In this section by relying on writings on 'the book' and a specific novel my aim was to underscore the idea of a book that does not claim to master, or to tell the individual story of a main protagonist but rather how a communal story can unfold carried by plural voices. Du Plessis, by underscoring not only the monumental constitution, the constitution as author, but also the memorial one, the constitution as narration, has disclosed a way for the South African Constitution to be approached in a communal and ethical way, as a possible way to think also about reconciliation. Through his work on the Constitution he has suggested a certain spirit of place for readers, or in his words 'a community of interpreters' to consider.

5 Conclusion

My aim in this chapter was to pay tribute to the work of Du Plessis, in particular the creative, critical and humane way in which he engaged with the Constitution, constitutional issues, the meaning and interpretation of the Constitution. Much of the writing on constitutional issues in the South African context leaves the reader with that taste of sawdust that Kafka so aptly noted. In contrast to these writings Du Plessis's voice stood out as bringing forth ideas and conceptual thought, but also more than that: a humanity and a certain ethics that created opportunities for further conversation and engagement.

By remembering his depiction of the Constitution as monument and memorial, as author and narration I attempted to link it with the political tension between regarding the Constitution as representing constituted or constituent power. I then took a glimpse of the discourse on land reform and linked it tentatively with this discourse in order to ask a similar question – does the process of restitution stand in the guise of already constituted power, in other words is the state forging a single history and thus one-dimensional

86 *Ibid*; Ndebele *The Cry of Winnie Mandela* 113.
87 Krog 'What the hell is Penelope doing in Winnie's story?' 58.
88 *Ibid*.
89 *Ibid* 59
90 Ndebele *The Cry of Winnie Mandela* 120 as quoted by Krog *ibid*.

present and future through the use of a master narrative or are there opportunities for constituent power, on-going resistance, staging of dissensus and plural narratives. In light of the notion of a minor literature, and Krog's refusal to write a novel and Ndebele's novel narrated by a community of ordinary women I considered how literary works can accept ambiguity and complexity and, to use Du Plessis' phrase, show restraint.[91] This is how I understand Du Plessis's reliance on aesthetics and why it is valuable to understand the Constitution as an aesthetic creation. I conclude with his words.

> To conclude: it is no use trying to reconcile or 'harmonise' the Constitution's contradictory modes of existence as monument and memorial. It is best, for jurists in particular, to learn to live with and make the most sense of them. The law is full of contradictions. So too is the South African Constitution. We need not try to 'resolve' these paradoxes (or *aporiai*) – not even by treating them as dialectical antitheses. This would be too 'logical' or 'rational' a modus operandi in a reality that defies any superimposed logic or rationality. Living with contradictions in our postmodern world is not a fate. It is rather an opportunity to appreciate the contrasts that constitute the full picture of the reality that we experience, in other words an aesthetic mode of coping with the dilemma of contradiction.[92]

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91 A number of novels have appeared in the post-1994 era that respond to not only memory but in particular to the land issue. My guess is that more are to come. The 'farm novel' has played a significant role in South African literature in the past. The coming of age novel quite often told the story of rural depopulation and urbanisation; the urban novel also has become prominent. I am currently busy with a project that involves the revisiting of these literary genres in light of post-apartheid jurisprudence, in particular notions of memory, spatiality, home and land.

92 Du Plessis 'The South African Constitution as monument and memorial, and the commemoration of the dead' 205 (references removed).

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Die ongeregtigheid van neutraliteit

Sekulêre beregting van religieuse kwessies∗

Francois Venter

1 Inleiding

Die fokus van Lourens du Plessis se merkwaardige doktorale proefskrif[1] was *geregtigheid*. Die ideaal om geregtigheid te bevorder, kenmerk deurlopend sy wetenskaplike werk en sy lewe, en getuig ook daarvan dat dit 'n onophoudelike maar onvervulde strewe van die mensdom is.

Feitlik 4% van die kontemporêre geglobaliseerde wêreld se inwoners bewoon nie die land waarin hulle gebore is nie.[2] Die konsep van enkelkultuurstate behoort tot die verlede. Religieuse pluralisme het 'n permanente eienskap van die oorgrote meerderheid van die amper 200 bestaande state geword. Gevolglik kom howe oral toenemend te staan voor die noodsaak om oor kwessies reg te spreek wat met geloofsoortuiging verband hou, byvoorbeeld besnydenis, onderwys, openbare rituele, feesdae, intra- en inter-godsdiens–tige geskille, ensomeer. In hierdie soort regspraak kom die vraag na die verband tussen religie[3] en geregtigheid pertinent na vore.

In vele regsordes word die hantering van religieuse pluralisme gekenmerk deur verwarde denke, wat regters wat ontvlugting soek van die brandende problematiek wat daarmee gepaard gaan, dikwels onder woorde bring met begrippe soos 'neutraal' en 'sekulêr'.[4] Die benutting van hierdie populêre konsepte gee aanleiding tot wesenlike teenstrydighede in nasionale, supranasionale en internasionale regspleging. Die vraag wat hier onder andere met verwysing na Du Plessis se werk oorweeg word, is of sekulêre neutraliteit geregtigheid bevorder of ondermyn.

In afdeling 2 word die verband tussen geregtigheid en religie onder die loep geneem, waarna die liberale benadering, wat steeds toonaangewend in die wêreld is maar betekenisvolle weerstand begin ervaar, ondersoek word. Afdeling 4 behandel die sekulêre

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∗ Aspekte van hierdie bydrae berus op die manuskrip van die outeur se aanstaande boek *Constitutionalism and Religion* (2015).

1 Du Plessis *Die Juridiese Relevansie van Christelike Geregtigheid*.

2 Sien bv United Nations Department of Economic and Social Affairs, Population Division *World Migration in Figures*.

3 Weens die potensiaal van onsekerheid oor wat presies bedoel word wanneer konsepte soos 'godsdiens' en 'geloof' ter sprake kom, word 'religie' hier gebruik as oorkoepelende begrip. Vir die huidige doeleindes word dus met 'religie' geloofsoortuigings, godsdienstige praktyke in al die uiteenlopende vorms wat dit in die wêreld aanneem, asook fundamentele lewens-beskoulike oortuigings, bedoel, ongeag of dit met formele strukture, praktyke of rituele in verband staan, en of dit die vorm van agnostiese of ateïstiese standpunte aanneem. Die woord 'godsdiens' en afleidings daarvan word hier gebruik om aanbiddingspraktyke in institusionele of groepsverband (bv kerke en bewegings soos Islam, Judaïsme en Hinduïsme) aan te dui.

4 Vgl bv Ladeur en Augsberg 'The myth of the neutral state: The relationship between state and religion in the face of new challenges' 143–144.

neutraliteitsbenadering veral in die Kanadese regspraak as voorbeeld van die gebrekkigheid daarvan, en die verskil tussen neutraliteit en objektiwiteit word in afdeling 5 bespreek. Daarna volg 'n kort beskrywing van twee belowende regterlike meganismes met behulp waarvan positiewe vordering na verdedigbare geregtigheid gemaak sal kan word, voordat 'n gevolgtrekking met verwysing na die Suid-Afrikaanse Grondwet aangebied word.

2 Geregtigheid en religie

Senior regswetenskaplikes verwys dikwels grappenderwys (maar soms ook verskonend) na hulle proefskrifte as 'jeugsondes'. Dit is te verstane, want professionele akademici skryf gewoonlik 'n proefskrif as toegangskwalifikasie aan die begin van hulle loopbane in 'n stadium wanneer die kandidaat se entoesiasme geneig is om sy of haar intellektuele rypheid te oortref. Hoewel dit onbillik sal wees om te verwag dat hy ná 35 jaar by alles in sy proefskrif sal bly staan, kan Du Plessis se proefskrif nie as 'jeugsonde' afgemaak word nie: afgesien daarvan dat daar heelwat in die werk oor sonde geskryf is, plaas die diepgang, omvang, navolgenswaardige struktuur en metodologie van die proefskrif dit in die kategorie van 'n grootliks onderwaardeerde en verrassend gedeë bydrae tot die regsfilosofie, ten spyte van sy destydse jeugdigheid. Dit is volledig in die idioom van die Potchefstroomse 'Christelik-wetenskaplike', Reformatoriese tradisie van die tagtigerjare geskryf. In die breë regswetenskaplike gemeenskap het hierdie tradisie nog nooit 'n groot aanhang geniet nie, wat moontlik verklaar waarom die proefskrif nie die aandag ontvang het wat die gehalte daarvan regverdig nie. Die Engelse opsomming van die proefskrif vat die trant daarvan netjies saam:[5]

> The principal objective of this study is to show that (from a Christian point of view) there cannot exist any discord between God's justice/righteousness (and therefore Christian justice) and mundane justice (that is the justice of human institutions), because someone who through faith participates in God's justice/righteousness must – in a radically a-synthetic fashion – accept and acknowledge that 'the world' is God's world and that the continuance of world history is a continuance in correlation with his 'deeper' history of salvation. In the final analysis God's call for obedience coincides with his appeal to live a just/rigtheous life through human institutions; for by living such a life, man obeys the law (the commandments) of God.

Du Plessis het geregtigheid dus regstreeks met religie geassosieer. Dat verskillende religieuse perspektiewe op geregtigheid onvermydelik is, is ooglopend as 'n mens die volgende kragtige samevatting van 'n Reformatoriese siening in Du Plessis se hoofstuk waarin hy 'kontoere vir 'n eie teorie' uiteengesit het, in 'n afdeling onder die opskrif 'Ontologiese Perspektief',[6] oorweeg:

> God se heilsgeskiedenis is... 'n 'diepere' geskiedenis wat die wêreldgeskiedenis tot en met die voleinding toe dra en rig: in die gang van gebeurtenisse in die wêreldgeskiedenis (in wat van dag tot dag en van tydvak tot tydvak gebeur) openbaar God aan sy kinders sy heil; dit is dus nie vergesog om te beweer dat daar 'n korrelasie tussen God se heilsgeskiedenis en die wêreldgeskiedenis bestaan nie. In hierdie korrelasie word die verlossingswerk van Christus konkreet in die lewens van gelowige mense en volkere gemanifesteer as *inter alia* met die 'sigbare' gebeurtenisse in die wêreldgeskiedenis gegee.

Ongeag die simpatieke, neutrale of vyandige reaksie wat hierdie en soortgelyke dele van die proefskrif selfs uit Christelike geledere, maar veral natuurlik uit ander religieuse en

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5 Du Plessis *Juridiese Relevansie* 840.
6 *Ibid* 722–723.

a-religieuse perspektiewe mag ontlok, behoort enige objektiewe leser toe te gee dat een wesenlike gegewe daardeur na vore gebring word: nadenke oor die aard en inhoud van geregtigheid (en verwante begrippe soos moraliteit en etiek) roep onvermydelik religieuse – oftewel wêreldbeskoulike – opvattings na vore. Daardeur word aan juridiese regskepping en regspleging, waarby geregtigheid uiteraard voorop behoort te staan, die onafwendbare eis van die verdiskontering van religieuse pluraliteit gestel.

Wanneer geregtigheid ter sprake kom, word dikwels na die millennium-oue universele 'goue reël' – ook bekend as 'wederkerigheid' ('reciprocity') – verwys. Hoewel Christene dit as 'n bybelse beginsel ken,[7] kom dit onder meer reeds vyf eeue voor die geboorte van Christus by K'ung-fu-tzu (Confucius) voor, en word dit ook in bekende Romeinse leerstellings soos *suum cuique tribuere* weerspieël.[8] Soos dit onder meer[9] uit Du Plessis se Engelse opsomming van sy proefskrif blyk,[10] sluit hy daarby aan deur geregtigheid (onder meer) as die roete of kanaal waarlangs die wederkerige 'doen aan ander' in konkrete lewensomstandighede verwerklik kan word, te beskryf.

> To accomplish this objective, (i) justice/righteousness in its true and fundamentally religious sense is distinguished (*though never separated*!) from (ii) justice as a channel or means for 'doing unto others' in life's concrete situations.

Die liberalisme domineer reeds vir verskeie eeue die Westerse staatsregtelike denke en woordeskat. Die lewensbeskoulike impak daarvan kom duidelik tot uitdrukking in die aandrang dat die staat religieuse neutraliteit moet handhaaf.

3 Die liberale grondslag van religieuse neutraliteit en reaksies daarteen

Die Kanadese filosoof, Charles Taylor, se kompakte maar besonder insiggewende voorwoord tot 'n versamelwerk oor die vraag wat sekularisme is, begin met die stelling dat daar algemene instemming daarmee is dat moderne demokrasieë 'sekulêr' moet wees. Hy wys egter dadelik op die verwarring wat daar oor die veelvuldige betekenisse van die woord bestaan.[11] Hy onderskei twee modelle van 'n sekulêre bedeling, albei gefundeer op die een of ander vorm van die skeiding tussen kerk en staat.

Die eerste model berus op tydlose beginsels wat gekonstrueer word deur die aanwending van die rede alleen. Volgens Taylor[12] behels hierdie beginsels dat niemand onder geloofsdwang geplaas mag word nie (vryheid), dat geen religieuse of a-religieuse *Weltanschauung* bevoorregte status mag kry nie (gelykheid), dat alle 'geestelike families' geleentheid moet kry om gehoor te word (broederskap) en dat harmonie en goedgesindheid in die verhoudings tussen die ondersteuners van verskillende godsdienste en lewensbeskouings gehandhaaf moet word.

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7 Bv 'Alles wat julle wil hê dat die mense aan julle moet doen, moet julle ook aan hulle doen. Dit is tog waarop dit neerkom in die wet en die profete' in Matthéüs 7:12 en 'Behandel ander mense soos julle self behandel wil word' in Lukas 6:31.

8 Vgl bv Wattles *The Golden Rule* en Flores 'Law, liberty and the rule of law (in a constitutional democracy)' hfst 6 *passim*.

9 Vgl bv ook Du Plessis 'Conceptualising "law" and "justice" (1): "Law", "justice" and "legal justice" (theoretical reflections)' 278, soos ook gerieflik saamgevat in Du Plessis 'Conceptualising "law" and "justice" (2): Just legal institutions in an optimally just society (with particular reference to possible options in a future South Africa)' 357.

10 *Juridiese Relevansie* 840.

11 Taylor 'Foreword – What is secularism?' xi.

12 *Ibid* xii.

Taylor se tweede sekulêre model berus op demokratiese onderhandeling wat beginsels moet oplewer waaroor almal kan saamstem en dus uit hoofde van hulle eie sienswyses kan regverdig.[13] Taylor voer nie aan dat die ooreengekome beginsels 'reg' is nie, maar wel dat die behoefte aan 'broederskap' tussen alle ter sake groepe daardeur bevredig word.

Soos Taylor oortuigend aantoon,[14] het die idee van die sekulêre staat voortgespruit uit wat hy die 'Latynse Christendom' noem: in daardie verband het sekularisme ontluik as 'n manier om te onderskei tussen profane (wêreldse) tyd en 'hoër' tyd (die ewigheid). Hierdie onderskeid het voortgespruit uit die teologiese kontrastering van die geestelike en die tydelike. Hiervolgens het die Rooms-Katolieke Kerk op die geestelike terrein beweeg, en die staat op die tydelike.

Weens die Reformasie is verskeie funksies, eienskappe in instellings van onder die beheer van die Kerk verwyder en in die hande van 'leke' geplaas. Hierdie proses is beskryf as 'sekularisering'.[15]

'n Verdere waardevolle perspektief van Taylor[16] is dat die Westerse sekulêre idee wesenlik verskil van dit wat in ander godsdiensstelsels (soos Islam) geld: die ander stelsels het naamlik nie deur 'n sekulariserende reformasie waardeur 'kerk' en 'staat' van mekaar geskei is, gegaan nie.

Voortspruitend uit die geskiedenis van 'n hele paar eeue het die Westerse denke, wat steeds die dominante bepaler van die hedendaagse regswoordeskat is, dus as vanselfsprekend aanvaar dat daar 'n onderskeid gehandhaaf moet word tussen wat werklik is – dit wat van 'hierdie wêreld' is – en dit wat transendentaal is. Die staat en die reg werk hiervolgens met die immanente werklikheid as primêre, eintlik eksklusiewe, oorweging. Die res, die transendente religieuse uitvindsels waarin individue toegelaat kan word om hulle vryelik te verlustig, is nie vir die staatlike reg tersake nie, solank as wat die godsdienstig- of lewensbeskoulik-gemotiveerde optrede van mense nie met die sekulêre staatlike werklikhede inmeng nie. Volgens hierdie wydverspreide beskouing is die sekulêre wêreld werklik, die religieuse is onwerklik of vals; regtens, en vir die realisering van geregtigheid, is die sekulêre werklikheid noodsaaklik; religie 'n oorbodige struikelblok by regspleging.[17]

Hierdie siening is in 2000 deur regter Albie Sachs in 'n uitspraak van die Konstitusionele Hof onder woorde gebring.[18] Daarin gee hy 'n kopknik in die rigting van die erkenning van die private belang vir individue van geloofsoortuigings wat weliswaar regsbeskerming geniet, maar identifiseer dit as irrasioneel en te onderskei van die rasionele werking en toepassing van die reg.

Sekulêre staatsneutraliteit word ten nouste en veral met die liberalisme vereenselwig. Hierin is 'n ironie opgesluit, aangesien die liberale opvattings oor die staat vanaf die 16de eeu ontwikkel het uit die godsdiens-gedrewe sienings oor verdraagsaamheid teenoor religieuse diversiteit as 'n produk van die protestantse Reformasie.[19]

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13 *Ibid* xvi.
14 *Ibid* xvii–xx.
15 Taylor *ibid* se bondige opsomming op xviii van die uitvloeisels van die onderskeid tussen die geestelike en die tydelike sedert die 17de eeu vat dit netjies saam.
16 *Ibid* xix *et seq*.
17 *Ibid* xx.
18 Par [34] van die uitspraak in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (KH).
19 Sien bv Levey 'Secularism and religion in a multicultural age' 4–5.

Weens faktore soos die toename van die mobiliteit van die mensdom as 'n element van globalisering neem die religieuse pluraliteit van burgerye in hierdie era sigbaar toe.[20] Vanselfsprekend stel hierdie tendens groterwordende eise aan regsordes. Die verskynsel van pluralisering kom wêreldwyd voor, maar as besonder prominente voorbeeld daarvan merk Slotte[21] op dat, waar die saambestaan van aanhangers van verkillende godsdienste voorheen in Europa nie so ingewikkeld was nie en hoëprofielsake rakende godsdiensvryheid raar was, die 'godsdienslandskap' aan die verander is en gevestigde opvattings oor geloof en die gemeenskap nou beproef word.

'n Nuttige onderskeid van grondwetlike benaderings tot religieuse pluralisme word deur Adams gemaak:[22] aktiewe pluralisme is volgens hom 'n benadering wat die oortuigings van gelowiges erken, nie bloot verdra nie, terwyl passiewe pluralisme die benadering is wat in 'n staat voorkom waar religie benader word as 'n private aangeleentheid. Passiewe pluralisme is tipies van hedendaagse liberale sekulariste soos byvoorbeeld Stefan Huster and Denise Meyerson, albei navolgers van John Rawls.

Huster argumenteer[23] dat dit vir die politieke ordes van vandag 'n wesenlike vereiste is dat hulle hulself, hulle bestaan en optrede teenoor almal moet regverdig. 'n Politieke orde se legitimiteit word volgens hom op die goedkeuring van die betrokke mense gefundeer en nie op 'n appél op die wil van God, die aard van 'n voorafbestaande gemeenskap of op tradisie nie. Hierdie benadering is, sê Huster, gefundeer op die idee van die teoretiese legitimering van individualisme waarop die sosiale verdrag deurlopend, van Hobbes tot by Rawls, gekonstrueer is. Die staat moet, ten einde die burgers se aanspraak op gelyke respek gestand te doen, afstand doen van enige spesifieke religieus-wêreldbeskoulike (*religiös-weltanschauliche*) en etiese regverdigings vir sy handelinge.[24]

In teenstelling met hierdie gangbare liberale benadering meen Adams ('n Belg) dat die idee van die skeiding van kerk en staat onvanpas is, aangesien die staat nouliks niks met godsdienstige instellings te doen kan hê nie. Dit blyk vir hom uit die feit dat institusioneel-sekulêre state (waar *laïcité* grondwetlik verskans is) soos België en Frankryk, verrassend intiem deur handelinge soos die subsidiëring van kerklike ampte uit openbare fondse op die godsdienstige terrein betrokke is.[25]

Adams het die liberalistiese benadering helder ontleed met verwysing na Meyerson se sogenaamde drie beginsels van openbare moraliteit, synde –

- 'n regering behoort nie met religieuse oogmerke te handel nie;
- die owerheid behoort religieuse groepe nie te ondersteun by die verkondiging van hulle oortuigings nie; en
- argumente ten gunste van wetgewing en beleid moet nie uitsluitlik berus op religieuse oortuigings nie.

'n Insiggewende kritiekpunt wat Adams opper teen Meyerson se aanhang van Rawls se idee dat die staat regeer moet word ooreenkomstig 'n oorvleuelende konsensus oor wat

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20 Vgl bv Davies 'Pluralism in law and religion' 76–99.
21 Slotte 'The religious and the secular in European human rights discourse' 264.
22 Adams 'Religie in de publieke ruimte: constitutionele contouren en politieke theorie' 13–14.
23 Huster *Die ethische Neutralität des Staates – Eine liberale Interpretation der Verfassung* 85 en 633–634.
24 'n Sprekende Amerikaanse weergawe hiervan is dié van Greenawalt 'Secularism, religion, and liberal democracy in the United States' 2392.
25 Adams 'Religie in de publieke ruimte' 7–11.

goed is, sonder dat dié konsensus op argumente wat op religieuse oortuigings gebaseer is, mag berus, is die volgende:[26]

> Rawls en Meyerson gaan er blijkbaar van uit dat normen en waarden kunnen bestaan in het luchtledige, dat wil zeggen zonder affiniteiten in de reële wereld. Maar het punt is juist dat oordeelsvorming per definitie plaatsgrijpt vanuit een bepaalde visie op het goede. Anders is er helemaal niets om je oordeel op te steunen.

Só ontmasker, blyk dit dat die liberalistiese ambisie om religie in die private sfeer, waaruit die staat hom ten volle moet onttrek, te isoleer, deur die teensprake in die liberalisme se logika self vernietig word.

Ian Hunter meen ook dat die liberale teorie oor soewereiniteit, demokrasie en sekularisme aan 'filosofiese oppervlakkigheid' ly:[27]

> In the rationales that the proto-liberals elaborated for political authority, sovereignty cannot be popular, because it is uncoupled from the expression of a common moral will – whether God's, the people's or reason's – and is tied instead to the achievement of a particular end, civil peace, for which the state is brought into existence.

Die vraag na die fondament van liberale moraliteit is nie onbekend onder liberale denkers nie. So het Hellsten byvoorbeeld ten gunste van 'morele individualisme' geargumenteer as voorgestelde teenwig vir die 'degeneration of modern welfare liberal democracy'. Sy meen dat sodanige morele liberalisme gekonstrueer behoort te word op die aktualisering van menswaardigheid, waardeur selfbeheersing en 'menslike universaliteit' geïmpliseer word.[28] Volgens haar is die 'probleem van die liberale staat' te vinde in die feit dat, waar seksionele waardes in 'n plurale gemeenskap bots, of op sigself strydig is met die liberale etos, neutraliteit nie 'n oorkoepelende maatstaf kan bied aan die hand waarvan sulke konflike hanteer en besleg kan word nie.[29]

'n Meer veralgemeende, Christelike, verklaring vir die oppervlakkigheid van die liberale filosofie is in 1959 deur die Nederlandse regsfilosoof Herman Dooyeweerd gegee, wat in 'n onlangse vertaling soos volg lui:[30]

> The religious antithesis does not allow a higher synthesis. It does not, for example, permit Christian and non-Christian starting points to be theoretically synthesized. Where can one find in theory a higher point that might embrace two religious, antithetically opposed stances, when precisely because these stances are religious, they rise above the sphere of the relative? Can one find such a point in philosophy? Philosophy is theoretical, and in its constitution it remains bound to the relativity of all human thought. As such, philosophy itself needs an absolute starting point. It derives this exclusively from religion. Religion grants stability and anchorage even to theoretical thought. Those who think they find an absolute starting point in theoretical thought itself come to this belief through an essentially religious drive. Because of a lack of true self-knowledge, however, they remain oblivious to their own religious motivation.

Liberale denke is inherent ontdaan van 'n 'absolute beginpunt': die verbanning van religie uit die openbare sfeer noodsaak 'n smaaklose en bloedlose benadering wat van almal, die staat inkluis, neutraliteit opeis. Die Australiese regsfilosoof, John Finnis, het dit netjies saamgevat in sy kommentaar op die 'Philosophers' Brief' van ses Amerikaanse 'moral

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26 *Ibid* 22.
27 Hunter 'The shallow legitimacy of secular liberal orders: the case of early modern Brandenburg-Prussia' 54.
28 Hellsten 'Moral individualism and the justification of liberal democracy' 344.
29 *Ibid* 329.
30 Dooyeweerd *Roots of Western Culture: Pagan, Secular, and Christian Options* 8.

philosophers' (waaronder Ronald Dworkin en John Rawls) wat in 1997 as *amici curiae* van die VSA Supreme Court opgetree het in 'n saak oor bystand tot selfdood:[31]

> Of course, a group of philosophers such as these brief-writers... will deny that they are advancing an emotivist, subjectivist, perspectivalist, or any other meta-ethical scepticism. They will say that their claim about neutrality is purely about political rights and the proper competence of the state's rulers, and the value or dignity of individual autonomy. And so, on its face, it is. But the weakness of all the arguments which these philosophers have put forward to justify their claim about individual rights and state competence is good reason to conclude that their position's real foundation is the concern to be 'let alone' to *do what one really feels like.*

Die sekularisering van die staat word inderdaad roetinematig verduidelik bloot as die historiese onttrekking van kerklike dominansie oor die staat.[32] Dit is egter nie so eenvoudig om die idee so gemaklik van sy lewensbeskoulike wortels te skei nie. Finnis se standpunt is dat sekularisme die verwering van ontsag ('reverence') vir God meebring, en dat (in navolging van Maritain) dit 'a kind of deficiency detectable to a greater or lesser degree in every human soul' is.[33]

Sekularisering veronderstel dat religieuse oortuigings geen rol in openbare aangeleenthede te vervul het nie, terwyl nie-religieuse oorwegings bepalend moet wees vir die optrede van die staat en sy organe – asof net godsdiens vooroordeel veroorsaak, en slegs rasionele (dit wil sê a-religieuse) besluitneming geregtigheid in die hand kan werk. Om 'sekulêr' te wees, is in werklikheid egter ver verwyderd van neutraliteit en nouliks bevorderlik vir objektiwiteit. Indien dit in die korrekte perspektief geplaas word, gee sekularisme self uitdrukking aan 'n religieuse uitgangspunt: die liberale verabsolutering van die vryheid van die individu.

In 2009 het Bill Marshall drie beperkings op die sekulêre ideaal van die VSA geïdentifiseer:[34] eerstens die onvermydelik interne teenstrydighede daarvan, wat daarin geleë is dat sekularisme self nie 'completely secular' is nie, aangesien dit in 'n sekulêre staat neerkom op 'n 'competing faith system'; tweedens bots dit met die gelykheidseis weens die onvermoë daarvan om neutraal te staan tussen religie en nie-religie deur byvoorbeeld staatsondersteuning te bied aan 'n reeks instellings en belange, behalwe aan dié wat met godsdiens geassosieer word, wat ooglopend neerkom op ongelyke en dus diskriminerende behandeling;[35] en derdens die botsing in die VSA van sekularisme met 'a public culture that is replete with religious symbols, names, and references'.[36]

Daar is in hierdie tyd duidelike aanduidings daarvan dat sekularisme besig is om, wat die kwessie van religie in die openbare lewe betref, sy voorkeurposisie te verloor. De Been en Taekema[37] het in 2012 die stelling gemaak dat '[T]he secular nature of liberal

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31 Finnis J 'On the practical meaning of secularism' 507.

32 Sien bv Böckenförde 'Die Entstehung des Staates als Vorgang der Säkularisation' 75, 76 n 5.

33 Hy verduidelik dit mvn die moderne parallel met Plato se onderskeid tussen twee proposisies: daar is geen God nie; geen God het belang by menslike aangeleenthede nie; of enige goddelike belangstelling in menslike sake word maklik tevrede gestel met oppervlakkige piëteit wat geen menslike hervorming vereis nie, wat ateïsme impliseer; a deïstiese veronderstelling dat geen goddelike tussenbydekoms in die geskiedenis van die mensdom kenbaar is nie; en 'n 'liberale' godsdienstigheid wat nie met immoraliteit gemoeid is nie: Finnis J 'On the practical meaning of secularism' 493.

34 Marshall 'Progressives, the religion clauses, and the limits of secularism' 235–236.

35 *Ibid* 236–237.

36 *Ibid* 237–238.

37 De Been en Taekema 'Religion in the 21st century – Debating the post-secular turn' 1.

democracy is losing its artless, self-evident quality. Secularism is coming under increased scrutiny' en ter stawing daarvan verwys na Jürgen Habermas as toegewyde sekulêre teoretikus se nuwe insigte rakende die noodsaak dat die hedendaagse 'post-sekulêre' samelewing aanpas by die standhoudende aanwesigheid van godsdiens.[38]

Habermas se onlangse werk oor hierdie aangeleentheid is betekenisvol, nie net omdat hy 'n invloedryke en meesterlike outeur uit die liberale stal is wat besondere aansien en invloed in Europa en die VSA het nie, maar veral omdat sy geleidelike standpunt-verskuiwing saamval met die verskynsel dat religie algaande aan die terugkeer is na die openbare debat. Habermas se werk word daardeur gekenmerk dat hy die liberalisme van geloofwaardige etiek en moraliteit wil voorsien. In die 1970's en 1980's het hy die waarde van godsdiens beskryf as 'n middel om die 'substansie van die menslike' te red. 'n Dekade later beklemtoon hy die behoefte aan nadenke oor religieuse kwessies ten einde die geskiedenis van idees te kan verstaan, en beklemtoon dat religieë, in teenstelling met die filosofie, semantiese elemente wat van wesenlike belang vir 'n regverdige sosiale orde is, bevat. Sedert 2001 huldig Habermas die standpunt dat die 'sekulariseringshipotese' nie meer 'n verduideliking van die sosiale werklikheid kan wees nie, en dat, al word geloof en kennis deurlopend teenoor mekaar opgestel, godsdiens 'n waardevolle morele hulpbron is.[39]

In sy boek *Zwischen Naturalismus und Religion,* gepubliseer in 2005, vat Habermas sy idees oor die huidige plek van religie saam. Daarin dui hy onder meer aan dat, indien die modernisering van die openbare bewustheid in Europa gesien kan word as 'n leer-proses[40] –

> that affects and changes religious and secular mentalities alike by forcing the tradition of the Enlightenment, as well as religious doctrines, to reflect on their respective limits, then the international tensions between major cultures and world religions also appear in a different light.

Die state van die 21ste eeu, kragtig gevorm of beïnvloed deur liberale konstitusionalisme, bevind hulself toenemend in 'n situasie van onsekerheid oor hoe daar op die 'terugkeer' van die religieuse na die openbare lewe gereageer moet word, terwyl die liberale idee van sekularisme slegs opportunisties ontvlugtingsmoontlikhede, maar geen oplossings nie, bied.

4 Ongeregtigheid ingeklee as geregtigheid

Daar is in die regspraak van die howe van verskeie state voorbeelde van regterlike worsteling met die vraag hoe die staat met godsdienstige kwessies moet omgaan, oftewel hoe regs- en religieuse oorwegings in die belang van geregtigheid gebalanseer moet word. Dat daaroor geworstel word, blyk onder meer uit die hoë voorkoms van veelvuldige, minderheids- en aanvullende uitsprake wat deur multi-regter regbanke in sulke sake gelewer word.[41] Die judisiële ongemak met en nouliks verskuilde onenigheid oor die

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38 *Ibid* 2.

39 Vgl Reder en Schmidt 'Habermas and Religion' se uitstekende opsomming van Habermas se werk op 3–7.

40 Habermas *Between Naturalism and Religion – Philosophical Essays* 310.

41 Voorbeelde van godsdiensverwante uitsprake van die Suid-Afrikaanse Konstitusionele Hof is *S v Lawrence* 1997 (4) SA 1176 (KH) waarin drie uitsprake in die verhouding 4 – 3 – 2 gelewer is, *Prince v President, Cape Law Society* 2002 (2) SA 794 (KH) waarin drie uitsprake ook in die verhouding 4 – 3 – 2 gelewer is en *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (KH) waarin een van die elf regters 'n afsonderlike uitspraak gelewer het. As uitsondering was die hof eenstemmig in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (KH).

aangeleentheid word in vele gevalle versluier deur die skyn van eenstemmigheid oor die wenslikheid van staatsneutraliteit oor religieuse aangeleenthede. Hierdie 'neutraliteit' word dan geregverdig op grond van die sekulêre grondslag van die moderne liberale demokrasie. Vir die huidige doeleindes is die prominente voorbeelde daarvan wat in die Kanadese regspraak van die afgelope dertig jaar voorgekom het, insiggewend.

Ten spyte daarvan dat die Kanadese Grondwet nie die Amerikaanse 'non-establishment'-model van die VSA, waarvolgens staatsondersteuning van godsdiens absoluut verbied word, volg nie, gee die howe in hulle reaksie op wetgewing en uitvoerende en administratiewe optrede in Kanada die toon aan om die idee dat 'sponsorship of one religious tradition amounts to discrimination against others' te bevorder.[42] Die toonaangewende *Big M Drug Mart*-uitspraak van die Kanadese Supreme Court, van 1985 (wat die Suid-Afrikaanse Konstitusionele Hof ook meermale as rigtinggewend aangehaal het)[43] kan beskou word as die keerpunt in Kanada, weg van religieuse akkomodasie na sekularisme. Die saak het oor die verbod sedert vroeg in die 20ste eeu op handeldryf op Sondag gehandel en die Hof het die bevinding dat die verbiedende wetgewing diskriminerend was, soos volg verduidelik:[44]

> To the extent that it binds all to a sectarian[45] Christian ideal, the *Lord's Day Act* works a form of coercion inimical to the spirit of the *Charter* and the dignity of all non-Christians. In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians.

Drie jaar later het die Ontario Court of Appeal staatneutraliteit in religieuse aangeleenthede beklemtoon toe 'n regulasie wat die opsê van die Onse Vader in openbare skole verpligtend gemaak het, nietig verklaar is op grond van die bevinding dat die voorskrif inbreuk maak op die grondwetlike beskerming van die gewetens- en godsdiensvryheid van nie-Christene.[46]

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42 Vgl *S.L. and D.J. v Commission scolaire des Chênes and Attorney General of Quebec* 2012 SCC 7 [2012] 1 S.C.R. 235 (hierna '*Commission scolaire*'), par [17].

43 Die Konstitusionele Hof het die doelgerigte ('purposive') interpretasiemetodologie van die Kanadese Supreme Court in die heel vroegste uitsprake (bv *S v Zuma* 1995 (5) BCLR 401 (KH) par [15] en *S v Makwanyane* 1995 (3) SA 391 (KH) par [9]) uit die *Big M Drug Mart*-uitspraak nagevolg. Die uitspraak het ook deeglik in die eerste saak van die Konstitusionele Hof waar die kwessie van godsdiens en reg ter sprake gekom het (*Lawrence*), gefigureer. In die meerderheidsuitspraak is dit gedeeltelik onderskei [89] maar andersins goedkeurend aangehaal [92]. 'n Interessante opmerking van regter O'Regan in haar uitspraak in die *Lawrence*-saak (in par [122]: 'Requiring that the government act even-handedly does not demand a commitment to a scrupulous secularism, or a commitment to complete neutrality'.

44 *R v Big M Drug Mart Ltd* [1985] 1 S.C.R. 295, par 97.

45 Die Hof se woordkeuse is sprekend: 'sektaries' – 'n woord wat gewoonlik 'n negatiewe betekenis van bevooroordeelde, skeefgetrekte of oordrewe godsdienstigheid dra – het die teenkant van die aangeprese 'sekulêr' geword. Dit is woordeskat wat ook in die uitsprake van die Suid-Afrikaanse Konstitusionele Hof ingevoer is, bv par [148] van regter Sachs se afsonderlike uitspraak in die *Lawrence*-saak: 'South Africa is an open and democratic society with a *non-sectarian state* that guarantees freedom of worship', asook par [153]: 'we should remember that the movement for freedom of belief has preceded every other in the history of the struggle for human rights and fundamental freedoms, while conversely, religious persecution, *sectarian strife*, and ideological totalitarianism have undermined democracy and respect for fundamental rights in many parts of the world' (kursivering bygevoeg).

46 *Zylberberg v Sudbury Board of Education (Director)* (1988), 65 O.R. (2d) 641, 654.

In 1990 bevind dieselfde hof dat provinsiale wetgewing wat godsdiensonderrig in openbare skole gereguleer het, neergekom het op staatlike indoktrinasie waardeur die godsdienstige opvattings van die meerderheid in stryd met die *Canadian Charter of Rights and Freedoms* op minderhede afgedwing is. Die hof het die standpunt gestel dat 'n program in openbare skole wat onderrig oor godsdiens en morele waardes, sonder indoktrinasie ooreenkomstig 'n spesifieke geloof, in orde sou wees.[47]

In ooreenstemming hiermee is 'n skolewet in 1996 in British Columbia aangeneem, waarvan artikel 76 soos volg lui:

(1) All schools and Provincial schools must be conducted on strictly secular and non-sectarian principles.

(2) The highest morality must be inculcated, but no religious dogma or creed is to be taught in a school or Provincial school.

In 'n meerderheidsuitspraak van 2002 in 'n saak oor 'n skoolraad se besluit om boeke wat oor 'enkelgeslag-gesinne' handel uit 'n kleuterskoolkurrikulum te verwyder, het die Kanadese Supreme Court soos volg verduidelik wat 'sekulêr' beteken en wat die toepassing daarvan behoort te wees:[48]

> What secularism does rule out... is any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community. A requirement of secularism implies that, although the Board is indeed free to address the religious concerns of parents, it must be sure to do so in a manner that gives equal recognition and respect to other members of the community. Religious views that deny equal recognition and respect to the members of a minority group cannot be used to exclude the concerns of the minority group.

Daar is 'n sprekende teenstrydigheid opgesluit in hierdie benadering. Die Hof sien 'sekulêr' nie as ontkoppel van religie nie, maar eerder as 'n vereiste dat almal se waardes in oorweging geneem moet word. Die liberalistiese blindekol wat hier waargeneem kan word, is dat moraliteit en waardes wat op sekularisme gefundeer is op velerlei wyses met ander religieuse uitgangspunte kan bots. Dit beteken dat 'n religieuse siening gebaseer op sekularisme (diskriminerend) voorkeur moet geniet bo enige ander religieuse oortuiging.

Sprekend van die triomfantelike sekulêre oorheersing van Kanadese regterlike oortuigings, is die uitsprake van 2012 in die *Commission scolaire*-saak. Die agtergrond van die saak was dat Katolieke ouers in 2008 die plaaslike skoolraad versoek het om hulle kinders vry te stel van die kursus oor etiek en godsdienskultuur ('Ethics and Religious Culture', hierna 'ERC') wat deur die onderwysdepartement van Quebec vir alle openbare skole ontwikkel en voorgeskryf is. Die gronde vir die ouers se versoek was dat hulle kinders ernstige leed sou ly as hulle die kursus moes deurloop, '[b]eing exposed, through this mandatory course, to the philosophical trend advocated by the state, namely relativism'.[49] Die oogmerke van ERC is soos volg beskryf:[50]

> For the purposes of this program, instruction in ethics is aimed at developing an understanding of ethical questions that allows students to make judicious choices based on knowledge of the values and references present in society. The objective is not to propose or impose moral rules, nor to study philosophical doctrines and systems in an exhaustive manner.
>
> Instruction in religious culture, for its part, is aimed at fostering an understanding of several religious traditions whose influence has been felt and is still felt in our society today.

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47 *Canadian Civil Liberties Assn. v Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341.

48 *Chamberlain v Surrey School District No. 36* [2002] 4 S.C.R. 710, 728–729.

49 *Commission scolaire* par [28].

50 *Ibid* par [34].

Die ouers se aansoek is op twee administratiewe vlakke geweier, waarna hulle hulle op hersiening tot die Superior Court of Quebec gewend het en om 'n verklaring te verkry dat ERC inbreuk gemaak het op hulle kinders se gewetens- en godsdiensvryheid. Die Hof het in 2008 die aansoek van die hand gewys, en in 2010 ook die Court of Appeal. Die Supreme Court moes toe beslis of die verhoorregter gefouteer het in sy bevinding dat die skoolraad se weiering van die aansoek om vrystelling van die ERC-program nie inbreuk gemaak het op die reg op gewetens- en godsdiensvryheid nie.

Die nege regters was dit eens dat die ouers se appél van die hand gewys moes word omdat hulle nie objektief bewys het dat die ERC-program ingemeng het met hulle vermoë om hulle geloof aan hulle kinders oor te dra nie. Sewe regters het egter een motiverings-argument gevolg en twee 'n ander.

Die meerderheidsuitspraak het soos volg begin:[51]

> The societal changes that Canada has undergone since the middle of the last century have brought with them a new social philosophy that favours the recognition of minority rights... Given the religious diversity of present-day Quebec, the state can no longer promote a vision of society in public schools that is based on historically dominant religions.

Namens die meerderheid het regter Deschamps die stelling gemaak[52] dat –

> [t]he place of religion in civil society has been a source of public debate since the dawn of civilization. The gradual separation of church and state in Canada has been part of a broad movement to secularize public institutions in the Western World... Religious neutrality is now seen by many Western states as a legitimate means of creating a free space in which citizens of various beliefs can exercise their individual rights.

Regter Deschamps het verder geargumenteer dat die religieuse diversiteit van die Kanadese gemeenskap, wat toe te skryf is aan globalisering en die toename in individuele mobiliteit die aanvaarding van 'n beleid van neutraliteit genoodsaak het.[53]

Om inbreukmaking op godsdiensvryheid te bewys, vereis die Hof meer as die bestaan van 'n opregte oortuiging, maar spesifiek ook bewys by oorwig van waarskynlikheid, dat werklike inbreukmaking op die reg plaasgevind het deur die kinders tot deelname aan die ERC-program te verplig. Die hof *a quo* is nie deur die ouers oortuig dat ERC nie neutraal was nie,[54] en die Supreme Court het saamgestem dat daar geen getuienis was wat ná 'n *objektiewe analise* daarop gedui het dat die program met die ouers se vermoë om hulle geloof aan hulle kinders oor te dra, ingemeng het nie.[55]

In reaksie op die mening wat die ouers gehuldig het dat dit vir die kinders verwarrend sou wees om aan 'n verskeidenheid van godsdienssienings blootgestel te word, het die Supreme Court na sy uitspraak in 2002 in die *Chamberlain*-uitspraak verwys, waar die Hof die mening gehuldig het dat 'kognitiewe dissonansie' by kinders 'simply part of living in a diverse society' en 'part of growing up' was.[56] Die meerderheidsgevolgtrekking was dus:[57]

> The suggestion that exposing children to a variety of religious facts in itself infringes their religious freedom or that of their parents amounts to a rejection of the multicultural reality of Canadian society and ignores the Quebec government's obligations with regard to public education.

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51 *Ibid* par [1].
52 *Ibid* par [10].
53 *Ibid* par [11].
54 *Ibid* par [36].
55 *Ibid* pars [2], [23], [24] en [27].
56 *Ibid* par [39].
57 *Ibid* par [40].

Die Hof het wel deeglik kennis geneem van die standpunt in die literatuur oor die ironie verbonde aan staatsvoorkeur aan sekularisme ten koste van ander religieuse sienings,[58] en het erken[59] dat '[w]e must also accept that, from a philosophical standpoint, absolute neutrality does not exist', maar het dit afgemaak met die stelling dat 'absolutes hardly have any place in the law', en tot die gevolgtrekking gekom dat[60] –

> following a realistic and non-absolutist approach, state neutrality is assured when the state neither favours nor hinders any particular religious belief, that is, when it shows respect for all postures towards religion, including that of having no religious beliefs whatsoever, while taking into account the competing constitutional rights of the individuals affected.

Ten spyte van die beskikbare gegewens tot die teendeel verkies die Hof dus om sekularisme aan te hang as realisties, nie-absolutisties en neutraal. Dit is egter vanself-sprekend dat sekularisme nie waardevry of neutraal kan wees nie. Etiek en moraliteit, wat logies regstreeks op geregtigheid inwerk, het religieuse fondamente, hetsy godsdienstig, agnosties of ateïsties. 'n Uitdrukking soos 'neutrale etiek en moraliteit' is, net soos 'sekulêre neutraliteit', dus onbestaanbaar – 'n oksimoron.

Die judisiële kampanje ten gunste van sekularisme in Kanada, met die uitspraak in *Commission scolaire* as hoogtepunt, maak dit dus nie verrassend dat die Quebec Court of Appeal binne 'n jaar ná die uitspraak bevind het dat 'n *private* Katolieke skool ook regtens verplig was om die ERC program, in plaas van 'n soortgelyke kursus wat uit 'n Katolieke perspektief aangebied is, te onderrig nie.[61] Teen hierdie uitspraak het die skool egter suksesvol na die Kanadese Supreme Court geappelleer, wat bevind het dat die verbod dat die skool die etiese elemente van die program uit 'n Katolieke perspektief onderrig, tersyde gestel moes word aangesien dit op 'n disproporsionele beperking van godsdiens-vryheid neergekom het.[62]

Die twee regters wat die minderheidsuitspraak in *Commission scolaire* gelewer het, het staatsneutraliteit en sekularisme ook sterk onderskryf.[63] Hulle het egter daarop gewys dat die verhoorhof veronderstel was om eers vas te stel of die applikante se oortuigings opreg was voordat vasgestel is of die ERC-program godsdiensvryheid geskend het al dan nie.[64] Volgens dié twee regters het die verhoorhof gefouteer deur die kwessie in 'n debat oor die verkeerdheid van die ouers se oortuigings omskep het, en toe op sterkte van die getuienis van 'n teoloog bevind het dat die ouers se oortuiging verkeerd was.[65] Die hof moes eintlik antwoorde op die volgende vrae gevind het:[66]

> [I]s it a program that will provide all students with better knowledge of society's diversity and teach them to be open to differences? Or is it an educational tool designed to get religion out of children's heads by taking an essentially agnostic or atheistic approach that denies any theoretical validity to the religious experience and religious values? Is the program consistent with the notion

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58 In par [30] is redelike lang passasies uit Moon 'Government support for religious practice' 231 sonder kritiek aangehaal, waar hy onder meer skryf: 'Ironically, then, as the exclusion of religion from public life, in the name of religious freedom and equality, has become more complete, the secular has begun to appear less neutral and more partisan'.

59 *Ibid* par [31].

60 *Ibid* par [32].

61 Québec (Procureur général) c. Loyola High School 2012 QCCA 2139.

62 *Loyola High School v Quebec (Attorney General)* 2015 SCC 12 (19 Maart 2015).

63 *Commission scolaire* par [54].

64 *Ibid* pars [48], [49] en [50].

65 *Ibid* par [51].

66 *Ibid* par [53].

> of secularism that has gradually been developed in constitutional cases, particularly in the field of education?

Die minderheid het verder gewonder of, byvoorbeeld,[67] –

> ... the content of the Christmas-related exercises for six-year-old students encourage the transformation of an experience and tradition into a form of folklore consisting merely of stories about mice or surprising neighbours?

Ten spyte van die minderheid se onderskrywing van die sekulêre sentiment is dit tog duidelik dat daar 'n wesenlike verskil tussen die regters bestaan het oor wat die korrekte benadering tot reg en religie is.

Opsommend kan van die *Commission scolaire*-uitspraak gesê word dat die aanname dat die regsoplossing van religieuse kwessies in staatsneutraliteit gesoek moet word, kenmerkend is van die benadering van heelwat howe in veral Westerse jurisdiksies, maar dat die uitspraak ook die kritieke logikasprong wat daarin verskuil is, goed demonstreer: die verplasing van vorige religieuse raamwerke met sekularisme as sou dit van neutraliteit spreek, is niks anders nie as die opdwing van 'n subjektiewe liberalistiese lewensbeskouing. Deur die ambisies van die ERC-program om die verstaan van etiese vrae en kennis van waardes by die kinders te ontwikkel as regsgeldig te aanvaar, impliseer die Hof dat hy homself en die staat nie losmaak van morele leiding uit watter oord ookal nie. Die onontwykbare implikasie daarvan is dat die Hof sekulêre moraliteit en etiek onderskryf terwyl dít wat op ander religieuse grondslae berus, as regtens onaanvaarbaar gebrandmerk word. Anders gestel, 'n staat se keuse vir sekularisme is 'n subjektiewe keuse vir vyandigheid teen godsdiens, en geensins 'neutraal' nie.

Soos ander howe wat die sekulêre keuse onderskryf, is die Kanadese Supreme Court vasgevang in 'n konseptuele vangnet. Wanneer die Hof met bewyslewering van inbreukmaking op 'n fundamentele reg by oorwig van waarskynlikheid handel, figureer neutraliteit nie:[68]

> The subjective part of the analysis is limited to establishing that there is a sincere belief that has a nexus with religion, including the belief in an obligation to conform to a religious practice. As with any other right or freedom protected by the *Canadian Charter* and the *Quebec Charter*, proving the infringement requires an objective analysis of the rules, events or acts that interfere with the exercise of the freedom. To decide otherwise would allow persons to conclude themselves that their rights had been infringed and thus to supplant the courts in this role.

Hier word *objektiewe* analise met *subjektiewe* oortuiging gekontrasteer. Is objektiewe analise neutraal, of is dit iets anders? Die Hof het dit nie verduidelik nie, maar geïmpliseer dat dit moontlik is om 'n kwessie objektief te benader, dus met iets anders as 'n subjektiewe oortuiging, terwyl ook erken is dat dit onmoontlik is om ten volle neutraal te wees.

Uit die voorgaande beskrywing van die Kanadese howe, regerings en burokrasieë se hantering van religieuse pluraliteit blyk dit dat die onderskrywing van sekularisme geensins 'n waarborg vir geregtigheid bied nie. Inteendeel, wat prominent as motivering vir die uitskuif van historiese godsdiensverwante praktyke gebruik word, is die ongeregtigheid van diskriminasie teen minderhede wat nie die meerderheidsienings deel nie. Vanselfsprekend kan geregtigheid nie verstaan word as 'n soort demokratiese voorkeur vir die meerderheidstandpunt nie, maar as minderheidsdiskriminasie voorkom word deur

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67 *Ibid*.
68 *Ibid* par [24].

diskriminasie teen die meerderheid, klop dit nie. Die liberalisme beklemtoon die vryheid van die individu om sy of haar voorkeure uit te leef, maar liberale sekularisme lei in die regspraak maklik tot beweerde neutraliteit wat egter niks anders is nie as die afdwing van liberale etiek en moraliteit – iets wat selfs deur liberale denkers as leeg, of ten minste onvoldoende, geëien word.

In 'n artikel van 2001 het Du Plessis gewys op die wenslikheid daarvan dat die beskerming van godsdiensvryheid in 'n plurale gemeenskap nie blote passiewe toleransie moet wees nie, maar dat aktiewe religieuse verdraagsaamheid bevorder behoort te word. In die konteks van die nuwe Suid-Afrikaanse grondwetlike bestel het hierdie bydrae nie soos sy proefskrif van meer as twintig jaar vantevore oor Christelike geregtigheid gehandel nie. Wat hy wel effektief gedoen het, was om die problematiek van die heersende ankerlose benadering soos wat dit in die Amerikaanse 'non-establishment'-praktyke en die stand van die Suid-Afrikaanse grondwetlike regspraak tot op daardie stadium sigbaar was, krities te belig:

> The constitutional protection of religious rights and freedom is arguably better off without the narrowly conceived version of the establishment clause, which has resulted in a strict separation of state and church as well as of politics and organized religion. This separationism makes for an official *freedom from* religion rather than individuals' *freedom of* religion in religiously likeminded groups, communities, and institutions. Tolerance of religious diversity goes beyond putting up with the free exercise of divergent religious beliefs and practices. It also entails the evenhanded treatment of diverse religions and of religious groups, communities, and institutions with potentially conflicting interests.[69]

Dit is hieruit duidelik dat Du Plessis nie 'n onderskrywer van liberalistiese onverdraagsaamheid oor godsdiens (soos van die Kanadese howe) is nie, maar aktiewe akkommodering van die verskille wat in 'n plurale gemeenskap voorkom in belang van objektiewe geregtigheid bepleit. Dit strook steeds met sy bevindings van 1978 oor die onlosmaaklike verband tussen geregtigheid en religie, waaruit die onbestaanbaarheid van 'neutrale' geregtigheid blyk.

5 Neutraliteit en objektiwiteit

Die liberale demokrasie van die Westerse wêreld is geneig om in die konseptuele slaggat van sekularisme en neutraliteit te trap wanneer – soos toenemend weens die globale mobiliteit van die mensdom gebeur – so 'n grondig-menslike eienskap soos religie te midde van toenemende religieuse pluralisme onder die bevolking ter sprake kom. Waarom sekulêre neutraliteit so 'n aantreklike opsie in hierdie post-sekulêre era bly, kan nie met sekerheid gesê word nie, maar 'n verklaring daarvoor met oortuigingskrag is dat dit juis is omdat die konsepte so bewustelik vaag en kleurloos is.

Geregtigheid wat onlosmaaklik deel is van die werk van juriste is egter nie kleurloos nie. Grondwette en fundamentele regte is gewortel in konsepte en waardes wat deur diepliggende filosofiese en religieuse voorveronderstellings geïnspireer is. Regverdigheid en geregtigheid kan nie neutraal wees nie. Inteendeel, die idee van neutraliteit impliseer afstandelikheid, ongeïnteresseerdheid, nie-betrokkenheid – gesindhede wat nie met regspraak, politiek, goeie regering of die regswetenskap geassosieer kan word nie: geregtigheid berus nie op wiskundige formules of rekenaaralgoritmes nie.

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69 Du Plessis 'Freedom *of* or freedom from religion? An overview of issues pertinent to the constitutional protection of religious rights and freedoms in "the New South Africa"' 450.

In die meeste gevalle waar die reg met religie te doen kry, word tereg na objektiewe regsmaatstawwe in die teks van 'n verhewe grondwetteks gesoek. Onafwendbaar verg so 'n soektog egter vertolking, oftewel uitleg, van die grondwetteks – 'n proses waarby subjektiwiteit nie uitgeweer kan word nie. Dit is dus problematies om na 'n 'neutrale' interpretasie van 'n grondwet te verwys as 'n gemeenkaplike verwysingspunt: dit sou neerkom op die verheffing van 'n spesifieke, veronderstelde 'waardevrye' interpretasie tot die status van morele gesag. Die ooglopende tekortkoming in so 'n benadering is dat grondwetlike interpretasie en die toepassing daarvan op kwessies waarin religie ter sprake kom nie sinvol die weg van reuklose, kleurlose en smaaklose neutraliteit kan volg nie, maar dat dit 'n bewuste oefening in *objektiwiteit* moet wees.

Een voorspelbare reaksie op so 'n stelling is dat neutraliteit en objektiwiteit sinonieme is. Dit is egter nie korrek nie. Aarnio het in 1997 'n voortreflike verduideliking van die verskil aangebied:[70]

> As is well-known, the goddess of justice is usually described with her eyes covered with a bandage. Her impartiality is a kind of neutrality that does not glance around. The symbol is, however, simultaneously a sign of danger. The goddess of justice can never see the course of her sword. Her dispensing justice is blind. And to blind action is always connected, whether we want it or not, the danger of sporadicality, ultimately of despotism. Only the kind of dispensation of justice that with an open look – fearing no justification – takes into consideration all circumstances, produces simultaneously both justice and reasonableness. For this reason one should, considering the challenges of modern society, presumably take off the bandage covering the eyes of the goddess of justice. It is then that the administration of justice has the courage to accept the entire enormous challenge that the future seems to unroll before man.

Hier word 'blinde geregtigheid' ontmasker as 'n neutrale ontwykingsmeganisme. Neutraliteit beteken dat daar nie kant gekies word nie. Regverdiging word nie vereis nie. 'n Neutrale arbiter kan nie 'n geskil besleg nie, want geskilbeslegting bring betrokkenheid mee. Om dit met objektiwiteit gelyk te stel, is verkeerd: 'n skeidsregter is betrokke, deel van die situasie, nie neutraal-onbetrokke nie. Objektiwiteit beteken egter wel dat vooroordeel uitgeskakel word. Waar neutraliteit na bewering inhou dat subjektiwiteit met behulp van belangelose onbetrokkenheid vermy kan word, verg objektiwiteit 'n bewustheid van die menslike geneigdheid tot subjektiwiteit en 'n gevolglike bewuste strewe na regverdigheid ten spyte van subjektiewe impulse.

Waar regskeuses gemaak moet word in sake waar religieuse oortuigings ter sprake kom, sou ware neutraliteit 'n bomenslike vermoë om robotagtig onbetrokke te wees, verg, terwyl objektiwiteit die eksplisiete erkenning van die menslike onvermoë tot sodanige onbetrokkenheid inhou, gevolg deur die eiening van die verantwoordelikheid om 'n objektief-regverdige oplossing te vind. Waar neutraliteit die ontkoppeling van gevoel veronderstel, aktiveer objektiwiteit die wens om regverdig te wees ten spyte van 'n mens se eie vooroordele. Dit is per slot van rekening wat goeie regters roetinematig in sake waaroor hulle moet beslis, doen. Om dit nie in sake waar religie ter sprake kom te doen nie, spreek van 'n versuim om persoonlike regterlike vooroordele uit te skakel en as neutraliteit te vermom.

Teen hierdie agtergrond kom die belang van gedeë grondwetlike hermeneutiek opnuut na vore.[71] 'n Bleek, bloedlose, 'neutrale' vertolking van byvoorbeeld die grondwetlike

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70 Aarnio *Reason and Authority – A Treatise on the Dynamic Paradigm of Legal Dogmatics* 16–17.

71 In 2008 het Du Plessis juis in die konteks van religieuse regspraak hieroor standpunt ingeneem deur te onderskei tussen drie *Leitmotivs* vir Suid-Afrikaanse grondwetlike hermeneutiek,

continued on the next page

bepalings oor die reg op gewetens- en godsdiensvryheid kan voorspelbaar aanleiding gee tot blinde onreg teenoor partye wat standpunte gefundeer op diepliggende oortuigings handhaaf, terwyl 'n warm, simpatieke en betrokke objektiwiteit, gebaseer enersyds op die bewussyn van persoonlike vooroordeel, en andersyds op duidelike, eksterne, openlik-geïdentifiseerde, nie-subjektiewe standaarde, behoort te lei tot 'n uitkoms wat strook met die 'goue reël' – om teenoor ander op te tree soos jy van hulle verwag. Om dit in grondwetlike regspraak te kan doen, verg 'n gebalanseerde vertolking van die toepaslike norme, grondwetlik of andersins.

Geen staat of sy organe kan sy institusionele funksies te midde van religieuse pluralisme en die hernude relevansie van godsdiens behoorlik vervul terwyl daar veronderstel word dat staatlike omgang met die realiteite van religie in die gemeenskap vermy kan word nie. Dit is die staat se grondwetlike plig om goeie en regverdige orde in die plurale gemeenskap te handhaaf. Dit is nie die staat se funksie om enige spesifieke religie (liberale sekularisme inkluis) te handhaaf en te verdedig nie, maar wel om religieuse geduld en verdraagsaamheid te midde van die pluraliteit te bevorder deur die regverdige balansering van alle religieuse belange, selfs waar dit van die aanhangers van mededingende religieë vereis om bepaalde voorregte op te offer. Du Plessis stel dit in die slotparagraaf van 'n artikel in 2009 wat veral op die Konstitusionele Hof se uitspraak in *MEC for Education: KwaZulu-Natal v Pillay*[72] gefokus het, soos volg:

> [R]igorous debate has been taking place on public platforms about taboos formerly relegated to (and hidden away in) 'the private sphere'. The bold assertions of the Constitutional Court on the affirmation and celebration of the Other, challenge all religions with simultaneously lofty and magnanimous ideas about 'doing unto Others' to make themselves heard as well, for 'our Constitution does not tolerate diversity as a necessary evil, but affirms it as one of the primary treasures of our nation'.[73]

6 Regterlike meganismes waarmee objektiewe geregtigheid moontlik bereik kan word

Dit is nie die bedoeling om die geïdentifiseerde probleme verbonde aan sekulêre neutraliteit hier uit die weg te probeer ruim met 'n uitgewerkte alternatief nie. Wat wel moontlik is, is om eksemplaries te wys op twee belowende meganismes wat deur sommige howe gebruik word, selfs te midde van die aanwending van die konvensionele liberaal-demokratiese woordeskat.

In die Duitse regspleging word van 'n interessante uitlegmeganisme bekende as *praktische Konkordanz* gebruik gemaak om oplossings te vind vir moeilike kwessies rakende botsende grondwetlike aansprake en verantwoordelikhede. Dit kom neer op die

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naamlik oorgangs-, transformerende en herinnerings- ('memorial') konstitusionalisme en aan die hand van sy aanprysing van die *Pillay*-uitspraak van die Konstitusionele Hof sy siening van die belang van herinneringskonstitusionalisme verduidelik: Du Plessis 'Affirmation and celebration of the "religious Other" in South Africa's constitutional jurisprudence on religious and related rights: Memorial constitutionalism in action?'. Dat herinneringskonstitusionalisme in die Suid-Afrikaanse konteks egter as 'n belade konsep verstaan kan word wat op sigself blootgestel is aan regterlike misbruik, verg nouliks motivering.

72 2008 (1) SA 474 (KH).

73 Du Plessis 'Religious freedom and equality as celebration of difference: A significant development in recent South African constitutional case law' 32.

soeke na die mees akkommoderende ekwilibrium, en is al meermale in sake wat oor godsdienskwessies handel, aangewend.[74]

'n Interessante onlangse aanwending van hierdie meganisme is in 'n beslissing van 2013 deur die Duitse Federale Administratiewe Hof te vinde.[75] Die vraag voor die hof was of die weiering van 'n versoek van 'n Moslemmeisie om van die bywoning van die verpligte swemklasse tydens skooltyd verskoon te word, grondwetlik regverdigbaar was. Die applikant het aangevoer dat deelname aan die klasse teen haar godsdienstige oortuigings rakende fisiese aanraking oor die geslagsgrens en blootstelling van die vroulike vorm in die openbaar ingedruis het. Die Hof het beslis dat die skool dit redelikerwys van die applikant kon verwag om 'n 'burkini' ('n swempak wat ontwerp is om alles behalwe die gesig, hande en voete van die draer te bedek, wat nie die liggaamskontoere sigbaar maak as dit nat is nie, en wat deur Moslemvroue in die openbaar gedra word) tydens die swemlesse aan te trek sonder dat haar aanspraak op godsdiensvryheid daardeur geweld aangedoen sou word. Die Hof het met verwysing na ander regspraak herbevestig dat die staat se grondwetlike reg op die bestemming van skoolonderwys (*Bestimmungsrecht*) en die reg op godsdiensvryheid gelykwaardig is, en dat geskille oor botsende aansprake op hierdie regte op so 'n manier besleg moes word dat albei aansprake optimaal ooreenkomstig die konsep *praktische Konkordanz* bevredig kon word. Die Hof wys verder daarop dat die godsdienstige 'neutraliteit' van die staat indoktrinasie op skool belet, maar dat die gemeenskap wat deur pluralisme en individualisme gekenmerk word, nie van die skool vereis om skoolgangers teen blootstelling aan gangbare sosiale gebruike soos skamele kleredrag in die swembad af te skerm nie.

'n Ongerapporteerde uitspraak van die KwaZulu-Natalse Provinsiale Afdeling (Pietermaritzburg) van 2009[76] het gehandel oor die jaarlikse Zoeloegebruik bekend as *Umkhosi ukweshwama*. Tydens hierdie ritueel word 'n bul in die teenwoordigheid van die Zoeloekoning deur 'n groep veertienjarige seuns met hulle kaal hande verwurg en sy nek gebreek. 'n Diereregtegroep het die hof om 'n interdik wat die ritueel verbied, genader.[77] Die interdik is nie toegestaan nie. Die Hof het opgemerk dat aansoeke van hierdie aard simptomaties van onverdraagsaamheid van godsdienstige en kulturele diversiteit was:

> They are often an attempt to force the particular secular views and opinion held by one faction on others. The traditional African form of culture, religion and religious practices may not be embraced by many who subscribe to the mainstream cultures and religions in Western societies,

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74 As *locus classicus* in hierdie verband word dikwels na die saak wat in 1995 beslis is oor die vraag of die vertoon van kruise soos gebruiklik in die Katolisisme in klaskamers geoorloof was al dan nie. Die *Bundesverfassungsgericht* se meerderheidsuitspraak (*BVerfGE* 1 BvR 1087/91 16.05.1995, 51) het dit soos volg netjies saamgevat: 'Dieser Konflikt zwischen verschiedenen Trägern eines vorbehaltlos gewährleisteten Grundrechts sowie zwischen diesem Grundrecht und anderen verfassungsrechtlich geschützten Gütern ist nach dem Grundsatz praktischer Konkordanz zu lösen, der fordert, daß nicht eine der widerstreitenden Rechtspositionen bevorzugt und maximal behauptet wird, sondern alle einen möglichst schonenden Ausgleich erfahren'.

75 *BVerwG* 6 C 25.12, op 11 Sept 2013 beslis. Sien veral pars 12, 15 en 30 van die uitspraak.

76 *Smit NO v King Goodwill Zwelithini Kabhekuzulu* 2009 JDR 1361 (KZP) (Juta se ongerap–porteerde uitsprake, saaknommer 10237/2009).

77 Sien ook Rautenbach 'Umkhosi ukweshwama: Revival of a Zulu festival in celebration of the universe's rites of passage'; Peté en Crocker 'Ancient rituals and their place in the modern world: Culture, masculinity and the killing of bulls' en Mnyongani 'The status of animals in African cosmology: A non-legal perspective'.

> and were historically often discriminated against and in some instances its followers were persecuted and punished.

Dít was egter nie die grond waarop die aansoek van die hand gewys is nie. Die Hof het oorweging geskenk aan die feit dat die aansoek gerig is kort voordat die ritueel sou plaasvind en dat dit gevolglik onmoontlik sou wees om dit uit te stel sonder om die Zoeloegemeenskap van die geleentheid te ontneem om hulle godsdiens en kultuur by die betrokke geleentheid te beoefen. Die meganisme wat die Hof toe aanwend (wat skynbaar in die Engelse 'equity'-tradisie ontwikkel is en in verskeie 'Common Law'-jurisdiksies gebruik word), staan bekend as 'n 'balance of convenience'. Daaronder word verstaan dat die ongerief waaraan die betrokke partye onderwerp sal word deur die uitkoms van 'n beslissing teen mekaar opgeweeg moet word ten einde die ongerief vir enigeen so goed moontlik te beperk. In die betrokke saak het die hof geoordeel dat die balans in die guns van die Zoeloegemeenskap was, aangesien die applikante, in teenstelling met die gemeenskap, eintlik geen ongerief sou ervaar as hulle aansoek nie sou slaag nie.

Hoewel nóg *praktische Konkordanz*, nóg 'balance of convenience' eksplisiet by die aanwending daarvan geëien word as maniere waarop howe objektief – in teenstelling met neutraal – tot hulle bevindings kom, word aan die hand gedoen dat dit inderdaad bruikbare meganismes is met behulp waarvan geregtigheid in religie-verwante (en ander) sake op 'n objektiewe manier gedien kan word. Die rede daarvoor is dat albei meganismes van die regter vereis om die betrokke partye se posisies deeglik buite die konteks van sy of haar eie subjektiewe voorkeure te oorweeg ten einde 'n billike uitspraak te kan gee.

7 Slotopmerkings

Ten spyte daarvan dat die huidige Suid-Afrikaanse grondwetlike orde reeds twintig jaar in plek is, is die sake oor godsdiensaangeleenthede waaroor die howe tot dusver moes beslis redelik yl oor die tydperk versprei en het oor uiteenlopende kwessies gehandel. Anders as in die geval van die reeks Kanadese uitsprake oor godsdiens op skool waarin die sekularistiese benadering met mening bevorder is, is dit tans nie moontlik om so 'n duidelike ontwikkelingslyn in die beskikbare Suid-Afrikaanse uitsprake waar te neem nie.

Wat wel uit die benadering oor die afgelope twee dekades van verskillende regters blyk, veral onder die regters van die Konstitusionele Hof, is dat pogings om 'n sekulêre vertolking van die Grondwet teweeg te bring, sowel as pogings om doktrinêre liberalisme in te voer, maar ook elemente van regterlik-politieke pragmatisme in die verskillende uitsprake herkenbaar is.

Hieruit kom die vraag na vore tot watter soort vertolking die Grondwet hom leen wanneer geregtigheid aan die hand daarvan te midde van die religieuse pluralisme wat al oor eeue in die Suid-Afrikaanse gemeenskap bestaan, moet geskied. Enersyds staan dit vas dat die Grondwet nie redelikerwys vertolk kan word as sou dit die Amerikaanse 'non-establishment'-benadering volg nie, en andersyds skep die Grondwet nie 'n staat wat die een of ander godsdiens of religieuse instelling borg nie.

Du Plessis het in 'n artikel van 1996 waarin hy 'n beoordeling van die (destyds nuwe) Suid-Afrikaanse Handves van Regte gemaak het, soos volg afgesluit:[78]

> With regard to issues on which there is disagreement among religious people, the Constitution creates an opportunity for levelheaded debate and guarantees the freedom of those whose beliefs differ from what is allowed, not to avail themselves of (or to enforce) controversial rights.

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78 Du Plessis 'A Christian assessment of aspects of the Bill of Rights in South Africa's Final Constitution' 74.

Dit is inderdaad die gees waarin regterlike vertolking van die Grondwet objektiewe geregtigheid in die hand sal kan werk in plaas daarvan dat dit religieus onder die skyn van sekulêre neutraliteit gekaap word ten einde moeilike kwessies te ontwyk of subjektiewe regterlike agendas te dien.

Vir die onderhawige tema is daar sonder twyfel veel meer te put uit 'n diepergaande ontginning van Du Plessis se werk oor geregtigheid wat so indrukwekkend met sy proefskrif ingelui is. Dit bied vrugbare moontlikhede vir die geloofwaardige uitleg van die Grondwet in toekomstige regspraak waar howe met die werklikhede van religieuse pluralisme gekonfronteer word.

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What makes the South African Constitution alive?

Marinus Wiechers

1 Introduction

It is a well-known aphorism that a constitution as it presents itself, is nothing but a document, mostly contained in a rather small booklet that one can hold in the hand. However, in reality a constitution is vastly more. It is the law that not only prescribes the conduct of government but also rules the life of a nation. This essay is an investigation into those elements that constitute a constitution's binding force, as well as the factors that assure its pre-eminence as a state's fundamental law, in short, the factors that put life into a constitution as the state's most important legal and normative instrument.

This essay does not pretend to deal exhaustively with all those forces that give life to the South African Constitution since that would have required a whole treatise of rather considerable length. Matters such as legality, interpretation and application, human rights, the role of the courts as well as the other topics touched upon, have since the advent of the Constitution become the subject of many learned writings and court judgments. Many of these writings and judgments were considered in the writing of this essay, but for the most, not expressly mentioned since that would have been impossible within the scope of one essay; also not to clog the main line of reasoning, namely that the Constitution is invigorated and becomes a living document as a result of a multitude of interrelated factors. However, this did not exclude some excursions and personal observations.

The main purpose of this essay is therefore to serve as a roadmap to follow the salient tracks in the path of the South African Constitution. To serve as a useful roadmap, it will also show those potholes that could make for a perilous constitutional journey.

2 The background and genesis of the Constitution

The South African Constitution, as was the case with the Namibian Constitution,[1] did not fall out of the blue skies. It was preceded by an interim Constitution which in turn was the outcome of many negotiations and agreements between the South African government and its main opponent, the ANC, as well as other political parties and actors.

South Africa's history abounds with constitutions and processes of constitution-making. Before the first constitution for the Union of South Africa, the Union Act of 1910, which was the outcome of the 1909 National Convention, there were colonial constitutions in the Cape Province and Natal, and the constitutions of the erstwhile Boer republics of Transvaal and the Orange Free State. In 1960, South Africa got its first republican constitution and in 1983 a new constitution to make way for parliamentary representation by the Coloured and Indian population groups, albeit in separate Houses.

Also, in line with the then government's policies of separate development, there were standard constitutions for the self-governing states as well as separate constitutions for

1 Carpenter 'The Namibian Constitution – ex Africa *Aliquid Novi* after all?' 22.

the so-called independent states of Transkei, Ciskei, Bophuthatswana and Venda, which in the case of Ciskei and Bophuthatswana included a bill of rights and provided for testing powers by the courts. Together with all these constitutions, there were also non-official constitution-making processes to propose constitutional solutions. In this regard, the 1986 Natal/KwaZulu Indaba and its constitutional proposals for that province must be mentioned.

Unlike many African countries that became independent under constitutions that were often the brain-children of, and modelled on, the constitutions of the former colonial powers, the present South African Constitution took root in a rich catchment soil of constitutional history and precedent. In other words, the South African Constitution has a true autochthonous character. Moreover, as explained above, the majority of South African peoples were for a very long time accustomed to live under the dictates of their own constitutions. However, for most of this time, they were living under a system of parliamentary sovereignty and not under that of a constitution's supremacy (with the exceptions of the Constitutions of Bophuthatswana and Ciskei). That was the fundamental change the present South African Constitution brought about.

3 Legality and legitimacy

In order to understand the binding force of a constitution, it is necessary to consider the concepts of legality and legitimacy. Legality and legitimacy are closely related concepts but they are not synonyms.

Legality denotes lawfulness whilst legitimacy, although it also presumes lawfulness, goes much wider. It implies a general conviction that a constitution is not only lawful but is just and good, in other words, it is the acceptance by the government, all political actors and citizens alike that the constitution is not only the solid legal foundation upon which the state edifice rests but also constitutes the bulwark against bad government practices as well as the fortress within which all individuals and especially minorities could find their protection. Colin Turpin[2] aptly observes: 'Legitimacy is of no less importance in the constitution and government than law itself. It is, however, an elusive concept springing from public attitudes and the "political culture"; and the legitimacy accorded to a regime is not something necessarily constant.'

It speaks for itself that a constitution must be lawful, or putting it more concretely, it must conform to the conditions of legality. Legality means the law is the ruling force. In countries where constitutional change came about by revolution, the validity of the constitution-making process and as a result its legality, often continues to be contested by dissident groups. The effect is that the new constitution's validity is questioned and the revolution continues.

By contrast, in countries such as South Africa, where constitutional change happened in an evolutionary manner, the legality of the new constitution is generally accepted and is not afterwards contested. What happened in 1994, was that the State President under his powers of the then existing Constitution, assented to the interim Constitution that was drafted by the Multi-Party Conference and approved by parliament. The interim Constitution provided for a general election. A newly elected parliament consequently converted

2 *British Government and the Constitution* 352.

itself into a constituent assembly to agree to the final constitution. This Constitution was then adopted by parliament in 1996.[3]

Legitimacy, as pointed out above by Colin Turpin, is in contradistinction to legality, a far more elusive concept. As explained, legitimacy in the first place means lawfulness. However, it is a concept that goes much further and has to rely on those political, physiological and philosophical factors that afford a constitution to be generally accepted and upheld. Legitimacy has a definite sociological basis. To gauge the legitimacy of a constitution at a certain point in time, regard should therefore also be had to opinion polls and other manifestations of popular attitudes and acceptance.

Constitutional legitimacy can be distinguished by two aspects, first the legitimacy of the constitution-making process and second, the legitimacy of government actions and behaviour under the constitution. If a government with its actions and behaviour denies or contradicts the provisions of the constitution, the legitimacy of the constitution itself becomes jeopardised since the conviction will arise that the constitution is not affording those safeguards and protection it is supposed to provide. It can be safely said that the legitimacy of the South African constitution-making process and adoption of the final Constitution, was not seriously contested by the majority of the political actors and certainly not by the majority of the people. The Constitution's final text was met with overwhelming approval.[4] Legitimacy of the final Constitution was further strengthened by the invitation to the public for their comments.[5] The home-grown qualities of the Constitution, namely the fact that the process of constitution-making took place and was conducted entirely on South African soil by South African political actors, certainly was a pertinent factor to enhance its legitimacy.

As mentioned, the erosion of legality by the government's actions and behaviour puts the legitimacy of the Constitution itself in peril. Legitimacy, so to say, sustains and invigorates the life of a constitution. It is therefore no wonder that the questions surrounding legitimacy evoked many theories and a rich academic discourse. Henk Botha[6] undertook an extensive investigation, mostly analysing the writings of American scholars, into the different theories relating to the question of legitimacy. His conclusion[7] is that 'the South African Constitution affords us the opportunity to institute a disruptive discourse of legitimacy or a radical democracy through an ongoing dialogue over the meaning of constitutional norms and values'. The Constitution, he goes on to say, 'far from having a fixed and final

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3 In Namibia, the Constitution, in its art 145(2), declare that nothing in that Constitution should be construed as 'recognizing in any way' the validity of the administration of Namibia by the government of the Republic of South Africa. However, in terms of art 140(1), all laws in force immediately before independence, remained in force until they are repealed by an Act of parliament or declared unconstitutional by a competent court of law. This anomaly could have been prevented if the previous administration was labelled 'illegitimate' and not invalid.

4 On the text of the Bill of Rights in the final Constitution, Du Plessis 'Evaluative reflections on the final text of SA's Bill of Rights' 283 remarks: 'Forensic connoisseurs... preferred technical nuance and precision to prevail over political rhetoric and expediency'.

5 Du Plessis 'The Bill of Rights in the working draft of the new Constitution' 3: 'It is important for the legitimacy of the Constitution to make the population feel that they have participated in its drafting'.

6 Botha *The Legitimacy of Law and the Politics of Legitimacy: Beyond a Constitutional Culture of Justification*.

7 *Ibid* ii.

meaning that can be discovered through the application of a correct method, institutionalises a debate about the foundations of our legal order'.[8] He warns in the same breath that 'we shall be able to live up to the Constitution's transformative aspirations only to the extent that we can liberate ourselves from the authoritarian, conceptualist and privatist habits of the past that have come to dominate legal thinking and practice in South Africa'.[9]

In South African legal writings the concept of legitimacy is generally used either to denote lawfulness or to describe a general conviction that legal provisions of the Constitution are just and should therefore be upheld. However, a clear analysis of the contents and especially the structure of the idea of legitimacy are lacking. (For instance the authors of two well-known textbooks on constitutional law, IM Rautenbach and EFJ Malherbe[10] and GE Devenish,[11] did not pay particular attention to the concept of legitimacy.) To reach clarity on this topic, it is most useful to have regard to some European and more particularly German constitutional theories. For instance, the eminent German constitutional lawyer, Peter Badura[12] gives a structured explanation of legitimacy that is most illuminating. According to him, legitimacy is the principled acceptance of the state's rule or dominance coupled with the legality of public authority. State rule or political dominance ('staatlicher und politischer Herrschaft') he explains, should be founded on the principles of sovereignty of the people and on state values and aims ('Staatliche Werte und Ziele') whilst taking cognisance of the limitations imposed on, and the tasks to be undertaken by the state ('Grenzen und Aufgaben des Staates'). A constitution, to be legitimate, should not only assure legality, effectiveness and orderliness ('Planmässigkeit'), but also a political dominance that is respectful of the individual's social norms and aspirations. In short, to this learned scholar, the realisation and principled task fulfilment by the constitutional state is the essence of democratic legitimacy.[13] To him, legitimacy forms the substratum of constitutional legality.

Applying professor Badura's insights to the legitimacy demands of the South African government's actions and behaviour, it is imperative to refer to the fundamental values enshrined in article 1 of the Constitution. Tersely stated, government's actions and behaviour would be assured of legitimacy if they adhere to the values of obedience to the supremacy of the Constitution and the rule of law, human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism. Also enshrined in article 1, is the value of universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness. Regular and free elections are vital conditions to assure and sustain the legitimacy of governmental actions and behaviour. In a country without regular and free elections, the legitimacy of the government is directly affected since the people become estranged and cease to give their support. In the end, they lose faith in their country's constitution. Because of the constitution's loss of legitim–acy, the way is paved for uprisings and even revolution.

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8 *Ibid*.
9 *Ibid*.
10 *Constitutional Law*.
11 *A Commentary on the South African Constitution*.
12 *Staatsrecht* 7–9.
13 He then quoted the succinct statement of the Bundesverfassungsgericht, BVerfGE 62, 1/43: 'Nach dem Grundgezetz bedeutet verfassungsmässige Legalität zugleich demokratische Legitimation'.

Our Constitution's legitimacy also depends on many other constitutional guarantees, namely the protection of human rights, a vigilant and free press, an active and participatory civil society and the freedom of political activities. In this respect, the manner in which the Constitution allows for a multi-party system of government and demands respect for the role of opposition parties is of vital importance for the upholding of the Constitution's legitimacy.

The strengthening of and quest for legitimacy is open-ended and continuing. To conclude with Colin Turpin, at no point in time can it be said that a constitution, once legit–imate, will always be legitimate.

4 Interpretation and application

Constitutional provisions to become active, must find their application in a concrete situation, either to prescribe a certain action, to solve an uncertainty or to settle disputes emanating from conflicting interests.[14] In order to be applied, the meaning and content of these provisions must be established. A constitutional provision would remain a dead letter if its meaning is not established. It is in this respect that the interpretation of constitutional provisions is of such primary importance. Du Plessis aptly remarks:[15] 'A constitutional text is not "complete" with its adoption by a constitution-making authority. In a sense, this formality signals but the "arrival" of the text in the legal order.'

Botha[16] makes a further valid statement: 'A supreme constitution, as the embodiment of the norms, values and aspirations to which a nation has committed itself, can only be kept alive from one generation to the next through a dynamic process of interpretation, in which constitutional commitments are being constantly modulated and redefined in the light of changing circumstances and experiences'. He also states:[17] 'The meaning of a text is not something to be "discovered" in a neutral and objective manner; it is rather the result of a creative process of interaction between the text and the interpreter'. In the same vein, Du Plessis[18] says: 'meaning is not discovered in a text, but is made in dealing with the text; in other words, there is a prescriptive meaning in the text itself'.

Du Plessis, although most of his learned academic contributions deal with the interpretation of a Bill of Rights, has set himself the task of exploring the 'creative process of interaction between the text and the interpreter'. In that regard, he presents extremely thoughtful and most valuable views that are relevant to constitutional interpretation in general.[19] In his writings he discards the old fictional notion that statutory interpretation has to find the 'intention of the legislature' by applying the ordinary meanings of ordinary words with the assistance of some so-called 'presumptions of interpretation'. He

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14 See Du Plessis 'Lawspeak as text... and textspeak as law: Reflections on how jurists work with texts – and texts work with them' 794 where he refers to the German jurist Friedrich Müller who regards the salient message of 'strukturierende Rechtslehre' as the resolution of disputes or issues in contentious proceedings. Müller's model jurist is the adjudicator with the 'awe-inspiring' responsibility of making a decision. Also, on Müller's views, Du Plessis *Re-Interpretation of Statutes* 227.

15 'The Bill of Rights in the working draft of the new Constitution' 3.

16 *The Legitimacy of Law and the Politics of Legitimacy* 332.

17 *Ibid* 331.

18 'Lawspeak as text… and textspeak as law' 794.

19 This is a view that he himself holds in his standard text-book, *Re-Interpretation of Statutes* 2002.

consistently points out that statutory interpretation should conform to and abide with the purpose of constitutional provisions.[20]

To Du Plessis,[21] in 1987, statutory interpretation entailed 'normative transposition' that takes place within a certain context, 'constituted by the inter-action between the statutory text itself on the one hand and its contextual "environment" on the other'. He and co-author Jacques de Ville make the observation[22] that 'constitutional legislation – and especially a bill of rights – is intrinsically dissimilar to "ordinary" legislation subject to the constitution'. Later, in the same article[23] the authors explain their holistic, integrated approach: 'The rules (of interpretation) and presumptions need not, however, be applied in a particular sequence. They are interpretively purposeful items on a hermeneutical checklist against which the fullness of the interpretation process is measured in order to determine whether all the possibilities of the text have been explored optimally.' Du Plessis's holistic approach is based on the belief that '(t)he new epoch of constitutionalism does not mean a sudden and total break with the common law tradition of interpretation'.[24] In this regard, he explains that some of the most important presumptions of statutory interpretation, although not subsumed under the Constitution, are still operative, namely presumptions that laws do not have retroactive force, that the law does not contain invalid or purposeless provisions, that a law refers to legally valid modes of conduct, that laws do not have extra-territorial application and that the same words carry the same meaning.[25]

An important question as regards constitutional interpretation is whether preceding and surrounding circumstances should be considered as having an influence on the interpretative process in terms of the new Constitution. Du Plessis writes: 'Historiese interpretasie is 'n inklusiewe proses wat die kontinuiteit van die verlede, hede en toekoms moet verdiskonteer'.[26] Explaining intra and extra text contextualisation, he says: '(E)xtra-textual contextualisation relates a provision to an environment which, though "external" to the very text itself, influences and indeed shapes its meaning decisively'.[27] To these authors, a text has a history that asks for reference to international instruments, other constitutions and surrounding circumstances. This viewpoint is in line with section 39(1)(*b*) and (c) of the Constitution which provides that 'when interpreting the Bill of Rights, a court, tribunal or forum must consider international law and may consider foreign law'.

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20 See in this regard, also De Ville *Constitutional and Statutory Interpretation* 64: 'The primary aim of statutory interpretation should thus be to ensure that the statute is in accordance with the aims and values of the Constitution'.

21 'Kontoere vir 'n eie wetsuitlegteorie' 175.

22 'Bill of Rights interpretation in the South African context (3): Comparative Perspectives and Future Prospects' 356.

23 *Ibid* 360.

24 Du Plessis 'Re-reading enacted law-texts. The epoch of constitutionalism and the agenda for constitutional interpretation in SA' 257.

25 Du Plessis 'A preliminary estimation of the role of the presumptions of statutory interpretation' 750. See also Du Plessis *Re-Interpretation of Statutes* 151, where he discusses the view '(t)hat presumptions can thus "stand in" for the Constitution where the Constitution does not cater for certain values'.

26 Du Plessis 'Enkele gedagtes oor die historiese interpretasie van hoofstuk 3 van die oorgangsgrondwet' 504.

27 'Bill of Rights interpretation in the South African context (3)' 356.

This view is especially true as regards the South African Bill of Rights. The latter was not simply the unique product of the South African constitution-making process, but finds its origin in the French Declaration of 1789 and the ensuing international documents, the UN Charter of Human Rights and the European Declaration. These historical foundations fortified the legitimacy of the South African Bill of Rights. It also emphasises the fact that there are other tenets for a democratic government that precede a constitution, and indeed constitute the fundamental conditions for such a government, for instance an independent judiciary, the separation of powers and universal suffrage.[28]

An interpretation of the South African Bill of Rights asks for an enquiry into the human rights decisions of the courts as well as those by the Appellate Division before 1994, since it is perhaps too easily accepted that the highest court never concerned itself with human rights issues before the transition to a democratic government. Du Plessis and De Ville[29] give an insightful analysis of the decisions emanating from Namibia, Bophuthatswana and the Ciskei under their Bills of Right. Although their conclusion is that the Appellate Division decisions show an improved understanding of human rights, but '"[t]echnically" speaking [the AD judges]…still have much to learn',[30] it cannot be denied that some of the human rights cases that were then considered could still serve as precedents since many provisions of those former Bill of Rights were similar to provisions in the present Constitution.

An aspect that is not always taken into consideration when constitutional interpretation is undertaken is the pervasive effect of the Constitutional Principles. These immutable Principles were accepted as a solemn pledge by all the political parties and were the touchstone in the certification judgments of the Constitutional Court.[31] They contain the basic tenets for the final Constitution and can be regarded as a declaration of an original intent. A question still largely unexplored is whether they are still to be referred to should uncertainty about the scope of present provisions arise, and importantly, whether they should be considered when interpreting the present provisions of the Constitution and ensuing laws. It can be argued that these Principles did not simply disappear in the haze of historical events and should still have interpretative meaning. For instance, Principle VI states that '[t]here shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness'. Separation of powers is nowhere expressly stated in the Constitution. However, laws under the Constitution and government actions might well encroach on this fundamental principle and on the principle of appropriate checks and balances. In such an event, the courts will certainly be called upon to give effect to Principle VI as it was expounded in the certification cases of the Constitutional Court.

A constitutional provision becomes concrete once it is applied either to prescribe the constitutionality of laws and government behaviour or to resolve an uncertainty or dispute**.** In this respect, judgments of the Constitutional Court are the most authoritative manner by which constitutional provisions become concretised.[32] A constitution can be

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28 See Wiechers 'The fundamental laws behind our Constitution' 383.

29 'Bill of Rights interpretation in the South African context (2): Prognostic observations'.

30 *Ibid* 217.

31 It can be safely said that the constitutional principles in the 1993 Constitution took their lead from the constitutional principles that guided the Namibian constitution-making process. For a study on the background and impact of the Namibian principles, see Wiechers 'Namibia: The 1982 constitutional principles and their legal significance' 1.

32 Du Plessis 'The South African Constitution as memory and promise' 385.

known in two ways. One way would be to describe the constitution as a static document, setting out the bill of rights, the legislative powers of parliament and provincial and municipal law-givers, as well as the powers and functions of the executive, provinces and municipalities, in other words, how the 'state in rest' manifests itself. In essence, such a description would explain the fundamental principle of the separation of powers, the functions of the judiciary and all the other constitutional bearings of a democratic government. Another way would be a description of the 'state in movement', based on an investigation how the constitution dictates behaviour, not only that of government organs and officials, but also that of natural and juristic persons.[33] Most important is how a constitution for the 'state in movement' provides for the solution, not only of uncertainties, but primarily for the solution of disputes and conflict. Du Plessis[34] correctly observes that what is required is a legal order that regulates conflict optimally, which means that the rules in that regard, must be clear and the conflict solving processes carried out with assiduity.

Moreover, if a constitution is silent on how the balance of power in government institutions and organs should be regulated when a dispute arises, the door is left wide open for constitutional crises. Major unresolved constitutional crises are detrimental for a constitution's legitimacy and its vigour as a living document.

The South African Constitution abounds with provisions to resolve conflict between the Houses of Parliament, Parliament and the Executive as well as a host of other conflicts that may arise between government, provinces and municipalities. In this respect, the principles of co-operative government and intergovernmental relations as stated in section 41 of the Constitution, are of prime importance and especially subsection 3 which provides that 'an organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute'. Also, section 167(4)(*a*) which provides that only the Constitutional Court may decide disputes between organs of state in the national and provincial sphere concerning the constitutional status, powers and functions of any of those organs of state. The Constitutional Court's exclusive jurisdiction would allow for a direct approach to the Court by parties in such matters.

5 Human rights

If a constitution is metaphorically seen as a living body of norms and rules, then the bill of rights is certainly the heart of that body. The significance and value of a bill of rights is twofold. First, through the recognition and protection of rights and freedoms, the individual becomes emancipated to be free and fully valued as a human being. That is the reason why it is inappropriate in present constitutional theory referring to individuals as 'subjects of the state' and not as 'citizens'. Second, a bill of rights not only binds the state to honour these fundamental rights and freedoms but also provides a programme of action to realise and give content to them. It is safe to say that a bill of rights is the constitution's major component to assure its legitimacy, since it creates a sense of ownership and belonging as well as protection amongst people.

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33 See art 8(2) of the Constitution: 'A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking account of the right and the nature of any duty imposed by the right'.

34 'Regsteoretiese en regspolitiese peiling van die menseregte-handves debat in Suid-Afrika' 124.

As said, the roots of the South African Bill of Rights can be traced far back in history, for example personal freedom, to the English Petition of Right of 1628. Nevertheless, this does not mean that the South African Bill of Rights was not carefully discussed and drafted at the time of the multi-party negotiations and in the constituent assembly before the final Constitution was agreed upon.[35] The Bill of Rights is rightly lauded as modern and progressive for its clear incorporation of so-called third generation human rights and for example, the inclusion of sexual orientation as a prohibited ground of discrimination.[36] Du Plessis[37] makes the important observation that human dignity is afforded a centrality which it lacks in the transitional Constitution. In fact, the Constitution declares the right to human dignity and the right to life to be non-derogable. The Bill of Rights has a pervasive working since in terms of section 39(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'.

But the Bill of Rights is not without blemishes. One of its severest shortcomings is its failure to describe what constitutes 'fair' discrimination. Section 9(5) simply states that discrimination on grounds of race, gender, sex, etc., is unfair unless it is established that the discrimination is fair. This is a glaring example of a *petitio principi,* or a begging of the question. The unfortunate result is that fair discrimination is now left in the discretion of the official or state organ that performs the discriminatory act.

Before 1994 and the advent of the Constitution, in cases of judicial review of administrative action it was necessary to prove the infringement or threat on an established right in order to insist on the compliance with the rules of natural justice. Stated differently, an administrative act was labelled to be quasi-judicial if an established right has been encroached upon or threatened to be encroached upon. To widen the scope and application of the rules of natural justice in cases where the existence of a clear right is not proven, the courts resorted to the concept of a 'legitimate expectation'. A legitimate expectation is accepted if it can be reasonably expected that from a *spes*, a right will eventually materialise. A legitimate expectation was often presumed in labour disputes. For example, a person does the same work diligently but is year after year appointed in a temporary position. Such a person, it was decided, had the legitimate expectation to be appointed permanently and may rely on compliance with the rules of natural justice. Strictly speaking, although the concept of legitimate expectation is still generally used,[38] it is no longer a construct that needs to be operative. Under the Constitution it suffices to rely on a right that is recognised and protected in the Bill of Rights. The person who claims a legitimate expectation to be

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35 See Du Plessis 'The genesis of the chapter on fundamental rights in South Africa's transitional Constitution' 1 where he observes that the process of drafting the Bill of Rights constituted a microcosm of the South African socio-political and economic reality in transition; at 4, he explains the working methods of the multi-party conference. Also, in defence of the work of the committee on human rights and in a response to Matthew Chaskalson, see Corder and Du Plessis 'What value the background in constitutional interpretation?' 601.

36 See Botha *The Legitimacy of Law and the Politics of Legitimacy* 401, where he refers to Karl Klare who wrote that the SA Constitution departs from the liberal tradition in a number of ways. To Klare, unlike classical liberal constitutions (like that of the USA), the SA Constitution guarantees economic, social and cultural rights alongside civil and political rights, embraces a substantive vision of equality, and imposes positive or affirmative duties on the state to promote social welfare and assist individuals in the exercise of their rights.

37 'Evaluative reflections on the final text of SA's Bill of Rights' 283.

38 De Ville *Judicial Review of Administrative Action in South Africa* 123.

appointed permanently, can today simply rely on the constitutional right to fair labour practices.

6 The courts

In the realisation of the Constitution as a living document, the court fulfils a pivotal role. Interpretation and application of a constitution's provisions are nonetheless undertaken by all the officials and organs of state as well as citizens on a daily basis and in a multitude of manners and fashions. These interpretations and applications to be valid must certainly adhere to the requirements of legality. At a first glance, all governmental actions bear the stamp of public authority. However, their legality is not conclusive and may be challenged in a court of law, since only a court may make a final and authoritative finding about the legality of government actions.

It is an accepted principle of democratic government that judges must be independent and exercise their functions without fear, favour or prejudice.[39] Why should the courts be independent? What if judges are highly qualified jurists and at the same time government officials? Could it not be said that in such a state of affairs, the requirements for a democratic government are not equally fulfilled? Answers to these questions are simple. Courts and judges who are not independent but stand under the demands and instructions of the government, although they seemingly perform judicial functions, are no longer courts of justice but a prolongation of the arms of the executive. The result is that their legitimacy becomes severely suspect and finally also the integrity of the constitution which they are supposed to uphold and protect.

However, this does not deter governments, although they pay lip-service to the independence of the judiciary, to create processes for the appointment of judges in such a manner that they can exert influence and subservience. The reason for this strategy to gain a say in judicial findings, is clearly stated by Du Plessis and De Ville:[40] 'Judgments in constitutional matters are most often contentious and have far-reaching "party-political" or "policy" implications, precisely because they follow from a judicial conscientiousness to keep participants in party politics to the "basic rules of the game"'. In short, a government that wants to thwart these rules of the game is not going to be content with these judgments. It must be remembered that the Constitution is not simply a law setting out the powers and functions of government and protecting the individual's fundamental rights. It is also a policy document of immense importance. The Bill of Rights prescribes how government must promote socio-economic welfare in the fields of education, health, environment and others. Previously, judicial deference made the courts hesitant to express themselves on policy matters. Now, under the Constitution, the courts must evaluate government policies to see whether they are compliant with the Bill of Rights. As stated above, a finding of the court that complies with the Constitution but goes against government policy, will no doubt in some cases arouse government anger or at least a measure of irritation.

It cannot be denied that the government's manipulations in the process of appointing judges, by securing a majority of government supporters in the Judicial Service Commission, is a real threat to the independence of the judiciary and in the end, can undermine the foundations of democracy. This is because it violates the principle of the separation of powers and leaves the constitution unprotected and in the hands of government.

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39 See the oath or solemn affirmation of judicial officers, Schedule 2.6.

40 'Bill of Rights interpretation in the South African context (1): Diagnostic observations' 63.

A matter often raised, is the unrepresentative nature of the courts. It is said that because judges are not popularly elected, the judiciary is an undemocratic element that is foreign to the representational character of a constitutional state. The debate on the status of the courts and in particular, their unrepresentative nature, can be found in constitutional writings of scholars in many countries. Francois Venter,[41] who undertook thorough research in this regard, writes rather summarily:

Despite the large impact that the counter-majoritarian debate had in scholarly literature, it must be clear that constitutional review has become an indispensable component of the contemporary constitutional state – those who are uncomfortable with it must learn to live with their discomfort... If politics in constitutional adjudication cannot be avoided, let us then rather have fearless judicial consistency as a correction to majoritarian arrogance (with its) judicial echoes of government policies and ideologies.

In conclusion[42] he states more soberly: 'The measurement of the quality of democracy has little to do with the absence of a popular democratic mandate of the constitutional judiciary: indications are that popular trust in constitutional courts as guarantors of the constitutional propriety of legislatures, administrations and executives lies at the root of the legitimacy of the constitutional state.'

Majority rule is an integral component of democracy. However, this does not imply that under a democratic constitution, the will of the political majority has a final say in all state affairs. A democratic constitution regulates many competing interests, not in the least, those of individuals and minority groups as well as opposition parties. The result is an extensive network of checks and balances that together constitute the political game, a game that asks for an independent referee. In this game, the majority's representatives cannot be players as well as referees. In short, it is an independent court which has to fulfil the task of an independent referee.

A representational factor was introduced in the Constitution by section 174(2). This section rules that when judicial officers are appointed, the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered. The purpose of this section is to assure the legitimacy of the judiciary amongst the population. It is drafted in a peremptory manner but leaves an open discretion as to how the racial and gender composition of the population should be considered. An exercise of this discretion may not have the effect of a watering-down of the requirement of article 174(1) that an 'appropriately qualified woman or man who is a fit and proper' may be appointed as judicial officer. Regrettably, the Judicial Service Committee in its recommendations of judicial appointments seems more and more inclined to use demographics as a criterion of preponderance and consequently neglects the criteria of qualifications, fitness and properness. Nowhere in the Constitution is there a provision to be found that makes demographics the most important or sole criterion for purposes of a broad reflection of the gender and racial composition of the country's population.

Also, as regards the question of representation, the different nature and role of a constitutional court has to be pointed out. A constitutional court is not an ordinary court. Its major task is to protect the constitution.[43] Constitutional issues that come before a

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41 *Global Features of Constitutional Law* 112.

42 *Ibid* 118.

43 Section 167(5) of the SA Constitution clearly states that the Constitutional Court makes a final decision whether an Act of Parliament, a provincial Act or the conduct of the President is constitutional.

constitutional court will have political overtones and implications. It can happen that a constitutional court giving judgments against laws and government action, estranges itself from the government of the day to such an extent that its status falls into disrepute and disobedience. To demand total respect, a constitutional court should be in the nature of a high court of parliament. This means that its members, or at least some of its members, should be highly qualified persons – not necessarily all of them jurists – who have the highest standing with, and confidence of, parliament and elected and appointed by parliament, not by the head of state. However, parliamentary election and appointment of these judges should not happen by majority vote, but by a higher vote of say seventy-five percent of parliament's members so as to assure the support of opposition parties as well.[44]

7 State institutions supporting constitutional democracy

Parliament and all the other provincial and local representative institutions as well as government with all its agencies carry the main responsibility to adhere to and give life to the Constitution. The courts, as pointed out above, are the prime protectors of the Constitution. In addition, there are also other institutions contained in Chapter Nine that fulfil the important and subsidiary task of protecting the Constitution. These so-called Chapter Nine institutions[45] are the Public Protector, the SA Human Rights Commission, the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor General and the Electoral Commission. As said, they perform the most important task of supporting the democratic order and to protect the life of the Constitution. Their instalment was certainly a bold and far-seeing step at the time when the present constitutional state was planned and came into being. The fact that they are independent, only subject to the Constitution and the law and in the exercise of their functions, required to be impartial without fear, favour or prejudice,[46] invests them in principle with considerable powers.

The President appoints the members of these commissions on the recommendation of the National Assembly. In the case of the Auditor General – who it is specified must have specialised knowledge of, and experience in auditing, state finances and public administration – and the Public Protector, at least a majority of sixty percent of the members of the Assembly must support the recommendation for their appointment. The tenure of office and consequently the independence of the office of Auditor General and Public Protector are assured in so far as they may only be removed from office, by a two-third vote by members of the Assembly. For the removal of members of the other commissions a majority vote suffices.[47]

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44 Regrettably, the Constitutional Court, as regards it composition, standing and functions took a wrong turn. Judges of the Constitutional Court are appointed by the President. The Court is more and more regarded as an apex court to the detriment of the Supreme Court of Appeal's standing and functions as the highest court in all civil and criminal matters, excluding constitutional matters. A direct result is that the Court, instead of concentrating on pertinent constitutional issues, becomes more and more embroiled in procedural niceties. In the recent case of *SA Police Service v Solidarity obo Barnard* (2014) ZACC 23, the majority was more concerned with procedural deficiencies than with the real constitutional issue, namely the Police Department's policies of affirmative action.

45 Ss 181–184 of the Constitution.

46 S 182(2).

47 S 194.

With the exception of the Auditor General, the Public Protector and the Electoral Commission, the performances of the other commissions have not been impressive. The fact that a majority of their members are, either patently or silently, supporters of the government, caused popular suspicion that these commissions rather serve as means to distribute seats on the gravy train. The question is whether these commissions should not become amalgamated into one strong commission for the protection of human rights and the rights of minorities.

The present controversy surrounding the Nkandla-issue does not put the President, the government and the parliamentary majority in a good light. But it has the effect that the standing and functions of the Public Protector as an institution supporting constitutional democracy, has become widely known, appreciated and more clearly circumscribed. Popular awareness of the functions of the Public Protector has certainly instilled life into the Constitution.

8 Just administrative action

It is in the arena of state administration that the individual encounters the workings of bureaucratic machineries and machinations. In this environment the individual becomes constantly aware of the plethora of laws, regulations, rules and orders that organise and regulate all daily lives. Although most of these laws and regulations do not directly imply the Constitution, they all, so to say, fall within the constitutional purview, since they must be authorised in terms of the Constitution. An individual who is subjected to unjust administrative action has every reason to look towards the Constitution for protection and blame the Constitution if such protection is not afforded.

With the advent of the Constitution, the bold and far-reaching step was taken to recognise the individual's right to just administrative action and to enshrine it in the Bill of Rights. Article 33 provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. The national legislation to give effect to this right came in the form of the Promotion of Administrative Justice Act of 2000 (PAJA). Section 33 of the Constitution has to be read in conjunction with section 1(*d*) that enshrines the basic value of a system of democratic government to ensure accountability, responsiveness and openness. Section 41(1) is also relevant; this section promises an effective, transparent, accountable and cohesive government for the Republic as a whole that does not assume powers and functions except those conferred in terms of the Constitution.

PAJA basically contains a codification of the rules for just administrative behaviour that over a long period of time were enunciated and developed in South African case law as rules of natural justice. However, it is not an elegant piece of legislation and bears witness to much uneasiness in the parliamentary discussions and deliberations that preceded its final adoption.[48] For example, section 6 which is PAJA's most important provision, and gives content to the constitutional demand that administrative action must be lawful and reasonable, is presented under the heading of 'judicial review of administrative action', whereas in truth it provides for much more. In fact, it contains a full list of requirements for lawful and reasonable administrative action and should have been formulated in a positive manner.

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48 See Pfaff 'Implementation strategies for the Promotion of Administrative Justice Act: State-of-affairs report and recommendations for further developments'.

In section 1(*i*) a whole list is given of government institutions and bodies whose executive powers and functions are not included within the purview of the Act. They are the National Executive, Provincial Executives and Municipalities. In terms of section 2 the Minister may by notice in the *Gazette* and approval by Parliament, exempt an administrative action or group of administrative actions from the application of some of the provisions of the Act. It is doubtful whether these provisions would stand the test of constitutional compliance in the light of section 33's clear entrenchment of administrative justice.[49] Exclusion from the provisions of PAJA would in any case not render the actions of these institutions and state organs immune from review.

9 Civil society

Civil society is the context in which the Constitution is applied. Stated differently, it can be said that the Constitution finds its roots in civil society. Civil society in South Africa comprehends all the members of the South African population, literally millions of individuals, women and men as well as children, persons from different ethnic origins, cultural backgrounds and occupations, with their own physiognomies, convictions and idiosyncrasies. However, civil society is not simply amorphous masses of millions of people. It is organised into thousands and thousands of families, formal organisations and informal groups, NGOs, clubs, associations, trade unions, professional societies, religious congregations and communities, political parties and an immense multitude of other forms of natural and voluntary coming-together formations.

The media in all its diverse forms and ramifications is the voice of civil society. That is the reason why the constitutional right of freedom of speech is of prime importance. But there are also other ways in which civil society's voice can be heard, for instance, through strikes, public protests, petitions and manifestations. In this regard, section 38 of the Constitution which allows for group actions, must also be mentioned.

Civil society is the constant subject of research, investigation and comment undertaken by all academic disciplines, whether social, economic, sociological, anthropological as well as many other sciences. Academic discourse in this regard, is rich, wide-ranging, diverse and sometimes polemic.

The major factor to assure a constitution's life-giving forces and influence is that it lives in the hearts and minds of members of civil society. For that reason, as is often said, civil society has a social contract, albeit tacit, with the rulers. Faith in and reliance on a constitution by civil society is indeed the basic ingredient of legitimacy. It is in this respect that a Bill of Rights is of such dominant importance since there is no fundamental human right that does not address one or more needs, activities, aspirations and endeavours of civil society's members. For example, members would not be able to organise themselves if freedom of association coupled with other freedoms such as freedom of religion and freedom of language and culture were not guaranteed. Above all, individual self-actualisation can only come about under the protective cover of human dignity.

It speaks for itself that should the promises of the constitution not be realised, civil society will become more and more disenchanted, not only with the government of the day, but finally with the constitution itself.

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49 Although it must be admitted that some of these exclusions do not relate to administrative acts and would therefore not fall foul of the Constitution; see Burns *Administrative Law* 154.

10 Constitutional amendment and revision

A rigid constitution, such as the South African Constitution, has the advantage that it cannot easily be changed to become the prey of policies and political whims of a ruling party, as was the situation under the previous dispensation when parliamentary sovereignty was the dominant theory. The disadvantage of a rigid constitution on the other hand, is that it could become stagnant and not address new demands and conforming to the exigencies of new situations. In this respect, Botha[50] poses the following questions:

> On what basis should the normative visions of the founders (of the Constitution) be privileged over current ideas of what is right and proper in politics?... What if the normative vision of the founders is, in some respects, fundamentally at odds with contemporary understandings of political morality?

> If it falls into desuetude, a constitution's legitimacy could become suspect in the eyes of civil society. Worse, a constitution asks for revolt if it keeps unpopular power structures in place that are so engrained in the system that they cannot easily be removed.

To meet the demands of the times, constitutions provide for constitutional amendment since no constitution, even though of a rigid nature, is cast in concrete. The South African Constitution allows for the amendment of most of its provisions by a two-thirds majority in Parliament with the possibility of a referendum – which is in the power of the President – to test popular support. The important exception is contained in section 1 that can only be amended with a seventy five percent vote. This section contains the foundational values of the democratic system and it is only understandable that it should be almost unchangeable.[51]

Constitutional amendment by a two-thirds majority in Parliament is certainly necessary to meet the exigencies of the times. But it also has its difficulties. If a ruling party has a two-thirds majority or more it can amend the constitution to its own likes and discard the wishes and opinions of opposition parties. Without a two-thirds majority, the ruling party has to secure support amongst the opposition and other minority parties, a process that could become protracted and even cause constitutional crises.

Constitutional revision entails amendment but is much more. It means a going back to the drawing board to look at the constitution in its totality or part of it. It implies a constitutional conference of all interested parties to draw up a new accord. Once consensus or near-consensus is reached, parliament is then assured of the necessary two-thirds majority and in a position to adopt the revised constitution or parts of it as constitutional amendments. Constitutional revision has the benefit to pass substantial amendments on a much broader basis than purely parliamentary debates. It is a forceful legitimacy-creating process.[52]

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50 *The Legitimacy of Law and the Politics of Legitimacy* 294.

51 These values are human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the constitution and the rule of law, universal suffrage, a national common voters' role, regular elections and a multi-party system of government, to ensure accountability, responsiveness and openness.

52 Some countries make provision for constitutional revision after a lapse of a certain period of time or the occurrence of a certain event. The German constitution foresaw the possibility of a re-unification, and when it occurred, the constitution was revised. Other European countries revised their constitutions to give effect to the European Community's Maastricht convention.

Constitutional revision under the Constitution could be achieved relatively simply. For example, parliament could create a revision process by passing a law installing a commission to revise the system of central government, for instance, to provide for a ceremonial presidency and a prime minister or to reform the provincial system. Even less difficult, the President could in the exercise of his powers under section 84(2)(*f*) appoint a multi-party commission to make recommendations for the revision of parts of the Constitution. When the commission reaches consensus or near-consensus, it can put its recommendations before parliament and propose constitutional amendments that can then be assured of two-thirds support.

11 The demise of a constitution

The demise of a constitution is heralded when its legitimacy fall into disrepute. Factors that negatively affect a constitution's legitimacy are all along pointed out in this essay. They are primarily the violation of human rights, abuse of state powers, administrative arrogance and estrangement from civil society. These factors can threaten the life of a constitution in such a measure that it becomes terminally sick. The almost inevitable consequences are revolution and revolt. Once a democratic constitution is thrown overboard, the time for anarchy and a dictatorship is ripe.

After twenty years of democratic rule, the legitimacy of the South African Constitution seems well assured. But we should not be too complacent. Many factors point to the fact that the present ruling party when the Constitution was agreed upon, was more anxious to take over the reins of power than to embrace and understand its basic tenets. Democracy, it seems, means simply majority rule disregarding the constitutional checks and balances, especially the measures for the protection of human and minority rights. A clear indication of this misconception of the true nature of a democracy is the propaganda for a 'national democratic revolution'. This is a contradiction in terms. Democracy is realised and sustained by evolutionary processes, not by revolution.

12 Conclusion

A constitution taken on its own, remains but a rather innocuous document contained in a small booklet. Once put to life, as explained in this essay, it becomes a forceful instrument not only to rule government but also to govern the state and nation.

The foundations of a constitution are vested in state institutions. State institutions are vulnerable constitutional edifices that need protection from all kinds of onslaughts and insurgencies. For instance, courts do not themselves have the means to enforce their judgments. Civil society also needs protection from crime and violence. It is in this respect that the military and police perform such vital tasks to assure a democratic order and thus to keep the constitution alive. Should the military and police forsake these tasks and be misused to keep an undemocratic government in power, or worse, become infested with corruption and criminal elements or usurp their powers to quell democratic protest, the demise of the constitution becomes a sad reality.

State institutions do not have a life of their own. A constitution as a document is but an inane bundle of pages. A host of factors, as pointed out, give life to the Constitution. In the final analysis, it is human beings who instil life-giving forces into a system of government and into the constitution. Government members and officials, members of parliament, state servants, public office-bearers, judges and finally, members of civil society assure that a constitution is alive and well. Ignorance of constitutional provisions sounds the death-knell of a constitution. A vigilant civil society, even more than the courts and state institutions is

the most important protector of a constitutional order. In this respect, public education of the values enshrined in the Constitution should constantly be instilled in the political culture.

Finally, it should be reiterated that for a constitution's vitality, interpretation and application of its provisions are the essential keys to disclose its contents. For it speaks for itself that if this does not happen, the constitution remains a closed book. It is in this respect, namely that of constitutional interpretation and application that the erudite and thoughtful contributions of Du Plessis stand to be acknowledged and praised. He has structured a theory of constitutional and legislative interpretation in a multi-layered and rich context of law, politics and linguistics. His writings and insights have sharpened our legal thought and enriched our body of juristic sciences.

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Tributes

Ode aan 'n 'Beste Professor'

Christa Rautenbach

Dertig jaar gelede ontmoet ek die eweknie van die bekende professor Charles W Kingsfield jnr, naamlik professor Lourens du Plessis. Min het ek as jong regstudent geweet dat hy uiteindelik 'n groot rol in my vorming en groei as mens in die algemeen en regsakademikus in besonder sal speel. Hierdie ode word aan hom opgedra deur iemand wat onder sy skerp, kritiese en deskundige denke gevorm en afgerond is.

Ses jaar nadat die voormalige Suid-Afrikaanse regering besluit het om 'n ope televisiediens in die land in te stel, voltooi ek in Desember 1980 matriek. Ek is gretig om met my universiteitsopleiding te begin, maar steeds onseker oor die presiese rigting wat ek wil volg. Twee televisie-uitsendings gedurende hierdie periode skets 'n aanloklike prentjie van die regswese. Die eerste een is die baie bekende 'LA Law' wat heelwat blinkoog-matrikulante na die regskole lok. 'n Tweede een is 'Beste Professor', 'n Afrikaanse oorklanking van die bekende Amerikaanse reeks 'The Paper Chase', waarin professor Charles Kingsfield die rol vertolk van 'n eksentrieke regsdosent by Harvard Regskool vir wie niks anders as 100% goed genoeg was nie en wat wou seker maak dat sy studente hulle werk doen en vir hulleself dink. 'n Tydelike aanstelling as 'n klerk by die plaaslike landdroskantoor gedurende die somervakansie en insae in 'n grusame geregtelike doodsondersoek was ten laaste genoeg om die pendule in die rigting van die regswese te swaai.

Die 1980's was beduidend om 'n verskeidenheid redes. Die apartheidsbeleid van die voormalige regering bereik 'n hoogtepunt en internasionale druk teen Suid-Afrika neem toe. Teen hierdie agtergrond begin ek in 1981 met 'n permanente aanstelling as klerk van die hof by Fochville landdroskantoor. Terselfdertyd skryf ek vir die graad BIuris by die Universiteit van Suid-Afrika in. Dit sou egter nog drie jaar duur voor ek vir Lourens, volgens my eerste indrukke die eweknie van professor Kingsley, ontmoet. In 1984 kry ek studieverlof by die Departement Justisie en skryf in as voltydse regstudent by die voormalige Potchefstroomse Universiteit vir Christelike Hoër Onderwys (of beter bekend as die PUK).[1] Vir die volgende twee jaar fokus ek op my voorgraadse regstudies. Alhoewel

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1 Die PUK bestaan as selfstandige universiteit nog maar sedert 1951, maar dit het 'n voorgeskiedenis wat strek sedert November 1869. Die voorloper van die PUK het op 'n baie klein skaal begin as 'n departement van die Teologiese Skool van die Gereformeerde Kerke in Suid-Afrika (GKSA) wat die kampus gestig het vir die opleiding van onderwysers. 'n Letterkunde-departement het in 1877 gevolg en in 1905 is die teologiese skool na Potchefstroom oorgeplaas. In 1919 was daar 'n skeiding tussen die teologiese skool en die letterkunde-departement en dit was die begin van 'Het Potchefstroom Universiteitskollege voor Christelike Hooger Onderwijs' (PUK). In 1921 is die PUK by die Universiteit van Suid-Afrika (UNISA) ingelyf. Na herhaalde pogings het die PUK in 1933 sy titel 'vir Christelike Hoër Onderwys' wettiglik teruggekry en in 1951 is die PUK erken as 'n onafhanklike universiteit, bekend as die Potchefstroomse Universiteit vir Christelike Hoër Onderwys (PU vir CHO). Op 1 Januarie 2004 het die PU vir CHO die Potchefstroomkampus van die nuwe Noordwes-Universiteit (NWU) geword. Dié kampus staan steeds algemeen bekend as die PUK. Vir meer inligting oor die onstaan en ontwikkeling van die voormalige PU vir CHO, sien Noordwes-Universiteit 'Die NWU: Onlangse Geskiedenis'; Van der Vyver *My Erfenis is vir my Mooi*.

ek nie persoonlik met Lourens te doen kry nie, is ek deeglik bewus van sy indrukwekkende teenwoordigheid en die rol wat hy speel as kritikus van die voormalige apartheidsregime. As konserwatief-denkende regstudent het ek sy aktivisme van 'n afstand bewonder, maar sou dit nooit self waag om openlik teen die apartheidsregime op te staan nie. Hy was onder andere leier van die groep wat die *Koinonia Verklaring*, wat skerp kritiek teen dié beleid uitgespreek het, in 1977 opgestel het.[2] Sewe jaar gelede verklaar hy soos volg: 'Dertig jaar ná Koinonia leef ons in 'n land waar 'n mens ongeïnhibeerd saam met medeburgers en medegelowiges jou nimlike "politieke self" durf wees en die regering van die dag vryuit kan kritiseer.'[3] In die lig van die huidige politieke ontwikkelinge sou hy hierdie uitlating vandag waarskynlik anders formuleer.

Gedurende my LLB-studie (1986–1987) voer Lourens, ten spyte van teenkanting van sommige van sy kollegas en vriende, samesprekings met lede van die voormalige verbanne 'African National Congress' (die ANC) in Dakar. Die wyse waarop hy ons as studente van die vraagstukke bewus gemaak het, was besonder doeltreffend. Gedurende dieselfde tyd neem hy 'n groep LLB-studente, myself ingesluit, na 'Khotso Huis' in Johannesburg vir 'n ontmoeting met lede van die ANC-jeugliga.[4] Ons kry opdrag om samesprekings te hou en belangrike kwessies te bespreek. Die besoek laat 'n blywende indruk op my en het aansienlik bygedra tot die vorming van my latere standpunte oor gelykheid en kultuur. Die feit dat my gewese eggenoot gedurende daardie tyd 'n lid van die veiligheidspolisie was, het sake natuurlik vir my bemoeilik, maar dit daar gelaat.

Onder sy leiding word 'menseregte' 'n lewendige, relevante kursus wat ons denke stimuleer en uitdaag. Hy skep 'n leeromgewing waar ons met veiligheid van hom kon verskil en met hom kon redeneer. In 1987 skryf ek, met Lourens as studieleier, 'n regsvergelykende LLB-skripsie met die titel 'Regterlike Funksie by die Toepassing van Menseregte in Suid-Afrika'. Sy ongelooflike geduld met my onvermoë tot liberale denke en die oortuigende wyse waarop hy teenargumente kon opper, bring my uiteindelik tot 'n punt waar ek kon aanbeveel dat Suid-Afrika 'n menseregteakte moet aanvaar, asook 'n spesiale hoërhof met toetsingskompetensie moet instel. Beide het inderdaad sewe jaar later plaasgevind. Vir 'n wyle was ek oortuig dat ek die potensiaal het om ook 'n regsfilosoof te word, maar alle aspirasies in daardie rigting het soos mis voor die son verdwyn na 14 jaar se praktiese toepassing van die reg by Justisie.

Lourens is ook onkonvensioneel op persoonlike vlak. Hy is een van die grootste feministe wat ek ken en dit word weerspieël in sy daaglikse handel en wandel. Hy was ook een van die weinige dosente wat moeite gedoen het om die sosiale funksies van studente by te woon. Gedurende hierdie geleenthede het hy ewe tuis met 'n glas wyn in die hand

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2 Soos uitgewys deur Lourens in later jare: 'Die Koinonia-verklaring (16 November 1977) was 'n groepsinisiatief van politieke jukskeibrekers wat gewaag het om openlik oor vergrype van die apartheidsregime te praat' en '[dit] het algemeen toepaslike riglyne vir 'n regverdige staat uitgestippel, en elke stel riglyne is op praktiese situasies in die Suid-Afrikaanse politiek toegepas, met 'n appèl op die regering om onreg en gebreke reg te stel'. Sien Du Plessis 'Koinonia – In Memoriam' 21.

3 Du Plessis 'Koinonia – In Memoriam' 24.

4 Khotso Huis was die hoofkwartier van die Suid-Afrikaanse Raad van Kerke. Dit was algemeen bekend dat die huis gebruik is vir die huisvesting van lede van die anti-apartheidsbeweging. Adriaan Vlok het gedurende die verrigtinge van die Waarheid- en Versoeningskommissie erken dat hy die huis in 1988 in opdrag van die voormalige president PW Botha gebombardeer het. Sien *South African History Online*.

saam met die studente om die braaivleisvuur gefilosofeer. 'n Mens kon van Lourens verskil en teenargumente voer – lewendige debatvoering (binne en buite klasverband) was sy kos. Sy skerp argumentasievermoë en kwinkslae het ons behoorlik laat bontstaan om teenargumente uit te dink. Stilbly was nie 'n antwoord nie. Jy was gedwing om uit jou gemaksone te treë en deel te neem.

'n Staaltjie wat ek graag oorvertel, is die aand toe die regstudente uit reaksie teen die destydse dansverbod voor die regsfakulteit gedans het.[5] Lourens was voor in die koor en het ewe ywerig die danspassies saam met ons uitgevoer. Die volgende dag was ons almal op die rooi tapyt, maar gelukkig was die nagevolge nie ernstig nie en is die verbod 'n jaar later in 1988 afgeskaf. Ongelukkig het ons beide die heuglike dag toe die eerste amptelike sokkie in die sentrale eetsaal van die PUK plaasvind, gemis.

In 1988 begin ek voltyds met my loopbaan by Justisie en Lourens verlaat die walle van die Mooirivier (Sarie Marais se woonplek) vir die groener weivelde van Universiteit Stellenbosch. In 1994 kry ek 'n aanstelling by die PUK as lektor en loop vir Lourens van tyd tot tyd by akademiese geleenthede raak. As akademikus het hy nooit opgehou met ontwikkel nie. Intussen het die winde van verandering op die PUK gelei tot opwindende nuwe dinge. Die Noordwes-Universiteit met drie kampusse [Potchefstroom (NWU-PUK), Vaaldriehoek en Mafikeng] kom in 2004 tot stand. Na 24 jaar lok die waters van die Mooirivier Lourens terug na die NWU-PUK en is ek vandag in die bevoorregte posisie om een van Lourens se kollegas te wees. Sy terugkeer na sy Alma Mater is 'n hoogtepunt vir ons almal wat hom persoonlik en professioneel ken. Dit is 'n salige gedagte om te weet hy is in ons midde en altyd beskikbaar vir die uitruil van stimulerende akademiese gedagtes en aktiwiteite. Ek het gevorder van 'n student wat vir die 'Beste Professor' skryf na 'n kollega wat saam met die 'Beste Professor' skryf en ons eerste gesamentlike publikasie is onlangs in die *German Law Journal* gepubliseer.[6]

Benewens sy aktivistiese ingesteldheid, was en is Lourens 'n juris met integriteit. In sy monografie *Die Professionele Gedrag van die Juris*[7] skryf hy dat daar nie iets soos 'n 'volmaakte ideale juris' is nie, maar dat sommige beter is as andere omdat hulle die 'persoonlikheidstoerusting' van 'n ideale juris het. Hierdie persoonlikheidstoerusting sluit in: integriteit, objektiwiteit, waardigheid, oordeelsvermoë, kennis en tegniese vaardighede, werkvermoë, respek vir die 'weg van die reg' en billikheid. Indien al hierdie kwaliteite die ideale juris kweek, is Lourens ongetwyfeld 'beter as andere', want hy beskik oor iedereen. Elke regstudent het 'n 'beste professor' nodig wat onafhanklike, kritiese denke kan stimuleer en ontwikkel, en elke regsdosent het 'n kollega soos Lourens nodig wat jou tot hoër hoogtes kan inspireer.

As ek aan my studentedae en die kontaksessies met Lourens aan die stuur terugdink, eggo die bekende woorde van professor Kingsfield in my ore: 'You teach yourselves the law, but I train your minds. You come in here with a skull full of mush; you leave thinking

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5 Dans is deur die sinode verbied van 'n diepgesetelde agterdog oor en afkeer aan dans in Calvinistiese kringe oor meer as vier eeue. As gevolg van die Christelike karakter van die PUK, is hierdie besluit ook by die PUK deurgevoer. Die verbod was so streng toegepas, dat die huidige vise-Kanselier, Theuns Eloff, in die sewentigerjare vir 'n tydperk geskors is omdat hy en sy vrou op die kampus gedans het.

6 Rautenbach en Du Plessis 'In the Name of Comparative Constitutional Jurisprudence'.

7 Du Plessis *Die Professionele Gedrag van die Juris* 12.

like a lawyer.' Lourens het einde 2014 afgetree, maar sy nalatenskap leef voort in my 'skull full of mush'. *Bon Voyage* Beste Professor!

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When jurisprudence meets political science

Amanda Gouws

As I write this, newspapers and online sites are saturated with writings about the shooting at *Charlie Hebdo*, the satirical paper in Paris, France where twelve people were killed by two allegedly fundamentalist Muslim brothers. At the core of this event are issues of freedom of speech, the limits of tolerance, the nature of satire and the understanding of racism as related to white Westerners. I want to start here in my tribute to Lourens du Plessis because my working relationship as well as my friendship with him started around the story of political tolerance that embodied all the above issues – the story of my PhD dissertation.

On 7 January 2015 ten members of staff and two police were killed in a shooting at the offices of *Charlie Hebdo*, ostensibly about the offensive cartoons the paper had published of the Prophet Mohammed. So offensive was it to Muslims that for the two brothers the only solution was to kill the cartoonists. In the days that followed, the debates raged about freedom of speech and its limits. Is it acceptable to draw tasteless and virtually pornographic cartoons about any religion? The definition of political tolerance is that if we claim certain rights for ourselves we also have to allow our enemies/opposition the same rights. But if we accept that everyone has those rights, do we still have to accept the content of free speech or should there be some limits to speech that incites violence or hate speech? In the West citizens united behind the slogan 'Je suis Charlie' (I am Charlie) to show solidarity with victims of the *Charlie Hebdo* shooting. New cartoons showed a pencil broken in half that turns into two pencils – the message being that the pen is always mightier than the sword. At the Golden Globe Award Ceremony in Hollywood many actors, upon receiving their awards, said 'Je suis Charlie'.

But on internet blogs more muted voices were starting to make other arguments – not about freedom of speech, but arguments about the hypocrisy of the West, about the sustained efforts of *Charlie Hebdo* to denigrate Muslims and to draw them as evil doers in a very racist way. One of the questions was why the West was so concerned with freedom of speech but not the content of speech. One of the conclusions that many of these arguments came to is that most Westerners were inherently racist against blacks, Muslims and everything non-Western and consequently it was this invisible racism that was the cause of the *Charlie Hebdo* shooting, not necessarily the fundamentalism of the shooters (or that the fundamentalism was fueled by racism rather than religion). In an article titled 'Unmourn–able Bodies' written by Teju Cole in *The New Yorker* he asks why the world unites around twelve dead French people but not around thousands of Muslims killed on a daily basis in the Middle East or by Boko Haram in Nigeria? (This was not to condone the shooting at *Charlie Hebdo* but to show the double standards of the West.)

The debate also engaged the issue of multiculturalism – how the West has constructed notions of multiculturalism as a discourse but that it lacks in its implementation. In countries like France and the Netherlands, for example, everybody can adhere to their own cultures as long as it does not destabilize the majority culture. France banned the headscarf worn by Muslim women in public spaces like schools. The shooting is viewed by those who oppose multiculturalism as an indictment of the problems of multiculturalism. The shooting is perceived as a very good example of the failure of multiculturalism – that

by inviting every culture into the body politic you open it up to erosion and violence by others (read: fundamentalists, terrorists) who want to destroy Western culture. The immediate call was for greater surveillance and a clampdown on migration and immigration. For others who support multiculturalism the argument is that accepting multiculturalism has always been on the terms of majority cultures whose members in effect want assimilation (read: Muslims should respect the rights they are so graciously given in Western countries.) In other words there is a disjuncture between the discourse and its implementation.

Now rewind to 1990 when I was returning to South Africa from the University of Illinois in the USA to do the fieldwork for my PhD dissertation on political tolerance in South Africa. The study of political tolerance includes all the elements mentioned above: freedom of speech, association, assembly and the limits of tolerance, as well as an understanding of political violence and racism as a consequence of apartheid just prior to the political transition. In short, the study had to deal with an interrogation of the political context of South Africa on the eve of the transition. Political context matters when you study tolerance and I came back to a context of pervasive violence in KwaZulu-Natal in general and between the ANC and members of the Inkatha Freedom Party specifically, as well as sporadic incidences of violence elsewhere in the country. One of the questions raised was how we would create a multicultural society in post-colonial conditions of racialized discourses and practices of a minority culture. What should the limits of tolerance be?

My study included interviews with a random sample of South Africans and also a sample of elite interviews. Many of the intellectuals whom I interviewed at that point asked the question why one would study political tolerance in a country that was inherently intolerant, forgetting that the implementation of human rights and civil liberties post-transition would need a basic level of tolerance to succeed. However Lourens was different. He engaged all the theoretical issues that make the study of political tolerance one that is intriguing and that at the same time is difficult.

I was determined to interview the man whose reputation as a progressive free thinker preceded him. Before I met him, some colleagues at Stellenbosch University would say '… you've got to meet him…' with that look in their eyes that shows that they were not certain whether he could be trusted to be 'one of them'. The subtext was that such a person is not a real Afrikaner, someone not to be trusted to protect Afrikaner heritage.

Lourens was one of the people who went to meet with the ANC in Dakar in 1987. For many Afrikaners that was a betrayal of the volk. No wonder colleagues at Stellenbosch University had mixed feelings about him. While in Dakar the South African delegation went to visit Goree Island with its notorious slave houses. They also stood on the threshold of the 'door of no return' in one of the slave houses. From here thousands of slaves were shipped to the Americas. If you stepped over the threshold of the door of no return you were severed from Africa forever. You could only look back at this door from the ocean, never to return.

In their house in Stellenbosch the Du Plessis family had a painting of the infamous 'door of no return'.[1] For me it was symbolic of Lourens's political journey. For Lourens to have gone to Dakar was in a sense going through the door of no return, never to be accepted back into the fold of the volk again. From then onwards his relationship with the volk would always be an uncomfortable one. As Max du Preez wrote in his book *Pale Native* about the Dakar experience: '[AWB] posters and slogans accused us of being traitors,

1 See Photos*.

communists and terrorists, and called on the government to charge us with high treason… [newspaper] stories suggesting that the ANC had used us simply to promote their own image, increase their legitimacy and weaken the resolve of law-abiding South Africans... [W]e were the "useful idiots" of the manipulative communists they had sweet-talked… into believing they were peace-loving democrats'. As was the case with many Afrikaner activists who supported a regime change, including Lourens, they were never really embraced by the new government either.

Yet, the importance of Lourens's academic publications and political involvement as someone who shaped thinking about constitutional law during the transition from apartheid to democracy, made him a strong candidate for involvement with the drafting of South Africa's first democratic constitution. He chaired the Technical Committee that wrote the Bill of Rights that would be included in the new constitution and would contribute to shaping civil liberties and the limits of political tolerance.

What made my interview with Lourens different was that he was genuinely interested in my research and was prepared to spend some time dwelling on the issues I was interested in, unlike some other intellectuals I interviewed – interviews where you get the impression that the person being interviewed is doing you a favour and you need to know it. Lourens engaged with my research questions and the wider context of my research, regardless of how time consuming it was.

The day of the interview was the start of a working relationship as well as a personal friendship that lasted throughout our careers. It was a privilege for me to co-author some articles with him. In these cases it was jurisprudence meeting political science on issues of gender in the constitution, or religion and political tolerance.

Over the years there were other mutual academic endeavours. As the co-ordinator of the Programme for Democracy and Development for Northwestern University in Chicago, that forms part of their Global Health Programme, and is taught at Stellenbosch University, I involved Lourens in teaching a module on Constitutionalism and Transformation. The American students loved Lourens's classes for his intellect, the content of the work but also for being accessible to them, unlike so many American lecturers they were used to. This programme took us to the Constitutional Court and the Apartheid Museum in Johannesburg once a year. The students were privileged to have an 'up close and personal' experience of the Constitutional Court through engagements with judges who Lourens invited to talk to them. They met judges Edwin Cameron and Johan Froneman for a discussion of the judges' personal experience of transforming the judiciary. The conversations continued over dinner at Soulsa in Mellville. I felt privileged to have been part of these discussions.

It is Lourens's generosity of spirit that sets him apart from many other intellectuals who have reached the pinnacles of their careers. Lourens worked hard but also believed in a good reward after hard work. If you were friends with Lourens you would always dine well and drink good wine. Lourens and I share a love of good wine, maybe because we both believe that 'life is too short to drink bad wine!' Our friendship included many a trip to wine farms around Stellenbosch, Paarl and Franschhoek. Being knowledgeable about wine, tasting wine and collecting good wine is a hobby for Lourens. In the basement of their house in Stellenbosch the Du Plessis family had a 'wine cellar' – one that was filled with cobwebs and lots of wine. If it were stacked with tins of canned food anyone who believed in the end of days and who entered there could survive for a long time after the apocalypse!

The Du Plessis family embraced me as a friend and there were many memorable social occasions, such as a trip to Namakwaland to have a picnic among the flowers, meeting

like-minded intellectuals at the Du Plessis' home and the totally unsuspected baby shower for my first child. I pride myself on the belief that nobody can keep a secret from me, but when Lourens invited me for a visit I suspected nothing. I was dumbfounded when the visit turned out to be a baby shower, generously organized by Wina.

Carien and Elmien, two of Lourens and Wina's daughters, whom I met while they were still in school ended up in my political science classes. It was a gift to have them there for the openmindedness with which Lourens and Wina raised them. Today one of them is one of South Africa's most highly rated investigative journalists, the other a professor of law.

In this Festschrift that is a celebration of Lourens's life and career one can safely say that Lourens's research has always been value-relevant and not value-free. What this means is that he understood the importance of his scholarship in relation to politics and to the transformation of the post-apartheid South African society. Lourens is a critical actor and an engaged intellectual who uses his research to ask critical questions about politics and law and in this intersection forges new ways of thinking about old problems. This way of being a scholar is something worth celebrating. Most of all it is Lourens's intellectual integrity that is deserving of celebration.

Lourens, I wish you well and I miss you.

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An unlikely friendship, yet typically South African

Hugh Corder

I think that it could be said without much fear of contradiction that friendships normally are sparked and developed between those of similar backgrounds, experiences and aspirations. Perhaps such a statement holds less water in times or circumstances of extraordinary stress or crisis, when people are thrown together with those who, despite their divergent backgrounds, share essential values and life-defining goals. So maybe the story which I am about to tell, unlikely as it may have appeared in prospect, is in fact typical of the South Africa of the past. I doubt whether it would still apply, in our current constitutional state of governance, but perhaps such a period will arise again.

1 Initial contacts

I cannot recall exactly when and where Lourens and I first met, but it was certainly at one of the eighteen-monthly congresses of the Society of Law Teachers of Southern Africa, as it is now styled, and either in Grahamstown in early 1986 or Durban in mid-1987. Our life experiences till then could only be characterised as very different: Lourens a product of the Western Transvaal, a brilliant philosophical mind, who had already earned a doctorate in law and philosophy, in a body which could more than hold its own in the front row of a rugby scrum.[1] Furthermore, Lourens was also closely involved with the Reformed Church and its media and political role, a context utterly outside my knowledge or experience.

By contrast, I came from a traditional English-speaking private school background in Cape Town, and had become extensively involved in progressive student politics during the 1970s, followed by a four-year stint of graduate studies in England. In rejecting some of the more extreme approaches to law as a 'science', neutralised or 'purified through discovering its European historical roots, and spurred on by the work of Tony Mathews and John Dugard, I had become more interested in the politics of the judiciary and a class-based analysis of legal relations, an outlook alien to almost all teachers of law in South Africa at that stage (and ironically, more so today). Extraordinarily, I had been appointed to the staff of the law faculty at Stellenbosch from mid-1983, where I was welcomed warmly by most of my colleagues and students, and which began to open all sorts of doors, among them invitations to lecture at other faculties of law. I would argue that this had less to do with who I was and what I had to offer, and more to do with the peculiarity of having someone so obviously out of kilter with the prevailing political orthodoxy, yet whose views were at least tolerated and whose academic freedom was respected. So I taught an option course in the final year of the LLB at Stellenbosch from 1984 to 1987 that essentially amounted to a Marxist analysis of law and the judicial process in South Africa. I was also able to invite

1 Later in life, I would be exposed to the image of General Koos de la Rey, 'die Leeu van die Wes-Transvaal'. In the best way possible, that is how I sometimes think of Lourens.

people to deliver guest lectures, and only once was I required to account for my choice of guest to a higher authority in the Faculty.[2]

So it was that I travelled to Potchefstroom in early May 1987 at the invitation of Lourens to attend an event with members of the law faculties of both Potchefstroom University and the University of Bophuthatswana, based in Mafikeng. I forget exactly what form the proceedings took, but it is worth recalling that Bophuthatswana had adopted a Bill of Rights as part of its Constitution, and that its law faculty numbered among its members some innovative teachers and writers in law, including some drawn from other African countries. I have three photographs taken during that visit: a group shot of most of those present at the 'lapa' in the garden of Uys van Zijl; a family picture of Lourens and Wina and daughters, taken in their back garden; and an evocative image of Lourens brandishing a bottle of white wine during a picnic on the banks of the Vaal River – I think that this must have been en route back to the Johannesburg airport.[3]

Later that year Lourens visited me in Stellenbosch, although by that stage I had been appointed to the University of Cape Town Faculty. He gave some guest lectures at Stellenbosch, where I was completing my teaching obligations. What remains with me already from that period in our acquaintance are the following characteristics: his incisive critical capacity, the great breadth of his scholarship, the gently-spoken and always slightly amused approach with which he asked razor-sharp questions, and his huge heart, both literally and figuratively. I remember being greatly impressed by his ability to complete a run on Stellenbosch Mountain with me, copious amounts of sweat notwithstanding.

Lourens fitted in naturally to some circles in Stellenbosch, and I was only mildly surprised when he was appointed to fill the position left by my move to UCT. By that stage, too, Lourens had made the public shift to engagement with the forces for progress out of the morass of white politics in South Africa, in the form of his participation in the trip to Dakar in June 1987 to meet the ANC in exile, and he was also among those who furthered such contacts through the four-day meeting between the members of the ANC Constitutional Committee in exile and about 30 (mainly white and Afrikaans-speaking) teachers of law from inside South Africa, in Harare in January 1989.

My contact with him on academic matters focussed on his writing the opening chapter for a book on jurisprudence which I edited, in which he examined the role of Calvinism in the legal and political thought of South Africa.[4] I had invited him to contribute this chapter precisely because so many South Africans were ignorant of the work of Calvin and also because I knew that Lourens would argue that Calvin's work had been misconstrued and misused for ideological reasons by the architects and enforcers of apartheid. As is stated in the abstract of that chapter: 'the author concludes by suggesting that many of the vast distortions of Calvin's views of state and politics – especially by people who claim to be "Calvinists" – can most probably be ascribed to a present-day process or "activity" whereby theories are manipulated to fulfil ideological functions'.[5]

Thus was the foundation established for the most remarkable and intense development of our friendship in the course of 1993.

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2 This was when I invited Raymond Suttner, not long before in gaol for crimes against 'state security', to lecture the Constitutional Law class in about 1984. My justification for inviting him was accepted by the then Dean.

3 See Photos*.

4 See Du Plessis 'Calvin, "Calvinism" and present-day South Africa' 31–64.

5 *Ibid* 31.

2 Drafting the Transitional Bill of Rights

The substantive beginning of the constitution-writing process in South Africa can be traced to April 1993, when what became known as the Multi-Party Negotiating Process (or MPNP) was convened at the World Trade Centre in Kempton Park near the Johannesburg international airport. The 26 political groups represented there soon decided that they needed the assistance of rather coyly styled 'technical committees' to advise them on specific points of disagreement or conflict between them. This device was to prove highly effective, in allowing party politicians to save face in departing from fiercely-held positions by conceding that 'the experts know better'. The members of those technical committees[6] generally had their own well-developed and sometimes partisan views on the matters on which they had to report, but such advice as they gave was always subject to public interrogation and ultimate acceptance or rejection by the Negotiating Council. In reality, after June 1993, when the Inkatha Freedom Party and several other groupings withdrew, the key players were the apartheid regime and the ANC, and their allies.

On 10 May 1993, Lourens and I found ourselves being briefed at the World Trade Centre as two of the 5 members of the 'Technical Committee on the Protection of Fundamental Rights during the Transition'. We were not given an extensive brief, being told that our specific task was to identify and then formulate such rights as we thought ought to be protected to ensure free and fair political activity during a process of transition from apartheid to democracy, with no attempt to define either 'fundamental' or 'the length of the 'transition'. Informally, we were told that our work should be done in about six weeks; in the event, it lasted more than six months, till mid-November.

Joining us as members of the Technical Committee were Zac Yacoob, a leading activist advocate from Durban and a member of the ANC who regularly consulted with that party;[7] Sbongile Nene, a social worker from Natal, with close links to the Inkatha group, which caused her to be entirely absent from our meetings from July onwards; and Gerrit Grové, a career civil servant from the Ministry of Justice, on whom the then Minister of Justice, Kobie Coetzee, leaned unconscionably from time to time, but who entirely properly and at times bravely asserted his independence from the policies of the apartheid regime. Ironically, Lourens had been nominated by a loose alliance of political groups on the conservative end of the political spectrum, despite or probably in ignorance of his formal membership of the ANC. I do not know which party nominated me, but perhaps I was seen by both the ANC and the Democratic Party as a relatively trustworthy individual.

We duly met, and elected Lourens as our Chair, a wise move. Over the next six months, this team became a relatively close-knit group, but we inevitably had differences of opinion, especially at the beginning of our work, and Lourens's calm gravitas and deep insights into human nature and the undercurrents of political tension in this country no doubt contributed hugely to the effective discharge of our mandate. The four of us (after Sbongile's departure) became good friends and could begin to laugh at each other's idiosyncracies and occasional outbursts. This process was strongly aided by the fact that Zac and Lourens and I dined together and spent each night while we were at the negotiations at the same Holiday Inn, so we were able in relaxed circumstances to revisit thorny issues and to think

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6 For a fuller account of the structure and functioning of the MPNP, see Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 7–10.

7 As Zac is blind, he was always accompanied by an attorney friend from Durban, who became an effective part of our meetings, but did not participate in our discussions.

about recommendations which might resolve them. We would usually find that Gerrit would agree with our proposals, once they had been fully explained and motivated to him.

There was a further element in this process which centred on the fact that Lourens and I travelled together from Cape Town to Johannesburg and back for each weekly session of the negotiations, and also frequently spoke to each other by telephone in between meetings. A pattern emerged: we would discuss the business of our next meeting intensively after checking in and during the early-morning flight to Jan Smuts Airport (as it then was called), and perhaps develop strategies and arguments for securing what was almost always a view held jointly by us; our return journeys to D F Malan Airport (as Cape Town Airport then was called), normally in the evening, were characterised by exhausted consumption of airways food and wine, and little conversation.

Within the formal deliberations of the Technical Committee (TC) itself, in which we were brilliantly assisted by Miriam Cleary in an administrative and secretarial capacity, Lourens was a wise and calming influence, often employing his understated sense of humour to defuse tense situations. Although the latter occurred more frequently in the first three months of our work, there were certainly many moments throughout the process when we could not agree on ways forward, especially when an Ad Hoc Committee of party political representatives was established from August, ostensibly to advise us, but in truth to make the final call on the political acceptability of contested aspects of our proposals. There was no clear demarcation of our roles and jurisdiction, although the TC still presented their progress reports to the Negotiating Council, but in reality we would not have proposed anything which did not stand a reasonable chance of acceptance by both the ANC and the then government. However, on occasion we did not bow to pressure from the Ad Hoc Committee, and that is when Lourens played an important reconciliatory role. He was also brilliant at defusing Zac Yacoob, who from time to time in our closed meetings rose to his feet and, pacing up and down, harangued us in his best oratorical style for up to half an hour, trying to persuade us of the error of what we were about to agree on. Sometimes, he succeeded in persuading us…

I think it fair to say that there is a little bit at least of the Constitution of South Africa that would not have been there, or at least not in those words, were it not for the presence of each of the four of us on that TC. The phrase that in my mind will ever be associated with Lourens du Plessis is that now contained in the much-debated section 39(2) of the final Constitution. It now reads as follows: '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.' This formulation is in all essential respects the same as it was in section 35(3) of the transitional Constitution. It was included, much to the dismay of the then judiciary, through a submission of Chief Justice Corbett, which resented the implication that the judiciary somehow needed instruction on how to interpret the law, particularly the common law, precisely because the TC feared that existing patterns of judicial behaviour would roll on regardless of the new constitutional context.

It was thus an attempt to shake up the judiciary, as well, vitally, to assist the horizontal operation of the Bill of Rights and the gradual infusion of its values into every aspect of the common law and customary law.

Lourens was already then one of the pre-eminent scholars working in the area of the interpretation of statutes, and it was he who proposed and piloted this clause, and chose its words. What mystified many, including his fellow members of the TC, was his choice of the word 'purport' – we understood what the 'spirit' and 'objects' were, but what was a 'purport'? Why not employ the word 'purpose', we argued? Lourens, however, doggedly

stuck to his use of 'purport', and so it has come to be part of the South African constitutional lexicon and, I daresay, few question its use today. When writing about this phrase afterwards, Lourens chose to describe it as the 'seepage clause', the attempt to ensure a limited degree of indirect horizontality, despite the opposition to that idea from several of the negotiating parties.

Lourens's internal contribution to the Technical Committee's work as Chair was matched by his extraordinary calmness and mental acuity when we as a Committee had to appear before the Negotiating Council (NC) to present and defend our various 'progress reports'.[8] I particularly remember how he dealt with the challenges to our proposed inclusion of 'sexual orientation' as a listed ground of prohibition of unfair discrimination. This inclusion had first been proposed to me by several organisations and individuals who promoted the interests of those with same-sex orientation (among them Kevin Botha of the Equality Foundation and [Justice] Edwin Cameron), once the NC insisted, contrary to our first proposals, that the prohibition of unfair discrimination be applied to certain grounds contained in a list. It is widely acknowledged that such listings serve a good purpose in giving prominence to certain often ignored grounds of unfair discrimination, but that they also run the risk of creating the impression that any item *not* on that list is therefore a legitimate basis for unfair discrimination.

The TC's response was to retain the blanket prohibition of unfair discrimination, but then to attempt to provide as open a list as possible of grounds on which unfair discrimination would not be tolerated. After being approached on the issue of sexual orientation, I immediately spoke to Lourens about his attitude, and he strongly supported its inclusion. Zac agreed, as this was the official line of the ANC, and Gerrit likewise supported its inclusion, albeit with a wry smile, a shake of the head and a warning that his current political superiors would be unhappy. So it proved to be, with Minister of Justice Coetzee raising the prospect of our tolerating bestiality, child pornography and so on. Lourens calmly reminded the Minister of the fact that the basic model of the Bill of Rights allowed every right to be limited in an acceptable and lawful way, and the spoken opposition disappeared. He also took that opportunity to educate the negotiators who called into question our prohibition of unfair discrimination on the grounds of both sex and gender, by pointing out that 'sex' referred to the physical differences between the sexes while 'gender' described the social construct based on each sex.

Again, Lourens's quiet but firm authority rebuffed many fears and reaffirmed many hopes. This was an absolutely extraordinary time in the development of the constitutional democracy which we know today and which, to some extent, we take for granted. Yet those who were present at the MPNP, as well of course as those who observed its activities anxiously from the outside, can readily testify to all sorts of moments when any form of transfer of political authority to the majority hung by a thread, let alone the successful transition which subsequently ensued. It is not an exaggeration to say that what made all the difference were the relationships of trust that were established and grew between many of the negotiators as well as those assisting them, regardless of an astonishing diversity of backgrounds and the chasms which separated their respective life experiences till that moment in history. Lourens Du Plessis was one of those whose collegiality, tenacity, durability, quiet confidence and scrupulous honesty made a measurable contribution to what we hold dear today as the ideals of our system of public governance.

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8 We deliberately chose to style them as such, at least to create the impression that negotiations were moving forward; which generally they were.

3 The aftermath

For those who were involved in CODESA or the MPNP, and who did not move on to a role in government after 1994, it could have been that everything which followed was an anti-climax. Certainly, almost nothing can compare to the privilege and excitement of being part of the MPNP, and those of us who were there appreciated how fortunate we had been. Lourens and I returned to our ordinary jobs, as professors of law, yet our paths continued to cross frequently in the years after 1994.

Firstly, we had during one of those return flights between Cape Town and Johannesburg, determined that we should write an account of the negotiations and the drafting of the transitional Bill of Rights. We initially thought that we should try to work on the text while the negotiations continued, but this good intention was soon swamped by all that was expected of us in the remainder of 1993 and early 1994. However, we did finally manage to produce a manuscript in relatively short order, by late September 1994, a book[9] dedicated to our wives, who had held the fort in so many ways during our frequent absences. In the Preface,[10] we expressed the hope that the book would contribute in a modest way to the achievement of a 'human rights culture' in South Africa.

Secondly, the book appeared while I was serving as a visiting professor at the Law School of the University of Florida at Gainesville, to which I had been generously invited by Professor Winston Nagan, and where I duly lectured on the constitutional transition in South Africa. Lourens followed me in that capacity a year later, and an enduring academic relationship was established between Gainesville and both UCT and Stellenbosch.

Thirdly, Lourens and I frequently spoke about our experiences at the MPNP, sometimes on the same platform. On one occasion, however, we resorted to writing a response to an article[11] purporting to explain the drafting history of the property clause in the transitional Constitution.[12] In Lourens's and my views, there were so many important points of inaccuracy in that account that we were moved to write a note[13] which sought to set the record straight.

Fourthly, I visited Lourens and Wina and their daughters at their home in Stellenbosch relatively frequently, as well as calling on him at his office in the Ou Hoofgebou. There I would find him typically writing his next book or article, enveloped by the classical music which played softly in the background. As someone who finds such an element distracting, I admired him for his capacity to use such a source of beauty to enhance his work.

Lourens's curriculum vitae of course shows the extent to which he has remained as a leading figure in academic life and the law in this country, and his engagement with such circles abroad, mainly in Europe. His departure from the Western Cape to return to a prestigious chair in Potchefstroom in the North West province closes a remarkable circle in his life, and is a fitting tribute to his diverse and abundant talents.

I started this account by observing that the basis of friendship is typically familiarity of context, but that times of great stress or opportunity may well throw people together in an unlikely bond, which thrives, endures and enriches. For me, Lourens du Plessis and I are

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9 See Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights*.
10 *Ibid* vi.
11 Chaskalson 'Stumbling Towards Section 28' 222.
12 Act 110 of 1993, s 28.
13 Corder and Du Plessis 'What value the background in constitutional interpretation?' 601–609.

counted among those incredibly fortunate people who have benefited in this way. The circumstances in this country may well mean that this type of friendship is disproportionately common in South Africa, but I would argue that that factor takes nothing away from its quality, and the hugely beneficial effects which it has on the people concerned.

And sometimes, in a small way, the benefits may 'seep' into the circles in which they move. I would like to think that the latter applies to Lourens and my friendship, for which I am eternally appreciative.

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Erinnerung und Frage

Friedrich Müller

Südafrika und Deutschland erlebten im 20. Jahrhundert bluttriefende, rassistische Diktaturen – in ihrem Beginn beinahe zeitgleich, doch ungleich in ihrer Dauer. Dabei hat die deutsche auf fast ganz Europa übergegriffen, die Weltherrschaft angestrebt, den Zweiten Weltkrieg verschuldet, den Holocaust begangen. Die Verschiedenheit der Proportionen muss bei dieser Assoziation gewahrt bleiben, was aber dem Regime der Apartheid in sich selbst nichts von seiner entsetzlichen Unmenschlichkeit und seinem Unrecht nimmt. Lourens du Plessis ist in diese Umwelt von grausamer Ungerechtigkeit hinein geboren worden. Er hat sich schon früh voll Mut und Luzidität gegen das Regime zu engagieren gewagt und er ist sich in der Klarheit seiner Haltung immer treu geblieben. Bevor ich mir erlauben werde, ihm eine Frage nach dem Ursprung seines Engagements zu stellen, möchte ich ungeschminkt erzählen, wie ich den Umbruch am Ende des Weltkriegs erinnere, und was das „Davor" und das „Danach" von Diktatur und Umbruch für die Konstitution meines Lebens, soweit ich das überhaupt erkennen kann, bedeutet haben.

Im Jahr 1945 war ich sieben. Die US-Armee hatte unser gemietetes Häuschen in Niederbayern beschlagnahmt; meine Mutter und ich flüchteten unter abenteuerlichen Umständen zu ihren beiden Schwestern nach Oberfranken. Dort, in einer kleinen Stadt, die damals wie heute um die 10 000 Einwohner zählt, erlebte ich die ersten Monate nach Kriegsende, die folgenden Hungerjahre, die sehr strengen Winter ohne Heizmaterial und vor allem die Besonderheit des aufgewühlten gesellschaftlichen Zustands. Meine Erinnerungen daran sind zahlreich, präzise bis in die optischen Details.

Die Erwachsenen zu Hause waren mit der Anstrengung des Überlebens von Tag zu Tag beschäftigt. Ich lief mit einer Freiheit, die mir sonst nie mehr gelassen wurde, von früh bis nachts durch die Straßen und drängelte mich, unbehelligt und unbemerkt, zwischen den Erwachsenen an den wenigen mit Kanonenöfen geheizten Orten wie Kneipen und Wettannahmestellen herum. An Hütten aus hastig aufgestellten Brettern las ich immer wieder das Wort „Behelfsheim". Auf Zetteln an deren Türen standen Familiennamen, die sehr ungewohnt klangen: „Babendererde", „Haltaufderheide" und noch fremdere, deren Dickicht aus Konsonanten ich nicht zu entziffern wusste. Durch die Straßen, von den Fahrzeugen der Militärregierung beherrscht, schnauften von Zeit zu Zeit die von uns Kindern bewunderten „Holzgaser" – alte Pkw's oder baufällige Kleinlaster mit enormen, siloähnlichen, dunkel qualmenden Aufbauten am Ende. In ihnen wurde Holz verbrannt, das die Karre irgendwie antrieb. Im Übrigen waren Straßen und öffentliche Räume zu jeder Tageszeit voller Menschen. Niemand hielt es zu Hause oder im Behelfsheim aus. Die ständige Bewegung half ein wenig gegen die Kälte; weniger allerdings den zahlreichen einbeinigen Männern, die sich mühsam auf Holzkrücken hielten. Diese (nicht nur für mich) anonyme Masse aus Einheimischen und Flüchtlingen erschien mir so ungewohnt außer sich, dass mich das in einen rauschhaften Zustand versetzte. Niemals später habe ich Erwachsene in der Öffentlichkeit so aufgewühlt gesehen. Ständig redeten Fremde einander an; manipulierten, mit irgendwelchen Gegenständen in der Hand, heimlich in Ecken herum („Das ist der Schwarzmarkt", erklärten mir die Tanten zu Hause); erzählten einander von der Großartigkeit ihrer Stellung in der Heimat, aus der sie vertrieben worden waren; machten lauthals Prognosen und Pläne, von denen ich viel nicht verstand. Aber ich

verstand (ohne es wirklich zu erfassen), wenn sie zu einander mit seltsamem Nachdruck sagten: „Mit dem Tod ist alles aus!" – und gleichzeitig predigten die Pfarrer am Sonntag in überfüllten Kirchen. Oder wenn sie sagten: „Man muss das Leben genießen!" – und damit konnte doch nicht das tägliche Maisbrot gemeint sein, das man kaum hinunterwürgen konnte, oder das infame „Heißgetränk" (eine Mischung aus Glyzerin, Farbstoff und heißem Wasser) oder die nach einiger Zeit auftauchenden blaugrauen Würstchen aus Fischmehl (und, meiner Erinnerung nach, wohl auch aus Sägemehl), derentwillen fliegende Stände auf dem Marktplatz aufgebaut wurden, vor denen sich sofort lange Schlangen bildeten. Da meine Mutter wochenlang abwesend war, um möglichst einige Trümmer von unserem früheren Haushalt zu retten und herzubringen, trieb ich mich unbeaufsichtigt herum und konnte davon nicht genug kriegen – allein in der Welt all dieser fremden Erwachsenen, deren Zustand mich mehr faszinierte als alles andere.

Viel später, als Student, stieß ich auf Kaschnitz' Gedicht „Elendes, herrliches Leben",[1] das in anderem Umfeld etwas von dieser ambivalenten Faszination festhält. Als ich, noch später, Marie-Luise Kaschnitz kennen lernte und bei einem unserer Treffen diesen Text erwähnte, forderte sie mich auf, ihn vorzusagen. Ich tat das. Ich gebe hier seinen letzten Teil wieder:

Ich lag im Bunker mit Vielen
keiner kam zur Ruh
und die eine Hand bestahl mich
und die andere deckte mich zu.

Und ich ging auf die Straße mit Vielen
weil es wieder zu wandern hieß
und die eine Hand schob mir den Karren
während die andre mich stieß.

Und ich wusste nicht zu sagen
wes Art mein Nächster war
es war nach den alten Gesetzen
nichts mehr berechenbar.

Und es war auch nicht mehr die Rede
vom Wohlgefallen
nur das elende, herrliche Leben
war in uns Allen.

Ich trug das also vor, und die Dichterin fragte mich: „Was ist darin das wichtigste ?" Ich bat sie darum, das lieber von ihr selbst hören zu dürfen, und sie sagte: „*Es war nach den alten Gesetzen/nichts mehr berechenbar*. Genau das war es".

1 Väter

Alles, was ich von der Zeit Deutschlands vor 1945 mitbekam, war diffus, pointillistisch. Dass ich später viel las und mich selbst informierte, steht auf einem ganz anderen Blatt. Das Unmittelbare, das dem Kind Zugängliche, blieb unklar, anonym und sogar im Rahmen der Familie bloß zwischen den Zeilen. Nicht einmal wie die ältere der Tanten, die als Redakteurin der Lokalzeitung eine gewisse privilegierte Stellung im Städtchen hatte, jüdischen Familien in der Nazizeit beim Emigrieren half, nicht einmal das wurde mir offen

1 Kaschnitz *Gedichte*.

berichtet. Ich fand, bis ans Ende der 50er Jahre, nur gelegentlich aus New York und Buenos Aires Luftpostsendungen mit Marken, die mir das Herz höher schlagen ließen, an den Namen dieser Tante im Briefkasten; an den einen der Absendernamen, Cohn, erinnere ich mich. Auf meine Fragen wurde mir nur scheu angedeutet, diese Familien seien meiner Tante für die „damalige" Hilfe sehr dankbar und zeigten auf diesem Weg noch ihre Anhänglichkeit.

Dunkel blieb auch, was es mit all den Akten auf sich hatte, die ich auf Bitten derselben Tante viele Male zur Nacht (zu Stunden, die mir sonst nie erlaubt worden wären) auf einer Handkarre über den Berg und durch die leeren Straßen in das Archiv des „Tagblatts" ziehen musste. Auf meine Fragen erfuhr ich nur, das sei „aus dem Krieg", davon „dürfe niemand etwas erfahren" und das „gehöre jetzt wieder in das Lager der Zeitung". Die Tante habe da seinerzeit etwas „vor den Nazis verstecken müssen".

Neben so nebulösen Andeutungen en famille also eine weithin anonyme, diffuse Überlieferung *zwischen den Zeilen.* Dass mein Vater nicht da war, hat dazu wohl beigetragen. Ich vermute jedenfalls, von ihm hätte ich mehr erfahren können.

In der ganzen weitläufigen Familie blieb im Übrigen sonst niemand „im Krieg"; alle Männer waren wieder da. Und in der Schule teilte, was ein Zufall war, nur noch ein Klassenkamerad mein Schicksal des Einzelkinds ohne Vater. Die Gleichaltrigen machten daraus weiter keine Diskriminierung. „Du hast ja nicht einmal einen Vater!" hörte ich nicht mehr als ein, zwei Mal. Dafür droschen unsere Nazilehrer, am Gymnasium noch mehr als in der Grundschule, trotz meiner Bestnoten umso mehr auf mich ein, als sie keine Reaktion eines Mannes zu gewärtigen hatten. Zudem fand es meine Mutter, ohne ersichtlichen Grund, geraten, diese Prügellehrer aufzufordern, mich „besonders hart herzunehmen", da ich „ja keinen Vater" hätte. Der meine war abwesend und blieb es; die Väter der Anderen – seien es die der Kameraden, seien es die Lehrer selbst – machten einen verbitterten, oft gewalttätigen, fast schon rachsüchtigen Eindruck. Nur manchmal wurde mir, auf Fragen in der Familie, als Erklärung ein pauschales „Nun, der ist so, weil er doch ein 150%iger gewesen war..." hingeworfen.

Viel konnte ich damals nicht damit anfangen. Heute sehe ich, dass die alten Nazis, die Brüll- und Prügellehrer (Schläge bis in die Untersekunda!) einfach die Szene beherrschten, gelegentlich auch mit verbalen Ausfällen im Unterricht gegen „die so genannte Demokratie" oder „die heutige Lage". Die nicht-nazistischen Lehrer und Väter redeten nicht. Sie blieben farblos, sprachen nicht *für* diese neue Situation. Sie waren wohl mit dem Wiederaufbau und mit Adenauers Restauration zu sehr beschäftigt, wollten sich angesichts der aggressiven Ressentiments ihrer Generationsgenossen vielleicht auch bedeckt halten.

An der Universität setzte sich das noch ein wenig fort; Ressentiments waren auch hier manchmal durchzuhören, wenn auch akademisch gedämpft. Und die Demokraten unter den Professoren gaben sich auch hier unpolitisch. Sie überließen das Feld den professionellen Predigern der Re-Education (etwa von der Bundeszentrale für Politische Bil–dung), die uns Sprüche von der Art bescherten wie: „Demokratien beginnen keine Kriege", „Die Demokratie ist das institutionalisierte Gespräch" oder: „Die USA waren nie eine Kolonialmacht". Was die Ordinarienuniversität der 1950er und der ersten Hälfte der 1960er Jahre beherrschte, war auch ohne nostalgische Randbemerkungen ganz allgemein die autoritäre Haltung der hierarchischen Eliten, die für mich in heutiger Sicht ein böses Erbe vergangener Zeiten Deutschlands darstellte.

2 Der eigene Vater

Mein Vater war und blieb abwesend. Man hatte ihn damals außerhalb der gesetzlichen Regeln als Soldat eingezogen. Er war nach der heutigen Einschätzung meiner

Erinnerungen unpolitisch, gehörte keiner Partei oder Gewerkschaft an – ruhig, friedliebend, in Konflikten eher leicht ironisch als aggressiv reagierend. Charakterlich und sozusagen stilistisch, wahrscheinlich auch für die Inhalte ihrer Politik, hatte er mit den Nazis nichts zu schaffen, und sie wussten das. Da er stellvertretender Filialleiter der damals noch so heißenden Bayerischen Hypotheken- und Wechselbank in dem niederbayerischen Städtchen war, in dem wir wohnten, galt er den dortigen Parteioberen als am Ort zu bekannt, um sich ihnen weiterhin fernhalten zu dürfen. Sie wollten ihn als formellen Parteigenossen haben, als bloße Karteileiche, denn dass er „sowieso keiner von uns" sei, sagten sie ihm ins Gesicht. Andernfalls, so drohten sie, müsse er trotz seines dafür zu hohen Alters (1942, dem Jahr seiner Einberufung, 41 Jahre) noch Soldat werden, dafür wollten sie sorgen. Er blieb standhaft. Er weigerte sich beharrlich, in die NSDAP einzutreten und wurde dafür wie angedroht behandelt. Zusätzlich steckte man ihn in ein Pionierbataillon als eine Art von besonders riskantem Strafbataillon. Kein einziger Kamerad seiner Truppe soll zurückgekommen sein.

Zwei Mal sah ich ihn in den Krieg ziehen, an der Seite meiner Mutter die Straße in Richtung Ortsmitte weggehend. Beide Male ließen sie mich, ich war vier Jahre alt, allein vor dem Häuschen in der Mitte dieser Straße stehen und ihnen nachschauen. Das erste Mal an die Westfront, nach Frankreich (Paris, dann Rouen); das zweite Mal, für einen kurzen Tag auf der Durchfahrt bei uns, in Richtung Russland. An diesen zweiten Abschied erinnere ich mich genau. Wieder stand ich mitten auf der Straße und, in vielleicht zehn Metern Entfernung, wandte sich mein Vater, von meiner Mutter weitergezogen, nochmals schräg im Gehen nach mir um. Wenn ich heute seinen Blick auf mich zu deuten versuche, dann wollte er sagen: „Jetzt bist Du dran!", was auch immer das zweideutig heißen möge. Oder, freundlicher gedeutet: „Jetzt ist es an Dir!" Er winkte nicht, rief mir nichts zu. Da war nur dieser stumme letzte Blick, der wirklich wie *ein letzter* bei mir ankam.

Und so war es dann auch. Nie kam eine Meldung, er sei gefallen. Er wurde als „vermisst" geführt, und das ist er in jedem Sinn des Wortes bis heute geblieben. Täglich kündigte mir meine Mutter beim Schlafengehen an, „morgen" werde er „bestimmt" wiederkommen. So ging das bis zum Austausch von Botschaftern mit der Sowjetunion 1955 und der Entlassung der letzten Kriegsgefangenen. Seine Wiederkehr wurde nun nicht mehr von Tag zu Tag konkret erwartet, blieb aber der lastende, immer gegenwärtige Horizont des Familiengeschehens. Meine Mutter starb im Frühjahr 1971, sie hat den ersten und bisher einzigen Bericht des Roten Kreuzes über das vermutliche Schicksal meines Vaters, nicht früher als im Herbst 1971 eintreffend, nicht mehr erlebt. Auch in dieser Mitteilung wird er immer noch als verschollen und nur wahrscheinlich, auf dem Rückzug vor der Roten Armee, in Westpolen ums Leben gekommen geführt.

Er hat kein Grab, an das Trauerarbeit anknüpfen könnte. Die Hoffnung auf seine Wiederkehr bedeutete nicht nur Vaterlosigkeit, sondern auch ein Warten als Lebensform, ein Leben im Aufschub; nicht zuletzt auch ein Leben in (unbewusst motivierter, aber durchaus gefühlter) Schuld – „Schuld" daran, da zu sein, während er nicht mehr da war. Sogar daran „schuld" zu sein, dass er in den Krieg hatte gehen müssen – so irrational wie unbegründet und dennoch das eigene Leben hinterrücks belastend.

Wiederum unbewusst, mir erst heute klar werdend, mögen solche Vorstellungen den Gang meines Lebens, die von mir getroffene Wahl mitbestimmt haben: sein Verschwinden nicht sinnlos bleiben zu lassen, so als sei es ein Opfergang gewesen; als Antwort auf sein Schicksal die Gegenpositionen zu allem einzunehmen, was die Völker in diesen Krieg und meinen Vater in den Tod getrieben hatte. So mag sich mein grundsätzlicher Pazifismus erklären, im Denken, in der Lebenspraxis, im symbolischen Stil. Mein Entsetzen vor allen Kriegen, besonders jenen, an denen „wir" beteiligt sind, am Wechsel der NATO-Doktrin, an

der Verwandlung der Bundeswehr von einer durch das Grundgesetz damals gewollten reinen Verteidigungs- zu einer weltweit operierenden „Eingreiftruppe". Meine Berufswahl der Rechtswissenschaft, ohne spontane innere Nähe dazu. Das Ambivalente daran – nämlich dass diese Wahl aus einer mir fremden Motivation stammte, unbewusst aus Gefühlen von Schuld und Sühne gegenüber dem Schicksal meines Vaters und seiner Generation herrührend – drückt sich möglicherweise in einer gleichsam schrägen Haltung zu meiner Wissenschaft aus: durch sie weder nach Reichtum noch nach Einfluss strebend (was beides im Recht ziemlich nahe liegt), nicht dem Mainstream zugehörig; mit der ständigen Anstrengung für Klarheit und Transparenz mir mehr Gegner als Freunde machend; desgleichen mit dem Kampf für die Menschenrechte in Vorrang zur Staatsraison; gegen Gewalt in Politik, Gesellschaft und Sprache; auch durch die stark politischen Elemente in meinem im engeren Sinn literarischen Schaffen; mit dem Eintreten für die Freiheit aller Menschen, für die Gleichheit der Rechte von Allem, das Menschenantlitz trägt. Mit all dem habe ich mich an den Rand manövriert; zwar bei klarem Bewusstsein und immer aus Überzeugung – aber ohne Analyse der unbewussten Motive, die mich dabei geleitet haben mögen: für den kleinen Umkreis meines Lebens eine Antithese zur generationell vorhergehenden Barbarei und Gewalt zu geben; für eine neue Synthese einzutreten, deren Möglichkeit jemandem wie meinem verschwundenen Vater verwehrt geblieben war.

Wie in einem Brennspiegel zeigt sich das in der Widmung meines Buchs *Recht – Sprache – Gewalt* – ich habe es, vor wenigen Jahren erst, meinem Vater IN MEMORIAM zugedacht: gegen Gewalt hilft, wenn überhaupt etwas, dann nur eine Ordnung des Rechts. Und diese ist nur möglich durch und in Sprache – durch eine gewaltlose Sprache, in der Gerechtigkeit und Gleichheit für Alle einen Raum finden können.

Auf den ständigen Kampf dafür könnte ich stolz sein, objektiv betrachtet. Ich bin es aber nicht, ich fühle keinen Stolz. Dagegen empfinde ich so etwas wie Erschrecken – und zwar davor, wie hoch der Anteil des Unbewussten an der Wahl meiner Lebensform und meiner Arbeit wahrscheinlich war, wie stark von der inneren Auseinandersetzung mit der Generation dieser Väter geprägt. Sogar diese Buchwidmung von 2008 war nicht eigentlich reflektiert gewesen. Sie „stimmt", aber sie ergab sich „wie von selber". So mag meine Geschichte Sigmund Freuds Einsicht (in „Totem und Tabu") im Kleinen bestätigen, „dass keine Generation imstande ist, bedeutsamere seelische Vorgänge vor der nächsten zu verbergen".[2]

Vielleicht liegt in der imaginierten „Schuld" am Verschwinden des Vaters auch einer der Gründe dafür, weshalb ich seit meiner Kindheit und Jugend Gedichte und poetische Prosa schreibe, als ein gleichgewichtiges Zwillingswerk neben dem der Wissenschaft. Doch die wirksamen Gründe für Kreativität durchschauen wir wohl ebenso wenig wie die für *transgenerationelle Gefühle von Schuld (im Sinn von Vorwerfbarkeit) und von Schuldigkeit (im Sinn von Verpflichtung zum Handeln)*.

Die Quellen meiner eigenen Haltung, und damit meiner eigenen Lebensgeschichte, kann ich also nicht rational analysieren. Ich kann sie bloß erzählen – und auch das nur „mit Furcht und Zittern".

Ich habe sie hier für Lourens du Plessis erzählt, weil ich mich frage, aus welchen Quellen *er* die Kraft für sein Suchen nach *Bedeutung*, für sein Streben nach *Sinn*, für seinen entschlossenen und mutigen *Widerstand* gegen das Apartheid-Regime und woher er insgesamt seine *Leidenschaft für Gerechtigkeit* unter uns Menschen bezieht.

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2 Freud *Gesammelte Werke*, Bd IX 191.

Lieber Lourens, für all dies – über Deine herausragenden Leistungen als Dogmatiker, Methodiker und Theoretiker des Rechts hinaus – gilt Dir unsere Bewunderung, unsere persönliche Zuneigung. So kennen und lieben wir Dich, so wirst Du bleiben und weiterhin wirken und arbeiten – und vielleicht hören wir von Dir auch noch mehr an Antwort über die Quellen Deiner Kraft zu gerechtem Widerstand.

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1981: *Regsteorie in praktyk, regspraktyk in teorie en regsopleiding* Potchefstroom Wetenskaplike Bydraes van die PU vir CHO Reeks H: Inougurele rede nr 80.

1985: *Beïnvloed ons (geloofs-)uitgangspunte ook ons wetenskaplike metodes?* Potchefstroom Wetenskaplike Bydraes van die PU vir CHO Reeks J3 Studiestuk nr 11.

1987: (met Lategan B, Kinghorn J en De Villiers E) *Die keuse vir inklusiewe demokrasie* University of Stellenbosch, Centre for Hermeneutics.

2002: *The future of South Africa: Perspectives of integrating different cultures–means of law* Rechtpolitisches Forum 6 Institut für Rechtspolitik an der Universität Trier.

Chapters in academic books

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1980: *Die teoretiese grondslae van wetsuitleg* (in Joubert DJ (ed.) *Petere Fontes: LC Steyn-gedenkbundel* Pretoria: Vereniging Hugo de Groot 24–43).

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_____ *Function and role of the state (with special reference to its relation to the church and educational institutions)* (in Vander Stelt JC (ed.) *The challenge of Marxist and Neo-Marxist ideologies for Christian scholarship* Sioux Center: Dordt College Press 149–86).

1984: *Calvin and Calvinism on the state and the law: a few perspectives for South Africa today* (in IRS *Our Reformational tradition: a rich heritage and lasting vocation* Potchefstroom: PU for CHE 510–34).

1986: *Calvin on state and politics according to the Institutes* (in IRS *John Calvin's Institutes: His opus magnum* Proceedings of the Second South African Congress for Calvin Research Potchefstroom: PU for CHE 174–83).

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_____ *Perspektiewe op paradigmas in die regswetenskap* (in PU vir CHO *Paradigmas in die wetenskappe–'n Christelike perspektief* Potchefstroom: Potchefstroomse Studies in Christelike Wetenskap 99–104).

1988: *Die maatskaplik-politieke implikasies van die Kairos-dokument* (in Hofmeyer JW, Du Toit JHH and Froneman CJJ (eds.) *Perspektiewe op/Perspectives on Kairos* Cape Town: Lux Verbi 102–24).

_____ *Calvin, 'Calvinism' and present-day South Africa* (in Corder H (ed.) *Essays on law and social practice in South Africa* Cape Town: Juta 31–64).

_____ *The position of human rights in South Africa* (in Van Vuuren DJ, Wiehahn NE, Rhoodie NJ and Wiechers M (eds.) *South Africa: the challenge of reform* Pinetown: Owen Burgess 225–44).

_____ *Filosofiese perspektief op 'n menseregtehandves vir Suid-Afrika* (in Van der Westhuizen JV and Viljoen HP (eds.) *A bill of rights for South Africa/'n Mense–regtehandves vir Suid-Afrika* Durban: Butterworths 8–27).

1989: *Justice as a legal concept* (in Nürnberger K, Tooke J and Domeris W (eds.) *Conflict and the quest for justice* Pietermaritzburg: Encounter Publications NIR Reader No 2 20–35).

1991: *The role of law in society* (in Gildenhuys JSH (ed.) *Ethics and the public sector* Cape Town: Juta 21–30).

_____ *Jurisprudential reflections on the status of unborn life* (in Van Niekerk A (ed.) *The status of prenatal life* Cape Town: Lux Verbi 41–66).

_____ *Statute law and interpretation* (in Joubert WA and Scott TJ (eds.) *The law of South Africa Volume 25* Durban/Pretoria Butterworths 182–291; pars 257–311).

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1993: *Human rights: Developments and problems* (in Van Niekerk A (ed.) *Health care as human right* Stellenbosch US Unit for Bioethics 15–35).

1994: *Amnesty and transition in South Africa* (in Boraine A, Levy J and Scheffer R (eds.) *Dealing with the past: Truth and reconciliation in South Africa* Cape Town: IDASA 107–116).

_____ *The constitutional and institutional bases of democratic government* (in Rhoodie N and Liebenberg I (eds.) *Democratic nation-building in South Africa* Pretoria: HSRC Publishers 91–103).

_____ *The interpretation of bills of rights in South Africa: taking stock* (in Kruger J and Currin B (eds.) *Interpreting a bill of rights* Kenwyn: Juta 1–25).

_____ *A background to drafting the chapter on fundamental rights* (in De Villiers B (ed.) *Birth of the constitution* Kenwyn: Juta 89–100).

_____ *Regsbedeling: Die grondwet die hoogste gesag* (in Van Rooyen A, Vorster D, Holland I and Gouws M (eds.) *Wêreldspektrum boek van die jaar 1994: Fokus op die nuwe Suid-Afrika* Cape Town: Ensiklopedie Afrikana 58–65).

_____ (with De Ville JR) *Personal rights: Life, freedom and security of the person, privacy and freedom of movement* (in Van Wyk D, Dugard J, De Villiers B and Davis D (eds.) *Rights and constitutionalism in South Africa: The new legal order* Cape Town: Juta 212–63).

_____ *Philosophical and Constitutional Perspectives: Discussion* (in Heyns C, Van der Westhuizen J and Mayimele-Hashatse T (eds.) *Discrimination and the law in South Africa Volume I: A multi-disciplinary inquiry into de facto racial discrimination* Pretoria: Centre for Human Rights 29–31).

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_____ (with Gouws A) *The gender implications of the final Constitution* (in *Aspects of the debate on the draft of the new South African Constitution dated 22 April 1996* Johannesburg: Konrad-Adenhauer-Stiftung 103–107).

_____ *Different evaluations of the new South African constitutional dispensation and dynamics from a Christian perspective: An evaluation with particular reference to the Bill of Rights* (in *Christianity and democracy in South Africa: Christian responsibility for political reflection and service* Potchefstroom PU vir CHO 74–84).

1999: *Afrique du Sud. Report on language and law* (in Jayme E (ed.) *Langue et droit. XV^e Congrès International de Droit Comparé, Bristol, 1998* Brussel: Bruylant 37–63).

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_____ *Statute law and interpretation* (in Joubert WA and Faris JA (eds.) *The law of South Africa First Reissue Volume 25 Part 1* Durban: Butterworths 223–413; pars 278–365).

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2006: *Subsidiariteit in grondwetsvertolking en-beregting* (in Nagel C (ed.) *Gedenkbundel vir JMT Labuschagne* Durban: LexisNexis Butterworths 207–28).

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_____ *International law and the evolution of (domestic) human-rights law in post-1994 South Africa* (in Nijman J and Nollkaemper A (eds.) *New perspectives on the divide between national and international law* Oxford: Oxford University Press 309–40).

_____ *AZAPO: monument, memorial…or mistake?* (in Le Roux W and Van Marle K (eds.) *Law, memory and the legacy of apartheid: Ten years after* AZAPO v President of South Africa Pretoria: Pretoria University Law Press 51–64).

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_____ *The South African Constitution as monument and memorial, and the commemoration of the dead* (in Christensen R and Pieroth B (eds.) *Rechtstheorie in rechtspraktischer Absicht. Freundesgabe zum 70. Geburtstag von Friedrich Müller* Berlin: Duncker & Humblot 189–205).

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_____ *State and religion in South Africa: Open issues and recent developments* (in Ferrari S and Cristofori R (eds.) *Law and religion in the 21st Century* Farnham, Surrey: Ashgate 17–32).

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1983: *Sensuur, soewereiniteit in eie kring en geloofsvryheid* Deskundige mening itv a 35(8) van die *Wet op Publikasies.*

1984: *The law as a regulator and/or manager of conflict, particularly in ethnically plural societies* Potchefstroom HSRC Report: Investigation into Intergroup Relations (Contract no TGV/02/P001).

1986: (with Ranchod B (chairman) *et al*) *Law and justice in South Africa* Pretoria HSRC Investigation into Intergroup Relations: Report of the Work Committee, Juridical Aspect.

1997: *Wetsuitleg in Suid-Afrika in die lig van die aanvaarding van 'n menseregtehandves* (Verslag oor aanwending van SWO-toekening vir gevestigde navorsers).

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2007: Comments on the Draft Interpretation of Legislation Bill, 2006 as explicated in Discussion Paper 112 of the South African Law Reform Commission/Supplementary Comments on the Draft Interpretation of Legislation Bill, 2006 as explicated in Discussion Paper 112 of the South African Law Reform Commission.

Contributions to publications

1999: Epp Buckingham J 'Religious freedom and wine sales on Sundays.' [A case comment on *S v Lawrence, S v Negal, S v Solberg* 1997 10 BCLR 1348 (CC), 1997 4 SA 1176 (CC)] *Stellenbosse Regstydskrif/Stellenbosch Law Review* 10(1): 117–25 (nature of contribution: guidance and advice to author, a doctoral student).

_____ Müller F 'Basic questions of constitutional concretisation' *Stellenbosse Regstydskrif/Stellenbosch Law Review* 10(3): 269–83 (nature of contribution: co-translator).

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_____ Müller F 'Observations on the role of precedent in modern European Continental law from the perspective of 'structuring legal theory' *Stellenbosse Regstydskrif/Stellenbosch Law Review* 11(3): 426–36 (nature of contribution: co-translator).

Annexure B

Popular scholarly and popular publications[1]

1971: 'n Demonstrasie van Afrikaanse 'student power'? *Loog* 1(2): 13–4.

_____ Juistement vrinde! *Loog* 1(4): 9–10.

1972: Die 'nuwe Afrikaner' *Loog* 1(7): 5.

_____ Ja-nee, so lyk die part…*Loog* 1(8): 8–9.

_____ Law and policy 1: The rule of law *Loog* 1(10): 8–9.

_____ Regspolitiek 2: Die ding waaroor almal fluister *Loog* 2(1): 10–1.

_____ Law an219d policy 3: Petty offenders and punishment *Loog* 2(2): 6–7.

_____ Die venster van die kerk *Loog* 2(3): 4–5.

_____ Regspolitiek 4: Wie tokkel die ghitaar (en wie dans)? (Oor die verhouding tussen die uitvoerende en regterlike gesag in Suid-Afrika) *Loog* 2(3): 12ev.

_____ Law and policy 5: Law and the civil service *Loog* 2(5): 8.

1973: Regspolitiek (slot): Is ons reg nog óns reg? *Loog* 2 (6 en 7): 4–5.

_____ 'n Nuwe politieke bedeling? (Redaksioneel) *Loog* 2(9): 2–3.

_____ Is ons (Afrikaanse) studente se gô uit? (Redaksioneel) *Loog* 3(2): 2–4.

_____ Laat elkeen hom onderwerp… *Woord en Daad* 14(131): 3–4.

1973/74: Ons erfenis...en die 'generation gap' *Loog* 3(5): 6ev.

1974: 'Ons wil onsself help' *Loog* 3(7): 8–10.

_____ 'n Nuwe liefde vir die eie *Loog* 3(8): 11–12.

_____ Wil ons mekaar nog vertrou? *Loog* 3(8 en 9): 8–9.

1975: Genadedood: 'n misplaaste deernis (Redaksioneel) *Woord en Daad* 15(152): 2ev.

_____ Enkele gedagtes oor openbare skandale en vertrouensmisbruik *Woord en Daad* 15(156): 14–6.

1976: Die Reformasie en staatkunde (Redaksioneel) *Woord en Daad* 16(169): 2ev.

_____ Mercy-killing: misplaced pity (Editorial) *Word and Work* 16(171): 6–7.

1977: Eenheid in verskeidenheid (Die ACB se antwoord op meerderheidsregering) *Woord en Daad* 17(183): 4–7.

1977/78: Woord en Daad se '*Wat en Waarom*' Bylaes tot *Woord en Daad* 17(183), 17(184), 18(185), 18(187), 18(188).

1978: Coherent diversity *International Reformed Bulletin* 21(70 and 71): 38–9.

_____ Oor strategie, taktiek, styl... en die waarheid (Redaksioneel) *Woord en Daad* 18(184): 2ev.

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1 Publications of the nature and standard of in-depth and review articles in the daily press and in news magazines and which required the author partly to rely on knowledge of his field.

1979: ’n Menseregte-akte vir die Republiek? *Woord en Daad* 19(198): 6–8.

_____ Dit was maar ’n doringrige turksvy... *Woord en Daad* 19(199): 6–8.

_____ ’n Jeugkongres...sonder die jeug *Woord en Daad* 19(206): 7–8.

_____ God’s judgement, his justice…and human relations *Contours of the Kingdom* March 1979: 3–4.

_____ Christelike wetenskap – wetenskap van wedergeboorte *Kruim* Mei 1979: 6ev.

_____ ’n Gevaarlike argaïsme? Enkele gedagtes na aanleiding van artikel 2 van die Wet op die Verbod van Politieke Inmenging *Deurbraak* 8(2): 2–3.

1980: ’n Politiek van hoop? *Woord en Daad* 20(212): 17–19.

_____ *Liefde: die venster van die kerk* (in *Venster op die kerk* Potchefstroom IBC Reeks F3 no 12 38–46).

_____ *The Afrikaans Calvinist Movement* (in Van der Merwe HW, Nel M, Weichel K en Reid J (eds.) *Towards an open society in South Africa: The role of voluntary organisations* Cape Town: Philip 31–38).

_____ Die Reformatoriese tradisie in sy kultuurhistoriese openheid *Woord en Daad* 20(218): 12–14.

_____ Wetlike voorskrifte wat die vrye beoefening van sport (kan) belemmer *Woord en Daad* 20(219): 4–6.

1981: Laingsburg (1981.01.25) *Woord en Daad* 21(223): 6–7.

_____ Nog ’n dun punt van die wig? *Woord en Daad* 21(223): 7–9.

_____ Ons salueer u, oom Hennie *Woord en Daad* 21(224): 2–3.

_____ En nou vir die pad vorentoe (Redaksioneel) *Woord en Daad* 21(225): 2–5.

_____ Arbeider en loon *Woord en Daad* 21(225): 9–11.

_____ Verantwoordelikheid–’n goeie plaasvervanger vir opportunisme (Redaksioneel) *Woord en Daad* 21(227): 2.

_____ Ons en hulle *Woord en Daad* 21(227): 15–6.

_____ Ter wille van wet en orde (Redaksioneel) *Woord en Daad* 21(228): 2.

_____ Oor polarisasie, geweld radikalisme... en die toekoms(?) *Woord en Daad* 21(228): 10ev.

_____ Gesprek oor die toekoms (Redaksioneel) *Woord en Daad* 21(230): 2.

_____ Alternatiewe vir 2000: Om te offer is realisties *Woord en Daad* 21(231): 8–10.

_____ Kinders van die Gelofte (Redaksioneel) *Woord en Daad* 21(232): 2.

1982: *Die Neo-Marxiste – ’n heilige familie?* Potchefstroom IRS Reeks F1 Studiestuk no 171.

_____ Is die praktyk altyd prakties? *Cognitio* 4(1): 8–9.

_____ *Met iemand van ’n ander kleur?* (in *Venster op die huwelik* Potchefstroom IRS 58–62).

_____ *Prinsipiële en praktiese besinning* (in IRS *Magsdeling–’n Trojaanse perd?* Potchef–stroom IRS Reeks F1 Studiestuk no 179 15–26).

_____ Outentiek Afrikaans (...en outentieker) (Redaksioneel) *Woord en Daad* 22(233): 2–3.

_____ Lyding kan louter (Redaksioneel) *Woord en Daad* 22(234): 2–3.

_____ Twee belangrike verslae (Redaksioneel) *Woord en Daad* 22(235): 2–3.

_____ Wantroue is staatsgevaarlik *Politiese Perspektief* Politiese Raad van die PU vir CHO (vlugskrif).

_____ Die krake van ’n grondverskuiwing *Woord en Daad* 22(236): 2–4.

_____ Politieke beginsel, beleid en realiteit 1: Vashou aan die ‘tradisionele beleid’ is sinsbedrog (Redaksioneel) *Woord en Daad* 22(237): 2–3.

_____ ‘Om hulle te onderrig of te laat onderrig’ *Woord en Daad* 22(237): 7–8.

_____ Politieke beginsel, beleid en realiteit 2: Gee ons dan politieke vaste spyse (Redaksioneel) *Woord en Daad* 22(238): 2–4.

_____ Koelkop bly! (Tweede Redaksioneel) *Woord en Daad* 22(238): 5.

_____ Is regs reg? (Redaksioneel) *Woord en Daad* 22(239): 2–4.

_____ Ons mag ons nie doodbloei nie (Redaksioneel) *Woord en Daad* 22(240): 2–3.

_____ Hierdie getuienis is vlymskerp! *Woord en Daad* 22(240): 16–7.

_____ Hierdie plan kan werk, mits... (Redaksioneel) *Woord en Daad* 22(241): 2–4.

_____ Is magsdeling ’n werklike skeurfaktor? *Woord en Daad* 22(241): 14–5.

_____ Legaliteit is die rugmurg van geregtigheid (Redaksioneel) *Woord en Daad* 22(242): 2–4.

_____ Ons is van die ‘Tweede Wêreld’ (Redaksioneel) *Woord en Daad* 22(243): 2–3.

_____ Kom ons leer ook van ons kritici (Redaksioneel) *Woord en Daad* 22(244): 2–3.

_____ Die geval Beyers Naudé moet nou na ’n kant toe *Woord en Daad* 22(244): 12–3.

1983: Toekomsangs betaam ons nie (Redaksioneel) *Woord en Daad* 23(245): 2–5.

_____ Redes tot blydskap waarsku ons ook (Redaksioneel) *Woord en Daad* 23(246): 2–3.

_____ Is die mens sommer ’n ding? (Redaksioneel) *Woord en Daad* 23 (248): 2–3.

_____ Verantwoordelike politiek hoef nie vuil te wees nie (Redaksioneel) *Woord en Daad* 23(249): 2–3.

_____ Liefde is ’n voorwaarde vir ‘gesonde verstand’ (Redaksioneel) *Woord en Daad* 23(250): 2.

_____ Eie reg is die grafskrif vir ’n ordelike samelewing *Woord en Daad* 23(251): 7–8.

_____ Bevolkingsverspreiding moet uit die politieke arena *Woord en Daad* 23(252): 8–9.

_____ ‘Komplot-isme’ smoor kritiese selfondersoek *Woord en Daad* 23(253): 4–5.

_____ (Rasse-) diskriminasie is geen middelmatige saak nie *Woord en Daad* 23(253): 6–7.

_____ Die opsies ná 2 November 1983 (Redaksioneel) *Woord en Daad* 23(255): 2–3.

_____ Voorraad opneem (...en wonde lek) *Woord en Daad* 23(256): 4–5.

_____ Hierdie kongres het fut gehad (en die ACB het REBSA geword) *Woord en Daad* 23(256): 14–5.

1984: Die reg van die gelowige – menseregte en menseverantwoordelikhede *Almanak van die Gereformeerde Kerke in Suid-Afrika* 110: 210–4.

_____ Nuwejaar 1984–voornemens en verwagtings (Redaksioneel) *Woord en Daad* 24(257): 2.

_____ Kultuurstrategie as geloofstrategie 1: Ons dilemma is ’n meesterstuk! *Woord en Daad* 24(259): 6–7.

_____ Kultuurstrategie as geloofstrategie 2: Kultuurbou vereis nie ’n meesterplan nie *Woord en Daad* 24(260): 4–6.

_____ Kultuurstrategie as geloofstrategie – slot: 'n Gehoorsame sterwe beter as 'n self-gesentreerde lewe *Woord en Daad* 24(261): 4–5.

_____ Die Christenjuris in die Suid-Afrikaanse samelewing *Woord en Daad* 24(262): 4–6.

_____ 'n Christelike universiteit is Christus s'n *Woord en Daad* 24(262): 11.

_____ Skuldgevoel versus skuldkompleks *Woord en Daad* 24(263): 4.

_____ Meer as maar 'net 'n vuishou...' *Woord en Daad* 24(263): 14.

_____ 'n Gedeelde kultuur is 'n lewende kultuur (Redaksioneel) *Woord en Daad* 24(264): 2.

_____ Verwag ons genoeg van ons howe? *Woord en Daad* 24(264): 8–9.

_____ Wat 'Calvinisties' is (en wat nie) *Woord en Daad* 24(265): 15–7.

_____ ICPCHE – quo vadis? – 1: Geen oorwinning vir enigiemand *Woord en Daad* 24(266): 5–7.

_____ Oppas vir nie-tersaaklikheid *Woord en Daad* 24(266): 16–7.

_____ Wanhoop en hoop in 'n land van teenstellings (Redaksioneel) *Woord en Daad* 24(267): 2–3.

_____ ICPCHE–quo vadis? – 2: Hier is jy vry...met 'n rewolwer voor jou kop *Woord en Daad* 24(267): 15–7.

_____ Ware hervorming verg moed *Woord en Daad* 24(268): 9–10.

_____ *Ons troetelideologieë (of: die stert(e) wat die hond(e) swaai)* (in *Ideologiese stryd in Suider-Afrika* Potchefstroom: IRS 51–61).

1985: *Diskriminasie* (in *Altyd reformeer: Besinning oor politiek en godsdiens* Braamfontein: Boekhandel De Jong 22–39).

_____ 'Salig is die vredemakers...' (Redaksioneel) *Woord en Daad* 25(269): 2–3.

_____ Rassekonflik rondom rassediskriminasie in Suid-Afrika *Woord en Daad* 25(269): 16–8.

_____ Daar is tog 'n kentering *Woord en Daad* 25(271): 4–5.

_____ Die hervormingskip mag nie strand nie! *Woord en Daad* 25(277): 4–5.

_____ Soos jouself...? *Woord en Daad* 25(277): 12–3.

_____ Die goeie uit die chaos *Woord en Daad* 25(278): 10–1.

_____ Is daar (nog) hoop? (Redaksioneel) *Woord en Daad* 25(279): 2–4.

_____ Prikkelperspektiewe 1: Perspektief op wet en orde *Woord en Daad* 25(279): 18–20.

_____ Prikkelperspektiewe 2: Perspektief op liefde vir die (Afrikaner-)volk *Woord en Daad* 25(280): 11–4.

_____ Afrikanerskuld...en gesprek met die ANC *Woord en Daad* 25(280): 17–8.

1986: Prikkelperspektiewe 3: Perspektief op 'genoeg hervorming' *Woord en Daad* 26(281): 10–3.

_____ Om te hoop is om te doen *Die Kerkblad* 88(2734): 11–2.

_____ Optimisme is peperduur (Redaksioneel) *Woord en Daad* 26(282): 2–4.

_____ Ons moet mekaar nie misverstaan nie (Redaksioneel) *Woord en Daad* 26(283): 2–3.

_____ Rubicon II lyk na besigheid *Woord en Daad* 26(283): 4–5.

_____ Prikkelperspektiewe 4: Perspektief op die Afrikaner van 2038 *Woord en Daad* 26(283): 13–5.

_____ Lesse uit ’n vredesgesprek *Woord en Daad* 26(284): 6–7.

_____ Prikkelperspektiewe 5: Perspektief op die agenda vir hervorming *Woord en Daad* 26(284): 12–5.

_____ Prikkelperspektiewe 6: Perspektief op perspektief *Woord en Daad* 26(285): 16–9.

_____ SA howe–grammofone of politieke kanaalgrawers? *Rapport* 16(20) (18 Mei 1986): 11.

_____ Prikkelperspektiewe 7(1): Perspektief op ’n menseregtehandves vir die RSA(1) *Woord en Daad* 26(286): 15–7.

_____ Die breuk is nou finaal *Woord en Daad* 26(287): 10–1.

_____ Prikkelperspektiewe 7(2): Perspektief op 'n menseregtehandves vir die RSA(2) *Woord en Daad* 26(287): 15–8.

_____ Prikkelperspektiewe 8: Perspektief op politieke geweld *Woord en Daad* 26(288): 13–8.

_____ Prikkelsperspektiewe 9: Perspektief op bevryding *Woord en Daad* 26(289): 5–7.

_____ Verwoerd...20 jaar later: Jou toekoms nie só geskep nie *Rapport* 16(36) (7 September 1986): 27.

_____ Prikkelperspektiewe 10: Perspektief op beskawing en barbarisme *Woord en Daad* 26(290): 13–6.

_____ Dié Christelike standpunt!(?) *Woord en Daad* 26 291: 7–8.

_____ Noodtoestand versus burgerlike verset en noodetiek: *ASBEELD* (Julie 1986): 1–6.

_____ *Will a bill of rights guarantee social justice in South Africa?* (in Law Students’ Council, University of Cape Town *Law in a state of emergency: a focus on law and repression in South Africa* Cape Town: SRC Press UCT 92–6).

1987: Witman nie vry solank swartman dit nie ook is nie *Rapport* 17(2) (11 Januarie 1987): 10.

_____ Ex Africa (Om van Afrika te wees) *Woord en Daad* 27(293): 15–7.

_____ Bevryding is nie ’n vinding van die Marxisme nie! *Woord en Daad* 27(295): 9–10.

_____ Keuse vir bevryding verg volle oorgawe (Indrukke van die Dakarsamesprekings) *Die Suid-Afrikaan* 1987(11): 12–3.

_____ Facing the ANC Reality *Financial Mail* 105(12) (18 September 1987): 60.

_____ Dís ’n keuse wat vry maak en vrese wegneem *Rapport* 17(44) (1 November 1987): 25.

1988: Skaf verpligte doodstraf af *Kampuskruis* 1(2) (26 Mei 1988): 3.

_____ *Regsoewereiniteit en menseregte in die nuwe Suid-Afrika* (in Landman JP, Nel P en Van Niekerk A (reds.) *Wat kom ná apartheid? Jong Afrikaners aan die woord* Johannesburg Southern 37–57).

_____ *Tien perspektiewe: gesprekke oor die toekoms* Kaapstad: Tafelberg.

_____ The universities: a place for politics *Leadership South Africa* 7(4): 113–5.

_____ *The Freedom Charter and equality before the law* (in Polley JA (ed.) *The Freedom Charter and the future* Proceedings of the National Conference on *The Freedom Charter and the Future* Cape Town: IDASA 80–83).

_____ Perspektief op barbarisme en beskawing *Rapport* 18(23) (5 Junie 1988): 10.

_____ Is it possible to love an Afrikaner? *Sunday Times* (5 Junie 1988): 17.

_____ Die Afrikaner in die jaar 2038 *Rapport* 18(24) (12 Junie 1988): 10.

_____ 1838, 1938, 2038: What shall the Afrikaner be? *Sunday Times* (12 June 1988): 18.

_____ Dié ystervark vra fyn voetwerk *Rapport* 18(32) (7 Augustus 1988): 10.

_____ In love of home, love of country *Housing in Southern Africa/Behuising in Suidelike Afrika* (September 1988): 6–7 (18 September 1987): 60.

_____ Die RSA in die jaar 2000: 'n Politieke toekomsblik *Woord en Daad* 28(315): 11–5.

_____ What we can all learn from the Great Trek *Sunday Times* (11 December 1988): 20.

1989: *Reflection on group rights* (in *A South African bill of rights* Proceedings of a Forum Discussion of The Civil Rights League Claremont 56–8).

_____ Slotopmerkings na aanleiding van 'n seminaar met die tema *Law Reform in Action: Formulating a Bill of Rights for South Africa Codicillus* 30(2): 80–3.

_____ Doodstraf moet uit die politieke arena *Rapport* 19(24) (11 Junie 1989): 29.

_____ Handves is nog lank nie deurgepraat *Rapport* 19(29) (16 Julie 1989): 11.

_____ Koalisie-kompromie –'n werklikheid? Enkele gedagtes oor 'n moontlike wankel-parlement *Woord en Daad* 29(324): 16–8.

_____ Nog te vroeg vir vure van vreugde *Rapport* 19(45) (5 November 1989): 31.

_____ 'n Moreel redelike feestyd vir u! *Rapport* 19(52) (24 Desember 1989): 15.

1990: 'Laat elkeen hom onderwerp...' Onderdanigheid aan en verantwoordelikheid teenoor die owerheid in Skrifperspektief *Almanak van die Gereformeerde Kerke in Suid-Afrika* 116: 259–62.

_____ Breyten, (en maatskappy-kritiese intellektuele soos jy): bly in die stryd! *Rapport* 20(8) (25 Februarie 1990): 31.

_____ 'n Lewe vir 'n lewe *Woord en Daad* 30(327): 6–10.

_____ Beveg veiligheidsvorste! Eerbied vir regsorde 'n vereiste *Rapport* 20(11) (18 Maart 1990): 28.

_____ Hét die Afrikaner se politieke kop gedraai? *Rapport* 20(15) (15 April 1990): 13.

_____ NP en ANC kan nog die slaggate vermy *Insig* Mei 1990: 12–3.

_____ Nie net 'n nuwe hart gevra. Versoening vra ook opoffering *Rapport* 20(20) (20 Mei 1990): 14.

_____ Opmerkings oor die Christelike fundering (en ontkenning) van menseregte *Woord en Daad* 30(329): 8–11.

_____ Doodstrafhervorming – enkele perspektiewe *Vox* 1(1): 11–2.

_____ FW voor toets oor Malan ná Harms *Rapport* 20(48) (2 Desember 1990): 11.

_____ Let justice be seen to be done *Sunday Times* (16 December 1990): 20.

1991: Publiek moet kan síén geregtigheid het geskied *Rapport* 21(4) (27 Januarie 1991): 23.

_____ Meer oor 'tyd' as die 'man' *Rapport* 21(8) (24 Februarie 1991): 25 (Review of *FW de Klerk – die man en sy tyd* deur Willem de Klerk).

_____ Menseregte nie einde van die pad *Rapport* 21(15) (21 April 1991): 21.

_____ 'n Nuwe regstelsel vir 'n nuwe Suid-Afrika *Forum* 14 (Augustus 1991): 12.

_____ (Nog) 'n Gesigshoek op die aborsievraagstuk *Regslui vir Menseregte Nuusbrief* 2(1) (Augustus 1991): 1.

_____ Jy is net 'legitiem' as jy ook respektabel is! *Rapport* 21(46) (17 November 1991): 21.

_____ *Staatsveiligheid* (in Bredenkamp F (red.) *Staatkundige en politieke begrippe* Pretoria: RGN 39–40).

1992: Africanus albus – van indringer tot inheemse spesie *Vrye Weekblad* No 157 (10–16 Januarie 1992): 12.

_____ Wat 'n dawerende 'Ja!' (maar was dit ook 'n dawerende einde aan wit politiek?) *Woord en Daad* 32(339): 11–2.

_____ Interim government: prospects and pitfalls *South Africa in the Nineties – prospects for solutions (HSRC)* 1(2) (March 1992): 17–8.

_____ Gateway to civilised world *The Pretoria News* (29 April 1992): 12.

_____ Vrede is nie goedkoop nie, mnr Sloet *Vrye Weekblad* No 184 (24–30 Julie 1992): 8.

1993: (with Gouws A) Principles and structures of an interim government: Marrying the desirable to the possible *Prospects: South Africa in the Nineties (HSRC)* 2(1): (March/ April 1993): 4–5.

1994: Vind en verwyder kanker om nuwe, gesonde Suid-Afrika te bou *Beeld* (6 Julie 1994): 9.

1996: 'n Nuwe struggle vir almal *Insig* (September 1996): 9.

_____ 'n Waardebeoordeling van 'n waardemanifes: Die Menseregtehandves in Suid-Afrika se finale Grondwet *Woord en Daad* 36(357): 2–4.

_____ Hoofregter: Die ou vs die nuwe orde *Insig* (November 1996): 9–10.

1997: Afrikanernegatiwiteit oor die WVK: Viva Rip van Winkel? *Woord en Daad* 37(360): 14–7.

1998: Hof versuim sy plig *Insig* (Julie 1998): 8.

1999: In die politici se pad. Hoe vaar Suid-Afrika se Grondwet? *Insig* (Desember 1999): 12.

_____ Wanneer is politieke lieg lieg en bedrieg bedrieg? *Woord en Daad* 39(370): 26–7.

2000: Wee die een wat dié menseregte ignoreer *Rapport: Perspektief* (22 Oktober 2000): 3.

2001: Die nadraai van die Heath-sage– 'n onrusbarende vertrouensbreuk *Woord en Daad* 41(376): 3–6.

2003: Nelson Mandela 85 *Woord en Daad* 43(385): 8–9.

2004: Godsdiensvryheid en die reg *Kerkbode* 173(5) (24 September 2004): 6.

2005: Petticoat racists squirm on bench *Cape Times* (2 June 2005): 13.

_____ Regte(r) rassisme *Woord en Daad* 45(391 & 392): 4–7.

2006: Internasionale mensregte – óók 'ons eie' *By* Bylae by *Die Burger* (9 Desember 2006): 9.

2007: Viva, Geagte Grondwet! (wat môre regtig verjaar) *By* Bylae by *Die Burger* (3 Februarie 2007): 9.

_____ Dakar en die groot epog van die klein wonderwerk *By* Bylae by *Die Burger* (21 Julie 2007): 15.

_____ Koinonia – in memoriam *Woord en Daad* 47(401 & 402) (Lente/Somer): 21–4.

2010: Twintig jaar na die ontbanning van die ANC–waar staan ons met die Grondwet en wetstoepassing *Woord en Daad* 50 413) (Lente 2010): 15–19.

2012: Só maklik is dit nie *Beeld* (6 Maart 2012): 9.

2014: Ek is 'n lojale Puk met hoop *Beeld* (27 Februarie 2014): 15.

Annexure C

Papers presented

National

1974: *Vraagstukke rondom die lewe – juridies* Interfacultary Lecture: Potchefstroom University for CHE.

1975: *Regsopleiding – akademiese vorming of beroepsafrigting* Congress of the Society of University Teachers of Law, Port Elizabeth (July 1975).

1976: *Die reg en geboortebeperking* Conference of the Department of Nursing: Potchefstroom University for CHE.

1979: *Die politieke betrokkenheid van die universiteit* Lecturers' Association: University of the Orange Free State, Bloemfontein.

1981: *Regsteorie in praktyk regspraktyk in teorie en regsopleiding* Inaugural Address: Faculty of Law, Potchefstroom University for CHE.

_____ *Neo-Marxisme, menslike vryheid en sosiale geregtigheid* Conference of the Vereniging vir Christelike Hoër Onderwys/Instituut vir Reformatoriese Studie/Koers-vereniging/Die Afrikaanse Calvinistiese Beweging, Bloemfontein (28–29 January 1981).

1983: *The law as a regulator and/or manager of conflict* Conference of the Centre for Intergroup Studies, University of Cape Town.

1984: *Die Christenjuris in die Suid-Afrikaanse samelewing* Address at the Graduation Ceremony of the Faculty of Law, Potchefstroom University for CHE.

_____ *Konflik en versoening rondom rassediskriminasie* Congress of the Reformational Movement of Southern Africa, Johannesburg.

_____ Series of lectures of own choice presented at the Department of Philosophy and Faculty of Law, University of Fort Hare.

_____ *Calvin's view of the law and the state according to the Institutes* International Calvin Conference, Potchefstroom (31 July–3 August 1984).

1985: *Teaching legal ethics in South Africa and abroad* Conference on Legal Ethics, hosted by the Wits Law Students' Council, Johannesburg.

_____ *Reg, mag en orde – waar staan ons nou?* Conference on Law, Power and Order, hosted by the Reformational Movement of Southern Africa, Bloemfontein.

1986: *Will an entrenched Bill of Rights guarantee more social justice in South Africa?* Conference on Law in a State of Emergency, hosted by the Law Students' Council at the University of Cape Town (11–14 April 1986).

_____ *Filosofiese perspektief op 'n menseregtehandves vir Suid-Afrika* Symposium on a Bill of Rights at the Faculty of Law, University of Pretoria (1–2 May 1986).

1987: *Law in theory, law in practice and law in reality* Colloquium Iuridicum VI, hosted by the University of the Orange Free State, Bloemfontein (16–18 September 1987).

1988: *The Freedom Charter and equality before the law* Conference on the Freedom Charter and the Future – a Critical Appraisal, hosted by IDASA, Cape Town (15–16 July 1988).

_____ *Capital punishment: a legal philosophical appraisal/Doodstraf: 'n regsfilosofiese waardering* Law Intervarsity of the Universities of Cape Town, Stellenbosch and the Western Cape (18 August 1988).

1989: *Jurisprudential reflections on the status of unborn life* Conference on the Status of prenatal Life, hosted by the Unit for Bioethics, University of Stellenbosch (20 March 1989).

_____ *Die rol van die reg in die samelewing* Second Winelands Conference on Ethics in the Public Sector, Stellenbosch (28–29 September 1989).

_____ *The courts, the legal profession and the legal process in a future South Africa* Conference on a New Jurisprudence for South Africa hosted by the Centre for Human Rights Studies, University of Pretoria (24–26 October 1989).

1990: *Reflecting on law, morality and communal mores* Conference on 'View of Human-Ethics/Medical science: A Christian Reformational alternative, hosted by the Koers Society/Institute for Reformational Studies at Potchefstroom University for CHE (27–28 July1990).

_____ *Die kriminologiese implikasies van 'n menseregtehandves* Symposium hosted by the Criminological Society of South Africa at UNISA, Pretoria (21 September 1990).

1991: *Verteenwoordigende regspraak* Seminar on the Accessibility of the South African legal system, hosted by the Students' Representative Council of the University of the Orange Free State (25 May 1991).

_____ *Legal education in South Africa would benefit by paying attention to the needs of educationally disadvantaged students* Congress of the Society of University Teachers of Law, Pretoria (8–11 July 1991).

_____ *Regspositivisme – geherdefinieer?* Congress of the Society of University Teachers of Law, Pretoria (8–11 July 1991).

1992: *Human rights: Developments and problems* Symposium on Appropriate Health Care as Human Right, hosted by the Unit for Bioethics, Tygerberg Campus, University of Stellenbosch (September 1992).

_____ *The politicisation of the judiciary – or the judicialisation of politics?* Research Colloquium of the South African Political Studies Association, Broederstroom (8–9 October 1992).

1993: *Political issues involved in drafting South Africa's first instrument entrenching fundamental human rights* Conference of the South African Political Studies Association, Bloemfontein (20–22 October 1993).

1994: *Background to and exposition on the application and enforcement of the chapter of fundamental rights of the Constitution of 1993* Conference on the Business Implications of the Constitution and Fundamental Human Rights during a Period of Transition: International Executive Communications, CSIR Conference Centre, Pretoria (22 February 1994).

_____ *Amnesty and transition in South Africa* Conference on Justice in Transition: Dealing with the Past, hosted by the Institute for Democracy in South Africa, Somerset-West (27 February 1994).

_____ *Interpretation of the Bill of Rights* Congress of the Society of University Teachers of Law, Port Elizabeth (4–7 July 1994).

_____ *The ideological dialectic shaping of chapter 3 of the transitional Constitution* Congress of the Society of University Teachers of Law, Port Elizabeth (4–7 July 1994).

1995: *Religion and the new Constitution* Conference on Christianity and the Secular State, hosted by the South African Council of Churches/Research Institute on Christianity in South Africa, Somerset West (7–8 November 1995).

1996: *Legal academics and the open community of constitutional interpreters* Presidential Address at the Congress of the Society of University Teachers of Law, University of the Western Cape, Bellville (22–25 January 1996).

_____ (with Gouws A) *The gender implications of the final Constitution* Conference on Aspects of the Debate on the Draft of the New South African Constitution dated 22 April 1996, hosted by the Konrad-Adenhauer-Stiftung, Umtata (24–26 April 1996).

_____ *Menseregte in die skadu's en skanse van die ivoortoring ('n Akademiese waardering van enkele fasette van menseregtebeskerming in Suid-Afrika se finale Grondwet)* Stellenbosch Forum Lecture (no 96/7) University of Stellenbosch (18 September 1996).

1997: *Law and justice in the Greco-Roman traditions: the fusion of two traditions* Interdisciplinary Colloquium on Law and Justice, hosted by the Department of Old Testament, Faculty of Theology, University of Stellenbosch (18–20 March 1997).

_____ *The jurisprudence of interpretation and the exigencies of a new constitutional order* Conference on Doing things with Words: On 'Meaning' in Legal Interpretation, hosted by the Faculty of Law, Rand Afrikaans University (1–3 September 1997).

1999: *Constitutional construction and the contradictions of social transformation* Interdisciplinary Colloquium on Social Transformation and Biblical Interpretation, hosted by the Department of Old and New Testament, University of Stellenbosch (10 September 1999).

_____ *The status and hierarchy of legislation under the Constitution* Colloquium on Constitutionalism after five Years – taking Stock, hosted by the University of Stellenbosch/ University of the Western Cape Research Unit for Legal and Constitutional Interpretation (Van der Merwe SE) *Judicial ethics and accountability* Justice College Conference on Judicial Independence, Ethics and Accountability, Pretoria (19 April 1999).

_____ (with Van der Merwe SE) *Judicial independence and the principles of recusal* Justice College Conference on Judicial Independence, Ethics and Accountability, Pretoria (19 April 1999).

2000: (with Van der Merwe SE) *Judicial ethics and accountability* Justice College Conference on Judicial Independence, Ethics and Accountability, Pretoria (1 May 2000).

_____ (with Van der Merwe SE) *Judicial independence and the principles of recusal* Justice College Conference on Judicial Independence, Ethics and Accountability, Pretoria (1 May 2000).

_____ *The South African Constitution as memory and promise* Conference on the occasion of the launch of the Institute for Justice and Reconciliation, Cape Town (11 May 2000).

_____ *Oor hoe juriste werk met tekste… en tekste met hulle. Enkele gedagtes oor die postmodernisering van Reformatoriese regsdenke* HL Swanepoel Memorial Lecture, Faculty of Law, Potchefstroom University for CHE (25 July 2000).

_____ *Lawspeak as text… and textspeak as law. Reflections on how jurists work with texts – and texts with them* Colloquium on Legal Interpretation in South Africa's Age of Constitutionalism, hosted by the University of Stellenbosch/University of the Western Cape Research Unit for Legal and Constitutional Interpretation (17–18 August 2000).

_____ (with Van der Merwe SE) *Judicial ethics and accountability* Justice College Conference on Judicial Independence, Ethics and Accountability, Pretoria (23 October 2000).

_____ (with SE van der Merwe) *Judicial independence and the principles of recusal* Justice College Conference on Judicial Independence, Ethics and Accountability, Pretoria (23 October 2000).

2002: *The re-systematisation of the canons of statutory interpretation* Congress of the Society of University Teachers of Law, Grahamstown (20–24 January 2002).

_____ *Constitutional Expectations with regard to a South African Culture of Human Rights* Workshop on Developing a Culture of Human Rights in South Africa, hosted by the New National Party, Cape Town (23–24 August 2002).

2005: '*Subsidiarity': what's in the name – for constitutional interpretation?* Colloquium hosted by the Research Unit for Legal and Constitutional Interpretation (RULCI) at the Law Faculty, University of Cape Town (20–21 October 2005).

2006: *Interpretation and limitation* Constitutional Law of South Africa: Public Lecture Series and Conference at the Women's Gaol, Constitution Hill, Braamfontein (28–30 March 2006).

_____ *International human rights in municipal application* Seminar on the Internationalization of Constitutional Law and Constitutionalisation of International Law: Surveying effects of globalisation on South African law, hosted by the Faculty of Law, North-West University, Potchefstroom (17 August 2006).

_____ *AZAPO: monument, memorial…or mistake?* Seminar on Law and the Apartheid Past: AZAPO v President of the RSA: Ten Years later, hosted by the Verloren van Themaat Centre for Public Law Studies, University of South Africa, Pretoria (18 August 2006).

_____ Bedroom in the courtroom…and courtroom in the bedroom: Observations on the publicisation of intimate gay and lesbian relationships. Keynote address at a Seminar on Same-sex Marriage in South Africa?, hosted by the Faculty of Law, North-West University, Potchefstroom (1 September 2006).

_____ *How fragile is our constitutional democracy in South Africa? An assessment of the Fourteenth Amendment debate/debacle* Conference on Law and Transformative Justice in post-apartheid South Africa, hosted by the Nelson R Mandela School of Law, University of Fort Hare, East London (4–6 October 2006).

2007: *Theory, practice… reality? (Reflections of a legal scholar)* Conference on the Scholarship of Teaching and Learning, hosted by the Centre for Teaching and Learning, University of Stellenbosch (22–23 May 2007).

_____ *What is law without morality?* One-day conference on What is Law without Morality?, hosted by the Department of Religion and Theology (UWC) and the Ecumenical Foundation of Southern Africa, in consultation with the Faculty of Law (UWC), Bellville (3 August 2007).

2010: *Leitmotivs in constitutional interpretation in South Africa* Humboldt Kolleg (Interdisciplinary Conference) on Ubuntu, Humanity and Good Faith/Equity as flexible Principles in Law and Society in Southern Africa – Appropriate Principles in an Ever-Changing World?, held at the North-West University, Potchefstroom Campus (1–3 September 2010).

_____ *The Status and Role of Legislation in South Africa as a Constitutional Democracy* First Konrad Adenauer Foundation and Faculty of Law (North-West University) Human Rights Indaba on the role of Local Government and the Lower Courts in realising Socio-economic Rights in North-West, Northern Cape and Free State Provinces, held at the Feather Hill Spa, Potchefstroom (29 October 2010).

2011: *Some Exploratory Reflections on Legislation as an Agent of Socio-Economic Transformation in a democratic South Africa* Law and Poverty Colloquium of the Research, Training

and Outreach Project: Combating Poverty, Homelessness and Socio-Economic Vulnerability under the Constitution of the Faculty of Law, University of Stellenbosch, held at the Stellenbosch Institute for Advanced Study (29–31 May 2011).

_____ *An Academic Assessment of the Scope for a Public Role the South African Constitution allows for Churches* Paper read at a conference on the scope the South African Constitution allows for a Public role by Churches, hosted by the Centre for Public Theology, University of Pretoria (10–11 November 2011).

2012: *Statutory Interpretation in the Era of Constitutionalism: The Impact of the Constitution on the Interpretation of Statutes* Workshop presented with Elmien du Plessis at the Law Faculty, University of Johannesburg (4 June 2012).

2013: *Beyond the Bill of Rights* Presentation at an Education and Human Rights Workshop entitled Education and Human Rights in Diversity, hosted by Education for Human Rights at the North-West University, Potchefstroom (18 September 2013).

2014: *The Phenomenal Awakening of Human Rights – Worldwide and in South Africa* Plenary address at an Education and the Constitution @ 20 Conference, held at the Faculty of Education, North-West University, Potchefstroom (8–10 April 2014).

International

1979: *Human rights and the principle of racial equality* The First International Conference on Human Rights in South Africa, Cape Town (22–26 January 1979).

1981: *Marxism and Neo-Marxism on the function and role of the state (with special reference to its relation to the church and educational institutions)* Third International Conference of Institutions for Christian Higher Education, hosted by the Dordt College, Sioux Center, Iowa, USA (13–20 August 1981).

1984: *Justice or judgment? The Biblical concept of social justice applied in Southern Africa* Africa Conference, hosted by the Institute for Reformational Studies, Potchefstroom (1984).

1989: *Between reform and transformation: Shalom for South Africa?* Conference on 'To serve the present age', hosted by the Institute for the Study of American Evangelicals, Philadelphia, Pennsylvania, USA (4–6 May 1989).

1991: *The value of a Christian approach to politics* Regional Conference for Africa of the International Association for the Promotion of Christian Higher Education, Harare, Zimbabwe (2–10 March 1991).

1992: *Constitutional interpretation in South Africa: taking stock* Conference on Interpreting a South African Bill of Rights hosted by Potchefstroom University and Lawyers for Human Rights (9–11 April 1992).

1993: *The state of religious human rights in South Africa* Consultation on the State of Religious Human Rights in the World: A Comparative Religious and Legal Study, hosted by the Law and Religion Program, Emory University School of Law, Atlanta, Georgia, USA (24–27 April 1993).

1994: *Feminists versus Traditionalists: African customary law as controversy in negotiating South Africa's transitional constitution* Gwendoline Carter Memorial Lecture, hosted by the Center for African Studies at the University of Florida, Gainesville, Florida, USA, 26 September 1994.

_____ *Legal dimensions of religious human rights: Regional and national patterns: South Africa* Conference on Religious Human Rights in the World today: Legal and Religious

Perspectives, hosted by the Law and Religion Program, Emory University School of Law, Atlanta, Georgia, USA (6–9 October 1994).

1995: *Zentralismus-Föderalismus: Die neue Verfassung der Republik Südafrika* Seminar mit leitenden Juristen aus den Gebieten Perm Tjumen und Omsk sowie Richter des Verfassungsgerichts der Russischen Föderation, Ost-Akademie, Lüneburg, Germany (18 May 1995).

_____ *The genesis of South Africa's transitional Constitution, with particular reference to the Bill of Rights* Faculteite Rechtsgeleerdheid en Sociaal-culturele Wetenschappen, Vrije Universiteit, Amsterdam (29 June 1995).

1996: *An evaluation of the new (final) South African constitutional dispensation and dynamics from a Christian perspective* International Conference on Christianity and Democracy in South Africa, Potchefstroom (10–12 July 1996).

_____ *South African experiences* International Research Workshop on Federalism and Decentralization in East and Central Europe (An Analysis of the Applicability of Western Models of Federalism for Central and Eastern Europe) hosted by the George C Marshall European Center for Security Studies/European Centre for Research on Federalism in Garmisch-Partenkirchen, Germany (24–27 November 1996).

1998: *The evolution of constitutionalism and the emergence of constitutional jurisprudence in South Africa* College of Law, University of Saskatchewan, Saskatoon, Canada (26 January 1998).

_____ *Religious freedom in South Africa* Department of State and Church, Faculty of Law, University of Milan (Italy, 4 May 1998).

_____ *Recent constitutional developments in South Africa* Department of Public Law, Faculty of Law, University of Milan, Italy (5 May 1998).

_____ *Language and law* South African Rapporteur at the XVth International Congress of Comparative Law held in Bristol, England (26 July–1 August 1998).

1999: *South Africa's Bill of Rights: Reconciliation and a just society* Conference on Race and Reconciliation in South Africa, hosted by the University of the Western Cape and Calvin College, Grand Rapids, Michigan, Bellville (13–15 January 1999).

_____ *Constitutional construction in social contradiction: The conflicting social forces shaping the making and understanding of South Africa's Constitution* Workshop on Changing Legal Cultures IV, hosted by the International Institute for the Sociology of Law, Oñati, Spain (24–26 June 1999).

_____ *State-religion relations in South Africa* Symposium on State-Religion Relations: Historical Aspects hosted by the Journalists and Writers Foundation, Istanbul, Turkey (15–17 October 1999).

2000: *The constitutional protection of religious human rights in the 'new South Africa'* Seventh Annual International Law and Religion Symposium on Comparative Constitutional Perspectives on Freedom of Religion and Belief, hosted by the Brigham Young University, Utah, USA (8–11 October 2000).

2001: *Current problems concerning church and state relationships and religious freedom in South Africa: The viewpoint of a constitutional lawyer* Colloquium on the Legal Position of Churches: South Africa – Europe – United States hosted by the Faculty of Canon Law, Catholic University of Leuven, Belgium (1 March 2001).

_____ *Die reg op godsdiensvryheid as groepsreg ingevolge die Suid-Afrikaanse Grondwet* Church and State Conference hosted by the Faculty of Theology, University of Stellen-

bosch/Faculty of Canon Law, Catholic University of Leuven, Stellenbosch (24–25 October 2001).

_____ *The future of South Africa: Perspectives of integrating different cultures – means of law* Rechtspolitisches Forum, Institut für Rechtspolitik, Universität Trier, Trier, Germany (4 December 2001).

_____ *The common-law tradition in South Africa* Lecture in the programme *Fachspezivische Fremdsprachenausbildung (FFA)*, Fachbereich Rechtswissenschaft, Universität Trier, Trier, Germany (6 December 2001).

2002: *Die impak van die Grondwet as 'hoogste reg' op bestaande reg (toegespits op wetsvertolking)* Conference on 'Ius Commune: Zuid-Afrikanse en Europese perspectiven' hosted by the Faculty of Law, University of Stellenbosch/Onderzoekskool Ius Commune, University of Maastricht/University of Utrecht/Catholic University Leiden, Stellenbosch (13–15 February 2002).

_____ *Rights of the embryo and foetus in private law* South African Rapporteur at the XVIth International Congress of Comparative Law, Brisbane, Australia (14–20 July 2002).

_____ *Constitutional reforms in African states (Perspectives with reference to the South African experience)* Conference of the International Bar Association on the Global Voice of the legal Profession, Durban, International Conference Centre (20–25 October 2002).

_____ *South Africa's peaceful revolution and its constitutional safeguarding* Colloquium on Constitution Making and Constitutional Reform in Germany and Abroad hosted by the Deutsches Institut für Föderalismusforschung on the occasion of the 65th birthday of Prof Dr Dr hc Hans-Peter Schneider Hannover, Germany (29–30 November 2002).

2003: *A new common law? Recent developments in (judicial) law-making in South Africa* Series of lectures in the programme *Fachspezivische Fremdsprachenausbildung (FFA),* Fachbereich Rechtswissenschaft, Universität Trier, Trier, Germany (4–5 December 2003).

2005: *Ubuntu-jurisprudence* Ubuntu Conference: A Working Seminar hosted by Prof Drucilla Cornell, Rutgers University, New Jersey, USA, Law Faculty, University of Pretoria, and the Stellenbosch Institute for Advanced Study (Stias) at the Constitutional Court of South Africa, Braamfontein, Johannesburg (3–4 August 2005).

_____ *Learned Staatsrecht from the heartland of the Rechtsstaat* Background paper presented at a conference on Public Law Themes in South Africa and Germany organised by South African scholars in Public Law under the auspices of the Alexander von Humboldt Foundation's regional 'Humboldt-Kolleg' programme and held at the Stellenbosch Institute for Advanced Study, Stellenbosch (8–10 September 2005).

2006: *Memorialising a constitution: The power of unspectacular constitutional forces* Paper presented at the Gwendolen M Carter Conference on Law, Politics, Culture, and Society in South Africa: The Politics of Inequality then and now, hosted by the Center for African Studies, University of Florida, Gainesville, Florida, USA (5–7 March 2006).

2007: *Beyond parochialism: International law and transnational learning in constitutional interpretation* Presentation at a Research Workshop on Law-Making and Development of Law in a Globalized World, hosted by the Faculty of Law, University of Stellenbosch/ the Ius Commune Research School/Trinity College, Dublin School of Law, held at the Stellenbosch Institute for Advanced Study (6–8 December 2007).

2008: *Affirming and celebrating the Other: Recent developments in freedom of religion jurisprudence in South Africa* Presentation at a conference on Religion and Human Rights in Africa held in Durban in the context of a project on Law, Religion, and Human Rights

in International Perspective of the Center for the Study of Law and Religion, Emory University, Atlanta, USA (30 April–3 May 2008).

_____ *Much ado about a nose stud? A contextualisation of the judgment of the South African Constitutional Court in* MEC for Education: KwaZulu-Natal and Others v Pillay and Others 2008 (2) BCLR 99 (CC), 2008 (1) SA 474 (CC). Presentation at a Seminar Discussion of the Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Heidelberg, Germany (16 June 2008).

_____ *Verfassungsdialog und die Dialogische Verfassung (Oder: Konstitutionalismus als Kultur des Dialogs)* Impulse Paper presented at a Colloquium on Kulturen des Dialogs, held at the University of Tübingen, in the context of an interdisciplinary project on Wertewelten of the Deutsches Seminar, University of Tübingen, Germany (19–22 November 2008).

2009: *State and religion in South Africa: Problems, perspectives and recent developments* Paper presented at the First International Consortium for Law and Religion Studies (ICLARS) Conference on Law and religion in the 21st Century: Relations between States and Religious Communities, University of Milan (22–24 January 2009).

_____ *From toleration to celebration of the religious Other: Snatches from South Africa's experience with constitutional guarantees for religious and related rights since 1994* Paper read at a conference on Religion and Society, hosted by the Free University of Amsterdam at Landgoed Duin and Kruidberg, Santpoort (20–22 October 2009).

2011: *Much ado about a nose stud: Some reflections on the power of leitmotivs in constitutional interpretation* Presentation at a Seminar of the Research Unit for the Study of Society, Law and Religion (RUSSLR) at the Law School, University of Adelaide (11 January 2011).

_____ Presenter of an enrichment course entitled *Comparative legal process* at the Fredric G Levin College of Law, University of Florida, Florida, USA (10 March–2 April 2011).

2012: *South African constitutionalism: From example to warning?* Presentation at a Seminar Discussion of the Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Heidelberg, Germany (29 October 2012).

Supervision by Lourens du Plessis

Annexure D

Theses and dissertations

Doctoral Students

As promoter

1984–1986: Du Plessis W *Die Reg op Inligting en die Openbare Belang* (PU for CHE).

1986–1990: Kruger TJ *Die Wordingsproses van 'n Suid-Afrikaanse Menseregtebedeling* (PU for CHE).

1990–1992: De Ville JR *Moontlike Veranderinge in die Administratiefreg na aanleiding van 'n Menseregteakte* (University of Stellenbosch).

1992–1995: Sarkin JJ *The Effect of a Constitution and Bill of Rights on Abortion in South Africa: A Comparative Study* (University of the Western Cape).

1993–1997: Moosa N *An Analysis of the Human Rights and Gender Consequences of the New South African Constitution and Bill of Rights with Regard to the Recognition and Implementation of Muslim Personal Law* (University of the Western Cape).

1997–1998: Epp Buckingham JL: *Realising Religious Freedom: The Application and Limitation of the Canadian Understanding of Religious Freedom to South Africa* (University of Stellenbosch).

1996–2000: De Vos PF *Sexual Orientation, the Right to Equality and South Africa's 1996 Constitution* (University of the Western Cape).

1997–2000: Feris L *The Development of a Conceptual Model for Environmental Justice within the Framework of the South African Constitution* (University of Stellenbosch).

1997–2001: Van der Poll L *The Constitutionality of Pornography* (University of Stellenbosch).

1995–2002: Gildenhuys JL *An Assessment of Constitutional Guarantees of Religious Rights in South Africa* (University of Stellenbosch).

2008–2010: Le Roux-Kemp A *A Legal Perspective on the Power Imbalances in the Doctor-Patient Relationship* (University of Stellenbosch).

As co-promoter

1982–1985: Raath AWG *Menslike Vryheid in Konteks en Perspektief* (University of the Free State).

1994–1997: Breytenbach M *The Manipulation of Public Opinion by Censorship of the Media during the Demise of White Rule in Southern Africa (1974–1994)* (University of Stellenbosch).

1997–1999: Ross DB *The Constitution, Hermeneutics and Adjudication: Points of departure for Substantive Legal Argument* (University of South Africa).

Master's Degree Students

1989–1993: Bonthuys E *The Legitimacy of Group Rights in the South African Legal System* (University of Stellenbosch).

2001–2002: Shackleford C *The Fate of Heath's Special Investigating Unit: An Evaluation in Terms of the Separation of Powers Doctrine* (University of Stellenbosch).