Author: L du Plessis

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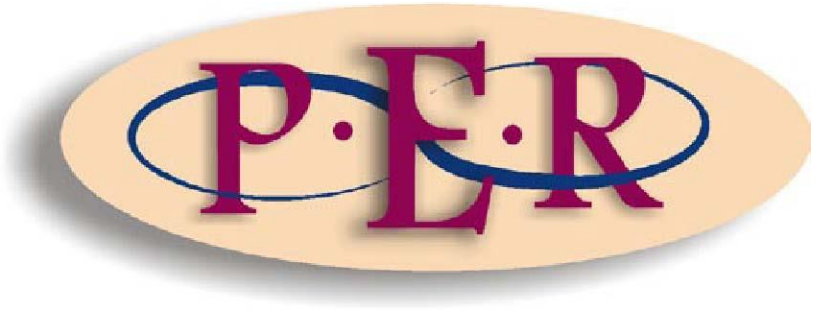

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THEORETICAL (DIS-) POSITION AND STRATEGIC LEITMOTIVS IN CONSTITUTIONAL INTERPRETATION IN SOUTH AFRICA

L Du Plessis*

1 Introductory observations

The constitutional makeover of a dilapidated South African state called for inimitable political prudence and integrity, and for courageous, ethical statesmanship rising above chancy brinkmanship. This essay zooms in on aspects of the historic restoration that bequeathed this country and its people a prototypical, justiciable Constitution. It is trite that a Constitution stands for the advancement of "the good" and the suppression of "evil". This clichéd truism bears regular reiteration as a reality check, to remind us of how easily benevolent governance can lose its footing on the slippery slopes of thuggish misgovernance and maladministration.

The commitment to substantial constitutionalism saw South Africa efflorescing as a champion for constitutional democracy. The Jacob Zuma regime has, however, in the meantime generously and audaciously contributed to blemishing South Africa's favourable but still vulnerable reputation. Setbacks notwithstanding, the authority of the *Constitution* and the integrity of constitutionalism have survived so far, while the incursive endeavours of legislatures and the executive more often than not miscarried, owing to bold judicial intercession (when appropriate) and a vigilant civil society.

The advent of constitutional democracy in South Africa has brought about a revolution in the field of the interpretation of *enacted law*, that is, law made by demonstrable, constitutionally authorised legislatures whose distinctive province is (or at least significantly includes) lawmaking.1 "Enacted law" consists of the supreme Constitution[2] and all original (or primary) and delegated (or secondary) legislation in all spheres of government. The consequences of the interpretive

* Lourens du Plessis. Hons BA (Stellenbosch), B Jur et Comm, LLB, B Phil, LLD (PU vir CHO). Extraordinary Professor of Law, North-West University (Potchefstroom). E-mail: lourens.duplessis@nwu.ac.za.

1 Organs of state whose distinctive province significantly includes lawmaking will be organs of the executive who are competent delegated lawmakers.

2 *Constitution of the Republic of South Africa*, 1996.

revolution have been vast and very visible. Statutory interpretation in South Africa had been deficient long before the advent of constitutional democracy, but the challenge of construing a supreme Constitution, an enacted law-text beyond compare in so many respects, brought matters to a head and set off what is also referred to as a linguistic, interpretive or hermeneutical turn.

Hitherto mostly unnamed or unlabelled (but not entirely alien) interpretive strategies pursued and developed by users of the *Constitution* are up for discussion in the present article, with mainly the Constitutional Court under the loupe. Judges are eminent, authoritative and decidedly visible readers and expositors of the *Constitution*, but are not its only officially authorised exegetists. However, in the absence of a jurisprudence of interpretation attributable to judicial effort and leadership the interpretive turn would have been destined to come to naught and constitutional democracy to go awry.

The traditional, common-law theories of statutory interpretation – also manifested in and as canons of construction – emanated from and thrived on certain dominant beliefs about the interpretation of law in general and enacted law in particular. These beliefs have been challenged by judges who acknowledged more and more that anyone's interpretation of the law, including their own, draws on a pre-understanding (*Vorverständnis*) teeming with inarticulate premises. Presuppositions and prejudices are mental agents embedded in this *Vorverständnis*, engendered by, among other things, someone's life and worldview, which in its turn co-constitutes the human being in a world of cognition and experience which (s)he calls "reality". Negotiating reality compels choice, and choosing prompts positioning in and vis-à-vis reality. In scholarship and in learned professions significantly dependent on theoretical knowledge, the consolidated outcome of crucial choices instantiates someone's *theoretical* position or his/her *philosophy*.

Interpretive leitmotivs bear witness to the presence - the effectual being there - of a theoretical position. Leitmotivs recur as keynote or defining ideas, motifs or *topoi* lending direction to specific instances of construing law. Four leitmotivs, each pertinent to a certain constellation of events in constitutional interpretation, are

discussed and their applicability and utility assessed, drawing on examples from constitutional case-law. The leitmotivs are: (i) transitional constitutionalism; (ii) transformative constitutionalism; (iii) monumental constitutionalism, and (iv) memorial constitutionalism. (i) and (ii) belong together as (A) programmatic leitmotivs and (iii) and (iv) as (B) commemorative leitmotivs. (A) is the pervasive reminder that the achievement of a negotiated transition embodied in a constitutional accord depends decisively on both well thought out strategic moves and due process, with (i) also functioning as a constitutionalism of justification. (A) furthermore measures the impact or "degree" of transition in a society on a socio-political and constitutional Richter Scale, and warns of either complacent in- or hectic over-action when reaping the benefits of constitutional democracy. (B) endeavours to make sense of the present in relation to the past, and *vice versa*, taking the pulse of hope for the future. It is, in other words, the leitmotiv of (the *Constitution* as) memory and promise.

Note below the schematic rendition of what is discussed in the text. The sequence in which arguments unfold in the discourse below is essentially but not entirely the same as in the scheme.

SCHEMATIC RENDITION – INTERPRETIVE LEITMOTIVS

(A) PROGRAMMATIC LEITMOTIVS ↔ **(B) COMMEMORATIVE LEITMOTIVS**

↓ ↓ ↓ ↓ ↓

(I) TRANSITIONAL CONSTITUTIONALISM **(III) MONUMENTAL CONSTITUTIONALISM**

(II) TRANSFORMATIVE CONSTITUTIONALISM **(IV) MEMORIAL CONSTITUTIONALISM**

2 Common-law theories of interpretation

Juristic use of the term "theory" is notoriously loose. Sometimes it is a synonym for "rule" or "precept", for example, the "expedition *theory*" in the law of contract.[3] A theory is, in part, "explanatory".[4] The *consensus theory* in the law of contract, for instance, explains that a contract stems from a *concursus animorum* of the parties

3 Hosten *et al Introduction to South African Law* 704-705.

4 Pearsall *New Oxford Dictionary* 1922. Scholarly or scientific theories are examples of such explanatory models.

involved.[5] A theory, as an idea accounting for a situation or substantiating a course of action, is justificatory as well, advancing the principles on which the practice of an activity is based.[6] The *consensus theory* in the law of contract, for instance, justifies a finding that in the absence of a *concursus animorum*, a contract has not been concluded. The conventional *theories* of statutory interpretation, sometimes also referred to as "interpretative approaches", are both explanatory and justificatory in this way.[7] The most prominent, traditional common-law theories of statutory interpretation are:

(i) *Literalism:* maintaining that the meaning of an enacted provision can and must be deduced primarily from the language in which it is couched,[8] thereby placing clear language on the same footing as plain or ordinary language;[9] in other words, language as a native speaker would use and understand it;[10]

(ii) *Intentionalism:* claiming that to discern and give effect to the intention of the legislature is the paramount rule of statutory interpretation;[11]

(iii) *Literalism-cum-intentionalism*: traditionally the dominant theory of statutory interpretation in South Africa,[12] premised on a combination of literalist and intentionalist assumptions;

(iv) *Contextualism:* asserting that meaning is vitally dependent on context: only by reading an enacted provision and its words and language in context can its meaning(s) be determined;[13]

(v) *Purposivism:* looking at a particular legislative provision as part of a more

5 Du Bois *Wille's Principles* 736-737.

6 Pearsall *New Oxford Dictionary* 1922.

7 Michelman 1995 *SAJHR* 482.

8 For examples, see Steyn *et al Uitleg van Wette* 64-67.

9 Maxwell and Langan *Interpretation of Statutes* 28-29.

10 Cross, Bell and Engle *Statutory Interpretation* 1.

11 Steyn *et al Uitleg van Wette* 2.

12 For a classical verbalisation of this theory, see *Venter v R* 1907 TS 910 913 per Innes J. For recent examples of one of South Africa's two highest courts (the Supreme Court of Appeal) still adhering to it, see *Randburg Town Council v Kerksay Investments (Pty) Ltd* 1998 1 SA 98 (SCA) 107A-B; *Public Carriers Association v Toll Road Concessionaries (Pty) Ltd* 1990 1 SA 925 (A) 942I-J*; Manyasha v Minister of Law and Order* 1999 2 SA 179 (SCA) 185B-C; *Commissioner, SA Revenue Service v Executor, Frith's Estate* 2001 2 SA 261 (SCA) 273G-I.

13 *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1925 AD 245 261; *Jaga v Dönges; Bhana v Dönges* 1950 4 SA 653 (A) 664H; *Secretary for Inland Revenue v Brey* 1980 1 SA 472 (A) 478A-B, *S v Makwanyane* 1995 3 SA 391 (CC) para 10; *Ferreira v Levin; Vryenhoek v Powell* 1996 1 SA 984 (CC) paras 52, 54, 57, 70 per Ackermann J and para 170 per Chaskalson P; *S v Motshari* 2001 2 All SA 207 (NC) para 8.

encompassing instrument, and contending that meaning is to be attributed to such a provision in the light of the purpose(s) or object(s) it has been designed to achieve;[14] and

(vi) *Objectivism*: which is meant as an antidote to the subjectivism of intentionalism; it maintains that once a law has been enacted the legislature has had its say and the text assumes an existence of its own[15] and must then be concretised and brought to completion, in an actual situation, by a court acting as the legislature's delegate.

None of these theories by itself can, however, adequately explain what interpretation – let alone constitutionally induced shifts in modes of and approaches to interpretation – really entails.

3 Theoretical multi-functionality

Frank Michelman[16] identifies *literalism, intentionalism, purposivism instrumentalism* and *moralism* as theories of constitutional interpretation in the USA context. These theories derive from approaches to interpretation akin to our own common-law theories of statutory interpretation. Michelman says of these theories that they constitute a "kind of standard list of interpretative approaches or methods available to constitution adjudicators – from which, it's sometimes imagined, a judge chooses one (or perhaps just falls into one)".[17] He is adamant that the items on the said list

> ... cannot be alternatives among which a judge chooses; they are multiple poles in a complex field of forces, among which judges navigate and negotiate. I don't believe that any responsible constitutional adjudicator will end up, over any interesting run of cases ignoring any of the factors: perceived verbal significations, perceived concrete intentions, perceived general purposes, perceived and evaluated

14 See eg *Stellenbosch Farmers' Winery Ltd v Distillers Corp (SA) Ltd* 1962 1 SA 458 (A) 473F; *Nasionale Vervoerkommissie van Suid-Afrika v Salz Gossow Transport* 1983 4 SA 344 (A) 357A; *Kanhym Bpk v Oudtshoorn Munisipaliteit* 1990 3 SA 252 (C) 261C-D; *Raats Röntgen and Vermeulen (Pty) Ltd v Administrator Cape* 1991 1 SA 827 (C) 837A; *Stopforth v Minister of Justice; Veenendaal v Minister of Justice* 2000 1 SA 113 (SCA) para 21.

15 For a discussion of this approach, see Cowen 1976 *TSAR* 156-158; Devenish *Interpretation of Statutes* 50-51.

16 In a talk on constitutional interpretation before a South African audience witnessing the beginning of their own tradition of constitutional interpretation. A transcript of this introductory talk/address during a seminar of the Centre for Applied Legal Studies at the University of the Witwatersrand is available as Michelman 1995 *SAJHR* 477-485. The seminar took place from 23 to 25 January 1995.

17 Michelman 1995 *SAJHR* 482.

> social consequences, perceived and intuited normative theories or unifying visions.[18]

German constitutional interpretation affords a special place to five theories of *fundamental rights* (*Grundrechtstheorien*),[19] namely the *classical liberal theory,* the *institutional theory,* the *value theory,* the *democratic-functional theory* and the *welfare-state* theory. Here too none of the theories enjoys pre-eminence in the jurisprudence of the Federal Constitutional Court, and in the circumstances of particular cases the court chooses freely which theory to rely on. *Theoretical multi-functionality* (*Multifunktionalität*), as Michael Sachs[20] calls this free choosing, is in other words also a feature of German constitutional interpretation.

4 Exit literalism and intentionalism, enter constitutionalism

Constitutional supremacy as both "a constitutional fact"[21] and a value[22] has dealt the dominance of the literalist-cum-intentionalist theory of interpretation – in the areas of statutory and constitutional interpretation at least – a decided blow. Nowadays a statutory provision is first and most importantly to be understood not as the legislature supposedly intended it, but in conformity with the *Constitution*. The possible meaning of a statutory provision most compatible with the *Constitution* is, in other words, to be preferred:

> The interpretative notion of ascertaining "the intention of the Legislature" does not apply in a system of judicial review based on the supremacy of the Constitution, for the simple reason that the Constitution is sovereign and not the Legislature.[23]

"All statutes must be interpreted through the prism of the Bill of Rights",[24] which means that section 39(2) of the *Constitution* actually establishes a new canon of statutory interpretation, namely that legislation must be construed to promote the spirit, purport and objects of the Bill of Rights. This canon cannot be overridden by

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18 Michelman 1995 *SAJHR* 483.

19 Böckenförde 1974 *NJW*. An English translation of this article occurs in Böckenförde *State, Society and Liberty* 175-203. See also Sachs *Grundgesetz Kommentar* 53-55

20 Sachs *Grundgesetz Kommentar* 55.

21 By virtue of s 2 of the *Constitution*.

22 By virtue of s 1(c) of the *Constitution*. See also Michelman "Rule of Law" 11-34 – 11-36.

23 Froneman J in *Matiso v The Commanding Officer, Port Elizabeth Prison* 1994 3 SA 592 (SE) 597E.

24 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd*. *In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) para 21.

"legislative intent" couched in (allegedly) "clear and unambiguous language". The "intention of the legislature", in all its possible significations, will always be subject (and second) to the *Constitution*, and not only when a statute is (allegedly) inconsistent with a provision or provisions of the *Constitution*.25 The interpretive strategy helping to give specific effect to this (new) canon of statutory interpretation in section 39(2) is known as *reading in conformity with the Constitution* (*Verfassungskonforme Auslegung*).

5 The notion of a "theoretical position" in law

A theory is explanatory and justificatory at the same time. A legal interpreter's theory of interpretation causes him or her to relate, intentionally or intuitively, issues of interpretation to broader questions regarding, amongst others, the role and function of language in law and the possibility of justice through the reading and realisation of written law. It also situates interpretive endeavours in a legal and constitutional tradition within prevailing understandings of matters of interpretive consequence, such as the nature and the division of power (reflected in, for example, *trias politica*) and the role appropriate to authorised (judicial and other) interpreters of the law in the system. An approach to interpretation is premised on and shaped by theoretical assumptions about the crucial matters just mentioned and by numerous other matters too. In constitutional interpretation these matters may, for instance, manifest in what Michelman calls "an emergent national sense of justice to which ... interpretations ... recursively" contribute.[26]

When the notion "theory of constitutional interpretation" is thought of as a position based on assumptions about the crucial matters mentioned above, it becomes clear why one-word depictions and one-sentence definitions – all parading as "theories" of

25 The court in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd*. *In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) para 21 motivated the overriding significance of the canon of statutory interpretation derived from s 39(2) as follows:
"All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens and includes all in the process of governance. As such, the process of interpreting the Constitution must recognize the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterizes the constitutional enterprise as a whole."

26 Michelman 1995 *SAJHR* 485.

or "approaches" to constitutional interpretation – are by themselves inadequate explanations of and justifications for "constitutional interpretation" in its complexity. Literalism, intentionalism and contextualism, for instance, cannot be *theories* of constitutional (or statutory) interpretation, but are at most elements of *theoretical positions.*

A theoretical position, pertinent to constitutional interpretation, is determined by the assumptions referred to above and it is a constitutional interpreter's theoretical position, rather than any specific conventional approach to (or common-law theory of) interpretation on which (s)he may rely that co-determines interpretive outcome.[27] To make an assumption involves making a choice. Theoretical positions on constitutional interpretation coming from choices thus made therefore order and rank (or hierarchize) interpretive preferences.[28]

A theoretical *position*, which is a theoretical *disposition* at the same time, is not in its entirety rationally or even consciously decided on. "Jurists in practice" (including judicial officers), especially, do not habitually devote time to reflect specifically on (and explain or justify) their theoretical positions, which mostly become discernible in the arguments they rely on to justify specific interpretive outcomes.[29] A theoretical position may nonetheless be reflected on, contested, defended, explained and (also consciously) changed. It may also be shared with others although, due to the uniqueness of each individual, no two theoretical positions can probably be identical in every detail. A theoretical position is constituted by multifarious interacting factors and forces, some of which result from conscious, reasoned choice, while others derive from intuitive perception. Covert and subconsciously held (theoretical) assumptions, precisely because of an interpreter's uncritical unawareness of them, often have a more decisive impact on interpretive outcome than overt and consciously reasoned assumptions.[30]

A nation's judiciary cannot assume a theoretical position *en bloc* on issues of

27 Michelman 1995 *SAJHR* 484-485.
28 Michelman 1995 *SAJHR* 484-485.
29 Michelman 1995 *SAJHR* 483-485 gives examples of this.
30 Fish *Doing What Comes Naturally* 358.

constitutional (or statutory) interpretation. The theoretical position of an individual judge may, as a matter of fact, vary from case to case depending on the measure of latitude that the law and the canons of construction allow for deciding the specific issues in a case.[31] However, it is possible that, within a given jurisdiction or tradition, a theoretical position of a certain kind may dominate how interpreters of a constitution (and of statutes and other law too), especially the judges and legal practitioners, approach their task. An overriding theoretical position may in time even become a template for additional (or *auxiliary*) positions on and approaches to interpretation.[32] *Literalism-cum-intentionalism* has long held a dominant position in statutory interpretation in South Africa,[33] with *contextualism* and *purposivism* mostly in auxiliary or secondary roles. The belief, growing in popularity, that since the advent of constitutional democracy in South Africa purposivism has been replacing literalism-cum-intentionalism as the template approach – definitely in constitutional interpretation, but increasingly so in statutory interpretation too – is not unproblematic.[34] It is a misapprehension that reliance on a single preferred approach to (constitutional or statutory) interpretation can eventually "make all the difference". Since 1994 it has mainly been "an emergent [new] national sense of justice" (à la Michelman)[35] – and not any particular interpretive approach – that has navigated constitutional and statutory interpretation in South Africa along previously unexplored pathways.

6 Interpretive leitmotivs and the law: some illustrations

The complexity of a theoretical position precludes a full and reliable depiction of it at first glance, and is most often recognised quite piecemeal, as it were, by effects or consequences in which it manifests (aspects of) itself, and not as a holistic picture of some sort. Theoretical positions, or aspects of them, can and do, for instance, become visible in *interpretive leitmotivs* detectable as recurring keynote or defining

31 See eg *Public Carriers Association v Toll Road Concessionaries (Pty) Ltd* 1990 1 SA 925 (A) 943C-944A.

32 In Du Plessis 2005 *SALJ* 591-613 the present author, for instance, showed how such a template position in South Africa occasioned the development of a hierarchical order of primacy involving the canons of and aids to statutory interpretation.

33 Du Plessis "Interpretation" 32-32 – 32-33.

34 Du Plessis "Interpretation" 32-52 – 32-56.

35 Michelman 1995 *SAJHR* 485. Also see Du Plessis "Interpretation" 32-52 – 32-56.

ideas, motifs or *topoi* guiding instances of constitutional interpretation. The same leitmotiv can manifest (aspects of) different theoretical positions on constitutional interpretation, but it is hardly conceivable that contradictory or conflicting theoretical positions will manifest in a significant number of similar or corresponding leitmotivs. The conventional approaches to – or theories of – statutory interpretation, such as literalism-*cum*-intentionalism or purposivism, cannot really be *leitmotivs* because they do not (re-)present and are not the sources of any ideas of significance from within themselves.

The judgment of the Constitutional Court in *MEC for Education: KwaZulu Natal v Pillay*[36] helpfully illustrates what leitmotivs are – and how one of the eminent leitmotivs in South African constitutional interpretation can enhance and enrich an interpretive event.

Sunali Pillay, a teenage Hindu girl, enjoyed an excellent school education at the Durban Girls' High School. In breach of a stipulation in her school's Code of Conduct Sunali, upon reaching physical maturity, had her nose pierced and a gold stud inserted not for fashion purposes, but to honour a long-standing family tradition, as a religious ritual and for cultural reasons. The school management refused to grant Sunali an exemption to wear the nose stud and this kick-started a series of litigation ending up in the Constitutional Court.

The Constitutional Court dismissed a number of arguments on behalf of the school, but of significance for the present purposes was the Court's response to the school's argument that wearing a nose stud was not a mandatory tenet of either Sunali's religion or her culture, and that the refusal of the exemption she sought would therefore not force her to do something against her religion or culture. The Court per Langa CJ disagreed:

> Freedom is one of the underlying values of our Bill of Rights and courts must interpret all rights to promote the underlying values of "human dignity, equality and freedom". These values are not mutually exclusive but enhance and reinforce each other ... The protection of voluntary as well as obligatory practices also conforms to the Constitution's commitment to affirming diversity. It is a commitment that is totally in accord with this nation's decisive break from its history of intolerance and

[36] *MEC for Education: KwaZulu Natal v Pillay* 2008 1 SA 474 (CC).

> exclusion. Differentiating between mandatory and voluntary practices does not celebrate or affirm diversity, it simply permits it. That falls short of our constitutional project which not only affirms diversity, but promotes and celebrates it. We cannot celebrate diversity by permitting it only when no other option remains.[37]

Listen! Do you hear it? The "never again" – "*nie wieder*"? The clarion call of memorial (or *Mahnmal*) constitutionalism which, together with monumental, transitional and transformative constitutionalism, has guided especially the Constitutional Court's interpretive thinking decidedly enough to have earned the appellation (and reputation) of leitmotivs in constitutional interpretation in South Africa. Observations about transitional and transformative constitutionalism will follow in due course, but first more about memorial and monumental constitutionalism.

7 Memorial and monumental constitutionalism

A constitution both *narrates* and *authors* a nation's history – so memorial constitutionalism maintains. Two constitutions since 1994 have accordingly archived as well as effected far-reaching change in South Africa. A constitution memorialises the past, but is also a monument triumphantly shedding the shackles of what went before, and setting a nation free to take thought (and responsibility) for its future. *Memorial constitutionalism is a 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) getting to grips with the future.*

Memorial constitutionalism, as interpretive leitmotiv, calls attention to and affirms the power of the unspectacular, non-monumental Constitution as vital (co-)determinant of constitutional democracy. The memorial Constitution coexists with the monumental Constitution,[38] kindling 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.

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37 *MEC for Education: KwaZulu Natal v Pillay* 2008 1 SA 474 (CC) paras 63-64, 65.

38 The image of the Constitution as monument and memorial emerged from legal scholars' engagement with the work of the South African philosopher, Johan Snyman, on the politics of memory. See Snyman 1998 *Acta Juridica* 317-321.

Monuments and memorials have memory in common, but in distinct ways: a monument celebrates; a memorial commemorates. The difference in (potential) meaning(s) between the two may be subtle, and some dictionaries may even indicate that "celebrate" and "commemorate" are synonyms, but according to memorial constitutionalists they are not really or, at least, not exactly synonymous. Heroes and achievements can be celebrated or lionised. The same does not apply to anti-heroes, failures and blunders: they must be remembered, yes, but they can hardly be celebrated. "Commemorate" is a feasible synonym for "remember", while "celebrate" is an exultant or jubilant mode of remembering. The closeness in meaning of "celebrate" and "commemorate" is not lamentable, however. On the contrary, it suggests their coexistence - contradictions notwithstanding. The German *Denkmal* and *Mahnmal* neatly capture the said contradictions. A *Denkmal* can celebrate (and may even commemorate), but a *Mahnmal* inevitably warns (and may even castigate). Monuments and memorials are aesthetic creations, and memorial constitutionalism contends that a constitution may, with interpretive consequences, be thought of as such a creation too.[39]

Restrained *Mahnmal* constitutionalism has resounded, in post-apartheid South Africa, the "*Nie wieder!*" that also inspired constitutionalism in a post-Holocaust Germany.[40] On the strength of this *Mahnmal* constitutionalism, human dignity as a value has, for instance, gained an upper hand in our constitutional project in general, and in our constitutional jurisprudence. This is true of our equality jurisprudence in particular.

MEC for Education: KwaZulu Natal v Pillay[41] must be understood in this context. In a sense *Pillay* is (to use a Dworkinian metaphor)[42] a chapter in a constitutional chain novel rigorously interrogating issues of identity and difference. A resoluteness not to repeat the injustices of the past has resulted in the affirmation of the status and dignity of several vulnerable groups and categories of persons who, under a culture of authority, had been marginalised and stigmatised for their non-compliance with "mainstream" morality and its preconceptions about how societal life is best

39 Le Roux 2005 *TSAR* 107.
40 Du Plessis L "German *Verfassungsrecht*" 531.
41 *MEC for Education: KwaZulu Natal v Pillay* 2008 1 SA 474 (CC).
42 Dworkin *Law's Empire* 228-238.

organised. Emblematic of the courts' (and especially the Constitutional Court's) affirmative endeavours are the confidence and forthrightness with which, unperturbed by the conventional public-private divide, they have addressed deficiencies in laws regulating intimate relationships. Landmark judgments that come to mind in this regard are *National Coalition for Gay and Lesbian Equality v Minister of Justice*[43] (the criminalisation of sodomy was found to be unconstitutional); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*[44] (the court read words into a statutory provision to extend immigration benefits that "spouses" of South African nationals enjoyed to same sex life-partners); *Satchwell v President of the Republic of South Africa*[45] (words were read into a statutory provision conferring financial benefits on a judge's "surviving spouse" so as to extend such benefits to a same sex life-partner); and *Daniels v Campbell*[46] (a surviving "spouse" reaping benefits from legislative provision for maintenance was held to include a partner in a Muslim marriage).[47] *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*,[48] the Constitutional Court judgment in which the statutory and common-law exclusion of same-sex life partnerships from the ambit of "marriage" was held to be unconstitutional, constitutes a high-water mark in the evolution of the constitutional jurisprudence on issues of identity and difference drawing on the compelling strength of memorial constitutionalism.

There are also some quite pedestrian cases in which memorial constitutionalism as a leitmotiv guided the Constitutional Court's reasoning decisively and had already done so since the early days of constitutional democracy.[49] In *Jafta v Schoeman; Van Rooyen v Stoltz*,[50] for instance, the Court was called upon to consider a challenge to

43 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC).
44 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 2000 2 SA 1 (CC).
45 *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC).
46 *Daniels v Campbell* 2004 5 SA 331 (CC).
47 For more examples, see *Du Toit v Minister for Welfare and Population Development* 2003 2 SA 198 (CC); *J v Director-General Department of Home Affairs* 2003 5 SA 621 (CC).
48 *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC).
49 See eg *S v Mhlungu* 1995 3 SA 867 (CC) para 111; *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 41; *Shabalala v Attorney-General, Transvaal* 1996 1 SA 725 (CC) para 41; *Minister of Finance v Van Heerden* 2004 6 121 (CC) para 27.
50 *Jafta v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC).

the constitutionality of certain provisions of the *Magistrates' Court Act*[51] which, in practice, had the effect that the houses of indigent judgment debtors – many of them first-time home owners who had acquired their homes with state subsidies – were attached and sold in execution to satisfy trifling debts. This, the applicants contended, was incompatible with the rights to adequate housing and security of (residential) tenure entrenched in sections 26(1) and 26(3) of the *Constitution*. In considering the challenge, the Court per Mokgoro J made it clear that "[s]ecurity of tenure in our historical context" had to be a crucial part of the enquiry.[52] The Court's reasoning in this case as well as the remedial relief it eventually granted to mitigate the effects of the impugned legislation bear the hallmark of memorial constitutionalism.

8 Transitional constitutionalism: the one-way bridge of justification

Transitional constitutionalism as the constitutionalism of justification depicts the *Constitution* as a bridge from the "old" South Africa to the "new", and thereby from a culture of authority to a culture of justification.[53]

South Africa's 1993 (transitional) *Constitution*[54] concluded with an unusual Postamble (or Postscript), an exhibition of efflorescent language, entitled *National Unity and Reconciliation* and decreed[55] to form part of the substance of the *Constitution*. The Postamble anticipated that the *Constitution* would provide "a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex". It furthermore verbalised a quest for "the pursuit of national unity, the well-being of all South African citizens and peace", requiring "reconciliation between the people of South Africa and the reconstruction of society".

51 *Magistrates' Courts Act* 32 of 1944.
52 *Jafta v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) paras 25-34.
53 Mureinik 1994 *SAJHR* 31-32.
54 *Constitution of the Republic of South Africa* 200 of 1993.
55 By virtue of s 232(4) of the said transitional *Constitution.*

The Postamble found its way into the transitional *Constitution* as an attempt to break a deadlock in the constitutional negotiations resulting from the constitution-makers' inability to agree, in precise terms and in time for the adoption of the transitional *Constitution*, on how to deal with "gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge" from the past.[56] The Postamble thus envisaged, in broad terms, the eventual adoption of cut-off dates and "mechanisms, criteria and procedures" for amnesty "in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past". The *Promotion of National Unity and Reconciliation Act*[57] was subsequently enacted, stipulating conditions – and laying down procedures to apply – for such amnesty.

Much of the spirit and tenor of the Postamble survived in the Preamble to the 1996 *Constitution* – with implications for the latter as a possible textual source-in-writing of transitional constitutionalism as interpretive leitmotiv.

"What is the point of our Bill of Rights?" Etienne Mureinik asked in one of the earliest commentaries on South Africa's first (or transitional) Bill of Rights,[58] and then set out to answer this question, exploring the bridge metaphor in the Postamble to the transitional *Constitution*:[59]

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

Justification and transition-as-a-bridge are not intrinsically related, but combining them presented an unusually powerful image of the "culture of justification" that many – like Mureinik – believed to be the quintessence of the new constitutional dispensation in South Africa. To this day Mureinik's articulation of (especially) what "the new Constitution" *clearly* "must be a bridge to" has been cited with approval

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56 For more on the nature of the compromise the parties reached, see Dyzenhaus *Truth, Reconciliation* 1-6.

57 *Promotional of National Unity and Reconciliation Act* 34 of 1995.

58 Ch 3 of the transitional *Constitution*.

59 Mureinik 1994 *SAJHR* 31-32.

and appreciation by many South African courts and by the Constitutional Court in particular,[60] and has thereby indeed established itself as an interpretive leitmotiv of consequence, more aptly depicted as *justificatory* rather than *transitional* constitutionalism. *The constitutionalism of justification* is a more elegant alternative for justificatory constitutionalism.

Much within the precincts of "the culture of justification" in administrative law is, at any rate, under the regulative authority of the *Promotion of Administrative Justice Act*,[61] a statute required by section 33(3) of the *Constitution* and enacted to give specific effect to the fundamental right to just administrative action entrenched in the Bill of Rights.[62] Some Constitutional Court judgments have, however, also contributed substantially to establish a culture of justification as a benchmark for administrative action.

In *Pharmaceutical Manufacturers Association of SA. In re: The Ex Parte Application of the President of the RSA*[63] the Constitutional Court, for instance, proclaimed the essential unity of the *Constitution* and (administrative) common law in dealing with the exercise of public power,[64] rejecting a suggestion – of the Supreme Court of Appeal in *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennie Group Ltd trading as Renfreight*[65] – that any common law from an era predating the inception of a constitutional culture of justification has continued to survive undisturbed. The judgments in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*[66] and *Minister of Health v New Clicks South Africa (Pty) Ltd*,[67] duly accounting for the effects of the

60 Here are but a few examples: *Qozoleni v Minister of Law and Order* 1994 3 SA 625 (E) 634E-F; *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) para 25; *Pharmaceutical Manufacturers Association of SA. In re: The Ex Parte Application of the President of the RSA* 2000 2 SA 674 (CC) para 85 n 107; *Matatiele Municipality v President of the Republic of South Africa* 2007 1 BCLR 47 (CC) para 100.

61 *Promotion of Administrative Justice Act* 3 of 2000.

62 In s 33(1) of the *Constitution*.

63 *Pharmaceutical Manufacturers Association of SA. In re: The Ex Parte Application of the President of the RSA* 2000 2 SA 674 (CC).

64 The judgement predates the commencement of the *Promotion of Administrative Justice Act*.

65 *Commissioner for Customs and Excise v Container Logistics (Pty) Ltd; Commissioner for Customs and Excise v Rennies Group Ltd t/a Renfreight* 1999 3 SA 771 (SCA).

66 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC).

67 *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC).

Promotion of Administrative Justice Act, have also contributed significantly to the culture of justification in administrative law.

A constitutionalism of justification is most certainly not only of consequence in relation to administrative justice, and the Constitutional Court's judgment in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*,[68] (the *FNB* case) developing a set of guidelines for determining when a deprivation of property is arbitrary and hence *unjustified*, is therefore also a crucial contribution to the kind of jurisprudence Mureinik must have anticipated when he spelt out his understanding of crossing the bridge of transition in South Africa. Adjudicative determination of the issue of arbitrariness was overdue and necessary for the peace of mind of propertied beneficiaries under section 25 of the *Constitution* (the property clause) and to promote legal certainty. The advantages of this landmark judgment have, however, been eroded to some extent by what could be construed as the Constitutional Court's subsequent retreat from its *FNB*[69] position in, for instance, the case of *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign MEC for Local Government and Housing, Gauteng*.[70] The flexible and context-sensitive manner in which the *FNB*[71] guidelines, as conceptual distinctions, were converted into a multi-factor balancing test,[72] probably paved the way for deviation from them in *Mkontwana.*[73]

If the *FNB* case[74] has had the potential to conduce property owners' peace of mind, then the Constitutional Court judgment in *Alexkor Ltd v The Richtersveld*

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68 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.

69 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.

70 *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng* 2005 1 SA 530 (CC). For a critical discussion of this case, see Van der Walt 2005 *SALJ* 75-89.

71 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.

72 Roux 2009 *ICON* 106-138.

73 *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng* 2005 1 SA 530 (CC).

74 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.

Community,[75] and the preceding judgment of the Supreme Court of Appeal in the same case[76] certainly have the potential to kindle the property aspirations of prospective beneficiaries of section 25, and especially communities and individuals whose property was taken away from them under a colonial and apartheid culture of authority.[77] The *Richtersveld* judgments have gone a long way towards bringing the common law on indigenous title within the ambit of a constitutionalism of justification – just as the *FNB* case[78] had done with the Roman-Dutch based common law of property.

A high threshold of justification applies when legislative and administrative action, likely to compromise the rudiments of constitutional democracy, is up for constitutional review. In the course of such a review South Africa's two highest courts have emerged as staunch guardians of, for instance, participatory democracy in law-making. Both the Supreme Court of Appeal, in *King v Attorneys Fidelity Fund Board of Control*,[79] and the Constitutional Court in *Doctors for Life v Speaker of the National Assembly*[80] as well as *Matatiele Municipality v President of the Republic of South Africa*,[81] required the National Assembly's meticulous compliance with its constitutional obligations[82] to facilitate public involvement in its legislative and other processes, and in its committees, and to conduct its business in an open manner. The absence of meticulous compliance with these obligations, it was held, renders legislative action and legislation ensuing from such action null and void.[83] The case of *African Christian Democratic Party v The Electoral Commission*[84] was also an instance of guarding the rudiments of popular democracy not by strictly enforcing

75 *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC).

76 *Richtersveld Community v Alexkor Ltd* 2003 6 BCLR 583 (SCA); but not so much the judgement in the Land Claims Court as the court of first instance – *Richtersveld Community v Alexkor Ltd* 2001 3 SA 1293 (LCC).

77 Mureinik 1994 *SAJHR* 32.

78 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.

79 *King v Attorneys' Fidelity Fund Board of Control* 2006 1 SA 474 (SCA).

80 *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC).

81 *Matatiele Municipality v President of the Republic of South Africa* 2007 1 BCLR 47 (CC).

82 In s 59(1) of the *Constitution*.

83 The Supreme Court of Appeal in *King v Attorneys' Fidelity Fund Board of Control* 2006 1 SA 474 (SCA) could of course not make a declaration of invalidity because adjudication of the National Assembly's fulfilment of this obligation is, in terms of s 167(4)(e) of the *Constitution,* within the exclusive jurisdiction of the Constitutional Court.

84 *African Christian Democratic Party v The Electoral Commission* 2006 3 SA 305 (CC).

procedural requirements, but by relaxing them (through purposive interpretation) in order to "promote enfranchisement rather than disenfranchisement and participation [in] rather than exclusion from municipal elections".[85]

The South African Constitutional Court has also earned itself a complimentary reputation for its "... 'universalist interpretation' of constitutional rights, in a series of judgments relating mostly to criminal processes",[86] beginning with judgements such as *S v Makwanyane*[87] and *S v Zuma*.[88] Vigilance in guarding the due process of the law in criminal proceedings is very much a distinctive attribute of a constitutionalism of justification.

9 Transformative constitutionalism: the bridge bridging

Transformative constitutionalism, in the words of Karl Klare,[89]

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

Klare wrote these words in an article on transformative constitutionalism in which he paid tribute to Etienne Mureinik, the principal proponent of a constitutionalism of justification.

Some critical legal scholars have questioned justificatory constitutionalism's use of the bridge metaphor to depict transition as a once-off, linear progression from "the old dispensation" to "the new", and thus from a culture of authority to a culture of justification. André van der Walt, for instance, claims that

> ... the bridge metaphor ... allows for another interpretation where the bridge is not simply an instrument for getting out of one place and into another, but an edifice that is inherently related to the abyss which it spans. Here, the focus is not on the two spaces on either side of the abyss, but on the abyss itself – the bridge is

85 *African Christian Democratic Party v The Electoral Commission* 2006 3 SA 305 (CC) para 23.
86 Peters "Globalization of State Constitutions" 300-301.
87 *S v Makwanyane* 1995 3 SA 391 (CC).
88 *S v Zuma* 1995 2 SA 642 (CC).
89 Klare 1998 *SAJHR* 150.

> functionally and inherently linked to and obtains its significance from the abyss beneath it, so that the bridge is not a temporary instrument for a single crossing, one way, but allows and invites multiple crossings, in both directions, since there is no inherent value attached to being one side of the bridge rather than the other. In this alternative interpretation of the bridge metaphor the danger is to stay on one side, while the bridge allows us to connect one side with the other.[90]

Wessel le Roux adds that it is not the bridge itself which is significant but the act of bridging, of linking the past and the future, reality and imagination, in order to create new ideas in the present.[91] Memorial constitutionalism makes very much the same point: South Africa is *still* coming to terms with its notorious past along the way of *still* getting to grips with the future. The past cannot and should not be left behind – there is in other words no once-off crossing of the bridge – and the promise of the future gains much of its significance from engagement with the past.[92]

Michael Bishop calls the bridge that Van der Walt and Le Roux metaphorically envision "a transformative bridge" and explains its significance as follows:

> [V]an der Walt and le Roux offer a space in which dialogue and transformation are truly possible, in which new ways of being are constantly created, accepted and rejected and in which change is unpredictable and constant. I would call this a transformative bridge because it envisions constant change and re-evaluation without end, rather than a move from one point to another ... [T]he transitional bridge is a path, while the transformative bridge is a space.[93]

What emerges from the discussion so far is that *transformative constitutionalism* has every potential to impact constitutional (and, more generally, legal) interpretation profoundly and guide, as a leitmotiv, both the interpretive mind-set (also read: theoretical position(s)) and the interpretive style (also read: methodology) of especially judicial interpreters of the *Constitution*, in an irrevocably new direction.[94] South Africa's *Constitution* is furthermore thoroughly transformative in many respects, and in section 7(2) it invites (and arguably compels) the optimum realisation of the rights entrenched in the Bill of Rights, requiring the state not only

90 Van der Walt 2001 *SALJ* 295-296.
91 Le Roux 2004 *SA Public Law* 634.
92 Van der Walt 2001 *SALJ* 296.
93 Bishop "Transforming Memory" 37.
94 On the impact of transformative constitutionalism on constitutional interpretation and adjudication, see Klare 1998 *SAJHR* 146-188; Pieterse 2005 *SA Public Law* 155-166; Langa 2006 *Stell LR* 351-360.

to respect and protect, but (also) to *promote* and *fulfil* those rights.

Klare typifies the South African *Constitution* as "post-liberal" because it simultaneously entrenches conventional liberal democracy *and* the basic tenets of (and normative preconditions to) an all-out transformation of South African society.[95]

The distinctive traits of the transformative South African *Constitution* are said to be (among others) "the attainment of substantive equality, the realisation of social justice, the infusion of the private sphere with human rights standards and the cultivation of a culture of justification in public law interactions".[96] Pius Langa, South Africa's former Chief Justice, in an extra-curial writing, conceives of such traits as challenges posed by the transformative *Constitution*, namely to procure equal access to justice for all, to educate law students who will be up to the demands of the kind of legal and social order envisaged in the *Constitution*, to rid the legal culture of its formalism, and to create a climate for and, indeed, conduce national reconciliation.[97] The transformative nature of the *Constitution* has far-reaching implications for its interpretation and necessitates a decisive makeover of legal culture, especially as it manifests in the conventional manners (and assumptions) of adjudicative reasoning pertinent to the interpretation and implementation of enacted law. Klare writes in this regard:[98]

> The Constitution invites a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals. By implication, new conceptions of judicial role and responsibility are contemplated. Judicial mind-set and methodology are *part of the law*, and therefore they must be examined and revised so as to promote equality, a culture of democracy and transparent governance.

According to Klare the drafters of the *Constitution*, having dramatically reworked substantive constitutional foundations and assumptions, could not have intended the new *Constitution* to be interpreted with reliance on conventional legalist methods of interpretation, thereby having its transformative qualities restrained by "the intellectual instincts and habits of mind of the traditional common or Roman-Dutch

95 Klare 1998 *SAJHR* 153; also see Pieterse 2005 *SA Public Law* 163-164.
96 Pieterse 2005 *SA Public Law* 161. Also see Langa 2006 *Stell LR* 353-354.
97 Langa 2006 *Stell LR* 354-359.
98 Klare 1998 *SAJHR* 156.

lawyer trained and professionally socialized during the apartheid era".[99] Transformative constitutionalism thus inspires preference for non-formalist, non-legalist and non-literalist approaches to constitutional interpretation and, very importantly, it explodes the myth that an a- or non-political legal interpretation – and constitutional interpretation, in particular – is achievable.

South African courts (and the Constitutional Court in particular) have on several occasions in the course of construing the *Constitution*, made boldly transformative moves. Most of the judgements where this happened could well be depicted as instances of transformative constitutionalism, though in much of its jurisprudence on intimate relationships – which is outcome-wise very progressive – the Constitutional Court tended to rely on a rather conventional formalist, legalist and literalist approach to constitutional interpretation, thereby dashing Klare's hopes that transformative constitutionalism would go hand in hand with an innovative mode of constitutional interpretation shedding conventional -isms.[100]

The Constitutional Court judgements most directly and evidently inspired by transformative constitutionalism as an interpretive leitmotiv are probably those dealing with the state's obligation to implement socioeconomic rights. *Government of the Republic of South Africa v Grootboom*[101] heralded a wholehearted (judicial) acceptance of the justiciability of the socioeconomic entitlements enshrined in the Bill of Rights (in sections 26 and 27 in particular). It furthermore emphasised competent courts' responsibility to enforce these entitlements by carefully crafting appropriate "orders with teeth" to redress government authorities' disinclination and/or incapacity to procure access to the commodities to which the said entitlements pertain. The *Grootboom* judgment blazed the trail for the bold and far-reaching declaratory and mandatory orders in *Minister of Health v Treatment Action Campaign*,[102] compelling the fulfilment of the state's constitutional mandate (and obligation) to supply and administer Nevirapine to HIV-positive women and their

99 Klare 1998 *SAJHR* 156.
100 Klare 1998 *SAJHR* 156.
101 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).
102 *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC).

babies.[103]

Generally speaking, it is transformative constitutionalism that pilots and shapes meaningful implementation of the socioeconomic rights enshrined in the Bill of Rights. According to Sandra Liebenberg[104] South Africa's transformative *Constitution*, with its decided emphasis on socioeconomic rights, "aims to facilitate the transformation of society by setting right the wrongs of the past", but also "aims at facilitating the construction of a new political, social and economic order 'based on democratic values, social justice and fundamental human rights'".[105] The *Constitution* is, in other words, both backward-looking and forward-looking – an insight that also resonates favourably with memorial constitutionalism.

10 Intermezzo

So far only tentative conclusions can follow from a still incomplete catalogue of leitmotivs in action, gleaned from actual instances of constitutional adjudication. Working with the samples selected it has become clear that an incontrovertible classification of judgments with reference to dominant leitmotivs determining their outcome is not achievable. The impetus of memorial constitutionalism, for instance, decisively codetermined the outcome of Constitutional Court cases in which rights to criminal due process in accordance with the exigencies of a constitutionalism of justification were meticulously upheld. It also appeared that a progressive and activist – backward- and forward-looking – adjudication of socio-economic rights issues can draw momentum both from transformative and memorial constitutionalism.

How then do leitmotivs help us to do "better" constitutional interpretation? To begin with, they show up rights interpretation and application as more than just an intellectual or "logical" process of deduction and subsumption. It is also an engaging performance of aesthetic significance, into the spirit of which an interpreter can enter. Most dictionaries give, as the primary meaning of "leitmotiv", something like

103 *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC).
104 Liebenberg *Socio-economic Rights* 25.
105 See the preamble to the *Constitution;* Liebenberg *Socio-economic Rights* 27.

"[a] theme associated throughout a [musical] work with a particular person, situation, or sentiment".[106] This phenomenon is especially associated with the opera music of Richard Wagner. Some dictionaries will concede that a leitmotiv can also be "[a] recurrent idea or image in a literary work etc.".[107] The entry "leitmotiv" is absent from most dictionaries of philosophy, dictionaries of ideas and dictionaries of the humanities and social sciences. The *Woordeboek van die Afrikaanse Taal* (*WAT*), on the other hand, generously explores quite a range of meanings of the word "leitmotiv"[108] (also "leidmotief", "leimotief" and "leitmotief"[109]).

It is significant that "leitmotiv" is so closely associated with music, for there is much to say for the contention that reading and applying a Constitution (and, as a matter of fact, any enacted law) is more like performing a piece of music than like reading a newspaper. Enacted laws are made and meant to have effect, and their provisions must accordingly be construed to be of consequence. Its *effect-directedness* makes an enacted law-text – a constitution- or a statute-in-writing – very much like sheet music. Its meaning and effects cannot be grasped sufficiently simply by reading it. Its "execution" or "performance" must also be experienced, or must at least be imaginable, to fully understand it. The actual effect of a constitutional provision can also not be gauged simply by reading and attaching meaning to signifiers that appear on paper, but rather from the manner in which the provision is (or could be) *construed* and *applied* in a real-life situation. Someone who can read music well can also "hear" the music when reading a score. The interpreter of enacted law-texts, especially someone with experience, reads those texts in a similar way. (S)he can imagine what a provision will "sound" like in a concrete, real-life situation. This could be because (s)he is seeking a solution to an actual problem or because (s)he hypothesises (and thus "conceives of") potentially problematic situations.[110] Actual or potential applications of any law, including provisions of enacted law such as the *Constitution*, determine their construction decisively: there is a unity in the duality of what is traditionally known (and unfortunately all too often too categorically

106 See eg Oxford University Press *Shorter Oxford English Dictionary.*
107 Oxford University Press *Shorter Oxford English Dictionary.*
108 WAT Date Unknown http://woordeboek.co.za.
109 WAT Date Unknown http://woordeboek.co.za.
110 Du Plessis 2000 *SA Public Law* 295.

distinguished) as *interpretation* and *application*.

11 Finale (and concluding perspectives)

"Objection!" a disillusioned (and by now wary and weary) reader of the *Constitution* may bellow, and then continue: "Enough of a Constitution with its perennial erosion and inevitable disempowerment of tried and tested common-law principles; with its enfeebling overemployment and mixing-up of assorted values; with its prolific production of sonorous jargon like subsidiarity, 'judicial self-restraint', *trias politica,* 'reading in conformity with the Constitution' and, on native African soil, *ubuntu, ubuntu* and *ubuntu*."[111] Must "leitmotiv" really be squeezed into an arsenal already replete with the law's construction equipment such as ideas, values, concepts, principles, rules, canons, theories and doctrine? Do we, in any event, need "leitmotiv" in our "lawspeak?" Our seemingly well informed, hypothetical denigrator is clearly sceptical (to say the least) about any possibility that working with (the notion of) leitmotivs can add value to the construction of enacted law.

A preponderance of opinion has it that the idea of leitmotivs sits most comfortably with pen-art (that is, creative writing such as poetry, prose and drama), the plastic arts and the performing arts (especially music). It is unnecessary, however, to devote time to proving or disproving this proposition, for it is also widely accepted that leitmotivs do occur and indeed thrive in text genres other than those just mentioned, and most certainly in law-texts too, albeit sporadically and often unnamed as such.

In several places in the constitutional text, a formulaic reference to "an open and democratic society" occurs, and in most instances it is followed by the further qualifier "based on human dignity, equality and freedom". The three key values just mentioned can also be referred to as the "triumvirate" of values. The Preamble, in an anticipatory vein, speaks of a democratic and open society whose foundations were laid with the adoption of the *Constitution*. In Chapter 1 of the *Constitution*,

111 Metaphorically expressing itself as *umuntu ngumuntu ngabantu:* "a person is a person because of people" or "a person is a person through other persons"; see *S v Makwanyane* 1995 3 SA 391 (CC) para 10.

entitled Founding Provisions, and especially in section 1(a), human dignity, the achievement of equality and the advancement of human rights and freedoms are said to be values on which the state is founded. This is serious business, which is why amendments to sections 1 and 74(1) of the *Constitution* require an "extraordinarily enhanced" majority of 75 per cent, surpassing the two-thirds benchmark for a "standard" or "ordinarily enhanced" majority.

Section 7(1) introduces the Bill of Rights as "a cornerstone of democracy in South Africa" affirming, among other values, "the democratic values of human dignity, equality and freedom". Section 39(1) enjoins adjudicative fora, construing legislation and developing common and customary law, to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom". Of the same tenor are stipulations in section 36(1) regarding the extent to which a law of general application may limit a constitutional right. The limitation must, among other things, be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".

These are but some examples of the constitutional references to a free and open society and the triumvirate of values on which it is based. The said examples come from section 1 of the *Constitution* and from the Bill of Rights, and they closely link (the ideal of) an open and democratic society with the triumvirate of values, tellingly instantiating a leitmotiv which recurs as the keynote or defining idea, motif or *topos*[112] throughout the Bill of Rights, but arguably also throughout the *Constitution* as a whole. This leitmotiv is *the (ideal of an) open and democratic society based on human dignity, equality and freedom.*

A leitmotiv could – in some instances more than in others - have a lot to do with values and principles and especially with reading and communicating (and "digesting") them. But a leitmotiv is not a value or a principle *per se*, and *vice versa*. It is, as its name indicates, a *motif* of a sort – also referred to as a *literary device*. Judiciously invoked, however, a leitmotiv is, in point of fact, much more than a

112 *Topos*: a traditional or conventional literary or rhetorical theme or topic; plural *topoi*.

literary device. It can, for instance, be quite useful in contemplating and developing a reading (and listening) strategy for non-literary texts too. The examples from the Bill of Rights above indeed show that the notion of a "leitmotiv" can also work quite efficiently with law-texts, and especially with the *Constitution*.

A leitmotiv is usually thought of as a phenomenon on the move, recurrently establishing and asserting itself, and frequently encountered in a text. But it is not all about movement, generated by, amongst other impulses, the recurrence of a prospective leitmotiv. A broad interest in the consequences of the motif's amassing power and attaining precedence to the point where it achieves the status of a leitmotiv is also up for scrutiny. The movements of a leitmotiv can then, for the time being, be reined in, since a host of other factors can at this point join in to add to or subtract from the status and weightiness of a prospective leitmotiv. Recall the founding provisions in section 1 of the *Constitution*. As explained before, they are entrenched more rigidly than other sections of the *Constitution,* requiring among other things an "extraordinarily enhanced" majority (75 per cent versus 66⅔ per cent) for their amendment. This in itself, directly and indirectly, enhances the status of these provisions. The full implications of this proposition stand to be determined from case to case and vis-a-vis – but also in interactive "partnership" with – other texts. Scouting out and engaging with leitmotivs call for profound reading and for text analysis of a sort with which "logical" jurists are not always too comfortable, but which at all times have the potential to be exceptionally rewarding.

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LIST OF ABBREVIATIONS

ICON	International Journal of Constitutional Law
NJW	Neue Juristische Wochenschrift
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review
TSAR	Tydskrif vir Suid-Afrikaanse Reg
WAT	Woordeboek van die Afrikaanse Taal

THEORETICAL (DIS-) POSITION AND STRATEGIC LEITMOTIVS IN CONSTITUTIONAL INTERPRETATION IN SOUTH AFRICA

L Du Plessis*

SUMMARY

This essay takes a look at the historic restoration that bequeathed this country and its people a prototypical, justiciable *Constitution*. The advent of constitutional democracy in South Africa went hand in hand with an about-turn in the interpretation of enacted law-texts (including the *Constitution*) and a critical interrogation of certain dominant beliefs about the interpretation of law in general and enacted law in particular. Hitherto mostly unnamed or unlabelled (but not entirely alien) interpretive strategies pursued and developed by users of the *Constitution* are discussed, concentrating mainly on the jurisprudence of the Constitutional Court.

Central to the author's approach is an acknowledgement of the decisive actuality of an interpreter's theoretical position becoming visible through (interpretive) leitmotivs. These recur as keynote or defining ideas, motifs or *topoi* lending direction to specific instances of construing law. Four leitmotivs pertinent to certain constellations of events in constitutional interpretation are discussed and their applicability and utility assessed, drawing on examples from constitutional case-law. The leitmotivs are: (i) transitional constitutionalism; (ii) transformative constitutionalism; (iii) monumental constitutionalism; and (iv) memorial constitutionalism. (i) and (ii) belong together as (A) programmatic leitmotivs and (iii) and (iv) as (B) commemorative leitmotivs.

The author concludes that, although scouting out and engaging with leitmotivs call for profound reading and for text analysis of a sort with which "logical" jurists are not always too comfortable, the said endeavours have the potential to be exceptionally rewarding.

* Lourens du Plessis. Hons BA (Stellenbosch), B Jur et Comm, LLB, B Phil, LLD (PU vir CHO). Extraordinary Professor of Law, North-West University (Potchefstroom). E-mail: lourens.duplessis@nwu.ac.za.

KEYWORDS: Constitution; Constitution – interpretation of; Constitutional Court – interpretive strategies; leitmotiv – Constitution – interpretation; memorial constitutionalism; monumental constitutionalism; transformative constitutionalism; transitional constitutionalism.

OPSOMMING:

In hierdie opstel word die historiese nalatenskap wat aan ons land en mense 'n prototipiese, beregbare grondwet besorg het, in oënskou geneem. Die koms van demokrasie in Suid-Afrika het hand aan hand gegaan met 'n ommekeer in die vertolking van verordende wetstekste (insluitend die Grondwet) en 'n kritiese bevraagtekening van sekere dominante opvattings oor die vertolking van die reg oor die algemeen en verordende reg in besonder. Dusver onbenoemde of ongeëtiketteerde (maar nie geheel en al vreemde) vertolkingstrategieë (nie), nagevolg en ontwikkel deur gebruikers van die Grondwet, word bespreek met klem op regspraak van die Konstitusionele Hof.

Sentraal tot die outeur se benadering is erkenning van die sleutelrol wat 'n vertolker se denkhouding in die vertolking van verordende wetstekste speel, en hierdie denkhouding kom tot uitdrukking in (vertolkende) leitmotivs. Hierdie leitmotivs herhaal hulself as sleutel- of definiërende idees, motiewe of *topoi* wat rigting gee aan besondere gevalle van wetsteksvertolking. Vier leitmotivs in bepaalde konstellasies van gebeure in grondwetsvertolking word bespreek en hulle toepaslikheid en nut word geëvalueer, met verwysing na voorbeelde uit ons grondwetlike presedentereg. Die betrokke leitmotivs is (i) oorganklike grondwetmatigheid; (ii) transformatiewe grondwetmatigheid; (iii) monumentale grondwetmatigheid, en (iv) kommemoratiewe (ook moontlik: kommememorabele) grondwetmatigheid. (i) en (ii) hoort saam as (A) programmatiese leitmotivs en (iii) en (iv) as (B) leitmotivs van gedenkmatige hoop.

Die outeur kom tot die slotsom dat, hoewel die identifikasie van en omgang met leitmotivs 'n diepgaande lees en teksanalise vereis waarmee "logiese juriste" nie altyd gemaklik is nie, die onderneming as sodanig in verskeie opsigte lonend kan wees.

TREFWOORDE: Grondwet; Grondwet – vertolking; grondwetmatige herinnering; leitmotiv – Grondwet – vertolking; monumentale grondwetmatigheid; oorganklike grondwetmatigheid; transfomatiewe grondwetmatigheid.