SELECT ESSAYS ON GOVERNANCE AND ACCOUNTABILITY ISSUES IN PUBLIC LAW

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THE THEORETICAL (AND CONSTITUTIONAL) UNDERPINNINGS OF STATUTORY INTERPRETATION*

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1.1 INTRODUCTION

The goal of statutory interpretation is central to the understanding of the theories and methods of statutory interpretation. There is, however, no consensus as to what this goal should be. Historically, the goals of statutory interpretation (and accordingly theories thereof) have been dependent on the views of the interpreter in relation to various factors. These will be the topic of consideration of this chapter. The judicial power of interpretation derives from the Constitution of the Republic of South Africa, 1996 (the Constitution), yet the Constitution does not prescribe a single accepted thesis of interpretation,¹ although it is trite that the South African judiciary has adopted an approach to the interpretation of statutes that seeks to animate and give life to the values and rights in the Constitution.²

Following the advent of constitutional democracy, “broad” purposive or teleological interpretation has been established as the dominant mode of statutory interpretation.³

1 Cross *Theory and Practice of Statutory Interpretation* (2009) 1.

2 See Botha *Waarde-aktiverende Grondwetuitleg: Vergestaltung van die Materiële Regstaat* (1996 thesis UNISA).

3 Van Staden “The role of the judiciary in balancing flexibility and security” 2013 *De Jure* 470-476. Teleological interpretation is the primary interpretive method in the Federal Republic of Germany (see Möllers *Legal Methods* (2020)), France (see Vogenauer *Die Auslegung von Gesetzen in England und auf dem Kontinent* (2001) 286) and Spain (see a 3(1) of the Spanish Código Civil). Although there is some authority for teleological interpretation in the United States of America (see section 1-103 of the Uniform Commercial Code), conservative judges of the US Supreme Court have been reluctant to look beyond the text of a legislative provision (see Scalia “Textualism and the Constitution” in Miroff, Seidelman and Swanstrom (eds) *Debating Democracy: A Reader in American Politics* (2010) 288-294). The approach is also becoming more preeminent in England and Wales (see *Pepper (Inspector of Taxes) v Hart* [1992]

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However, as the Court in *Qozoleni v Minister of Law and Order*⁴ pointed out, “it serves little purpose to characterise the proper approach to constitutional interpretation as liberal, generous, purposive or the like. These labels do not in themselves assist in the interpretation process and carry the danger of introducing concepts or notions associated with them which may not find expression in the Constitution itself.”⁵ As such, it is of paramount importance to investigate the theoretical (and constitutional) underpinnings that animate such an approach to the interpretation of statutes.

In South Africa, the views that underlie any given theory of statutory interpretation are dependent upon the Constitution. They are considerations of the relevance of the intention of the legislature, the nature and function of language, the role of the judiciary in the interpretation of statutes and the time frame within which statutes operate. An inquiry into questions of this nature must inevitably start with the Constitution.⁶ A constitution cannot, however, comprehensively guide the balancing of these underlying notions as cases may test the boundaries between vagueness and precision in language, text and purpose or intent, the role of judges, time-bound or contemporary interpretation and these notions in themselves.⁷

This chapter explores the theoretical underpinnings of a constitutionally appropriate theory of statutory interpretation. It will consider the historic use of theories of statutory interpretation in South Africa. The theoretical underpinnings central to theories of interpretation will consequently be explored, as well as implicit and explicit constitutional waymarks that should inform our understanding of the teleological model of interpretation.

1.2 THEORIES OF STATUTORY INTERPRETATION

Eskridge and Frickey have warned readers not to expect that anybody’s theory of statutory interpretation is an accurate statement of what courts actually do.⁸ This is so as judges differ on the factors that underlie a theory of statutory interpretation, often blend approaches, may find that a given approach does not work in a given case, or join the opinions of others.⁹ All theories have failings. Nevertheless, three theories of statutory interpretation have dominated statutory interpretation in jurisdictions that share the common-law tradition: literalism, intentionalism and purposivism.¹⁰

UKHL 3). Teleological interpretation also plays a leading role in the European Court of Justice (see Hager *Rechtsmethoden in Europe* (2009) 11).

4 1994 3 SA 625 (E).

5 633G.

6 *Holomisa v Argus Newspapers Ltd* 1996 6 BCLR 836 (W) 863.

7 Solan “Linguistic issues in statutory interpretation” in Tiersma and Solan (eds) *Language and the Law* (2012) 88-89.

8 Eskridge and Frickey “Introduction” in Hart and Sacks (eds) *The legal Process: Basic Problems in the Making and Application of Law* (1994) 1169.

9 Jellum “The theories of statutory construction and legislative process in American jurisprudence” in Araszkievicz and Pleszka *Logic in the Theory and Practice of Lawmaking* (2015) 193.

10 Above 181-199.

Literalism (or textualism)¹¹ maintains that meaning must be deduced from the very words of the statute, to the exclusion of other interpretive criteria.¹² The theory is best described by its Afrikaans designation: *letterknegtigheid*, which translates as subservience to the letter. Intentionalism (or “actual specific intent”)¹³ maintains that meaning must be determined by ascertaining the real, subjective intention of the legislature.¹⁴ Purposivism (or “hypothetical intent”)¹⁵ holds that meaning must be deduced through asking what the objective purpose of the law is.¹⁶ It holds the view that the law is designed to solve specific societal problems.¹⁷

The key difference between purposivism and intentionalism is that, instead of asking what was actually intended, purposivism asks what a reasonable legislature would have reasonably wanted. Both theories reject the notion that meaning can be deduced solely from the words. Although both start with the statutory language, they do not stop there even if the text is clear. They examine other sources of meaning.¹⁸ What they disagree about, however, is what sources may be used and what they seek by examining extra-textual sources of meaning. Intentionalist search for the actual intent of the legislature. Purposivists search for the hypothetical intent of a reasonable legislature, attempting to address a societal problem with a specific remedy. Literalists attack purposivists and intentionlists because, they aver, looking beyond the enacted text raises constitutional concerns associated with the separation of powers. Purposivists and intentionlists argue that literalists misunderstand the nature of language and are wrong to believe that language can constrain meaning.

The debate between advocates of these theories is central to the field of statutory interpretation. It is difficult to pin down what the debate is about, as various

11 “Literalism” and “textualism” are often used as synonyms. See Popkin *Statutes in Court: The History and Theory of Statutory Interpretation* (1999) 194. According to the author, the better approach is to refer to literalism as “‘spurious’ textualism” or “the practice of interpreting a text without adequate attention to the way authors write and audiences understand language”. For purposes of this study no such distinction is made as it is incompatible with the South African common-law tradition and as such a distinction can be regarded as a mere semantic exercise or as a distinction without a difference. On this account literalism can be seen as an extreme form of textualism. As Jellum (n 9) 183-184 states, “[t]extualism comes in gradations”. There are extreme, moderate and “soft plain meaning” theories of textualism, with various degrees of variance thereof. The use of two distinct binary terms to denote (only two) textualist positions are therefore counterproductive. Importantly, it should be noted that proponents of literalism in South Africa have also advocated different versions thereof and that not all have advocated extreme positions thereof. In this study the two terms are used interchangeably.

12 Du Plessis “Interpretation of the Bill of Rights” in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* (2014) 32-29 and Popkin (n 11) 263.

13 Popkin (n 11) 185.

14 Du Plessis (n 12) 32-31.

15 Popkin (n 11) 185.

16 Du Plessis (n 12) 32-35.

17 Purposivism has traditionally been expressed as the so-called mischief rule. According to this rule, a court interpreting a statutory provision must ask four questions: “first, what the common law was before the enactment of the provision; second, what the mischief and defect were for which the common law did not provide; third, what remedy Parliament resolved and appointed ‘to cure the disease of the common-wealth’; and, fourth, the true reason for the remedy.” See Du Plessis (n 12) 32-31.

18 Jellum (n 9) 190-191.

difficulties must be confronted. The theories are broad churches and there is not necessarily a single position for each of these theories. The boundaries between the theoretical positions are not clear-cut as the advocates find common ground. The debate is often complicated by a reformulation or re-labelling of pre-existing theories of statutory interpretation. Additionally, *bona fide* attempts to acknowledge pragmatic aspects of language have spawned new theories of statutory interpretation, which are not necessarily different to existing theories. It is important to clarify these labels because contemporary debate is phrased in terms thereof.¹⁹

Du Plessis argues that the South African judiciary has utilised two further theories of statutory interpretation: contextualism and literalism-cum-intentionalism. Contextualism holds that the meaning of legislative provisions should be determined through a consideration of the background conditions and context of the law.²⁰ It is difficult to normatively justify contextualism as an independent theory. Contextualism does not necessarily challenge literalism.²¹ Every action of communication contains different kinds of content. In addition to semantic content, “which is the type of content that is fully determined by the lexical meaning of the words used”, there are other types of content that are context dependent. Assertive content “is the content that the speaker actually says or asserts by an occasion of speech in the context of the expression”.²² Assertive content is determined, *inter alia*, by “the semantic content of the sentence uttered, the communicative intentions of the speaker, the shared presuppositions of speaker-hearers, and obvious features of the context of utterances”.²³ Implicated content is the content that a speaker is committed to even though they have not said it. There may also be presuppositions that are relied on by speakers and taken for granted in the context of a conversation.²⁴

Recall that, in terms of the literalist position, meaning of a legislative provision must be deduced from the very words in which they are couched. Literalists do not only believe that words have semantic content, but also that they have assertive content, that is, context dependent. Context is important as it helps the listener figure out what the communicative intentions of the speaker are.²⁵ Literalists accept and adopt this view. Scalia has stated that “[i]n textual interpretation, context is everything”.²⁶

19 Jellum (n 9) 181-199.

20 Du Plessis (n 12) 32-35.

21 Jellum (n 9) 183-184.

22 Marmor “Introduction” in Marmor and Soames (eds) *Philosophical Foundations of Language and Law* (2013) 1 6.

23 Above 8.

24 Above 7.

25 Marmor “Textualism in context” 2012 *USC Law Legal Studies Paper No 12-13* 1 7.

26 Scalia “Common-law courts in a civil-law system: the role of United States federal courts in interpreting the constitution and laws” in Gutmann (ed) *A Matter of Interpretation* (1996) 37.

In *Chisom v Edwards*,²⁷ Scalia J, writing in dissent, stated that interpretation starts by finding the ordinary meaning of the language in its textual context.²⁸ The Supreme Court of Appeal²⁹ has approved a similar dictum by Sir Anthony Mason CJ:

Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.³⁰

Contextualism also does not challenge purposivism or intentionalism. It is impossible to determine true or hypothetical intentions without having regard to the background provisions and the legislative history of the adoption of a legislative provision. If interpreters were only to have regard to the text to determine the intention of the legislature, the theory degenerates into literalism (or literalism-cum-intentionalism). In any event, literalists acknowledge that meaning is context-dependent. Similarly, purposivism without contextualism will be an empty theory as we determine purpose of the law from circumstances that brought about the legislation, the mischief it aimed to remedy and from assumptions about what a reasonable legislature would have wanted to achieve.³¹ The Supreme Court of Canada in *R v Big M Drug Mart Ltd*³² illustrated the importance of context to purposive theory:

The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection.³³

27 111 S. Ct. 2354 (1991).

28 2369.

29 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) par 18.

30 *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* 1985 157 CLR 309 315.

31 Marmor (n 25) 4.

32 (1985) 13 C.R.R. 64.

33 103. This passage was endorsed by the Constitutional Court in *Ferreira v Levin; Vryenhoek v Powell* 1996 1 SA 984 (CC) par 46 and 172.

In terms of literalism-cum-intentionalism, the purpose of statutory interpretation is to determine the intention of the legislature. It was, however, presumed that the legislature “encoded” or “couched” its intention within the words of the legislation. But as Du Plessis points out, this was essentially a literalist position as

it is assumed that there is a grammatical structure that allows for a fixed, ‘ordinary effect’ of the language” and “that the (most) correct use of the language, in conformity with its grammatical structure and rules, will make for an objective perspicuity in the advantages of which all (reasonable?) users of the language can share.³⁴

Du Plessis dismisses the idea that language can have such a fixed effect that the intention of a speaker can be conveyed to the listener. Notions of intention in the literal interpretation of law cannot be underestimated. Legislation is a speech act: “A hearer who wants to grasp what the speaker says aims to grasp what the speaker intended to communicate, legal speech cannot be a kind of striking exception.”³⁵ This position is not contrary to the literalist position. Literalists do not view language as consisting merely of semantic content. The intention of the speaker is important to determine the assertive content of the speech act. Teleological interpretation is a relative of purposivism that can also be labelled as “broad” purposivism.³⁶

1.3 THEORETICAL UNDERPINNINGS

1.3.1 The relevance of the intention of the legislature

Legislative intent is of fundamental importance to the interpretation of statutes. Legislation is a speech act that is communicated intentionally.³⁷ Texts without authors and intended meanings are not texts and texts are only texts in regard to their intended meanings.³⁸ As Rosen shows, legislators may have various different kinds of intentions.³⁹ They have lexical intentions (“the intention to use a certain word or construction”),⁴⁰ semantic intentions (“the intention to mean this or that by their words”), communicative intentions (“the intention to cause certain beliefs or expectations in their audience in a characteristic way”), and practical intentions (“the intention to cause downstream non-legal effects, e.g., to promote economic

34 Du Plessis (n 12) 2C-55.

35 Marmor (n 25) 9.

36 See Le Roux “Directory provisions, section 39(2) of the Constitution and the ontology of statutory law *African Christian Democratic Party v Electoral Commission*” 2006 SAPR/PL 382.

37 Marmor (n 25) 3.

38 Alexander and Prakash “Is that English you’re speaking?” some arguments for the primacy of intent in interpretation” 2003 *Public Law and Legal Theory Research Paper Series* 1 13.

39 Rosen “Textualism, intentionalism and the law of contract” in Marmor and Soames (eds) *Philosophical Foundations of Language and Law* (2013) 130 132-133.

40 Above 132.

growth”). Importantly, they have legal intentions (“the intention to bring about certain changes in the law by means of their pronouncements”).⁴¹

There are three distinct conceptions of the relevance of legislative intent.⁴² The first, what Popkin labels “actual specific intent”, requires that judges ask if the legislature had any specific intent about the facts of the case.⁴³ “Instead of averring that a provision ‘means X or Y’, a court will typically assert that ‘the legislature intended X or Y.’”⁴⁴ To find specific intent, intentionalists will start with the text, but they will not stop there.⁴⁵ They reject ordinary meaning for a meaning that furthers specific legislative intent. As Popkin states, intentionalism conceived in this way is not workable as “legislatures probably did not think of the issue; legislatures might want to avoid a decision and pass the buck to the court; and change prevents legislatures who adopted the law from appreciating the actual impact of a statute on future events”.⁴⁶ It has been questioned how a legislature (composed of a body of persons) can have a specific intent. It has also been argued that

the tools available for courts trying to figure out legislative intent are such that the courts are bound to yield skewed and biased results, mostly favoring the vocal supporters of a law who use strategic manoeuvres to overemphasize their legislative agenda over of the views of the median legislators who formed the majority.⁴⁷

There are constitutional reasons to reject intentionalism. In *Matiso v The Commanding Officer, Port Elizabeth Prison*,⁴⁸ it was stated that the intention of the legislature does not apply in a system based on the supremacy of the Constitution, as the Constitution is sovereign and not Parliament.⁴⁹ Interpreters who searched for the actual intent of legislatures did so because of the supremacy of Parliament. In a constitutional democracy, the Constitution is binding on all branches of the state and has priority over any rules made by the legislature.⁵⁰ Meaning must be determined not with reference to the intent of any legislature but with reference to a supreme constitution. Scalia has said that it is incompatible with democratic government to have meaning determined by the intention of the legislature.⁵¹

41 Above 133.

42 Popkin (n 11) 185.

43 Above.

44 Du Plessis (n 12) 31-32.

45 Jellum (n 9) 190. Such as statements made during the legislative process, early draft versions of the bill and policy documents.

46 Popkin (n 11) 187. See also Marmor “On some pragmatic aspects of strategic speech” in Marmor and Soames (eds) *Philosophical Foundations of Language and Law* (2013) 83 97.

47 Marmor (n 25) 2-3.

48 1994 3 SA 592 (SE).

49 597B-597H.

50 Currie and De Waal *The Bill of Rights Handbook* (2013) 9. See also ss 2 and 8 of the Constitution.

51 Scalia (n 26) 16.

The chief response has been the objectification of legislative intent.⁵² The literalist response, what Du Plessis terms “literalism-cum-intentionalism”,⁵³ gives rise to the second conception of the relevance of legislative intent.⁵⁴ In England, Lord Diplock has held that “the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it”.⁵⁵ In the same case, Lord Scarman held that “[i]f Parliament says one thing but means another, it is not ... for the courts to correct it We are to be governed not by Parliament’s intentions but by Parliament’s enactments.”⁵⁶ Lord Reid has explained that “[w]e are seeking not what Parliament meant but the true meaning of what they said”.⁵⁷ Scalia has stated that it is the law that governs and not the intention of the legislature.⁵⁸ Prior to the advent of constitutional democracy, the dominant theory of statutory interpretation assumed that

[t]he legislature couches or encodes its intention in the language of the statutory provision to be construed. When the words used for this purpose are clear and unambiguous, their literal, grammatical meaning must prevail and they must be given their ordinary effect. This, it is believed, will disclose and convey, without further ado, the true intention of the legislature and thereby the ‘correct’ meaning of the provision construed.⁵⁹

The purposivist response (“hypothetical intent”) gives rise to the third conception of the relevance of legislative intent.⁶⁰ It requires the interpreter to enquire into the objects, purposes or intentions of a hypothetical, reasonable legislature. This response has also been the objectification of legislative intent, but it also rejects the idea that the intention of the legislature can be couched within the words used by the legislature. Purposivism has an advantage over intentionalism as purposivists can interpret statutes in situations that the legislature did not contemplate. Purposivism allows laws to change with technological, social, legal, and other circumstances.⁶¹ By contrast, intentionalism is unhelpful when a statute is applied to a new circumstance not foreseen by the legislature. Again, the use of hypothetical intent has also been subject to criticism. Although purposivists rely on factors such as text, history,

52 Above 17.

53 Du Plessis (n 12) 32-32.

54 Popkin (n 11) 185. It should however be noted that there are literalist positions that reject the relevance of the intention of the legislature outright.

55 *Duport Steels Ltd v SIRS* 1980 1 All ER 529 (HL) 541.

56 Above.

57 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* 1975 1 All ER 810 (HL) 814. Refer also to the *Sussex Peerage Case* 1844 8 ER 1034 where Tindal CJ held that “[t]he words themselves alone do, in such case, best declare the intention of the lawgiver”.

58 Scalia (n 26) 17.

59 Du Plessis (n 12) 32-32.

60 Popkin (n 11) 185.

61 Jellum (n 9) 194-195.

context, values and legal comparisons to discover purpose,⁶² these sources may be inconclusive. The proposed answer is for courts to “presume that legislatures are ‘made of reasonable persons pursuing reasonable purposes, reasonably’”. Literalists criticise the subjectivity of this approach and point to the fact that there may be competing ideas of how to further the purpose and that statutes often have many (sometimes competing) purposes.⁶³

1.3.2 The nature and function of language

If it seems that a provision doesn’t have to be interpreted, that is because you have interpreted it already. Interpretive principles are always at work.⁶⁴ This is so because a statute is a legal instrument and a legal instrument is, according to Endicott, “a normative text with a technical effect” in that “the law itself has techniques for determining the effect of the normative text”.⁶⁵ This is not to say that legislative provisions may not be more precise than others (or perhaps more vague than others). According to the author, “[a] legal instrument is vague if its language is imprecise, so that there are cases in which its application is unclear”.⁶⁶

The central point is that “there is no straightforward, general relation between the language used in a legal instrument to make law, and the law that is made”.⁶⁷ A paradoxical question that has often been posed is how legislation can be certain while still achieving flexibility. Legal certainty is required by the rule of law, which, in turn, requires predictability of outcome.⁶⁸ The Constitutional Court has held that laws must be written in a clear and accessible manner and that impermissibly vague provisions violate the rule of law, a founding value of our Constitution.⁶⁹ On the other hand, no two sets of facts are ever exactly the same, requiring that legislation should be sufficiently flexible to cover a multitude of situations.

62 Du Plessis (n 12) 32-159.

63 Jellum (n 9) 195.

64 Sunstein *The Partial Constitution* (1993) 104. This presupposition stands in stark contrast to the maxim *clara non sunt interpretanda* (transparent text requires no interpretation).

65 Endicott “The value of vagueness” in Marmor and Soames (eds) *Philosophical Foundations of Language and Law* (2013) 14 15.

66 Above 16.

67 Above 16. In *Combined Developers v Arun Holdings* 2015 3 SA 215 (WCC) it was held that “the nature of language does not always admit to one a clear answer”. In *Venter v R* 1907 TS 910 913 it was stated that there is “a difficulty inherent in the nature of language – that no matter how carefully words are chosen, there is a difficulty in selecting language which, while on the face of it expressing generally the idea of the framer of the measure, will not, when applied under certain circumstances, go beyond it, and, when applied under other circumstances, fall short of it”.

68 Maley “The language of the law” in Gobbons (ed) *Language and the Law* (1994) 17.

69 *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) par 49. S 1(c) of the Constitution states that the Republic is founded upon the values of “supremacy of the constitution and the rule of law”. See also *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) par 102 where the Constitutional Court stated that “[t]he need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know of the law, and be able to conform his or her conduct to the law”.

Vague language is viewed as “bad”, and precise language as “good”. Precise legal standards are not necessarily better than vague ones.⁷⁰ Rules of interpretation may give a vague effect to a precise term.⁷¹ Similarly, rules of interpretation may give a precise effect to a precise term. Meaning can only be determined through the processes of interpretation. This is contrary to the literalist position, which assumes that there is a fixed and stable ordinary effect of language.⁷² Some have described a linguistic turn in legal interpretation where meaning is not discovered from a construable text, but made in dealing with it.⁷³

Values are expressed in vague language. This is the concern of those who express a preference for “black letter law”.⁷⁴ The concern is understandable. The purpose of any provision is to create a norm to which citizens may conform their conduct. When a norm is vague, it is incapable of guiding conduct (nor does it control the conduct of the officers or public officials responsible for applying the norm or resolving a dispute). How then is it possible for individuals to conform their conduct to the norm? Concerns related to the separation of powers are also raised. The task of giving content to a vague norm is transferred first to an applying official but ultimately to the courts. In effect, vague norms open the doors for judicial law making. Even the most adamant defenders of positivism concede this point.⁷⁵

Our legal system consists of vague and precise norms and, it will be argued, that vague norms are not always “bad”, but sometimes politically desirable. Legislatures may choose to frame legislative provisions in a vague manner. The effect would be to create a vague norm so that its application is unclear.⁷⁶ The judiciary is given discretion to decide for itself what the norm means. Additionally, there may be instances where, although the text of a legislative provision is seemingly precise the technical effect of legal language means that rules of interpretation may give a vague effect to a precise term. This is so because there is no general relation between the language of a provision and the law that is made.

To understand why vagueness can be valuable, the starting point must inevitably be to ask why precision is valuable. Precision has guidance value because a precise standard makes it clear what people’s rights and obligations are. Precision has process

70 Endicott (n 65) 19.

71 Above 16.

72 Du Plessis (n 12) 32-159.

73 Above 32-44 and Boshoff *Die Interpretasie van Fundamentele Aansprake in 'n Heterogene Samelewing* (2000 thesis Rand Afrikaans University) 157-162.

74 Woolman “True in theory, true in practice: why direct application still matters” in Woolman and Bishop (eds) *Constitutional Conversations* (2008) 135.

75 Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994) 332 and Waluchow *Inclusive legal Positivism* (1994) 157. According to Waluchow this is so as the statute in such cases obliges judges to seek guidance from non-legal sources.

76 Endicott (n 65) 16.

value because it directs officials in a legal system.⁷⁷ From here, it is easy to formulate the chief points of criticism against the judiciary's reliance on values: the vagueness of values does not make it clear what the obligation of affected parties are. But when a legislature decides to draft a norm vaguely that does not mean to say that this is always a result of poor legislative drafting. It might be useful for the legislature to leave it to the judiciary to give content to a legislative norm. According to Endicott this choice has power allocation value and private ordering value.⁷⁸

Substantively, the effect of vague terms is to delegate to courts the power to determine the content thereof. This is justifiable because judges possess specialised expertise to develop norms and, because the doctrine of precedent will allow them to develop the norm incrementally, to revise general principles through the processes of appeal. The processes of the courts mean that general rules would develop after taking cognisance of parties to a dispute in which the value is deployed. It may be valuable to leave persons affected by a rule uncertain as to its application as parties will have an incentive to come up with creative ways to avoid accountability, which might not have occurred to the legislature. The uncertainty created incentivises parties to avoid the risk of being found to have contravened the value.⁷⁹

It is important to note that what is vague or precise is a contextual matter,⁸⁰ and that it would be wrong to describe values as either totally vague or precise. Every communication act contains different kinds of content. In addition to semantic content, communication acts contain assertive content, implicated content. There may be presuppositions that are relied on by speakers and taken for granted in the context of a conversation.⁸¹ It is indisputable that values are vague terms but this does not mean that these terms do not contain at least assertive content. It also does not mean that the interpretive choice of the presiding officer will be as arbitrary as flipping a coin. The judiciary will not have an unfettered discretion. Not any decision will do. The task of the interpreter will be to figure out what the (reasonable) drafter of the Constitution intended to convey through its choice of words and to this end the assertive content, which is context dependent, must be taken into account.

Following from the above, it would be logical to ask how we could determine what the assertive content of a value is. The starting-off point should be to acknowledge that actors in the legal profession constantly partake in this exercise. A decision about the appropriate interpretation of a legislative provision can only be said to be "good" if it is principled (and not arbitrary). The principles on which these cases are determined are not only contained in the legislative provision itself but also in other

77 Endicott (n 65) 19.

78 Above 26-28.

79 Above.

80 Saomes "What vagueness and inconsistency tell us about interpretation" in Marmor and Soames (eds) *Philosophical Foundations of Language and Law* (2013) 31 32.

81 Marmor (n 25) 6 and Marmor (n 22) 8.

sources of our legal system. When terms are employed that may be said to be vague, it merely means that the principles outside of the legislative provision are perhaps more important than the provision itself.

The shift in the interpretive approach endorsed by the Constitutional Court (from “the strict legalistic to the substantive”)⁸² can be illustrated with reference to the way the Court has sought to determine if a statutory provision is peremptory (when statutes require exact compliance and when failure to comply will leave the ensuing act null and void) or directory (when a statute requires substantial compliance only and when non-compliance thereof will not result in ensuing acts being null and void).⁸³ There were cases in which our courts, even before the advent of constitutionalism, “insisted that the distinction between directory and peremptory provisions does not rest on semantic or textual considerations (alone), but requires reference to extra-textual (or contextual) factors”.⁸⁴

Nevertheless in the great bulk of pre-constitutional cases matters of compliance were decided on rules such as the following: a word or words with an imperative or affirmative character indicate a peremptory provision (e.g., “shall” or “must”),⁸⁵ permissive words indicate a discretion and are directory (e.g., “may” or “can”),⁸⁶ words in negative form are peremptory,⁸⁷ positive language is directory,⁸⁸ flexible or vague terms are directory,⁸⁹ and so on.⁹⁰ Due to the shift in interpretive approach by the judiciary, which favours extra-textual factors over textual elements, Du Plessis has questioned the relevance of this distinction:

It may be that the majority judgment of the Constitutional Court in *African Christian Democratic Party* has dealt the distinction between peremptory and directory provisions a blow, since the court raised the question whether a provision can be ever so peremptory that *eo nomine* compliance with it has to be preferred to realising its purpose, and the court itself, in point of fact, answered this question in the negative. The Supreme Court of Appeal previously also voiced rejection of a categorical distinction between peremptory and directory provisions ... and the ACDP case thus actually confirmed an already existing move away from such a distinction.⁹¹

In *Steenkamp v Edcon Ltd*, the Constitutional Court had to determine what the consequences of non-compliance with section 189A(2)(a) of the LRA is (“an

82 *African Christian Democratic Party v Electoral Commission* 2006 3 SA 305 (CC) par 25.

83 Botha *Statutory Interpretation: An Introduction for Students* (2005) 109.

84 Le Roux (n 36) 389.

85 *Messenger of the Magistrate's Court, Durban v Pillay* 1952 3 SA 678 (A).

86 *Amalgamated Packaging Industries v Hutt* 1975 4 SA 943 (A).

87 *Samuel Thomas Myers v Pretorius* 1944 OPD 144.

88 *R v Sopete* 1950 3 SA 769 (EC).

89 *Leibrandt v SA Railways* 1941 AD 9.

90 Botha (n 83) 111.

91 Du Plessis (n 12) 2C-131.

employer *must* give notice of termination of employment in accordance with the provisions of this section”).⁹² The employer retrenched over 3,000 employees and gave the employees notices of termination of their contracts of employment. These notices were given prior to the expiry of the periods prescribed by section 189A(8) of the LRA and therefore were in breach of the Act.⁹³ The Act allows aggrieved parties to strike in the event of non-compliance with the section⁹⁴ or to approach the Labour Court for an appropriate order.⁹⁵ The Act does not explicitly provide that any dismissal in contravention of the Act would be invalid. The applicants however argued that the 30- to 60-day period allowed under the Act suspends the employer’s power to dismiss and relegate the relief available under section 189A(7).⁹⁶

The applicant’s arguments were based on the literalistic archetype that the Act used the word “must” and therefore that the employer was obliged to comply with the prescribed procedures before dismissing the employees. Failure to do so, they argued, resulted in an invalid dismissal.⁹⁷ Tellingly, the majority of the Court did not utilise the distinction between peremptory and directory provisions to resolve the question as to what the consequences of non-compliance with section 189A(2)(a) of the Act was. Rather, it may be argued that the distinction was merely used as a semantic device to frame the distinction after the fact. Instead both the majority⁹⁸ and the minority⁹⁹ asked what the purpose of the statutory provision was to determine its consequence (although it may be argued that the minority used purpose to determine if the provision was peremptory or directory).

The majority and the minority however disagreed as to what the purpose of the provision is. The minority argued that the purpose of the provision was to “create a dismissal-free zone during which consensus may be sought and alternatives may be explored”¹⁰⁰ and that the purpose of the act would be contravened if this “dismissal-

92 2016 37 ILJ 564 (CC) par 6.

93 s 189A(8) reads: “If a facilitator is not appointed (a) a party may not refer a dispute to a council or the Commission unless a period of 30 days has lapsed from the date on which notice was given in terms of section 189(3); and (b) once the periods mentioned in section 64(1)(a) have elapsed (i) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the Basic Conditions of Employment Act; and (ii) a registered trade union or the employees who have received notice of termination may (aa) give notice of a strike in terms of section 64(1)(b) or (d); or (bb) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11).”

94 s 189A(8) and (9).

95 These orders may include: 189A(13) “an order (a) compelling the employer to comply with a fair procedure; (b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure; (c) directing the employer to reinstate an employee until it has complied with a fair procedure; (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.”

96 par 30.

97 par 43.

98 par 99, 101, 147, 182, 183, 184, 185 and 186.

99 par 20, 23, 26, 33, 36, 46, 60 and 74.

100 par 45.

free zone” was disregarded. As such, the minority found the dismissal to be null and void.¹⁰¹ The majority disagreed. Instead the majority found that the concept “invalid dismissal” was not part of the Act and that it was therefore inappropriate to import a remedy designed for “unfair dismissals” (reinstatement) for invalid dismissals.¹⁰² The Court found that the dismissal of the employees could have been unfair, but that they had not claimed this. In any event, the Court found that the remedies provided in the section were “adequate” and, as such that “there seems to be no justification for the conclusion that the purpose of the legislation is to visit an act committed in breach of the provision with nullity”.¹⁰³

1.3.3 The role of the judiciary in the interpretation of statutes

Considerations of separation of powers, democracy, rule of law, and the role of a judge in a democracy have important consequences for the way that statutes are interpreted.¹⁰⁴ “The theory of statutory interpretation a judge adopts is based, in large part, on that judge’s view of the proper power distribution of the judiciary and the legislature – in other words, on that judge’s view of separation of powers.”¹⁰⁵ One conception of separation of powers is that the principle means that specific functions, duties and responsibilities are allocated to distinctive institutions with defined areas of competence.¹⁰⁶ On this view, which is described as the “airtight compartment approach”, judges interpret law, Parliament makes the law and the executive implements it. There should be no overlap.¹⁰⁷ The courts, as Montesquieu stated, are a “mouth that pronounces the words of the law”.¹⁰⁸ This approach is invoked as an objection to judges having (too much) discretion in their interpretive tasks, and the approach only allows judges to create law when a statute is vague. The Constitutional Court has rejected a strict separation between the three branches of government.¹⁰⁹ The rejection of such a separation has, however, not prevented the Constitutional Court from acknowledging that each branch has a specific mandate.

101 par 60 and 86.

102 par 180 and 188.

103 par 183.

104 Barak *Purposive Interpretation in Law* (2005) 88.

105 Jellum (n 9) 177.

106 Seedorf and Sibanda “Separation of powers” in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* (2014) 12.1. In *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC) par 25 it was held that “[t]he separation of the judiciary from the other branches of government is an important aspect of the separation of powers required by the Constitution, and is essential to the role of the courts under the Constitution. Parliament and the provincial legislatures make the laws but do not implement them. The national and provincial executives prepare and initiate laws to be placed before the legislatures, implement the laws thus made, but have no law-making power other than that vested in them by the legislatures.... Under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent.”

107 Popkin (n 11) 241.

108 Montesquieu *The Spirit of the Laws* (translated by Nugent) (1748) 191.

109 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC) par 112.

In *Minister of Health v Treatment Action Campaign (2)*,¹¹⁰ the Court clearly made this point when it stated that “although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation”.¹¹¹ In *Doctors for Life International v Speaker of the National Assembly*,¹¹² the Constitutional Court warned that “[c]ourts must be conscious of the vital limits on judicial authority and the Constitution’s design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.”¹¹³

The Court stressed that separation of powers concerns, although important, “cannot be used to avoid the obligations of a court to prevent the violation of the Constitution”.¹¹⁴ It can be said that the Constitutional Court has instead adopted the conception of separation of powers, referred to as the “checks and balances” approach, that judges do some legislating such as in the case of the judicial review of legislation and invoking the golden rule of statutory interpretation to prevent unjust law.¹¹⁵ These approaches are rooted in literal modes of statutory interpretation.¹¹⁶ These modes of interpretation are often defended by separation of powers arguments by literalists or formalists. On their view, judges “create law” when they look beyond the text of the statutory provision and rely on features such as “purpose”, “values” or “principles” which they deem to lie outside of the law.

They defend the use of literalist modes of interpretation on four grounds. First, they argued that, should we allow judges to disregard the literal meaning, it is difficult to explain why law is authoritative for judges. The more scope we give judges, the more we permit them to treat legal rules not as “proper” rules but merely as “guides”.¹¹⁷ Second, it is averred that disregarding the literal meaning represents a threat to the rule of law because citizens will be uncertain how the rules will be applied before a

110 2002 5 SA 721 (CC).

111 par 199.

112 2006 6 SA 416 (CC).

113 par 37.

114 par 200.

115 Popkin (n 11) 241.

116 Some formalists, such as Schauer “Formalism” 1988 *Yale LR* 509 521 even rejected the idea that judges could reject unjust or absurd interpretations. In South Africa, adherence to the so-called golden rule of statutory interpretation meant that the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency. As such South African literalism, even at its zenith, was not as formalistic. Nevertheless, meaning was still primarily to be discerned from the very words a provision was couched in.

117 Meyerson *Jurisprudence* (2011) 145.

court has had the opportunity to interpret them.¹¹⁸ Third, it is argued that judges may make mistakes when trying to do justice based on the teleological approach and therefore subvert Parliament's legislative programs.¹¹⁹ Fourth, it is reasoned that judges are not accountable to an electorate. They claim that notions of intention or purpose are disguises for judicial law making.¹²⁰

Such formalism, that only text is relevant to interpretation, places the role of the legislature above that of the judiciary,¹²¹ and is rooted in a particular view of the nature of the law.¹²² Some positivists, for example, argue that the law consists only of "pedigreed sources" and that courts cannot rely on consideration outside the text.¹²³ Ethical or democratic positivists put more faith in the legislature than the judiciary and believe that legislatures should assume full responsibility for the making of moral or policy choices.¹²⁴ Although ethical positivists believe that it may be possible that there are moral criteria for the validity of law, that moral criteria in law is not morally desirable and that the application thereof should be avoided where possible.¹²⁵ On this view, legislation should be drafted in precise and unambiguous language so that judges do not need to rely on moral or political considerations.¹²⁶ They believe that judges are under an obligation to apply clear legal rules.¹²⁷

118 Above 146. According to Eskridge "Dynamic statutory interpretation" 1987 *University of Pennsylvania Law Review* 1479 1483 "the traditional understanding of the 'rule of law' requires that statutes enacted by the majoritarian legislature be given effect, and that citizens have reasonable notice of the legal rules that govern their behavior."

119 Above 147.

120 Above 147. Scalia (n 26) 17-18 has argued that, "under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field".

121 Jellum (n 9) 178.

122 Meyerson (n 117) 147. According to Barak (n 104) 54 there exists an interrelationship between jurisprudential theories and interpretative theories. According to the author "legal philosophy expresses its distinctiveness 'practically' through its treatment of interpretation".

123 An Austinian approach to the interpretation of statutes, for example, would require that only "positive laws" or "laws strictly so called" should be taken into consideration when interpreting a statutory provision. As such only the legislative text, as a sanction-backed command handed down by a sovereign, can be taken into consideration. Matters of 'positive morality' would be deemed irrelevant to the interpretive task. Austin's Command Theory as an aggregate of nothing but rules also does not take societal values and principles or standards such as equity, good faith and reasonableness into account. See Austin "Extract from *The Province of Jurisprudence Determined*" in Freeman (ed) *Lloyd's Introduction to Jurisprudence* (2008). Similarly, Raz *The Authority of Law: Essays on Law and Morality* (1975) 39-40 and 47-48 argued that law necessarily only consists of source-based or pedigreed standards, and that moral value can never be criteria for legal validity. See also Raz "Authority, law and morality" 1985 *The Monist* 295 316. For Raz law is an exercise in authority and "nothing can possibly count as an exercise of authority if its net effect is to leave [a person] in the position of having to figure out the issue for himself". See Waldron "Vagueness and the guidance of action" in Marmor and Soames (eds) *Philosophical Foundations of Language and Law* (2013) 58 68.

124 Above 102-103. See also Campbell *The Legal Theory of Ethical Positivism* (1996) 3; Waldron "Normative and ethical positivism" in Coleman (ed) *Hart's Postscript: Essays on the Postscript to the Concept of Law* (2001) 421 and Dyzenhaus "The genealogy of legal positivism" 2004 *Oxford Journal of Legal Studies* 39 62.

125 Meyerson (n 117) 102.

126 Campbell (n 124) 64.

127 Meyerson (n 117) 103.

The other side of the spectrum, that considerations outside of the law such as purpose and values are more important than the legislative text, places the role of the judiciary above that of the legislature. On this view,

every statutory interpretation case requires a judge to make a policy choice by adopting one statutory meaning and thereby rejecting at least one other meaning. Further, this choice will affect future cases because of *stare decisis* – the concept that similar cases should be decided similarly. Thus, judges do not simply interpret law; judges act in concert with the legislature to develop law; while legislatures make law, judges inevitably assist them in the process.¹²⁸

Such a view may be justified on several perspectives of the nature of law. Realists argue that legal doctrine is indeterminate and that legal doctrine could be used to support contradictory outcomes.¹²⁹ They claim that non-legal factors are more important than legal factors in adjudicating cases.¹³⁰ Such a view would have the consequence of untethering interpretation as a field of study as it would mean that judges do not decide cases on legal grounds. Such an approach would lead to unpredictability of the law. It also leaves citizens with no way to determine what conduct is expected of them. In hard cases, Hart argues that courts do go beyond their traditional function of merely interpreting the rules of law and that they “perform a rule producing function”.¹³¹

In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide. There will be plain cases constantly recurring in similar contexts to which general expressions were clearly applicable ... but there will also be cases where it is not clear whether they apply or not.¹³²

128 Jellum (n 9) 178.

129 Meyerson (n 117) 190.

130 Meyerson (above) 191. See Holmes *The Common Law* (1923) 1. Similarly, in the postmodernist movement it was argued that it is impossible to achieve finality in interpretation because meaning is endlessly deferred and incapable of being fully determined. See Derrida *Positions* (1981) 41. The author argued that it is only possible to create the illusion of stable meaning through binary options. The Critical Legal Studies movement took the attack further. They claimed that “the law is so full of contradictory values and so obviously the outcome of political conflict that judges can never make fully coherent sense out of it”. See Howarth “Making sense out of nonsense” in Gross and Harrison *Jurisprudence: Cambridge Essays* (1992) 30.

131 Hart *The Concept of Law* (1961) 135. Barak “The role of a supreme court in a democracy” 2002 *Hastings Law Journal* 1205-1206, in endorsing this view of law has said that “there are hard cases. In such cases, the law is uncertain. There is more than one meaning to be given to the legal text. There is more than one solution to the legal problem. In such cases, law declaration also involves law creation. Prior to the judicial determination, the law (the constitution, the statute, the common law) spoke-even after all rules of interpretation were used-with a number of voices. After the judicial determination the law speaks with a single voice. The law was changed. A new meaning was created. The creation of a new norm – to be binding on all courts by the rule of precedent – is the main function of the supreme court in a democracy. Such creation involves discretion. The judge of a supreme court is not a mirror, passively reflecting the image of the law. He is an artist, creating the picture with his or her own hands. He is ‘legislating’ – engaging in ‘judicial legislation’.”

132 Hart (above) 123.

In hard cases, judges have an unapologetic creative function; they act as political decision makers. The source of this legislative power is “not a reflection of judicial imperialism” but rather “an indication of the uncertainty inherent in the law itself”.¹³³ In these cases, judges rely on their sense of what is best.¹³⁴ In easy cases, Hart believes that judges should not stray from the rule as stated, even if they believe that the result is undesirable. Most cases will fall within the core of determinate meaning.¹³⁵

Hart does not believe it to be entirely the function of language whether or not a case falls within the core of easy cases or the penumbra of hard cases. A case can fall within the core because the purpose of the rule is clear.¹³⁶ Hart did not consider purposive interpretation of a rule to be a threat to the separation between law and morality because rules may also have an evil (or immoral) purpose.¹³⁷ A case can conceivably fall within the core of easy cases because its language is entirely certain.

According to Kelsen, every act of law applying would be regarded as an act of law creating: “The function of laying down the law is a properly constitutive one, it is a making of law in the real sense of the word. ... The judicial decision is itself an individual legal norm.”¹³⁸ When a norm is applied to a new set of facts, any decision would “add something” that might be significant for future cases. New norms would enter our legal system through the doctrine of precedent.¹³⁹

There are those who deny that judges exercise discretion when they look beyond the text.¹⁴⁰ According to Dworkin, the law comprises rules and principles. Whereas rules either apply or do not apply, principles can be relevant to a given case without being decisive.¹⁴¹ Principles will always carry some weight but not conclusive weight, and judges will have to decide how much weight a principle will carry (taking into consideration other competing principles) when applied to the circumstances of a given case.¹⁴² This distinction is central to Dworkin’s thesis that the law is always determinate, and he avers that although rules cannot always provide clear answers, principles can always supply answers. Judges can therefore go beyond established and explicit rules and still come to a decision according to the law. Judges do not create law when they rely on principles to interpret rules, as these rules are present in the law. In any event, judges are constrained by the fact that a satisfactory interpretation must fit the pre-interpretive legal materials and make the law the best (read “most

133 Barak (n 104) 1206.

134 Hart (n 131) 275.

135 Above 123 and 150.

136 Hart *Essays in Jurisprudence and Philosophy* (1983) 106.

137 Hart “Positivism and the Separation of Law and Morals” 1958 *Harvard Law Review* 593.

138 Kelsen “Extract from *The Pure Theory of Law*” in Freeman Lloyd’s *Introduction to Jurisprudence* (2008) 331.

139 Patterson “Hans Kelsen and his *Pure Theory of Law*” 1952 *California Law Review* 5 9.

140 Dworkin *Taking Rights Seriously* (1977) concedes that judges will have discretion in the weak sense of the word because principles “cannot be applied mathematically but demand the use of judgment”.

141 Above 23.

142 Above 22-28.

morally valuable”) it can be.¹⁴³ Accordingly, determining what the law *should* be based on the criteria of “fit” and “value” is equal to determining what the law is.¹⁴⁴

There are also separation of power arguments which, although focusing on the role of the courts, argue that when judges look beyond text, that this allows the courts to legislate without completing the required processes for enactment of legislation.¹⁴⁵ It is argued that it is only the text, and not any general or specific intent, which is adopted through constitutionally appropriate procedures by the legislature.¹⁴⁶ The text is often a compromise between political factions.¹⁴⁷ As such, the text (in being such a compromise) may possibly be narrower or more restrictive than the primary objectives of any real or hypothetical legislature.¹⁴⁸

1.3.4 The time frame within which statutes operate

Scalia and Garner uses the following example to support their argument that words must be given the meaning they had when the text was adopted:

Queen Ann is said (probably apocryphally) to have commented about Sir Christopher Wren’s architecture at St. Paul’s Cathedral that it was ‘awful, artificial, and amusing’ – by which she meant that it was awe-inspiring, highly artistic, and thought-provoking. All three words have since undergone what linguistics call *pejoration*: Their meanings have degenerated so that they now bear mostly negative connotations. It would be quite wrong for someone to ascribe to Queen Ann’s 18th-century words their 21st-century meanings. To do so would be to misunderstand – or misrepresent – her meaning entirely.¹⁴⁹

Historically, common-law jurisdictions have adopted similar rules.¹⁵⁰ The South African judiciary has also adopted such an approach, in that legislative provisions must be understood in accordance with the usage and linguistic conventions at the time of adoption.¹⁵¹ This canon of interpretation can be seen as an exception to the

143 Dworkin *Law’s Empire* (1986) 104.

144 Dworkin *Justice in Robes* (2006) 145.

145 Chomsky “Unlocking the mysteries of Holy Trinity: Spirit, letter, and history in statutory interpretation” 2000 *Columbia Law Review* 901 951.

146 Above. See s 73 of the Constitution.

147 Above.

148 Above.

149 Scalia and Gardner *Reading Law: The Interpretation of Legal Texts* (2012) 78.

150 Scalia and Gardner (above) 79 refer to the earliest statute directed to statutory interpretation which made it an offence to argue the opposite of the rule. The Scottish Parliament in 1427 adopted an act titled “That nane interpret the Kingis statutes wrangeouslie”. It read: “Item, The King of deliverance of council, the manner of statute forbidis, that na man interpret his statutes utherwaies, then the statute beares, and to the intent and effect, that they were maid for, and as the maker of them understoode: and quha so dois the contrarie, shall be punished at the Kingis will.” Similar approaches were advocated by Coke *The Fourth Part of the Institutes of the Laws of England* (1797) 324-325, Lock *An Essay Concerning Human Understanding* (1801) 133 and Blackstone *Commentaries on the Laws of England* (1770) 60.

151 *Finbro Furnishers Pty Ltd v Registrar of Deeds, Bloemfontein* 1985 4 SA 773 (A) 804D; *Minister of Water Affairs and Forestry v Swissborough Diamond Mines Pty Ltd* 1999 2 SA 345 (T) 352A-B. Refer however to *Golden China TV Game Centre v Nintendo Co Ltd* 1997 1 SA 405 (A) par 13 where it was found that the

canon that “language of a legislative instrument must be understood in its ordinary signification” – the so-called “ordinary-meaning” rule.¹⁵² Du Plessis has suggested that the canon be reformulated as follows: “The interpreter must observe usage and the conventions of the natural language ... in which the text (a statute or the Constitution) has been drafted.”¹⁵³

Intentionalism is innately originalist as, in terms thereof, the paramount rule is that the real intention of the legislature at the time of adoption, once discerned, must be given full effect. This rule was therefore, even prior to the advent of constitutional democracy, criticised because it encouraged excessive over-the-shoulder peering that is based upon a wrong construction of an historic legislature’s thoughts.¹⁵⁴ But it is not true that all originalist arguments are intentionalist and such criticism fails to effectively deal with textualist arguments that words must be given the meaning they had when the text was adopted.¹⁵⁵ Reference to intentionalism in South Africa was in any event mostly lip service as it was assumed that the legislature encoded its intention within the text of statutes.¹⁵⁶

The Constitutional Court in *Association of Personal Injury Lawyers v Heath* rejected originalist intentionalism outright.¹⁵⁷ As such, it is important to understand the use of the rule in its historic textual context. Textualism need not be originalist as “[a] textualist might insist on reading the text in accordance with its meaning at the time of interpretation, as opposed to at the time of its enactment”.¹⁵⁸ Scalia advocated a textualist originalist view “that judicial interpretation should aim to discern the objective indication of the words as they would have been understood at the time of their enactment”.¹⁵⁹ On this view, judges in a democracy may not “tinker with

purpose of the statute in question requires that words should be interpreted flexibly to keep pace with the fast pace of technical change so as to avoid the legislature constantly having to update the statute.

152 *Union Government (Minister of Finance) v Mack* 1917 AD 731 739; *Mayfair South Townships Pty Ltd v Jhina* 1980 1 SA 869 (T) 879H; *HMBMP Properties Pty Ltd v King* 1981 1 SA 906 (N) 909A; *Nyembezi v Law Society Natal* 1981 2 SA 752 (A) 757H; *S v Du Plessis* 1981 3 SA 382 (A) 403H and *S v Henckert* 1981 3 SA 445 (A) 451G-H.

153 Du Plessis (n 12) 2C102-2C103.

154 Cowen “The interpretation of statutes and the concept of ‘the intention of the legislature’” 1980 *THRHR* 347 391.

155 Such confusion seems to be widespread. Du Plessis (n 12) 32-41 states that “intentionalism and its place in constitutional interpretation remains a live issue in the world’s oldest constitutional democracy: in the United States of America, originalists have maintained that the US Constitution must be read and understood as faithfully as possible in accordance with the original intent of its framers. Indeed, it is fair to say that in some form or another, original intent is endorsed by a plurality if not a majority of the US Supreme Court.” One of the foremost advocates of originalism, Scalia J, can hardly be said to advocate intentionalism and instead uses textualist arguments to justify originalism.

156 Du Plessis (n 12) 2C-57.

157 2001 1 SA 883 (CC) par 19.

158 Stack “The divergence of constitutional and statutory interpretation” 2004 *University of Colorado LR* 1 10 n 20.

159 Above 10.

statutes” and thus the meaning of a statute cannot change over time.¹⁶⁰ The debate as to the time frame within which statutes are to be construed has been most strong within the field of constitutional interpretation. James Madison, author of the American Constitution, asked: “Can it be of less consequence that the meaning of a constitution should be *fixed or known*, than that the meaning of a law should be so? Can, indeed, a law be fixed in its meaning and operation, unless the constitution be so?”¹⁶¹

In South Africa, a number of arguments have been raised against originalist reasoning primarily because they are “reminiscent of intentionalist-speak in statutory interpretation”,¹⁶² although the Constitutional Court has regularly asked what the framers of (both the Interim and Final) Constitution had “intended”.¹⁶³ Although it may be true that originalist reasoning may be inappropriate due to constitutional reasons, the problem that occurs, is that such arguments ignore the textual argument for originalism. For Scalia and Gardner, the real aim of the rule should be to ascertain “original meaning, as opposed to original intention”.¹⁶⁴

Originalism is not a challenge to purposivism. Purposivists start with the text but do not end there.¹⁶⁵ This means that adherence to originalism does not mean that an interpreter will also adhere to intentionalism or literalism. Additionally, purposivists would not have deduced – on Scalia and Gardner’s example of Queen Ann’s commenting of St Paul’s Cathedral that it was awful, artificial, and amusing – that she meant to say that the cathedral was unpleasant, synthetic, and comical. They would have determined that she meant that the cathedral was awe-inspiring, highly artistic, and thought provoking by determining the purpose of the statement. Purposivists achieve this feat by considering the text but also by considering factors such as history, values, context and legal comparative experience.¹⁶⁶

160 Scalia (n 26) 40.

161 Scalia and Gardner (n 149) 80.

162 Du Plessis (n 12) 32-41.

163 *S v Makwanyane* 1995 3 SA 391 (CC) par 392; *S v Mhlungu* 1995 3 SA 867 (CC) par 100, 102 and 105; *Ferreira v Levin NO*; *Vryenhoek v Powell NO* 1996 1 SA 984 (CC) par 15; *Bernstein v Bester* 1996 4 BCLR 449 (CC) par 53; *Du Plessis v De Klerk* 1996 3 SA 850 (CC) par 45; *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development of the RSA*; *Executive Council of KwaZulu-Natal v President of the RSA* 2000 1 SA 661 (CC) par 39-41 and *S v Twala (Human Rights Commission Intervening)* 2000 1 SA 879 (CC) par 9-17.

164 Scalia and Gardner (n 149) 92. According to Scalia (n 26) 17 “it is simply incompatible with democratic government, or indeed even with fair government, to have the meaning of law determined by what the lawgiver meant, rather than what the lawgiver promulgated”.

165 *United States v Am. Trucking Ass’ns, Inc.* 310 U.S. 534 1940 543-544. In this case the US Supreme Court held that “[t]here is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation.”

166 Du Plessis (n 12) 32-159.

1.4 OTHER CONSTITUTIONAL WAYMARKS

The Constitution contains various explicit and implicit waymarks that are essential for the interpretation of statutes.¹⁶⁷ The Constitution, for example, does not explicitly mention the principles of interpretation in conformity with the Constitution or the separation of powers. These principals impact on the interpretation of statutes and can be deduced from the explicit provisions of the Constitution or the structure thereof.¹⁶⁸ The Constitutional Court has held that implicit provisions of the Constitution are just as much part of the Constitution as express provisions.¹⁶⁹ In what follows, the most important constitutional waymarks are considered.

1.4.1 Application

Woolman summarises the doctrine contained in section 8 of the Constitution:¹⁷⁰

All law governing disputes between the state and natural persons or juristic persons is subject to the direct application of the Bill of Rights. All state conduct that gives rise to disputes between the state and natural persons or juristic persons is likewise subject to the direct application of the Bill of Rights. Disputes between natural persons and/or juristic persons *may* be subject to the direct application of the Bill of Rights, if the specific right asserted is deemed to apply. Where direct application of the right asserted occurs in terms of s 8(2), and the court further finds a non-justifiable abridgment of that right, then the court must develop the law in a manner that gives adequate effect to the right infringed.¹⁷¹

This section delineates the ambit of the Bill of Rights and determines the impact thereof on existing law, the functions of the legislature, the executive, the judiciary and organs of state, and on natural persons and on juristic persons.¹⁷² As such, these matters have a significant impact on the interpretation of statutes. Although this section is not primarily an interpretive clause in the same way that section 39 of the Constitution is, significant guidance may be sought from the provision to determine, for example, if a law binds the state or a natural or juristic person and to determine how rights should be limited and the common law developed.

167 Above 32-116.

168 Above 32-133.

169 *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 par 20.

170 The section reads: "(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1). (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."

171 Woolman "Application" in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* (2014) 31-7.

172 Du Plessis (n 12) 32-126.

1.4.2 Basic (or founding) values

The Constitution is a value-laden document. It encompasses the hopes and aspiration of our society. Section 1 enshrines the values of human dignity, equality, the advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the Constitution and the rule of law, universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.¹⁷³ These provisions are significant interpretive waymarks. Its status is underscored by the requirement that 75 per cent of the National Assembly, and the six out of the nine provinces in the National Council of Provinces, is needed to amend section 1.¹⁷⁴

These values can be described as the aims of South African society, which are to be achieved by "political and other means under the Constitutions guidance and control".¹⁷⁵ It "connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law".¹⁷⁶ The object of the Constitution is to achieve a society that is reflective of these values. The attainment of these values is *sine qua non* for the achievement of a socially just society – which is the central vision of the Constitution.¹⁷⁷

The Constitution comprises values and rules, as it is the primary source of citizens' rights and obligations. The judiciary has placed values, and not rules, at the centre of its jurisprudence and demonstrated a preference for dealing with values, even when more precise "rules" of the Constitution such as those found in the Bill of Rights are potentially relevant.¹⁷⁸ This is so as the Constitutional Court has established the principle that when legislation gives effect to a right in the Bill of Rights, a claimant cannot rely directly on the Constitution.¹⁷⁹

This does not mean that the Constitution will play no role in adjudication, as legislative provision in question must be interpreted so as to promote the spirit, purport and objects of the Bill of Rights.¹⁸⁰ Interpretation of statutes on the approach adopted by the Constitutional Court is essentially teleological. This approach distinguishes between the spirit or purport of a statute and its words. The former is allowed to supersede the latter.¹⁸¹ Teleological interpretation does not require reference to the

173 Similarly, s 195 contains values that are important for the interpretation of provisions dealing with public administration, which may be relevant within the context of public sector employment.

174 Du Plessis (n 12) 32-119.

175 Michelman "Expropriation, eviction and that gravity of common law" 2013 *Stellenbosch Law Review* 245.

176 Klare "Legal culture and transformative constitutionalism" 1998 *SAJHR* 146 150.

177 Preamble of the Constitution.

178 Woolman "The amazing, vanishing Bill of Rights" 2007 262 263.

179 *Sali v National Commissioner of the South African Police Service* 2014 9 BLLR 827 (CC) par 4, 72 and n 2. See also *S v Mhlungu* 1995 3 SA 867 (CC) par 59, *MEC for Education: KwaZulu Natal v Pillay* 2008 1 SA 474 (CC) and *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) par 51.

180 s 39(2).

181 Devenish *Interpretation of Statutes* (1992) 39-40.

mere purpose of the statute, but to all other considerations and values that can be applied, such as the values that exist within the legal system as a whole, including constitutional values.¹⁸² The effect of the preference for indirect application of the Constitution over direct application means that the Court has consequently also favoured values over the (arguably more) concrete rules of the Constitution.¹⁸³

Constitutional values are not a catalogue of all possible values in our legal system.¹⁸⁴ Constitutional values interact with common law. In the context of the interpretation of statutes, several foundational values may be found. Canons and presumptions of statutory interpretation are foundational values because they represent the “political and moral concerns and traditions of the community”.¹⁸⁵ These principles may also be described as public values.¹⁸⁶ These canons are verbalisations of values vital to the sustenance of a just and effective legal order”.¹⁸⁷ These values include equity, reasonableness, equality, legality, legal certainty, public interest and the like. It is therefore possible to rely on these canons when they are consistent with the Constitution and have not been subsumed under the Constitution, or when they have been left unaffected thereby. If these values have been subsumed under the Constitution then the constitutional values will take precedence. Du Plessis has identified the possibility that the presumptions can “augment, enrich and enhance” the Constitution.¹⁸⁸ The author submits that the presumptions could fulfil a number of useful functions:

First they can supplement, facilitate and mediate resort to constitutional values ... Second, they can advance foundational values consistent with – but not explicitly spelled out in – the Constitution. Third, they can amplify foundational values embodied in the Constitution ... Finally, they can guide constitutional interpretation itself and amplify certain of its procedures.¹⁸⁹

182 Above 45.

183 Refer to Woolman “True in theory, true in practice: why direct application still matters” in Woolman and Bishop (eds) *Constitutional Conversations* (2008) 113.

184 Du Plessis *Re-Interpretation of Statutes* (2002) 151-152.

185 Dworkin *Taking Rights Seriously* (1977) 67 and Du Plessis (n 184) 149.

186 Elhauge *Statutory Default Rules: How to Interpret Unclear Legislation* (2008) 3. The common law has, *inter alia*, presumed that: delegated legislative powers are to be exercised by the *delegatus* itself; legislation applies to general instances as opposed to specific instances; legislation does not alter the existing law more than is necessary; legislation does not bind the state in the event that, if the state were bound, it would hamper the fulfilment of an essential function; legislation does not contain a *casus omissus*; legislation does not contain invalid or purposeless provisions; legislation does not have extraterritorial effect; legislation does not operate retrospectively; legislation does not violate international law; legislation does not interfere with the jurisdiction of the courts; legislation is not unjust, inequitable or unreasonable; legislation is presumed to be constitutional; legislation promotes the public interest; references in legislation to acts and conduct are references to legal acts and conduct; remedial legislation must be construed generously; the existing meaning of words and phrases must be preserved; and words and phrases bear the same meaning throughout a legislative text. Refer to Van Staden “A comparative analysis of common-law presumptions of statutory interpretation” 2015 *Stellenbosch Law Review* 550 for a full discussion of these values.

187 Du Plessis (n 184) 151.

188 Above 152.

189 Above 153.

Du Plessis still utilises an explanation that insists upon a distinction between constitutional values and “foundational” common-law values. This is a logical distinction as common-law values originate from a source different than a justiciable constitution. There are some who hold the view that the origin of the value should not play such a seminal role in describing their status. Michelman writes:

Is it beyond imagining that you would sometimes think of the animating human rights ideals of your country's constitutional bill of rights as being essentially continuous with a human rights tradition ensconced in your country's historical, common law *corpus juris*? These ideals would belong to the set ... of your country's public values. Thus perceiving the set to encompass both constitutional and common-law values, principles, or ideals, you might sometimes think of testing the constitutionality of a questioned statutory solution to a rights controversy by looking to see how the statute's specific dictates and implicit principles compare with those of the extant and historic common-law solutions.¹⁹⁰

In fact, the Constitutional Court has already done so.¹⁹¹ It may be argued that the Constitution, through calling for the development of the common law and its values through the prism of the Constitution, supports such an argument.¹⁹² The point is that the presumptions of statutory interpretation may be important, beyond merely supplementing, facilitating and mediating, they resort to constitutional values, as the values inherent in the common-law presumptions may be viewed as public and thus constitutional values. On such a view, common-law values may in fact in themselves be seminally important, foundational values. Giving effect to extra-constitutional norms can also protect rights.¹⁹³

1.4.3 Interpretation of statutes and the Bill of Rights

Section 39(1)(a) of the Constitution reads as follows: “When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom”. Section 39(2) of the Constitution 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.”

Because the interpretation of the Bill of Rights and other legislation are dealt with in different subsections of section 39, this may suggest that there is a difference between constitutional and statutory interpretation. Because theories of statutory interpretation are characterised by the factors discussed above (that is the relevance

190 Michelman “The Bill of Rights, the common law, and the freedom-friendly state” 2003 *University of Miami Law Review* 401 401.

191 Above 402. The author refers to the early cases of *Bernstein v Bester* 1996 4 BCLR 449 (CC) and *S v Zuma* 1995 4 BCLR 401 (CC).

192 S 39 of the Constitution and *Carmichele v Minister of Safety and Security* 2001 10 BCLR 995 (CC) par 39.

193 Du Plessis (n 12) 32-14.

of the intention of the legislature, the nature and function of language, the role of the judiciary in the interpretation of statutes and the time frame within which statutes operate), it is not possible to hold different theories for different statutes to be interpreted. In the context of the United States, some have drawn a distinction between the approaches to constitutional and “normal” or “ordinary” statutory interpretation.¹⁹⁴ In contemporary scholarship, there is an uncharacteristic agreement between defenders of opposing theories of statutory interpretation that constitutional and statutory interpretation should converge rather than differ.¹⁹⁵

De Ville has argued that both subsections command a similar interpretive approach because a theory of statutory interpretation indicates the role of the court *vis-à-vis* the legislature.¹⁹⁶ Because an approach is derived from the Constitution, a major difference in the interpretive approach between the Constitution and statutes is therefore not warranted. Similarly, both Scalia¹⁹⁷ and Eskridge¹⁹⁸ (who are theoretically opposed) have invoked separation of powers, democratic and rule of law arguments to justify their respective positions that theories of statutory and constitutional interpretation should converge.

Put differently, an interpreter cannot justify the use of different theories of statutory interpretation when interpreting different documents because the interpreter cannot justifiably have different attitudes in regard to conceptions of the relevance of the intention of the legislature, the nature and function of language, the role of the judiciary in the interpretation of statutes and the time-frame within which statutes operate. This is so as these factors are not (necessarily) influenced by the document that happens to be the subject of interpretation, but rather independently thereof by constitutional theory or “theories of authority”.¹⁹⁹ Theories of statutory interpretation depend upon theories of authorities. It would therefore be problematic to reconcile for example a literalist approach to “ordinary” statutory interpretation with a purposive approach to constitutional interpretation.²⁰⁰ This does not mean to refute the existence of particular differences between constitutional interpretation and the interpretation of other enacted law. It only challenges the idea that the approach to the interpretation of the Constitution and other enacted law is different.²⁰¹

194 See Stack “The divergence of constitutional and statutory interpretation” 2004 *University of Colorado LR* 1.

195 Above 3.

196 De Ville *Constitutional and Statutory Interpretation* (2000) 58.

197 Scalia (n 26).

198 Eskridge and Frickey “The Supreme Court, 1993 term-foreword: law as equilibrium” 1994 *Harvard Law Review* 26 77.

199 Raz “On the authority and interpretation of constitutions: some preliminaries” in Alexander (ed) *Constitutionalism: Philosophical Foundations* (1998) 153 157.

200 Botha (n 83) 114.

201 Du Plessis (n 184) 134-135: “(a) The Constitution, as supreme law, is a long-lasting, enacted law-text at the apex of the legal system. (b) The Constitution is justiciable and, therefore, a standard for the assessment of the validity of both ‘law’ and ‘conduct’ in every (legislative and executive) echelon of government. (c) The Constitution verbalises, in characteristically broad, inclusive and open-ended

When both subsections are read together, taking into account the argument developed above that there can be no difference between an approach to constitutional interpretation and to normal interpretation, it is clear that the Constitution endorses a teleological model to both modes of interpretation. It may be argued that an interpretation that promotes the values that underlie an open and democratic society based on human dignity, equality and freedom will necessarily promote the spirit, purport and objects of the Bill of Rights (*et vice versa*). In the case of constitutional interpretation, the Constitution therefore requires a teleological mode of statutory interpretation. The purpose of the Constitution is to transform South African society into a society that is reflective of the Constitution's foundational values. The purpose of the Constitution and its values are therefore two sides of the same coin.

The Constitution obliges us to advance constitutional values. If this was not the case then the purpose, object or spirit of the Constitution could not be promoted. Because there can be no difference between (normal) statutory interpretation and constitutional interpretation, ordinary interpretation must also advance the purpose of the statute (in light of constitutional values). It is not possible for purposes of a statutory provision to be at odds with constitutional values. If it is averred by a litigant that the purpose of a statutory provision does not advance constitutional values, it will be incumbent on a court to cure the defect by interpreting the provision in conformity with the Constitution or to a remedy the defect in terms of section 172 of the Constitution.

1.4.4 Interpretation in conformity with the Constitution

Interpretation in conformity with the Constitution is a reading strategy associated with constitutional interpretation.²⁰² The principle was best described in *Hyundai Motor Distributors*:²⁰³ “judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section”.²⁰⁴ In *Van Rooyen v The State*,²⁰⁵ the Constitutional Court held that “legislation must be construed consistently

language, values and beliefs associated with democracy and the constitutional state (or *Rechtsstaat*).” In *Hunter v Southam Inc* 1984 2 SCR 145 155 the Supreme Court of Canada held: “The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts not to read the provisions of the Constitution like a last will and testament lest it become one.”

202 Du Plessis (n 12) 32-138.

203 *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) (hereafter *Hyundai*).

204 par 23.

205 2002 5 SA 246 (CC).

with the Constitution and thus, where possible, interpreted so as to exclude a construction that would be inconsistent with ... [the Constitution]”.²⁰⁶ The principle is also described as a presumption of constitutionality.²⁰⁷ If this is not possible then it is incumbent upon the courts to declare the relevant provision invalid.²⁰⁸ Similarly, the US Supreme Court has adopted the so-called “constitutional-doubt canon”,²⁰⁹ and has stated that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.²¹⁰ The Court has also confirmed that this principle is “beyond debate”.²¹¹ This principle was endorsed by section 35(2) of the 1993 Constitution, which stated that

[n]o law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.²¹²

Although this section is not repeated in the 1996 Constitution, it is accepted that courts are required to read in conformity with the Constitution in terms of section 39(2) of the Constitution.²¹³ It was stated in *De Lange v Smuts* that the principle is “a sound principle of constitutional interpretation” which is recognised by other

206 par 88.

207 Du Plessis (n 12) 32-138.

208 s 172(1)(a) of the Constitution.

209 Scalia and Garner (n 149) 247.

210 *United States ex rel. Attorney General v Deleware & Hudson Co* 213 US 366 (1909) 408.

211 *Edward J DeBartolo Corp v Florida Gulf Coast Bldg & Constr Trades Council* 485 US 568 (1988) 575. According to Scalia and Garner (n 149) 251 this principle together with the principle that “if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter” are known as the “rules of constitutional avoidance”. The authors argue that the two principles should not be conflated, as the constitutional-doubt canon is a matter of statutory interpretation while the latter principle is a rule of judicial procedure. There exists a similar principle in South African law. In terms of the principle of subsidiarity “[w]here there is legislation giving effect to a right in the Bill of Rights, a claimant is not permitted to rely directly on the Constitution”. Refer to *Sali v National Commissioner of the South African Police Service* 2014 9 BLLR 827 (CC) par 4, 72 and n 2. This does not imply that the Constitution will play no part, as s 39(2) of the Constitution obliges the judiciary to “promote the spirit, purport and objects of the Bill of Rights” in all cases when interpreting any legislation. This is referred to as indirect application.

212 Refer also to s 232(3) of the Constitution of the Republic of South Africa Act 200 of 1993. In *Bernstein v Bester* 1996 2 SA 751 (CC) par 59 n 87 it was observed that “[t]he formulation of this subsection bears a close resemblance to the rule of construction adopted by the United States Supreme Court as formulated by Justice Brandeis in *Ashwander v Tennessee Valley Authority* [1936] USSC 36; 297 US 288 (1936) 346 as the seventh principle enunciated in that case”. The court also went on to show how various other jurisdictions also apply this rule. *Verfassungskonforme Auslegung*, as this principle is known in German law, is according to Bakker “Verfassungskonforme Auslegung” in Bakker, Heringa and Stroink *Judicial Control: Comparative Essays on Judicial Review* (1995) 9 9 “an essentially German concept” which can be traced back to the decision of the *Bunderverfassungsgericht* of 7 May 1953 where it was expressed as follows: “Ein gesetz ist nicht verfassungswidrig, wenn eine Auslegung möglich ist, die im Einklang mit dem Grundgesetz steht, und das Gesetz bei dieser Auslegung sinnvoll bleibt.”

213 Currie and De Waal *The Bill of Rights Handbook* (2013) 65.

democratic societies such as the United States of America, Canada and Germany.²¹⁴ In *Ynuico Ltd v Minister of Trade and Industry*, it was explained that the origins of this rule may be found in the common law rule of interpretation of *ut res magis valeat quam pereat* which had its origins in Roman law and had been tested and applied over many centuries.²¹⁵

Because it is believed to be narrower than other possible readings, reading in conformity with the constitution is generally referred to as “reading down”.²¹⁶ The principle should not be equated to only restrictive interpretation as it might be possible for generous readings to conform to the Constitution and restrictive readings not to.²¹⁷ This is generally referred to as “reading up”.²¹⁸ According to Rautenbach the purpose of the rule is to “avoid indiscriminate invalidation of legislative provisions and to encourage the laundering and refreshing of existing fixed interpretations”.²¹⁹ In *Wary Holdings Pty Ltd v Stalwo Pty Ltd*, it was found that where two interpretations are possible, the interpretation that better reflects the Constitution should be adopted.²²⁰ The Constitutional Court has found that limits must be placed on the application of this principle so that an interpretation should not be unduly strained.²²¹

1.4.5 Limitation of rights

Section 36 of the Constitution is the most openly and frequently relied on interpretive waymark.²²² This is so as the provision embodies the operative provisions that set

214 1998 3 SA 785 (CC) par 85. This *dicta* was endorsed in *Hyundai* (n 203) par 23.

215 1995 11 BCLR 1453 (T) 1468G-J. This rule was set out in *Digest* 1.3.19 (*in ambigua voce legis ea potius accipienda est signification, quae vitio caret*) which had been accepted through Roman-Dutch law into our law in *R v Pickering* 1911 TPD 1054 and *R v Correia* 1958 1 SA 533 (A) 542.

216 Du Plessis (n 12) 32-138.

217 *Daniels v Campbell* 2004 5 SA 331 (CC) par 31.

218 Du Plessis (n 12) 32-141.

219 Rautenbach “Introduction to the Bill of Rights” in LexisNexis (eds) *Bill of Rights Compendium* (2011) par 1A18.

220 2009 1 SA 337 (CC) par 46.

221 *Hyundai* (n 203) par 24. Refer also to Rautenbach “The Bill of Rights and statutory interventions with common law delictual remedies in compensation schemes for road accidents and work-related injuries and diseases” 2011 TSAR 527 538-540. Rautenbach (n 219) par 1A18 lists the limits of the principle: The rule can be applied only if a law can reasonably be interpreted in conformity with the Constitution. The rule applies only to the interpretation and not to the interpretation of the Bill of Rights. This means that the judiciary should not interpret the Bill of Rights in such a (limited) way as to validate the statute under consideration. Section 36 of the Constitution must be considered to determine if an interpretation is one which can be said to be in conformity with the Constitution. This point will be considered in the following paragraph. Rights may also be constitutionally limited and the principle does therefore not involve promoting the rights of individuals at all costs. An interpretation that is otherwise consistent with the Constitution is not permissible if it would extend the scope of a crime. An interpretation in conformity with the Constitution must be clear and precise. Interpretation in conformity with the Constitution is a reading strategy as supposed to a constitutional remedy. The principle only applies when the constitutionality of a provision is in issue. The rule does not apply to the provision when only one meaning can be attached to it and there is no alternative reasonable interpretation.

222 Du Plessis (n 12) 32-127. The section reads as follows: (1) “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable

constitutionally acceptable limits to rights. It has not been considered how section 36 affects ordinary statutory interpretation. Arguably, the section affects ordinary statutory interpretation in two distinct ways.

First, when the courts interpret legislation in conformity with the Constitution, section 36 must be considered to determine if an interpretation is one that can be said to be in conformity with the Constitution. The principle of interpretation in conformity with the Constitution comprises distinct steps.²²³ At the outset, it must be determined whether two or more meanings can reasonably be inferred from the text. Thereafter, it must be determined whether these interpretations are consistent with the Bill of Rights. To do so, it must be considered if a provision limits a right and, if so, whether the limitation is justifiable in terms of limitation clauses. If for example, two interpretations are possible which both limit constitutional rights, the one will survive which has less serious consequences.²²⁴ Second, the section is particularly value-laden. Consider the phrase “an open and democratic society based on human dignity, equality and freedom”.²²⁵ Section 36 is therefore important within the context of a teleological model of statutory interpretation where the primary objective is to give effect to the purpose of a statutory provision in light of constitutional values.

1.4.6 Rights

Section 7 of the Constitution is similar to section 1 and its founding provisions.²²⁶ It reasserts the Bill of Rights as the cornerstone of democracy, reaffirms the obligation of the state to make good on the promises of the Constitution, and reiterates that rights may only be limited in accordance with section 36 of the Constitution. The ideals embodied in the section would come to naught if not advanced through interpretation. The value statement contained in section 7 is therefore of particular importance within the context of teleological interpretation. Constitutional rights impact upon legislation law in three distinct ways: First, the validity of legislation can be tested against these rights. Second, legislation must be interpreted to give effect to these rights. Third, rights can be used to develop the common law.²²⁷

in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights”.

223 Rautenbach (n 219) par 1A18.

224 s 36(1)(c).

225 s 36(1).

226 The section reads: “(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights. (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.”

227 Van Niekerk and Smit (eds) *Law@work* (2015) 36.

1.4.7 The Preamble to the Constitution

In *S v Mhlungu*,²²⁸ the Constitutional Court stated that the Preamble

should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes.²²⁹

Although the Preamble does not give rise to rights and duties of its own, it is an important interpretive aid.²³⁰ The Constitutional Court has treated the Preamble as a purpose statement.²³¹ The Preamble, within the context of a teleological approach to the interpretation of statutes, should be understood to imply a purposive approach to interpretation, and to be an important source for determining what those purposes are.²³² The courts have relied on the Preamble to determine interpretive purposes without imposing the literalist qualification that reliance is only acceptable where the language of the Constitution is ambiguous or unclear.²³³

1.5 CONCLUSION

The theory of statutory interpretation that an interpreter prescribes to, strongly influences a particular interpretative outcome. It was also noted that the goal of statutory interpretation is central to the understanding of the theories and methods of statutory interpretation. Literalists, intentionalists and purposivists have distinct understandings as to the goal of statutory interpretation. Literalists hold the view that the goal of statutory interpretation is to discern and give effect to the meaning of the very words in which a statutory provision is couched. Intentionalists hold the view that the goal of statutory interpretation is to discern and give effect to the

228 *S v Mhlungu* 1995 3 SA 867 (CC) par 112. The principle was confirmed in *Van Vuuren v Minister of Correctional Services* 2010 12 BCLR 1233 (CC). The Preamble of the Constitution: "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. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; improve the quality of life of all citizens and free the potential of each person; and build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations. May God protect our people. *Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso. God seën Suid-Afrika. God bless South Africa. Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.*"

229 par 47.

230 Devenish *The South African Constitution* (2005) 27-29.

231 *Bato Star Fishing (Pty) v Minister of Environmental Affairs* 2004 4 SA 490 (CC) par 72-73; *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service*; *First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) par 52 and *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC) par 43.

232 Fowkes "Founding provisions" in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* (2014) 13-3.

233 Du Plessis (n 12) 32-118.

real or subjective intentions of the legislature, while purposivists view the goal of statutory interpretation discerning meaning by asking what the objective purpose of the law is. History has shown that none of these theories have dominated the approach of statutory interpretation in the Anglo-American legal tradition.

These theoretical positions rest upon the following considerations: the relevance of the intention of the legislature, the nature and function of language, the role of the judiciary in the interpretation of statutes, and the time-frame within which statutes operate. While literalists reject the notion that the intention of the legislature can be relevant (or that such intentions should [exclusively] be discerned from the language employed by the legislature), intentionalists are primarily concerned with the real intentions of the legislature while purposivists are concerned with the intentions of a reasonable or hypothetical legislature.

While literalists assume that there is a grammatical structure inherent in all language that allows for a fixed and stable ordinary effect of language, intentionalists and purposivists hold that meaning is not retrieved from a construable text, but that it is made in dealing with the text (although intentionalists and purposivists disagree as to the sources that may be considered to determine meaning). Theorists also diverge in their views related to vague and precise legal language. This study has displayed that vagueness may be an important legislative instrument and that all statutory language undergoes processes of interpretation.

There is also disagreement amongst those who adhere strictly to the text and those who are willing to determine meaning with reference to extra-textual sources that is rooted in differing views of power distribution and the separation of powers. These views are strongly influenced by the theorist's view of the nature of law. Literalists, for example, reject the idea that interpreters may use extra-textual sources, as they would view this action as amounting to a usurpation of the legislative powers of Parliament. Similarly there can be disagreement as to the time frame within which statutes operate, although such disagreement is not necessarily connected to adherence to any specific theory of statutory interpretation.

Although the Constitution does not profess allegiance to a singularly accepted theory of interpretation, it is clear that significant guidance is given in the Constitution as to the proper approach thereto. The implicit and explicit waymarks in the Constitution should inform our understanding of the teleological model of interpretation. In fact, the Constitution provides much more guidance than just the interpretive clause on interpretive practices.